

## TWENTY-YEAR LEGACY OF *SOUTH DAKOTA V. DOLE*

### DOLE DIALOGUE<sup>†</sup>

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Thank you very much for inviting me. When I told my family, friends, and colleagues that I was very excited to be going to South Dakota in late January, they thought I had lost my mind. It's a tribute to the persuasive powers of Professor Day that it never occurred to me *not* to come after he and I began speaking about this event. I am also very grateful for the very generous hospitality that the Law Review has shown me. I can't speak for what the editors have done for Professor Levinson; I can only hope they have been as nice to him as they've been to me. It's a real pleasure to be here.

It's also very exciting for me to be here with Sandy. Part of what makes teaching at the University of Texas so enjoyable is that it's a big institution, large enough for both of us, despite our very different views on many issues. We do agree on some things – but probably not very much that we'll be talking about today. Sandy is one of my most generous colleagues, in terms of both his time and his spirit, even with regard to ideas with which he deeply disagrees. So it's a special pleasure for me to be here with Sandy, to have this public conversation with him.

In these very introductory remarks, I will touch very briefly on three topics. This is meant to be, and will become, a dialogue. Sandy can more than hold his own in any conversation, so I am glad to have a little bit of an edge by leading off. My first topic is the historical context of *South Dakota v. Dole*.<sup>1</sup> Secondly, I want to talk a little bit more about one issue that was discussed very well in the session this morning: the issue of why states are valuable and useful. Usually when I am invited to these conferences it's because I am one of the few academics willing to say in public that I think states are a good thing. Here in South Dakota, however, that doesn't seem to be an especially controversial sentiment, so it's a special pleasure for me to be speaking here. The third issue that I will discuss, which is perhaps also the most interesting issue because of Sandy's presence and, in particular, in light of Sandy's most recent book<sup>2</sup> is this: Were we all to agree, at least in part, on what the problem is, what do we do about it? Sandy has one vision of what we might do, to the extent that we agree about what the problem is, and I have a rather different vision of the most

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<sup>†</sup> The *South Dakota Law Review* would like to thank Professor David Day for his invaluable support and assistance in organizing this symposium event. We are also very grateful for the support of Dean Barry Vickrey and the Law School Foundation in sponsoring this event. This is an edited transcript of remarks presented at the University of South Dakota School of Law on January 26, 2007.

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1. 483 U.S. 203 (1987).

2. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (Oxford University Press 2006).

attractive solution.

So without further ado, let's begin. Today I think it's fair to say that, even outside of South Dakota, the case of *South Dakota v. Dole* is viewed both as an important contribution to American constitutional law and an important part of the legacy of the late Chief Justice Rehnquist. But when the case came before the Court in 1987, notwithstanding the excitement here in South Dakota that we heard about this morning regarding how the case might play out, it was far from clear that the case would be an important contribution to American constitutional law. In the world of 1987 in which the "front door" of the commerce power was wide open, a world in which there were essentially no judicially recognized limitations on that congressional power, there was little reason to be concerned with whether and to what extent the "back door" of the spending power should or could be kept closed.<sup>3</sup> Indeed, it has only been since the 1995 decision in *Lopez*<sup>4</sup> and, before that, *New York*,<sup>5</sup> in which we began to see the Supreme Court paying somewhat more attention to enforcing constraints on the federal commerce power. Thus, it has been only in the last decade or so that the spending power has become important again. And that was when I first entered this particular scholarly conversation.<sup>6</sup>

Let me briefly summarize again *Dole*'s four-pronged test, which we discussed at greater length this morning. The bottom line is well known of course: The Supreme Court upheld the federal statute which conditioned South Dakota's (and every other state's) receipt of certain federal highway funds on the state having a minimum state-wide drinking age of twenty-one. At that time, South Dakota permitted persons as young as nineteen to purchase certain alcoholic beverages,<sup>7</sup> and challenged the constitutionality of the condition. The *Dole* Court found it unnecessary to rule on the Twenty-First Amendment question seemingly posed by the case concerning the nature and extent of state powers to regulate liquor.<sup>8</sup> The Court stated that, however it might ultimately be inclined to rule on the Twenty-First Amendment question, because Congress was acting under its spending power, the challenged legislation was "within constitutional bounds even if Congress may not regulate drinking ages directly."<sup>9</sup> Because South Dakota and every other state has the choice whether or not to accept the congressional bargain, the Court reasoned that the "Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."<sup>10</sup>

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3. This is Professor Albert Rosenthal's wonderful metaphor. See Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987).

4. *United States v. Lopez*, 514 U.S. 549 (1995).

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

6. See Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995).

7. *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

8. *Id.* at 206.

9. *Id.*

10. *Id.* at 210.

The Court went on to hold that the congressional spending power “of course” was not unlimited,<sup>11</sup> and Chief Justice Rehnquist, writing for the majority, set out four restrictions on the exercise of that power. The first restriction was that the exercise of the spending power must be consistent with “the general welfare.”<sup>12</sup> And, as was rightly noted this morning, virtually anything Congress does is, by definition, considered by the Court to be “in the general welfare.”<sup>13</sup> Second, the federal statute must state unambiguously what the terms of Congress’ deal with the state are: The states must be able “to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>14</sup>

Third, the Court imposed a relatedness requirement, a germaneness test, which asks if the funding condition is related “to the federal interest in particular national projects or programs.”<sup>15</sup> Justice Sandra Day O’Connor in her *Dole* dissent was quite concerned that this prong of the majority’s test might not have been met under the facts of the particular case.<sup>16</sup> Fourth, the Court concluded that “other constitutional provisions may provide an independent [constitutional] bar to the conditional grant of federal funds.”<sup>17</sup> And, as we discussed this morning, no one ever expects that prong of the test to play much of a role.

There was also a fourth-and-one-half or fifth prong to the Court’s test, which concerns the possibility of the funding condition in some circumstances being “coercive.”<sup>18</sup> This restriction could come into play, according to the Court, if some sufficiently large, but unspecified, amount of money were at stake. The Court concluded that the threatened loss to states of five percent of their otherwise obtainable allotment of certain federal highway funds, which was the amount at issue in *Dole*, did not rise to the level of coercion, but did not specify what percentage of these or any other funds might pass that threshold.<sup>19</sup> Those were the prongs of the test set forth in *Dole*.

Since that 1987 decision, the Court has never wavered in its apparent commitment to the doctrinal test set out there. Given the longevity of the test and the important role it has come to play, one might imagine that a great deal of thought and care went into its crafting. In fact, however, a review of the historical record suggests that Chief Justice Rehnquist crafted the test seemingly casually, and largely tracked the Eighth Circuit’s opinion in the case.<sup>20</sup> Even

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11. *Id.* at 207.

12. *Id.*

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

14. *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

15. *Id.*

16. *Id.* at 213-14 (O’Connor, J., dissenting) (“In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.”).

17. *Id.* at 208 (majority opinion).

18. *Id.* at 211 (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

19. *Id.*

20. *South Dakota v. Dole*, 791 F.2d 628 (8th Cir. 1986).

more surprising, at least in hindsight, is a fact I was able to glean from the late Justice Blackman's papers, which were only recently made available to the public. Chief Justice Rehnquist did not consider the case to be an important one when it came before the Court. He didn't consider it important as a matter of doctrine. He didn't consider it important in any particular respect.

The papers of Justice Blackman include his handwritten notes of the Court's internal conference on the case that was held three days after the oral argument. Justice Blackman's notes on the Court conference indicated that Rehnquist said at the conference that he would vote to uphold the challenged legislation. The conference vote, by the way, as it was reported in Blackman's notes, was the same as the vote in the final opinion. It was 7 to 2, with Justices O'Connor and Brennan being the two dissenters. Justice Blackman's notes indicate that Chief Justice Rehnquist said the following about the *Dole* case during the conference: "Avoid metaphysical abstractions. US grants can be restricted. Not much more here and Congress can do this."<sup>21</sup>

That was apparently what Rehnquist thought. Thus, I think it's fair to say that were he alive today he would be more than a little amused that we are all gathered here today to discuss this opinion, and that the legal world in general considers this case to be as important as it does. Chief Justice Rehnquist's opinion did differ from the Eighth Circuit's opinion in two ways that, in hindsight, are very predictable I think. One, which we talked about this morning, was the "unambiguous condition" prong of the test, the "clear statement" prong.<sup>22</sup> That requirement was nowhere mentioned in the Eighth Circuit's opinion, and was one of Rehnquist's genuine contributions to the *Dole* decision. It's not especially surprising that he wanted to include that provision, since in a 1981 decision, *Pennhurst v. Halderman*, he had put forth for the first time the idea of viewing conditional spending as a contract.<sup>23</sup> As you all know from contract law, the parties to a contract have to understand clearly what the material terms of the contractual bargain are for it to be enforceable. So having come up with that conditional-spending-as-contract analogy in 1981 he sought to cite himself, much as an academic might, in his later *Dole* opinion.

