The Spending Power and the Federalist Revival

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Introduction

Amid all the attention afforded the Court's recent federalism decisions, one important fact has gone largely unnoticed:[1] The greatest threat to state autonomy is, and has long been, Congress's spending power.[2] No matter how narrowly the Court might read Congress's powers under the Commerce Clause[3] and

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1 The few exceptions include 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*]; Jim C. v. United States, 235 F.3d 1079, 1083 (8th Cir. 2000) (en banc) (Bowman, J., dissenting) (quoting Baker, *supra*, approvingly); South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) ("If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.") (quoting United States v. Butler, 297 U.S. 1, 78 (1936) (citation omitted)).

2 U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

3 *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded congressional power under the Commerce Clause); United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked authority under the Commerce Clause to enact civil remedy provision of Violence Against Women Act). *Cf.* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 121 S.Ct. 675, 683 (2001) (observing that twice in the past six years the Court has "reaffirmed the proposition

section 5 of the Fourteenth Amendment,[4] and no matter how absolute a prohibition the Court might impose on Congress's "commandeering" of state and local officials,[5] the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.[6]

The Framers did not intend for Congress to have a near plenary power of the purse.[7] As written, the Spending Clause limits

that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited").

4 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeded Congress's enforcement powers under Section 5 of the Fourteenth Amendment); *Morrison*, 529 U.S. 598 (holding that civil remedy provision of Violence Against Women Act exceeded Congress's enforcement powers under section 5 of the Fourteenth Amendment); Board of Trustees of the Univ. of Alabama v. Garrett, __ U.S. __, 2001 WL 173556 (2001) (holding that provision of Americans with Disabilities Act authorizing individuals to sue a State for money damages in federal court exceeded Congress's enforcement powers under section 5 of the Fourteenth Amendment and is not a valid abrogation of the States' Eleventh Amendment immunity).

5 *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (holding that the "take title" provision of the Low-Level Radioactive Waste Policy Act of 1985 exceeded Congress's enumerated powers and violated the Tenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (holding that the obligation on state law enforcement officers under the Brady Handgun Violence Prevention Act to conduct background checks on prospective handgun purchasers unconstitutionally required state officers to execute federal laws). *But see* Reno v. Condon, 528 U.S. 141, 148 (2000) (unanimously holding that Driver's Privacy Protection Act of 1994, regulating the disclosure of personal information contained in the records of state motor vehicle departments, did not "violate the principles laid down in either *New York* or *Printz*").

6 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"). In addition, the Constitution's other protections for individual rights could be viewed as incidental constraints on the spending power insofar as some laws held to violate those provisions of the Constitution might involve the expenditure of federal funds. For the purposes of this article, it is significant that all of these constraints are aimed at protecting individuals rather than the states and could therefore be expected to be of little use in protecting the states against federal expenditures they find problematic.

7 *See, e.g.,* United States v. Butler, 297 U.S. 1, 77 (1936) ("Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them . . . that the general welfare of the United States, (which has aptly been termed 'an indestructible Union, composed of indestructible States,') might be served by obliterating the constituent members of the Union."); South Dakota v. Dole, 483 U.S. 203, 217 (O'Connor, J., dissenting) ("If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' . . . This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.") (quoting Butler, 297 U.S. at 78); John C. Eastman, *Restoring the "General" to the General Welfare Clause,* 4 CHAP. L. REV. 63, 65 (2001) (arguing that historical record shows that Congress "has only the power to spend for the 'general' welfare and not for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states and therefore might be said to enhance 'general' welfare in the aggregate"); *cf.* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 243 (1995) (concluding from historical record that "the 'general Welfare' phrase in the Taxing Clause

Congress's expenditures to providing "for the common Defence and general Welfare of the United States."[8] Since 1936, however, the Supreme Court has held this limitation to be effectively non-justiciable and, with few exceptions, has historically declined to review Congress's spending decisions.[9] In addition, since 1923 the Court has crafted standing doctrine to severely restrict the ability of taxpayers to challenge Congress's spending decisions in *any* federal court.[10]

of the Constitution alludes to the vast generality of purposes to which tax revenues, as well as other federal receipts, might be put, but does nothing to empower Congress to spend").

8 U.S. CONST. art. I, § 8, cl. 1.

9 In United States v. Butler, 297 U.S. 1 (1936), the Court described the standard of review under the Spending Clause as follows:

> When such a contention [that a law fails to conform to the limits set upon the use of a granted power] comes here we naturally require a showing that *by no reasonable possibility* can the challenged legislation fall within the *wide range of discretion* permitted to the Congress. *How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark.* But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains.

Id. at 67 (emphasis added). The following year, in Helvering v. Davis, 301 U.S. 619 (1937), the Court reiterated the "no reasonable possibility" standard first articulated in *Butler*, *see id.* at 641, and added that the discretion afforded by the "general welfare" language of the Spending Clause "belongs to Congress, unless the choice is *clearly wrong, a display of arbitrary power, not an exercise of judgment*." *Id.* at 640 (emphasis added).

By 1976, the Court was willing to state that it considered the "general welfare" language to provide no constraint at all on Congress's spending power:

> Appellants' "general welfare" contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause . . . . It is for Congress to decide which expenditures will promote the general welfare: "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." . . . Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution . . . . Whether the chosen means appear "bad," "unwise," or "unworkable" to us is irrelevant; Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8.

Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam). Finally, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court observed that the level of judicial deference required under the Spending Clause was so great that it "questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 n.2.

10 *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 486 (1923) (holding a federal taxpayer to be without standing to enjoin the execution of a federal appropriation act, and observing that the "right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court"); Frothingham v. Mellon, 262 U.S. 447 (1923) (same; consolidated action); Asarco Inc., v. Kadish, 490 U.S. 605, 613 (1989) ("As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts. . .").

But see Flast v. Cohen, 392 U.S. 83, 85 (1968) (describing *Frothingham* as standing for 45 years as "an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," and holding that "the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment [Clause]"). *See also* Richard Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV 1, 4 (2001) (contending, *inter alia*, that "doctrine of standing in American constitutional law was crafted by the progressives who were anxious to insure that their political initiatives . . . could be shielded

Today, Congress's largely unfettered spending power undermines the Constitution's protections for state autonomy and reduces aggregate social welfare in two major ways: through systematic fiscal redistribution among the states[11] and conditional federal spending.[12] This Article examines this important and long-standing, if largely undiscussed, problem. I conclude that state autonomy cannot be protected in this context through either of the means most frequently proposed: the inherent protections of the federal lawmaking process or the process of constitutional amendment. Thus, the only viable protection lies in judicial review under the existing Spending Clause. The interesting question then becomes why the modern Court has so steadfastly refused to play any role in this area.

Part I explains how the modern Congress regularly uses fiscal redistribution among the states and conditional federal spending to impinge, intentionally or unintentionally, on the autonomy that the Framers sought to guarantee the states. This Part also explains how and why these intrusions on state autonomy reduce aggregate social welfare. Thus one need not subscribe either to "originalist" schools of constitutional interpretation or to my reading of the Framers' intent in this context in order to find the existing state of affairs unsatisfactory. One need only be persuaded that a reduction in aggregate social welfare is both likely and problematic.

Part II examines two commonly invoked means of limiting congressional power in the area of states' rights and argues, contrary to the existing commentary, that neither of them can be successful in this context. I show, first, that the states cannot protect themselves through the federal political process against Congress's exercise of its spending power, notwithstanding the fact that Congress is comprised of representatives of the states. Second, I demonstrate that an amendment to enhance the existing, unenforced constitutional constraints on Congress's spending

from judicial attack"). *But see* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434-36 (1988) (describing evolution of standing doctrine as an attempt to restore common law entitlements of *Lochner* era); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 178-197 (1992) (tracing history of standing).

11 In previous articles, I have discussed the role of the United States Senate in ensuring unjustifiable, systematic redistribution among the states. *See* Lynn A. Baker & Samuel H. Dinkin, *Getting From Here to There: The Rebirth of Constitutional Constraints on the Special Interest State*, 40 WM. & MARY L. REV. 515 (1999) [hereinafter Baker & Dinkin, *Rebirth*]; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997) [hereinafter Baker & Dinkin, *The Senate*]; Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923 (1997).

12 I have discussed the various problems with conditional federal spending in previous articles. *See* Lynn A. Baker, *Conditional Federal Spending, supra* note 1; Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95 (1998) [hereinafter *The Revival of States' Rights*]. R

power will never be formally proposed, let alone ratified, because an identifiable group of states—numerous enough to block the proposal of such an amendment—systematically and unjustifiably benefits from the existing regime.

In light of these difficulties constraining Congress's spending power through other means, the inexorable conclusion is that any solution rests with the Courts' willingness to exercise judicial review under the Spending Clause. Part III discusses the importance of judicial review in this area, and concludes with speculation on why the modern Court nonetheless has so aggressively declined to play any meaningful role in limiting Congress's spending power.

I. The Effects of the Modern Congress's Spending Power on State Autonomy and Aggregate Social Welfare

The modern Congress's exercise of its spending power regularly impinges in two general ways on the autonomy that the Framers sought to guarantee the states: through fiscal redistribution among the states and conditional federal spending. In this Part, I describe each of these intrusions on state autonomy and explain why each occurs. I also explain why each type of intrusion reduces aggregate social welfare.

A. Fiscal Redistribution Among the States

It is well known that the existing structure of representation in Congress, combined with the existing rules of majoritarian decision making,[13] affords small population states disproportionately great representation relative to their shares of the nation's population. It is much less well known that this allocation of representation significantly affects the distribution of gains from any legislation Congress enacts under the Spending Clause, ensuring small population states a disproportionately large slice, and large population states a disproportionately small slice, of the federal "pie." This systematic wealth redistribution obviously infringes on the autonomy of the states that are burdened by the redistribution: In the absence of such redistribution, the burdened states would effectively have more money and, therefore, greater freedom of choice. In this section, I explain how and why, in the absence of any meaningful constitutional constraint, Congress's exercise of its spending power can be expected to result in system-

13 Of course, Congress is at present only an imperfectly majoritarian body given the Senate's cloture rule, which requires 60 votes to end debate regardless of the number of Senators present. *See* Baker & Dinkin, *The Senate*, *supra* note 11, at 29 n.28, 61. *See generally* SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997). R

atic wealth redistribution from the larger states to the smaller states.

Insofar as members of Congress are concerned with re-election, and therefore also with the welfare of their constituents, they will each seek to enact legislation whose expected benefits to his or her own constituents exceed its expected costs to them. Moreover, because legislators themselves are scarce resources and their choice of agenda necessarily entails opportunity costs,[14] their first priority is likely to be legislation whose expected benefits to their constituents *most greatly* exceeds its expected costs to them. Thus, we would expect each legislator to be especially eager to enact "special legislation" whose benefits accrue uniquely to her own constituents but whose costs are spread among the constituents of all legislators. Certainly, each legislator should be relatively more interested in enacting such special legislation than in seeking legislation whose costs and benefits are both generally distributed or are both concentrated on her own constituents.[15]

Unfortunately, special legislation is more likely to be expropriative, that is, to have aggregate costs that exceed its aggregate benefits, than legislation whose costs and benefits are both generally distributed or both concentrated on the same constituency. Each of these latter two types of legislation is likely to be enacted only if its aggregate benefits exceed its aggregate costs since no constituency is likely to seek the passage of legislation whose costs to itself exceed its benefits. Special legislation, however, may be enacted even if its aggregate costs exceed its aggregate benefits. Since vote trading is possible, Legislator A will often agree to support legislation that yields $10 million in benefits for Legislator's B constituents even if it imposes aggregate costs of $11 million on the rest of the nation (including, but not

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14 Professors Paul Samuelson and William Nordhaus explain "opportunity costs" as follows:

> The immediate dollar cost of going to a movie instead of studying is the price of a ticket, but the opportunity cost also includes the possibility of getting a higher grade on the exam. The opportunity costs of a decision include all its consequences, whether they reflect monetary transactions or not.
>
> Decisions have opportunity costs because choosing one thing in a world of scarcity means giving up something else. The opportunity cost is the value of the good or service forgone.

PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 128 (16th ed. 1998) (emphasis omitted).

15 Although any legislator's first preference logically might be to enact special legislation that uniquely benefits her own constituents and whose costs are borne *exclusively* by other legislator's constituents, such legislation likely will face greater opposition than similar legislation whose costs are distributed more generally. This is particularly likely to be the case if the costs of the legislation are concentrated on another group. *See* Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 400-22 (1992); *cf.* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 44 (1983) ("A representative or senator seldom can argue convincingly that he alone is responsible for the legislative production of *a public good* . . . .") (emphasis added).

concentrated on, Legislator A's constituents). Legislator A will support this legislation in exchange for Legislator B's vote on legislation that similarly benefits Legislator A's constituents at the expense of the rest of the nation (including Legislator B's constituents).

Notwithstanding the aggregate welfare loss, this type of vote trading would be attractive to representatives for at least two reasons. First, the terms of each representative's trades, taken alone, might well provide *her own constituents* aggregate benefits that exceed the aggregate costs to them. That is, in order to obtain support sufficient to enact legislation that provides her constituents $10 million in special benefits, a representative may need to support legislation that provides other representative's constituents special benefits at an aggregate cost to her own constituents of only $8 million. This is possible because the approval of only a simple majority of legislators is necessary for enactment. Thus, the constituents of representatives who were not a party to these particular bargains, and who may have even opposed the legislation, will nonetheless bear a portion of its total cost, a portion that the beneficiaries of the special legislation need not internalize.[16]

Second, even if the terms of a particular set of trades do not provide a representatives' constituents aggregate benefits that ex-

16 In making such bargains, therefore, a representative might logically be expected to seek the support of the minimum number of representatives necessary to secure passage of her legislation. *See* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 32-101 (1962) (arguing that in American politics, parties seek to increase votes only until they achieve the minimum necessary to form a winning coalition). By doing so, a representative simultaneously minimizes the amount of strategic bargaining in which she must engage (i.e., the representative's opportunity costs), and maximizes the competition among legislators to join her coalition, thereby driving down the price of obtaining any one legislator's support. This in turn minimizes the total amount the representative must "pay" to ensure passage of her legislation.

In practice, however, proponents of legislation will strive to secure a supermajority of votes, largely because of the uncertainty under which pre-vote lobbying and logrolling takes place: the outcome of the final vote cannot be known in advance. In this context, political scientist R. Douglas Arnold has observed:

> *All else equal*, [legislative] leaders prefer large coalitions because they provide the best insurance for the future. Each proposal must survive a long series of majoritarian tests—in committees and subcommittees, in House and Senate, and in authorization, appropriations, and budget bills. Large majorities help to insure that a bill clears these hurdles with ease.

R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 117-18 (1990) (emphasis added) [hereinafter ARNOLD, LOGIC]; *see also* R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 43, 52 (1979) (Legislators seek supermajorities "because a whole series of majorities are required, one at each stage of the congressional process . . . . [and] they want to minimize risks of miscalculation or last-minute changes.") [hereinafter ARNOLD, THEORY]; DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 111-15 & n.67 (1974) (frequency distribution data indicate that House and Senate roll call votes "are bimodal, with a mode in the marginal range (50-59.9 percent) and a mode in the unanimity or near-unanimity range (90-100 percent)"; similar patterns have been observed in state legislatures). *But see* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 32-101 (1962) (arguing that in American politics, parties seek to increase votes only until they achieve the *minimum* necessary to form a winning coalition).

ceed its aggregate costs to them, the representative will be able to claim complete credit for the special legislation that benefits her constituents, but will share only diffuse blame for helping enact special legislation that benefits others at the partial expense of her own constituents. Because this blame is diffuse, it will be less salient to her own constituents and may also be less well publicized than the passage of the beneficial special legislation. Thus, the benefits *to each representative* of this sort of vote trading are likely to exceed the costs.

This is the tragedy of the legislative commons.[17] Although each representative's individually rational decision will necessarily contribute to a decline in social welfare, a representative can only hurt her own constituents (and therefore her own chances for re-election) if she does not seek special legislation.[18] For in a majoritarian system in which vote trading is possible, a representative's constituents nonetheless will bear part of the costs of other successful bargains resulting in special legislation for other representatives' constituents, including bargains to which the representative was not a party and which she even may have opposed. Thus, only by joining the race to forge successful bargains that simultaneously benefit her constituents and exploit those who are not members of the winning coalition—a true "race to the bottom"—can an individual legislator maximize her constituents', and therefore her own, welfare.[19]

Of course, legislation must also receive the approval of the President before it becomes law, and such expropriative legislation seems a likely target for an executive veto. Because his constituency is the entire nation, a President might be expected to be guided by the preferences of a majority of the entire electorate.[20]

17 *Cf.* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); *see also* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 139-40 (1962) [hereinafter BUCHANAN & TULLOCK]; Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 645-46 (1994).

18 BUCHANAN & TULLOCK, *supra* note 17, at 139-40; Gillette, *supra* note 17, at 636-38, 645-46. R

19 The "race-to-the-bottom" and the "tragedy of the commons," whether legislative or otherwise, are both variants on the Prisoner's Dilemma. *See, e.g.,* Gillette, *supra* note 17, at 638 n.36 (explaining "tragedy of the commons" in terms of the Prisoner's Dilemma); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1217-19 (1992) (explaining "race-to-the-bottom" in terms of the Prisoner's Dilemma). R

20 BUCHANAN & TULLOCK, *supra* note 17, at 248 ("The President should, insofar as he uses his veto power as a simple legislative tool, follow the preferences of the majority of the voters."); Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145, 155 (1992) ("One-quarter of the voters may elect one-half of the legislature, but the [P]resident must still be responsive to a coalition of one-half."). R

This expectation must be modified slightly, however, in light of the fact that the President is not elected directly by the People, but rather by the electoral college which gives different weights to the votes of residents of different states. *See* U.S. CONST. art. II, § 1, cl.

And, notwithstanding its passage by a majoritarian body, special legislation is unlikely to have the sincere support of a majority of voters.[21] Nonetheless, special legislation is unlikely to be vetoed for the same sorts of reasons that legislators seek its enactment. Should he veto such legislation, the President will arouse the intense, well publicized, and not-soon-forgotten ire of the concentrated minority that would have benefited from the legislation, while simultaneously providing a diffuse and scarcely salient benefit to a substantial majority.[22] Certainly, the benefits *to a President* of vetoing such legislation (particularly during his first term) will seldom exceed the costs.[23]

Given this analysis, one would expect much of the legislation that Congress enacts pursuant to its spending power to be special legislation that reduces aggregate social welfare. These enactments would not impinge on state autonomy, however, if representation of the states in Congress were allocated solely on the

2-3. By affording each state "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress," U.S. CONST. art. II, § 1, cl. 2, the Constitution gives the small states a disproportionately greater power to choose the President, relative to their share of the nation's population. Thus, although California, for example, currently has 69 times the population of Wyoming (33,145,121 versus 479,602), it has only 18 times as many presidential Electors ((52 Reps. + 2 Senators = 54) versus (1 Rep. + 2 Senators = 3)). *See* THE COUNCIL OF STATE GOV'TS, 33 THE BOOK OF THE STATES 464-65 tbl.10.3 (2000-01 ed.) [hereinafter THE BOOK OF THE STATES].

This in turn means that the President, who needs 270 electoral votes in order to be (re)elected, may formally represent only the 45.4% of the nation's population that resides in the 40 smallest states. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 23, tbl. 20 (120th ed.) [hereinafter STATISTICAL ABSTRACT].

21 That is, in a world without vote trading, this legislation would not garner the support of a majority. *Cf.* Gillette, *supra* note 17, at 636-47. **R**

22 *See* Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 411-12 (1988) (suggesting this as the reason why one "may doubt that item veto authority would effect a major change in political practice. . ."). These same incentives nearly led President Clinton in 1995 to veto the recommendations of an independent commission on military base closings—a body originally established to avoid the problem of special legislation—because their recommendation would result in a loss of nearly 20,000 jobs in California, a state crucial to his re-election. *See* Tim Weiner, *Decrying Base-Closing Plan as an "Outrage," the President Gives a Grudging Go-Ahead*, N.Y. TIMES, July 14, 1995, at A16. Indeed, Clinton ultimately approved the Commission's recommendations only after the Commission assured him that the Pentagon would be permitted to turn over most of the jobs at risk to private contractors. *See* Eric Schmitt, *After Assurances on California Jobs, Clinton Is Expected to Approve Base-Closing List*, N.Y. TIMES, July 10, 1995, at B9.

23 Buchanan and Tullock do not appear to see this. *See* BUCHANAN & TULLOCK, *supra* note 17, at 248 (contending that "the President should, insofar as he uses his veto power as **R** a simple legislative tool, follow the preferences of the majority of the voters" and "[t]herefore, he would accept only bargains which meet the approval of the majority of the populace. . ."). Yet this lack of presidential incentive is why Professor Robinson predicts that "the item veto would be only marginally useful in curtailing private goods [or "special"] legislation." Robinson, *supra* note 22, at 419-20. In addition, the President may himself **R** have "special political debts to particular groups or geographic regions, and can be expected to favor special benefits for them" or at least not to veto such benefits. *Id.* at 412 n.32. Former President Reagan, for example, did not extend "his general campaign against wasteful spending to subsidized grazing rights and electric power in the West, his strongest political base." *Id.* (citing Normal Ornstein, *Veto the Line Item Veto*, FORTUNE, Jan. 7, 1985, at 109-11).

basis of population, and each state's coalition-building power (i.e., its power to enact legislation) in Congress were therefore substantially proportional to its share of the nation's population. Under a scheme of proportional representation, one would expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be approximately proportional to its population, and the *per capita* benefits to each state would therefore be nearly the same. Thus, under a scheme of purely proportional representation, one would not expect Congress's spending legislation to reveal systematic fiscal redistribution among the states with its attendant impingement on the autonomy of the states that systematically bear the costs of the redistribution.

In fact, of course, the representation of the states in the Senate is not proportional to their respective populations. Because each state receives two representatives, the Senate affords small-population states ("small" states) disproportionately great representation, and large-population states ("large" states) disproportionately little representation, relative to their shares of the nation's population. This in turn means that the small states have disproportionately great "coalition-building power" in the Senate relative to their shares of the nation's population.

