LOCHNER'S LEGACY FOR MODERN FEDERALISM: *PIERCE COUNTY V. GUILLEN* AS A CASE STUDY

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INTRODUCTION

As jurisprudential epithet, *Lochner*[1] has come to signify many different things. Indeed, Cass Sunstein has observed that "[i]n "the different answers to the question, what was wrong with the decision in *Lochner*?, can be found the various positions on most of the major constitutional issues of the modern

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Some of the issues raised in this Essay are discussed also in Lynn A. Baker, Federalism and the Spending Power from *Dole* to *Birmingham Board of Education*, in THE REHNQUIST LEGACY (C. Bradley, ed., forthcoming 2006).

[1] Lochner v. New York, 198 U.S. 45 (1905).

era."[2] It is therefore not surprising that those opposed to the Rehnquist Court's federalism decisions of the past decade, most notably including Justice Souter, have been quick to invoke the specter of *Lochner*.[3]

As is cogently set forth in Justice Souter's *Lopez* and *Morrison* dissents, *Lochner*'s legacy for modern federalism has its logical focus in three particular concerns: (1) a concern about the institutional competence of courts to answer the sorts of questions raised;[4] (2) views about the necessity of judicial review in contrast to relying on political safeguards for protection of the relevant constitutional values;[5] and (3) widely held attitudes about the relative importance of personal or cultural liberties vis-à-vis economic liberties and states' rights.[6]

In this Article, I examine *Lochner*'s legacy for modern federalism through the lens of one scarcely noticed, but intriguing, decision: *Pierce County v. Guillen*.[7] The Article proceeds in three parts. Part I describes the *Guillen* litigation and explains why, contrary to the U.S. Supreme Court's unanimous decision, the federal statute at issue quite readily should been found, pursuant to existing precedent, to exceed Congress's commerce power. Part II discusses why the statute also exceeds Congress's Article I spending power under the test set forth in *South Dakota v. Dole*.[8]

Part III examines the possibility that *Lochner*-based concerns led the Court – including the "States' Rights Five"[9] – to aggressively avoid confronting existing Spending Clause jurisprudence by resolving *Guillen* on cursory and highly suspect Commerce Clause grounds. I ultimately find significantly more persuasive, however, the possibility that the Court's decision in *Guillen* is in fact readily reconciled with the positions taken by the States' Rights Five in other spending power and Commerce Clause decisions. In the end, I suggest, consistency may be found in a (sometimes unstated) focus in all these cases on whether or not the regulatory area at issue is one in which States "historically have been sovereign" or is instead a traditional and appropriate area of federal

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[2] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873-74 (1987).

[3] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting); United States v. Lopez, 514 U.S. 549, 603 (1995) (Souter, J., dissenting).

[4] *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) (internal citations omitted); *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (internal citations omitted).

[5] *Morrison*, 529 U.S. at 647 (Souter, J., dissenting); *Lopez*, 514 U.S. at 604 (Souter, J. dissenting).

[6] *Morrison*, 529 U.S. at 636 n.10 (Souter, J., dissenting); *Lopez*, 514 U.S. at 604 (Souter, J., dissenting).

[7] 537 U.S. 129 (2003).

[8] 483 U.S. 203 (1987).

[9] *See, e.g.*, *Fiddling with Federalism*, N.Y. TIMES, Oct. 15, 1999, at A34 (referring to Chief Justice Rehnquist, and Justices Scalia, Thomas, Kennedy, and O'Connor as the "states' rights five").

concern.[10]

Put more starkly, my thesis is that *Guillen* is best understood not as signaling that the States' Rights Five have been persuaded of the correctness of the *Lochner*-based critique of their recent federalism decisions, but the exact opposite. That is, notwithstanding the lessons of *Lochner*, the States' Rights Five seem to have quietly returned to a largely unarticulated *National League of Cities*[11] type of inquiry in the federalism context.

I. *GUILLEN V. PIERCE COUNTY* AND THE COMMERCE CLAUSE

Guillen v. Pierce County[12] was the first case in which a court (here, the Supreme Court of Washington) employed the doctrine set forth in *South Dakota v. Dole*[13] to strike down a federal statute as exceeding Congress's spending power.[14] Indeed, *Guillen* was the first case in which any court had struck down a federal statute on purely Spending Clause grounds.[15]

A. *The Facts and the Decision of the Washington Supreme Court*

Guillen involved various constitutional challenges to a federal statute, 23 U.S.C. § 409, as amended in 1995 ("§ 409"), that, in relevant part, regulates the rules of evidence to be applied in state court proceedings involving causes of actions brought solely under state law. These regulations – which protect from discovery and introduction into evidence certain accident reports and highway safety data compiled and held by city and county governments – are included among the conditions that attach to the states' receipt of certain federal highway safety monies.

The statute became the focus of litigation when the families of two Washington State motorists involved in traffic accidents requested accident reports and other materials and data held by county agencies related to the traffic history of the sites of their accidents.[16] The motorists sought the information in order to pursue tort claims that the relevant city and county governments were negligent in their maintenance and operation of the

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[10] *See, e.g.*, *Lopez*, 514 U.S. at 564; see also National League of Cities v. Usery, 426 U.S. 833, 849 (1976) (whether the congressional enactment would "interfere with traditional aspects of state sovereignty").

[11] National League of Cities v. Usery, 426 U.S. 833 (1976).

[12] 537 U.S. 129 (2003).

[13] *Dole*, 483 U.S. at 203.

[14] Guillen v. Pierce County, 31 P.3d 628, 650-51 (Wash. 2001). For an early, brief discussion of the potential importance of this case, see Michael C. Dorf, *What an Auto Accident Decision Teaches about Federalism*, FINDLAW'S WRIT, Oct. 15, 2001, at http://writ.findlaw.com/dorf/20011015.html.

[15] *Cf.*, United States v. Butler, 297 U.S. 1 (1936) (presenting a Spending Clause challenge, but holding the law unconstitutional on other grounds).

[16] *Guillen*, 31 P.3d at 632-38.

intersections at which the accidents occurred.[17] Pierce County refused to provide the requested reports and data, relying on § 409, which states in relevant part:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites . . . , pursuant to section[ ] . . . 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[18]

Because the accident reports and other materials that the plaintiffs sought had been collected by the relevant county as part of an application to the state of Washington for federal hazard elimination funds under § 152, the county argued that they were privileged under § 409.[19]

The question for the Washington Supreme Court was whether the collecting of certain reports and other materials for this statutorily specified purpose rendered them privileged even if those reports and other materials had been compiled for other purposes, such as routine law enforcement.[20]

To understand the importance of the question, consider the following example: A local police officer prepares (compiles) an accident report as he is required to do under long-standing state law. The report is later collected by a state authority pursuant to § 152 in order for the state to determine the twenty intersections in the state where safety improvements are most needed.[21] The

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[17] *Id.* at 632-38.

[18] 23 U.S.C. § 409 (2000) (as amended).

[19] *Guillen*, 31 P.3d at 634.

[20] *Id.* at 644-46.

[21] Section 152 states in relevant part:

> Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

23 U.S.C. § 152(a)(1) (1995).

Notice that this provision is stated as an unconditional mandate: Apparently, a state's obligation to conduct and maintain an engineering survey of the sort described exists independently of that state's pursuit or receipt of federal funds. If this is the correct understanding of § 152, then the mandate seemingly violates the anti-commandeering rules of *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). To save § 152, it could be read, then, as a spending provision that conditions certain federal highway funds on a state's evaluation of its roads. This is how the Supreme Court

state authority prepares a report discussing those twenty intersections, and uses the report and the data on which it was based to set its priorities for spending its annual allotment of federal highway safety funds. Plainly, the report prepared by the state pursuant to § 152 would be covered by the § 409 privilege. The question before the state court, however, was whether the original accident reports – reports that (by hypothesis) would have been prepared even in the absence of the federal scheme, and which were not *prepared* pursuant to § 152 – would *also* be covered by the privilege once they were *collected* pursuant to § 152 in order to generate the report of state-wide highway safety priorities.

The Washington Supreme Court held that they were.[22] Under the statute's plain language, it reasoned, materials or data that have been "collected" for a statutorily specified purpose are covered by § 409.[23] Whether the materials or data had been originally compiled for distinct purposes appeared irrelevant.[24] Moreover, the history of § 409 bolstered this interpretation. When initially enacted in 1987, that section did not contain the words "or collected."[25] Accordingly, the court observed, "most state courts restricted the application of the federal privilege" to materials and data "that had been *specifically* created for the purpose of applying for federal safety improvement funding or implementing a funded project."[26] Congress amended § 409 in 1995 by adding the words "or collected" after "compiled" specifically in response to these narrow decisions and in order to "clarify" the intended scope of the privilege.[27] And Congress described the privilege's scope as follows:

> It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.[28]

For these reasons, the Washington Supreme Court agreed with Pierce County that any reports or data collected for the statutorily specified purposes became fully privileged.[29]

But Pierce County's victory on the question of the scope of the privilege afforded by § 409 quickly became pyrrhic. The Washington Supreme Court

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seemed to view the statute in *Guillen*. *See* Pierce County v. Guillen, 537 U.S. 129, 132-35 (2003).

[22] *Guillen*, 31 P.3d at 646.

[23] *Id.*

[24] *Id.*

[25] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, Title I, § 132(a), 101 Stat. 170 (1987).

[26] *Guillen*, 31 P.3d at 718 (emphasis in original).

[27] *Id.* at 644.

[28] H.R. REP. NO. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. (109 Stat.) 651.

