CONDITIONAL FEDERAL SPENDING AFTER *LOPEZ*

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On April 26, 1995, in *United States v. Lopez,* the Supreme Court held for the first time in nearly sixty years that a federal law exceeded Congress's power under the Commerce Clause.[1] At issue was the Gun-Free School Zones Act of 1990, which made it a federal offense for any individual knowingly to possess a firearm within 1,000 feet of a school.[2] Finding that the Act "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way

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For helpful conversations and careful readings of drafts, I am deeply grateful to Samuel Dinkin, Larry Alexander, Mark Ascher, Barbara Atwood, Robert Glennon, Geoffrey Goldman, Ted Markson, Toni Massaro, Ted Schneyer, David Wexler, and, especially, Anne Park. My former dean, Tom Sullivan, and my current dean, Joel Seligman, both provided financial and institutional support which made this Article better. Olivia Olivares, as usual, provided efficient and cheerful research assistance.

I presented a very preliminary version of some of these arguments at a conference on "Perspectives on the Unconstitutional Conditions Doctrine" at the University of Denver College of Law in March 1995. My thanks to Dean Dennis Lynch for providing a most congenial forum for intellectual exchange, and to the conference participants for their comments.

1. 115 S. Ct. 1624 (1995). In 1936, the Court invalidated a federal statute regulating the price of coal and the wages and hours of miners, having found that these regulations had only a "secondary and indirect" effect on interstate commerce. Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936); see also Laurence H. Tribe, American Constitutional Law 308–09 (2d ed. 1988).

2. 115 S. Ct. at 1626 & n.1 (citing 18 U.S.C. §§ 921(a)(25) & 922(q)(1)(A) (1988 & Supp. V 1993)).

to interstate commerce,"[3] the Court held that the statute exceeded Congress's authority to " 'regulate Commerce . . . among the several States.' "[4]

As noteworthy as the *Lopez* majority's invalidation of the Gun-Free School Zones Act was its conclusion that the Commerce Clause permits Congress to regulate activities that "substantially affect" interstate commerce only if they are "commercial" activities.[5] Thus, both the majority and dissent specifically identified family law and education, and the majority included criminal law enforcement, as areas in which the states "historically have been sovereign" and which would therefore likely be beyond the scope of Congress's regulatory authority.[6]

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3. Id. at 1626.

4. Id. (quoting U.S. Const. art. I, § 8, cl. 3).

5. See id. at 1630. The Court "identified three broad categories of activity that Congress may regulate under its commerce power:" "the use of the channels of interstate commerce;" "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and "those activities having a *substantial* relation to interstate commerce." Id. at 1629–30 (emphasis added). With regard to the last category, the Court left no doubt that the distinction between "commercial" and "noncommercial" activities was central to its test. See id. at 1630 ("[T]he pattern [of our prior cases] is clear. Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained.") (emphasis added); id. at 1633 ("We do not doubt that Congress has authority under the Commerce Clause to regulate numerous *commercial activities* that substantially affect interstate commerce and also affect the educational process.") (emphasis added); id. ("Admittedly, a determination whether an intrastate activity is *commercial or noncommercial* may in some cases result in legal uncertainty.") (emphasis added); id. at 1630–31 ("Section 922(q) is a criminal statute that by its terms has nothing to do with *'commerce' or any sort of economic enterprise*, however broadly one might define those terms.") (emphasis added); id. at 1634 ("The possession of a gun in a local school zone is in no sense an *economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce.") (emphasis added); id. at 1640 (Kennedy, J., concurring) ("As The Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a *commercial character*, and neither the purposes nor the design of the statute have an evident *commercial nexus*.") (emphasis added); see also Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1817 (1995) ("[T]he [*Lopez*] Court removed noneconomic local activity—whatever its effect on interstate commerce—from the scope of federal regulatory power.").

6. The *Lopez* majority wrote:

> [U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: *family law (including marriage, divorce, and child custody)*, for example. Under the theories that the Government presents in support of [the Gun-Free School Zones Act], it is difficult to perceive any limitation on federal power, even in areas such as *criminal law enforcement* or *education* where States historically have been sovereign. Thus if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

115 S. Ct. at 1632 (emphasis added). Even the primary dissent in *Lopez*, authored by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, was eager to point out that:

Advocates of states' rights cheered the *Lopez* Court's "renewed appreciation" that "our Founders did indeed create a [federal] government of limited powers."[7] But the celebration was short-lived. Three days after the Court's ruling in *Lopez*, President Clinton proclaimed that he was "determined to keep guns out of our schools," and contended that Congress would not run afoul of the Constitution if it now chose to "encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans."[8]

> To hold [the Gun-Free School Zones Act] constitutional is not to "obliterate" the "distinction of what is national and what is local," . . . nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," *to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education.*

See id. at 1661 (Breyer, J., dissenting) (quoting majority opinion) (emphasis added). The failure of the dissent to include criminal law enforcement in its list of distinctively "local" activities is not surprising given its willingness to sustain the Gun-Free School Zones Act. See id. at 1657.

The lower federal courts have already begun invalidating other federal legislation in light of *Lopez*. In July 1995, a federal district court found that Congress had exceeded its regulatory powers under the Commerce Clause in enacting the Child Support Recovery Act of 1992 ("CSRA"). Quoting *Lopez*, the court ruled that "the CSRA is a 'criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.' Clearly there is no nexus between this criminal statute and interstate commerce." United States v. Mussari, 894 F. Supp. 1360, 1363–64 (D. Ariz. 1995) (quoting *Lopez*, 115 S. Ct. at 1630–31); see also United States v. Parker, Criminal No. 95-352, 1995 U.S. Dist. LEXIS 17193, at *13–*15 (E.D. Pa. Oct. 30, 1995) (holding CSRA to exceed scope of commerce power); United States v. Bailey, Criminal No. SA-95-CR-138, 1995 U.S. Dist. LEXIS 15833, at *3–*4 (W.D. Tex. Oct. 25, 1995) (same); United States v. Schroeder, 894 F. Supp. 360, 364 (D. Ariz. 1995) (same). But see United States v. Sage, No. 3:95cr108(DJS), 1995 U.S. Dist. LEXIS 15798, at *10–*16 (D. Conn. Oct. 3, 1995) (holding CSRA to be constitutional exercise of Congress's commerce power); United States v. Hopper, 899 F. Supp. 389, 393 (S.D. Ind. 1995) (same); United States v. Murphy, 893 F. Supp. 614, 616–17 (W.D. Va. 1995) (same); United States v. Hampshire, 892 F. Supp. 1327, 1329–30 (D. Kan. 1995) (same). Cf. Dailey, supra note 5, at 1789 ("*Lopez* did not directly concern federal legislation on the family, yet the case provided the opportunity for an otherwise deeply divided Court to unite around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority."). For a list of other federal family law legislation that might well be challenged in light of *Lopez*, see id. at 1788 n.1.

7. Expansion Checked, Wall St. J., Apr. 27, 1995, at A14.

8. Todd S. Purdum, Clinton Seeks Way to Retain Gun Ban in School Zones, N.Y. Times, Apr. 30, 1995, at A1; see Ann Devroy & Al Kamen, Clinton Says Gun Ruling Is a Threat; President Will Seek To Renew Ban on Schoolyard Firearms, Wash. Post, Apr. 30, 1995, at A1.

As will be discussed at greater length below, a conditional grant of federal funds is the only way for Congress to achieve precisely the regulatory effect that it originally sought with the Gun-Free School Zones Act. An alternative would be to modify the language of the original Act, for example, to limit its applicability to possession of firearms " 'that [have] moved in or that otherwise affect[ ] interstate commerce.' " See Clinton Seeks To Reinstate Ban on Guns, N.Y. Times, May 7, 1995, at A23; cf. Scarborough v. United States, 431 U.S. 563, 575 (1977) (sustaining federal law regulating possession of firearms that "have been, at some time, in interstate commerce" (footnote omitted)); Barrett v. United States, 423 U.S. 212, 225 (1976) (sustaining federal law regulating receipt of firearms "that

President Clinton's understanding of current Spending Clause doctrine is plainly correct. In 1987, the Court held in *South Dakota v. Dole* that the Spending Clause authorizes Congress to make even those conditional offers of funds to the states which, if accepted, regulate the states in ways that it could not directly mandate.[9] Thus, with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.[10]

The *Lopez* majority has signalled its intent to resume a meaningful constitutional role as guardian of "a healthy balance of power between the States and the Federal Government."[11] But confirming that the Commerce Clause does not grant Congress plenary regulatory power will not be enough. As President Clinton was quick to see, prevailing Spending Clause doctrine appears to vitiate much of the import of *Lopez* and any progeny it may have. Thus, a reexamination of *Dole* should be next on the *Lopez* majority's agenda. Only four members of the *Dole* Court of 1987 are still sitting, and the possibility of change is therefore real.[12] But Chief Justice Rehnquist is the key: ironically, he authored

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previously had moved in interstate commerce"). But this modified statute, unlike the original Act, would still permit the possession in school zones of firearms that have not moved in interstate commerce. In addition, it is not clear that the mere possession of a firearm that has moved in interstate commerce would meet the "economic activity" requirement of *Lopez*. See supra note 5 and accompanying text.

9. 483 U.S. 203 (1987). In *Dole*, the Court sustained a federal statute that directed the Secretary of Transportation "to withhold a percentage of federal highway funds otherwise allocable from States 'in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.' " Id. at 205. The Court observed that "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages," and went on to hold the legislation "within constitutional bounds even if Congress may not regulate drinking ages directly." Id. at 206.

10. Several scholars, writing before *Lopez*, considered *Dole* to be the last, best test case of limits on the spending power because the Twenty-first Amendment constituted the clearest exception to Congress's seemingly plenary regulatory power under the Commerce Clause. See, e.g., Richard A. Epstein, Bargaining with the State 150–51 (1993); Tribe, supra note 1, at 475 n.1 ("Congress can, [after *Dole*], achieve by way of its spending power much of what the twenty-first amendment may deny it the ability to achieve through its commerce power."); Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85, 100.

11. United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)); see also Linda Greenhouse, Justices Step In as Federalism's Referee, N.Y. Times, Apr. 28, 1995, at A1 (discussing renewed role of court in federalism debate); Jeffrey Toobin, Chicken Supreme: The Rehnquist Court is Political in Every Way, New Yorker, Aug. 14, 1995, at 81–82 (stating that in 1994–1995 Term, "the Rehnquist wing [of the Court] . . . . proposed a radical reorientation of governmental power away from the federal government and toward the states").

12. The members of the *Dole* Court still sitting are Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia. Rehnquist and Scalia were in the majority in both *Dole* and *Lopez*; O'Connor dissented in *Dole* but joined the majority in *Lopez*; and Stevens joined the majority in *Dole* but dissented in *Lopez*. Compare *Dole*, 483 U.S. 203 (1987) with *Lopez*, 115 S. Ct. 1624 (1995).

both the majority opinion in *Lopez* and the majority opinion in *Dole* which now threatens to render *Lopez* moot.[13]

Justice Thomas's concurring opinion in *Lopez* suggests that he might well be willing to overrule *Dole* in favor of a reading of the Spending Clause that is more consistent with both the Framers' intent and the notion of a federal government of enumerated powers. See *Lopez*, 115 S. Ct. at 1643 (Thomas, J., concurring) ("I also want to point out the necessity of refashioning a coherent [Commerce Clause] test that does not tend to 'obliterate the distinction between what is national and what is local and create a completely centralized government.' ") (citation omitted). Justice Kennedy's views are more difficult to predict. Compare, e.g., id. at 1638 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.") with U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Kennedy, J., concurring) (holding invalid Arkansas constitutional provision limiting the number of terms its representatives to the U.S. Senate can serve, on the ground "that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere").

13. Compare *Dole*, 483 U.S. 203 (1987) with *Lopez*, 115 S. Ct. 1624 (1995). This apparent inconsistency in Chief Justice Rehnquist's concern for "states' rights" might be explained by his longstanding attraction to the argument that the government's "greater power" (for example, the federal government's power not to offer the states any money at all) includes the "lesser power" (for example, the power to offer the states funds subject to any conditions the federal government chooses). See, e.g., Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 122–26 (the federal postal power includes the lesser power of Congress to regulate the terms and conditions of home delivery), appeal dismissed, cert. denied, 453 U.S. 917 (1981); Delta Air Lines, Inc. v. August, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting) (accusing majority of ignoring the "common-sense maxim" that the greater power includes the lesser power); First Nat'l Bank v. Bellotti, 435 U.S. 765, 825–27 (1978) (Rehnquist, J., dissenting) (arguing that states' power to grant certain rights to corporations does not oblige it to grant all rights that would inhere to natural persons); Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (employees "must take the bitter with the sweet" in accepting employment with limited due process protections for dismissal that might otherwise run afoul of Due Process Clause); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 559, 563 (1985) (Rehnquist, J., dissenting) (same, citing *Arnett*).

Other current Justices have also employed the "greater includes the lesser" argument, but less frequently and consistently. Justice O'Connor, for example, has used the argument outside of the area of states' rights, see, e.g., South Dakota v. Neville, 459 U.S. 553, 565–66 (1983) (state is not obliged to grant suspended drunk driver right to refuse blood test; state's provision of such right is "a matter of legislative grace;" power to do so includes power to do so subject to later consequence, and such later consequence will not be held to violate Due Process clause), but has termed the argument "an absurdity" in the federalism context, see FERC v. Mississippi, 456 U.S. 742, 781 (1982) (O'Connor, J., dissenting in part and concurring in part); see also Lynn A. Baker, The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions, 75 Cornell L. Rev. 1185, 1190 n.12 (1990).

This Article argues that the *Lopez* majority should reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause. Any substitute for the standard of review set out in *Dole*, however, must reconcile two potentially conflicting goals. It must strive to safeguard both state autonomy and the related principle of a federal government of enumerated powers by restricting Congress from using conditional offers of federal funds in order to regulate the states in ways that it could not directly mandate.[14] At the same time, however, it must preserve for Congress a power to spend that is greater and broader than its power to regulate the states directly.[15]

Thus, this Article proposes that the Court presume invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers. This presumption could be rebutted by a judicial finding that the offer of funds constitutes "reimbursement spending" rather than "regulatory spending" legislation.[16]

The Article begins by discussing both the problem posed by conditional offers of federal funds to the states and the insights into that problem afforded by traditional formulations of the unconstitutional conditions doctrine.[17] A brief examination of the development of the Supreme Court's jurisprudence in this area and a review of the academic commentary follow. Part II offers three normative arguments which, taken together, demonstrate that the courts should presume invalid those conditional offers of federal funds to the states that seek to regulate them in ways Congress could not achieve directly. Thus, these arguments also explain both why the *Dole* test needs rethinking and why the proposed test is preferable, if still imperfect.

Part III begins with a critique of the major proposals for reforming Spending Clause doctrine that have been offered to date. It then presents the proposed test and explains the operation of, and reasons for, the critical distinction the test makes between "reimbursement spending" and "regulatory spending" legislation. This Part concludes by considering four congressional enactments (two actual and two

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14. See infra notes 33–35 and accompanying text.

15. See infra notes 30–32 and accompanying text.

16. "Reimbursement spending" legislation specifies the purpose for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose. All other legislation that offers the states federal funds is "regulatory spending" legislation. See infra Part III.B.

17. Justice Sutherland provided the classic statement of the doctrine in 1926:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926); see also infra Part I.A.

hypothetical), under both the prevailing *Dole* test and the proposed test. The sample enactments offer states certain federal funds only if they: (a) comply with a series of deadlines toward providing for the disposal of all low level radioactive waste generated within their borders;[18] (b) prohibit the purchase or public possession of alcoholic beverages by anyone less than twenty-one years old;[19] (c) employ an approved program of race-based "affirmative action" when admitting undergraduate students to the state's public universities;[20] (d) do not officially sanction or encourage the practice of homosexual sex.[21] Analysis reveals that all four conditional offers of federal funds actually have been, or likely would be, upheld under the *Dole* test, while only Statute (a) would be sustained under the test proposed in this Article.

The examination of these diverse sample enactments suggests that liberals and conservatives alike should fear the power granted Congress by the Court's decision in *Dole*. Liberals, especially, must take care not to conclude from forty years of a Democratic majority in Congress that federal regulation is always preferable to states' rights and the resulting interstate diversity.[22] Now that there are Republican majorities in both houses of Congress,[23] some who welcome the end run around the Court's

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18. See Sections 2021e(d)–(e) of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b, 2021e(d)–(e) (1988) (providing system of financial incentives and penalties to induce state compliance with waste disposal deadlines), at issue in New York v. United States, 112 S. Ct. 2408, 2425–27 (1992); see also infra text accompanying note 296.

19. See 23 U.S.C. § 158 (Supp. III 1982) (withholding otherwise allocable funds from states that do not comply with national drinking age), at issue in South Dakota v. Dole, 483 U.S. 203 (1987); see also infra text accompanying note 297.

20. Cf. 20 U.S.C. § 1134(r) (1988) (Faculty Development Fellowship Program making funds available only to institutions of higher education "with a demonstrated record of enhancing the access of individuals from underrepresented groups including African Americans, Asian Americans, Hispanic Americans, Native Americans, and Native Hawaiians"); 10 U.S.C. § 503(a) (Supp. V 1993) (prohibiting Department of Defense from awarding any research grants or contracts to any institution of higher learning which denies the military campus access for recruiting); see infra note 298 and accompanying text.

21. At present, but perhaps not for long, such an enactment is merely hypothetical. See infra note 299 and accompanying text.

22. The Democrats had a majority of the House from 1955 to 1995, and majority of the Senate for all but six (1981–1987) of those years. See Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1970, pt. 2, at Y204–10 (1975) [hereinafter Historical Statistics] (1955–1970 statistics); Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States, 1994, at 279 (tbl. 432) (114th ed. 1994) [hereinafter Statistical Abstract] (1970–1994 statistics).

23. The November 1994 election yielded Republican majorities in both chambers for the first time in 40 years; 53 Senators and 227 House members. See, e.g., Protest Vote: An Angry Electorate Hands the Republicans a Landslide, Pittsburgh Post-Gazette, Nov. 10, 1994, at C2. Historically, the Republican party has had periods when it has controlled both houses of Congress for several decades. See, e.g., Alison Mitchell, Chaos Below, Panetta Does High-Wire Act: Success and Failure in the White House, N.Y. Times, Aug. 17, 1995, at A14 ("Republicans had ruled politics for 30 years, and Democrats were a husk of a party,

invalidation of the Gun-Free School Zones Act that *Dole* offers Congress today may find it easier to keep in mind that they may not always view Congress's regulatory aims with favor. And they may therefore be more readily persuaded to regard with apprehension any interpretation of the Spending Clause that provides Congress the means seemingly always to achieve its desired regulatory ends.

