THE FUTURE OF FEDERALISM? *PIERCE COUNTY V. GUILLEN* AS A CASE STUDY

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INTRODUCTION

The most interesting aspect of current federalism doctrine, I believe, is the role of the spending power, particularly conditional federal spending. In this brief essay, I will discuss that larger issue by focusing primarily on a 2003 United States Supreme Court decision, *Pierce County v. Guillen*,[1] that likely went unnoticed even by most federalism junkies.

Guillen came to the Court after the Supreme Court of Washington held that the federal statute at issue exceeded Congress's spending power[2] under the doctrine set forth in *South Dakota v. Dole*.[3] Rather than seize this extraordinarily rare opportunity to re-

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Some of the issues raised in this Essay are discussed at greater length in Lynn A. Baker, *Federalism and the Spending Power from* Dole *to* Birmingham Board of Education, *in* THE REHNQUIST LEGACY 205 (C. Bradley ed., 2006) [hereinafter Baker, *Federalism and the Spending Power*], and in Lynn A. Baker, *Lochner's Legacy for Modern Federalism:* Pierce County v. Guillen *as a Case Study*, 85 B.U. L. REV. 725 (2005) (proceedings of conference on "*Lochner*'s Centennial").

1. 537 U.S. 129 (2003).

2. Guillen v. Pierce County, 31 P.3d 628, 650-52 (Wash. 2001) *rev'd*, 537 U.S. 129 (2003). Congress's spending power derives from Article I, § 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." U.S. CONST. art. I, § 8.

3. 483 U.S. 203, 207 (1987). The Court stated the doctrinal test as follows:

> The spending power is of course not unlimited, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, and n.13, . . . (1981), but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare."

consider the Court's spending clause doctrine in light of its larger, evolving federalism jurisprudence, however, even the "States' Rights Five"[4] chose simply to avoid the spending power issue. The Court instead resolved *Guillen* on cursory and highly suspect Commerce Clause grounds.[5]

In this essay, I ask "Why?" and tentatively suggest an answer. My thesis is that *Guillen can* be reconciled with the positions taken by the States' Rights Five in other recent spending and commerce power cases if one acknowledges the possibility that those justices have engaged throughout in an incompletely theorized and largely unarticulated inquiry into whether the regulatory area at issue is

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See Helvering v. Davis, 301 U.S. 619, 640-641, . . . (1937); *United States v. Butler,* [297 U.S. 1, 65 (1936)]. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis,* [301 U.S.] at 640, 645 . . . . Second, we have required 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." *Pennhurst State School v. Halderman,* [451 U.S.] at 17 . . . . Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States,* 435 U.S. 444, 461 . . . (1978) (plurality opinion). See also *Ivanhoe Irrigation Dist. v. McCracken,* [357 U.S. 275, 295 (1958)]. ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Lawrence County v. Lead-Deadwood School 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).

Id. at 207-08. 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. "[I]n some 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.'" *Id.* at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

For further discussion of the origins and operation of the *Dole* doctrine, see Baker, *Federalism and the Spending Power, supra* note *.

4. The five are the late Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas who together provided the majority for the Court's major federalism decisions beginning with New York v. United States, 505 U.S. 144 (1992). *See, e.g.,* Editorial, *Fiddling with Federalism,* N.Y. TIMES, Oct. 15, 1999, at A34 (referring to these justices as the "states' rights five").

5. *Guillen,* 537 U.S at 146-48 (2003).

one in which the states "historically have been sovereign"[6] or is an area of traditional and appropriate federal concern. That is, perhaps *Guillen* is part of a larger, quiet revival of the doctrine set forth by the late Chief Justice Rehnquist in 1976 in *National League of Cities v. Usery*[7] and that the Court, over his dissent, declared "unsound in principle and unworkable in practice" in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*.[8]

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6. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995); National League of Cities v. Usery, 426 U.S. 833, 849 (1976) (inquiring whether the congressional enactment would "interfere with traditional aspects of state sovereignty").