Secondly, keeping in mind Rehnquist's views in another case that we heard discussed this morning, the *Garcia* case,<sup>24</sup> there was a part of the Eighth Circuit's decision that presented a vision of federalism that predictably wasn't especially attractive to him. In *Dole*, Rehnquist declined to subscribe to the Eighth Circuit's vision, with its affirmation of the *Garcia* majority's claim that "[t]he [federal] political process ensures that laws that unduly burden the states will not be promulgated."<sup>25</sup> Now with all that having been said about the historical context of this decision, initially the most surprising thing for me was

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21. Lynn A. Baker, *Federalism and the Spending Power from Dole to Birmingham Board of Education*, in THE REHNQUIST LEGACY 205, 208-09 (C. Bradley, ed. 2006) [hereinafter *The Spending Power*].

22. *Dole*, 483 U.S. at 207. See also Baker, *The Spending Power*, *supra* note 21, at 209-10.

23. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981).

24. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

25. *Dole*, 791 F.2d at 634 (quoting *Garcia*, 469 U.S. at 556). See also Baker, *The Spending Power*, *supra* note 21, at 211.

learning that someone as seemingly interested in states and in state autonomy as Chief Justice Rehnquist nonetheless viewed the *Dole* case from the beginning as an easy case, indeed a “throw-away.”

What is so important to me about states, and important to many of you here, I know, is the opportunity for diversity that they provide. This is the “laboratories of experimentation” idea that was discussed this morning. The problem for me – and here’s where the South Dakota folks are going to get off the bandwagon, I predict – is that our federal legislature is organized so that small-population states are over-represented in the Senate.<sup>26</sup> There is a great benefit to states such as South Dakota in how the money and other good things that come from the federal government will be allocated to the states. By virtue of the over-representation in the Senate of small population states such as South Dakota, one would expect there to be – and there is in fact substantial empirical data to support this<sup>27</sup> – redistribution of all sorts, financial and otherwise, in favor of small states like the one we are in now, and away from large states like Texas.

And, from my perspective, this is a problem, one that I’ve written about extensively.<sup>28</sup> It’s not that I think South Dakota folks aren’t lovely people and shouldn’t get more than their fair share of the federal fisc. My primary concern, rather, is with the potential to oppress. A majority of states can harness the federal lawmaking power to oppress a minority of the states. And that is what to me is so troubling about the failure of the Courts to enforce limitations on federal power. The political safeguards argument and many of the other arguments that “there just isn’t anything to worry about because the states can protect themselves perfectly well in the federal political process” all are premised on the view that the problem is “the” federal government oppressing “the” states. And from my perspective that’s not the problem. The problem is the opportunity for a majority of states to oppress a minority of states – and the federal government is the mechanism by which that will transpire.<sup>29</sup>

So what do we do about this? What really, as a practical matter, can we do? And despite the proclaimed optimism of some of our panelists this morning, I confess that I don’t share their optimism that we’re going to see much change as a doctrinal matter in this area. I don’t envision the Supreme Court coming forward and saying, as they have from time to time, historically, we have thought about it, and we now think that we got it all wrong in *Dole*, and thank goodness we finally came to our senses.

That having been said, the issue of the spending power is a particularly

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26. See generally Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997).

27. *Id.* at 39-42. See also Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195 (2001); Lynn A. Baker, *Federalism and Redistribution: Lessons from the U.S. Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE U.K. 173 (J. Fedtke & B. Markesinis eds., 2006).

28. See, e.g., *supra* notes 26-27.

29. See, e.g., Baker, *supra* note 6. See also Baker, *The Spending Power*, *supra* note 21; Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001).

problematic one because of the allocation of power in the Senate. And here's what I mean. Based on the 2000 census, there are some thirty-three states that are over-represented in the Senate,<sup>30</sup> which is to say that these states have disproportionately great representation in the Senate, and therefore also in Congress, given their population. That means that in some respects, and to differing degrees perhaps, those states all can be predicted to like the current arrangement because it results in redistribution systematically over time in their favor. I was told by Professor Day at dinner last night that for South Dakota it's \$3 into the federal treasury and \$5 out. And a lot of people would think that's a pretty good deal. In Texas, we are on the other end of that: more money goes out than comes in.<sup>31</sup> And we don't find that so attractive.

So what are the options if we are going to try to fix this, and what if it really is the allocation of representation in the Senate that's the root of the problem? One only has a couple of possible options. One route would be to say, "Now that we have all read Professor Baker and Professor Levinson's scholarship, and can see that this is a problem, let's just all gather together, celebrate the fact that we can amend the Constitution, and fix this problem." The problem with this potential solution is that it takes a super-majority of the states – two different super-majorities, in fact – to amend the U.S. Constitution.<sup>32</sup> And we can safely predict, I think, that South Dakota is not going to be the first in line to sign on to something that's going to give South Dakota less money, however upset many of us gathered here today might be about the decision in *South Dakota v. Dole*. So I think it's very easy to predict that we won't ever be amending the Constitution to fix the problem.

That leaves only one other option from my perspective, which is that we really do have to do something doctrinally.<sup>33</sup> And, consistent with Tony's question to the panel this morning, maybe we ultimately do need to think harder and better about how to get the Court to do something, to put some bite in the *Dole* test. And there is no reason to believe, I think, that in the very short term that anything productive will happen on that front. But I think it's also the case that one can predict with even greater certainty that it is even less realistic to expect any changes in the very well-entrenched structure of representation in the Senate to be forthcoming, either through the amendment process or through the constitutional convention process.

With those few remarks, I'll now turn things over to Sandy.

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30. This includes all states with eight or fewer representatives in the House, and is an increase of one state (Wisconsin) over the 1990 Census. See <http://www.census.gov/population/www/censusdata/apportionment.html>.

31. See Baker, *The Spending Power*, *supra* note 21, at 211 table 2.

32. U.S. CONST. art. V. An amendment must be proposed by two-thirds of both houses of Congress, or by a convention called by two-thirds of the states. In either case, the proposed amendment must be ratified by the legislatures of, or conventions in, three-fourths of the states.

33. Baker, *The Spending Power*, *supra* note 21; Lynn A. Baker, *Solving the Problem of the Modern Spending Power* (unpublished manuscript on file with author).

PROFESSOR SANFORD LEVINSON<sup>†††</sup>

First, I want to express my gratitude for this opportunity to visit Vermillion and participate in this splendid event. As Lynn noted, I in fact had turned down an earlier invitation to go to upstate Michigan for a conference that's being held even as we speak, in part, because late January in upstate Michigan was a bit daunting. There are also responsibilities at UT that led me to believe that perhaps I should just remain there. Like Lynn, though, I do think *Dole* is an extremely fascinating case, and David Day proved to be a compelling recruiter, even for a January conference. But I also have to confess that I was especially eager to visit South Dakota for my very first time, not least because South Dakota represents the fiftieth state that I have now been to. So I do feel a bit like the fabled member of the postal service: neither rain, nor sleet, nor snow would dissuade me from this opportunity to come to South Dakota. And I am truly, truly delighted to be here.

The first time that Professor Day and I actually had contact with one another was when he was kind enough to write a note expressing his appreciation for an article that I had written in the *Fordham Law Review*<sup>34</sup> attacking the then-recent decision by the Supreme Court in which a unanimous court, treating the issue as close to a toss-off, held that Massachusetts was without the power to pass a law directing that public funds not be used to enter into contracts with companies that did business in Burma. This was somewhat similar to the much better known campaign of economic sanctions in South Africa in the 1980s. And the Supreme Court, through Justice Souter, basically said that the national government – or actually, if one really understands what the case is about, the Executive Branch, inasmuch as Congress had never indicated in any specific way that states couldn't do this, but the President had issued a basically boilerplate declaration that the highest interests of American national security precluded states from engaging in this kind of independent activity – preempted any such policy by Massachusetts. I wrote this piece vigorously attacking the decision. It seemed to me that there is good reason to support the right of a state to express its own view of politics unless Congress – and not merely the President – does declare that there is indeed an overriding national interest that states not go out on some sort of independent policy. I thought it was particularly ironic that the *Crosby* case came out within three weeks of the *Dale* case,<sup>35</sup> involving the Boy Scouts of America. A bitterly-divided 5-4 Court held that the Boy Scouts had an expressive interest in prohibiting participation by gays, and that this overrode an attempt by the State of New Jersey to regulate the Scouts under its state anti-discrimination law. State “sovereignty,” a term the contemporary Court tosses around with some abandon, did not reach to the Boy Scouts.

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<sup>34</sup>. Sanford Levinson, *Compelling Collaboration With Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 *FORDHAM L. REV.* 2189 (2001).

<sup>35</sup>. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

I found it rather strange, frankly, that the Court reached out to defend the interests of the Boy Scouts against a determination by New Jersey that its commitment to anti-discrimination required limiting the Scouts' autonomy. I realize that people's opinions can differ on this case; one can certainly make a serious argument about the importance of private organizations. But if one does believe in state's rights, state's powers and the like, one could say that New Jersey should have had the right to decide for itself how it wanted to apply its anti-discrimination law within the state. Yet the majority of the Court said no. Most commentators analyzed the case in terms of the conservative majority prevailing over the four "liberals" (or, as I would prefer to call them, "moderates").