One measure of a state's theoretical "coalition-building power" is the likelihood that it will be the swing vote on any proposed legislation.[24] In the Senate, each state has the same 2-in-100 theoretical chance to be the swing vote on a given piece of proposed legislation.[25] In the language of modern game theory, the Shapley-Shubik power index of every state is equal in the Senate.[26] But this means that smaller states have a disproportion-

24 The notion of the swing voter or "pivot" for the winning coalition is central to both the Shapley-Shubik power index and the Banzhaf power index. *See* MARTIN SHUBIK, GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS 200-04 (1982). I assume throughout that each state's representatives vote as a block. Relaxing this assumption simplifies the calculations I discuss in this part, but does not change the results.

25 Each Senator has the same 1-in-100 theoretical chance to be the swing vote on any proposed legislation. And each of the 50 states is represented by two Senators, each with one vote. *See* U.S. CONST. art. I, § 3, cl. 1.

26 The Shapley-Shubik index considers all possible orders in which a vote can take place. For any ordering of *n* players (voters) there will be a unique player who is in a position to provide the winning coalition with just enough strength to win. That player is the pivot for the coalition. If all *n!* orderings are assumed equiprobable, then the Shapley-Shubik index is a measure of the probability that any player is pivotal. If one assumes instead that every winning coalition is equiprobable, the Banzhaf Index can be used to measure the probability that any one player (voter) is pivotal. *See* MARTIN SHUBIK, GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS 200-04 (1982). The analysis is not affected, however, by one's choice of assumptions or the index used.

There are 100 players (Senators) in the Senate. Thus, there are 100! possible orderings in which a vote can take place. Because each player has the same number of votes (one) on a given piece of proposed legislation, each player has the same likelihood of being the swing vote. And, since each state is represented by the same number of players (two Senators), each *state* has the same likelihood of being the swing vote. Calculated precisely, ately greater likelihood, relative to their shares of the nation's population, of being the swing vote on any proposed legislation. In the House, in contrast, where each state's representation is substantially proportional to its population,[27] the theoretical likelihood that a small state is the swing vote on any proposed legislation is roughly equal to its share of the population and therefore small.[28] This means that smaller states are less likely than larger states to cast the deciding vote in the House. In sum,

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each state has a 2-in-100 chance to be the swing vote on any given piece of proposed legislation, and each state's Shapley-Shubik index is therefore .02.

Although in this instance each state's (and each player's) Shapley-Shubik index is the same as its voting strength, that will not always be the case. Indeed, a major contribution of the Shapley-Shubik index is to demonstrate the erroneousness of the common intuition that the *a priori* power distribution inherent in a given apportionment of voting strength is always a trivial function of the nominal voting strengths. In particular, the Shapley-Shubik index shows that large weighted majority games (such as the electoral college) give a disproportionate power advantage to the big players, and that some voters may be incapable of affecting the outcome of *any* proposed legislation even though they have a vote. The former finding is presented in Irwin Mann & L.S. Shapley, *The A Priori Voting Strength of the Electoral College*, *in* GAME THEORY AND RELATED APPROACHES TO SOCIAL BEHAVIOR, 151-64 (Martin Shubik ed., 1964) (demonstrating that states with 16 or more votes in the electoral college have a Shapley-Shubik index slightly greater than their number of votes, while states with 14 or fewer votes have a Shapley-Shubik index slightly smaller than their number of votes). The latter finding is demonstrated by the following example:

Consider a game with four players (or coalitions) - A, B, C, d - with votes of 2, 2, 2, and 1, respectively. A simple majority of four votes is needed to carry a motion. In each of the 24 (4!) possible orderings of the four players, the pivot is italicized:

A*B*Cd	B*A*Cd	B*C*Ad	B*C*dA
A*B*dC	B*A*dC	Bd*A*C	Bd*C*A
Ad*B*C	C*A*Bd	C*B*Ad	C*B*dA
Ad*C*B	C*A*dB	Cd*A*B	Cd*B*A
A*C*Bd	dA*B*C	dC*A*B	dB*C*A
A*C*dB	dA*C*B	dB*A*C	dC*B*A

The Shapley-Shubik indices for A, B, C, and d are, respectively: 8/24 (.33), 8/24 (.33), 8/24 (.33), and 0/24 (0). *See* Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 730 n.83 (1991) [hereinafter Baker, *Direct Democracy*]. Thus, although the player denoted *d* has 1/7 of the total *voting strength* in this hypothetical body, it can be shown to have no *power*. That is, it can be shown mathematically to be incapable of affecting the outcome of any motion, no matter how it votes. *Id.*; *see also* SHUBIK, *supra*, at 24. Similarly, in a game with three players with votes of 2, 2, and 1, respectively, each of the players has a Shapley-Shubik index of 0.33 if a simple majority of three votes is required for passage. Thus, even though one player has a *voting strength* only one-half as large as the others', his *power* to affect the outcome of any vote is identical to theirs.

27 Because the Constitution provides that "each State shall have at Least one Representative" no matter how small its population, the smallest states may be slightly over represented in the House even though representation in that body is "apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. I, § 2, cl. 3. Thus, although California, for example, currently has 69 times the population of Wyoming (33,145,121 versus 479,602), it has only 52 times as many Representatives in the House (52 versus 1). *See* THE BOOK OF THE STATES, *supra* note 20, at 464-65 tbl.10.3.

28 For two reasons, a small state's Shapley-Shubik index will only approximate, rather than be identical to, its share of the nation's population. First, as explained in note 26, *supra*, the smallest states' voting strength in the House slightly exceeds their actual share of the nation's population. Second, as explained in note 26, *supra*, large weighted majority voting games such as the House give a disproportionate power advantage to the big players. For a complete listing of the various states' current Shapley-Shubik power

the Shapley-Shubik power index of a small state is larger in the Senate than in the House.[29]

Of course, neither the House nor the Senate alone may enact legislation; the approval of at least a simple majority present in each body is required.[30] Thus, one must determine each state's theoretical coalition-building power in the Congress as a whole. In a previous Article, Samuel Dinkin and I presented the first computer calculations of each state's Shapley-Shubik power index for Congress.[31] These are set forth in Table 1.

TABLE 1
SHAPLEY-SHUBIK POWER INDICES FOR THE STATES
BASED ON 1990 CENSUS

State	Reps	S-Shubik Index for House	S-Shubik Index for Senate	S-Shubik Index for Congress
CA	52	.130	.02	.081
NY	31	.073	.02	.049
TX	30	.070	.02	.047
FL	23	.053	.02	.038
PA	21	.048	.02	.035
IL	20	.046	.02	.034
OH	19	.044	.02	.033
MI	16	.036	.02	.029
NJ	13	.029	.02	.025
NC	12	.027	.02	.024
GA;VA	11	.025	.02	.023
MA;IN	10	.022	.02	.021
MO;WI;TN;WA	9	.020	.02	.020
MD;MN	8	.018	.02	.019
LA;AL	7	.016	.02	.018
KY;AZ;SC;CO;CT;OK	6	.013	.02	.016
OR;IA;MS	5	.011	.02	.015
KS;AR	4	.009	.02	.014
WV;UT;NE;NM	3	.007	.02	.013
ME;NV;NH;HI;ID;RI	2	.004	.02	.011
MT;SD;DE;ND; VT;AK;WY	1	.002	.02	.010

Comparing any large and small state, these calculations reveal that the smaller state's disproportionately great power in the Senate, relative to its share of the nation's population, is only very slightly mitigated by the proportional representation that the

indices for the House, Senate, and Congress, and each state's number of House Representatives, *see* Table 1, *infra*.

29 *See infra* Table 1. Similarly, the *voting strength* of a small state is greater in the Senate than in the House. *See supra* note 26. **R**

30 *See* U.S. CONST. art. I, § 7, cl. 2. Sometimes, of course, more than a simple majority of one or both chambers is required, as in the case of Senate filibusters, *see supra* note 26, **R** in order to override a President's veto, *see* U.S. CONST. art. I, § 7, cl. 2, or where supermajorities are required by the Constitution.

31 Baker & Dinkin, *The Senate*, *supra* note 11, at 26-27. **R**

House provides. Consider, for example, the following relationships between California and Rhode Island:[32]

Population:[33]	29.7 to 1
Power in House:[34]	32.5 to 1
Power in Senate:[35]	1 to 1
Power in Congress:[36]	7.4 to 1

Counter-intuitively, the ratio of California's and Rhode Island's power in Congress (7.4 to 1) turns out not to be the midpoint between the ratio of their power in the House and the Senate (16.25 to 1), but much more nearly approximates the ratio of their power in the Senate (1 to 1) than the ratio of their power in the House (32.5 to 1).

Of course, theoretical measures of coalition-building power such as the Shapley-Shubik power index capture only part of the complex reality. The committee system, seniority, savvy, and charisma—to name just a few variables—all affect a particular legislator's, and therefore a particular state's, *actual* coalition-building power in the Senate. Happily, however, we need not attempt to quantify these myriad, often intangible, variables. For the equal apportionment of representation in the Senate also determines the likelihood that an especially powerful Senator—*by any measure of influence*—represents a particular state.

Thus, West Virginia, for example, has a 2-in-100 chance of having one of its representatives chair all of the important Senate committees and otherwise wield the influence that Senator Byrd historically has.[37] To be sure, this is the same 2-in-100 chance

32 Rhode Island was chosen because it receives two Representatives in the House. *See* 33 The Book of the States, *supra* note 20, at 464-65 tbl.10.3. States such as Wyoming **R**
that receive only one Representative may be over represented in the House because of the Constitution's dictate that "each State shall have at Least one Representative" no matter how small its share of the nation's population. U.S. Const. art. I, § 2, cl. 3. *See supra* note
27. **R**

33 *See* Statistical Abstract, *supra* note 20, at 23, tbl. 20. According to the 1990 **R**
Census, upon which the apportionment of representation in Table 1 is based, the population of California was 29,811,000 and the population of Rhode Island was 1,003,000.

34 *See supra* Table 1.

35 *See supra* Table 1.

36 *See supra* Table 1.

37 For example, Senator Byrd's committee memberships have included Appropriations, Armed Services, Budget, and Rules and Administration. *See* Congressional Yellow Book 56 (Eric L. Birholz ed., Fall 2000); *see also Senator Byrd's Committee Assignments* (visited Mar. 7, 2001) <http://www.senate.gov/~byrd/committee.htm>. Many observers have attributed Byrd's extraordinary success in steering federal dollars to his home state to his chairmanship of the Senate Appropriations Committee. *See, e.g.,* Richard Munson, *Deforming Congress; Why Those Capitol Hill Budget Reforms Could Cost You Plenty*, Wash. Post, Sept. 5, 1993, at C3; Brian Kelly, *Pigging Out at the White House; Never Mind Last Week's Spending Bonanza; George Bush Has Long Been a Closet Pork Barreler*, Wash. Post, Sept 6, 1992, at C1; *see also* Brian Kelly, Adventures in Porkland (1992) (highlighting Senator Byrd's ability to obtain a relatively large share of federal benefits for his small home state and crowning him "the Pope of Pork"); Drummond Ayres, Jr., *Senator Who Brings Home the Bacon*, N.Y. Times, Sept. 6, 1991, at A16 (detailing Sena-

that California or Texas has, but it is much larger than the 3-in-435 chance that West Virginia would have if representation in the Senate were apportioned as it is in the House.[38] That is, relative to its share of the nation's population, West Virginia has a disproportionately great chance of having an especially powerful representative in the Senate, while it has only a substantially proportional chance of having an especially powerful representative in the House.