7. 426 U.S. 833 (1976). In *National League of Cities*, then-Justice Rehnquist, joined by then-Chief Justice Burger and Justices Blackmun, Powell, and Stewart, held that:

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . .
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> . . . [T]he dispositive factor [here] is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system" . . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendment operates to directly displace *the States' freedom to structure integral operations in areas of traditional governmental functions*, they are not within the authority granted Congress by Art. I, § 8, cl. 3.

Id. at 842, 852 (emphasis added). Justices Brennan, Marshall, Stevens, and White dissented.

8. 469 U.S. 528 (1985). In *Garcia*, Justice Blackmun, joined by justices Brennan, Marshall, Stevens, and White, explicitly overruled *National League of Cities*, *id.* at 557, holding

> Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities* . . . .
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> The distinction [between "governmental" and "proprietary" functions] the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable. . . .
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> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a

I. *GUILLEN* IN THE WASHINGTON SUPREME COURT

Guillen involved various constitutional challenges to a federal statute that, in relevant part, regulates the rules of evidence to be applied in *state* court proceedings involving causes of action brought solely under *state* law.[9] 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.[10]

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 their accident sites.[11] The family members sought the information in part to pursue tort claims that the relevant city and county governments negligently maintained and operated the intersections at which the accidents occurred.[12] Pierce County refused to provide the requested information, invoking the federal statute that it contended rendered the information privileged even for purposes of a state court proceeding.[13]

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judicial appraisal of whether a particular governmental function is "integral" or "traditional."

Id. at 539, 543, 546-47. Then-Chief Justice Burger and Justices O'Connor, Powell, and Rehnquist dissented.

9. *Guillen*, 31 P.3d 628 (Wash. 2001).

10. *See Guillen*, 537 U.S. at 133-36.

11. *Id.* at 136-38; *see also Guillen*, 31 P.3d at 633-37.

12. *See Guillen*, 537 U.S. at 137; *see also Guillen*, 31 P.3d at 634-35.

13. In refusing to provide the requested reports and data, Pierce County relied on 23 U.S.C. § 409, as amended in 1995, 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.

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

The Washington Supreme Court ultimately held that the federal statute exceeded Congress's powers under the Commerce Clause and the Spending Clause.[14] Thus, *Guillen* became the first case in which any court had struck down a federal statute as exceeding Congress's spending power under the doctrine set forth in 1987 in *South Dakota v. Dole*.[15]

II. *GUILLEN* IN THE U.S. SUPREME COURT

For those interested in federalism, the decision of the Washington Supreme Court in *Guillen* was positively brimming with possibilities. As I have discussed at length elsewhere, it is the spending power that I believe poses the most significant threat to state autonomy.[16] No matter how narrowly the Court might read Congress's

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federal hazard elimination funds under § 152, the county argued that they were privileged under § 409. *Guillen*, 31 P.3d at 634.

14. The Washington Supreme 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." *Guillen*, 31 P.3d at 654 (quoting Hodel v. Indiana, 452 U.S. 314, 328 n.17 (1981)). The court also concluded that the privilege did not meet *Dole*'s requirement 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.

Id. at 651 (emphasis in original). The court therefore held § 409, as amended, to have exceeded Congress's spending power.

Lastly, relying heavily on its construal of recent Rehnquist Court federalism decisions as displaying a "fundamental respect for state sovereignty," *id.* at 653, the court reasoned that § 409 "cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government." *Id.* at 655. 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 . . . . " *Id.*

15. *See Dole*, 483 U.S. 203 (1987). See also *supra* note 2.

16. *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)); 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);

powers under the Commerce Clause[17] and § 5 of the Fourteenth Amendment,[18] and no matter how absolute a prohibition the Court might impose on Congress's "commandeering" of state and local officials,[19] the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.[20]

Thus, *Guillen* seemed to offer the Supreme Court — or at least the States' Rights Five — an opportunity that they will not likely soon again have to affirm that the doctrine set forth in *Dole* 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.

For me, the case was every law professor's dream: an issue that I had been thinking and writing about for nearly a decade had made its way to the Court. My colleague, Mitch Berman, and I submitted an amicus brief in the case.[21] We focused our attention on the spending power issue and argued — utterly persuasively, we thought — that the statute violated at least two of the requirements set out in *Dole*: the "clear notice" (or so-called *Pennhurst* prong)[22]

Lynn A. Baker, *The Spending Clause and the Federalist Revival*, 4 CHAP. L. REV. 195, 195-96 (2001) (contribution to symposium on "The Spending Clause").