Yet within the month, the entire Court said that Massachusetts had no right to engage in meaningful expression about whether it wanted to collaborate with what it regarded as a serious evil. Burma's is a very oppressive government that has no respect for human rights. I believe that Massachusetts' interests were at least as strong as those of the Boy Scouts in expressing a desire not to be associated with what it viewed as morally evil. As a matter of fact, I would not defend Massachusetts had Congress determined that we needed to speak with one, softer, voice with regard to Burma, but I was certainly not taken with the view that the President alone, simply by signing a boilerplate declaration, could in effect veto the state policy.

I tell the story not only to say how it is that Professor Day and I originally got in touch, but also to indicate that I am not so hostile to federalism as my esteemed colleague and friend Lynn Baker might think I am. There are indeed values to federalism. One of them is the promotion of certain kinds of diversity, for good or for ill, since we have to take into account the extent to which such diversity includes such subjects as legalized prostitution or gambling, and different policies on drugs and alcohol.

I note for the record that I personally would tolerate diversity with regard to polygamy or monogamy. Excepting American slaves and Native Americans, perhaps the most systematic coercion in nineteenth century America involves the bitter campaign against Mormons, particularly in Utah. After all, Utah was denied admission to the union five separate times because it – or, more to the point, its Mormon majority – allowed polygamy. It was a condition of admission that Utah write a ban on polygamy into its state constitution, and in 1890, on the sixth try, Utah entered. I think it's a very interesting theoretical question as to whether Utah has any obligation to adhere to this promise made under duress. But again, this is simply pointing out that I think there is some value to diversity. I also think there is some value to states as laboratories of experimentation. I also think that there is value in what Europeans often call subsidiarity – that is, a decision should be made locally if it can. This is especially true in a country as large as we are. The Constitution says that we are committed to a republican form of government.<sup>36</sup> There is a very, very serious question, frankly, as to whether one can have a republican form of government

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36. See U.S. CONST. art. IV, § 4.



in a country as large as we are. To be sure, James Madison in the 14th Federalist attacked the anti-federalist opponents to the Constitution and their argument that it would be impossible to preserve the values of civil republicanism if you establish this new national government. He countered with the virtues of the so-called extended republic, not least because he believed that what he called self-interested “factions” would be more prone to succeed in smaller states than in the country at large. Most of us may well believe he was correct, but it is essential to recognize that he was writing about a country that had about three million people, extending North-South from Maine down to Georgia (not including Florida) and westward only to the east bank of the Mississippi River. To put it mildly, he was not referring to a country that has 300 million people, that extends from Maine to Florida, and under some definitions to Puerto Rico, and under any definition, to Hawaii in the mid-Pacific.

I hope that I have been persuasive in presenting myself as someone who recognizes the values associated with federalism quite seriously. As some of you might predict, though, there is a “but” coming up! So let me turn to what I also believe are some of the serious problems with federalism. I think that it’s possible that Lynn and I disagree on the frequency of serious problems and the ability of national legislation to provide solutions. Let me give you an example of such a serious problem that has engaged the interest of many commentators on the (ir)rationality of the upcoming process by which we will select our presidential candidates for the 2008 election. It involves what might be called the “rational selfishness” of a number of states, in this instance such large states as California, New Jersey, and New York, all of which want to break what I happen to agree is the indefensible role that is played by two particular small states – Iowa and New Hampshire – with regard to the presidential nomination process. California and these other states say, altogether accurately, that very often the nominations are in fact decided by the time these states get around to their primaries, which are therefore reduced to an entirely inconsequential role. It is the momentum coming out of Iowa and then the bigger momentum coming out of New Hampshire and then South Carolina that has determined recent nominees, and not the choices made by large-state primary voters.

As much as I sympathize with the attempt to stymie the strangleholds that Iowa and New Hampshire place on the presidential nomination process, I am totally unsympathetic to what the large states have done in response. They have all moved their primaries up to February, which means that we will, at that time, have a “front-loaded” quasi-national primary. This is a terrible development for American politics. More than ever, it will be the capacity to raise extraordinary amounts of money, coupled with name recognition, that will determine who gets the nominations. Far better would be a rather stately process of presidential primaries where the candidates might test themselves over many months in different areas of the country. For me this is exhibit A for what’s wrong with federalism, which is the potential for rationally-behaving states, in the absence of a central coordinating body, to generate absolutely dysfunctional public policy. None of the individual states – Iowa, New Hampshire, California, New York, etc. – is behaving irrationally, which is part of the problem. If they were truly

behaving irrationally, relative to their own interests, then one might well persuade them to change. But one has to plead with them to sacrifice their individual state interest on behalf of the “national interest,” and why would any given state wish to do that? The greatest defense for a strong national government, and the greatest defense of national power, is precisely the need for the national government to play an essential role as a coordinator. Sometimes this means the use of coercion; other times, it may mean that the national government offers “inducements” in the form of federal funds to those states that will adopt nationally attractive policies. Usually the outcome will be the same.

I think, perhaps more than Lynn does, that it may indeed be appropriate at times for the majority of states to gang up on the recalcitrant minority of states whose insistence on following their own policies ends up generating what economists might call serious “negative externalities” that harm the nation at large. You might compare this to the need for eminent domain, which is another very controversial area these days, but nobody would truly advocate getting rid of the power of eminent domain entirely. It’s an obvious truth, though, that eminent domain is most important where you have holdouts, and the way you cure the holdout problem is by coercing them to sell their farm. It may be regrettable from one perspective, but it’s the only way that the airport is going to get built, the convention centers can get built, or whatever, unless you simply say that we should allow the holdout to extract extraordinary rents that go beyond any plausible theory of market value.

So the same notion that defends eminent domain – which is something that I know Lynn teaches in local government law – does I think defend, let us say, states ganging up on my home state of North Carolina, and other holdouts with regard to child labor. I often accuse Lynn of, in effect, having to be in favor of the majority of *Hammer v. Dagenhart*,<sup>37</sup> which invalidated a congressional child labor act as beyond Congress’ power under the Commerce Clause. It is a very interesting case, and I teach Justice Day’s majority opinion with great respect, not least because he recognizes that there is something “unfair” about the ability of “holdout” states to discourage other states from taking progressive steps, because of the holdouts’ ability to take competitive advantage of the fact that their labor costs will be lower if children can work or if there are no minimum wage laws. The iron fist of the national government is necessary in order to break the presumptively unfair power of the holdouts, as the Supreme Court finally held to be the case in the aftermath of the New Deal.<sup>38</sup>

So whether the example be child labor, presidential primary dates, or, getting to the heart of this conference, drinking ages, federalism may lead to distinctly unfortunate policy outcomes from the perspective of achieving defensible goals of national policy. I think it is worth noting that *Dole* would have been an absolutely easy case, had Congress simply passed legislation under the Commerce Clause mandating a uniform drinking age, and were it not for the somewhat arbitrary existence of the Twenty-First Amendment in the

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37. 247 U.S. 251 (1918).

38. See, e.g., *Helvering v. Davis*, 301 U.S. 619 (1937).

Constitution. When the United States repealed the Eighteenth Amendment, which established national prohibition of alcohol, it seemingly left to states an absolute power to decide for themselves what they wanted their particular policies regarding alcohol to be. That is, regulation of alcohol might indeed be one of the “reserved powers” of states protected by the Tenth Amendment against national regulatory legislation, including that passed under the Commerce Clause.

There is, of course, an alternative to direct regulation, which is for the national government to bargain with states to adopt nationally-desired policies in return for some benefit to be delivered by the national government, usually federal funds. This brings me to a couple of points about *Dole* and my own preferred approach to analyzing the general issue. Lynn and I are in substantial agreement on at least some aspects of this approach. First, one must recognize the fact that the Constitution provides no real safeguards of federalism per se. Whatever one thinks of the Constitution, it does not in the year 2007 operate as a meaningful defender of federalism interests. Lynn and I disagree about how much judges ought to step in and make up a number of doctrines designed to safeguard federalism, but the central point is that Lynn (and others) must look to the judiciary precisely because the structures established by the Constitution do precious little to protect federalism. If you want to safeguard federalism, then perhaps you would repeal the Seventeenth Amendment and have senators chosen by state legislators, which would set up an incentive to take seriously the specific sort of state governmental interests that one presumes that state legislators would have. Indeed, if you really want to have structural safeguards for federalism, you might support what the German constitution does. Germany, like the United States, has a bicameral legislature; the popularly-elected Bundestag, and the Bundesrat, which is composed of public officials who are also state governmental officials. It's as if the South Dakota governor, lieutenant governor, the commissioner of education, or whoever, went off to Washington but returned to run the state institutions that constituted their primary political identity. Members of neither the House of Representatives nor the Senate are state officials, of course. They are all popularly elected, and their primary loyalties, understandably enough, are to their constituents, not to state political institutions. As it happens, both Lynn and I dislike the present allocation of power in the Senate, which gives extraordinary, and we think unjustified, power to senators from small states (like South Dakota). But this has nothing to do with protecting anything particularly connected with federalism as such. Instead, the present Senate operates as nothing more than an affirmative action program for the citizens of small states, who are only randomly interested in the intricacies of protecting federalism. Perhaps we'll have an occasion to talk more this afternoon about whether reform of the Senate would be desirable, but the main thing I want to do is to posit, as a political scientist, that if you're serious about political safeguards of federalism, one must think of reforming the present Constitution, given the basic lack of structural safeguards of federalism beyond the role played by state legislatures, generally speaking, in deciding whether to ratify constitutional amendments proposed by Congress.