[29] *Guillen*, 31 P.3d at 644.

went on to hold that, when construed so broadly, the § 409 privilege exceeded Congress's powers under both the Commerce Clause and the Spending Clause.[30]

The court reasoned that § 409 was not a valid exercise of Congress's commerce power because such an expansive privilege "cannot reasonably be characterized as an 'integral part' of the Federal-aid highway system's regulation."[31] The court also concluded that the privilege did not meet the requirement, set forth in *South Dakota v. Dole*,[32] that any condition attached to the receipt of federal funds be related to the spending program:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," . . . *among other reasons*, pursuant to a federal statute for federal purposes.[33]

The court therefore held § 409, as amended, to exceed Congress's spending power.[34]

Lastly, relying heavily on its construal of recent Rehnquist Court federalism decisions as displaying a "fundamental respect for state sovereignty,"[35] the court reasoned that § 409 "cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government."[36] Simply stated, Congress lacks "power to intrude upon the exercise of state sovereignty in so fundamental an area of the law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads."[37]

Three justices of the Washington Supreme Court disagreed with the majority's interpretation of § 409. As these concurring justices read the privilege, an individual report originally compiled for an ordinary state or local law enforcement purpose was not covered by § 409 merely because it was later collected, along with other reports or data, for the purpose of applying for a share of the state's federal safety-improvement funds.[38] In their view, all that the 1995 amendment clarified was that if these reports were subsequently "collected" pursuant to § 152 or another specified provision of federal law, the

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[30] *Id.* at 656.

[31] *Id.* at 654 (quoting Hodel v. Indiana, 452 U.S. 314, 328 n.17 (1981)).

[32] 483 U.S. 203 (1987).

[33] *Guillen*, 31 P.3d at 651 (emphasis in original).

[34] *See id.* at 655.

[35] *Id.* at 653.

[36] *Id.* at 655.

[37] *Id.*

[38] *Id.* at 657 (Madsen, J., concurring).

collection of reports would not itself be discoverable.[39]

In other words, as the concurring justices read the legislative history, in amending § 409 in 1995 Congress was reacting against judicial decisions that permitted plaintiffs "to gain information that was 'collected' by an agency for purposes of preparing an application for federal funding from the agency that 'collected' the information."[40] By adding "or collected" to "compiled," under this view, Congress simply wanted to ensure that a plaintiff could not exploit the state's action of collecting reports to save it from doing its own work in litigation against the state or any of its political subdivisions. It would not follow, the concurring justices concluded, that plaintiffs should be handicapped when "seeking information or reports from their original source, such as accident reports from a law enforcement agency."[41]

B. *The Decision of the U.S. Supreme Court*

Because the Washington Supreme Court had held a federal statute unconstitutional, there was no question that the U.S. Supreme Court would grant certiorari in the case. And for those interested in the spending power and federalism the case was bursting with possibilities. Most obviously, the case offered the Court – or, at least the "States Rights' Five" – an opportunity that will not likely soon recur to significantly narrow the one remaining, and potentially eviscerative, "loophole" that existing spending doctrine provides to the Rehnquist Court's important project of restoring a meaningful balance between the state and federal spheres.[42]

As I have discussed at length elsewhere, it is the spending power that I believe poses the most significant threat to state autonomy.[43] No matter how narrowly the Court might read Congress's powers under the Commerce Clause[44] and Section 5 of the Fourteenth Amendment,[45] and no matter how

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[39] *Id.* at 658.

[40] *Id.*

[41] *Id.*

[42] 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, 460 (2003).

[43] *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911, 1920 (1995) ("[I]f the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' will have no meaning." (footnote omitted)) [hereinafter Baker, *Conditional Federal Spending*]; Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Baker & Berman, *supra* note 42, at 460; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195-96 (2001) [hereinafter Baker, *Federalist Revival*] (contribution to symposium on "The Spending Clause").

[44] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

absolute a prohibition the Court might impose on Congress's "commandeering" of state and local officials,[46] the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.[47] In this context, *Guillen* presented the States' Rights Five a range of potentially alluring opportunities. The justices could have used the case to affirm that the doctrine set forth in *South Dakota v. Dole*[48] does in fact have "bite," and that the spending power does not provide Congress an eternally available means of circumventing those limitations on Congress's other Article I powers that the Court has recognized.[49] Or they could have used the case to strengthen – to add further "bite" to – the *Dole* doctrine. Or, perhaps most significantly, they could have used the case to revisit the question, noted in *Dole*, of whether the Constitution's "general welfare" restriction on Congress's spending power[50] is a judicially enforceable restriction at all.[51]

Instead of seizing upon any of these opportunities, however, the States' Rights Five took seemingly extreme measures to avoid reaching the spending power issues posed in *Guillen*.[52] Because the statute at issue regulated apparently non-commercial activity – the discovery and introduction of evidence in civil litigation[53] – and interfered with a traditional area of state sovereignty – state judicial processes,[54] one might reasonably have expected

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[45] *See, e.g.*, Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2000); Morrison, 529 U.S. 598; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

[46] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). But see Reno v. Condon, 528 U.S. 141 (2000).

[47] Today, the major constitutional constraint on Congress' spending power is the Establishment Clause of the First Amendment. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 105 (1968) (holding that "the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8").

[48] 483 U.S. 203 (1987).

[49] *See* Baker, *Federalist Revival*, *supra* note 43, at 196.

[50] U.S. CONST. art. I, § 8, cl. 1.

[51] *Dole*, 483 U.S. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (*per curiam*)).

[52] *See* Pierce County v. Guillen, 537 U.S. 129, 147 (2003). On August 19, 2002, the author of this Article (joined by Professor Mitchell N. Berman) filed an Amicus Brief in the U.S. Supreme Court in support of Respondents in *Guillen*. See Amicus Brief of Law Professors Lynn A. Baker and Mitchell N. Berman in Support of Respondents, Pierce County v. Guillen, 537 U.S. 129 (2003) [hereinafter *Brief*], 2002 WL 1964091. The authors received no monetary contribution to, or financial compensation for, the preparation and submission of that brief.

[53] See *Brief*, *supra* note 52, at *22-*24.

[54] See *id.* at *24-*25:

> This Court has clearly held that Congress may regulate state court procedure with regard to federal causes of action brought in state court, see, e.g., Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 361 (1952); Felder v. Casey, 487 U.S. 131, 138 (1988). This Court has also repeatedly observed, however, that we should not

the States' Rights Five to hold the statute unconstitutional under *United States v. Lopez*[55] and *United States v. Morrison*.[56]

Instead, however, in a brief, fifteen-page opinion, released ten short weeks after oral argument in the case,[57] the Court unanimously reversed the Washington Supreme Court and concluded that the challenged statute was a valid exercise of Congress' commerce power. The Court therefore never reached the spending power issue.

Justice Thomas, writing for the Court, interpreted § 409 as the Solicitor General advocated,[58] and much as the concurring justices at the state court had, explaining that § 409

> [P]rotects all reports, surveys, schedules, lists, or data actually compiled *or* collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point "collected" by another agency for § 152 purposes.[59]

Thus construed, the Court thought that the statute passed muster under the Commerce Clause with ease.[60] Indeed, its opinion proceeds as a straightforward syllogism. First, "under the Commerce Clause, Congress 'is

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lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." Patterson v. New York, 432 U.S. 197, 201 (1977), quoting Speiser v. Randall, 357 U.S. 513, 523 (1958); see also Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Felder, 487 U.S. at 138 ("No one disputes the general and unassailable preposition . . . that States may establish the rules of procedure governing litigation in their own courts."). Further, this Court in Lopez cautioned that it is particularly important for limitations on federal power to be maintained "in areas . . . where States historically have been sovereign," 514 U.S. at 564.

[55] 514 U.S. 549 (1995).

[56] 529 U.S. 598 (2000).

[57] The case was argued on November 4, 2002 and decided on January 14, 2003. See *Guillen*, 537 U.S. at 129.

[58] *Guillen*, 537 U.S. at 144.

[59] *Id.* The Court elaborated:

> Under this interpretation, an accident report collected only for law enforcement purposes and held by the county sheriff would not be protected under § 409 in the hands of the county sheriff, even though that same report would be protected in the hands of the Public Works Department, so long as the department first obtained the report for § 152 purposes. We agree with the Government's interpretation of the statute.

Id.

[60] *Id.* at 147-48.

empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'"[61] Second, "both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce."[62] Therefore, "they fall within Congress' Commerce Clause power."[63] In light of this disposition, the Court noted in a footnote, "we need not decide whether [§ 409] could also be a proper exercise of Congress' authority under the Spending Clause . . . ."[64]

C. *A Critique*

This is a highly questionable Commerce Clause analysis, all the more remarkable for its brevity: the entire analysis comprises seven sentences of a fifteen-page opinion.[65] The most powerful objection to this analysis begins with the observation that § 409 is a regulation of state court procedure and is not a regulation of the channels or instrumentalities of interstate commerce. This objection contains two analytically distinct elements, each of which has significant force.

The first element of this objection draws a distinction between *what* is being regulated and what such regulation *is for*. Hornbook law holds that, after *Lopez*, the Commerce Clause allows Congress to regulate "three types of activities": the channels of interstate commerce; the instrumentalities of interstate commerce; and intrastate economic activities that, in the aggregate, substantially affect interstate commerce.[66] But § 409 did not regulate instrumentalities or channels, in the sense that these are not the things upon which the statute operated. It seems more accurate to describe § 409 as a regulation of state court procedure adopted to protect the instrumentalities and channels of commerce. That might be a permissible use of the commerce power, but its permissibility is not so obvious, either by the *Lopez* dictum that the *Guillen* Court quotes or by the previous decisions that *Lopez* cited, as to foreclose further discussion.[67]

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[61] *Id.* at 147 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 147 n.9.

[65] *See Id.* at 147-48.

[66] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 261 (2d ed. 2002); *see Lopez*, 514 U.S. at 558 ("[W]e have identified three broad categories of activity that Congress may regulate under its commerce power." (citations omitted)).