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

18. *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).

19. *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).

20. Today, the major constitutional constraint on Congress's 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").

21. *See* Brief for Lynn A. Baker and Mitchell N. Berman as Amici Curiae Supporting Respondents, Pierce County v. Guillen, 537 U.S. 129 (2003) (No. 01-1229), 2002 WL 1964091 [hereinafter *Brief*]. Professor Berman and I received no monetary contribution to, or financial compensation for, the preparation and submission of our brief.

22. *See Dole*, 483 U.S. at 207 ("[W]e have required 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.'") (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); *Brief, supra* note 21, at *8-*15.

and the "relatedness" requirement.[23]

The first of these seemed like a slam dunk: the sixteen courts that had discussed the statute had been divided in their interpretations of the statute's meaning, so it seemed clear that the states could not know with certainty the terms of the funding "contract" with the federal government.[24] And insofar as the explicit federal

23. *Id.* at 207-08 ("[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'") (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978)); *Brief, supra* note 21, at *15-*22.

24. The text of 23 U.S.C. § 409 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. *See Brief, supra* note 21, at *8-*15. The most noteworthy of these ambiguities is the one that divided the Washington Supreme Court: 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? A majority of the Washington Court held that the collecting of certain reports and data for the statutorily specified purpose rendered them privileged even if they had been compiled for other purposes, such as routine law enforcement. *Guillen*, 31 P.3d at 640-46. Three of the Washington justices, however, disagreed with this interpretation of § 409, and would not have extended the privilege so far. *Id.* at 656-59 (Madsen, J., concurring).

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 that have discussed this aspect of § 409 have been divided in their interpretations, with ten courts reading this aspect of § 409 broadly as the *Guillen* majority did. *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. App. 2000); Sevario v. Louisiana, 752 So.2d 221, 230 (La. App. 1999); Fry v. Southern Pacific Trans. Co., 715 So.2d 632, 637 (La. App. 1998); Hardenstein v. Cook Constr., 691 So.2d 177, 182 (La. App. 1997); Coniker v. New York, 695 N.Y.S.2d 492, 495, 496 (N.Y. Ct. Claims 1999). Five courts read the text more narrowly, essentially as the *Guillen* concurrence did. *See* Werner v. IA Constr. Corp., 51 Pa. D. & C. 4th 509, 513 (2001); Ex parte Ala. Dep't of Trans., 757 So.2d 371, 374 (Ala. 1999); Irion v. Louisiana, 760 So.2d 1220, 1226 (La. App. 2000); Guillen v. Pierce County, 982 P.2d 123, 129 (Wash. App. 1999); Palacios v. La. & Delta R.R., Inc., 682 So.2d 806, 810 (La. App. 1997). In the words of one federal district court, "Section 409 has engendered some confusion in the courts, thanks to its unwieldy language and the absence of any significant legislative history." *Powers*, 177 F. Supp. 2d at 1277.

The extent 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. *Guillen*, 537 U.S. at 143. 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. *Id.* at 143-46.

interest to be served by the funding program was increasing highway safety,[25] the broad evidentiary privilege mandated by the funding condition seemed clearly to reduce one of the incentives that encourage state and local governments to improve the safety of their highways: the threat of tort liability. One cannot successfully sue a county for negligent maintenance of its highways if a federal statute makes it impossible to obtain or introduce into evidence the accident reports and other data necessary to establish such a claim. And such a reduction in the county's threat of tort liability would seem logically to result in reduced, rather than increased, highway safety, an outcome obviously antithetical to the federal funding program's claimed interest in increasing highway safety.