Given the absence of any constitutional constraints on the modern Congress's exercise of its spending power, the allocation of coalition-building power in the Senate will importantly affect the distribution of special legislation ("pork") that Congress enacts under the spending clause. In the Senate, each state has the same likelihood over time of providing the swing vote on a given piece of proposed legislation,[39] and each state's Senators therefore have the same power to secure special legislation that benefits their constituents. Thus, if the Senate alone could enact legislation, and if all Senators were rationally self-interested,[40] one would expect the total dollar amount of special legislation that each state receives over time to be equal. This means, however, that the per capita benefits of the special legislation received would be substantially greater in small population states than in large ones. When California and Wyoming each secure the equivalent of one billion dollars in special legislation from the federal government, for example, this amounts to $34 for each of California's 29.8 million residents, but $2,203—sixty-five times as much—for each of Wyoming's 454,000 residents.[41] In the House, in contrast, representation is allocated on the basis of population, and each state's coalition-building power within that body is substantially proportional to its share of the nation's population.[42] Thus, if the House alone could enact legislation, we would expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be approximately proportional to its popula-

tor Byrd's steering of over $750 million worth of federal projects and over 3,000 jobs into West Virginia over a three-year period); Kevin Merida, *Watchdog Group Cites Congress for Barrelful of Porcine Projects*, WASH. POST, Feb. 17, 1994, at A21 (observing that "watchdog group" awarded Senator Byrd a "Lifetime Achievement" award for obtaining more tax dollars than any other member of Congress for his home state).

38 *See* THE BOOK OF THE STATES, *supra* note 20, at 464 tbl.10.3. R

39 *See supra* notes 24-26 and accompanying text. R

40 This is a central assumption of the interest group theory component of public choice theory. *See, e.g.,* BUCHANAN & TULLOCK, *supra* note 17, at 11-39; DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991). R

41 The 1990 Census determined the population of California to be 29,811,000 and the population of Wyoming to be 454,000, STATISTICAL ABSTRACT, *supra* note 20, at 23, tbl. 20. R

42 *See supra* notes 27-28 and accompanying text. R

tion.[43] And the *per capita* benefits to each state would therefore be nearly the same.

But, of course, neither the House nor the Senate acting alone can pass legislation. The approval of at least a simple majority present in each body is required.[44] And, we would therefore expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be neither directly proportional to its share of the nation's population (House), nor equal (Senate), but somewhere in between. More specifically, one might expect the percentage share of special legislation that each state will receive over time to approximate its Shapley-Shubik power index in Congress. The existing allocation of coalition-building power in the Senate is likely to affect the distribution of the "gains" from

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43 *See supra* note 27-28 and accompanying text. It is a common misconception that if the House acting alone could enact legislation, a permanent majority coalition of large states would form, depriving the smaller states of the benefits of Union membership while imposing on them all of its costs. This outcome, however, would require the congressional logrolling "game" to have a permanent "core," which it lacks. R

Robert Sugden explains that a Condorcet choice provides the only "core solution" to the logrolling game:

> An outcome is said to be in the core of a game if it cannot be *blocked* by any coalition of players. Given the assumption that all preferences take the form of strict orderings, a coalition of players blocks one outcome, *x*, if there is some other alternative, *y*, such that (i) every member of the coalition prefers *y* to *x*, and (ii) by the rules of the game, concerted action by the members of the coalition can ensure that *y* is the outcome of the game, irrespective of what non-members do . . . . [A]n alternative, *x*, is in the core of the majority rule game if and only if, for every other feasible alternative, *y*, a majority of voters prefer *x* to *y*. This of course is Condorcet's criterion. The core of the game is identical with the Condorcet choice.

Robert Sugden, The Political Economy of Public Choice: An Introduction to Welfare Economics 148 (1981).

In the following example, alternative 1 is the Condorcet winner, even though only A prefers it to all other alternatives, because both A and B prefer 1 to 3, and both A and C prefer 1 to 2:

A	*B*	*C*
1	2	3
2	1	1
3	3	2

See Sugden, *supra*, at 140, 147; Dennis C. Mueller, Public Choice II, at 114-15 (1989); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 989 n.55, 994-96 (1989).

Whenever a Condorcet choice does not exist—that is, whenever there is no single alternative that cannot be blocked by any coalition of voters even though it is not the first choice of a majority—the legislative outcome will be a function of such "procedural" variables as the order in which various alternatives are formally considered. This is the "voting paradox," frequently referred to as the Arrow "impossibility theorem." *See* Kenneth J. Arrow, Social Choice and Individual Values (1951). The theoretical significance of the paradox was discussed by Black in the 1940's. *See* Duncan Black, The Theory of Committees and Elections (1958); *see also* Sugden, *supra*, at 140; Levmore, *supra*, at 984-90; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121 (1990).

44 *See* U.S. Const. art. I, § 7, cl. 2. Sometimes, of course, more than a simple majority of one or both chambers is required, as in the case of Senate filibusters, *see supra* note 26, R in order to override a President's veto, *see* U.S. Const. art. I, § 7, cl. 2, or where supermajorities are required by the Constitution.

the special legislation that is enacted by ensuring small states a disproportionately large slice, and large states a disproportionately small slice, of the federal "pie." The prediction, in short, is that the Senate's current structure of representation ensures a systematic redistribution of wealth from the larger states to the smaller states.[45]

Empirical evidence supports this theoretical claim. A December 1999 statistical study conducted by researchers at Harvard's Kennedy School of Government calculates the "balance of payments" that each state had with the federal government in fiscal year 1998.[46] Each state's contribution to the federal fisc (i.e., individual and corporate income taxes, social insurance taxes, excise taxes, estate and gift taxes, and customs duties)[47] is measured against the federal outlays it received (e.g., Medicare, Social Security, public assistance including Unemployment Insurance, defense spending, including veterans' benefits, and non-defense discretionary spending including federal programs in agriculture, education, national parks, and transportation).[48]

The results are consistent with the prediction. A regression analysis of the data for all fifty states reveals that the Per Capita Shapley-Shubik Index is a statistically significant ($p < 0.05$) explanator of the Per Capita Balance of Payments between the states and the federal government for Fiscal Year 1998.[49] As Tables 2 and 3 reveal, the 1998 Fiscal Year balance of payments with the federal government was negative in seven of the ten largest states, but positive in eight of the ten smallest states. The result is an average per capita income transfer of -$542 for residents of the ten largest states, compared to an average per capita income transfer of +$657 for residents of the ten smallest states.

45 This prediction rests in part on the assumption that large and small states' contributions to the federal fisc are not systematically disproportional to their share of the nation's population.

46 *See* Herman B. Leonard, et al., The Federal Budget and the States: Fiscal Year 1998 (23rd ed. 1999) [hereinafter FY 1998 Study]. It is revealing that the federal government, usually a font of statistics, does not appear to compile and publish such state-by-state, balance of payments data. The federal government does, however, publish one of the two sets of data on which Leonard et al. base their calculations: the annual report of the Bureau of the Census entitled *Consolidated Federal Funds Report*, a successor to the Census Bureau's annual report entitled *Federal Expenditures by State*. *See id*. at 93 (Appendix A). The tax collection data published by the I.R.S., however, "show which states collect the taxes rather than those states that bear the burden of Federal taxes." *Id.* at 95 (Appendix B). Thus, Leonard et al. relies on the "state by state tax estimates published by the non-profit and non-partisan Tax Foundation." *Id.*

47 *Id.* at 95.

48 *Id.* at 26-32; *see also id.* at 93, 95 (describing methodology).

49 For the details of how this regression analysis was performed, *see* Baker & Dinkin, *The Senate*, *supra* note 11, at 103, app. 3. In the present instance, the p value of the one-sided t-test is 0.0234, and the adjusted R2 of the regression is 0.189. The null hypothesis is rejected at the 5% level. The results for Fiscal Year 1995 are similarly statistically significant. *See* Baker & Dinkin, *The Senate*, *supra* note 11, at 103, app.3.

Such systematic redistribution is not problematic if there is a principled justification for it. Unfortunately, however, there does not appear to be one. The most obvious justification, poverty, does not fully explain this systematic difference. The rate of poverty in the ten largest states is higher on average than in the ten smallest states, yet the direction of the average federal income transfer is from the larger to the smaller states.[50] A statistical analysis confirms that even after controlling for each state's poverty rate as determined by the Census Bureau, the Shapley-Shubik index is still a statistically significant explanator of the individual states' balance of payments with the federal government.[51]

That a state has a small population does not make it, or its residents, obviously more virtuous, needy, beneficial to the larger society, or otherwise deserving of a disproportionately large share of the federal fisc relative to large-population states and their residents. Neither moral nor economic theory appears to offer any justification for the type of redistribution ensured by the existing allocation of representation in the Senate. Thus, whatever one's conception of the "general Welfare" constraint of Article I, Section 8 might be,[52] it is unlikely to encompass such redistribution.

TABLE 2
BALANCE OF PAYMENTS WITH THE FEDERAL GOVERNMENT: FISCAL YEAR 1998[53]

TEN LARGEST STATES

STATE	PER CAPITA INCOME TRANSFER	POPULATION (MILLIONS)	POVERTY RATE (%)
California	–$595	32.7	17.8
New York	–$948	18.2	19.4
Texas	–$225	19.7	15.0
Florida	+$118	15.0	14.0
Pennsylvania	+$223	12.0	12.5
Illinois	–$1,508	12.0	12.1
Ohio	–$354	11.2	10.9
Michigan	–$1,142	9.8	10.6
New Jersey	–$2,289	8.1	11.2
North Carolina	+$59	7.5	10.9
Total		146.2	

Average per capita income transfer = –$542
Average poverty rate among these states = 14.6%
Average poverty rate nationwide = 13.6%

50 *See infra* Tables 2 and 3.
51 *See supra* note 50.
52 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").
53 *See* HERMAN B. LEONARD ET AL., THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1998 (23rd ed. 1998).

TABLE 3
BALANCE OF PAYMENTS WITH THE FEDERAL GOVERNMENT: FISCAL YEAR 1998[54]

TEN SMALLEST STATES

STATE	PER CAPITA INCOME TRANSFER	POPULATION (MILLIONS)	POVERTY RATE (%)
Wyoming	+$228	0.5	13.8
Alaska	+$2,376	0.6	12.0
Vermont	+$170	0.6	10.3
North Dakota	+$2,336	0.6	12.9
Delaware	−$1,059	0.7	10.3
South Dakota	+$1,655	0.7	15.4
Montana	+$2,291	0.9	15.2
Rhode Island	+$818	1.0	16.0
Idaho	+$760	1.2	14.2
New Hampshire	−$1,661	1.2	10.7
Total		8.0	

Average per capita income transfer = +$657
Average poverty rate among these states = 13.2%
Average poverty rate nationwide = 13.6%

B. Conditional Federal Spending

Conditional federal spending is a second way in which the modern Congress's exercise of its spending power both infringes on state autonomy and reduces aggregate social welfare. A conditional offer of federal funds to the states implicitly divides them into two groups:[55] (1) states that already comply, or would happily comply, with the funding condition(s) without financial inducement and for which the offer of federal money therefore poses no real choice; and, (2) states that find the funding condition(s) unattractive and therefore face the choice of foregoing the federal funds in order to avoid complying with the condition(s), or submitting to undesirable federal regulation in order to receive the offered funds.