[67] The first premise of what I have called the *Guillen* syllogism quotes *Lopez* for the proposition that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *See supra* note 61 and accompanying text. That statement in *Lopez* was immediately followed by the following string cite: "*See, e.g.*,

The second element of this objection is not only that § 409 does not regulate instrumentalities or channels of interstate commerce but that what it does regulate are the rules of evidence to be applied in state court proceedings involving causes of action brought solely under state law. Even insofar as Commerce Clause precedent permits Congress to regulate some things other than instrumentalities and channels when the aim is to protect instrumentalities or channels, that precedent is not indifferent to what those other things are. To the contrary, a large number of opinions authored by the States' Rights Five have strongly suggested that the Constitution imposes special constraints upon federal legislation that intrudes upon integral areas of historical state sovereignty.[68] If this is so, then it is not quite enough that "Congress could reasonably believe that" privileging § 152 data in the relatively modest way that § 409 (as construed by the Court) did "would result in more diligent

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Shreveport Rate Cases, 234 U.S. 342 (1914); Southern R. Co. v. United States, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); Perez v. United States, 402 U.S. 146, 150 ("[F]or example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)")." *Lopez*, 514 U.S. at 558 (quotation edited for form).

The legal proposition stated in *Lopez*, however, is not identical to the proposition implicitly assumed by the *second* premise of the *Guillen* syllogism – and which is necessary to support the *Guillen* holding – namely, that Congress may regulate things *other than* instrumentalities or channels in order to protect instrumentalities or channels. That is, "regulate and protect" need not mean "regulate or protect." Furthermore, as the parenthetical the *Lopez* majority provided to describe the holding of *Southern Railway* and its very brief quotation from *Perez* suggest, neither of those cases obviously supports the critical proposition of law that the second *Guillen* premise presupposes. The *Shreveport Rate Cases* are no more helpful. Those cases rested on the proposition that "Congress in the exercise of its paramount power may prevent *the common instrumentalities of interstate and intrastate commercial intercourse* from being used in their intrastate operations to the injury of interstate commerce." 234 U.S. at 353 (emphasis added).

[68] Then-Justice Rehnquist's plurality opinion in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (invalidating federal legislation because it "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions") is the most obvious point of reference, especially given his and Justice O'Connor's refusal to accept the legitimacy of *Usery*'s subsequent overruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985). *See id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting); *see also, e.g.*, United States v. Morrison, 529 U.S. 598, 615 (2000) (criticizing an argument in support of federal legislation on the basis that it could "be applied equally as well to family law and other areas of traditional state regulation"); *Lopez*, 514 U.S. at 564 (invalidating the Gun-Free School Zone Act in part because, under the government's theories, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *id.* at 579-80 (Kennedy, J., concurring) (arguing that although the limits of the Commerce Clause present "questions of constitutional law not susceptible to the mechanical application of bright and clear lines[,] . . . at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern").

efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads."[69] The fact that § 409 proceeds by the specific means of regulating the rules of evidence to be applied in state court proceedings involving causes of action brought solely under state law would seem nonetheless to be a matter of constitutional concern.

To be sure, the Court gestures in the direction of this worry when acknowledging in a footnote that "Respondents contend in passing that § 409 violates the principles of dual sovereignty embodied in the Tenth Amendment."[70] But its immediately following assertion, that this contention did not merit discussion because "[t]he court below did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress' enumerated powers,"[71] seems less than wholly candid. For one thing, the Washington Supreme Court did devote an entire section of its opinion – separate from its Commerce Clause, Spending Clause, and Necessary and Proper Clause sections – to a discussion of "State Sovereignty."[72] Yet more fundamentally, the implication of the *Guillen* footnote that the Commerce Clause and Tenth Amendment inquiries are independent of each other seems inconsistent with the Court's explanation in *New York*, that in a case

> involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[73]

For this reason, the state court's conclusion that § 409 exceeded Congress's commerce power need not emerge separate and distinct from a conclusion that the statute "violates the principles of dual sovereignty embodied in the Tenth Amendment."[74] To the contrary, the state court opinion may most fairly be

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[69] Pierce County v. Guillen, 537 U.S. 129, 147 (2003).

[70] *Id.* at 148 n.10.

[71] *Id.*

[72] *See* Guillen v. Pierce County, 31 P.3d 628, 655 (Wash. 2001). Moreover, toward the end of that section, the state court stated:

> If this state court has misconstrued the United States Constitution's limitations upon the federal government's power to intrude upon *the exercise of state sovereignty in so fundamental an area of law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads*, we are confident that the United States Supreme Court will so instruct. . . .

Id. (emphasis added).

[73] New York v. United States, 505 U.S. 144, 156 (1992) (citations omitted).

[74] *See supra* note 70.

read to reason that § 409 was not a valid exercise of the commerce power precisely because of the way it intruded upon core areas of state sovereignty.[75]

In sum, the Commerce Clause question is far more complex than the unanimity and brevity of the *Guillen* Court's analysis suggests. That all nine justices were content to proceed in this way might indicate an affirmative wish to avoid the Spending Clause thicket. At the least, *Guillen* seems to strongly undermine any sense that members of the present Court are eager to revisit *Dole*.

II. *GUILLEN* AND THE SPENDING POWER

Of course, if the U.S. Supreme Court in *Guillen* had instead concluded that the challenged statute exceeded Congress's power under the Commerce Clause, it would then have needed to determine whether the statute could be sustained as an exercise of Congress's spending power.

A. South Dakota v. Dole

The Court's current spending doctrine derives from its 1987 decision in *South Dakota v. Dole*, and is explicit 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."[76]

At issue in *Dole* was a federal statute that conditioned states' receipt of a portion of federal highway funds on the state's adoption of a minimum drinking age of twenty-one.[77] The State of South Dakota, which permitted persons as young as nineteen to purchase certain alcoholic beverages, sought a declaratory judgment that the statute violated the Twenty-first Amendment to the U.S. Constitution and exceeded Congress' spending power.

The Twenty-first Amendment provides, in relevant part, that "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Congress' spending power derives from Article I, Section 8 of the Constitution, which empowers Congress 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."

Writing for the *Dole* majority, Chief Justice Rehnquist began by noting that there was no need for the Court to decide the Twenty-first Amendment claim. Observing that "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages," the Court went on to hold the legislation "within constitutional bounds *even if Congress may not*

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[75] *See Guillen*, 31 P.3d at 651-54.

[76] 483 U.S. 203, 207 (1987) (citation omitted) (citing United States v. Butler, 297 U.S. 1, 65-66 (1936)).

[77] *Id.* at 205 (quoting 23 U.S.C. § 158 (Supp. III 1982)); *see also id.* at 211 (describing the five percent condition on the receipt of federal highway funds).

regulate drinking ages directly."[78]

Because a state always has "the 'simple expedient' of not yielding to what she [considers] federal coercion,"[79] the *Dole* Court concluded that the "Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."[80] At the same time, the Court was clear that "[t]he spending power is of course not unlimited, . . . but is instead subject to several general restrictions articulated in our cases."[81] Ultimately, however, none of the four stated restrictions was portrayed as having much "bite."[82]

Thus, the first restriction articulated in *Dole*, that "the exercise of the spending power must be in pursuit of 'the general welfare,'"[83] is subject to the caveat that "courts should defer substantially to the judgment of Congress" when applying this standard.[84] Indeed, the Court acknowledged that the required level of deference is so great that it has "questioned whether 'general welfare' is a judicially enforceable restriction at all."[85] Second, the Court affirmed that Congress must state any conditions on the states' receipt of federal funds "'"unambiguously[,] . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."'"[86] But it could cite only one instance in which it had found that an enactment did not meet this requirement.[87]

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[78] *Id.* at 206 (emphasis added). Even today it is uncertain whether Congress has the power to regulate drinking ages directly in light of the Twenty-first Amendment. *See, e.g.*, *id.* at 206 ("the bounds of [the Twenty-first Amendment] have escaped precise definition"); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 346 (1987) (observing that "the Court "has rejected the view 'that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned.'") (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331-32 (1964)); *see also* Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911, 1984-85 (1995) (describing the uncertainty of states' power to regulate drinking ages in light of the Twenty-first Amendment and exploring several interpretations).

[79] *Dole*, 483 U.S. at 210 (quoting Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 127 (1947)).

[80] *Id.*

[81] *Id.* at 207.

[82] *See id.* at 207-08.

[83] *Id.* at 207 (citing United States v. Butler, 297 U.S. 1, 65 (1936); Helvering v. Davis, 301 U.S. 619, 640-41 (1937).

[84] *Id.* (citing *Helvering*, 301 U.S. at 640, 645).

[85] *Id.* at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam)).

[86] *Id.* at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)) (second alteration in original).

[87] *Id.* (citing *Pennhurst*, 45 U.S. at 17). Moreover, the import of the Court's holding in that instance was not to require Congress to continue providing funds to a state that had failed to comply with an ambiguously worded condition on those funds, but to deny relief to a third-party beneficiary of the funds who alleged that the state of Pennsylvania had failed to

Third, the *Dole* Court noted that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs,'"[88] but added that this restriction was merely "suggested (without significant elaboration)" by prior cases.[89] Indeed, the Court could cite no instance in which it had invalidated a conditional grant of federal money to the states on this ground.[90] Fourth, the Court concluded that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[91] That is, Congress may not use its powers under the Spending Clause "to induce the States to engage in activities that would themselves be unconstitutional," such as "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment."[92] But again, the Court could cite no case in which it had invalidated a conditional grant of federal money to the states on this basis.[93]

In addition to these four restrictions, the *Dole* Court read the Spending Clause to impose limits on Congress's ability to "coerce" the states in ways that it could not directly mandate under its other Article I powers.[94] "[I]n some

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comply with the federal condition that the Court ultimately found to be ambiguous. *Pennhurst*, 451 U.S. at 27-28.

[88] *Dole*, 483 U.S. at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

[89] *Id.* at 207.

[90] *See id.* at 207-08. The *Dole* Court cited *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion), and *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958). But the Court had not invalidated a condition on federal funds in either case.

[91] *Dole*, 483 U.S. at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam); King v. Smith, 392 U.S. 309, 333, n.34 (1968)).

[92] *Id.* at 210.