I. CONDITIONAL FEDERAL SPENDING

Federal funds totalling billions of dollars each year constitute an increasingly large proportion of each state's revenue.[24] And none of this federal money is offered the states unconditionally.[25] In some cases, such as the legislation President Clinton encouraged Congress to enact in response to the *Lopez* decision,[26] Congress may make conditional offers of federal funds in order to regulate the states indirectly in ways that it could not directly mandate. For the past sixty years, this possibility has been of scant concern, since the Court's Commerce Clause decisions uniformly suggested that Congress could regulate the states directly in virtually any way it chose.[27] So long as the "front door" of the commerce power was

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too feeble even to repudiate the Ku Klux Klan, only eight years before Franklin D. Roosevelt founded a political dynasty in 1932."); Adam Clymer, Theorists Look at '94 Voting: Was It Major or Minor Trend?, N.Y. Times, Sept. 4, 1995, § 1, at 8 (noting that Republican victory of 1894 ushered in a third of a century of Republican congressional dominance).

24. Over the past fifty years, federal grants to states and localities have increased nearly *20,000%*, growing from $991 million in 1943 to $18.173 billion in 1968 and $195.201 billion in 1993. See Historical Statistics, supra note 22, at 1125 (1943 and 1968 statistics); Statistical Abstract, supra note 22, at xvii (1993 statistics). In addition, these federal grants have constituted an increasingly large proportion of total state and local revenues, increasing from 10.8% in 1950, to nearly twice that—19.9%—in 1991. See U.S. Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism, Revenues and Expenditures, vol. 2, at 56 (tbl. 23) (1992) [hereinafter Fiscal Federalism]; see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552–53 & nn.13–14 (1985); Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 871–72 (1979) (tracing development of federal offers of funds to the states from their beginnings in the early 1800s).

25. Even "block grants" include the condition that the funds be used for a stipulated, if general, purpose, such as "poverty relief." For discussion of recent "block grant" poverty relief proposals, see, e.g., Celia W. Dugger, Budget Cuts Threaten Effort To Preserve Families at Risk, N.Y. Times, May 12, 1995, at A1; Fred Kammer, Block Grants Will Worsen Poverty, N.Y. Times, Aug. 1, 1995, at A15; Robert Pear, Moynihan Joins Welfare Fray With Bill of His Own, N.Y. Times, May 14, 1995, at 22; Robert Pear, Senators Start Debate On Changes In Welfare, N.Y. Times, Aug. 8, 1995, at B6; Eric Pianin, From House Republicans, 'Revolutionary' Budget Plan, Int'l Herald Trib., May 12, 1995, at 3.

26. See supra note 8 and accompanying text.

27. One constitutional law treatise, the latest edition of which was on its way to the printer when *Lopez* was decided, had stated that "The Supreme Court today interprets the commerce clause as a complete grant of power." See John E. Nowak & Ronald D. Rotunda, Constitutional Law 154 (4th ed. 1991); see also Linda Greenhouse, High Court Re-Examines A Long-Standing Basis For Federal Powers, N.Y. Times, Apr. 30, 1995, § 4, at 2 (" 'It was right when we wrote it,' [Rotunda] said ruefully . . . ."). After *Lopez*, the authors

perpetually open, there was little reason to discuss the extent to which the "back door" of the spending power should be kept closed.[28] The Court's decision in *Lopez*, however, makes discussion of conditional federal spending meaningful once again.[29]

In the post-*Lopez* era, should Congress be permitted to use conditional offers of federal funds to regulate the states in ways that it could not directly mandate? The answer cannot be a simple "no." Article I, Section 8 of the Constitution grants Congress the power to "provide for the common Defence and general Welfare of the United States."[30] Beginning with *United States v. Butler*, the Court has explicitly interpreted this provision to afford Congress a power "to authorize expenditure of public moneys for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution."[31] A prohibition on *all* conditional offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate would implicitly deny, *contra Butler* and its progeny,[32] that Article I grants Congress a power to spend that is greater and broader than its power to regulate the states.

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revised this sentence to read, "The Supreme Court today interprets the commerce clause as a broad grant of power." See John E. Nowak & Ronald D. Rotunda, Constitutional Law 155 (5th ed. 1995).

28. 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) ("If the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed.").

29. As the cases discussed in Part I.B, infra, indicate, discussion of conditional federal spending was especially meaningful prior to the expansion of Congress's power under the Commerce Clause and the later dilution of the Tenth Amendment to a truism. Cf. Tribe, supra note 1, at 321–23 ("[A]s the Supreme Court has construed the scope of congressional power under the commerce clause more expansively, this question [of conditional federal spending] has become less pressing since Congress ordinarily has the power to regulate directly, with or without the aid of conditional grants, the objects of its concern."); David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 1–53 (1994).

30. U.S. Const. art. I, § 8, cl. 1.

31. 297 U.S. 1, 66 (1935). In *Butler*,

> [T]he Court endorsed a thesis derived from Hamilton's *Report on Manufactures to the House of Representatives*: "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution;" rather, "its confines are set in the clause which confers it. . . . "

Tribe, supra note 1, at 322 (footnotes omitted).

Since *Butler*, the Court has further held that it "should defer substantially to the judgment of Congress" when considering whether a particular expenditure comports with the "general welfare." South Dakota v. Dole, 483 U.S. 203, 207 (1987). Indeed, the level of deference has become so great that the Court has questioned "whether 'general welfare' is a judicially enforceable restriction at all." Id. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam)); see also infra Part I.C.

32. See Engdahl, supra note 29, at 35–49; infra Part I.B.

The answer to our question also cannot be a simple "yes," however.[33] So long as the Commerce Clause is not interpreted to grant Congress plenary power to regulate the states directly, the Tenth Amendment's reservation to the states of all powers not delegated to the federal government has content and significance.[34] But if the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of "a federal government of enumerated powers" will have no meaning.[35] There are many compelling reasons, in addition to effectuating the Framers' intent, why liberals and conservatives alike should seek to ensure the states a measure of autonomy that is secure against indirect federal encroachment under the Spending Clause. These arguments are detailed in Part III.

The problem, in brief, is to find a principled way to distinguish and invalidate those conditional offers of federal funds to the states that threaten to render meaningless the Tenth Amendment's notion of a federal government of limited powers, while simultaneously affording Congress a power to spend for the "general Welfare" that is greater than its power directly to regulate the states.

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33. As is detailed infra Part I.B, however, the answer historically has in fact been a rather unconditional "yes."

34. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

In the words of the *Lopez* Court, "We start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . As James Madison wrote, '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) (citing The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)); see also Tribe, supra note 1, at 297 ("[A]rticle I, § 1 endows Congress not with 'all legislative power,' but only with the 'legislative powers herein granted.' In theory, Congress is thus a legislative body possessing only *limited* powers—those granted to it by the Constitution.") (emphasis added).

For a general discussion of the Court's Tenth Amendment jurisprudence, see, e.g., Martha Field, *Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84 (1985); Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After *Garcia*, 1985 Sup. Ct. Rev. 341; William W. Van Alstyne, Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea, 1987 Duke L.J. 769.

35. As Justice O'Connor observed in her dissent in *Dole*,

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." . . . This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.

483 U.S. at 217 (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

A. *The Unconstitutional Conditions Doctrine*

The question whether Congress should be permitted to use conditional offers of federal funds in order to regulate the states in ways that it could not directly mandate takes the classic form of questions posed under the unconstitutional conditions doctrine: should the government be permitted to impose conditions on government largesse in order to achieve indirectly those regulatory ends that the Constitution prohibits it from achieving directly?[36] Understanding this larger doctrine may therefore prove useful in our inquiry.

The unconstitutional conditions doctrine begins by acknowledging that the Constitution does not require the government to provide largesse to individuals or the states.[37] Thus, the doctrine's focus is determining which conditions the government may constitutionally impose on the receipt of that largesse. If a state or individual has a constitutional right to certain federal funds, there is, of course, no controversy.[38] Any condition that unreasonably interferes with an eligible claimant's receipt of the constitutionally guaranteed funds will be held invalid.

But even in the absence of such a constitutional right, the federal government's "greater" power not to make certain funds available at all does not obviously include the "lesser" power to provide those funds sub-

36. See Baker, supra note 13, at 1193–94 & n.21. Various commentators have differed slightly, and ultimately unimportantly, in their statements of the doctrine. See, e.g., Richard A. Epstein, The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 6–7 (1988); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1340 (1984); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989); William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1445–46 (1968).

37. "Largesse" is, by definition, a gift, and one cannot therefore have a constitutional (or other) entitlement to it.

38. Many state constitutions provide a right to certain funds or services. The New York Constitution, for example, has been interpreted to "prevent[ ] the Legislature from simply refusing to aid those whom it has classified as needy." Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977) (interpreting N.Y. Const. art. XVII, § 1 to impose an affirmative duty to aid the "needy"); see Michael A. Dowell, State and Local Governmental Legal Responsibilities to Provide Medical Care for the Poor, 3 J.L. & Health 1, 6 (1988–89) ("Fifteen states have constitutional provisions which authorize or mandate the provision of medical care for the poor."). In addition, virtually all state constitutions contain provisions requiring the legislature to provide a "uniform" or "thorough and efficient" system of free public schools. See, e.g., Md. Const. art. VIII, § 1 ("The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance."); N.J. Const. art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years."); Tex. Const. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

ject to any condition it chooses.[39] For example, few would question that the federal government can require individuals to make a showing of financial need as a precondition to receiving public assistance.[40] But requiring the poor to be sterilized to receive assistance seems a much more problematic condition for the government to impose. The difference is not just that sterilization is more intrusive and less obviously relevant to the purposes of public assistance than is a demonstration of financial need. Rather, it is that individuals have a constitutional right to control their ability to reproduce,[41] but have no analogous right to refrain from disclosing their financial status. Another way to understand this difference is to note that the federal government has the power to require each of us to disclose our financial status (every April 15th, say),[42] and that any regulatory objective the government can achieve directly it can also seek indirectly through a condition on the receipt of federal largesse.[43] Thus,

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39. Both the courts and commentators have spilled much ink on the question of whether the government's "greater" power not to bestow a benefit or privilege at all incorporates a "lesser" power to provide it conditionally. See Baker, supra note 13, at 1190–91, 1190 n.12. Several commentators have demonstrated that the argument fails deductively. See id. at 1191 n.13; Michael Herz, Justice Byron White and the Argument that the Greater Includes the Lesser, 1994 B.Y.U. L. Rev 227, 238–49. Seth Kreimer has persuasively shown that the argument is also flawed as analogy. See Kreimer, supra note 36, at 1311–14. For a brief discussion of the persistent attractiveness of this argument to Chief Justice Rehnquist, see supra note 13.

40. See Baker, supra note 13, at 1189. Some commentators during the "Welfare Revolution" of the 1960s found even means testing problematic, however. See, e.g., Albert M. Bendich, Privacy, Poverty, and the Constitution, 54 Cal. L. Rev. 407, 425–34 (1966); Joel F. Handler, Controlling Official Behavior in Welfare Administration, 54 Cal. L. Rev. 479, 492–500 (1966).

41. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942) (invalidating a state statute providing for the sterilization of persons convicted two or more times of "felonies involving moral turpitude," and describing the right to reproduce as "one of the basic civil rights of man"); see also Carey v. Population Serv. Int'l, 431 U.S. 678, 684–86 (1977) (invalidating state statute prohibiting distribution and advertisement of contraceptives to persons 16 years of age or over); Roe v. Wade, 410 U.S. 113, 152–54 (1973) (invalidating state statute criminalizing abortion). See generally Tribe, supra note 1, at 1337–62 (discussing fundamental rights related to decisions about reproduction).

42. See, e.g., United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978) (affirming conviction for willful failure to file tax returns); United States v. Pohlman, 522 F.2d 974, 975–78 (8th Cir. 1975) (same), cert. denied, 423 U.S. 1049 (1976). See generally Boris I. Bittker & Martin J. McMahon, Jr., Federal Income Taxation of Individuals ¶ 45.4, at 45-30 to -32 (1988).

43. There is no case in which the Court has held that Congress cannot achieve indirectly through conditional federal spending a regulatory objective that it can achieve directly. Professor Richard Epstein has noted:

> Where the federal government may compel the state by direct regulation, then it should have the like power to do so by grant and by bargain as well. Thus if the federal government can order states to implement extensive programs with respect to their employees or the environment, then it should have comparable power to offer to pay the states some portion of the cost of defraying these programs as well. . . . If the national government can regulate the states with a free hand, then, alas, it can bargain with them with a free hand as well.

Epstein, supra note 10, at 155, 157.

the critical variable is whether the condition attached to the offered funds, taken alone, impinges on a constitutional right of the claimant. Conditions that do not affect the claimant's exercise of a constitutional right are unproblematic; conditions that do, however, may or may not be.

In the context of conditional grants of federal money to the states, it is clear that the Constitution does not guarantee the states any federal funds. In addition, the Court has never questioned that Congress can seek indirectly, through conditions on federal funds it offers the states, any regulatory objective that it could also achieve directly.[44] Thus, our inquiry must focus on the "rights" against the federal government that the Constitution affords the states,[45] since only conditions involving these rights are potentially the basis of a successful unconstitutional conditions claim.[46] The Constitution's limitations, at least after *Lopez*, on Congress's

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The Court's implicit position is not uncontroversial, however, and several commentators have even suggested that "the distinction should run in the opposite direction." Rosenthal, supra note 28, at 1141. Professors Thomas McCoy and Barry Friedman, for example, have argued that "[i]n the kind of case where Congress is buying conduct in excess of its legislative powers rather than overtly regulating in excess of its legislative powers, one cannot count on the political process to serve as an effective restraint, as an effective guardian of the state's role in the constitutional scheme." McCoy & Friedman, supra note 10, at 124. In a related vein, Professor Albert Rosenthal has contended:

> Whether or not there is enough political influence at the state and local government level to prevent the more intrusive direct threats to the autonomy of those governments, the same process may not work effectively to forestall similar interference through coercive conditions. A continued high level of federal financial assistance will often be of great importance to state and local governments and a focus of substantial lobbying activities on their part; these governments may not find it politically expedient to dilute their efforts to obtain such funds by simultaneously campaigning against the conditions, however objectionable they may appear to be.

Rosenthal, supra note 28, at 1141 (footnotes omitted).

44. See supra note 43.

45. By the states' " 'rights' against the federal government," I mean simply to denote those powers which the states have reserved to themselves pursuant to the Tenth Amendment. See supra note 34; see also Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers. . . . The States thus retain substantial sovereign authority under our constitutional system."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("The States unquestionably do 'retai[n] a significant measure of sovereign authority' . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (citation omitted)).

Since *Lopez*, it is clear that the Commerce Clause does not grant Congress a plenary police power, and the notion of powers reserved to the states is therefore once again meaningful. See United States v. Lopez, 115 S. Ct. 1624, 1633 (1995) (the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation").

46. In fact, there is no such thing as an "unconstitutional conditions claim" any more than there is a single "unconstitutional conditions doctrine" under which to bring it. The claim, rather, is that a condition on some form of government largesse violates a provision of the state or federal constitution. See, e.g., Baker, supra note 13, at 1196–97, 1256 ("[N]o single meaningful positive theory is likely to explain the operation of the doctrine

ability directly to regulate the states can be understood as Tenth Amendment rights that the states have against the federal government.[47] Thus, the question becomes when, if at all, Congress *should* be permitted to offer the states federal funds in exchange for a waiver of one of these Tenth Amendment rights.

B. *The Case Law*

The Court's decisions in cases challenging conditions on federal funds offered the states, unlike its resolution of challenges to conditions on benefits that the government offers individuals,[48] are strikingly consistent: the Court has never invalidated such an enactment.[49] It appears, then, that the Court has yet to arrive at an interpretation of the Spending Clause that enables it to draw meaningful distinctions between those conditional offers of funds to the states that threaten the Tenth Amendment's notion of a federal government of limited powers, and those that do not.

Massachusetts v. Mellon, decided in 1923, was the Court's first case involving a conditional offer of federal money directly to the states.[50] At

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in its myriad contexts, but . . . a positive theory may well be possible for each group of cases involving the same type of government benefit or privilege."); William P. Marshall, Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses, 26 San Diego L. Rev. 243, 243–44 (1989) (concluding that the "search for a comprehensive theory of unconstitutional conditions is ultimately futile"); Frederick Schauer, Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency, 72 Denv. U. L. Rev. (forthcoming 1995) (manuscript at 2–3, on file with the Columbia Law Review) (suggesting that problem of unconstitutional conditions is unlikely to have an easy solution); Cass R. Sunstein, Is There an Unconstitutional Conditions Doctrine?, 26 San Diego L. Rev. 337, 344 (1989) (arguing that the unconstitutional conditions doctrine should be abandoned in favor of a more particularized approach); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593 (1990) [hereinafter Sunstein, Anachronism] (same).

47. By the notion of the states' "Tenth Amendment rights" I in no way mean to suggest that the Tenth Amendment affords states any protection beyond the "truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941); see New York v. United States, 112 S. Ct. 2408, 2418 (1992) (Tenth Amendment "restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, . . . is essentially a tautology"). I simply use the notion of "rights" to denote those powers that the states have not surrendered to Congress. See also supra note 45.

48. See, e.g., Epstein, supra note 10, at 75–103; Epstein, supra note 36; Kreimer, supra note 36, at 1297–1300; Sullivan, supra note 36, at 1415–17; Sunstein, Is There an Unconstitutional Conditions Doctrine?, supra note 46; Sunstein, Anachronism, supra note 46. But see Baker, supra note 13, at 1256–57 (offering a positive theory of the Court's resolution of challenges to conditions on public assistance benefits).