When the federal government makes a conditional offer of funds, states in the second group are severely constrained in their decision-making by the lack of equivalent, alternative sources of revenue. There is no competitor to the federal government to which these states might turn for substitute financial assistance. Although each state has the power to raise funds by taxing income, purchases, and property within its borders,[56] this power,

54 *Id.*

55 The exception would be the odd case in which every state liked the condition or—even less probably—disliked it.

56 Insofar as the states did not, under Article I, Section 8, or under the Sixteenth Amendment, surrender to Congress all of their power to tax income, purchases, and property within their borders, some of this power may be understood to have been reserved to

too, is subject to indirect federal control. Since the adoption in 1913 of the Sixteenth Amendment, which granted Congress the power to tax income "from whatever source derived, [and] without apportionment among the several States,"[57] the states implicitly have been able to tax only the income and property remaining to their residents and property owners[58] after the federal government has taken its yearly share.[59]

This means, in addition, that when the federal government offers a state money subject to unattractive conditions, it is often offering funds that the state readily could have obtained without those conditions through direct taxation—if the federal government did not also have the power to tax income directly.[60] Moreover, should a state decline proffered federal funds because it finds a condition intolerable, it receives no rebate of any tax dollars that

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the states under the Tenth Amendment. Nonetheless, the people of a state may choose to include in the state constitution certain restrictions on the ability of the state or its municipalities to raise funds through taxation, as in the case of California's "Prop. 13." *See* CAL. CONST. art. XIII A; Nordlinger v. Hahn, 505 U.S. 1 (1992) (sustaining Prop. 13 against an equal protection challenge under the U.S. Constitution); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978) (sustaining Prop. 13 against various challenges under the United States and California constitutions); *see also* Massachusetts's "Proposition 2-1/2," MASS. GEN. LAWS ch. 59, § 21C (West. 2000).

These sorts of restrictions are relevant to my analysis only insofar as they may indicate that a state, implicitly or explicitly, has chosen to rely more heavily on federal largesse, conditions and all. That is, these self-imposed restrictions on the raising of revenue are also part of the package of goods and services which a state offers to its residents and potential residents.

57 U.S. CONST. amend. XVI. The Sixteenth Amendment overturned Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), and repealed Article I, Section 9, Clause 4 of the Constitution, which had stated that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

58 States may also impose "commuter taxes" on the income of those who work within their borders but reside elsewhere. *See, e.g.,* Shaffer v. Carter, 252 U.S. 37, 52 (1920):

> [W]e deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein . . . .

See also International Harvester Co. v. Wisconsin Dep't of Taxation, 322 U.S. 435, 441 (1944); 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION: CORPORATE INCOME AND FRANCHISE TAXES ¶¶ 6.4 - 6.8 (2d ed. 1993); 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION: SALES AND USE, PERSONAL INCOME, AND DEATH AND GIFT TAXES ¶¶ 20.15 to 20.33 (1992).

59 The federal government is constitutionally authorized to, and does, tax both individual and corporate income. *See, e.g.,* Brushaber v. Union Pac. R.R., 240 U.S. 1, 17-18 (1916) (sustaining federal income tax against Fifth Amendment challenge); Flint v. Stone Tracy Co., 220 U.S. 107, 150 (1911) (upholding corporate income tax as an excise or indirect tax, not subject to the apportionment rule of Article I, Section 9); BORIS I. BITTKER & MARTIN J. MCMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 49.8, at 49-41 to -42 (1995); DANIEL Q. POSIN, FEDERAL INCOME TAXATION 33-40 (1993).

60 The exception is the purely theoretical possibility that the federal government would undertake massive redistribution in favor of a particular state, and offer it an amount of funds that it could not have raised directly from its own residents and property owners. A state's willingness to tax is in any case always affected by the total package of services and taxes that it chooses to offer its residents and potential residents.

its residents have paid into the federal fisc. In these cases, the state (through its residents) contributes a proportional share of federal revenue only to receive less than a proportional share of federal spending. Thus, when the federal government offers the states money, it can be understood as simply offering to return the states' money to them, often with unattractive conditions attached.[61]

Through the enactment of conditional federal spending legislation, a simple majority of states is able to harness the federal lawmaking power to restrict the competition for residents and tax dollars that would otherwise exist among them.[62] In the usual course of affairs, each of the fifty states chooses the package of taxes and services, including state constitutional rights and other laws, that it will offer its residents and potential residents.[63] In this way, the states compete for both individual and corporate residents and their tax dollars.[64] As part of its unique package, a state might choose, for example, to prohibit the use of "affirmative

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61 I am not the first to make this observation. My colleague, Lino A. Graglia, for example, has noted that:

> The Sixteenth Amendment, establishing the income tax, effectively gave the national government unlimited control of the nation's wealth and, consequently, a virtually unlimited spending power. . . . By extracting money from the now-defenseless states and offering to return it with strings attached, the national government is able to control by promises of reward—some would say bribery—whatever it might be unable or unwilling to control by threat of punishment.

Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129, 130-31 (1993); *see also* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 124 ("[F]or most states' voters the only real question is how much they can get back in federal financial handouts. There is no immediate sense that *it is their own money being returned to them with strings attached* and that the net effect of the money's round trip to Washington is simply to carry the regulatory strings with it back to the state." (emphasis added)).

62 Although the concurrence of a simple majority of states may be sufficient, those eager to enact such legislation will often seek to build a coalition of supporting states that is larger than the minimum number necessary for passage. *See supra* note 16. Moreover, the concurrence of a simple majority of states will always be sufficient for passage only in the Senate. Whether the same simple majority of states will also be sufficient for passage in the House will depend on the populations of the relevant states. Assuming that each state's representatives vote together on a given issue, a small number of large states is likely to need fewer additional votes in the House in order to block legislation to which it is opposed than will the same small number of small states. Indeed, the nine largest states together control a majority (227) of the House's 435 total members. *See* STATISTICAL ABSTRACT, supra note 20, at 282, tbl. 461.

63 This is not a one-time decision but a choice that a state makes repeatedly over time. In addition, when selecting its package of taxes and services, a state may be influenced by its assessment of the likely availability of federal funds—whether conditional or not—for certain purposes.

64 *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For commentary on Tiebout's classic model, see*, e.g*, CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 384 (1999) (collecting sources); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 514-18 (1991) (offering critique and collecting sources).

action" in the admission of students to its public universities, to prohibit the death penalty, to provide a constitutional or statutory right to same-sex "civil unions," or to prohibit the purchase or public possession of alcoholic beverages by any person who is less than eighteen years of age. The resulting choices can be understood as a state's determination that, *for it*, the benefits of a particular provision of state statutory or constitutional law exceeds the costs.[65]

A state's statutory or constitutional recognition of same-sex "civil unions," for example, could be understood as its determination that, for it, the benefits of formally recognizing intimate relationships that some consider morally repugnant outweigh the costs. In the absence of a federal government, a state that formally recognizes only marriages between a man and a woman would have only two ways to compete with a state, such as Vermont, that chooses also to formally recognize same-sex unions.[66] The former state could continue to offer its current package of taxes and services, including the formal recognition of marriages involving only two persons of different sexes, and seek to attract (and retain) those individuals and corporations who prefer this package. Or, the state could make some adjustment(s) to its package, which may include adopting a statutory or constitutional provision formally recognizing same-sex unions.[67]

Conditional federal spending, however, provides the majority of states, which do not formally recognize same-sex civil unions, a third, competition-impeding option whenever a state might choose to formally recognize such relationships: The majority's congressional representatives could simply enact an appropriately conditioned offer of federal funds in order to divest the outlier state of any competitive gains from its action.[68] By supporting legislation

65 By a "state's determination" is meant, of course, the judgment of the voters of the state as expressed either indirectly (through the election of state legislators) or directly (through the state constitution's amendment process, an initiative process, or the election of judges). Of course, some individuals and interest groups may have more influence than others on the outcome of these democratic processes.

66 *See* VT. STAT. ANN. tit. 15, ch. 23, § 1, (2000); *see also* E.J. Graff, *Civil Unions are Homemaking Here for a Reason,* BOSTON GLOBE, Feb. 11, 2001, *available in* 2001 WL 3919109 (observing that within six months of the enactment of Vermont's "civil union" law, "1,527 couples, only one-fifth of them Vermont residents, had been declared legally united for purposes of Vermont law").

67 An obvious third option—simply lowering taxes—is not really available. Because the revenue a state generates through taxation is necessary to provide various services, any decrease in taxes is likely to bring a concomitant reduction in service provision. Although this combination of changes may make the state more attractive to residents whose preferred package of taxes and services is different from that currently offered by the state, it cannot make the state more attractive to residents who would prefer to receive the current package of services, but at a reduced cost.

68 The fact that Congress nonetheless to date has not enacted or proposed an offer of federal funds thus conditioned is not surprising nor does it contradict the proposed theory of how and why Congress makes these conditional offers. The Vermont law is of recent

that offers the states federal funds on the condition that they not formally recognize same-sex marriages or civil unions, a coalition of the states that are unwilling to formally recognize such relationships can put any state that does to an unattractive choice: either abandon the competitive advantage that its formal recognition of same-sex unions presumably affords, or forego the offered federal funds and accept an obvious financial disadvantage relative to each state that accepts the federal money. In this way, conditional offers of federal funds necessarily make the states that without financial inducement would not willingly comply with the funding condition relatively worse off than they would have been in the absence of the offer, while making all other states, by implication, relatively better off.

Through the enactment of conditional federal spending legislation, a simple majority of states is able to harness the federal lawmaking power to force some states to pay more than others (including themselves) for their preferred package of laws. This is especially problematic when the funding condition seeks to reduce—to the minimums mandated by the U.S. Constitution and federal statutes—the heightened statutory or constitutional protection that a small number of outlier states currently provide certain minorities.[69] In these cases, one might expect the increased

vintage, and it may therefore take Congress a few sessions to propose and enact the predicted legislation. Should such legislation never be enacted, one still cannot conclude that this is because a minority state such as Vermont, which favors the formal recognition of same-sex intimate relationships, can protect itself effectively within the federal political process. The absence of such federal legislation may simply mean that a sufficiently large number of federal legislators have not yet considered it a high priority. *But see* H.R. 270, 107th Cong., 1st Sess. (2001) ("State Regulation of Marriage Is Appropriate Act"); Christopher Heredia, *Rep. Frank Goes for Round 2 in Fight for Allowing Gay Marriage*, SAN FRANCISCO CHRONICLE, Jan. 26, 2001, *available in* 2001 WL 3393376 (discussing bill introduced by Rep. Barney Frank "seeking to undo a 1996 federal definition of marriage as an institution between a man and a woman" and seeking "to hold Vice President Dick Cheney's feet to the fire after Cheney stated in October that he would support a state's right to determine whether to sanction same-sex unions").