[93] *See id.* at 208. The Court cited three cases, but in none of them had it invalidated a conditional grant of federal money to the states on this ground. *See* Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985) (invalidating a South Dakota law limiting the manner in which counties or other qualified local government units may spend federal in-lieu-of-tax payments as violating the Supremacy Clause but upholding the federal government's imposition of a condition on the disbursement of federal funds under the Spending Clause); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam) (holding that limitations on campaign expenditures were unconstitutional restraints on the ability of candidates, citizens, and associations to engage in political expression protected by the First Amendment, but upholding limits on individual and political committee contributions, disclosure and reporting requirements, and a public financing scheme aimed at reducing the influence of large contributions on the political process as falling within Congress' power "to decide which expenditures will promote the general welfare"); King v. Smith, 392 U.S. 309, 333 & n.34 (1968) (invalidating Alabama's substitute father regulation because it defined "parent" in a manner inconsistent with § 406(a) of the Social Security Act and stating unequivocally that the federal government, barring a constitutional prohibition, may impose conditions on states when disbursing federal funds).

[94] *See Dole*, 483 U.S. at 211.

circumstances," the Court observed, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[95] The Court concluded that a threatened loss to states of five percent of their otherwise obtainable allotment of federal highway funds did not pass this critical point, but did not suggest what percentage of these (or any other) funds might.[96]

When considered in light of the *Dole* doctrine, § 409 at issue in *Guillen* appears to violate at least two of the requirements for constitutionally permissible conditions on federal funds: the "clear notice" requirement and the "relatedness" requirement. I now consider each of these in turn.

B. *Section 409 and the "Clear Notice" Requirement*

Under the so-called *Pennhurst* prong, the *Dole* Court held that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[97] The reason for this requirement is straightforward: "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[98] Thus, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the state voluntarily and knowingly accepts the terms of the 'contract'."[99]

The text of § 409, as amended, contains at least four significant ambiguities of the sort that surely would have precluded States and their political subdivisions from knowing with any certainty the terms of their "contract" with the federal government. In the recent words of one federal district court, "[s]ection 409 has engendered some confusion in the courts, thanks to its unwieldy language and the absence of any significant legislative history."[100]

Recall that, as amended, 23 U.S.C § 409 states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data *compiled or collected for the purpose* of identifying, evaluating, or planning the safety enhancement of potential accident sites . . . , pursuant to section[ ] . . . 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be

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[95] *Id.* (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[96] *See id.* (dismissing the Petitioner's argument that the success of the program was evidence of its coerciveness, and vaguely distinguishing between permissible temptation and impermissible coercion).

[97] *Dole*, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[98] *Pennhurst*, 451 U.S. at 17.

[99] *Id.* (citing Harris v. McRae, 448 U.S. 297 (1980); *Stewart Machine*, 301 U.S. at 585-98).

[100] Powers v. CSX Transp., Inc., 177 F. Supp. 2d 1276, 1277 (S.D. Ala. 2001).

> subject to discovery or *admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages* arising from any occurrence at a location *mentioned or addressed* in such reports, surveys, schedules, lists, or data.[101]

The first, and most noteworthy, ambiguity is the one that divided the Washington Supreme Court as discussed above in Part I.A.: If a report, survey, or any other specified item is originally compiled for purposes entirely unrelated to a federally funded highway-safety improvement project, does the report itself and the data contained therein become privileged simply because it has been subsequently collected for purposes of such a federally funded project? That is, can a local government shield from discovery and introduction into evidence all pre-existing, highway-related reports and data simply by collecting them for the purposes specified in § 409?

The language of § 409 seems strongly to support an affirmative answer. But the concurring justices' reading is also arguably consistent with the text of § 409. As even the majority of the Washington Supreme Court acknowledged:

> [A] few state courts have understandably remained reluctant to construe § 409 in a manner that effectively creates a legal black hole into which state and local governments can drop virtually all accident materials and facts, simply by showing that such materials and 'raw data' are *also* 'collected' and used to identify and rank candidates for federal safety improvement projects statewide.[102]

Furthermore, as the *Guillen* concurrence explained, its narrower reading of the § 409 privilege would not render the 1995 amendment pointless.[103] Some state courts had held prior to 1995 that data collected by one state agency for the purposes specified in § 409 were discoverable even from that collecting agency, and in the form that agency produced, so long as they had originally been compiled by other agencies for purposes not mentioned in § 409.[104] On the reading favored by the *Guillen* concurrence, the 1995 amendment made clear that this reading of § 409 was mistaken.[105] Thus, the amendment serves a function even if it does not establish, as the *Guillen* majority held, that the subsequent collecting of the data made the data undiscoverable even in their original form from the agencies that had initially compiled them. This is not a merely formalistic distinction, for plaintiffs' attorneys would find their jobs much easier if they could piggyback on a single government agency's efforts

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[101] 23 U.S.C. § 409 (2000) (emphases added).

[102] Guillen v. Pierce County, 31 P.3d 628, 644 (Wash. 2001) (emphasis in original) (citations omitted).

[103] *Id.* at 657 (Madsen, J., concurring).

[104] *Id.* at 657-58 (Madsen, J., concurring) (describing how some state courts' interpretations of § 409 partially undermined Congress' intent in enacting it and necessitated the 1995 amendment to § 409).

[105] *See id.* at 658.

to identify and assemble relevant data or reports compiled by several other governmental entities. In the end, if the *Guillen* concurrence's favored reading of the § 409 condition on federal funds is a textually permissible one, the condition is ambiguous and must fall under *Dole*.

The justices of the Washington Supreme Court were not alone in finding the text of § 409 ambiguous in this regard. The fifteen additional courts that have discussed this aspect of § 409 have been divided in their interpretations. Ten courts have interpreted this aspect of § 409 broadly (as the *Guillen* majority did).[106] Meanwhile, five courts have read the text more narrowly, essentially as the *Guillen* concurrence did.[107]

A second respect in which § 409 is ambiguous is closely related to, yet analytically distinct from, the first. Suppose now that a report is simultaneously created for various purposes, only one of which involves planning for federally funded highway safety improvements. Say, for example, that a municipality conducts a survey of road usage patterns at a particular intersection for two reasons: to design a routing plan for its public transportation system, and to assess the safety of the intersection for purposes of a federally funded highway safety improvement project. Is the survey privileged under § 409, as amended?

It is difficult to know. Is a survey "compiled or collected for the purpose of"[108] planning or developing federally funded highway safety improvements when that is merely *a purpose*, but not *the sole purpose*, for which the survey is created? Does it matter whether the statutorily specified purpose is not even a but-for purpose for the survey's creation? The text of § 409, as amended, does not resolve this mixed-motive problem, and on its face can support either the privileging or the admissibility of the survey.

The third major textual ambiguity in § 409, as amended, concerns the proceedings to which the privilege applies. Suppose a defendant being prosecuted for vehicular homicide seeks to introduce data related to the accident history at the location of the accident to support his contention that he was guilty, at most, of ordinary civil negligence. Are the data admissible if they have been collected for the statutorily specified purpose? In other words,

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[106] *See* Powers v. CSX Transp., 177 F. Supp. 2d 1276, 1280 (S.D. Ala. 2001); National R.R. Passenger Corp. v. Transwood, Inc., 2001 WL 986868 *1, *2 (E.D. La. 2001); Isbell v. Arizona, 9 P.3d 322, 324 (Ariz. 2000) (en banc); Palacios v. La. & Delta R.R., Inc., 740 So. 2d 95, 101-02 (La. 1999); Reichert v. Louisiana, 694 So.2d 193, 200 (La. 1997); Dowell v. Louisiana, 750 So. 2d 498, 501 (La. Ct. App. 2000); Sevario v. Louisiana, 752 So. 2d 221, 230 (La. Ct. App. 1999); Fry v. S. Pac. Trans. Co., 715 So. 2d 632, 637 (La. Ct. App. 1998); Hardenstein v. Cook Constr., 691 So. 2d 177, 182 (La. Ct. App. 1997); Coniker v. New York, 695 N.Y.S.2d 492, 495, 496 (N.Y. Ct. Cl. 1999).

[107] *See Ex parte* Ala. Dep't of Trans., 757 So. 2d 371, 374 (Ala. 1999); Irion v. Louisiana, 760 So. 2d 1220, 1226 (La. Ct. App. 2000); Palacios v. La. & Delta R.R., Inc., 682 So. 2d 806, 810 (La. Ct. App. 1997); Werner v. IA Constr. Corp., 51 Pa. D. & C. 4th 509, 513 (2001); Guillen v. Pierce County, 982 P.2d 123, 129 (Wash. Ct. App. 1999).'

[108] *See* 23 U.S.C. § 409 (2000) (as amended).

does the privilege apply only to Federal or state court proceedings for damages, or does it apply even to Federal or state court criminal proceedings and civil actions seeking injunctive relief?

Again, the text of § 409 provides little guidance. In relevant part, § 409 states that the covered documents and data:

> [S]hall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[109]

Clearly, the data would not be privileged in our hypothetical case had Congress included commas in § 409 as follows: "a Federal or State court proceeding, or considered for other purposes in any action, for damages arising from . . . ." The opposite interpretation would seem clear if Congress had instead inserted commas as follows: ". . . a Federal or State court proceeding, or considered for other purposes in any action for damages, arising from . . . ."

Unfortunately, Congress included no commas in this portion of § 409, both as amended in 1995[110] and as originally enacted in 1987.[111] So neither of these two interpretations is clearly inconsistent with, or mandated by, the text of § 409.

The fourth noteworthy textual ambiguity in § 409 is in the final clause of the provision: ". . .any action for damages arising from any occurrence at a location mentioned or addressed in such . . . data."[112] Consider a hypothetical report prepared pursuant to the federal scheme that lists and describes only the ten locations determined by the state to be most in need of safety improvements. Imagine further that this list was arrived at after an analysis of the locations of all traffic accidents that had occurred during the preceding twelve months.

What is the status of a location at which at least one accident occurred during the preceding twelve months and that was therefore a part of the data analysis that was necessary for the creation of the state's "worst ten" list? Is such a location "mentioned or addressed in such data" within the meaning of § 409? What is the status of a location at which no accident occurred during the preceding twelve months and which therefore arguably was not even included in the data analysis that resulted in the "worst ten" list? Is such a location "mentioned or addressed in such data"? Again, the text of § 409, as amended, permits either reading.

Given these four facially apparent and significant ambiguities in the text of

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[109] *Id.*

[110] *See* National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 591, Title III, § 323 (amending 23 U.S.C. § 409).