49. See Epstein, supra note 10, at 155–57; Rosenthal, supra note 28, at 1141, 1162.

50. 262 U.S. 447 (1923). Prior to *Mellon*, the Court decided the Child Labor Tax Case, 259 U.S. 20 (1922), which invalidated a federal tax on firms that employed child labor in certain occupations. Although the aim of the federal legislation at issue was to displace the states' reserved power to enact labor regulations, the financial inducement

issue was the federal Maternity Act, which the Commonwealth of Massachusetts challenged as a usurpation by Congress of power reserved to the states under the Tenth Amendment.[51] The Act appropriated money to those states willing to comply with its provisions toward the end of "reduc[ing] maternal and infant mortality and protect[ing] the health of mothers and infants."[52] Massachusetts contended that the Tenth Amendment was violated by the very passage of the Act, which imposed upon the states "an illegal and unconstitutional option either to yield to the Federal Government a part of its reserved rights or lose the share which it would otherwise be entitled to receive of the moneys appropriated."[53]

Although the Court held that the case posed a non-justiciable political question,[54] it observed *en route* that "the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."[55] Moreover, "[i]f Congress enacted [the statute] with the ulterior purpose of tempting [the

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was offered directly to individual firms rather than to the states. Id. at 34–37 (discussing §§ 1200, 1203 & 1206 of the Child Labor Tax Law, 40 Stat. 1057, 1138–40 (1919)); see also Epstein, supra note 10, at 146–50 (discussing pre-1937 conditional funding cases, including the Child Labor Tax Case).

51. See *Mellon*, 262 U.S. at 479–80.

52. Id. at 479. The Act did not specify what states were required to do in order to receive the appropriated funds beyond "designat[ing] or authoriz[ing] the creation of a State agency with which the Children's Bureau [of the U.S. Department of Labor] shall have all necessary powers to cooperate as herein provided in the administration of the provisions of this Act," and having "detailed plans for carrying out the provisions of this Act . . . [which] shall provide that no official, or agent, or representative in carrying out the provisions of this Act shall enter any home or take charge of any child over the objection of the parents." Maternity Act, Pub. L. No. 97, §§ 4, 8, 42 Stat. 224, 225 (1921).

53. *Mellon*, 262 U.S. at 479–80.

54. The Court observed that the statute at issue imposed no "burden" on the states, and concluded that,

> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

Id. at 483. The Court acknowledged that the challenged statute might impose "the burden of taxation" upon a state's inhabitants, id. at 482, but held that such a taxpayer suit also could not be maintained:

> The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488; see also id. at 487 ("The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern.").

55. Id. at 480.

states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."[56]

By January 1936, the Court considered at least some challenges to congressional appropriations justiciable,[57] and decided three Spending Clause cases during the next seventeen months.[58] Although none involved a conditional grant of federal money directly *to the states*, each caused the Court to examine the general question of whether the Spending Clause authorizes Congress to use conditional spending to achieve regulatory objectives that it could not directly mandate under its other Article I powers. The most significant of these cases was *United States v. Butler*.[59]

In *Butler*, processors of farm products contended that the Agricultural Adjustment Act of 1933 exceeded Congress's powers under the Constitution.[60] The Act sought to regulate production of certain agricultural commodities, and authorized the Secretary of Agriculture "to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable."[61] The *Butler* Court observed that the Act was not authorized under the Commerce Clause since it did not purport to regulate transactions in interstate or foreign commerce.[62] Thus, the central question was whether the Act was a permissible exercise of Congress's spending power.[63] Noting that the words of Article I, Section 8, authorizing Congress to " 'provide for the . . . general Welfare of the United States,' " must be meaningful "else they would not have been used,"[64] the Court concluded that the spending

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56. Id. at 482.

57. See United States v. Butler, 297 U.S. 1, 61 (1936). The Court held that the respondents, receivers of the Hoosac Mills Corporation, had standing to challenge the validity of the Agricultural Adjustment Act which, *inter alia*, imposed processing and "floor" taxes on various agricultural commodities. See id. at 61. The Court distinguished the taxpayers in *Mellon*, whom it had held did not have standing, on the ground that in *Butler* "the respondents who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan," while *Mellon* was simply "a suit by a taxpayer to restrain the expenditure of the public moneys." Id. at 58. The Court concluded that the act at issue in *Butler* "is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction." Id. at 61.

58. See Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); *Butler*, 297 U.S. 1.

59. 297 U.S. 1 (1936).

60. See id. at 37–40 (oral argument of respondent).

61. Id. at 55 (quoting Agricultural Adjustment Act of 1933). The source of revenue for the "rental or benefit payments" to be paid the consenting farmers was to be taxes levied against "the first domestic processing" of the regulated commodities. Id.

62. "Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer." Id. at 63–64. The Court also observed that the Government did "not attempt to uphold the validity of the act on the basis of the commerce clause." Id. at 64.

63. See id. at 62.

64. Id. at 65.

power "is not limited by the direct grants of legislative power found in the Constitution."[65]

All this was merely dicta, however, since the Court ultimately held the challenged legislation invalid as a violation of the Tenth Amendment rather than of the "general Welfare" requirement of the Spending Clause.[66] Because the Constitution gave Congress no power directly "to regulate and control agricultural production,"[67] the Court reasoned that the Tenth Amendment also precluded it from enacting conditional spending legislation in order to achieve that regulatory end. Disclaiming any concern with the "coerciveness" of the conditional offer of funds,[68] the Court focused instead on the "obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."[69]

In *Butler*, the Court thus acknowledged, and sought to disable, the potential of the Spending Clause to "nullify all constitutional limitations upon [congressional] power:"[70]

> If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.[71]

Nor was the Court willing to permit the "general Welfare" requirement of the clause to offer Congress a loophole:

> It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states.[72]

In 1947, twenty-four years after *Mellon,* the Court again took up the issue of conditional grants of federal money directly *to the states.*[73] In

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65. Id. at 66.

66. See id. at 68.

67. Id.

68. See id. at 72. The Court observed that: "The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation." Id. at 70–71. The Court went on to hold, however, that even "if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." Id. at 72.

69. Id. at 73.

70. Id. at 74.

71. Id. at 75.

72. Id. at 74–75.

73. See Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). Between its 1923 decision in *Mellon* and 1947, the Court's Commerce Clause and Tenth

Oklahoma v. United States Civil Service Commission, the state of Oklahoma challenged a then-applicable provision of the Hatch Act that prohibited state officials and employees from taking "any active part in political management or in political campaigns" if their "principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency."[74] Because Oklahoma failed to remove a member of its State Highway Commission who was found by the U.S. Civil Service Commission to have violated this provision, the state faced the withholding of federal highway grants " 'in an amount equal to two years compensation' " of the offending official.[75] Oklahoma contended that these "penalty provisions" of the Hatch Act violated the Tenth Amendment.[76]

The *Oklahoma* Court acknowledged that Congress "has no power to regulate[ ] local political activities as such of state officials," but went on to assert that Congress "does have power to fix the terms upon which its money allotments to states shall be disbursed."[77] The Court observed that the Tenth Amendment "has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are *appropriate and plainly adapted* to the permitted end.' "[78] And it held that this standard was met by both the end and means of the challenged enactment—"better public service by requiring those who administer funds for national needs to abstain from active political partisanship."[79] Echoing its dictum in *Mellon*,[80] the Court concluded by observing that Oklahoma retained—and, indeed, by refusing to remove the offending official, had chosen—"the 'simple expedient' of not yielding to what she urges is federal coercion."[81]

Forty years later, in its 1987 decision in *South Dakota v. Dole*, the Supreme Court reaffirmed that "objectives not thought to be within Article I's 'enumerated legislative fields[ ]' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[82] In *Dole*, the Court sustained a federal statute that withheld a percentage of federal highway funds from states " 'in which the

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Amendment jurisprudence had changed drastically. For a concise summary of this shift, see Tribe, supra note 1, at 308–13 (Commerce Clause); id. at 378–85 (Tenth Amendment).

74. *Oklahoma*, 330 U.S. at 129 n.1 (quoting Hatch Act § 12(a), 5 U.S.C. § 118K(a) (1940), repealed by Federal Election Campaign Act Amendments of 1976, § 201, 90 Stat. 475).

75. Id. at 133 (quoting Hatch Act § 12(b)).

76. Id. at 142.

77. Id. at 143.

78. Id. (quoting United States v. Darby, 312 U.S. 100, 124 (1941) (emphasis added)).

79. Id.

80. See supra notes 55–56 and accompanying text.

81. *Oklahoma*, 330 U.S. at 143–44. The Court further concluded that "[n]o penalty was imposed upon the state" by the challenged statute. Id. at 143.

82. 483 U.S. 203, 207 (1987) (citing United States v. Butler, 297 U.S. 1, 65–66 (1936)).

purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.' "[83] The Court observed that "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages," and went on to hold the legislation "within constitutional bounds *even if Congress may not regulate drinking ages directly*."[84]

Because a state always has " 'the "simple expedient" of not yielding to what she [considers] federal coercion,' "[85] the *Dole* Court concluded that the "Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."[86] Although the Court held that "[t]he spending power is of course not unlimited . . . but is instead subject to several general restrictions articulated in our cases,"[87] none of the four stated restrictions was portrayed as having much "bite."

Thus, the first restriction articulated in *Dole*, that "the exercise of the spending power must be in pursuit of 'the general welfare,' "[88] is subject to the caveat that "courts should defer substantially to the judgment of Congress" when applying this standard.[89] Indeed, the Court acknowledged that the required level of deference is so great that it has "questioned whether 'general welfare' is a judicially enforceable restriction at all."[90] Second, the Court affirmed that Congress must state any conditions on the states' receipt of federal funds " 'unambiguously[,] . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' "[91] But it could cite only one instance in which it had found that an enactment did not meet this requirement.[92] Third, the *Dole* Court noted that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs,' " but added that this restriction

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83. Id. at 205 (quoting 23 U.S.C. § 158 (Supp. III 1982)).

84. Id. at 206 (emphasis added). Even today it is uncertain whether Congress has the power to regulate drinking ages directly in light of the Twenty-first Amendment. See infra notes 318–323 and accompanying text.

85. *Dole*, 483 U.S. at 210 (quoting *Oklahoma*, 330 U.S. at 127).

86. Id.

87. Id. at 207.

88. Id. (citing Helvering v. Davis, 301 U.S. 619, 640–41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936)).

89. Id.

90. Id. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam)).

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

92. See id. Moreover, the import of the Court's holding in that instance was not to require Congress to continue providing funds to a state that had failed to comply with an ambiguously worded condition on those funds, but to deny relief to a third-party beneficiary of the funds who alleged that the state of Pennsylvania had failed to comply with the federal condition that the Court ultimately found to be ambiguous. *Pennhurst*, 451 U.S. at 27–28.

was merely "suggested (without significant elaboration)" by prior cases.[93] Indeed, the Court could cite no instance in which it had invalidated a conditional grant of federal money to the states on this ground.[94] Fourth, the Court concluded that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[95] That is, Congress may not use its powers under the Spending Clause "to induce the States to engage in activities that would themselves be unconstitutional."[96] But, again, the Court could cite no case in which it had

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93. *Dole*, 483 U.S. at 207.

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

In contrast to the majority, Justice O'Connor would have invalidated the condition at issue in *Dole* on precisely this ground:

> [Section] 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment.

Id. at 212 (O'Connor, J., dissenting). Justice O'Connor clearly read the "reasonable relationship" prong of the majority's test to have more bite than the majority did. She would have held that

> a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

Id. at 218 (O'Connor, J., dissenting).

Justice O'Connor envisioned a meaningful "germaneness" requirement that would preclude Congress from

> insist[ing] 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. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports [23 U.S.C. § 158].

Id. at 215.

95. Id. at 208.

96. Id. at 210. Here the Court gave as an example "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment." Id.

invalidated a conditional grant of federal money *to the states* on this basis.[97]

In addition to these four restrictions, the *Dole* Court read the Spending Clause to impose limits on Congress's ability to "coerce" the states in ways that it could not directly mandate under its other Article I powers.[98] "[I]n some circumstances," the Court observed, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' "[99] The Court concluded that a threatened loss to states of five percent of their otherwise obtainable allotment of federal highway funds did not pass this critical point, but did not suggest what percentage of these (or any other) funds might.[100]

Most recently, the Court in *New York v. United States* upheld the conditional spending provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 against a Spending Clause challenge.[101] Although the constraints on Congress's spending power set out in *Dole* were ultimately not at issue in *New York*, the Court nonetheless took this opportunity to reaffirm that earlier holding, implicitly including Congress's power to achieve otherwise impermissible regulation of the states through conditional offers of federal funds.[102] The Act encouraged the states to develop, by January 1, 1993, the capability to dispose safely of all low level radioactive waste generated within their borders, by providing federal funds to states that achieved a series of deadlines toward this end.[103] In order to meet each of these deadlines, a state's legislature or governor was required to take some official action.[104] Although the Court conceded that Congress had the power under the Commerce Clause to directly regulate "the generators and disposers of waste,"[105] it held that the Tenth Amendment precluded Congress from mandating that *the states* do so: "[E]ven where Congress has the authority under the

97. See id. at 208. The Court cited three cases, but in none of them had it invalidated a conditional grant of federal money to the states on this ground. See Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam); King v. Smith, 392 U.S. 309, 333 & n.34 (1968).

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

99. Id. (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

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

101. 112 S. Ct. 2408, 2427 (1992). The Court did not uphold the "take title" provision of the Act, however. That provision, which required states to take title to radioactive waste if certain deadlines were not met, was struck down on Tenth Amendment grounds. See id. at 2429.

102. See id. at 2426.

103. See id. at 2416.

104. These actions included ratifying "legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State." Id.

105. Id. at 2420.

Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly *to compel the States* to require or prohibit those acts."[106]

Perhaps sensibly, in light of *Dole*, the state of New York did not dispute Congress's authority to use conditional offers of federal funds in order to regulate the states in ways that it could not directly mandate.[107] Instead, the state argued, unsuccessfully, that the Act exceeded Congress's powers under the Spending Clause insofar as it authorized the expenditure of funds that the state contended were not "federal funds."[108] When the *New York* Court nonetheless applied the four-factor *Dole* test to the Act's funding scheme, however, it had no difficulty sustaining it.[109]

C. *Existing Critiques*

Since *Dole,* many commentators have lamented the Court's willingness to grant Congress seemingly plenary power to bargain with the states.[110] Three general concerns have been repeatedly expressed. First,

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106. Id. at 2423 (emphasis added); see also id. ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). Thus, the Court reaffirmed that "Congress may not simply 'commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " Id. at 2420 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

107. Id. at 2426.

108. See id. The state claimed that:

> [B]ecause the money collected and redisbursed to the States is kept in an account separate from the general treasury, because the Secretary holds the funds only as a trustee, and because the States themselves are largely able to control whether they will pay into the escrow account or receive a share, the Act "in no manner calls for the spending of federal funds."

Id. The Court, however, held that:

> A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose. . . . The Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner. Petitioners' argument regarding the States' ability to determine the escrow account's income and disbursements ignores the fact that Congress specifically provided the States with this ability as a method of encouraging the States to regulate according to the federal plan.

Id. at 2426–27.

109. See id. at 2426. The *New York* Court did not explicitly reaffirm the *Dole* Court's additional observation that the financial incentives Congress offers the states might sometimes be impermissibly coercive. See South Dakota v. Dole, 483 U.S. 203, 211 (1987); supra text accompanying notes 98–99.

110. See, e.g., Epstein, supra note 10, at 150–57; Engdahl, supra note 29, passim; McCoy & Friedman, supra note 10, passim; William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 Harv. J.L. & Pub. Pol'y 303 passim (1993); see also Rosenthal, supra note 28, passim (writing just before *Dole*).

Some of these commentators have viewed Congress's seemingly plenary power to bargain with the states as part of the larger pre-*Lopez* problem of the expansion, beginning

scholars have observed that any constitutional limits on Congress's regulatory powers can apparently be circumvented through combined use of the taxing and spending powers.[111] Some suggest that *Butler* has been misread in reaching this result,[112] but none contends that the federal government can, after *Dole*, be understood as one of limited, delegated powers.[113]

Second, commentators have expressed dissatisfaction with the two most promising constraints on Congress's spending power that the Court identified in *Dole*: "coercion" and "germaneness."[114] Although the *Dole* Court suggested that the Spending Clause did not authorize Congress either to coerce the states unduly[115] or to impose conditions "unrelated 'to the federal interest in particular national projects or programs,' "[116] it provided neither a workable definition of these critical standards nor any actual or hypothetical example of their violation.[117]

Third, to the extent that *Dole* would relegate control over conditional federal spending to the federal political process, scholars have questioned the ability of the states to protect themselves from Congress within that process.[118] Here the discussion to date has focused exclusively on issues of political expediency and accountability.[119] On the former issue, Professor Albert Rosenthal posits that because "[a] continued high level of federal financial assistance will often be of great importance to state and local governments . . . these governments may not find it politically expedient to dilute their efforts to obtain such funds by simultaneously campaigning against the conditions, however objectionable they may ap-

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in 1937, of Congress's powers to regulate the states directly under the Commerce Clause. See, e.g., Epstein, supra note 10, at 155–57; Rosenthal, supra note 28, at 1131.

111. See Epstein, supra note 10, at 151–57; Engdahl, supra note 29, at 62–63, 81; McCoy & Friedman, supra note 10, at 86–87, 102–03, 115–23, 125–27; Van Alstyne, supra note 110, at 319–20.

112. See Engdahl, supra note 29, at 54–65, 81–86; McCoy & Friedman, supra note 10, at 105–10, 115–20; cf. *Dole*, 483 U.S. at 216–17 (O'Connor, J., dissenting).

113. See Epstein, supra note 10, at 155–57; McCoy & Friedman, supra note 10, at 125–26; Rosenthal, supra note 28, at 1131; Van Alstyne, supra note 110, at 319–20.

114. See Epstein, supra note 10, at 155–56 (noting that in "[t]he only case in which the coercion arguments appear to have prevailed . . . the fact of coercion [was] conceded [by the government]" and the case was never heard by the U.S. Supreme Court); Engdahl, supra note 29, at 54–62, 78–86 (noting that the Supreme Court has never actually held a spending condition invalid on grounds of lack of germaneness or of coercion); McCoy & Friedman, supra note 10, at 101–02, 117–23 ("A close look at these two doctrinal limits suggests . . . that they are verbal constructs devoid of content.").

115. See *Dole*, 483 U.S. at 211 ("In some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' ").

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

117. See supra notes 93–94, 98–100 and accompanying text.

118. See, e.g., McCoy & Friedman, supra note 10, at 123–25; Rosenthal, supra note 28, at 1141.

119. Compare the arguments presented in Part II.B. infra.

pear to be."[120] With regard to accountability, Professors Thomas McCoy and Barry Friedman contend that because each state retains the final decision either to accept the federal regulation or to forego the offered funds, voters are likely to attribute the result to their state legislature rather than to their federal representatives[121] and, in any case, are unlikely to discern when the result represents an abuse of congressional power.[122] Thus, offending federal legislators are likely to go unpunished at the next election.