Some of you might be tempted to say that Article I, section 8 could serve as a safeguard of federalism, inasmuch as it supports the notion that the national government is a “limited government of assigned powers,” to use a standard mantra of our constitutional rhetoric. But almost all of us agree, as a descriptive even if not a normative matter, that Article I, section 8, has been little more than what James Madison might have called a “parchment barrier” to the assertion of national power. In the aftermath of the New Deal, the Supreme Court endorsed hosts of federal laws that basically swept aside any notion of significant limits to federal power. And there is no reason to think, even after two full terms of a Court overwhelmingly appointed by Presidents Reagan, George H.W. Bush, and George W. Bush, that we will see a significant reinvigoration of constitutional protections for state autonomy. What we are seeing is what Dean Edward Rubin has aptly termed “puppy federalism,” which might be cute, but is ultimately unserious.<sup>39</sup> We have seen, for example, the invalidation of what everybody agrees is quite pointless legislation, such as the Gun-Free School Zones Act of 1990 struck down in *Lopez*.<sup>40</sup> I’ve never run into anybody who believed that the Act was of the slightest importance; it was a piece of grandstanding legislation supported by legislators who wanted to appear tough on crime without actually doing anything relevant. Although as a doctrinal lawyer I would have signed Justice Breyer’s dissent, as a citizen I really don’t think that it matters one whit that the Court overruled it. In fact, I can understand why the Court felt really angry at having the federal code being cluttered up with a lot of such grandstanding legislation. The Court was trying to hit Congress over the head with a two-by-four. But I think we now know, twelve years later, that it was largely an expressive decision, as is often the case with slapping a rambunctious puppy in order to get his attention. But we now know that the Court, however “conservative” it may be said to be, is unlikely to invalidate anything that is genuinely thought to be significant legislation supported by national political elites. The best (or, for some, worst) example is surely *Raich v. Gonzales*,<sup>41</sup> in which even Justice Scalia agreed that Congress could override California’s policy of tolerating so-called “medical marijuana.” Thus a terminally ill and suffering plaintiff was told that she could not have access to the drug because national policy, sensibly or not, forbids it.

As I conclude my remarks, I do want to discuss briefly one of the most peculiar aspects of *Dole*, which is the quite different approaches of Chief Justice Rehnquist and Justice William Brennan to the case. There is, of course, nothing unusual about these two justices having disagreed. They usually did in non-unanimous decisions of the Supreme Court. What is surprising is that it was the ostensibly-conservative Chief Justice who gives away the store with regard to federalism and states’ rights, by viewing the case through the lens of ordinary bargaining between the national government and states, in which South Dakota could of course be induced to waive its right to set a particular drinking age

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39. Edward Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001).

40. *United States v. Lopez*, 514 U.S. 549 (1995).

41. 545 U.S. 1 (2005).

should it wish to receive the federal highway funds at issue. And, at the very same time you have the Justice who served as the symbol of Great Society liberalism and nationalism writing an opinion saying that what the United States was doing was unconstitutional and that South Dakota indeed had a right to resist federal pressure and collect the funds at the same time. How does one explain this?

For me, the best explanation is that the late Chief Justice Rehnquist believed that those who paid the piper could always call the tune. It didn't matter whether the piper was a non-profit radio station<sup>42</sup> or a State within the Union. Whoever offered benefits could condition receipt on whatever conditions the offeror wished. He always phrased it – I think quite unhelpfully – as the offer of a “subsidy” (instead of the imposition of a “penalty”). So whenever government, whether at the state or national level, offers a goody, you basically have to take it on the terms offered. *Dole* is simply one in a whole string of cases in which Rehnquist proved unsympathetic to recipients of state or federal funds who claimed that they were being illegitimately deprived of their ability to enjoy their constitutional rights because of the terms of the deal being offered by the grantor government. For political liberals, the most important examples involve plaintiffs asserting their First Amendment rights, based either on standard-form freedom of speech arguments or freedom of religious liberty claims, none of whom received succor from Rehnquist.<sup>43</sup> Sometimes he carried the majority of the Court with him, sometimes he was in dissent, even alone; what is consistent is his hostility to plaintiffs' arguments that they can take the money without complying with the conditions government wishes to impose. South Dakota, therefore, was treated no worse, in Rehnquist's universe, than political dissenters or persons whose religious commitments were at odds with the desires of the state. No one had to take the state's money, and rights – whether predicated on the First Amendment or the Twenty-First Amendment – could always be waived. It is worth mentioning plea bargaining in this context, which depends on the ostensibly “voluntary” waiver of one's Sixth Amendment right to a trial. We as a society simply ignore the almost-inevitable inequality of bargaining resources between the state and the criminal defendant, not least because our criminal-justice system would collapse without plea bargaining. The point is that Rehnquist always believed that the state should be able to buy up constitutional rights, whether by offering money or a reduced sentence. He was more than happy to sacrifice South Dakota's interests, assuming that he perceived that it even had legitimate interests.

So now let's look at William Brennan. Perhaps he took the Twenty-First Amendment argument seriously; he said he did, and I can't read into his mind. That being said, I must say that the first free association that comes when one thinks of Justice Brennan is not of a person who is really committed to robust

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42. *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

43. *See, e.g., Locke v. Davey*, 540 U.S. 712 (2004); *League of Women Voters*, 468 U.S. at 402 (Rehnquist, J., dissenting); *Rust v. Sullivan*, 500 U.S. 179 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting).

federalism. After all, he had written an “end-of-civilization-as-we-know-it” dissent, against Rehnquist’s majority opinion, in *National League of Cities v. Usery*.<sup>44</sup> That was the first case in almost forty years to reject an act passed by Congress based on the Commerce Clause, and Rehnquist, speaking for the Court, based his invalidation on the act’s conflict with the special rights of “states qua states” to be free of certain kinds of federal regulation. So, frankly, I believe that it is really wildly unlikely that Brennan’s heart beat faster when reading the federalism and Twenty-First Amendment-based claims of South Dakota. Still, he cast his vote on behalf of South Dakota. Why? The answer, I think, is that Brennan was as consistently worried about the power of governments, both state and national, to use conditional funding – an essential reality of the contemporary “tax and spend” state – to buy up what would otherwise be protected constitutional rights. With regard to the cases cited in footnote forty-three, there is not a single instance in which Rehnquist and Brennan agreed on what constituted a proper analysis. So I think Brennan was therefore willing to pay the price for upholding South Dakota’s claim in this instance because, frankly, it gave more credibility to the times when he wanted to protect the rights of more standard-form plaintiffs in conditional funding cases. Justice Brennan, for all of his support of an empowered national government or empowered state legislatures, was also in fact very sensitive to the possibility of the abuse of power. I don’t think that “abuse of power” was a notion that very often came to Justice Rehnquist’s mind, especially where dispensing federal funds was concerned. So that’s my explanation for what might be the otherwise bizarre lineup of votes in *Dole*.

I want to conclude with a brief discussion of Lenin’s classic question, “What is to be done,” if one wishes genuinely to protect the decisional autonomy of state governments? One answer is offered by Lynn Baker, which is to invigorate the doctrines enforced by the Supreme Court. I think this is a non-starter for two quite different reasons. The first is suggested by the insights of political science. As a sometime political scientist, I see no reason to believe that presidents will nominate or the Congress will be quick to confirm members of the Supreme Court who announce in advance that they are going to try to clip the wings of the national government and to make it substantially harder for Representatives and Senators to buy support from their constituents by passing what prospective voters believe to be good legislation. I just don’t see this in the cards, simply in terms of how political incentives work. As political conservatives upset about the No Child Left Behind legislation recognize, the Bush Administration has been more than happy to use national power when it believes it necessary to do so to achieve its political agendas.

My second criticism is more “lawyerly”: I see no reason to believe that the Court could in fact come up with a truly coherent doctrine as to when the state can buy up constitutional rights through waiver by accepting deals, and when the Constitution forbids this. Some of the finest minds in the legal academy have attempted to solve the puzzle presented by conditional funding and the possible

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44. 426 U.S. 833 (1976).

presence of “unconstitutional conditions,” but, to put it mildly, none has been acknowledged by his or her colleagues as having truly done so. For all sorts of reasons, we have no reason at all to believe that the persons appointed to the Supreme Court will have any greater success than have the academic all-stars who have tried so hard to achieve some kind of doctrinal closure. Doctrinal incoherence is, I believe, inevitable.