[111] *See* Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, Title I, § 132 (a) (codified as amended at 23 U.S.C. § 409 (2000))

[112] 23 U.S.C. § 409 (2000) (as amended).

§ 409, as well as the extensive disagreement among the nation's judiciary as to the intended meaning and scope of the provision, this condition on federal funds cannot plausibly be described as "unambiguous[]," as required by *Dole*.[113] The extent and significance of the ambiguity in § 409 is further underscored by the fact that the U.S. Supreme Court found it necessary to "determine the statute's proper scope" before it could address the constitutional questions raised in *Guillen*.[114] Indeed, as the Court noted, the Petitioner, Respondents, and the United States as Intervenor each proposed a different interpretation of § 409 in their briefs, with the Court ultimately adopting the Government's interpretation of the statute. [115]

In many contexts, the Court has the option – indeed the self-imposed obligation – to construe an ambiguous statute to avoid a "constitutionally doubtful" construction.[116] Under the Court's spending power doctrine as set forth in *Dole*, however, the mere existence of the ambiguity is constitutionally determinative – and fatal. This is not only because such legislation is "in the nature of a contract,"[117] but also because "the clear-notice safeguard of our Spending Clause jurisprudence" is "a "vital safeguard for the federal balance."[118] As Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, recently wrote in their dissent in *Davis*, "[o]nly if states receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power."[119]

Given its various textual ambiguities as well as the extensive disagreement as to its meaning and scope among the many judges across the nation who have construed § 409, as amended, it seemed inevitable that the Court would have concluded that the provision violated *Dole*'s clear-notice requirement.

C. *Section 409 and the "Relatedness" Requirement*

If the Court had reached the spending power issue, and had somehow concluded that § 409 satisfied *Dole*'s clear-notice requirement, one could only guess as to which interpretation the Court would be more likely to adopt with respect to what I have identified above as the second, third, and fourth ambiguities in the text of § 409. It seems clear, however, that the Court could not hold § 409 unambiguous in its entirety without endorsing the broad

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[113] 483 U.S. 203, 207 (1987).

[114] *Guillen*, 537 U.S. at 143.

[115] *Id.* at 143-44.

[116] *See, e.g.*, Jones v. United States, 529 U.S. 848, 851, 857 (2000); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

[117] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (quoting *Pennhurst*, 451 U.S. at 17); *see also id.* at 655 (Kennedy, J., dissenting).

[118] *Id.*

[119] *Id.*

interpretation of the first putative ambiguity adopted by the Washington Supreme Court and two-thirds of the other courts to take up the issue. As explained in Part II.B above, it strains credulity to conclude that the narrower interpretation[120] – adopted only by the concurring justices in *Guillen* and by a small minority of courts to discuss the issue – is not merely the better interpretation of § 409, as amended, but the unambiguously correct one. Revealingly, not even the concurring justices in *Guillen* made so strong a claim. Rather, they stated only that "the 1995 amendment *can be logically read*" in the narrower fashion they favored.[121]

Let us therefore assume, *arguendo*, that the Court had reached the spending power issue and had held that § 409 is not impermissibly unambiguous. That is, let us assume that the Court had held that the privilege applies even to documents or data that were not compiled for a statutorily specified purpose so long as the document or datum is at some subsequent point "compiled or collected" pursuant to the federal scheme. If this is what § 409 means, however, then it seems clear that condition must be found to fail *Dole*'s "relatedness" requirement, just as the Washington Supreme Court held.[122]

Dole's spending power doctrine requires that conditions on federal grants not be "unrelated 'to the federal interest in particular national projects or programs.'"[123] In *Dole*, the majority stated that it had not yet been necessary for the Court to "define the outer bounds of [this] 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power."[124] The *Dole* Court elaborated on this requirement only insofar as it quoted with approval the Court's 1958 statement that "the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof."[125]

More recently, the Court has described this requirement as mandating only that conditions on the receipt of federal funds "bear *some relationship* to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."[126]

The federal interest to be served by the federal funds on which § 409 is a condition on receipt is clear: increasing highway safety. "Section 409 forms part of a comprehensive federal plan to promote highway and railway

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[120] *See supra* note 107 and accompanying text.

[121] Guillen v. Pierce County, 31 P.3d 628, 657 (Wash. 2001) (Madsen, J., concurring) (emphasis added).

[122] *See id.* at 650-51.

[123] 483 U.S. 203, 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)) (plurality opinion).

[124] *Id.* at 209 n.3.

[125] Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

[126] New York v. United States, 505 U.S. 144, 167 (1992) (citing *Dole*, 483 U.S. at 207-08 & n.3) (emphasis added).

safety."[127] Section 409 is a subsection of Chapter 4 of Title 23, which is titled "Highway Safety," and Chapter 4 originated as the Highway Safety Act of 1966.[128] The core provision of Chapter 4 is § 402,[129] which requires each state to establish a "highway safety program" that is "designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom."[130]

Thus, in order to withstand scrutiny under existing doctrine, § 409 must "bear some relationship to,"[131] or must not be "unrelated to,"[132] increasing highway safety. In fact, however, § 409, if construed as the Washington Supreme Court majority construed it,[133] is logically at odds with the federal interest in increasing highway safety.

There is no evidence – neither prior to 1987, when § 409 was originally adopted,[134] nor prior to 1995, when it was amended[135] – that Congress or the Secretary of Transportation withheld any portion of a state's allotment of federal highway safety funds for non-compliance with § 152 or with any of the other provisions of federal law specified in § 409. Thus, we are left to assume that all of the states were receiving the federal funds and spending them on projects reasonably expected to increase highway safety. Given this state of affairs, the privilege afforded by § 409 was not needed to increase highway safety by increasing state participation in the federal highway safety scheme because participation had apparently already reached 100 percent. It is possible, however, that the privilege afforded by § 409 would increase the willingness of localities within each state to provide the state the data necessary for the state to spend its annual allotment of federal highway safety funds more efficiently.

Absent such federal funding, state and local governments can be presumed to have two principal incentives for improving the safety of their own roads. The first is the interest in protecting their citizens from all the physical and economic harms associated with vehicular accidents. The second, for entities that do not enjoy or have not waived sovereign immunity, is the interest in avoiding tort liability for any negligent acts or omissions that might be held causally responsible for highway accidents. Of course, resources being limited, states and localities likely could not make all the improvements they might desire. Nonetheless, these considerations would generally be adequate

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[127] Dowell v. Louisiana, 750 So. 2d 498, 500 (La. Ct. App. 2000).

[128] Pub. L. No. 89-564, 80 Stat. 731.

[129] 23 U.S.C. § 402 (2000).

[130] 23 U.S.C.. § 402(a).

[131] *New York*, 505 U.S. at 167.

[132] *Dole*, 483 U.S. at 207 (internal quotation mark omitted).

[133] Guillen v. Pierce County, 31 P.3d 628, 644 (Wash. 2001).

[134] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, Title I, § 132(a), 101 Stat. 170.

[135] National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 591, Title III, § 323 (amending 23 U.S.C. § 409).

to incentivize state and local governments to investigate how to prioritize their highway safety needs most efficiently.

To understand how those pre-existing incentives affect a locality's interest in receiving federal funding for road safety improvements, consider § 152[136] to which § 409, as amended, explicitly applies.[137] Under § 152(a), as it read in 1995 when the amendment to § 409 was adopted, states are obligated to identify "high-hazard" highway locations and, *inter alia*, "assign priorities for the correction of such locations."[138] A specified total amount of federal monies is appropriated each year for the states' hazard-elimination projects.[139] Pursuant to § 152(e), these federal funds are to be apportioned among the participating states substantially in proportion to the population of each state.[140] Within each state, its share of the total appropriation of federal funds is to be spent on hazard-elimination projects of the state's choosing, with the federal monies covering 90 percent of a selected project's cost.[141] Thus, the only competition for federal highway hazard-elimination funds would occur within each state, with each state the judge of that internal competition for its share of federal funds. Because a successful application for a share of the state's allotment of federal funds would enable a locality to improve the safety of its highways at least in part with federal dollars, localities would have a good reason to participate aggressively.

There is a countervailing consideration, however. Without a privilege for the efforts undertaken for the purpose of trying to secure a share of the state's allotment of federal funds, the fear of increased tort liability might threaten to take away what the carrot of federal funds provided. That is, a locality might decide not to undertake the efforts necessary to develop a potentially successful funding proposal out of concern that doing so would build a record that would make it more susceptible to successful negligence suits if its application for highway-safety funds were not approved and the proposed safety improvement therefore not made.[142]

Conditioning federal funding for projects on the nondiscoverability and inadmissibility of any work product created "for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites,

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[136] 23 U.S.C. § 152 (2000).

[137] 23 U.S.C. § 409.

[138] 23 U.S.C. §152(a) (1994).

[139] 23 U.S.C. § 152(e) (2000).

[140] *See* 23 U.S.C. § 402(c) (2000) (apportioning federal hazard elimination funds based 75% on the population of each state and 25% on the total public road mileage of each state).

[141] 23 U.S.C. § 152(d) (2000).

[142] *Cf.* Rodenbeck v. Norfolk & W. Ry., 982 F. Supp. 620, 624 (N.D. Ind. 1997) (observing that "[i]f a railroad knows that its candid efforts of persuasion directed to a local government that possesses discretionary authority may ultimately be used against it, the railroad will be far less forthcoming in offering any 'data' by which that discretion can be exercised, and indeed may choose not to offer safety suggestions at all").

hazardous roadway conditions, or railway-highway crossings . . . or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds,"[143] thus plausibly promotes highway safety by eliminating one consideration that might deter local governments from competing vigorously for their state's allotment of federal dollars. Of course, the state would still spend its total allotment of federal highway-safety funds on road-safety improvement projects even if some localities sat out the competition or participated only half-heartedly. But the state would presumably spend its allotment of funds less efficiently, buying a smaller overall increase in safety, than if all localities put forth their best efforts at identifying the most dangerous locations.