Although interesting, and in some cases persuasive, these critiques of the *Dole* test leave two important issues unresolved. First, they do not confront the central question that the unconstitutional conditions doctrine prods us to ask: Why should Congress *not* be able to attach any conditions it chooses to the federal funds it offers the states? An offer is, after all, obviously and importantly different from a mandate. And, as the Court has repeatedly observed, a state is always free to decline an offer of federal funds that it finds unattractive.[123] Why, then, would additional, judicial protection be needed to ensure the states' autonomy?

Second, insofar as *Dole* consigns control over conditional federal spending to the federal political process, commentators have not persuasively explained why the states cannot adequately protect themselves within that process. Those, such as Rosenthal, who have portrayed Congress as a potentially oppressive monolith that is separate from, and often opposed to, the states, have implicitly ignored the fact that Congress consists simply of the *representatives of the states*.[124] These commentators therefore do not explain why the representatives of the states are willing to enact legislation that offers the states, including their own, federal funds with unattractive conditions attached.[125] Others, such as McCoy and Friedman, who acknowledge that the members of Congress each represent particular states (or a part thereof), and are each elected by the people of a state (or a part thereof), suggest that voters cannot monitor these representatives well when the legislation at issue involves conditional of-

120. Rosenthal, supra note 28, at 1141.

121. See McCoy & Friedman, supra note 10, at 125.

122. See id. at 124.

123. See, e.g., South Dakota v. Dole, 483 U.S. 203, 210 (1987); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947); Steward Machine Co. v. Davis, 301 U.S. 548, 595 (1936); Massachusetts v. Mellon, 262 U.S. 477, 482 (1923).

124. See, e.g., Rosenthal, supra note 28, at 1140–41.

125. This question is an even larger problem for those, such as Professor Herbert Wechsler, who have argued that the states *can* adequately protect themselves within the political process. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 558 (1954). Although Wechsler focuses on the state-based allocation of representation in Congress, he nonetheless suggests that oppression by the "national authority," rather than the oppression of some states by other states, is the problem which that structure of representation avoids. See id. (the national political process "is intrinsically well adapted to retarding or restraining new intrusions *by the center* on the domain of the states") (emphasis added); see also infra Part II.B.

fers of federal funds.[126] But they do not explain why any state's congressional representatives would ever require this monitoring. That is, they do not explain why these representatives would ever prefer to enact a conditional rather than an unconditional offer of federal funds to the states, including their own.[127]

II. Toward A Normative Theory of Conditional Federal Spending

This Part presents three arguments which, taken together, explain why the courts should presume invalid those offers of federal funds to the states which, if accepted, regulate them in ways that Congress could not directly mandate. Thus, these arguments also suggest why a test that embodies such a presumption is preferable to the *Dole* test, which does not. First, this Part argues that the federal government has a monopoly power over the various sources of state revenue, which should render any offer of federal funds to the states presumptively coercive. Second, many conditional offers of federal funds will actually pose a choice only to a small subset of states, and this minority cannot effectively protect themselves against the majority of states through the political process. Third, federal regulatory spending is especially likely to reduce aggregate social welfare by reducing the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers to its residents and potential residents.

A. *Sources of State Revenue*

A conditional offer of federal funds to the states implicitly divides them into two groups:[128] (1) states that already comply, or without financial inducement would happily comply, with the funding condition(s), and for which the offer of federal money therefore poses no real choice; and, (2) states that find the funding condition(s) unattractive and there-

126. See McCoy & Friedman, supra note 10, at 124–25.

127. Even outside the context of conditional federal spending, scholars have reached no consensus on the role that "national" interest groups, for example, might play in causing representativese to support legislation that harms their own state. Compare, e.g., Kaden, supra note 24, at 863 (contending that to the extent that federal legislators "develop independent constituencies among groups such as farmers, . . . environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests . . . is reduced") with Michael A. Fitts, The Vices of Virtue; A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. Pa. L. Rev. 1567, 1605 (1988) (arguing that support by House members of "legislative items that have impact across a broad constitutency is unrewarding politically . . . [because] the benefits of . . . such legislation will inure to the advantage of other representatives or their constituencies," and concluding that these representatives have "a greater incentive to concern themselves with those interests that concern only their own constitutents—local projects, local issues, and constitutent services" (footnote omitted)).

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

fore face the choice of foregoing the federal funds in order to avoid complying with the condition(s), or submitting to undesirable federal regulation in order to receive the offered funds.

When the federal government makes a conditional offer of funds, states in the second group are severely constrained in their decisionmaking by the lack of equivalent, alternative sources of revenue. There is no competitor to the federal government to which these states might turn for substitute financial assistance. And, although each state has the power to raise funds by taxing income, purchases, and property within its borders,[129] this power, too, is subject to indirect federal control. Since the adoption in 1913 of the Sixteenth Amendment, which granted Congress the power to tax income "from whatever source derived, [and] without apportionment among the several States,"[130] the states implicitly have been able to tax only the income and property remaining to their resi-

129. Insofar as the states did not, under Article I, Section 8, or under the Sixteenth Amendment, surrender to Congress all of their power to tax income, purchases, and property within their borders, some of this power may be understood to have been reserved to the states under the Tenth Amendment. Nonetheless, the people of a state may choose to include in the state constitution certain restrictions on the ability of the state or its municipalities to raise funds through taxation, as in the case of California's "Prop. 13." See Cal. Const. art. XIII A; Nordlinger v. Hahn, 505 U.S. 1 (1992) (sustaining Prop. 13 against an equal protection challenge under the U.S. Constitution); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978) (sustaining Prop. 13 against various challenges under the U.S. and California constitutions); see also Massachusetts's "Proposition 2 1/2," Mass. Ann. Laws ch. 59, § 21C (Law. Co-op. 1989).

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

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

dents and property owners[131] after the federal government has taken its yearly share.[132]

This means, in addition, that when the federal government offers a state money subject to unattractive conditions, it is often offering funds that the state readily could have obtained *without those conditions* through direct taxation—*if* the federal government did not also have the power to tax income directly.[133] Moreover, should a state decline proffered federal funds because it finds a condition intolerable, it receives no rebate of any tax dollars that its residents have paid into the federal fisc. In these cases, the state (through its residents) contributes a proportional share of federal revenue only to receive less than a proportional share of federal spending. Thus, when the federal government offers the states money, it can be understood as simply offering to return the states' money to them, often with unattractive conditions attached.[134]

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

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

See also International Harvester Co. v. Wisconsin Dep't of Taxation, 322 U.S. 435, 441 (1944); 1 Jerome R. Hellerstein & Walter Hellerstein, State Taxation: Corporate Income and Franchise Taxes 6.4 to 6.8 (2d ed. 1993); 2 Jerome R. Hellerstein & Walter Hellerstein, State Taxation: Sales and Use, Personal Income, and Death and Gift Taxes 20.15 to 20.33 (1992).

132. The federal government is constitutionally authorized to, and does, tax both individual and corporate income. See, e.g., Brushaber v. Union Pac. R.R., 240 U.S. 1, 17-18 (1916) (sustaining federal income tax against Fifth Amendment challenge); Flint v. Stone Tracy Co., 220 U.S. 107, 150 (1911) (upholding corporate income tax as an excise or indirect tax, not subject to the apportionment rule of Article I, Section 9); Bittker & McMahon, supra note 42, at 1-1 to 1-8; Daniel Q. Posin, Federal Income Taxation 1-8 (1983).

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

134. I am not the first to make this observation. Professor Lino Graglia, for example, has noted that:

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

Lino A. Graglia, From Federal Union to National Monolith: Mileposts in the Demise of American Federalism, 16 Harv. J.L. & Pub. Pol'y 129, 130–31 (1993); see also McCoy &

This monopoly power that the federal government directly and indirectly wields over the states' ability to raise revenue makes the states' financial relationship with the federal government more closely analogous to that of welfare recipients than to that of public employees.[135] Individuals eligible for public assistance benefits have no equivalent alternative source of funds to which they can turn if they find the conditions on government assistance unattractive.[136] Federal government employees, in contrast, are likely to have comparable employment opportunities in the private sector or with another (federal, state, or local) governmental entity.[137] The availability of these other options has two important implications: if a public employee finds a condition on his current job unattractive, he is likely to be able to find other, comparable employment; and, in turn, the existence of a competitive market for these employees'

Friedman, supra note 10, at 124 ("[F]or most states' voters the only real question is how much they can get back in federal financial handouts. There is no immediate sense that *it is their own money being returned to them with strings attached* and that the net effect of the money's round trip to Washington is simply to carry the regulatory strings with it back to the state." (emphasis added)).

135. The analogy intended here is a relative, rather than an absolute, one. Obviously, a denial of welfare benefits may be the difference between subsistence and death for an indigent person. A state's need for federal funds, in contrast, is unlikely to seem as severe or ultimately desperate. In addition, the states are always assured representation in both houses of Congress, while the poor are not and indeed may have little political power relative to other interest groups.

136. Although some private sector aid may be available from charities, religious groups, and individuals, it is today unlikely to be as reliable or as generous as that offered by the government. There is substantial evidence that the involvement by the federal, state, and local governments in the provision of public assistance has served to reduce the amount of private sector funds that are available to aid the poor. See, e.g., Burton A. Abrams & Mark D. Schitz, The "Crowding-Out" Effect of Governmental Transfers on Private Charitable Contributions, Pub. Choice Vol. 33, Issue 1, 1978, at 29 (1978); Dwight R. Lee & Richard B. McKenzie, Second Thoughts on the Public-Good Justification for Government Poverty Programs, 19 J. Legal Stud. 189, 198–99 (1990); Russell D. Roberts, A Positive Model of Private Charity and Public Transfers, 92 J. Pol. Econ. 136 (1984); see also Beth Stevens, Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector, *in* The Politics of Social Policy in the United States 123 (Margaret Weir et al. eds., 1988).

The monopoly power over the poor which the government obtains through this displacement of private donations is heightened by the absence of intergovernmental competition in this area. Most governmental public assistance programs are either unique to a particular level of government, or are the products of cooperation by two levels of government. See Sar A. Levitan, Programs in Aid of the Poor 17–21 (5th ed. 1985); Theodore R. Marmor et al., America's Misunderstood Welfare State: Persistent Myths, Enduring Realities 45–46 (1990); Baker, supra note 13, at 1197–1200.

137. This is true also of state and local government employees, of course. See, e.g., Epstein, supra note 10, at 213–14 ("[E]ven in governmental settings, the large number of separate government employers at all levels may help to create a competitive labor market, even with services uniquely provided for by the state. . . . It is very hard to create monopolies in labor markets without explicit government intervention to block free entry." (footnote omitted)); Stephen F. Williams, Liberty and Property: The Problem of Government Benefits, 12 J. Legal Stud. 3, 27–31 (1983) (discussing market for services of various types of government employees).

services should cause fewer arbitrary (and, therefore, unattractive) conditions to be imposed by any of the competing employers.[138] Analogously, the absence of a similarly competitive market for public assistance benefits means that eligible individuals are more likely both to face and to feel forced to accept conditions on those benefits that seem arbitrary and unattractive.[139]

Significantly, the Supreme Court has long acknowledged (if only implicitly) this greater power that the federal government has over recipients of public assistance, relative to federal employees, by invalidating challenged conditions on public assistance benefits much more readily than challenged conditions on federal employment.[140] Because the federal government exercises a monopoly power over states' ability to raise revenue that is comparable to the monopoly power it wields over welfare recipients' income, the Court should be similarly willing to invalidate challenged conditions on federal money that Congress offers the states.

B. *Protections of the Political Process*

One might be less concerned about the level of judicial scrutiny accorded conditional offers of federal funds to the states if one were confident that the states could protect themselves through the political process. Professor Herbert Wechsler has observed in this context that the Senate, in which all states are equally represented, "cannot fail to function as the guardian of state interests as such," and that "[f]ederalist considerations . . . play an important part even in the selection of the President."[141] He has therefore concluded that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the

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138. See, e.g., Epstein, supra note 10, at 211–14; Williams, supra note 137, at 27–31.

139. For discussion of the Supreme Court cases involving some of these conditions, see Baker, supra note 13.

140. Compare, for example, the cases involving conditions on public assistance benefits discussed in Baker, supra note 13, with the cases involving conditions on public employment discussed in Epstein, supra note 36, at 67–73, and in Epstein, supra note 10, at 211–36. This comparison bears out Epstein's prediction (and hope) that "the law should find fewer occasions to invoke the unconstitutional conditions doctrine in the context of government employment than in other contexts." Id. at 214. It is also consistent with my positive theory of the unconstitutional conditions doctrine in the context of public assistance benefits, set out in Baker, supra note 13.

141. Wechsler, supra note 125, at 548, 557. Wechsler's discussion was cited approvingly by the Court in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550, 551 n.11 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."), and by the dissent in National League of Cities v. Usery, 426 U.S. 833, 877 (1976) (Brennan, J., dissenting) ("[T]he extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress.").

legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."[142]

While the state-based apportionment of representation within the federal government[143] may well ensure that "*state interests as such*" are protected against federal oppression, *federal* oppression is not the problem.[144] The problem, rather, lies in the ability of *some states* to harness the federal lawmaking power to oppress *other states*. Not only can the state-based allocation of congressional representation not protect states against this use of the federal lawmaking power, it facilitates it.

Recall that a conditional offer of federal funds to the states implicitly divides them into two groups.[145] One would therefore expect such conditional funding legislation to be enacted only if a (substantial) majority of states fall within the first group: that is, they already willingly comply with, or favor, the stated condition, and the conditional offer of funds is therefore no less attractive to them than a similar unconditional offer.[146]

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142. Wechsler, supra note 125, at 559 (footnote omitted); see also id. at 558 ("Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse . . . .").

143. The state-based allocation of representation in the Senate is obvious: each state receives two senators and therefore has formal equality in representation. See U.S. Const. art. I, § 3, cl. 1. Although representation in the House is proportional to population, it too is state-based insofar as each state is ensured one representative no matter how small its population, representatives are allocated by state, and House districts do not cross state lines. See U.S. Const. art. I, § 2, cl. 3. Even the President is ultimately elected by the states, insofar as each state receives "a number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." See U.S. Const. art. II, § 1, cl. 2; see also Wechsler, supra note 125, at 547–50, 552–55.

144. It is not clear what Wechsler means by "state interests as such" or the (presumably) opposed "federal interests as such." Juxtaposing these two sets of interests is nonetheless common in the context of conditional federal spending, especially by commentators who, in contrast to Wechsler, are concerned that "state interests as such" are less likely to be advanced by Congress than "federal interests as such." See, e.g., Kaden, supra note 24, at 860–68; McCoy & Friedman, supra note 10, at 123–25.

145. See supra note 128 and accompanying text.

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

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

R. Douglas Arnold, The Logic of Congressional Action 117–18 (1990) (emphasis added) [hereinafter Arnold, Logic]; see also R. Douglas Arnold, Congress and the Bureaucracy: A Theory of Influence 43, 52 (1979) (legislators seek supermajorities "because a whole series of majorities are required, one at each stage of the congressional process . . . [and] they want to minimize risks of miscalculation or last-minute changes"); David R. Mayhew, Congress: The Electoral Connection 111–15, 112 n.67 (1974) (frequency distribution data indicate that House and Senate roll-call votes "are bimodal, with a mode in the marginal range (50–59.9%) and a mode in the unanimity or near-unanimity range (90–100%);"

Few congressional representatives, after all, should be eager to support legislation that gives the states money only if they comply with a condition that a majority of their own constituents would independently find unattractive.[147]

The conditional offer of federal funds to the states proposed by President Clinton in response to *Lopez*[148] directly supports this theory. At the time the President spoke, more than forty states had already enacted prohibitions on the possession of guns in or near schools.[149] Thus, only a (small) minority of states would be posed a choice by the President's suggested offer of federal funds, and the representatives of those states would likely have scant ability within the political process to prevent the legislation's passage. Their best hope would be to trade votes with the requisite number of members of the majority coalition, exchanging their

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similar patterns have been observed in state legislatures). But see William H. Riker, The Theory of Political Coalitions 32–101 (1962) (arguing that in American politics, parties seek to increase votes only until they achieve the *minimum* necessary to form a winning coalition).

147. A legislator is less likely to be reelected if the median voter in her constituency believes that she voted "the wrong way" on an important issue. And it is an axiom of political science and theory that legislators' primary, but not sole, concern is winning reelection. See, e.g., Arnold, Logic, supra note 146, at 5 (1990) (although members of Congress "are not single-minded seekers of reelection; reelection is their dominant goal"); Frank E. Smith, Congressman from Mississippi 127 (1964) ("All members of Congress have a primary interest in being re-elected. Some members have no other interest."); William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, 74 Va. L. Rev. 373, 396 (1988) (legislator is "a placeholder opportunistically building up an ad hoc majority for the next election"); Mark Tushnet, Principles, Politics, and Constitutional Law, 88 Mich. L. Rev. 49, 51–53 (1988) (discussing normative implications of "orientation toward reelection").

Thus, *ceteris paribus*, a member of Congress should prefer to support legislation that gives the states money if they comply with a condition that a majority of her constituents find unproblematic, if not positively attractive, rather than identical legislation that imposes a condition that a majority of her constituents would otherwise find unattractive or even oppressive. Of course, other things are not always equal, and an individual legislator may nonetheless choose to support conditional funding legislation of the latter sort if she predicts that the benefits to her, in terms of reelection campaign contributions and other support from state or national interest groups will outweigh the costs, in terms of lost votes and other support within her district. Or a legislator may sometimes choose to express a preference at odds with that of a majority of her electorate and support conditional funding legislation of the latter sort, especially if she does not believe her reelection to be at risk. See, e.g., Arnold, Logic, supra note 146, at 5; Richard F. Fenno, Jr., Congressmen in Committees 1 (1973). In recent years, a lively academic debate has grown up around the extent to which legislators enact their own ideological preferences rather than those of interest groups or their constituents. See, e.g., Lynn A. Baker, Direct Democracy and Discrimination: A Public Choice Perspective, 67 Chi.-Kent L. Rev. 707, 740 n.117 (1991) (collecting sources); Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 27 (1991); Jerry L. Mashaw, The Economics of Politics and the Understanding of Public Law, 65 Chi.-Kent L. Rev. 123, 143–50 (1989).