So if one does want to try to safeguard federalism more than it is protected today, one has to think in terms of constitutional design, not judicial doctrine. This is where the Germany example is especially interesting, or perhaps we should talk and put on the table the question whether the Seventeenth Amendment was such a good idea after all. We should recognize that the current Constitution, for better or worse, presents no real institutional support for federalism. I have recently written a book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*,<sup>45</sup> which concludes by calling for a new constitutional convention to address the many deficiencies I think have been identified in the current Constitution. If such a convention ever occurred, we might well want to have a national discussion about the extent to which we truly wish to protect a robust notion of federalism defined as protected realms of state autonomy.

I want to conclude, though, as I began, with an expression of my utter gratitude in every way for the opportunity you have given me to come to South Dakota to talk about *South Dakota v. Dole*. I look forward to what Lynn has to say and to the ensuing general discussion.

#### PROFESSOR LYNN BAKER

I will comment very briefly on a couple of points Sandy made. As always, Sandy was very persuasive and eloquent. On the collective action point, I agree that there are many, many instances in which we need a higher level of government to reach down, in effect, and coordinate activity by the lower levels of government. I am not opposed to federal environmental regulation, for example. I surely understand the need for eminent domain in order to put together a large parcel of land for certain public uses, and so on.

A critical dividing point for me, what distinguishes the situations in which I am really quite comfortable with the use of federal power versus the situations in which I think it's very important to preserve maximum diversity across the states, is the presence of an externality. Sandy mentioned holdouts. Well, there are potential holdouts in lots of situations. Consider the Mormons in Utah. I think they ought to be allowed to hold out. They are a more unusual case perhaps because we might well be able to find forty-nine states willing to say as a constitutional matter that they want to take away Utah's ability to hold out in a given situation. And the “homogenization” of an outlier state when there exists that degree of consensus in the rest of the country is consistent with our

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45. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (Oxford University Press 2006).

constitutional structure and the requirements of the federal amendment process.

The concern for me is that very often there is a tendency of people in, for example, states where they don't necessarily think that Vermont permitting same sex civil unions is such a great idea, to want to "fix" that "problem." But these are people in states far away who have somehow decided it's their obligation, far away from Vermont, to fix that Vermont "problem." And I think the issue there becomes one of classical liberal theory: At what point is someone else's business really their business? At what point does what goes on in another state impinge on your welfare in a way that is problematic and that you should have some remedy against? My guess is that on a lot of these individual examples, Sandy and I will agree. And I don't want there to be a misperception that I am not aware of, or don't care about, the obvious instances in which we need some centralized coordination among lower levels of government.

My second point, quickly, is this: Sandy mentioned very rightly that Chief Justice Rehnquist had a long-standing fascination with an underlying theme – to call it a doctrine isn't really accurate. The idea that "the greater power includes the lesser power" was something that Rehnquist found incredibly attractive.<sup>46</sup> He saw it everywhere and, as Sandy correctly noted, if that idea was present, that was what was going to decide the case for Rehnquist.

On this issue, I have a relevant anecdote. When I taught for some years at the University of Arizona which, by the way, shares your good taste in school colors, I had the opportunity to talk with Chief Justice Rehnquist briefly about this. He used to spend part of each winter teaching at the University of Arizona, and he actually held office hours. Students and faculty could go into his office and try to extract from him exciting information about past cases, future cases, and the rest. I had the audacity one day, after I had tenure and after the decision in *Lopez* had come down, to go and see him.

My part of the conversation went something like this: Chief, I am sure you noticed yourself that there's an interesting contrast between your opinion for the majority in *Lopez* and your opinion for the majority in *Dole*. In *Lopez* it looks like you care a lot about protecting the states, but in *Dole* it's not so clear that you care as much about the autonomy of the states. The idea that "the greater power includes the lesser power" seems to be a lot of what might be causing you to think differently about these two doctrines.

I wanted to ask him about this directly, but I didn't want to seem ignorant about the obvious limitations on what a sitting Justice can discuss. I wasn't expecting him to tell me very much. And he sat there and nodded sagely, and he said, essentially, "Well, yes, the greater power includes the second power. There is a certain logic to that." And then there was silence. And I felt rather like I had just had a visit with the Zen master. I had climbed the mountain and was now listening to the sound of one hand clapping. And I thanked him and left. But I think that for Rehnquist the notion that "the greater power includes the lesser power" was a deeply compelling argument in a wide range of circumstances, for reasons that to this day I don't really understand.

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46. Baker, *supra* note 6, at 1915 n.13.



There is one final issue that I'd like to discuss, which actually weighs against my own optimism about an invigoration of doctrine in this area being possible, as I set forth in substantial detail in the *Columbia Law Review* article that Professor David Day mentioned earlier.<sup>47</sup> There was a case a few years ago that went up to the United States Supreme Court, *Pierce County v. Guillen*.<sup>48</sup> This case came out of Washington State, and it was the beginning of a thrilling, if brief, period of my life. I got an email one day from a Washington state lawyer asking me if I had seen the decision, and he included a link to the case. The Washington Supreme Court had in fact held – and was the first court ever to do so – that a federal statute exceeded Congress' spending power.<sup>49</sup> And I was ecstatic. I knew the case had to end up in the United States Supreme Court, and I felt as if my entire career had been building to this very moment.

I excitedly persuaded a junior colleague, Mitch Berman, to work with me on an amicus brief in that case.<sup>50</sup> To summarize the case for you very briefly: Like *Dole*, it involved highways and federal highway money, but it did not involve drinking ages. The conditional federal spending in the *Guillen* case attempted to dictate to state courts what the rules of evidence would be for certain state court tort proceedings. Mitch and I worked on the case much of one summer. And we quickly persuaded ourselves that we couldn't lose: After all, what could be more central to state sovereignty than the operation of the state courts? In addition, we thought it was to our advantage that the facts of the case were deeply boring. As Sandy noted earlier, gun free school zones and abused women are issues of some interest to most people. Not a lot of people want to stand up and say, "Well, really, what's important here is an abstract notion of federalism, not abused women, not guns in schools." We thought it was to our advantage that even we sometimes fell asleep reading the statute at issue in *Guillen*. We decided that *Guillen* would certainly be the vehicle for the Court to give the test in *South Dakota v. Dole* some real "bite." Mitch and I were positively giddy with anticipation.

I was invited to the mootings with the lawyer in Seattle who would argue the case before the Court, and this was obviously a very exciting moment in his career. He had been a tort lawyer litigating issues surrounding a traffic accident when he began his work on the *Guillen* case. Then one day he wakes up and he's going to be arguing an important issue of constitutional law in the United States Supreme Court. In my first meeting with him, I presented the theory on which Mitch and I had worked so hard all summer, at no expense to him or his client. And he said essentially this: "Thank you so much for all your help, Professor, but here's my concern. I really think the Court's going to see

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47. See *supra* note 6.

48. 537 U.S. 129 (2003).

49. See *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001). See also Lynn A. Baker, *The Future of Federalism? Pierce County v. Guillen as a Case Study*, 50 N.Y.L. SCH. L. REV. 699, 703 (2005-2006); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 488 (2003).

50. Brief for Lynn A. Baker & Mitchell N. Berman as Amici Curiae Supporting Respondents, *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001) (No. 01-1229), 2002 WL 1964091.

highways and not state courts when they look at this statute. And the minute they see highways they are going to think that highways are an appropriate area of federal concern, and they are going to uphold the statute as a valid exercise of the commerce power.” I patiently tried to explain to him why that simply couldn’t happen. I gave him all the reasons why a Court with five members deeply interested in states’ rights would relish the opportunity to reach the spending power issue. I assured him that the case would be one of enormous import.

Only a few weeks after oral argument, the Court handed down the opinion.<sup>51</sup> A quick decision is always a bad sign if one thinks that a case is both important and controversial. In fact, the decision in *Guillen* was unanimous – but, unfortunately, not in the way that Mitch and I had hoped. Indeed, the decision read pretty much the way that the humble Seattle traffic accident litigator had predicted. In the briefest possible opinion, the Court essentially said, “We see highways. Congress can regulate highways directly under the commerce power. We don’t see any constitutional problem here.”<sup>52</sup>

The reason why I’ve told you this story, apart from warning everyone that you don’t want me to write an amicus brief for you, unless perhaps Sandy is my co-author, is this: In so many ways *Guillen* presented a priceless opportunity for what was then an even better Court for those of us interested to protect state autonomy from federal encroachment via the spending power. O’Connor was still on that Court. Rehnquist was still on that Court. Yet even that Court apparently had no interest in seizing a very rare opportunity to reexamine its doctrine surrounding the spending power. So, as a practical matter, I am not at all optimistic that we will see any change to existing Spending Clause doctrine, including the *Dole* test, any time soon.