The Commerce Clause issue seemed even more clear to Mitch and myself. As we elaborated in our amicus brief, the statute at issue regulated apparently non-commercial activity — the discovery and introduction of evidence in civil litigation[26] — and interfered with state judicial processes, which are a traditional core area of state sovereignty.[27] We expected at least five Justices to easily find

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In many contexts, the Court has the option — indeed the self-imposed obligation — to construe an ambiguous statute to avoid a "constitutionally doubtful" construction where possible. *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 General v. Del & Hudson Co., 213 U.S. 366, 408 (1909). 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," Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999); *see also id.* at 655 (Kennedy, J., dissenting), but also because "the clear-notice safeguard of our Spending Clause jurisprudence" is a "vital safeguard for the federal balance." *Id.* As Justice Kennedy wrote in his dissent in *Davis*, "Only 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." *Id.*

25. Section 409 is a subsection of Chapter 4 of Title XXIII, which is titled "Highway Safety," and Chapter 4 originated as the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966). "Section 409 forms part of a comprehensive federal plan to promote highway . . . safety." *Dowell*, 750 So.2d at 500; *see also Brief, supra* note 21, at *17.

26. *See Brief, supra* note 21, at *22-*24.

27. *See id.* at *24-*25, stating:

> 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.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 lightly construe the Constitution so

the statute unconstitutional under *United States v. Lopez*[28] and *United States v. Morrison*.[29]

In fact, the entire Court did find the case easy, but not in the way we had hoped. In a brief, fifteen-page opinion, released ten short weeks after oral argument in the case,[30] the Court unanimously concluded that the statute at issue was a valid exercise of Congress's commerce power.[31] The Court therefore never reached the spending power issue.

The Commerce Clause analysis in Justice Thomas's opinion comprises a mere seven sentences and proceeds as a straightforward syllogism.[32] First, quoting *Lopez*, "under the Commerce Clause, Congress 'is empowered to regulate and protect the instrumentalities of interstate commerce, . . . even though the threat may come only from intrastate activities.'"[33] Second, the statute at issue "can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentali-

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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 proposition . . . 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.

28. 514 U.S. 549 (1995).

29. 529 U.S. 598 (2000).

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

31. *Id.* at 146-48.

32. *Id.* at 146-47.

33. *Id.* at 147 (quoting *Lopez*, 514 U.S. at 558 (1995) (citing Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Ry. Co. v. United States, 222 U.S. 20 (1911); Perez v. United States, 402 U.S. 146 (1971))).

ties of interstate commerce."[34] Therefore, the legislation "fall[s] within Congress's Commerce Clause power."[35]

This is a highly questionable and conclusory Commerce Clause analysis, made further remarkable by its failure to acknowledge at any point that the statute at issue in fact regulates the rules of evidence to be employed in state court proceedings. From the Court's opinion, one might have imagined that the statute instead regulated highways.

III. SOLVING THE PUZZLE OF *GUILLEN*

Why were all nine justices willing to resolve *Guillen* through a highly dubious Commerce Clause analysis that is seemingly inconsistent with the Court's own precedent?[36] Why did the States' Rights Five forego this rare opportunity to strengthen or re-affirm the significance of existing spending power doctrine which is so central to any meaningful "federalist revival"?

There are not many data points to connect, but I believe that the decision in *Guillen* can be reconciled with *Lopez*[37] and *Morrison*,[38] as well as with both the majority and dissenting opinions in the two cases to date in which any member of the Court has held that a federal statute exceeded Congress's spending power: *South Dakota v. Dole*[39] and *Davis v. Monroe County Board of Education*.[40] My quite preliminary thesis is that the fundamental focus of the States'

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34. *Id.*

35. *Id.*

36. For a thoughtful discussion of this question that proposes a different answer than that put forward here, see Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1533 (2004) (concluding that "*Guillen* issued not from attention to the Court's own Commerce Clause doctrine but rather from sensitivity to the Court's understanding of Commerce Clause meaning").

37. 514 U.S. 549 (1995).

38. 529 U.S. 598 (2000).

39. 483 U.S. 203 (1987).

40. 526 U.S. 629 (1999). Several months after I presented these remarks in San Francisco, the Court decided *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Justice Thomas, writing in dissent and joined by the late Chief Justice Rehnquist and Justices Kennedy and Scalia, contended that the implied right of action under Title IX for retaliation claims at issue in the case would violate *Dole*'s clear notice requirement. *See Jackson*, 125 S. Ct. at 1514-15. For a discussion of how that most recent case is also consistent with the tentative thesis set forth in this essay, see Baker, *Federalism and the Spending Power*, *supra* note *, at 219.