148. See supra note 8.

149. See Purdum, supra note 8, at A1; see also United States v. Lopez, 115 S. Ct. 1624, 1641 (Kennedy, J., concurring) (citing state statutes regulating possession of guns in school zones).

support on a matter of greater concern to those states for help in opposing the condition on federal funds.[150] Of course, the likelihood of success of such a vote trading effort is positively correlated with the number and size of states in the minority coalition.[151]

But why would a state's congressional representatives ever prefer to enact a conditional rather than an unconditional offer of federal funds to the states, including their own? Several possibilities merit discussion. To begin, legislators might support a conditional offer of funds in order to "entice" outlier states into amending or adopting some provision(s) of state constitutional or statutory law.[152] To the extent that Congress, at least after *Lopez*, cannot always directly regulate the states in the ways it might prefer,[153] an offer of appropriately conditioned federal funds may be the only means to certain regulatory ends.[154] By proposing or supporting legislation to lure outlier states into adopting these regulations, individual legislators may garner the approval of "single issue" voters and interest groups, who may provide reelection votes as well as nationwide financial and other support for their next campaign.[155]

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

The classic discussion of vote trading or logrolling is James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 131–45 (1962); see also Baker, supra note 147, at 721–32.

151. Assuming that each state's legislators vote together on a given issue, a larger minority of states will need fewer additional votes in the Senate in order to block legislation to which it is opposed than will a smaller minority of states. Thus, *ceteris paribus*, any vote trading effort to secure the additional votes should have a greater likelihood of success, and should be easier to achieve, when the minority undertaking it is larger rather than smaller. See Baker, supra note 147, at 730–31.

By the "size" of states is meant their population. This variable matters in any discussion of vote trading in Congress because population determines the number of representatives and, therefore, votes that a state will have in the House. Assuming that each state's representatives vote together on a given issue, a small number of large states is likely to need fewer additional votes in the House in order to block legislation to which it is opposed than will the same small number of small states. Indeed, the nine largest states together control a majority (227) of the House's 435 total members. See Statistical Abstract, supra note 22, at 273.

152. This was President Clinton's express aim when he made his post-*Lopez* suggestion that Congress "encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans." See Purdum, supra note 8, at A1.

153. See supra notes 3–6 and accompanying text.

154. See supra note 8.

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

In addition, legislators might also thus win the votes of rationally self-interested constituents who believe that certain activities in another state impose negative externalities on them. Consider, for example, the federal regulation at issue in *Dole*. Voters in a state that, consistent with the regulation, already prohibited "the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age"[156] might reasonably believe that there would be fewer alcohol-related accidents on their own state's highways if their young residents no longer had an incentive to commute to border states where the drinking age is lower and, therefore, were less likely "to combine their desire to drink with their ability to drive."[157]

Sometimes members of Congress might support conditional funding legislation not in order to encourage interstate conformity in some area,

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In recent years, highly controversial candidates for governor and the U.S. Senate, notably David Duke and Oliver North, have received as much financial and other campaign support from outside their respective states as from within. On David Duke, see, e.g., Susan Gilmore, Hundreds in State Donated to Duke, Seattle Times, Nov. 29, 1991, at C1 ("More than 200 Washington state residents gave more than $11,000 to David Duke's unsuccessful race."); Anthony Lewis, Abroad at Home: "America Be on Guard," N.Y. Times, Nov. 18, 1991, at A15 (47% of Duke's total campaign contributions were from people in 45 states other than Louisiana). On Oliver North, see, e.g., Margaret Edds, North Still Asking Faithful Followers to Dig a Little Deeper, Roanoke Times & World News, Nov. 16, 1994, at C1 (North raised more money than any candidate in U.S. Senate history, almost $20 million, from more than 200,000 contributors nationwide); Michael Ross, Another Epic Battle Plays Out in Virginia, L.A. Times, Nov. 4, 1994, at A20 ("North has raised more money—$17.6 million—than any other Senate candidate this year, most of it from out of state."); see also Andrew Mollison, Outside Funds Are Politics As Usual; Study Tracks Cash for Hot State Races, Atlanta J. & Const., Nov. 19, 1991, at A3 ("a big surge of private funds across state lines for important U.S. Senate and gubernatorial races is politics as usual, according to nine-state study").

The growth of political parties as national rather than local sources of political influence may also be a factor in the rise of nationwide support for candidates in statewide elections. See, e.g., John H. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America 15 (1995) (arguing that "the party provides more support [of all kinds] than any other organization for all but a very few candidates for national *and state* offices" (emphasis added)); L. Sandy Maisel, Political Parties in a Nonparty Era: Adapting to a New Role 159, 269, *in* Parties and Politics in American History (L. Sandy Maisel & William G. Shade eds., 1994) ("[E]ach party has used opportunities . . . to mount unified, coordinated campaigns throughout the country and thus the national parties have been able to finance local efforts.") John S. Saloma III & Frederick H. Sontag, Parties: The Real Opportunity for Effective Citizen Politics (1972); Michael A. Fitts, Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions, 88 Mich. L. Rev. 917 (1990); Fitts, supra note 127; Kaden, supra note 24, at 859–60, 862–67; Jonathan R. Macey, The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups, 89 Mich. L. Rev. 1 (1990).

156. South Dakota v. Dole, 483 U.S. 203, 205 (1987) (quoting 23 U.S.C. § 158 (Supp. III 1985)).

157. Cf. id. at 208 ("Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their decision to drink with their ability to drive, and that this interstate problem required a national solution."); see also 130 Cong. Rec. S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg); id. at S8212 (statement of Sen. Heinz).

but in the hope that some state(s) might decline the offer of federal funds.[158] States that forego the conditional federal revenue enable the other states to profit at their expense. By not receiving their proportionate share of the funds offered under the conditional grant, such states leave more money in the federal fisc for other purposes, and thus may well receive a smaller share of the total federal pie in a given year than they otherwise would have.[159]

If this is the congressional majority's goal, however, there is a more direct way to accomplish it. They can simply pass a law that allocates federal funds for a particular purpose only to states in the majority coalition.[160] Such an appropriation might well be sustained if challenged,[161]

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158. Although it is not at all clear that this was Congress's aim, there are several notable instances in which states have chosen to decline an offer of funds rather than comply with the attached condition. See, e.g., *Dole*, 483 U.S. 203; Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). But see 131 Cong. Rec. S15,202 (daily ed. Nov. 12, 1985) (statement of Sen. Lautenberg) ("Congress did not pass Public Law 98-363 [at issue in *Dole*] in order to withhold highway funds.").

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

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

Epstein, supra note 10, at 152.

160. Or, in the alternative, "Congress simply could pay states a flat fee to enact laws Congress desires, but which are outside the scope of Congress' regulatory power." McCoy & Friedman, supra note 10, at 123.

161. Although nearly every state constitution has a provision explicitly prohibiting "special legislation" such as that described here, see Osborne M. Reynolds, Jr., Local Government Law 85–92 (1982); Lyman H. Cloe & Sumner Marcus, Special and Local Legislation, 24 Ky. L.J. 351 (1936); Clayton P. Gillette, Expropriation and Institutional Design in State and Local Government Law, 80 Va. L. Rev. 625, 642 (1994), the U.S. Constitution is not today understood to contain an analogous provision.

It is possible, however, that the Framers intended the "general Welfare" requirement of the Spending Clause, U.S. Const. art. I, § 8, cl. 1, to serve this function. Thomas Jefferson, for example, contended in his annual address to Congress on December 2, 1806, that a constitutional amendment would be necessary if a federal revenue surplus were used to fund internal improvements and education "because the objects now recommended [public education, roads, rivers, canals, and other objects of public improvement] are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied." 16 Annals of Cong. 11, 15 (1806). Nonetheless, Congress passed, and Jefferson signed, a bill appropriating funds to pay for construction of the "Cumberland Road" which was projected to extend from Cumberland, Maryland, across West Virginia to the Ohio River. See Act of Mar. 29, 1806, ch. 19, § 1, 2 Stat. 357, 358.

but it might also be more difficult to enact than a law offering federal funds to any state that meets some generally applicable condition. For example, individual legislators may reap greater political gains from supporting, and may therefore be more willing to support, an offer of federal funds to the states that simultaneously makes explicit their endorsement of "gun-free school zones," affirmative action in undergraduate admissions, heterosexual "family values," or a minimum drinking age of twenty-one years, rather than legislation that suggests nothing more than a seemingly selfish willingness to deny certain states their fair share of the federal pie.[162] In addition, it may be easier to form a stable majority coalition to support a law that explicitly ties the grant of federal funds to a larger issue on which legislators are likely to have well publicized, and therefore relatively firm, positions.[163]

Two decades later, President Jackson vetoed the Maysville Road Bill of 1830 on the ground that it ran wholly within the state of Kentucky and therefore would be of merely local benefit rather than for the "general Welfare" as he believed the Spending Clause required. See Andrew Jackson, Veto of the Maysville Road Bill (1830), reprinted in 2 A Compilation of the Messages and Papers of the Presidents 483–92 (James D. Richardson ed., 1897). See generally Engdahl, supra note 29, at 26–35.

162. Indeed, legislators may lose the support of their constituents and the goodwill of their congressional colleagues if they appear too obviously to be selfish in this way (even if on behalf of their constituents), rather than concerned for "the public good."

163. The firmness of the legislators' positions will increase the likelihood that a majority coalition can form, insofar as they increase the likelihood that a Condorcet choice exists for some majority of legislators. A Condorcet choice is a single legislative alternative (here, a particular conditional offer of federal funds) that will defeat all competitors in a head-to-head competition even if it is not the *first choice* of a majority. See Robert Sugden, The Political Economy of Public Choice: An Introduction to Welfare Economics 140 (1981); see also Baker, supra note 147, at 726 n.62.

When vote trading is possible, a majority coalition will have difficulty forming on any issue for which a Condorcet choice does not exist. This is because a Condorcet choice is the only "core solution" to the logrolling or vote trading game:

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

Sugden, supra, at 148.

If a Condorcet choice does not exist, the outcome of sincere voting will be a function of such "procedural" variables as the order in which various alternatives are formally considered. This is the "voting paradox," frequently referred to as the Arrow "impossibility theorem," see Kenneth J. Arrow, Social Choice and Individual Values 2–3 (1951), although the theoretical significance of the paradox was discussed by Black in the 1940s, see Duncan Black, The Theory of Committees and Elections (1958); see also Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121 (1990).

Finally, Congress may sometimes have no other goal than distributing federal funds for the states to use for some specified purpose. It may attach additional, regulatory conditions to the receipt of those funds merely to secure majority support for the legislation.[164] For example, some legislators may be willing to offer the states federal funds to provide medical care to their low income residents, but only if the states are merely permitted, and not required, to use those funds to provide abortions to indigent women.[165] Thus, it may sometimes be easier to pass a conditional grant of federal funds to the states than to pass a similar, unconditional grant.

In summary, the state-based apportionment of representation in Congress facilitates the ability of some states to harness the federal lawmaking power to oppress other states to their own advantage. And legislators have many incentives to enact such legislation. Whatever a particular legislator's motivation might be, supporting a conditional grant of federal funds to the states is likely to make her state (and therefore herself) better off, and should only rarely make it (and herself) worse off, *if her state already voluntarily complies, or without financial inducement would happily comply, with the funding condition.*[166] For these states and their congressional representatives, a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states. Whether a state that is not already in compliance chooses to decline the offer of federal funds or to acquiesce in the stated condition, those states already in com-

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164. By "regulatory condition," I do not mean to include the obvious condition of *how*, i.e., the purpose for which, the state is to spend the funds.

165. In August 1995, the House passed such a provision by nine votes as part of its appropriations bill for Health and Human Services, Labor, and Education. The provision

> would nullify a White House directive that requires all states to use Medicaid funds to pay for rape- or incest-related abortions. The Clinton Administration has insisted on obedience to the directive although it is conflict [sic] with laws or the constitutions of 36 states that expressly bar any government financing of abortion except in cases where pregnancy poses a risk to a woman's life.

Jerry Gray, House Spending—Bill Votes Reveal Faults in Party Unity, N.Y. Times, Aug. 4, 1995, at A1.

Only recently has it become conceivable that Congress would offer the states money to assist the poor in the form of "block grants," without also providing detailed instructions for allocating those funds. See supra note 25.

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

pliance may well improve, and will only rarely worsen, their competitive position relative to that state.[167]

C. *Interstate Competition and Aggregate Social Welfare*

In the usual course of affairs, each of the fifty states chooses the package of taxes and services, including state constitutional rights and other laws, that it will offer its residents and potential residents.[168] In this way, the states compete for both individual and corporate residents and their tax dollars.[169] As part of its unique package, a state might choose, for example, to prohibit the use of "affirmative action" in the admission of students to its public universities, to prohibit the death penalty, to provide a constitutional right to same-sex marriage, or to prohibit the purchase or public possession of any alcoholic beverage by any person who is less than eighteen years of age. The resulting choices can be understood as a state's determination that, *for it*, the benefits of a particular provision of state statutory or constitutional law exceeds the costs.[170]

Thus, a state's statutory or constitutional prohibition against the death penalty, for example, could be understood as its determination that, for it, the benefits of precluding a type of state action that some consider morally repugnant outweigh the costs of any foregone deterrence of crime. In the absence of a federal government, a state in which the death penalty is available for first degree murder, for example, would have only two ways to compete with a state that chose to prohibit the execution of individuals it convicts of that crime.[171] The former state could continue to offer its current package of taxes and services, including the availability of the death penalty for first degree murder convictions, and seek to attract (and retain) those individuals and corporations

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167. By "competitive position" here I mean a state's position, relative to other states, in the competition for individual and corporate residents and their tax dollars. See infra Part II.C.

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

169. See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956). For commentary on Tiebout's classic model, see, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 514–18 (1991) (offering critique and collecting sources); Clayton P. Gillette, Local Government Law: Cases and Materials 382 (1994) (collecting sources).

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

171. The competition here is for non-criminal residents. Individuals (or corporations) with strong views on the death penalty are the subgroup most likely to be influenced in their selection of a state in which to reside by the availability of the death penalty in that state.

who prefer this package. Or, the state could make some adjustment(s) to its package, which may include adopting a statutory or constitutional prohibition against the death penalty.[172]

But if Congress is permitted to offer the states federal funds on the condition that they make the death penalty available for first degree murder convictions, notwithstanding the fact that Congress likely could not directly mandate the states to do so,[173] a simple majority of states will be able to harness the federal lawmaking power to restrict the competition for residents and tax dollars that would otherwise exist among them.[174] Thus, whenever a state might choose to prohibit the death penalty, the majority of states, which favor capital punishment, would have a third, competition-impeding option: their congressional representatives could enact an appropriately conditioned offer of federal funds in order to divest the outlier state of any competitive gains from its action.[175]

By supporting legislation that offers the states federal funds on the condition that they make the death penalty available for first degree murder convictions, a coalition of the states that favor the death penalty can put any state that does not to an unattractive choice: either abandon the

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

173. See United States v. Lopez, 115 S. Ct. 1624, 1632 (1995).

174. Although the concurrence of a simple majority of states may be sufficient, those eager to enact such legislation will often seek to build a coalition of supporting states that is larger than the minimum number necessary for passage. See supra note 146. Moreover, the concurrence of a simple majority of states will always be sufficient for passage only in the Senate. Whether the same simple majority of states will also be sufficient for passage in the House will depend on the populations of the relevant states. See supra note 151.

175. Of course, a majority of states must favor the death penalty in order for this legislation to be enacted. As of December 31, 1993, the death penalty was available in 36 of the 50 states. See James Stephen, Bureau of Justice Statistics, U.S. Dep't of Justice, Capital Punishment 1993, at 6. Kansas and New York have since adopted laws providing for capital punishment. See, e.g., John A. Dvorak, Kansas is Returning to the Death Penalty, Kan. City Star, Apr. 23, 1994, at C–1; Steve Fainaru, Pataki Signs Death Penalty into Law; New York Move May Augur Shift in Other States, Boston Globe, Mar. 8, 1995, at 3.

The fact that Congress nonetheless to date has not enacted or proposed an offer of federal funds thus conditioned is not surprising nor does it contradict the proposed theory of how and why Congress makes these conditional offers. For all but six of the past 40 years, the Democratic party has had a majority in *both* houses of Congress. See supra note 22. The pro-death penalty stance of such a conditional offer of funds is one that the Republican party is much more likely to embrace. We might yet see such a conditional offer of federal funds, however, if the Republican party continues to control Congress for an extended period of time. Should such legislation never be proposed or enacted, one still cannot conclude that this is because anti-death penalty states can protect themselves effectively within the federal political process. Its absence may simply mean that a sufficiently large number of federal legislators has not yet considered it a high priority.

competitive advantage that its prohibition against the death penalty presumably afforded, or forego the offered federal funds and accept an obvious financial disadvantage relative to each state that accepts the federal money. In this way, conditional offers of federal funds necessarily make the states that without financial inducement would not willingly comply with the funding condition relatively worse off than they would have been in the absence of the offer, while making all other states, by implication, relatively better off.

Permitting Congress to offer the states funds conditional on the constitutional rights and other laws that they offer their residents and potential residents enables a simple majority of states to harness the federal lawmaking power to force some states to pay more than others (including themselves) for their preferred package of laws.[176] This is especially problematic when the funding condition seeks to reduce—to the minimums mandated by the U.S. Constitution and federal statutes—the heightened statutory or constitutional protection that a small number of outlier states currently provide certain minorities.[177] In these cases, one

176. See supra note 174.

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

At present, several states have statutes that provide protection against various forms of discrimination on the basis of sexual orientation while federal law does not. Compare, e.g., Conn. Gen. Stat. § 46a-81e (1995) (prohibiting housing discrimination on the basis of sexual orientation) and Haw. Rev. Stat. § 368-1 (1994) (same) with 42 U.S.C. § 3604 (1988 & Supp. V) (prohibiting housing discrimination only on the basis of "race, color, religion, sex, familial status, or national origin"—the reference to "familial status" referring not to sexual orientation but to "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody." Id. at § 3602(k)). And compare Cal. Lab. Code § 1102.1 (1995) (prohibiting employment discrimination on the basis of sexual orientation) and Haw. Gen. Stat. § 368-1 (1994) (same) with 42 U.S.C. § 2000e-2 (1988) (prohibiting employment discrimination only on the basis of "race, color, religion, sex, or national origin") and 29 U.S.C. § 623 (1988 & Supp. V) (prohibiting employment discrimination on the basis of age).

might expect the increased cost of the protection, measured in terms of foregone federal funds, to cause an outlier state readily to relinquish it. After all, the greatest and most direct benefits of such heightened protection will typically accrue to a relatively small and powerless segment of the state's voters,[178] while the proffered federal funds may well be of direct benefit to a substantial majority.[179]

To permit Congress to offer the states funds on the condition that they make the death penalty available for first degree murder convictions, notwithstanding the fact that Congress likely could not directly mandate the states to do so,[180] is to authorize an end run around the federal amendment procedure. It is to provide a simple majority of Congress the option of denying states a power reserved to them under the Tenth Amendment—the power to choose *not* to execute those it convicts of first degree murder—without the bother of securing a federal amendment to that effect.[181] For outlier states, the disadvantage of this option is clear: they are likely to find it more difficult to garner the simple majority in either chamber necessary to block a congressional enactment than to assemble the coalition of thirteen states necessary to block an amendment to the U.S. Constitution.[182]

By providing a competition-impeding alternative to interstate competition, conditional offers of federal funds reduce the diversity among the states in the package of taxes and services, including state constitu-

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

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

180. See supra note 6 and accompanying text.

181. The court has interpreted the Eighth Amendment's prohibition against "cruel and unusual punishments" to permit, but not to require, states to make the death penalty available. See Gregg v. Georgia, 428 U.S. 153, 187 (1976).