69 Increasingly, states have expanded their constitutional protections for individual rights beyond the federal minimums in a variety of ways: by adopting a constitutional provision that is explicitly more expansive than its federal counterpart, see*, e.g.*, CHESTER J. ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS (1965); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1212-14 (1985); by adopting a constitutional provision that has no federal counterpart, *see, e.g.,* N.J. CONST. art. VIII, § 4 (the right to a free public education); N.Y. CONST. art. XVII, § 1 (the right to public assistance); Burt Neuborne, *Foreward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989); and by more expansive judicial interpretation of a constitutional provision than the federal courts afford its federal counterpart, see*, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-49 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977); *see also* Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 154-58 (1995) (comparing state and federal procedures for constitutional change) [hereinafter Baker, *Constitutional Change*]; Suzanna Sherry, *Foreward: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935 (1994) (discussing judicial construction of state constitutions and citing examples).

cost of the protection, measured in terms of foregone federal funds, to cause an outlier state readily to relinquish it. After all, the greatest and most direct benefits of such heightened protection will typically accrue to a relatively small and powerless segment of the state's voters,[70] while the proffered federal funds may well be of direct benefit to a substantial majority.[71]

By providing a competition-impeding alternative to interstate competition, conditional offers of federal funds reduce the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, which each offers.[72] Thus, some individuals and corporations may no longer find any state that provides a package (including the formal recognition of same-sex civil unions, for example) that suits their preferences, while other individuals and corporations may confront a surfeit of states offering a package (including a prohibition against legally recognized same-sex unions) that they find attractive. The net result is likely to be a decrease in aggregate social welfare, since the loss in welfare to opponents of same-sex unions is unlikely under these circumstances to yield a comparable gain in welfare for those who favor it.[73]

At present, several states have statutes that provide protection against various forms of discrimination on the basis of sexual orientation while federal law does not. Compare, for example, CONN. GEN. STAT. § 46a-81e (1999) (prohibiting housing discrimination on the basis of sexual orientation) and HAW. REV. STAT. § 368-1 (1999) (prohibiting housing discrimination on the basis of sexual orientation) with 42 U.S.C. § 3604 (2000) (prohibiting housing discrimination only on the basis of "race, color, religion, sex, familial status, or national origin"—with "familial status" referring not to sexual orientation but to "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody." *Id*. at § 3602(k)). And *compare* CAL. LAB. CODE § 1102.1 (2000) (prohibiting employment discrimination on the basis of sexual orientation) and HAW. GEN. STAT. § 368-1 (2000) (prohibiting employment discrimination on the basis of sexual orientation) *with* 42 U.S.C. § 2000e-2 (2000) (prohibiting employment discrimination only on the basis of "race, color, religion, sex, or national origin") and 29 U.S.C. § 623 (2000) (prohibiting employment discrimination on the basis of age).

70 On some occasions, of course, the minority might be rich and, therefore, also potentially politically powerful. There may also be reasons why the "discrete and insular" status of even non-wealthy minorities actually enhances their political power. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723-24 (1985). *But see* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993).

71 The benefits of the proffered funds may also be more salient to the majority than the benefits of a statutory or constitutional provision protecting minority rights. Consider, for example, the salience to the median voter of a grant of federal education funds to the local school district versus a state prohibition against the death penalty.

72 This reduction in diversity results if even one state that would *not* have complied with the federal condition in the absence of the contingent offer of funds chooses to comply rather than to forego the funds.

73 That is, the mere existence of one state in which same-sex unions are formally recognized seems likely to yield aggregate benefits for proponents of such recognition which are far greater than the aggregate benefits that the opponents of formal recognition of

II. The Ineffectiveness of Traditional Means of Limiting Congress's Spending Power

The discussion in Part I makes clear that formalists and functionalists alike should favor the restoration of limits on Congress's spending power. A less plenary conception of the spending power would not only be more consistent with the Framers' intent, it would also increase aggregate social welfare. But how do we get from here to there? How might limits once again be imposed on Congress's spending power?

In this Part, I consider two promising possibilities. First, if one's concern is protecting state autonomy, perhaps no constitutional limits on Congress's spending power are necessary. Perhaps the state-based nature of representation in Congress affords the states adequate protection against autonomy-infringing exercises of the congressional spending power. Second, a constraint on Congress's spending power could, in theory, be explicitly reimposed via the Constitution's amendment process. Examples proposed in recent years include the Balanced Budget Amendment and supermajority rules for the passage of certain spending legislation. Notwithstanding the plausibility of each of these means of limiting Congress's spending power, the analysis in this Part shows, perhaps surprisingly, that each is doomed to failure.

A. Protections of the Political Process

When concerns are expressed about the scant protections afforded the states under modern readings of the Constitution, a now-classic response is to invoke the nature of the federal political process.[74] The political process argument contends that there is no need for the federal courts to invalidate federal legislation that may encroach on the autonomy of the states because of the role that the states themselves play in the enactment of federal legis-

same-sex unions would realize if there were 50 rather than 49 states in which only marriages between two persons of different sexes were formally recognized. Indeed, for proponents of the formal recognition of same-sex unions, the sole state in which such relationships are formally recognized may have a value beyond measure.

74 *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1995) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); National League of Cities v. Usery, 426 U.S. 833, 877 (1976) (Brennan, J., dissenting) ("[T]he extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress."); United States v. Morrison, 120 S.Ct. 1740, 1771 (2000) (Souter, J., dissenting) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.") (quoting *Garcia*, 469 U.S. at 552); Printz v. United States, 521 U.S. 898, 956 (1997) (Stevens, J., dissenting) ("'The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.'") (quoting *Garcia*, 469 U.S. at 550-51).

lation. That is, the states are arguably fully capable of protecting themselves against federal oppression through the federal political process, so there is simply no need for further, external limits on Congress's spending power.

Consider the reasoning of Professor Herbert Wechsler who, along with Professor Jesse Choper, is the scholar with whom this argument is commonly associated.[75] Wechsler has observed that the Senate, in which all states are equally represented, "cannot fail to function as the guardian of state interests as such," and that "[f]ederalist considerations . . . play an important part even in the selection of the President."[76] He has therefore concluded that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."[77]

The central problem with Wechsler's analysis is that he misidentifies the problem. While the state-based apportionment of representation within the federal government[78] may well ensure that "*state interests as such*" are protected against federal oppression, *federal* oppression is not the problem.[79] The problem, rather,

75 Sometimes called the Wechsler-Choper thesis, this argument was presented first in 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), and later in JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000) (criticizing Wechsler's particular arguments but contending that there "are 'political safeguards' of federalism, safeguards that have a longer pedigree and a stronger claim to constitutional legitimacy than the current Supreme Court's clumsy bid to impose its will on Congress").

76 Wechsler, *supra* note 75, at 548, 557. Wechsler's discussion was cited approvingly by the Court in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550, 551 n.11 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."), and by the dissent in National League of Cities v. Usery, 426 U.S. 833, 877 (1976) (Brennan, J., dissenting) ("[T]he extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress."). *See also supra* note 74. R

77 Wechsler, *supra* note 75, at 559 (footnote omitted); *see also id.* at 558 ("Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse . . . ."). R

78 The state-based allocation of representation in the Senate is obvious: each state receives two senators and therefore has formal equality in representation. *See* U.S. CONST. art. I, § 3, cl. 1. Although representation in the House is proportional to population, it too is state-based insofar as each state is ensured one representative no matter how small its population, representatives are allocated by state, and House districts do not cross state lines. *See* U.S. CONST. art. I, § 2, cl. 3. Even the President is ultimately elected by the states, insofar as each state receives "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]" U.S. CONST. art. II, § 1, cl. 2; *see also* Wechsler, *supra* note 75, at 547-50, 552-55. R

79 It is not clear what Wechsler means by "state interests as such" or the (presumably) opposed "federal interests as such." Juxtaposing these two sets of interests is nonetheless common in the context of conditional federal spending, especially by commentators who, in

lies in the ability of *some states* to harness the federal lawmaking power to oppress *other states.* Not only can the state-based allocation of congressional representation not protect states against this use of the federal lawmaking power, it facilitates it.

Wechsler's observation about the Senate's role in protecting state autonomy is especially ironic in the context of fiscal redistribution among the states. The analysis in Part I.A. showed that under a scheme of purely proportional representation, such as the House provides, one would not expect Congress's spending legislation to reveal systematic fiscal redistribution from the larger states to the smaller states. This redistribution, with its attendant impingement on the autonomy of the large states that systematically bear its costs, occurs solely because of the disproportionately great (because "equal") representation that the Senate affords small-population states.

As a theoretical matter, it is therefore clear that the state-based allocation of Congressional representation *cannot* protect the large states against autonomy-infringing (and aggregate-welfare reducing) fiscal redistribution. As an empirical matter, the discussion in Part I.A. also makes clear that the state-based allocation of Congressional representation *does not* protect the large states against this encroachment on their autonomy.

Conditional federal spending legislation is no different. The state-based apportionment of representation in Congress does not prevent, and in fact facilitates, the ability of some states to harness the federal lawmaking power to encroach on the autonomy of other states to their own advantage. Recall that a conditional offer of federal funds to the states implicitly divides them into two groups.[80] One would therefore expect such conditional funding legislation to be enacted only if a (substantial) majority of states fall within the first group: that is, if they already willingly comply with, or favor, the stated condition, and the conditional offer of funds is therefore no less attractive to them than a similar unconditional offer.[81] Few congressional representatives, after all,

contrast to Wechsler, are concerned that "state interests as such" are less likely to be advanced by Congress than "federal interests as such." *See, e.g*, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 860-68 (1979); McCoy & Friedman, *supra* note 61, at 123-25. **R**

Although Wechsler focuses on the state-based allocation of representation in Congress, he nonetheless suggests that oppression by the "national authority," rather than the oppression of some states by other states, is the problem which the structure of representation avoids. *See* Wechsler, *supra* note 75, at 558 (The national political process "is intrinsically well adapted to retarding or restraining new intrusions *by the center* on the domain of the states.") (emphasis added). **R**

80 *See supra* note 55 and accompanying text. **R**

81 As was explained in note 16, *supra*, in practice, proponents of legislation will strive to secure a supermajority of votes because of the uncertainty under which pre-vote lobbying and logrolling take place. **R**

should be eager to support legislation that gives the states money only if they comply with a condition that a majority of their own constituents would independently find unattractive.[82]

The conditional offer of federal funds to the states suggested by President Clinton in response to *United States v. Lopez* directly supports this theory.[83] At the time the President spoke, more than forty states had already enacted prohibitions on the possession of guns in or near schools.[84] Thus, only a (small) minority of states would be posed a choice by the President's suggested offer of federal funds, and the representatives of those states would likely have scant ability within the political process to prevent the legislation's passage. Their best hope would be to trade votes with the requisite number of members of the majority coalition, exchanging their support on a matter of greater concern to those states for

82 A legislator is less likely to be re-elected if the median voter in her constituency believes that she voted "the wrong way" on an important issue. And it is an axiom of political science and theory that legislators' primary, but not sole, concern is winning reelection. *See, e.g.,* ARNOLD, LOGIC, *supra* note 16, at 5 (Although members of Congress "are not single-minded seekers of reelection, reelection is their dominant goal."); FRANK E. SMITH, CONGRESSMAN FROM MISSISSIPPI 127 (1964) ("All members of Congress have a primary interest in being re-elected. Some members have no other interest."); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 396 (1988) (A legislator is "a placeholder opportunistically building up an ad hoc majority for the next election."); Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 51-53 (1988) (discussing normative implications of "orientation toward reelection"). R

Thus, *ceteris paribus*, a member of Congress should prefer to support legislation that gives the states money if they comply with a condition that a majority of her constituents find unproblematic, if not positively attractive, rather than identical legislation that imposes a condition that a majority of her constituents would otherwise find unattractive or even oppressive. Of course, other things are not always equal, and an individual legislator may nonetheless choose to support conditional funding legislation of the latter sort if she predicts that the benefits to her, in terms of reelection campaign contributions and other support from state or national interest groups will outweigh the costs, in terms of lost votes and other support within her district. Or a legislator may sometimes choose to express a preference at odds with that of a majority of her electorate and support conditional funding legislation of the latter sort, especially if she does not believe her reelection to be at risk. *See, e.g.,* ARNOLD, LOGIC, *supra* note 16, at 5; RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973). In recent years, a lively academic debate has grown up around the extent to which legislators enact their own ideological preferences rather than those of interest groups or their constituents. *See, e.g.*, Baker, *Direct Democracy*, *supra* note 26 at 740 n.117 (1991); FARBER & FRICKEY, *supra* note 40, at 27; Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 143-50 (1989). R R R

83 Three days after the Court's ruling in *Lopez*, 514 U.S. 549 (1995), President Clinton proclaimed that he was "determined to keep guns out of our schools," and contended that Congress would not run afoul of the Constitution if it now chose to "encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans." Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1; *see* Ann Devroy & Al Kamen, *Clinton Says Gun Ruling Is a Threat; President Will Seek To Renew Ban on Schoolyard Firearms*, WASH. POST, Apr. 30, 1995, at A1.