What about Sandy’s last point, that a coherent doctrine with more bite may not even be possible in this area? I think there is an unfortunate tendency, from which Sandy may suffer somewhat less than some of his fellow travelers, to look at these cases, as the Supreme Court most famously did in the *Garcia* case, and say, “Oh, wow, it turns out that drawing principled, coherent lines here is really hard. It’s too hard, in fact. We quit. We’re not even going to try any longer.” There seems to be something about states’ rights, as compared to individual rights, that causes us to think that what might otherwise be construed as the Court abnegating its constitutional duty is not especially problematic if the issue is the protection of state autonomy, states’ rights.<sup>53</sup> Perhaps it’s because states’ rights aren’t very photogenic, at least not in the way that many individual rights are. And on top of the rest, there is the deeply tragic issue of slavery that follows

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51. *Guillen* was argued in the U.S. Supreme Court on November 4, 2002, and decided some ten weeks later on January 14, 2003. See Baker, *The Future of Federalism?*, *supra* note 49, at 707 n.30.

52. More specifically, the Court concluded that the challenged statutory provisions “can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress’ Commerce Clause power.” *Guillen*, 537 U.S. at 147.

53. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001).

American federalism everywhere.<sup>54</sup> At virtually every academic conference at which I have spoken about federalism someone asks me some variant of this question: “You’ve said you’re in favor of states’ rights, so I guess you’re in favor of slavery?” Sandy always asks me about child labor instead, which is progress of a sort, I suppose.

I think it’s very important that neither we nor the Court be so quick to give up, just because the job seems difficult. Consider that in the First Amendment context we wouldn’t ever say, “Oh wow, defining ‘speech’ in 2007 is really tough. We give up. There will be no more judicial review under the free speech clause.” Or what about the equal protection clause? Defining the word “equal” is really tough – philosophers have written whole books about that one word. Yet the Court doesn’t say, “This is too hard. We will just not decide cases under the equal protection clause of the Fourteenth Amendment any more. We’ll just declare this whole area to be nonjusticiable.”

In the end, I would simply observe the following: As a practical matter, I am not optimistic that we are going to see much movement by the Court doctrinally, particularly in light of my experience with the *Guillen* case. At the same time, however, I think we need to encourage attempts to craft a spending power doctrine with more bite. In this regard, I was delighted to learn of efforts in precisely this direction by some of your law students.<sup>55</sup> As I’ve explained today and in various articles, I think that the only avenue for meaningful change in this area runs through the Courts. And that, in turn, means that we need to keep before the Court the idea that just because something is difficult doesn’t mean that it isn’t part of the judiciary’s ongoing job under our Constitution.<sup>56</sup>

#### QUESTION AND ANSWER SESSION

QUESTION: I want to go back to what you were discussing earlier with regard to safeguards on this idea of federalism in the Constitution itself, particularly your comments about reversing the Seventeenth Amendment. I am curious if out in the real world outside of the law school, or even in the constitutional law classes, you have ever tried to convince a human being that they shouldn’t have the opportunity to vote for this guy, whether it’s a Senator, or whether we should have the state legislatures picking our electors – and what the result was in that effort.

PROFESSOR SANFORD LEVINSON: The quick answer to your question is no, since I in fact support the Seventeenth Amendment. However, insofar as I have recently become more interested in constitutional design and what I have come to call the “hard-wired structures” of our political system than, relatively speaking, in constitutional doctrine, I can certainly see laying out the argument why a reasonable person could believe that the Seventeenth Amendment was a

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54. See, e.g., Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002).

55. See, e.g., Tonnis H. Venhuizen, Note, *United States v. American Library Association: The Supreme Court Fails to Make the South Dakota v. Dole Standard a Meaningful Limitation on the Congressional Spending Power*, 52 S.D. L. REV. 565 (2007).

56. Some recent justices have needed no persuading on this score. See, e.g., Baker & Young, *supra* note 53, at 94-100.

mistake. I don't – but I would come back to my central point that if you are interested in political safeguards of federalism you should recognize that in some ways the two most important amendments to the Constitution since the Bill of Rights were the Sixteenth and Seventeenth Amendments. The Sixteenth Amendment really creates the modern taxing-and-spending state, for better or for worse, depending on your political views, while the Seventeenth Amendment in some significant sense creates the incentive structure for Senators to join Representatives in being primarily interested in bringing home the bacon in order to secure re-election. Nobody has an incentive to take state autonomy as such particularly seriously, unless it happens to be the case that he or she represents a quite unusual constituency that takes the theoretical issues of federalism with such seriousness that it would sacrifice its own material interests in order to vindicate the commitment to limited government. It may, of course, be the case that constituents take certain substantive issues seriously and that such interests could be translated into a professed commitment to the virtues of federalism. Medical marijuana use is a good example with regard to many political liberals. And, as Lynn suggests, I and some of my friends certainly invoke little-laboratories-of-experimentations talk about the importance of allowing Massachusetts to recognize gay and lesbian marriage. But opportunistic embrace of federalism when it is convenient to attaining one's substantive ends is quite different from a more general commitment to federalism, where one would have to take the quite-often bitter with the only-sometimes sweet. So Lynn is correct in doubting that I have developed a fully-systematic commitment to taking federalism seriously.

Incidentally, with regard to the Seventeenth Amendment, one should note that even the pre-Seventeenth Amendment system didn't work very well to protect federalism as such. By the time the Seventeenth Amendment was proposed and ratified in 1913, most states in fact were engaging in a de facto popular election of the senators.

QUESTION: One place where we've heard about conditional federal spending recently is with Hurricane Katrina. It was reported that the federal funds might possibly be conditional on New Orleans doing certain things, including the rebuilding of certain areas in the city, etc. I don't think that this followed through to the final spending plan to rebuild after Hurricane Katrina – but can you talk about that example and the possible political effects of it.

PROFESSOR SANFORD LEVINSON: I would be very interested in Lynn's response and where we might agree or disagree. First of all, it seems to me we are talking about \$100 billion or whatever it is. Nobody would say just to throw it out the window and let the people who get it spend it however they wish. I *want* conditions. I think that one of the toughest questions about New Orleans is precisely whether it makes sense to rebuild it exactly as it was on a disastrous flood plain; quite frankly, my most conservative curmudgeonly side comes out whenever the Mississippi floods and very often, conservative republican governors from the Midwest ask for federal disaster relief. I tend to see much such relief as a subsidy for people to build homes where the homes probably shouldn't be built. If you're going to build homes in flood plains, buy

private insurance. It's not clear to me that the national government should be in the business, in effect, of subsidizing that.

So this is by way of addressing your first question. I think people must make some very, very tough decisions about the public policies they are willing to support, and those they are not. Recall the classic comment of Everett Dirksen, the leader of Senate Republicans in the 1960s, that a billion here, a billion there, sooner or later it becomes real money. This is certainly the case with regard to Katrina; we're talking about very real money. But the second thing that occurred to me as you asked your question involves one of the classic conditional federal spending cases from the 1940s, where the United States said that a condition of getting federal highway funds – you could write a whole book on highway cases – was insulating state highway administrators from ordinary politics. Oklahoma claimed in effect that it had the right to structure state government however it wished, including tolerating the involvement of highway commissioners in ordinary politics. The federal government, which has operated under the constraints of federal civil service acts since 1886, responded that it wanted federal money administered by people who are likely to be asking questions other than how can I spend federal dollars to help my political party win the next election. I think that's a defensible condition, though Hans Linde, one of the greatest state-court judges of the twentieth century, has criticized the Supreme Court's decision upholding the condition as allowing the national government basically to restructure state government.

Now to go back to your question. I think it is descriptively true that Louisiana has been over time probably the most corrupt state in the country. There has never been a time, from the Louisiana Purchase to the present day, when Louisiana has been truly free from corrupt government. So therefore, the really deadly serious question is, do you trust Louisiana's elected officials to administer these programs fairly. And I think a reasonable person could – indeed, *must* – say no. So at that point you have two options. One is to say okay, let's let federal bureaucrats do it, let's cut out state officials from the implementation process entirely. For a variety of reasons, I think it would be a terrible idea. The more moderate solution is, okay, let's let state officials administer this, but put them on a short leash: A condition of accepting these federal funds, for example, is that you are going to have write reports every six months as to how much you spent, to whom you have given the money, and assure us that this isn't simply a way of buying voters. Now I don't know what Lynn's view would be on that, but I think Katrina is a great, great example of the problems that can arise with relying on local control.

PROFESSOR LYNN BAKER: I agree with virtually everything Sandy said. It is of course a separate question whether rebuilding a city on a flood plain at great public expense is a sensible idea. And the fact that the federal government would want to put constraints on, and demand accountability for, the money that it gives to another unit of government is nothing that I find problematic. Indeed Justice O'Connor's dissent in *Dole*,<sup>57</sup> which I tracked to a

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57. *South Dakota v. Dole*, 483 U.S. 203, 215 (1987) (O'Connor, J., dissenting) ("When Congress

significant extent in the somewhat invigorated test I put forward,<sup>58</sup> precisely seeks to take all that into account. The question then is how one is to distinguish between a condition that's really just about ensuring accountability for the money in whatever form that takes, versus something that looks more like the type of condition at issue in *South Dakota v. Dole*. I think that the difference between these two types of conditions is actually pretty apparent for the most part.