182. Article V of the U.S. Constitution requires the consent of two-thirds of both houses of Congress to propose amendments, and the subsequent consent, by the legislature or by a convention, of three-fourths of the states for ratification. An amendment also can be proposed by a national convention called by Congress pursuant to "the Application" of the legislatures of two-thirds of the states. U.S. Const. art. V.

Although there are to date 27 examples of our willingness and ability to amend the Constitution, see, e.g., infra notes 194–200 and accompanying text, the Constitution has also sometimes proven surprisingly difficult to amend. For example, only 35 of the required 38 states had ratified the Equal Rights Amendment by the June 30, 1982 deadline Congress had set, even though from 1972 to 1982 "a majority of Americans consistently told interviewers that they favored this amendment to the Constitution." Jane J. Mansbridge, Why We Lost the ERA 1 (1986).

tional rights and other laws, which each offers.[183] Thus, some individuals and corporations may no longer find any state that provides a package (including the absence of the death penalty) that suits their preferences, while other individuals and corporations may confront a surfeit of states offering a package (including the availability of the death penalty for first degree murder convictions) that they find attractive. The net result is likely to be a decrease in aggregate social welfare, since the loss in welfare to opponents of the death penalty is unlikely under these circumstances to yield a comparable gain in welfare for those who favor it.[184]

Of course, increased diversity among the states is not always a good thing. Some states, for example, might have laws expressing a moral preference that a majority of Americans consider unacceptable, and which a conditional offer of federal funds might persuade these states to repeal.[185] In addition, some conditional offers of federal funds may increase aggregate welfare by impeding welfare-reducing interstate races to the bottom,[186] or by reducing the costs that disuniformities may impose

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

184. See infra notes 278–283 and accompanying text.

185. For example, prior to the adoption of the 13th Amendment in 1865, some states made the owning of slaves a constitutional right, see, e.g., Miss. Const. of 1817, art. VI, Slaves, § 1 ("The general assembly shall have no power to pass laws for the emancipation of slaves, without the consent of their owners. . . ."); Mitchell v. Wells, 37 Miss. 235, 258 (1859) ("[I]t *now is* and *ever has been*, the policy of Mississippi to protect, preserve, and perpetuate the institution of slavery as it exists amongst us, and to prevent emancipation generally of Mississippi slaves."). Other states stringently regulated the ability of slave owners to emancipate their slaves. See, e.g., Va. Const. of 1850, art. IV, §§ 20–21 ("The general assembly may impose such restrictions and conditions as they shall deem proper on the power of slave-owners to emancipate their slaves; and may pass laws for the relief of the commonwealth from the free negro population, by removal or otherwise. . . . The general assembly shall not emancipate any slave, or the descendant of any slave . . . ."); see also George M. Stroud, A Sketch of the Laws Relating to Slavery in the Several States of the United States of America 96–97 (2d ed. 1856) ("In South Carolina, Georgia, Alabama and Mississippi, it is only *by authority of the legislature specifically granted* that a valid emancipation can be made. . . . [A] slave-owner must continue a slave-owner, (unless he dispose of his *chattels* by *sale*,) until he can induce the legislature to indulge him in the wish to set the captives free.") (footnote omitted).

Prior to the adoption of the 15th Amendment in 1870, several state constitutions specified "free white male citizens" twenty-one years or older as those qualified to vote in state elections. See, e.g., Miss. Const. of 1817, art. III, § 1; Mo. Const. of 1820, art. III, § 10; Va. Const. of 1830, art. III, § 14 (further limiting suffrage to landowners). See generally Tribe, supra note 1, at 330–53 (discussing Supreme Court's Thirteenth, Fourteenth, and Fifteenth Amendment jurisprudence).

186. The obvious examples are laws concerning environmental regulation and poverty relief. As Professor Richard Revesz has observed, "the race to the bottom has been invoked as an overarching reason to vest regulation that imposes costs on mobile capital at the federal rather than the state level, and has been cited as one of the bases for [federal environmental statutes and for] the New Deal." Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1210–11 (1992) (footnotes omitted).

on corporations and individuals seeking to act in more than one state.[187] These observations, however, do not lead inexorably to the conclusion that Congress should be permitted to offer the states federal funds subject to any conditions that it chooses.

First, conditional offers of federal funds are not needed to rid states of their most pernicious laws: our federal and state constitutions unam-

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But see id. at 1233–44 (arguing that race-to-the-bottom hypothesis lacks sound theoretical basis); id. at 1244–53 (arguing that even if there *were* a race to the bottom in the environmental arena, federal regulation would not necessarily be the solution).

The prototypical race to the bottom begins innocently enough with two (or more) identical, competing jurisdictions, one of which (State 1) initially provides a scheme of environmental regulation, for example, that would be optimal if the state did not have to compete for industry and residents, and their tax dollars. In considering what scheme of environmental regulation it will provide, State 2 likely considers the benefits of the regulation, the costs it imposes on industry, and the benefits (and costs) of predicted industry migration into (and out of) the state. Should State 2 then conclude that a level of environmental regulation lower than that provided by State 1 is preferable, industry is likely to migrate from State 1 to State 2 in order to benefit from the (presumably) lower cost of complying with State 2's environmental regulations.

In response to the exodus of jobs and tax revenues which industry migration represents, State 1 now reconsiders its scheme of environmental regulations. The likely result is a reduction—to or below State 2's level—in the level of environmental regulation that State 1 now considers desirable. This process of reconsideration and adjustment is expected to continue until neither state has any incentive to make further alterations in the level of environmental regulation it provides. At this equilibrium, which represents the end of the race, there will be no industry migration and both states will provide equally low levels of environmental regulation. Thus, each state will have the same amount of industry that it had at the beginning of the race, but will now provide a suboptimal level of environmental regulation. The net result is reduced social welfare. See id., at 1216–19; see also Richard B. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 747 (1977); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1211–12 (1977); Alvin K. Klevorick, Reflections on the Race to the Bottom (Dec. 28, 1994) (unpublished manuscript, on file with the Columbia Law Review).

187. The costs imposed by such disuniformities are among the arguments currently made in favor of the federal reform of tort law. Recommending passage of the Product Liability Fairness Act, the Senate Committee on Commerce, Science, and Transportation observed in its report of April 18, 1995,

> The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. Such a system does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs exceed compensation paid to victims. Those transaction costs are passed on to consumers through higher product prices. The system's unpredictability and inefficiency have stifled innovation, kept beneficial products off the market, and have handicapped American firms as they compete in the global economy.

S. Rep. No. 69, 104th Cong., 1st Sess. 1–2 (1995); see also 141 Cong. Rec. E595 (daily ed. Mar. 8, 1995) (Hon. Stephen E. Buyer speaking); Donna Greene, Westchester Q&A: M. Stuart Madden; The Case for Federal Reform of Tort Law, N.Y. Times, Apr. 30, 1995, § 13WC, at 3.

biguously prohibit their enactment and enforcement.[188] State laws that violate no federal constitutional provision but which nonetheless express a moral preference that some find reprehensible—for example, laws making the death penalty available for first degree murder convictions,[189] providing free abortions to indigent women,[190] or providing legal recognition to same-sex marriages or "domestic partnerships"[191]—denote areas of significant moral disagreement within our society. And these are precisely the areas in which interstate diversity is most valuable and federal homogenization through conditional federal spending will therefore most greatly reduce aggregate social welfare.[192]

Should our society reach a substantial consensus that interstate diversity in some area is no longer acceptable, we can always amend the Constitution to prohibit the practice(s) agreed to be immoral. History offers many examples of our willingness and ability to amend the Constitution to reflect such shifts in our moral sensibilities:[193] the Thirteenth Amendment's prohibition against slavery;[194] the Fourteenth Amendment's guarantee to *all persons* of due process and equal protection of the laws;[195] the Fifteenth Amendment's prohibition against race-based discrimination in voting rights;[196] the Eighteenth Amendment's prohibition against the manufacture, sale, or transportation of intoxicating liquors within the

188. For examples of such provisions in the U.S. Constitution, see infra notes 194–200. For examples of such provisions in state constitutions, see supra note 177.

189. See, e.g., Ariz. Rev. Stat. Ann. § 13-703 (Supp. 1994); Md. Ann. Code art. 27 § 412(b) (1994); see also Stephen, supra note 175, at 5 (tbl. 1) (listing capital offenses, if any, by state).

190. See, e.g., Right to Choose v. Byrne, 450 A.2d 925, 935, 938 (N.J. 1982) (under New Jersey law, state must provide funds for all medically necessary abortions) (interpreting N.J. Stat. Ann. § 30:4D-6.1 (West 1981)); see also Doe v. Maher, 515 A.2d 134, 143–45 (Conn. Super. Ct. 1986) (same result under Connecticut law) (interpreting Conn. Gen. Stat. § 17-134b (renumbered as § 17b-260), and holding invalid regulation limiting funding to those abortions necessary to save the life of the mother).

191. No state has yet authorized the legal marriage of same-sex couples, but Hawaii may soon be the first. See infra note 299. At present, the laws granting legal recognition to same-sex "domestic partnerships" are local ordinances. See LAMBDA Legal Defense Fund, Domestic Partnership Issues and Legislation 1–21 (1992); Vada Berger, Domestic Partnership Initiatives, 40 DePaul L. Rev. 417, 423–27 (1991); Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164, 1188–92 (1992) (collecting and comparing ordinances).

192. See supra notes 171–184 and accompanying text. There is no evidence that the *Dole* test would preclude Congress from enacting conditional offers of federal funds aimed at regulating the states in any of these areas. See generally South Dakota v. Dole, 483 U.S. 203 (1987).

193. On occasion, however, the Constitution has proven surprisingly difficult to amend. See supra note 182; see also Baker, supra note 177, at 152–53 (discussing difficulties posed by supermajority requirement for constitutional amendments).

194. U.S. Const. amend. XIII, § 1 (adopted 1865).

195. Id. amend. XIV, § 1 (adopted 1868).

196. Id. amend. XV, § 1 (adopted 1870).

United States;[197] the Twenty-first Amendment's repeal of the Eighteenth Amendment;[198] the Nineteenth Amendment's prohibition against gender-based discrimination in voting rights;[199] and the Twenty-sixth Amendment's guarantee of the right to vote to all citizens eighteen years of age or older.[200]

Finally, it is critical to keep in mind our earlier determination that permitting Congress to offer the states federal funds subject to any conditions that it chooses will often yield reductions in aggregate social welfare.[201] Thus, any benefits that may result from always affording Congress this *additional* legislative means of preventing interstate races to the bottom, and of reducing the costs that disuniformities may impose on multistate actors, must be weighed against those substantial costs.[202]

III. A Role for the Unconstitutional Conditions Doctrine?

We have seen that there are good reasons for the Court to abandon the *Dole* test, and instead to presume invalid those offers of federal funds to the states which, if accepted, regulate them in ways that Congress could not directly mandate.[203] Others have agreed that the *Dole* test is problematic, but have suggested different solutions. This Part begins with a critical examination of the proposals offered to date for limiting Congress's power to regulate the states through conditional federal spending. A new test is then proposed which seeks to safeguard state autonomy while preserving for Congress a power to spend that is greater than its power directly to regulate the states.

Consistent with the normative discussion in Part II above, the proposed test would have the courts presume invalid those conditional offers of federal funds to the states which, if accepted, regulate them in ways that Congress could not directly mandate. This presumption can subsequently be rebutted, however, if Congress shows that the offer of funds is "reimbursement" spending rather than "regulatory" spending legislation. Thus, even some conditional funding legislation that regulates the states in ways that Congress could not directly mandate will be sustained under the proposed test.

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197. Id. amend. XVIII, § 1 (adopted 1919).

198. Id. amend. XXI, §§ 1–2 (adopted 1933).

199. Id. amend. XIX, § 1 (adopted 1920).

200. Id. amend. XXVI, § 1 (adopted 1971).

201. See supra notes 183–184 and accompanying text; infra notes 278–283 and accompanying text.

202. Of course, even in a hypothetical world in which no conditional offers of federal funds to the states were permitted, Congress would still have authority under the Commerce Clause to enact many direct regulations aimed at preventing various interstate races to the bottom or reducing the costs that certain disuniformities impose on multistate actors. Thus, the availability of conditional federal spending is most important when Congress seeks a regulatory objective that it could not achieve directly under its other Article I powers.

203. See supra Part II.

How and why the proposed test seeks to distinguish between reimbursement spending and regulatory spending legislation, then invalidates only the latter, is next explained. This Part concludes by considering four sample enactments under both the *Dole* test and the proposed test. Although all four conditional offers of federal funds actually were, or likely would be, upheld under the *Dole* test, only one would be sustained under the test proposed in this Article.

A. *Existing Proposals*

In contrast to their substantial accord on the existence and nature of the problems with the *Dole* test,[204] commentators have thus far expressed little agreement on workable principles by which the Court might cabin Congress's power to achieve otherwise impermissible regulatory objectives through conditional offers of federal funds to the states. Writing before *Lopez*, Professor Richard Epstein uncharacteristically declined to make any normative proposal, observing simply, if sadly, that the Court had come to read the Commerce Clause "to confer on the federal government the untrammeled power to regulate the business of states as states."[205] Other commentators have provided extensive critiques of *Dole*, but, like Epstein, have not suggested any cures for the maladies they identify.[206] Indeed, only two scholars have offered the Court a new approach,

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204. See supra Part I.C.

205. Epstein, supra note 10, at 155. Thus, the Court's decision in *Dole* only exacerbated Epstein's sense of futility: "[I]t is clear that with *Dole*, . . . any constitutional challenges to the conditions attached to federal grants are hopeless under the current law." Id. at 157.

Although Epstein has yet to propose a new interpretation of the Spending Clause, he has repeatedly urged the Court to alter its expansive interpretation of the Commerce Clause. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain at x, 281 (1985) (arguing that "the system of limited government and private property is not elastic enough to accommodate the massive reforms of the New Deal"); Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1388 (1987) ("I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government."); cf. Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357, 1357–58 (1983) (proposing a common law regime of tort and contract law to replace New Deal labor laws).

206. See, e.g., Engdahl, supra note 29, at 54–62; McCoy & Friedman, supra note 10. McCoy and Friedman implicitly suggest that the Court should prohibit Congress from using its spending power to achieve regulatory effects beyond the scope of its other enumerated powers. They argue that this was in fact the Court's holding in *Butler*, which the *Dole* Court subsequently misconstrued. Id. at 105–07. Perhaps because their aim is a critique of *Dole* rather than a new interpretation of the Spending Clause, McCoy and Friedman leave two critical questions unanswered: How, in practice, should the Court distinguish between permissible and impermissible conditional offers of federal funds to the states? And what is the normative justification for making such a distinction? These are some of the questions that Justice O'Connor also failed to answer in her *Dole* dissent. See infra notes 229–249 and accompanying text.

and each of their proposals is problematic.[207] The most attractive alternative to date is that merely outlined by Justice Sandra Day O'Connor in her brief dissent in *Dole*.[208]

Professor Albert Rosenthal has suggested that the Court employ "a presumption that conditions on federal spending may not be used to *coerce* [individual] conduct that would otherwise be protected by constitutional guarantees of civil liberties."[209] This presumption stems from his belief that "[i]f the exercise of certain [individual] rights is protected by the constitution from interference by direct regulation, a comparable interference by coercive conditional spending should be afforded similar protection."[210] In order to rebut his proposed presumption, Rosenthal would require a showing that there is "something sufficiently different about the relationship of the restriction to government spending to justify drawing a distinction."[211] Among the "circumstances [that] might appropriately rebut the presumption," Rosenthal focuses chiefly on "the amount of genuine choice afforded to the recipient."[212]

Thus, although Rosenthal would (correctly, I believe) shift the burden of proof in conditional spending cases from the offeree to the federal government,[213] the center of his test remains a notion of coercion that is ultimately no more useful than that suggested by the Court in *Dole*.[214] Even more importantly, by limiting his proposal to conditional

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207. See Rosenthal, supra note 28, at 1152–60; Van Alstyne, supra note 110.

208. See South Dakota v. Dole, 483 U.S. 203, 212–18 (1987) (O'Connor, J., dissenting).

209. Rosenthal, supra note 28, at 1152 (emphasis added). Rosenthal would explicitly limit his presumption to "coercive conditions and only to those comparable to direct regulation that would be invalid . . . ." Id. at 1155. In addition, Rosenthal's exclusive focus appears to be "[federal] constitutional guarantees of civil liberties." Id. at 1152.

210. Id.

211. Id.

212. Id. at 1153.

213. See id. at 1152. "Spending *can* be different from regulation, and different results may follow. But where the regulation and the condition intrude equally into constitutionally protected conduct, one who contends that the two cases should be treated differently should have the burden of showing why." Id. (footnotes omitted).

214. Compare id. at 1153–56 with South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (discussing "germaneness") and with id. at 211 (discussing "coercion"). Rosenthal's express aim is for the courts to "uphold[ ] those conditions that expand, or at least do not seriously threaten, individual liberties while invalidating those that are as destructive as direct regulation would be." Rosenthal, supra note 28, at 1155–56 (footnote omitted).

Rosenthal attempts to distinguish "coercive conditions" from "classifying conditions" by noting that the former type "has the likely effect (and usually the purpose as well) of influencing [eligible recipients'] conduct." Id. at 1114. Later, however, Rosenthal undertakes to distinguish conditions that influence *conduct* from those that influence "*extraneous conduct*":

> In referring to coercive conditions, I do not mean to include expressions of the purpose of the expenditure itself—the agreed quid pro quo of a contract for government employment, for the purchase of property, or for the scholarly or other performance expected from the recipient of a grant. My concern is rather with provisions that would regulate extraneous conduct. . . . Analytically, such a

offers of federal funds to *individuals*, Rosenthal ultimately attempts no resolution of the conflict between Congress's spending power and constitutional guarantees of state autonomy at the center of cases like *Dole*.[215] Indeed, he appears to find unproblematic the Court's historically different treatment of conditional offers of federal funds to individuals and to the states.[216]

More recently, Professor William Van Alstyne has suggested that the solution, at least for a particular subset of conditional federal spending

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> condition [an "expression of the purpose"] might be deemed "coercive," but both the purpose and effect are to offer a benefit or desired exchange rather than to impose controls.