Put another way, § 409 would provide the political subdivisions of the states an incentive – if a state were simply unwilling to impose, or unable successfully to enforce, a state-wide mandate to this effect – to gather and provide the state the information it might need to increase the likelihood that the state's allotment of federal highway safety funds was spent in the most effective possible way. This would perhaps yield a greater increase in highway safety than would have been obtained if the same funds were spent on different safety improvement projects. To the extent that § 409, as amended, extends a privilege to documents created in order to help the state maximize the effectiveness of its expenditure of federal highway safety funds, it is arguably related to the relevant federal interest of increasing highway safety.

But the privilege afforded by § 409 – as interpreted by the Washington Supreme Court – goes farther than this.[144] It ensures, recall, not merely that a locality that develops an application for a share of its state's federal safety-improvement funds will be no more susceptible to successful damage suits as a result of having sought the federal funding than if it had not, but that it will be substantially less susceptible to such suits. The broad privilege that the Washington Supreme Court read § 409 to afford thus reduces one of the incentives that operate to encourage state and local governments to improve the safety of their highways: the threat of tort liability.

Furthermore, the broad reading of § 409 provides no countervailing increase in highway safety. After all, so long as a locality is made no more susceptible to damage suits by applying for federal funding, it should be fully incentivized to do so by the prospect that a successful application would result in its own roads being made safer – a consequence that would itself reduce the locality's potential exposure in tort simply by reducing the number and seriousness of accidents.

In sum, then, to the extent that the § 409 privilege extends to documents and data that would have existed in the absence of the federal funding scheme, and that would not have been privileged in the absence of § 409, it diminishes the ability of individuals to successfully sue the state or its political subdivisions

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[143] 23 U.S.C. § 409 (2000).

[144] Guillen v. Pierce County, 31 P.3d 628, 645-46 (Wash. 2001).

for hazardous road conditions, relative to the state of affairs that would exist if the § 409 privilege did not extend so far. This diminished likelihood of success means that the states will face a reduced incentive to devote their own funds to increasing highway safety as a means of precluding such potentially costly suits. At the same time, extending the privilege to these original documents – as distinct from a compilation of them, or a report summarizing them – does not enable the state to spend its allotment of federal highway-safety funds more effectively or efficiently.

The state receives and spends the same amount of federal highway safety funds, and spends those funds in exactly the same way, as it would have if the privilege did not extend to materials and data that would have existed and would have been discoverable in the absence of the federal funding scheme. Thus, by apparently extending the privilege this far, Congress diminished – perhaps into non-existence – one important force for increased highway safety within the state while providing no countervailing increase in highway safety relative to the level that would have been obtained with a narrower § 409 privilege. The net result would be a certain decrease in highway safety. Such an outcome is obviously antithetical to – and therefore not appropriately "related to" – the federal interest in increased highway safety at the center of the federal funding scheme of which § 409 is a part. Thus § 409 would fail *Dole*'s "relatedness" requirement.[145]

III. *LOCHNER*'S LEGACY FOR THE SPENDING POWER AND FEDERALISM?

The preceding discussion of the *Guillen* decision raises several noteworthy questions. Why were all nine justices willing to resolve the case through a substantially underdeveloped and highly dubious Commerce Clause analysis that is seemingly inconsistent with the Court's own precedent? Why did the "States' Rights Five" forego an opportunity that they will not likely again soon have to re-examine and strengthen, or to re-affirm, the significance of existing spending power doctrine, which is so central to any meaningful "federalist revival"?

This Part discusses two plausible answers to these questions. It first considers the possibility that *Guillen* is best read as signaling a shift in the attitude of the States' Rights Five toward the role of the courts in protecting the federal-state balance, whether via a limited spending power or a limited commerce power. It briefly discusses what I take to be the three major "lessons of *Lochner*" for modern federalism: (1) a concern about the institutional competence of courts to answer certain sorts of constitutional questions; (2) a view that various safeguards of the political process may be sufficient, and that judicial review may therefore not be necessary, to appropriately protect certain constitutional values; and (3) a belief that states' rights (and economic liberties) are not as worthy of protection as personal or

[145] 483 U.S. 203, 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)) (plurality opinion).

cultural liberties.

This Part goes on to consider, and ultimately finds more persuasive, an alternative explanation for the States' Rights Five's seemingly aggressive avoidance of the spending power issue in *Guillen*. This explanation has the virtue of being able to reconcile the decision in *Guillen* with both the majority and dissenting opinions in the three cases to date in which any member of the States' Rights Five has held that a federal statute exceeded Congress's spending power: *South Dakota v. Dole*,[146] *Davis v. Monroe County Board of Education*,[147] and *Jackson v. Birmingham Board of Education*.[148] All of these decisions, I contend, are consistent with the States' Rights Five having a fundamental (if incompletely theorized and articulated) focus in the spending power cases on whether the regulated area at issue is one in which the States "historically have been sovereign"[149] or is instead an area of traditional and appropriate federal regulation.

This Part concludes with a similar examination of whether *Guillen* can be reconciled with the majority opinions in the two cases to date in which the States' Rights Five has held that a federal statute exceeded Congress's commerce power: *United States v. Lopez*[150] and *United States v. Morrison*.[151] The conclusion here too is that the decisions are consistent with a fundamental focus on whether the regulated area at issue has traditionally and appropriately been one regulated by the states or by the federal government.

A. Lochner*'s Lessons for Modern Federalism*

Although many critics of the Rehnquist Court's federalism decisions of the past decade have invoked the specter of *Lochner*,[152] the most articulate – and intriguing – such critic has been Justice Souter.[153]

In his dissents in *Lopez* and *Morrison*, Justice Souter discusses three central

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[146] 483 U.S. 203 (1987).

[147] 526 U.S. 629 (1999).

[148] 125 S.Ct. 1497 (2005).

[149] United States v. Lopez, 514 U.S. 549, 564 (1995).

[150] *Id.*

[151] 529 U.S. 598 (2000).

[152] Baker & Young, *supra* note 43, at 76 (citing Souter's *Lopez* dissent as an exemplar of critics' attempts to link the Rehnquist Court's "states' rights" decisions to "discredited aspects of the Court's pre-New Deal jurisprudence").

[153] United States v. Morrison, 529 U.S. 598, 615 (2000) (Souter, J., dissenting) ("Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes."); *Lopez*, 514 U.S. at 608 (Souter, J., dissenting) ("[I]t seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.").

Lochner-based concerns. The first, broadly put, is an institutional concern about judicial *competence* to second-guess legislative judgments in particular areas.[154] This concern has at least two core components: the contention that the Court has no claim to being a "better" or more "legitimate" source of policy than Congress in the federalism area; and the belief that the Court simply cannot craft a principled, judicially manageable standard in this area.

With regard to the first component, consider Justice Souter's words in *Lopez*:

> [U]nder commerce, as under due process, adoption of rational basis review expressed the recognition that *the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments*, and for the past half century the Court has no more turned back in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy).[155]

Regarding the second component, Justice Souter in *Lopez* (crediting Justice Breyer for the point), bemoaned "the hopeless porosity of 'commercial' character as a ground of Commerce Clause distinction in America's highly connected economy," and elaborated as follows:

> The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the process of deciding how much interference with contractual freedom was fatal. *Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.* The answer is not reassuring. . . . [T]here is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began.[156]

Implied here is the suggestion that judges are (or should be) generally more comfortable overriding majoritarian choices if they have a relatively determinate text in which to ground their decisions, that a sufficiently determinate doctrine can only really emerge from a relatively determinate text. The abandonment of *Lochner*'s freedom-of-contract and related doctrines is traceable (at least in part) to the obverse concern – that is, that the judicially-crafted standards under those doctrines were so indeterminate, and destined by

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[154] *See, e.g.*, *Morrison*, 529 U.S. at 628 (Souter, J., dissenting); *Lopez*, 514 U.S. at 604 (Souter, J., dissenting).

[155] 514 U.S. at 607 (Souter, J., dissenting) (emphasis added).

[156] *Id.* at 608 (Souter, J., dissenting) (emphasis added).

the relevant indeterminate text to be such, as to invite judicial *policy judgments* which the Court had neither the expertise nor the popular mandate to make.[157]

A second set of concerns revolves around the perceived *necessity* of judicial review in particular areas. Many, if not most, discussions of judicial review in this century have perceived judicial override of actions by the political branches as an exceptional act requiring special justification.[158] That justification is lacking – so the argument goes – when the political branches can be counted upon to protect the constitutional values at stake even in the absence of judicial intervention. In Justice Souter's words in *Lopez*:

> The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." . . . In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.[159]

And some, including Justice Souter, have made the case for deference in the federalism area on the additional ground that the states have sufficiently effective political means of fending off inroads on their authority:[160]

> The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of *the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests* as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy. . . .
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> Madison . . . took care in The Federalists No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. . . . James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal

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[157] *See, e.g., id.* at 607 (Souter, J., dissenting) (observing that, after 1937, "under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments").

[158] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-18 (2d ed. 1962) (describing the "counter-majoritarian difficulty" of judicial review).

[159] 514. U.S. at 604 (Souter, J., dissenting).

[160] *See, e.g.*, 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 (1954).

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> As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics.[161]

The final set of concerns involves the identification of a set of preferred rights, entitled to special judicial protection on *normative* grounds. On this view, economic substantive due process or "states' rights" are simply not as normatively attractive as the individual rights that the judiciary has been willing aggressively to enforce since 1937. Such arguments generally emphasize the centrality of free speech, personal privacy, or racial equality to the autonomy and dignity of individual human beings, or some other normative theory of justice.[162] In addition, though, there is Justice Souter's somewhat different argument for the primacy of individual rights over states' rights:

> The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties.[163]

Justice Souter went on here to contend that the justices eager to have a judicially enforced federalism have in fact been the ones engaged in an illegitimate privileging of states' rights (presumably as compared to individual rights): "The [*Morrison*] majority's *special solicitude for 'areas of traditional state regulation'* . . .is thus founded not on the text of the Constitution but on what has been termed the '*spirit* of the Tenth Amendment,' . . . ."[164]

Although the various *Lochner*-based concerns set forth above were expressed by Justice Souter in the context of the commerce power, they are no less relevant to discussions of the spending power once one acknowledges that a limited congressional spending power is necessary to a meaningful federalism.[165] Thus, one might reasonably expect the justices who invoke or subscribe to these concerns in the Commerce Clause context to be at least as eager to embrace them in the area of spending power doctrine.