84 *See* Purdum, *supra* note 83, at A1; *see also* United States v. Lopez, 514 U.S. at 581 (Kennedy, J., concurring) (citing state statutes regulating possession of guns in school zones). R

help in opposing the condition on federal funds.[85] Of course, the likelihood of success of such a vote trading effort is positively correlated with the number and size of states in the minority coalition.[86]

One question remains: Why would a state's congressional representatives ever prefer to enact a conditional rather than an unconditional offer of federal funds to the states, including their own? Several possibilities merit discussion. To begin, legislators might support a conditional offer of funds in order to "entice" outlier states into amending or adopting some provision(s) of state constitutional or statutory law.[87] To the extent that Congress, at least after *New York* and *Lopez*, cannot always directly regulate the states in the ways it might prefer,[88] an offer of appropriately conditioned federal funds may be the only means to certain regulatory ends. By proposing or supporting legislation to lure outlier states into adopting these regulations, individual legislators may garner the approval of "single issue" voters and interest groups who may provide re-election votes as well as nationwide financial and other support for their next campaign.[89]

85 This assumes, of course, that the residents of the states in the minority have a sufficiently intense preference regarding the proposed legislation that they are willing to trade their states' vote on other legislative matters in order to block its passage.

The classic discussion of vote trading or logrolling is BUCHANAN & TULLOCK, *supra* note 17, at 131-45; *see also* Baker, *Direct Democracy*, *supra* note 26 at 721-32; GILLETTE & BAKER, *supra* note 64, at 268-72. **R** **R**

86 Assuming that each state's legislators vote together on a given issue, a larger minority of states will need fewer additional votes in the Senate in order to block legislation to which it is opposed than will a smaller minority of states. Thus, *ceteris paribus*, any vote trading effort to secure the additional votes should have a greater likelihood of success, and should be easier to achieve, when the minority undertaking it is larger rather than smaller. *See* Baker, *Direct Democracy, supra* note 26 at 730-31. **R**

By the "size" of states is meant their population. This variable matters in any discussion of vote trading in Congress because population determines the number of representatives and, therefore, votes that a state will have in the House. *See supra* note 27. **R**

87 This was President Clinton's express aim when he made his post-*Lopez* suggestion that Congress "encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans." *See* Purdum, *supra* note 83, at A1. **R**

88 *See* Baker, *Conditional Federal Spending*, *supra* note 12, at 1911-12; Baker, *The Revival of States' Rights*, *supra* note 12, at 96-100. *See also* New York v. United States, 505 U.S. 144 (1992); United States v. Lopez, 514 U.S. 549 (1995). **R** **R** **R**

89 At least one commentator has speculated that this was the motivation underlying Congress's enactment of the Gun-Free School Zones Act invalidated in *Lopez*. *See* Jerome L. Wilson, *High Court Did Well in School-Guns Case*, N.Y. TIMES, May 5, 1994, at A30 ("[T]he Gun-Free School Zones Act was little more than a press release from Congress that it cared."); *cf.* United States v. Morrow, 834 F. Supp. 364, 366 (N.D. Ala. 1993) ("A generalized salutary purpose is simply not enough to justify the creation of a new federal crime. Liking the way 'Gun-Free School Zones' rolls off the tongue does not make § 922(q) constitutional.").

In recent years, highly controversial candidates for governor and the U.S. Senate, notably David Duke and Oliver North, have received as much financial and other campaign support from outside their respective states as from within. On David Duke, *see, e.g.,* Susan Gilmore, *Hundreds in State Donated to Duke*, SEATTLE TIMES, Nov. 29, 1991, at C1 ("More than 200 Washington state residents gave more than $11,000 to David Duke's unsuccessful race . . ."); Anthony Lewis, *Abroad at Home: 'America Be on Guard*,' N.Y. TIMES, In addition, legislators might thus win the votes of rationally self-interested constituents who believe that certain activities in another state impose negative externalities on them. Consider, for example, the federal regulation at issue in *South Dakota v. Dole*. Voters in a state that, consistent with the regulation, already prohibited "the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age"[90] might reasonably believe that there would be fewer alcohol-related accidents on their own state's highways if their young residents no longer had an incentive to commute to border states where the drinking age is lower and, therefore, were less likely "to combine their desire to drink with their ability to drive."[91]

Sometimes members of Congress might support conditional funding legislation not in order to encourage interstate conformity in some area, but in the hope that some state(s) might decline the offer of federal funds.[92] States that forego the conditional federal

Nov. 19, 1991, at A15 (47% of Duke's total campaign contributions were from people in 45 states other than Louisiana). On Oliver North, *see, e.g.*, Margaret Edds, *North Still Asking Faithful Followers to Dig a Little Deeper*, ROANOKE TIMES & WORLD NEWS, Nov. 16, 1994, at C1 (North raised more money than any candidate in U.S. Senate history, almost $20 million, from more than 200,000 contributors nationwide); Michael Ross, *Another Epic Battle Plays Out in Virginia*, L.A. TIMES, Nov. 4, 1994, at A20 ("North has raised more money—$17.6 million—than any other Senate candidate this year, most of it from out of state"); *see also* Andrew Mollison, *Outside funds are politics as usual; Study tracks cash for hot state races*, ATLANTA JOURNAL & CONSTITUTION, Nov. 18, 1991, at A3 ("a big surge of private funds across state lines for important U.S. Senate and gubernatorial races is politics as usual, according to nine-state study").

The growth of political parties as national rather than local sources of political influence may also be a factor in the rise of nationwide support for candidates in statewide elections. *See, e.g.*, JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 15 (1995) (arguing that "the party provides more support [of all kinds] than any other organization for all but a very few candidates for national *and state* offices" (emphasis added)); L. Sandy Maisel, *Political Parties in a Nonparty Era: Adapting to a New Role*, *in* PARTIES AND POLITICS IN AMERICAN HISTORY 259, 269 (L. Sandy Maisel & William G. Shade eds., 1994) ("[E]ach party has used opportunities . . . to mount unified, coordinated campaigns throughout the country and thus the national parties have been able to finance local efforts."); JOHN S. SALOMA III & FREDERICK H. SONTAG, PARTIES: THE REAL OPPORTUNITY FOR EFFECTIVE CITIZEN POLITICS (1972); Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); Kaden, *supra* note 79, at 859-60, 862-67; Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 MICH. L. REV. 1 (1990). R

90 South Dakota v. Dole, 483 U.S. 203, 205 (1987) (quoting 23 U.S.C. § 158 (1982 ed., Supp. III)).

91 *Id.* at 208 ("Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution."); *see also* 130 CONG. REC. S18,640 (daily ed. June 26, 1984) (statement of Sen. Lautenberg); *id.* at S18,644 (statement of Sen. Heinz).

92 Although it is not at all clear that this was Congress's aim, there are several instances in which states have chosen to decline an offer of funds rather than comply with the attached condition. *See, e.g., Dole*, 483 U.S. 203; Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). *But see* 131 CONG. REC. S15,202 (daily ed. Nov. 12, 1985)

revenue enable the other states to profit at their expense. By not receiving their proportionate share of the funds offered under the conditional grant, such states leave more money in the federal fisc for other purposes, and thus may well receive a smaller share of the total federal pie in a given year than they would have if they had accepted the conditional offer.[93]

Whatever a particular legislator's motivation might be, supporting a conditional grant of federal funds to the states is likely to make her state (and therefore herself) better off, and should only rarely make it (and herself) worse off, *if her state already complies, or without financial inducement would happily comply, with the funding condition.*[94] For these states and their congressional representatives, a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states. Whether a state that is not already in compliance chooses to decline the offer of federal funds or to acquiesce in the stated condition, those states already in compliance may well improve, and will only rarely worsen, their competitive position relative to that state.[95]

It is also worth noting that insofar as conditional federal spending legislation is simply a particular form of special legislation or "pork," the allocation of representation (and therefore also coalition-building power) in the Senate will affect its distribution as well. As in the case of other fiscal legislation, one would expect

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(statement of Sen. Lautenberg) ("Congress did not pass Public Law 98-363 [at issue in *Dole*] in order to withhold highway funds").

93 This assumes that the funds remaining in the federal fisc will be allocated substantially proportionally across the states. In the *Dole* context, Richard Epstein has described the problem as follows:

> South Dakota must continue to pay the same level of taxes, even though the money it contributes is diverted to other states. The offer of assistance is not an isolated transaction, but must (as with the thief who will resell stolen goods to its [sic] true owner) be nested in its larger coercive context. The situation in *Dole* is scarcely distinguishable from one in which Congress says that it will impose a tax of *x* percent on a state that does not comply with its alcohol regulations—a rule that is wholly inconsistent with the preservation of any independent domain of state power. The grant of discretion, therefore, allows the federal government to redistribute revenues, raised by taxes across the nation, from those states that wish to assert their independence under the Twenty-first Amendment, to those states that do not.

Richard A. Epstein, Bargaining with the State 152 (1993).

94 The exception is when a majority of the citizens of a state, within a relatively brief period of time, change their view on an issue, such as the death penalty, which is the focus of a conditional offer of federal funds. In these rare instances, a state that previously found the funding condition attractive may find that it no longer does, and that it too is therefore relatively worse off than it would have been if Congress had never made the conditional offer of funds. Thus, it is possible, if highly unlikely, that Congress may impose a condition on federal funds that *at some point* is attractive to, and thus renders compliance costless for, *no* state.

95 By "competitive position" here I mean a state's position, relative to other states, in the competition for individual and corporate residents and their tax dollars. *See supra* notes 62-65 and accompanying text. R

the small states to benefit disproportionately—and the large states to be disadvantaged disproportionately—by conditional offers of federal funds to the states. Thus, it seems clear that the state-based allocation of congressional representation can neither protect the large states against autonomy-infringing, conditional federal spending nor prevent the concomitant reduction in aggregate social welfare.