Rights Five in both the spending power and Commerce Clause cases is on whether the regulated area at issue is one in which the States "historically have been sovereign"[41] or is instead a traditional and appropriate federal function.

By the time the Court decided *Guillen*, 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*. In 1987, Justice O'Connor made clear in her dissent in *Dole* that she would have invalidated the statute at issue under the prong of the *Dole* test that requires conditions on federal grants to be "reasonably related to the purpose of the federal program."[42] Twelve years later in *Davis*, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas in dissent, all would have invalidated the challenged statute under the so-called *Pennhurst*, or "unambiguousness," prong of the *Dole* doctrine.[43]

It therefore seems implausible that any of the States' Rights Five was aggressively avoiding reaching the spending power issue in *Guillen*. It seems more likely, notwithstanding my own contrary analysis under the spending power, that each of these Justices in fact believed that the statute at issue in *Guillen* should be sustained under *Dole*. There was therefore no pressing need for them to reach the spending power issue in that case.

Why is it plausible that none of the States' Rights Five would have applied the *Dole* doctrine in *Guillen* so strictly as I applied it? My larger thesis is that the Five would in fact, if implicitly, have focused in their decisionmaking on whether the core regulatory activity at issue was a "traditional" and appropriate area of federal rather than state regulatory concern.[44]

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41. *See, e.g.*, *Lopez*, 514 U.S. at 564; *Davis*, 526 U.S. 629, 654 (Kennedy, J., dissenting). *See also National League of Cities*, 426 U.S. at 849 (discussing whether the congressional enactment would "interfere with traditional aspects of state sovereignty").

42. *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting). O'Connor contended that "the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. . . . In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose." *Id.* at 213-14.

43. *See* 526 U.S. at 654-55 (Kennedy, J., dissenting).

44. The "relatedness" prong of the *Dole* doctrine, 483 U.S. at 207, is a potential toe-hold for this inquiry, and was the centerpiece of Justice O'Connor's dissent in *Dole*.

To see how this (under-theorized and incompletely articulated) inquiry may have been deployed by the Court in the past, consider the majority and dissenting opinions in *Davis*.[45] The question presented was whether a private damages action may lie against a school board under Title IX in cases of student-on-student harassment.[46] This majority opinion, authored by Justice O'Connor, portrays the case as being about certain anti-discrimination regulations contained in Title IX.[47] And such regulations, at least since the Civil War, generally have been considered an appropriate area of federal concern.[48] O'Connor's view, consistent with my thesis, was that the challenged condition on federal funds passed muster under *Dole*.[49]

In a dissent authored by Justice Kennedy, the remaining four of the States' Rights Five would have held the challenged provision invalid.[50] Although their explicit contention was that the challenged condition on federal funds did not survive scrutiny under the "clear-notice" prong of the *Dole* test,[51] the core of these Justices'

See id. at 213; *see also supra* note 42 and accompanying text. It does not, however, seem to play that role in *Davis*, 526 U.S. 629, or *Jackson*, 544 U.S. 167. That prong requires an examination of whether there is a "federal interest" in the relevant project or program, and then a determination of whether the challenged condition on the federal grant of funds is "unrelated" to that "federal interest." *Dole*, 483 U.S. at 207-08. A regulatory area that has traditionally been the province of the states would presumably have difficulty passing this "federal interest" test, no matter what the challenged condition on federal funds.

45. *See Davis*, 526 U.S. 629; *id.* at 654 (Kennedy, J., dissenting).

46. *Id.* at 632-33.

47. *Id.* at 639 ("[A]t issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances *for discrimination* in the form of student-on-student sexual harassment.") (emphasis added); *id* at 650-51 ("We have elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes . . . .") (Kennedy, J., dissenting).

48. The Fourteenth Amendment to the U.S. Constitution, adopted in 1868, prohibits "any State" from denying "the equal protection of the laws" to "any person within its jurisdiction." U.S. CONST. amend. XIV, § 1.

49. 526 U.S. at 649-50 ("Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action.").