I have discussed each of the above concerns at length in previous work, and

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[161] *Morrison*, 529 U.S. at 647-49 (Souter, J., dissenting) (emphases added).

[162] *See, e.g.*, Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45-50 (describing and criticizing this argument for the double standard between economic and personal rights).

[163] *Morrison*, 529 U.S. at 648 (Souter, J., dissenting).

[164] *Id.* at 648 n.18 (Souter, J., dissenting) (first emphasis added).

[165] *See, e.g.*, Baker, *Federalist Revival*, *supra* note 43, at 196 (arguing that the "states will be at the mercy of Congress so long as there are no meaningful limits on its spending power").

have contended that each is unpersuasive.[166] For present purposes, however, it does not matter whether one ultimately finds these *Lochner*-based concerns persuasive. It matters only that one understand *what* those concerns are, *that* at least four of the Court's current justices do find those concerns persuasive, and, most importantly, that the States' Rights Five's seemingly aggressive avoidance of the spending power issue in *Guillen* might reflect a shift in their own views such that they have come to find these *Lochner*-based concerns persuasive, at least with regard to some aspects of federalism doctrine. In the next two Parts I consider whether there is a more persuasive, alternative explanation for the participation of the States' Rights Five in the *Guillen* decision.

B. Guillen *and the Spending Power: An Alternative Explanation*

In order logically to conclude that the seemingly aggressive avoidance of the spending power issue in the U.S. Supreme Court's *Guillen* decision reflects a conversion of sorts by the States' Rights Five regarding the persuasiveness of *Lochner*-based concerns about modern federalism doctrine, one would have to reconcile that theory with the opinions of each of those justices in *South Dakota v. Dole*,[167] *Davis v. Monroe County Board of Education*,[168] and *Jackson v. Birmingham Board of Education*.[169]

In *Dole*, Justice O'Connor made clear in her dissent that she would have invalidated the statute at issue as exceeding Congress's power under the Spending Clause.[170] Chief Justice Rehnquist and Justice Scalia, in contrast, upheld the statute, but articulated a doctrinal standard for review of those spending power cases involving conditional offers by Congress of federal funds to the states.[171] Thus, even considering this case in isolation, it seems clear that neither Justice O'Connor (most obviously) nor Chief Justice Rehnquist or Justice Scalia had, at least in 1987, any concern about judicial competence in the area of the spending power or the necessity for judicial review in this area, nor had they subscribed to the view that states' rights were not as worthy as protection as individual rights. Thus, in 1987 it was implausible that any of these three justices found persuasive the *Lochner*-based concerns about modern spending power doctrine.

Twelve years later, in *Davis*,[172] the roles among O'Connor and Rehnquist and Scalia were reversed, and Justices Thomas and Kennedy were now on the

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[166] *See* Baker & Young, *supra* note 43, at 163-64; Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 440 (2002); Baker, *Federalist Revival*, supra note 43 at 230.

[167] 483 U.S. 203 (1987).

[168] 526 U.S. 629 (1999).

[169] 125 S. Ct. 1497 (2005).

[170] 483 U.S. at 212.

[171] *Id.* at 206-07.

[172] 526 U.S. 629 (1999).

Court. In this 1999 decision, Justice O'Connor wrote for the majority and upheld the federal statute at issue (a provision of Title IX),[173] while Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas in dissent would have invalidated the statute under the so-called *Pennhurst* or "clear notice" prong of the *Dole* doctrine.[174] Thus, by the time *Davis* was decided each member of the States' Rights Five was on record as having been willing to invalidate a federal statute under the doctrine set out in *Dole*. This, in turn, makes it seem unlikely either that these justices were aggressively avoiding reaching the spending power issue in *Guillen* or that the reason for any such avoidance was a conversion by each to the *Lochner*-based concerns about the judicial role in this context.

Moreover, I would suggest that there is an entirely plausible alternative explanation for the failure of the States' Rights Five to reach the spending power issue in *Guillen*. Notwithstanding my analysis in Part II above, it seems entirely possible that each of these justices in fact was of the view that the statute at issue in *Guillen* should be sustained under *Dole*. There was therefore simply no pressing need for them to reach the spending power issue in that case.

The support for this thesis rests on the possibility that none of the Five would have applied the *Dole* doctrine in *Guillen* as strictly as I applied it in Part II above. Rather, consistent with the positions taken by each of the Five in *Dole*, *Davis*, and *Jackson*, the thesis is that they each in fact, if implicitly, would have focused on whether the core regulatory activity at issue was a "traditional" and appropriate area of federal rather than state regulatory concern.

To see how this (under-theorized and incompletely articulated) inquiry may have been deployed in the past, consider both the majority opinion of Chief Justice Rehnquist and the dissenting opinion of Justice O'Connor in *Dole*. From O'Connor's perspective, the challenged provision of federal law was *not* part of a regulatory area traditionally or appropriately within the province of the federal government.[175] Although the condition at issue was attached to federal highway construction funds, O'Connor noted that the challenged provision was not about highways but about "an attempt to regulate the sale of liquor" that she believed was an activity traditionally and (as a matter of the Twenty-first Amendment) solely within the province of the states.[176] She noted in this regard that the statute at issue was titled the "National Minimum Drinking Age Amendment."[177] In applying the "relatedness" prong of the *Dole* test, Justice O'Connor observed that while "interstate highway construction" was a legitimate federal program (read "area of traditional

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[173] *Id.* at 632.

[174] *Id.* at 656-57 (Kennedy, J., dissenting).

[175] *Id.* at 213-14 (O'Connor, J., dissenting).

[176] *Id.* at 212 (O'Connor, J., dissenting).

[177] *Id.* (O'Connor, J., dissenting)

federal concern"), that "establishment of a minimum drinking age of 21 is not sufficiently related" to highway construction "to justify so conditioning funds appropriated for that purpose."[178] Chief Justice Rehnquist and Justice Scalia, in contrast, were of the view that the minimum drinking age provision was "directly related" to "safe inter-state travel" and was therefore permissible.[179]

One way to understand the difference in these majority and dissenting opinions is that from O'Connor's perspective the core government activity at issue was the regulation of minimum drinking ages,[180] while from the perspective of Rehnquist and Scalia the core government activity was the regulation of interstate highway safety.[181] Thus conceptualized, O'Connor (and likely also Rehnquist and Scalia) did not consider the regulation of minimum drinking ages to be a regulatory area of traditional federal concern; at the same time, Rehnquist and Scalia (and likely also O'Connor) did consider the regulation of interstate highway safety to be an area that had traditionally been the province of the federal government.

Now consider the majority and dissenting opinions in *Davis*.[182] The question presented was whether a private damages action may lie against a school board under Title IX of the Education Amendments of 1972 ("Title IX") in cases of student-on-student harassment.[183] A bare majority of the court held that Title IX was enacted pursuant to Congress's spending power and that it met the requirements set forth in *Dole*.[184] Writing for the majority, Justice O'Connor acknowledged that "the scope of liability in private damages actions under Title IX is circumscribed by *Pennhurst*'s requirement that funding recipients have notice of their potential liability,"[185] and she went on to conclude that "the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents."[186] She observed that the Court had previously determined "that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action."[187]

The dissent was authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Scalia and Thomas. The dissenters observed that "there is no established body of federal or state law on which courts may draw in

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[178] *Id.* at 213-14 (O'Connor, J., dissenting).

[179] *Id.* at 208-09.

[180] *Id.* at 212 (O'Connor, J., dissenting).

[181] *Id.* at 208-09.

[182] 526 U.S. 629 (1999).

[183] *Id.* at 633-34.

[184] *Id.* at 640-50.

[185] *Id.* at 641.

[186] *Id.* at 643.

[187] *Id.* at 650.

defining the student conduct that qualifies as Title IX gender discrimination,"[188] and asserted that the majority had failed "to provide any workable definition of actionable peer harassment."[189] The dissenters termed the clear-notice (*Pennhurst*) prong of the *Dole* test a "vital safeguard for the federal balance"[190] and contended that it was "eviscerate[d]" by the majority,[191] that the majority's was a "watered-down version of the Spending Clause clear-statement rule."[192]

The dissenters concluded that schools "cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students."[193] En route the dissenters asserted that "[w]ithout doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds,"[194] and they offered the following context-specific elaboration on *Dole*'s clear-notice prong:

> [T]he Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.[195]

Thus, four of the States' Rights Five, in dissent, would have held the challenged provision in *Davis* to be invalid under *Dole*.[196] Although their contention was that the challenged condition on federal funds did not pass muster under *Dole*'s "clear-notice" prong, the core of these justices' concern seemed to be that the case ultimately was about the federal regulation of schools. Consider the following excerpts from that dissent:

> The Nation's schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator. The federal government will have insinuated itself not only into one of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs. This federal control of the discipline of our Nation's schoolchildren is contrary to our traditions and inconsistent with the sensible administration of our schools. . . .
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[188] *Id.* at 675 (Kennedy, J., dissenting).

[189] *Id.* at 677.

[190] *Id.* at 655.

[191] *Id.*

[192] *Id.* at 686.

[193] *Id.* at 658.

[194] *Id.* at 656.

[195] *Id.* at 656-57.

[196] *Id.* at 656-57 (Kennedy, J., dissenting).