B. Amending the Constitution

A second possible way to restore limits on Congress's spending power is by the adoption of a constitutional amendment. In recent years, scholars interested to curtail the rise of the special interest state have in fact proposed amendments that, for example, would require the consent of a supermajority to pass certain spending legislation.[96] In addition, Congress itself has considered amendments, such as the Balanced Budget Amendment, that would impose limits on its spending power.[97]

The analysis provided in Part I above, however, suggests that all these amendment possibilities are highly likely to remain no more than that. In that Part, I demonstrated that the existing rules governing the enactment of conditional and all other federal spending legislation have a clearly identifiable group of systematic beneficiaries—the small population states that are afforded disproportionately great (because equal) representation in the Senate, and therefore also in Congress, relative to their shares of the nation's population. Based on the 1990 Census, thirty-two states currently are over-represented in the Senate.[98] Each might be expected to oppose the adoption of a constitutional amendment that would adversely affect its continued ability to obtain a disproportionately large share of the federal "pie." Under Article V, the

96 *See, e.g.,* John O. McGinnis & Michael R. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365 (1999) (proposing amendment to U.S. Constitution that would require an unspecified supermajority of each house of Congress to pass a resolution authorizing the government to spend more than 90% of the total amount spent in the previous year, and would similarly require a supermajority to pass bills that establish or expand "entitlement programs").

97 The Balanced Budget Amendment of 1995, H.R.J. Res. 1, 104th Cong., would have required a balanced budget unless three-fifths of each house authorizes a budgetary deficit. *See id.* § 2. The Amendment failed to secure the two-thirds majority necessary for a constitutional amendment by a margin of 65 to 35 in favor of adoption. *See* 141 Cong. Rec. S3,314 (daily ed. Mar. 2, 1995). Professors McGinnis and Rappaport have observed that "[t]he amendment effectively lost by only one vote because Senator Robert Dole voted against it as a parliamentary maneuver to preserve his ability to bring the amendment forward for reconsideration." McGinnis & Rappaport, *supra* note 96, at 371 n.21 (citing 141 Cong. Rec. S3,314 (daily ed. Mar. 2, 1995)). **R**

In addition, Congress recently considered an amendment to require a two-thirds vote to raise taxes. The House defeated this proposed amendment by a vote of 233 to 199 in favor of adoption. *See* 143 Cong. Rec. H1,491, H1,506 (daily ed. Apr. 15, 1997).

98 *See* Baker & Dinkin, *The Senate*, *supra* note 11, at 71 tbl.5. **R**

consent of two-thirds of the Senate (or a convention called by two-thirds of the state legislatures) is necessary even to propose an amendment, and ratification by three-fourths of the states is required for adoption.[99] Thus, if the senators (or legislatures) from as few as seventeen of these thirty-two over-represented states opposed the proposal of an amendment, or as few as thirteen states opposed ratification, the continuation of the existing regime would be ensured.

In order for an amendment limiting Congress's spending power to have any chance at adoption, therefore, its proponents would need to persuade a substantial number of the states that clearly benefit from the existing regime that they would do *even better* under the proposed regime. This would require the amendment's proponents to demonstrate not only that aggregate social welfare would increase if the amendment were adopted, but also that at least twenty of the thirty-two states that disproportionately benefit from the existing regime would *each* experience an increase in aggregate welfare notwithstanding the anticipated loss of federal redistribution in their favor. Moreover, to the extent that particular interest groups might have disproportionately great power within particular states (e.g., farmers in Iowa and Nebraska, the dairy industry in Wisconsin), the amendment's proponents similarly would need to persuade these interest groups that they would each experience an increase in aggregate welfare notwithstanding the anticipated loss of federal redistribution in their favor if the amendment were adopted. I am far from sanguine that proponents of such an amendment could provide the relevant states and interest groups persuasive evidence on this score.

III. Why Has the Modern Court Declined to Play a Role?

The Framers did not intend for Congress's spending power to be unlimited and, as we have seen above, imposing the proper constraint on the spending power will increase aggregate social welfare in any case. The analysis in Part II makes clear that neither the protections of the federal political process nor the constitutional amendment process is likely to yield effective limits on the congressional spending power. And one is left to conclude that the only meaningful solution lies in judicial review under the existing Spending Clause.

In this regard, the Court could simply consider justiciable the "general Welfare" limitation in the text of the Spending Clause, and could invalidate any challenged spending legislation that it concluded did not "provide for the common Defence and general

99 U.S. Const. art. V.

Welfare of the United States."[100] Since 1936, however, the Court has proclaimed, increasingly emphatically, that it does not believe it can or should undertake this task,[101] and that "[i]t is for Congress to decide which expenditures will promote the general welfare."[102]

Thus, the interesting question becomes why the Court has taken this position. The question merits discussion not only as an academic matter, but also because understanding the Court's view is a necessary step in persuading the Court that it should change it. Three possibilities seem especially worthy of further consideration: (1) that the Court's unwillingness to constrain Congress's power in this area is simply a vestige of the New Deal era that has outlived any arguable usefulness; (2) that the Court believes that the exercise of the spending power is better left to the politically accountable branches of the federal government; or (3) that the federal appropriations process does not readily lend itself to traditional judicial review.

It is possible that the Court's unwillingness to review Congress's spending decisions continues today largely as a matter of unfortunate habit formed during the New Deal era.[103] To the extent that a major reason for constraining the spending power is to protect state autonomy, the latter was the very antithesis of the New Deal agenda.[104] Having set out down the road of nonjusticiability, the Court today may simply find this the path of least resistance (or, at least, the path of least work). Of course, the same might have been said of the Court's treatment of the commerce power prior to *Lopez*.[105] The spending power seems no less worthy of re-examination by the Rehnquist Court. And one might therefore hope that the current Court will soon undertake this task or, at least, explain why it believes the spending power is different.

A second possibility is that the Court simply believes that the exercise of the spending power is best left solely to the politically accountable branches of the federal government. If the voter-taxpayer is unhappy with Congress's spending decisions she can sim-

100 U.S. CONST. art. I, § 8, cl. 1.

101 *See supra* notes 8-9. **R**

102 Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam).

103 *See, e.g.,* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 154 (1995) (the Roosevelt Court "expanded the commerce power and the taxing and spending power so greatly that it soon became evident that there was almost no statute for social welfare or the regulation of business that the Court would not invalidate"); Epstein, *supra* note 10 at 1. **R**

104 *See, e.g.,* LEUCHTENBURG, *supra* note 103; WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932-1940 (1963); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

105 United States v. Lopez, 514 U.S. 549 (1995). *Lopez* was the first case in nearly sixty years in which the Supreme Court held that a federal law exceeded Congress's power under the Commerce Clause. *See* Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936); Baker, *Conditional Federal Spending*, *supra* note 1, at 1911. **R**

ply "vote the bums out." As the discussion in Part I above showed, however, political accountability does not play the role one might hope in increasing aggregate social welfare under the spending clause. On election day, each voter faces a prisoner's dilemma in which the individually rational strategy is *not* to vote out one's representatives if they are successful in obtaining rent-seeking legislation that benefits their home district and constituents, but rather to vote them out if they do *not* obtain such legislation. Such legislation, unfortunately, is highly likely to be aggregate-welfare reducing. Thus, political "accountability" in this context has the utterly perverse effect of exacerbating the problem rather than mitigating it. It is precisely because the Court is *not* politically accountable in the same way that it alone can stop the otherwise inevitable "race to the bottom."[106] Why, then, does the Court refuse to seize this uniquely important opportunity?

A third possibility is that the Court considers judicial review of Congress's spending decisions to be unworkable because of the nature of the federal appropriations process. It is undoubtedly true that the special nature and importance of appropriations legislation raises a host of unique issues.[107] For example, should a lawsuit be limited to challenging a single "line item" of an appropriations bill? What should the status of the challenged appropriation be while the challenge proceeds through the courts? And should such challenges be heard on an expedited basis?

The fact that judicial review of such legislation raises unique and possibly difficult issues, however, would not seem alone to be a legitimate reason for the courts to abrogate their constitutional duty. In permitting taxpayers to have standing to challenge congressional expenditures as violations of the Establishment Clause of the First Amendment, the Court in *Flast v. Cohen* was unperturbed by such practical concerns: "we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution."[108] In addition, one wonders whether critics of judicial review in the spending con-

106 *See supra* note 19. R

107 *See, e.g.,* ALLEN SCHICK, THE FEDERAL BUDGET PROCESS: POLITICS, POLICY, AND PROCESS (1980); D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991); LANCE T. LELOUP, THE FISCAL CONGRESS: LEGISLATIVE CONTROL OF THE BUDGET (1980); DONALD F. KETTL, DEFICIT POLITICS: PUBLIC BUDGETING IN ITS INSTITUTIONAL AND HISTORICAL CONTEXT (1992).

108 Flast v. Cohen, 392 U.S. 83, 106 (1968) (distinguishing *Frothingham* as a case in which "a taxpayer seeks to employ a federal court as a forum in which to air his *generalized grievances* about the conduct of government or the allocation of power in the Federal System") (emphasis added).

text would as readily embrace a declaration by the Court that the "free speech" clause of the First Amendment will henceforth be nonjusticiable because of the difficult and novel practical and jurisprudential issues posed by the Internet and cyberspace.[109]

Finally, it is significant that in recent decades the federal courts have been willing to take on enormously complex institutional reform litigation ranging from school desegregation to prison overcrowding.[110] The role of the courts in these cases has been at least as innovative and potentially rife with practical difficulties as those likely to be encountered in judicial review of federal spending legislation. All of this suggests that the issue ultimately may be the Court's willingness, rather than ability, to limit Congress's spending power.

Conclusion

Since 1936, the Supreme Court has increasingly emphatically declared that it considers nonjusticiable any limitation on congressional power that the Spending Clause may contain. During this same period, federal spending has undergone a transformation "from a modest budget devoted to public interest goods into a vast engine for the production of private interest goods."[111] Commentators and members of Congress alike have decried "the rise and rise" of the special interest state,[112] yet the rise continues unabated.

In this Article, I have sought to explain both the mechanism that powers the special interest state to the detriment of state autonomy and why neither the protections of the federal political process nor the constitutional amendment process is today likely to yield effective limits on the congressional spending power. This analysis leads to the inescapable conclusion that the only mean-

109 For a more extensive discussion of the "double standard" of judicial review in the context of federalism, *see* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, __ Duke L.J. ___ (forthcoming 2001); *see also* United States v. Lopez, 514 U.S. 549, 579 (Kennedy, J., concurring) ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes. . . . But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.").

110 *See* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376, 377 (1982) (discussing "structural reform" litigation "in which federal judges have assumed a new role" and "actively supervise the implementation of a wide range of remedies designed to desegregate schools and to reform prisons and other institutions"); *see also, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (authorizing district court to achieve desegregation through the use of quotas, redrawing of attendance zones, optional majority-to-minority school transfers, and busing); cases cited in Resnik, *supra*, at 386 n.56.

111 McGinnis & Rappaport, *supra* note 96, at 368. R

112 *Cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994). *See also generally* McGinnis & Rappaport, *supra* note 97. For recent congressional proposals, *see supra* note 97. R

ingful solution lies in judicial review under the existing Spending Clause, yet the modern Court has aggressively resisted playing any role in this area. I have speculated on three plausible reasons for the Court's reluctance to enforce the Constitution's limits on Congress's spending power, and have found none to be especially persuasive.

Perhaps, then, the Court simply has not appreciated either the threat posed to state autonomy by an unfettered congressional spending power or the uniquely beneficial role that judicial review might play in this area. If so, then by enlightening the Court this Article may also, and more importantly, rouse it to action.