Id. at 115–16.

Ultimately, Rosenthal appeals to "the ordinary sense of the term" in his attempts to provide a useful definition of "coercion":

> The performance contemplated as part of an employment agreement, the undertaking of an educational program or a research project, or the supplying of products purchased by the government, may all involve some curtailment of the freedom to remain idle or to use one's time or resources for other purposes; these limitations are not coercive, however, *in the ordinary sense of the term*, and they do not give rise to the problems of the use of the spending power for regulatory purposes to which this article is addressed.

Id. at 1152 n.222 (emphasis added).

215. This omission likely stems from the fact that he was writing before the Court decided *Lopez* or *New York*. It is therefore not surprising that he shared the then-popular view that

> [a]lthough the Framers may not have planned it that way, we have found authority for almost every kind of federal action, under the commerce clause as well as under some of the other enumerated powers, that not much is left that is so local that Congress cannot regulate it in some fashion.

Rosenthal, supra note 28, at 1131. Rosenthal goes on to observe that

> some of the difficulties in probing how far Congress can intrude into state autonomy via conditional spending where it could not do so directly is the lack of cases that could have served as a baseline, in which direct federal regulation of state government has been attempted or challenged.

Id. at 1134.

216. Rosenthal observes that "in recent years the majority of the Court has almost never expressed in the civil liberties area what it has said with respect to interference with state autonomy: If you object to the condition, you have the simple alternative of not taking the money." Id. at 1163. He goes on to hypothesize that,

> This difference in [the Court's] approach may reflect a belief, perhaps less valid now than it once may have been, that the states are sufficiently strong to resist the blandishments of federal money, while private individuals and institutions tend not to be. . . . [P]olitical self-help by victims is less feasible when majorities seek to curtail civil liberties than when Congress goes beyond its enumerated powers or interferes with the autonomy of state or local government.

Id. at 1164.

As I explain, see supra Part II.A., I do not share the confidence of Rosenthal and the Court in the current ability of the states to resist conditional offers of federal funds. As my earlier work makes clear, I also do not share Rosenthal's implicit view that there are good reasons to expect or want the Court to treat conditions on federal money offered to at least some individuals (recipients of public assistance, for example) any differently than conditions on state or local money offered to those individuals. See Baker, supra note 13.

cases, lies in the states themselves rather than in the federal courts.[217] His focus is offers of federal funds to the states that put at risk *individual rights* guaranteed by a *state's* constitution.[218] Van Alstyne proposes that a state constitution's bill of rights be interpreted by that state's courts to preclude the state legislature from taking *any* action that would abrogate those guarantees.[219] Thus, if "the right of the people guaranteed by Article N [of the state constitution] would be compromised by the state's participation in the federal program, then the state's participation is foreclosed *as a matter of state constitutional law.*"[220] In this way, Van Alstyne contends, the states might foil congressional tendencies "to secure a flattening out of differences among states that take a different view of 'rights' than Congress wants them to take."[221]

Although Van Alstyne's goal is laudable,[222] his proposal may not be an effective means of achieving it. First, he assumes that state courts would be willing to undertake his suggested "strong reading" of the state constitution's bill of rights in order to invalidate the state legislature's decision to accept a congressional offer of federal funds. In the absence of a clear obligation to do so,[223] however, one might reasonably doubt the eagerness of elected or appointed state judges, without life tenure,[224] to impose on the state the substantial and visible cost of foregoing federal funds in the face of an enforceable majoritarian decision to accept them. Second, were a state's judges consistently to read the state's bill of rights to preclude the state legislature from accepting certain offers of federal funds, a substantial majority of the state's voters might well decide to eliminate or reduce those constitutional protections for minority rights to

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217. See Van Alstyne, supra note 110.

218. See id. at 307.

219. See id. at 311, 315.

220. Id. at 316 (emphasis added).

221. Id. at 307.

222. Indeed, I share Van Alstyne's concern that Congress not be permitted to preclude diversity—in excess of the minimums mandated by federal law—in the constitutional and statutory protections for individual rights that the states provide. See supra Part II.C.

223. Van Alstyne's proposal is original and interesting precisely because, as he acknowledges, no case of the sort he describes has yet been brought or decided. See Van Alstyne, supra note 110, at 318–19. He points out, however, that

> the Supreme Court of Oregon has recognized the relevance of such a suit and has virtually assumed that the suit would be appropriate. See Salem College & Academy, Inc. v. Employment Div., 695 P.2d 25, 30, 34 (Or. 1985) ("[A] legislature cannot violate the state's constitution in order to qualify for a benefit that Congress leaves optional. . . . [T]he state cannot violate its own constitution in order to satisfy a federal program that Congress has not made obligatory under the Supremacy Clause.").

Id. at 319 n.36.

224. Even in the case of state courts of last resort, only in Rhode Island do the judges have life tenure. See 30 The Council of State Governments, The Book of the States, 1993–1995, at tbl. 4.1 (1994). In Massachusetts, New Hampshire, and Puerto Rico, the term of all judges on the court of last resort ends upon reaching age 70. Id.

the minimums required by federal law.[225] The result would be the very "flattening out of differences" in state constitutional guarantees that Van Alstyne seeks to prevent.[226]

Finally, to the extent that Van Alstyne's proposal is successful and a state chooses to forego federal funds rather than reduce the constitutional protection it provides individual rights, that state is nonetheless relatively worse off—and other states relatively better off—than if the offer of federal funds had never been made.[227] Perhaps because he focuses on the acceptance rather than the making of conditional offers of federal funds to the states, or perhaps because he accepts rather than seeks to change the *Dole* Court's broad interpretation of Congress's power under the Spending Clause, Van Alstyne does not acknowledge this redistributive aspect of the conditional spending problem.[228]

The most promising proposal to date is that outlined by Justice O'Connor in her dissent in *Dole*.[229] She claimed to concur in the four-prong test set out by the *Dole* majority,[230] but added that she would *apply* their "germaneness" requirement differently,[231] ultimately reaching a different result in the case.[232] In fact, however, O'Connor would have im-

225. The individual rights guaranteed each state's citizens by the U.S. Constitution cannot be constrained or diminished by any state's constitution. See generally Tribe, supra note 1, at 772–73 (substance of state law is limited by federal guarantees of individual rights). Under the Due Process Clause of the Fourteenth Amendment, virtually all of the rights guaranteed by the first eight amendments have been selectively incorporated into the Fourteenth Amendment and, therefore, applied to the states. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (applying Sixth Amendment right of trial by jury to states); Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (Fourteenth Amendment incorporates rights that are "of the very essence of a scheme of ordered liberty"); see also Brennan, Bill of Rights, supra note 177, at 545–46; Brennan, State Constitutions, supra note 177, at 492–94.

226. See Van Alstyne, supra note 110, at 307.

227. See supra notes 158–159, 166–167 and accompanying text.

228. In this regard, Van Alstyne simply proclaims: "*That no other state may have a [constitutional] provision of the same rigor is merely interesting.*" Van Alstyne, supra note 110, at 313 n.26; see also id. at 316 ("That other states are not similarly constrained by any similarly strong . . . guarantee in their own constitutions may be true. But that . . . makes no difference at all.").

229. See South Dakota v. Dole, 483 U.S. 203, 212–18 (1987) (O'Connor, J., dissenting).

230. See id. at 213 ("I agree that there are four separate types of limitations on the spending power.").

231. O'Connor asserted that, "My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself." Id. at 212. She added that "*the Court's application* of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing." Id. at 213 (emphasis added).

232. "In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose." Id. at 213–14; see also id. at 218 ("[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction."). "Because 23 U.S.C. § 158 . . . cannot be justified as an

posed a substantially different germaneness requirement. The *Dole* majority was concerned only that a funding condition not be "unrelated 'to the federal interest in particular national projects or programs,' "[233] and thus sought to ensure minimum rationality in the relationship between the funding condition and the federal interest sought to be advanced.[234] O'Connor, in contrast, implicitly would have required a much closer fit—essentially a showing of a "substantial relationship"—between the funding condition and the proclaimed federal interest.[235] Thus, O'Connor, unlike the *Dole* majority, would not sustain a funding condition found to be over- or under-inclusive.[236]

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exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent." Id.

233. Id. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

234. Cf., e.g., Rinaldi v. Yeager, 384 U.S. 305, 308–09 (1966) (equal protection requires "*some rationality* in the nature of the class singled out" (emphasis added)); cf. also Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Equal Protection Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 19–20 (1972); Tribe, supra note 1, at 1439–50 (discussing "minimum rationality" standard in equal protection doctrine).

The Court has repeatedly interpreted the "minimum rationality" tier of equal protection scrutiny to permit both under- and over-inclusiveness, invalidating only a governmental choice that is "clearly wrong, a display of arbitrary power, not an exercise of judgment." See, e.g., Mathews v. DeCastro, 429 U.S. 181, 185 (1976); Tribe, supra note 1, at 1446 n.3 (citing cases); see also id. at 1446–50, 1447 n.4 ("In practice, only rarely does the Court invalidate *underinclusive* legislation as unconstitutionally arbitrary." (emphasis added)); id. at 1450 ("[L]egislative resort to somewhat *overinclusive* classifications is legitimate as a prophylactic device to insure the achievement of statutory ends." (emphasis added)).

235. Cf., e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (gender-based classification must be "substantially related" to achievement of the objectives invoked to defend it); id. at 201–02 (finding "an unduly tenuous 'fit' " between the protection of public health and safety and a law providing different minimum drinking ages for men and women); Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating New York law giving unmarried mothers, but not fathers, a veto power over the adoption of their child, and finding this classification not substantially related to the state's proclaimed interest in promoting adoption); Trimble v. Gordon, 430 U.S. 762, 770–71 (1977) (invalidating Illinois law prohibiting illegitimate children from inheriting from their fathers through intestate succession because the state "failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity"); cf. also Tribe, supra note 1, at 1601–18 (discussing standard of intermediate review in equal protection cases).

236. O'Connor thought it "hardly need[ed] saying" that

> if the purpose of § 158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation.

Dole, 483 U.S. at 214–15. She therefore would have invalidated the funding condition on the ground that it was "not sufficiently related to interstate highway construction." Id. at 214, 218.

The *Dole* majority, in contrast, never acknowledged this over- and under-inclusiveness *en route* to its conclusion that

O'Connor explicitly traced the jurisprudential roots of her germaneness requirement to the distinction that the Court drew in *United States v. Butler*, between "a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."[237] Thus, she would interpret the Spending Clause to afford Congress no power " 'to impose requirements on a grant that go beyond specifying how the money should be spent,' " unless the condition " 'falls within one of Congress' delegated regulatory powers.' "[238]

It is not clear what O'Connor means by a condition that specifies "how the money should be spent," however. For example, she asserts that the condition at issue in *Dole*, "that a State will raise its drinking age to 21," is *not* "a condition determining how federal highway money should be expended."[239] Yet she also contends that a condition prohibiting members of a state Highway Commission from "tak[ing] any active part in political management or in political campaigns" if their "principal employment is in connection with [an] activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency"[240] *is* a permissible "condition relating to how federal moneys [are] to be expended."[241] Unfortunately, O'Connor fails to explain why the latter condition is not instead a "regulation" on the extracurricular activities of the employees of various state and local agencies, and therefore beyond the scope of Congress's spending power and other delegated regulatory powers.[242] Nor does she elaborate on the difference she sees

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> the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. . . . This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." . . . By enacting § 158, Congress conditioned the receipt of federal funds in a way *reasonably calculated* to address this particular impediment to a purpose for which the funds are expended.

Id. at 208–09 (emphasis added).

237. Id. at 216 (quoting United States v. Butler, 297 U.S. 1, 73 (1936)).

238. Id. (quoting Brief for the National Conference of State Legislatures et al. as Amici Curiae at 19–20).

239. Id. at 218.

240. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 129 n.1 (1947) (quoting Hatch Act § 12(a), 5 U.S.C. § 118K(a) (1940), repealed by Federal Election Campaign Act Amendments of 1976, § 201, 90 Stat. 475).

241. *Dole*, 483 U.S. at 217.

242. Compare O'Connor's discussion of the condition at issue in *Dole*:

> The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

between the relationship this condition and the drinking age restriction each have with "the expenditure of funds for highway construction."[243]

O'Connor also does not discuss the role, if any, that "coercion" would play under her analysis. The *Dole* majority was explicit 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,' " and emphasized that the legislation at issue in that case would withhold from a noncomplying state only five percent of its otherwise obtainable allotment of federal highway funds.[244] O'Connor, in contrast, never expressed any concern with the amount of federal money that a state would forego if it chose not to comply with an attached condition. Thus, she apparently would find equally unproblematic (1) legislation that would withhold a state's *entire yearly allotment* of federal highway funds if any employee of a state or local agency, whose principal employment is in connection with any activity which is financed in whole or in part by those funds, takes any active part in political management or in political campaigns and is not removed from his office or employment within thirty days of the political activity;[245] and (2) identical legislation that would withhold highway funds from a state only in "an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation."[246] Obviously, the first enactment provides states a significantly greater incentive to comply with the funding condition than the second does.

Finally, O'Connor never details the normative underpinnings of her proposed test beyond an expressed concern with "the Framers' plan,"[247] "the meaning of the Spending Clause,"[248] and the precedent established by the Court in *Butler*.[249] Despite these flaws, however, the test O'Connor outlined in her *Dole* dissent makes substantial progress toward workable principles for cabining Congress's spending power. Indeed, the proposal that follows builds upon the best elements of O'Connor's test.

B. *A Post-*Lopez *Proposal*

I propose that the courts employ the following test instead of the *Dole* test when deciding state challenges to conditional offers of federal funds: those offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate, will

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Id. at 218.

243. Id.

244. Id. at 211.

245. Cf. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 129–30 n.1 (1947) (quoting Hatch Act § 12(a), 5 U.S.C. § 118K(a) (1940), repealed by Federal Election Campaign Act Amendments of 1976, § 201, 90 Stat. 475).

246. Id. at 129.

247. *Dole*, 483 U.S. at 217.

248. Id.

249. See id.

be presumed invalid.[250] This presumption will be rebutted upon a determination that the offer of funds constitutes "reimbursement spending" rather than "regulatory spending." "Reimbursement spending" legislation specifies the *purpose* for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose. Most "regulatory spending" legislation thus includes a simple spending component which, if enacted in isolation, would be unproblematic under the proposed test.

Part II presented the rationale underlying the proposed test's presumption of invalidity for the subset of conditional offers of federal funds which, if accepted, would regulate the states in ways that Congress could not directly mandate. This Part, therefore, will focus on the distinction the proposed test would make between reimbursement spending and regulatory spending legislation. In order to understand this critical distinction, it may be useful to consider two hypothetical offers of federal funds, each of which, consistent with the suggestion President Clinton voiced three days after the Court's decision in *Lopez*,[251] seeks to "encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans."[252]

> (A) Any state receiving federal *Safe School funds* must have a Gun-Free School Zones Act ("Act"), which makes it a criminal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone; *participating states shall receive Safe School funds in the amount of their demonstrated costs of prosecuting offenders under the state's Act.*
>
> (B) Any state receiving federal *Education funds* must apply them toward the cost of providing a free education to children in grades K through 12 residing in the state, *and* must have a Gun-Free School Zones Act, which makes it a criminal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone; *participating states shall receive Education funds in the amount of $100 per student enrolled in grades K through 12 of the state's public schools.*

Congress has no power under the Constitution directly to regulate the possession of firearms in school zones (Statutes A and B),[253] or to mandate that the states offer a free education to resident children in

250. By regulations that Congress *could* "directly mandate," I simply mean regulations that Congress could enact pursuant to the direct regulatory powers granted it by provisions of Article I other than the Spending Clause of Section 8, Clause 1. I do not include those regulations that Congress could currently enact pursuant to the Spending Clause, of course, because I am seeking to redefine the scope of the spending power, and must therefore start from the assumption that the limits of that power are undefined.

251. United States v. Lopez, 115 S. Ct. 1624 (1995) (holding unconstitutional the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. V 1993)).

252. Purdum, supra note 8, at A1.

253. See *Lopez*, 115 S. Ct. at 1626.

grades K through 12 (Statute B),[254] or to "commandeer" the states to perform either function.[255] Thus, both Statute A and Statute B would regulate those states that accept the conditional offer of funds in ways that Congress could not directly mandate. And both statutes would therefore be presumed invalid under the proposed test. In each case, however, this presumption of invalidity can be rebutted, and the conditional offer of federal funds ultimately sustained, if the statute is determined to be "reimbursement spending" legislation.

Statute A, in fact, is an example of reimbursement spending legislation. It specifies the purpose for which the states are to spend the proffered federal funds—prosecuting offenders of the state's Gun-Free School Zones Act—and, importantly, offers states an amount of money no greater than that necessary to reimburse them for their expenditures for the specified purpose.[256] Statute B, in contrast, which President Clinton likely would prefer, exemplifies regulatory spending legislation, and would not therefore rebut the initial presumption of invalidity.[257]

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254. See id. at 1632 (denoting education as an area "where States historically have been sovereign"); cf. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("local autonomy [in education] has long been thought essential"); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (in general, "public education in our Nation is committed to the control of state and local authorities").

255. See New York v. United States, 112 S. Ct. 2408, 2420–23 (1992) (citations omitted):

> Congress may not simply "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."
>
> . . . .
>
> . . . [T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.
>
> . . . .
>
> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (describing criteria sufficient to support a finding of invalidity); Coyle v. Smith, 221 U.S. 559, 568 (1911) (Congress may not impose conditions that deprive a state of any of the attributes "essential to its equality in dignity and power with other states"); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 77 (1868) (Congress cannot specify manner of payment of state taxes); cf. FERC v. Mississippi, 456 U.S. 742, 756 (1982) (holding that federal regulation of energy industry is essential to protecting interstate commerce).

256. The notion of reimbursement is used here in order to cabin the amount of money that Congress may ultimately offer the states for a particular purpose. It is not meant to suggest that the states must first make the relevant expenditures from their own fisc before being permitted to receive federal reimbursement funds. Thus, under this Article's proposal, there is no reason why the appropriate amount of federal funds could not be transferred to the states in the same way, and at the same time, that Congress currently does.