> . . . The Court clears the way for the federal government to claim center stage in America's classrooms. . . . Enforcement of the federal right recognized by the majority means that federal influence will permeate everything from curriculum decisions to day-to-day classroom logistics and interactions.[197]

Justice O'Connor, in contrast, writing for the majority, held that Title IX:

> [M]akes clear that, whatever else it prohibits, *students must not be denied access to educational benefits and opportunities on the basis of gender.* We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive *that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.*[198]

Thus, Justice O'Connor portrays the case as being about certain anti-discrimination regulations contained in Title IX.[199] And such regulations, at least since the Civil War, have been considered to be an appropriate area of federal concern.[200] Consistent with the thesis set out above, O'Connor's view was that the condition on federal funds to the states at issue in *Davis* passed muster under *Dole*.[201]

As in the case of *Dole* itself,[202] one way to understand the difference in the majority and dissenting opinions in *Davis* is that from O'Connor's perspective the case was about the regulation of civil rights via a prohibition on gender-based discrimination, while from the perspective of Rehnquist, Kennedy, Scalia, and Thomas the case was about the regulation of the public schools. Thus conceptualized, these latter four justices (and likely also Justice O'Connor) considered the regulation of the public schools to be an area of traditional state concern, while Justice O'Connor (and likely the other four of the Five) considered the regulation of gender-based discrimination to be a traditional and appropriate federal function.

Similarly, consider the 2005 case of *Jackson v. Birmingham Board of Education*.[203] The question before the Court was whether the acknowledged private right of action for sex discrimination under Title IX extends to claims

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[197] *Id.* at 657-58, 686 (Kennedy, J., dissenting).

[198] *Id.* at 650 (emphasis added).

[199] *Id.* at 639; *Id.* at 650.

[200] The Fourteenth Amendment to the U.S. Constitution, adopted in 1868, prohibited "any State" from denying "the equal protection of the laws" to "any person within its jurisdiction," U.S. CONST. amend. XIV, § 1, and further gave Congress the "power to enforce, by appropriate legislation, the provisions of this article," U.S. CONST. amend. XIV, § 5.

[201] 526 U.S. at 649-50.

[202] *See supra* text accompanying notes 180-181.

[203] 125 S.Ct. 1497 (2005).

of retaliation.[204] Justice O'Connor, again writing for the majority, held that Title IX does encompass such claims "where the funding recipient retaliates against an individual *because* he has complained about sex discrimination."[205] Justice Thomas, writing in dissent, and joined by the remainder of the States' Rights Five, in contrast, contended that a "claim of retaliation is not a claim of discrimination on the basis of sex."[206] Thus, for the dissenters the case was not about sex discrimination nor, therefore, was it about an appropriate area of federal concern. They, predictably, went on to find that an implied right of action under Title IX for retaliation claims would violate *Dole*'s clear notice requirement,[207] while the majority held that Title IX "supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls' basketball team."[208]

Now reconsider *Guillen*. The text of the opinion makes clear that the unanimous court in that case considered the statutory provision at issue to be about the regulation of highway safety.[209] Although the challenged provision itself was a regulation of the rules of evidence to be applied in state court civil proceedings involving causes of action brought under state law, the regulation was limited to evidence related to highway safety. Highways are generally considered to be a regulatory area of traditional and appropriate federal concern. It would therefore be consistent with my thesis for each of the States' Rights Five to have concluded that the challenged provision did not exceed Congress's spending power.

C. Guillen *and the Commerce Power: An Alternative Explanation*

If my thesis is persuasive thus far, one question remains: Why did the States' Rights Five not simply decide *Guillen* on spending power grounds rather than on the basis of a conclusory and seemingly distorted commerce clause analysis? One possible answer is that none of the Five considered the Commerce Clause analysis in *Guillen* to be any significant distortion of existing precedent.

Recall that Thomas wrote for the Court in *Guillen* that *Lopez* interpreted the Commerce Clause to permit Congress "to regulate and protect the instrumentalities of interstate commerce . . . even though the threat may come only from intrastate activities."[210] And the Court explicitly interpreted the regulation at issue in *Guillen* to be "aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate

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[204] *Id.* at 1502.

[205] *Id.* at 1504 (emphasis in original).

[206] *Id.* at 1510.

[207] *Id.* at 1514-15.

[208] *Id.* at 1510.

[209] Pierce County v. Guillen, 537 U.S. 129, 132-35 (2003).

[210] *Guillen*, 537 U.S. at 147 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

commerce."[211] Thus, perhaps *Guillen was* an easy case under the Commerce Clause?

The problem, however, as I observed in Part I.C. above, is that neither *Lopez* nor the precedents upon which it relies remotely establish that Congress is authorized under the Commerce Clause to regulate just *anything* – including state court judicial proceedings – so long as it is "aimed at" protecting the channels or instrumentalities of interstate commerce. Why did the States' Rights Five in *Guillen* apparently ignore this distinction?

One plausible answer, I believe, has at its core an appreciation that the recent Commerce Clause jurisprudence of the States' Rights Five, like their spending power jurisprudence, is driven by a (sometimes) unstated inquiry into whether the congressional enactment seeks to regulate an area "where States historically have been sovereign"[212] or whether it instead involves an appropriate and traditional federal function.

In support of this thesis it should be noted that delineating the scope of traditional state regulation was an unambiguous focus of Chief Justice Rehnquist's opinions for the States' Rights Five majority in both *Lopez* and *Morrison*. In both cases, the majority was explicit that federal power should not extend to "areas such as criminal law enforcement or education where States historically have been sovereign."[213] In addition, the majority in each of those cases held that Congress had exceeded its power under the Commerce Clause because it deemed the regulatory area at issue in fact to be one in which States "historically have been sovereign."[214] The Gun Free School Zones Act at issue in *Lopez* was quite reasonably understood by the majority to involve both criminal law enforcement and education, two of the areas in which it contended that states historically had been sovereign.[215] And in *Morrison*, which involved the civil remedy provision of the Violence Against Women Act, the majority observed:

> The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[216]

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[211] *Id.* at 147.

[212] *Lopez*, 514 U.S. at 564.

[213] *Lopez*, 514 U.S. at 564, *quoted in* United States v. Morrison, 529 U.S. 598, 613 (2000).

[214] *Lopez*, 514 U.S. at 564, *quoted in Morrison*, 529 U.S. at 613.

[215] *Lopez*, 514 U.S. at 564.

[216] 529 U.S. at 617-18 (citations omitted).

In *Guillen*,[217] although the statutory provision at issue regulates state court rules of evidence, it does so only with regard to evidence related to highway safety. Thus, this provision, and the sense in which the case is "about" an appropriate federal function (i.e., the regulation of highway safety), seems markedly different from a hypothetical analogous statutory provision that might regulate state court rules of evidence more broadly (for example, in areas including, but not limited to, highway safety). Once Guillen is understood in this way, its Commerce Clause analysis seems quite consistent with the above conception of both *Lopez* and *Morrison* in which the notion of "areas in which States historically have been sovereign" serves as a pivotal, if incompletely theorized, decisional principle.

Further, once *Guillen* is understood in this way, it seems clear that there was no reason for the Court to decide the case on spending power grounds. The Commerce Clause analysis was seemingly simple and straightforward. A Spending Clause analysis under *Dole*, in contrast, would inevitably be lengthier and potentially more complex, while posing especially awkward questions under *Dole*'s "clear notice" prong.

D. *Some Possible Criticisms*

The thesis of Parts III.B and III.C above is subject to several criticisms. First, and most obviously, the determination of what a particular case or statute is "about" is both central and likely to be controversial. Indeed, as was discussed in the context of *Dole*, *Davis*, and *Jackson*, the members of the States' Rights Five arguably disagreed among themselves on precisely that ultimately dispositive point.[218]

If the mission of this article were a prescriptive rather than a purely diagnostic one, it would surely be important to begin to articulate how this central determination is to be made. For present purposes, however, it seems sufficient merely to note the existence of the issue and to acknowledge that it is indeed a worthy subject of future discussion.

A second criticism is that the core of the thesis is an inquiry into notions of "traditional" and "appropriate" state and federal regulatory concern, and that this is precisely the sort of inquiry that was held in *Garcia* to be doomed to failure[219] and that *Lochner* had arguably taught us was neither necessary nor legitimate. Put more starkly, the thesis of this Part can be read to suggest not that *Guillen* is best understood as signaling that the States' Rights Five have been persuaded of the correctness of the *Lochner*-based critique of their prior federalism decisions, but the exact opposite. That is, *Guillen* and the thesis of

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[217] 537 U.S. 129 (2003).

[218] *See supra* text accompanying notes 180-209.

[219] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

this Part are quite consistent with the possibility that the States' Rights Five have quietly returned to a largely unarticulated *National League of Cities*[220] type of inquiry in the federalism context, notwithstanding the lessons of *Lochner*.

For present diagnostic purposes, it is not necessary to determine whether the *Lochner*-based critique *should* guide the development of future federalism doctrine. It is enough simply to observe that the States' Rights Five may indeed be subject to such a critique in this area with greater vigor than ever before. In addition, it is worth acknowledging the *possibility* that a second attempt at developing a *National League of Cities* type of doctrine in the federalism area may ultimately prove successful precisely because of that first, arguably failed attempt, and notwithstanding *Lochner*'s legacy.

CONCLUSION

This Article has sought both to examine *Lochner*'s legacy for modern federalism through the lens of the U.S. Supreme Court's 2003 decision in *Guillen* and to reconcile that puzzling, scarcely noticed decision with the Court's other recent spending power and Commerce Clause cases. I have presented above a detailed critique of *Guillen*, which suggests that the federal statute at issue should have been – but was not – found to have exceeded both Congress's commerce and spending powers under a plausible reading of recent precedent.

The Article ultimately suggests that the Court's decision in *Guillen* is in fact readily reconciled with the positions taken by the States' Rights Five in other recent spending and commerce power cases. The key is acknowledging the possibility that those justices have engaged throughout in an incompletely theorized and largely unarticulated inquiry into whether the regulatory area at issue is one in which the states "historically have been sovereign" or is an area of traditional and appropriate federal concern.

Future spending power and Commerce Clause decisions will reveal both the accuracy of the very preliminary positive theory sketched here and the precise contours of *Lochner*'s legacy for modern federalism. No less importantly, future decisions will also tell us whether this apparent second attempt at a *National League of Cities*[221] type of doctrine is in any significant way – or could in any significant way be – an improvement on the first.

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[220] *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

[221] *See* 426 U.S. 833 (1976).