Sandy mentioned the Oklahoma case, and that's one in which the constraint involved doesn't particularly trouble me.<sup>59</sup> I don't view that case as involving a restructuring of state government in the same way that the *Guillen* case did.<sup>60</sup> I was deeply offended in the *Guillen* case by the apparent federal interference with state court rules of evidence. The Oklahoma case is also distinguishable from the commandeering cases,<sup>61</sup> which are another instance of the federal government attempting to have state officials or state governments behave in a certain way. It's really quite the opposite, because in the commandeering cases Congress is saying in effect, yes, we know you work for the state or the locality and you've got other things to do with your time, but here's some other stuff we'd like you to do for us, even if it conflicts with your primary employer's policies. The Oklahoma case doesn't involve anything like that, so I would disagree with Hans Linde, to the extent he is concerned about the Oklahoma case.<sup>62</sup> I think putting reasonable and sensible constraints on the use of the federal money in order to have some accountability is something we just ought to expect, and I don't think there is anything particularly troublesome about that.

On a related note, and something that we might discuss, though, is an issue that we were discussing at lunch – the homeland security payments to the states. This money presents a very different issue to my mind, because there are all sorts of allocation issues there, lots of concerns about what states are getting how much.<sup>63</sup> Those sorts of allocation issues go back to the concerns that I more generally have, and that maybe even Sandy would have, about the allocation of pork among the states. So I think on this particular issue that Sandy and I

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appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety."); *id.* at 216 ("Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent.").

58. Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995).

59. *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947).

60. *Pierce County v. Guillen*, 537 U.S. 129 (2003).

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

62. Hans A. Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965).

63. *See, e.g., Code Pink for Pork*, N.Y. TIMES, May 21, 2005, at A12 ("The independent 9/11 commission warned Congress that its pork addiction was undermining security by letting sparsely populated states reap six and seven times as much funds per capita as more tempting terrorist targets like California and New York."); *Security Loses; Pork Wins*, N.Y. TIMES, July 14, 2005, at A24 ("The Senate voted, disgracefully, to shift homeland security money from high-risk areas to low-risk ones . . . [A]t bottom, the senators had a choice between accepting the recommendation of the Homeland Security Department or the preference of senators from states with sparse populations that are highly unlikely targets for terrorism. They chose wrong. It is telling that the senators from the states most at risk – New York, California, New Jersey, Texas and Illinois – unanimously voted against the Collins amendment.").

probably don't disagree at all, and I agree that it's a great question.

QUESTION: You seem to both agree when you talk about the structure of democracy and the idea that the Senate is the source of the problem for how money is allocated and how the smaller states are overrepresented. It seems to me that the reason that funds flow to smaller states like South Dakota, over the larger states, has more to do with the economic and social characteristics of the state. If you look at a big state like Texas, Texas is a wealthy state with big cities. In this state we have a very large number of elderly people; in the county I come from, Social Security checks are the largest source of income for that population. Our state also has, I believe, five of the ten poorest counties in the nation. In South Dakota, it's certainly not true that every county gets more than it pays out. Isn't that an alternative way to look at the distribution of funds through the Senate to smaller states?

PROFESSOR LYNN BAKER: I think that's another great question. When I first got interested in this larger topic some years ago, once I had done the more theoretical work involved, I came across the reports that the Kennedy School at Harvard puts together every year and has been putting together for a long time.<sup>64</sup> Their project was originally directed by the late Senator Moynihan of New York, and is a study of what the researchers there call the "balance of payments" that the individual states have with the federal government.

Moynihan was from New York, and despite being in the Senate, or maybe because he was in the Senate, he hated the Senate on this particular issue. He was from a large-population state, and he thought that the Senate's structure of representation would have to go at some point.<sup>65</sup> Indeed, he has his own book about that.<sup>66</sup> And in looking at those Kennedy School statistics, I undertook to analyze them for a number of years, and then reported my findings in part in an article that I published some years ago in the *Journal of Law and Politics* at the University of Virginia.<sup>67</sup> My first thought when I began that work, quite consistent with the intuition that you've just expressed, is that maybe what was reflected was just a New Deal kind of redistribution. Maybe the money is simply going from richer states to poorer states, and if that's true, I'm not sure I have a problem with that. That form of redistribution would be a sensible solution to a coordination problem, and there's predictably going to be a race to the bottom if we don't have this cabined at the federal level. So I was fully prepared to find that poverty was really what the redistribution was about, and if that had explained my findings, I probably wouldn't be here today.

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64. For more information about these reports, see <http://www.ksg.harvard.edu/taubmancenter/publications/fisc/index.htm>.

65. Then-Senator Moynihan asserted in 1995 that "[s]omewhere in the next century we are going to have to face the question of apportionment in the United States Senate." Daniel Patrick Moynihan, *Yes, New Yorkers Pick Up Tab for Other States*, N.Y. TIMES, Sept. 21, 1995, at A22.

66. DANIEL PATRICK MOYNIHAN, MILES TO GO: A PERSONAL HISTORY OF SOCIAL POLICY 4-5 (1996) (contending that "[i]n the course of the next century, the United States will have to address the constitutional problem of 'equal Suffrage in the Senate' (Article V), but for this century the next best thing for a large state is to have a chairman of the Committee on Finance, a position last held by a New Yorker in 1851.").

67. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997).

But when I had some regressions run – I had a Ph.D. in Economics help with this to be sure that all the math got done properly – it turned out that there was no correlation at all between the poverty of the state and the state's balance of payments with the federal government.<sup>68</sup> Rather, it turned out that the strongest predictor statistically for whether a given state would have a positive or negative balance of payments was its population size. The results were keyed to population, with small states having an advantage. And there was no statistically significant relationship with poverty, as measured again using data whose collection I had nothing to do with. I don't recall offhand if South Dakota is an example of a state where the actual correlation that we more generally found exists, but across the fifty states, as a statistical matter, we don't find that poverty explains the variance in the states' balance of payments.

PROFESSOR SANFORD LEVINSON: I'd like to read a couple of lines from my book:

As the late Senator Daniel Patrick Moynihan noted, in 1999 only New Mexico had a greater percentage of its citizens living in poverty than New York. Yet, because New York ranked forty-first in per capita levels of payments and services received from the federal government, this meant, practically speaking, that New Yorkers were exporting significant amounts of money to other states with less poverty. Over the period of 1963-1999, New York taxpayers paid out \$252 billion more in taxes than were received back in federal payments or services. Other major outpayers were California, Illinois, and New Jersey, each with a significant level of poverty and other needs among its own citizens.<sup>69</sup>

There is another feature of the Senate that is especially important to South Dakotans. There is a very interesting book by two political scientists on the implications of the equality of representation in the Senate; they point out that particularly the Democratic Party, however much it might ordinarily be thought of as an urban big-state party, tends to pick its leaders from strikingly small states. South Dakota's own Tom Daschle is Exhibit A, though one should note that he was succeeded by Harry Reid from Nevada. Other recent Democratic leaders in the Senate came from Montana, Maine, and West Virginia. None of these states would be confused with New York or California, Illinois or Michigan, or other states that you think of more quickly as Democratic states. This has real consequences. I have tried not to make any strongly political statements today, but I will diverge from that right now. I think that one of the truly terrible pieces of legislation that has been passed in recent years is the bankruptcy bill, which is a disaster for people at the economic margins. Senator Daschle was a very, very strong proponent of that bill, I suspect because of the role that Citicorp plays in South Dakota politics. Perhaps the bill would have passed anyway, and it is certainly the case that there are a lot of bankers in New York who believe very strongly in the importance of the bankruptcy bill. It obviously helped though, that Senator Daschle, whether as Majority or Minority leader, had particular incentives, with regard to his own prospects for re-election,

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68. *Id.* at 39-42.

69. LEVINSON, *supra* note 2, at 60.



to push the bill.

Or consider the fact that small states benefit disproportionately from funding formulas that distribute homeland security funds. Vermont, for example, gets three times the per capita protection of homeland security funds as Massachusetts. Now it is wildly unlikely that Vermont is three times more vulnerable than Massachusetts, and it's also hard to defend the use of homeland security funds as an anti-poverty program. So you have to understand why Vermont gets three times per capita what Massachusetts gets, or each Wyomingite gets seven times what each New Yorker gets. This can be explained only because of the power that small states have, thanks to the Senate, to impose these formulas that ensure that small states get more than their fair share.

There may, of course, be certain economies of scale that help to explain, and to justify, some of this disproportion. It is essential that interstate highways go through South Dakota even if fewer people will make use of them than in, say, New Jersey, or that the airport in Sioux Falls have the same kind of expensive luggage-checking technology that is available in Minneapolis. But, with respect, I do not think that the degree of disproportion could possibly be explained with reference to such defensible considerations.