50. *Id.* at 654-58 (Kennedy, J., dissenting).

51. *Id.* at 654-58. See especially *id.* at 657:

> In order to make its case for school liability for peer sexual harassment, the majority must establish that Congress gave grant recipients clear and unambiguous notice that they would be liable in money damages for failure to remedy discriminatory acts of their students. The majority must also demonstrate that the statute gives schools clear notice that one child's har-

concern was that the statute, ultimately, was about the federal regulation of local schools. Consider the following excerpt 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 . . . .[52]

Thus, from O'Connor's perspective, *Davis* was "about" an area of traditional federal concern — 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" a regulatory area — public schools — that has historically been the province of the states. Consistent with my thesis, O'Connor found no congressional overreaching; the dissenters concluded that Congress had exceeded its spending power.

Now consider *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.[53] 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. As "channels of interstate commerce," highways are generally considered to be a regulatory area of traditional and appropriate federal concern.[54] It would there-

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assment of another constitutes "discrimination" on the basis of sex within the meaning of Title IX, and that — as applied to individual cases — the standard for liability will enable the grant recipient to distinguish inappropriate childish behavior from actionable gender discrimination. The majority does not carry these burdens.

52. *See id.* at 658.

53. 537 U.S. at 147 (finding that the legislation at issue "can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce").

54. *See, e.g., id; Lopez,* 514 U.S. at 558; United States v. Darby, 312 U.S. 100, 114 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964).

fore be consistent with my thesis for the States' Rights Five to have concluded that the challenged provision did not exceed Congress's spending power.

If my thesis is persuasive thus far, the question remains why the Court did not simply decide *Guillen* on spending power grounds rather than on the basis of a seemingly distorted Commerce Clause analysis. One possibility is that the Court, including the States' Rights Five, did not consider its commerce clause analysis in *Guillen* to be any significant distortion of existing precedent. As the *Guillen* Court observed, *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."[55] And the Court explicitly interpreted the regulation at issue in *Guillen* to be "aimed at . . . increasing protection for the instrumentalities of interstate commerce."[56] Thus, perhaps *Guillen* was an easy case under the Commerce Clause.

The problem, however, 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 the regulation is "aimed at" protecting the 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 statute would regulate an area "where States historically have been sovereign,"[57] or whether it instead involves a traditional and appropriate federal function.

In support of this thesis one might recall that "subjects of traditional state regulation" was an unambiguous focus of the majority in both *Lopez* and *Morrison*.[58] In both cases, the majority was explicit that federal power should not extend to "areas such as crimi-

55. *Guillen*, 537 U.S. at 147.
56. *Id.*
57. See *supra* note 41.
58. *See Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613.

nal law enforcement or education where States historically have been sovereign."[59] And in each case the Court held that Congress had exceeded its power under the Commerce Clause because it deemed the regulatory area at issue to be one of traditional state concern. 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.[60] 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.[61]

In *Guillen*,[62] although the statutory provision 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 (e.g., 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 instead to decide the case on

59. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613.
60. *See* 514 U.S. at 564.
61. 529 U.S. at 617-18.
62. 537 U.S. 129 (2003).

spending power grounds. The Commerce Clause analysis was seemingly simple and straightforward. A Spending Clause analysis, in contrast, would inevitably be lengthier and potentially more complex, while posing awkward questions under *Dole*'s "clear notice" prong.

IV. CONCLUSION

If there is merit to this analysis, there is also a certain irony. The inquiry into notions of "traditional" and "appropriate" areas of state and federal regulatory concern, after all, is precisely the sort of inquiry that the Court in *Garcia* declared a failure,[63] and that Chief Justice Rehnquist in dissent promised would "in time command the support of a majority of this Court."[64] Future federalism decisions will reveal the extent to which the very preliminary positive theory that I have sketched here is accurate. No less importantly, future decisions will also tell us whether the Court's apparent second attempt at a *National League of Cities*[65] type of federalism doctrine is in any significant way an improvement on the first.

63. *Garcia*, 469 U.S. at 546-47.
64. *Id.* at 580 (Rehnquist, J., dissenting).
65. 426 U.S. 833 (1976).