PROFESSOR LYNN BAKER: Well, let me recant slightly, on the larger question of the relationship to poverty. There the issue is clearly about people, and a state either has more poor people or fewer poor people relative to other states. On issues like homeland security, on issues like national defense which I view as moderately distinct but which may not be, I would concede that there is more of a case to be made that there may be appropriate measures that don't have anything to do with population. If, on the other hand, what one finds is that without regard to miles of highway or miles of coastline, that the best predictor of how much federal money a state receives is its population, particularly if the relationship is inverse, that suggests to me that the allocation of funds reflects nothing more than the state's relative power in the Senate.

COMMENT: Mark Meierhenry, former South Dakota Attorney General, challenged the speakers' statements regarding their concerns about the distribution of federal funds. Mr. Meierhenry specifically contested their allegations of inequitable distribution which favors small states, especially since states like South Dakota are reliant on employers like Ellsworth Air Force Base.

PROFESSOR LYNN BAKER: Sandy may not know, and the rest of the audience may not be able to tell, but Mark's a state government alum. First of all, Mark, I want to congratulate you for sticking up for your state's pieces of pork pie. I am prepared, and Sandy probably is as well, to say, absolutely, there are certain things that are in the general welfare. For example, what is more in the "general welfare" than national security? That's something that the purest originalist will go along with. So if one could show that the pattern of redistribution was related to things like national defense expenditures, I wouldn't find that problematic. I should add that much of the reason why I think it's so important to question the wisdom of the existing structure of representation in Congress is precisely because it's not just about money. Money is the easy thing

to look at, the easy thing to measure, but it's ultimately about power. It's about every piece of legislation that comes through Congress. It's about every important committee and who is chairing it. In the long run, over time, what will one expect to see is South Dakota getting more than its fair share on each of these measures.

On the highway front, there is one more anecdote which I love and want to share with you. This concerns the federally funded interstate highway system. For those of you who haven't perhaps been to any of the Hawaiian Islands, there are interstate highways there, complete with signs, that go around each of the islands. To my mind, "interstate" means "between states," connecting one state to another state. And quite obviously that's not what's going on with the "interstate" highways in Hawaii. And on this issue my liberal colleagues will say things like, "But the macadamia nuts on the way to the airport go on that road, and people all across America love macadamia nuts," and so on and so forth. But I confess that I don't find those arguments especially persuasive.

DEAN BARRY VICKREY: The data you were talking about doing the correlation inverse to population – did you do an analysis of the impact of federal lands? Because it would seem to me that federal lands would be directly correlated with population so the inverse relationship with population might give you a direct correlation to the amount of federal land you have in a state.

PROFESSOR LYNN BAKER: That's a good question. We looked at that, but not in a completely systematic way. That is to say, what one would expect to see then is redistribution in favor of the western states, which are where we disproportionately have the federal land. But in fact what we see is systematic redistribution in favor of small states. So we see redistribution in favor of Vermont and New Hampshire, and I think it's fair to say that there is not disproportionately much federal land in those states. Consider also another kind of takings argument, which I find initially very appealing. Perhaps the federal government through this redistribution is compensating states for the prior taking of land for public purposes. I am going to be very sympathetic to that type of argument for compensation. But under any sort of takings doctrine, what we would expect to see is a large one-time payment – not payments in perpetuity that also ebb and flow with a state's population, which is what in fact we tend to see.

PROFESSOR SANFORD LEVINSON: I want to go back for a moment though to the previous exchange about per capita expenditures. I want to put this within the context of how we interpret the Equal Protection Clause. Rightly or wrongly, the most common interpretation of the Clause is that it protects individuals (and not, for example, groups). Although there is a huge fight about how best to interpret the Equal Protection Clause, almost everyone agrees that the paradigm case involves some A who is complaining about not being treated so well as a similarly situated B. Obviously, the presumption is that if they are indeed similarly situated, then they ought to get the same thing from government. As those of you who have taken courses on the Clause know, you can spend years debating all of its intricacies. But you at least begin with that kind of primal notion that A has a right to complain if B gets more without

adequate reason. The power of comparing per capita expenditures falls into this commonplace pattern of interpreting Equal Protection. If someone from Wyoming can be shown to get far more per capita benefits than a New Yorker, then one should show that there are differences between the two that justify the disparity. Otherwise, by definition, the Wyomingites are the beneficiary of an arbitrary preference. But maybe people from Wyoming have five times or seven times the need for national security protection because, for example, Wyoming is the location of some very special and highly vulnerable sites that are essential to national security. If that's the case, then of course you ought to put huge amounts of money there, and New Yorkers could be dismissed as whiners. All of this being said, I know to a certainty that Vermont does *not* have the sorts of national securities facilities that Wyoming may in fact have, so any explanation of the three-one per capita disparity between Vermont and Massachusetts must look to other factors, which, ultimately, brings us back to basically arbitrary funding formulas dictated by small states taking advantage of the power that the Constitution gives them in the Senate.

I am quite happy to accept all sorts of inequality if people can present good reasons as to why A and B aren't in a similar situation. The basic notion that likes should be treated alike can be defeated by demonstrating that they are actually not alike and in fact relevantly different. But if the only difference between people in Massachusetts and people in Vermont is the vagary of where they happen to live and the political advantage enjoyed by the latter, then the difference, although "real," is also irrelevant.

QUESTION: The arbitrariness of using per capita's is pretty fallacious by taking a look at the cost of a single piece of machinery used for airport security. You're sitting in a state that has two international airports, and if you must have four pieces of machinery that cost \$200,000 a piece at each airport, you're looking at \$800,000 per airport, and we have two. New York City has many international airports, of course, but when you take a look at the population and per capita information, then obviously it's going to cost more, or a particular state is going to get more per capita for security, simply because that piece of equipment costs the same no matter where it goes. And that's the problem with that per capita argument.

PROFESSOR LYNN BAKER: Again, I'm sympathetic to your point. I think it's a very good point. But what we would then expect to see is that what explains the amount of money a given state receives is the number of airports, or the number of security checkpoint machines, or the amount of traffic through the airport, because one might need more machines at a bigger airport. And if that were the relationship that we saw across the states, that would be a very different situation. I confess that on the homeland security legislation, I am not as confident as I am on the others that we have been discussing, because I have not crunched the homeland security funding numbers myself. But I expect what we would not see is that the amount of money a given state receives correlates with the number of airports, number of checkpoint scanning machines at the state's airports, and so on. But again, and I think Sandy would go along with this, if you could show that that's really what's going on, that the funding is in fact

based on how many airports a state has, that would seem sensible and justifiable to me.

PROFESSOR SANFORD LEVINSON: I've already conceded the point on the importance of looking at economies of scale and other factors that might well justify per capita disparities in favor of small states. If you look particularly at airport security funding, I think you present a terrific argument as to why one might expect to see and support certain inequalities in per capita expenditures because of economies to scale. But again, without meaning to pick too much on Vermont, I am confident that the comparative financial advantage Vermonters enjoy over people from Massachusetts has only a little to do with the fact that there may be more economies of scale at Logan Airport in Boston than at the Burlington airport in Vermont. Homeland security expenditures may be on their way to becoming just one more form of pork, with small states, as usual, being advantaged with regard to the ability of Senators to help bring home the bacon.

We should pay more attention than we do to the extent to which purported "defense" expenditures are better viewed as local-interest pork that has little to do with genuinely protecting the nation. This leads me to remember an article that I read in 1962, when I was working as an intern in Washington, that it had basically become government policy, under the Kennedy Administration, to spread federal spending around the country. This was justified in part as a spread-the-wealth mechanism, but notice was also taken of the ability of such spreading to reinforce support for federal defense – or at least, more to the point, support for the specific weapon placed in one's district. We often talk about welfare dependency; less attention is paid to similar dependency relationships with regard, say, to building certain nuclear submarines in New London, Connecticut, or building B-2 bombers elsewhere. A lot of purported national defense expenditures are better viewed as de facto welfare programs for politically well-connected districts. I remember thinking in 1962, after reading the *Post* story, that it might be better if we focused defense expenditures on just one or two states so that you could in fact have some sort of rational discussion as to whether we need this particular weapons program or that particular weapons program instead of building in the felt political need to continue funding these things long after they make sense or when they are competing for scarce dollars with other sorts of suggested programs that might make more sense. Consider the extent to which Mississippi got lots of extra federal funds for shipbuilding when Trent Lott was the Senate majority leader. Now maybe it's the case that a completely disinterested judge would have said that we needed more ships built and we needed them built especially in Pascagoula, but I remain more cynical about whether that's the best explanation for that particular piece of public policy.

It is naïve in the extreme to believe that public policy should generally be able to pass abstract tests of "rationality." But we should try to figure out if modification of certain institutional structures might limit the predictable departures from almost any plausible notion of rational policy making.