257. It is important to keep in mind that the issue is not whether one favors permitting guns in school zones. Most Americans likely do not. The issue, rather, is whether regulation in this area should be the province of the states or of Congress. In the words of Justice Kennedy, joined by Justice O'Connor,

Typical of regulatory spending legislation, Statute B has both reimbursement spending and regulatory spending components.[258] The reimbursement spending component is the offer of Education funds, whose purpose and authorized use are expressly limited to reimbursing the states for some portion of their localities' cost of providing a free education to resident children in grades K through 12.[259] The regulatory spending component is the statute's *additional* requirement that states receiving Education funds "make[ ] it a criminal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[260] Under the proposed test, this regulatory spending component renders Statute B invalid in its entirety.[261]

To summarize: it is permissible reimbursement spending under the proposed test for Congress (1) to offer the states funds in the amount of $100 per enrolled student on the condition that the funds are applied

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> While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.
>
> . . . .
>
> The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.

Lopez, 115 S. Ct. at 1641 (Kennedy, J., concurring); see also Wilson, supra note 155, at A30 (the Act "was little more than a press release from Congress that it cared. . . . Congress did nothing but enact a naked Federal statute, which arguably could lead state and local law enforcement authorities to back away from addressing gun possession in the schools by leaving it up to the Feds.").

258. Indeed, one way to distinguish reimbursement spending legislation from regulatory spending legislation is to see if one can identify a reimbursement component and still have another component of the enactment—whether an additional condition or an amount of funds above and beyond the amount necessary for the designated reimbursement—left over.

259. In most states, public education is funded primarily through local property taxes, but numerous state supreme courts have struck down the resulting state-wide pattern of school finance on state constitutional grounds. See Gillette, supra note 169, at 898–919; Richard Briffault, The Role of Local Control in School Finance Reform, 24 Conn. L. Rev. 773, 775 nn.5–6 (1992); Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1, 24–30 (1990).

For discussion of the legal relationship between states and their subdivisions, see Gillette, supra note 169, at 209–39; Reynolds, supra note 161, at 13–48, 66–123.

260. See supra text accompanying notes 252–253.

261. Although it is logically possible for a court to invalidate only the "regulatory" component of this enactment, I do not propose that it do so. Taken alone, the reimbursement spending component of Statute B does not achieve Congress's presumed aim in enacting the statute, and might well not have been passed. Thus, I would have the court invalidate the entire enactment and leave to Congress the decision of how next to proceed given its regulatory aim.

toward the cost of providing a free education to resident children in grades K through 12 (as Statute B does *in part*); *or* (2) to offer the states funds in the amount of their demonstrated costs of prosecuting offenders under the state's Gun-Free School Zones Act on the condition that they have such an Act making it a criminal offense for any individual "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone" (as Statute A does). As formulated above, Statute A is reimbursement spending legislation which rebuts the initial presumption of invalidity under the proposed test. Because of its regulatory spending component, however, Statute B does not alter the initial presumption of invalidity. Thus, Statute A would be sustained under the proposed test while Statute B would be invalidated.

In seeking to distinguish between reimbursement spending and regulatory spending legislation, the proposed test, like the *Dole* test, imposes a type of "germaneness" requirement on conditional offers of federal funds to the states. In contrast to that in *Dole*, however, the germaneness inquiry under the proposed test has two separate parts, and a challenged condition will be found "germane" and subsequently sustained if it meets the requirements of either part.[262]

The germaneness requirement of the *Dole* test focuses solely on the relationship between the funding condition and "the federal interest in particular national projects or programs," and is met if the condition is not "unrelated" to some "federal interest."[263] As applied by the Court, this requirement entails only the weakest form of "rational basis" scrutiny of the relationship between the condition and the federal interest.[264] Moreover, the Court's notion of a permissible "federal interest" is seemingly boundless, expressly including even those regulatory objectives that Congress cannot achieve directly.[265] Under the first part of the proposed test's germaneness inquiry, in contrast, the notion of a "federal interest" is strictly and unambiguously limited by Congress's Article I regulatory powers other than the spending power, and a funding condition will be found to be germane under this part whenever its regulatory effects are ones that Congress *could* otherwise achieve directly.

The second part of the germaneness inquiry under the proposed test is embodied in the distinction between "reimbursement spending" and "regulatory spending," and applies only to those conditional offers of federal funds which, if accepted, would regulate the states in ways that Con-

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

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

264. See supra notes 233–234 and accompanying text.

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

gress could *not* directly mandate. It focuses on the relationship of the funding condition to both the purpose for which the funds are offered and the amount of money at issue. A condition will be found to be germane under this portion of the proposed test's inquiry only (1) if it specifies nothing more than how—i.e., the purpose for which—the offered funds are to be spent, *and* (2) if the amount of money offered does not exceed the amount necessary to reimburse the state for its expenditures for the specified purpose.[266] The germaneness requirement set out in *Dole*, in contrast, permits conditions that do much more than specify the purpose for which the states are to spend the offered funds, and permits seemingly *any* amount of money to be made contingent on a state's compliance with a given condition.[267]

It is important to keep in mind that a germaneness inquiry is merely the means to some normative end. Part II set forth the normative underpinnings of the first part of the proposed test's germaneness inquiry, which would permit any funding condition that would regulate complying states in ways that Congress *could* otherwise achieve directly. Now let us examine the normative justification for the second part of the proposed test's germaneness inquiry, which centers on the distinction between reimbursement spending and regulatory spending legislation.

In order to understand *why* the proposed test seeks to distinguish between these two forms of legislation,[268] and would invalidate only the regulatory spending type, consider the following pair of hypothetical congressional enactments. In each case, if a state accepts the offer, the statute would regulate it in ways that Congress could not directly mandate.[269]

> (C) Any state receiving federal Death Penalty funds ("Funds") must have the death penalty available for first degree murder convictions; participating states shall receive Funds in the amount of their demonstrated cost of executing those sentenced to death for first degree murder."
>
> (D) Any state receiving federal Law Enforcement funds ("Funds") must use the Funds to provide "beat cops" who will daily patrol the state's urban neighborhoods on foot, *and* must demonstrate its depth of commitment to the national fight

266. Thus, the proposed test would require Congress to disaggregate offers of federal funds for different purposes even if the offers are all reasonably related to a single, general federal interest in eradicating poverty or drug abuse, for example. Congress would not need to enact separate legislation for each offer of funds, however. It could include them as separate provisions of the same statute, so long as it makes clear which condition(s) attach to each offer of funds.

267. See *Dole*, 483 U.S. at 208–09. For the *Dole* Court, it was apparently dispositive that the decision whether or not to comply with the funding condition "remains the prerogative of the States not merely in theory but in fact." Id. at 211–12.

268. This distinction embodies the second portion of the germaneness inquiry under the proposed test. See supra note 266 and accompanying text.

269. In *Lopez*, the Court suggested that state and local "criminal law enforcement" was beyond the regulatory powers granted Congress under the Commerce Clause. See United States v. Lopez, 115 S. Ct. 1624, 1632 (1995).

> against crime by having the death penalty available for first degree murder convictions; participating states shall receive Funds in the amount of $1.00 per resident according to the most recent federal census.[270]

Statute C is an example of reimbursement spending legislation. Like Statute A above, it simply specifies the purpose for which the states are to spend the offered federal funds (here, executing those sentenced to death for first degree murder) and, critically, offers states an amount of money no greater than that necessary to reimburse them for their expenditures for the specified purpose. Statute D, in contrast, is regulatory spending legislation and, like Statute B above, it has both reimbursement and regulatory spending components.[271] Here, the reimbursement spending component is the offer of Law Enforcement funds, whose purpose and authorized use are limited to reimbursing the states for some portion of their (or their localities') cost of employing police to patrol the state's urban neighborhoods daily on foot.[272] The regulatory spending component, which renders the entire statute impermissible under the

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270. Cf. 42 U.S.C.A. §§ 13701–09 (West Supp. 1995) ("Violent Offender Incarceration and Truth in Sentencing Incentive Grants"). This Act appropriates $8 billion over six years to be distributed to states that, *inter alia*, demonstrate that their correctional policies and programs "provide sufficiently severe punishment for violent offenders, including violent juvenile offenders," id. § 13701(b)(1), and have in effect "laws which require that persons convicted of violent crimes serve not less than 85 percent of the sentence imposed," id. § 13702(a)(1).

The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. §§ 13701–14223 (West Supp. 1995), also includes the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration Program, id. § 14071, which stipulates that any state that, within three years from the date of the Act's enactment, does not have a federally approved registration program for individuals who are convicted of sexually violent offenses or crimes in which the victim was a minor, shall not receive 10% of the federal funds that would otherwise be allocated to it under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3756 (1988 & Supp. V 1993). See 42 U.S.C.A. § 14071(f) (West Supp. 1995).

In July 1995, the New Jersey Supreme Court ruled that New Jersey's analogous "Megan's Law," N.J.S.A 2C:7-1 to -5 (Registration) and N.J.S.A. 2C:7-6 to -11 (Community Notification), did not violate the constitutional rights of sex offenders because the statute does "not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further." Doe v. Poritz, 662 A.2d 367, 372 (N.J. 1995); see also Lawrence Wright, A Rapist's Homecoming, New Yorker, Sept. 4, 1995, at 56, 68 ("So far, forty-four states require sex offenders to register with authorities when they move into a community. . . . In addition, twenty-seven states now have community-notification statutes.").

For examples of the formula that the federal government currently uses to distribute "law enforcement" funds to the states, see 42 U.S.C.A. §§ 13702(b), 13703(b), 13754 (West Supp. 1995).

271. See supra note 258 and accompanying text.

272. Typically, municipal law enforcement is funded primarily by each locality and has historically constituted approximately 5% of all local expenditures. See Fiscal Federalism, supra note 24, at 149 tbl. 79 (local expenditures by function, 1948–1990); id. at 119 tbl. 61 (local revenue by source, 1948–1990); see also Gillette, supra note 169, at

proposed test, is the statute's *additional* requirement that states receiving these Law Enforcement funds also have the death penalty available for first degree murder convictions.

Both Statute C and Statute D provide states an incentive to make the death penalty available for first degree murder convictions. From the perspective of a state which, prior to these federal enactments, preferred *not* to have the death penalty available for first degree murder convictions, however, Statute C is surely preferable. Under Statute C, the cost to a state of not complying with the condition attached to the offered funds is much lower than it is under Statute D. Although a non-complying state foregoes federal reimbursement for the costs of executing individuals it convicts of first degree murder and sentences to death, it incurs no such costs. Thus, the major cost of Statute C to such a state is an opportunity cost:[273] a portion of the federal fisc is being used to subsidize a project—executing individuals that *other states* have convicted of first degree murder and sentenced to death—from which the state will not directly benefit[274] (and by which it will in fact be burdened[275]) instead of a project that the state would prefer. The cost of Statute D to a non-complying state, in contrast, is (a) the opportunity cost represented by that portion of the federal fisc—including its own contributions—which is being used to provide a benefit solely to other states, *as well as* (b) foregone *desired* Law Enforcement funds for which the state would

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209–39 (discussing legal relationship between states and their subdivisions); Reynolds, supra note 161, at 13–48, 66–123 (same).

273. See, e.g., Paul A. Samuelson & William D. Nordhaus, Economics 119 (15th ed. 1995) (emphasis omitted):

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

274. Although a non-complying state will not benefit directly insofar as it will not receive any of the federal funds conditionally offered under the legislation, it may benefit indirectly if, for example, the increase in the number of states in which the death penalty is available for first degree murder convictions has a deterrence effect which results in a decrease in the number of murders committed even in the non-complying state.

275. Such legislation may burden a non-complying state in two ways. First, some portion of the federal funds which the legislation distributes to states that comply with the attached condition(s) will have been contributed by taxpayers who reside in the non-complying state and who will therefore receive no direct benefit from this use of their tax dollars. See supra note 274. Second, a substantial proportion of the residents of the non-complying state are presumably opposed to the availability of the death penalty (which is why the state has declined the offer of federal funds), and may be displeased or even distressed that their tax dollars are being used to subsidize an activity—the execution of individuals convicted by other states of first degree murder—which they consider unwise or immoral.

have been eligible had it been willing to waive its Tenth Amendment right not to administer the death penalty.

It is important to recognize that a non-complying state bears a similar opportunity cost under both Statute C and Statute D.[276] Indeed, virtually all federal funding legislation, whether conditional or not, imposes such opportunity costs on at least one state.[277] With the improbable exception of a federally funded project that every state not only favors but thinks should take priority over any other possible use of those funds, federal expenditures always leave at least one state wishing that the money—at least the portion that *it* contributed to the federal fisc—had instead been spent on something else. The only way to eliminate these opportunity costs to the states is to prohibit the federal government from taxing and spending—that is, to have no federal government at all. If we would retain some meaningful form of federal government, however, there is no principled way to distinguish, as a normative *or* descriptive matter, the opportunity costs imposed by Statute C from those imposed by Statute D or, indeed, by any other federal spending legislation.

Thus, the significant difference, both descriptively and normatively, between statutes C and D is the *additional* cost of foregone desired Law Enforcement funds that a non-complying state bears only under Statute D. Regulatory spending legislation such as Statute D is normatively problematic precisely because the additional cost that it threatens to impose on non-complying states makes this legislation *especially* likely to induce otherwise reluctant states to comply. After the enactment of Statute D, for example, it is quite possible that each of the twelve states in which the death penalty is not currently available would choose to make it available for first degree murder convictions rather than forego the offered funds.[278] This means that some individuals, who would prefer to live in a state in which the death penalty is not available, and who, in any case, do not want their federal tax dollars used to subsidize the execution of individuals convicted in other states of first degree murder, will no longer find *any* state that offers a package of taxes and services, including state constitutional rights and other laws, which they find attractive. Mean-

276. The effect of both statutes is that a portion of the federal fisc is used to subsidize a project from which the non-complying state will not directly benefit, instead of a project that the state would prefer. The size of the opportunity cost that each statute imposes on a non-complying state will differ, however, to the extent that the total dollar amount of federal funds disbursed under each statute differs.

277. In fact, since a legislature's time and other resources are limited, all federal legislation, whether or not it involves the disbursement of federal funds, imposes opportunity costs on at least one state. The highly improbable exception is a federal enactment that every state not only favors but thinks should take priority over any other possible enactment (or other use of the legislature's time and resources).

278. As discussed supra notes 178–179 and accompanying text, when the rights of a minority, such as individuals convicted of first degree murder, is involved, the majority can be expected readily to "sell" those rights in exchange for federal funds that more directly and saliently benefit themselves. See also supra note 175.

while, other individuals may now confront a surfeit of states offering a package of taxes and services—including the availability of the death penalty for first degree murder convictions—which suits their preferences.

Thus, the enactment of Statute D may well cause the number of states in which the death penalty is available to increase from thirty-eight to fifty, and the number of states in which the death penalty is not available to decrease simultaneously from twelve to zero. The net result is likely to be a decrease in overall social welfare, since the aggregate loss in welfare to death penalty opponents from the decrease from twelve to zero in the number of non-death penalty states seems likely to be greater than the aggregate gain in welfare to death penalty proponents from the increase from thirty-eight to fifty in the number of death penalty states.[279]

To better appreciate the likely welfare effects of Statute D, it is useful to compare the state of affairs following its enactment with a scenario in which the thirty-eight states in which the death penalty is currently available negotiate an agreement with the remaining twelve states under which the latter will also make the death penalty available for first degree murder convictions in exchange for financial compensation from the thirty-eight states.[280] Assume further that the thirty-eight states make this payment directly from their own coffers to those of the remaining twelve states. From the perspective of each of the fifty states, the resulting agreement will be both Pareto superior and Kaldor-Hicks efficient.[281] That is,

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279. That is, the mere existence of the last remaining state in which the death penalty is *not* available seems likely to yield aggregate benefits for death penalty opponents which are far greater than the aggregate benefits that death penalty proponents would realize if there were fifty rather than forty-nine states in which the death penalty were available. Indeed, for death penalty opponents, the last remaining state in which the death penalty is not available may have a value beyond measure.

280. The transaction costs incurred in reaching such an agreement among all fifty states are likely to be high and may even be prohibitive. The number of parties involved in the negotiations is relatively large, and the opportunities for holding out and free riding are correspondingly great. See, e.g., Richard A. Posner, Economic Analysis of Law 62 (4th ed. 1992) ("The costs of transacting are highest when elements of bilateral monopoly coincide with a large number of parties to the transaction—a quite possible conjunction."); see also id. at 61–65; Jesse Dukeminier & James E. Krier, Property 51–52 (3d ed. 1993); Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (Pap. & Proc. 1967).

281. Judge Richard Posner describes "Pareto superiority" and "Kaldor-Hicks efficiency" as follows:

> A Pareto-superior transaction is one that makes at least one person better off and no one worse off. . . . In other words, the criterion of Pareto superiority is unanimity of all affected persons. . . . In the less austere concept of efficiency . . . called the Kaldor-Hicks concept or wealth maximization—if A values the wood carving [that she owns] at $5 and B at $12, so that at a sale price of $10 (indeed at any price between $5 and $12) the [sale of the carving to B] creates a total benefit of $7 (at a price of $10, for example, A considers himself $5 better off and B considers himself $2 better off), then it is an efficient transaction, provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed $7. The transaction would not be Pareto superior unless A and B actually compensated the third parties for any harm suffered by them. The Kaldor-Hicks

we can conclude that each of the thirty-eight pro-death penalty states values the increase in the number of states in which the death penalty is available more than it values the funds it has paid to the remaining twelve states. And each of the twelve states that did not make the death penalty available in the status quo ante apparently values the increase in revenue offered by the other thirty-eight states more than it values remaining a non-death penalty state. By their actions, all fifty states have indicated that they prefer the new state of affairs to the status quo ante, and the agreement has therefore indisputably increased aggregate social welfare.

The state of affairs following the enactment of Statute D, in contrast, cannot be shown to be similarly Kaldor-Hicks efficient. Even if each state accepts the congressional offer, all we will know is that each state values the offered federal funds more than it values not making the death penalty available for those convicted of first degree murder. In the case of the twelve states that did not make the death penalty available in the status quo ante, we will now know an amount of money that is *sufficient* for each to overcome its aversion to the death penalty.[282] If, as in the scenario above, this dollar amount were now willingly paid to the twelve states *directly from the coffers of the thirty-eight states* that had the death penalty in the status quo ante, we could be confident that the enactment of Statute D increased aggregate social welfare. But the money that the twelve states will receive under Statute D comes instead from the federal fisc and, before that, most probably from those very same twelve states.[283] Since we do not know how much *of their own money* the thirty-eight pro-death penalty states would have willingly paid to ensure that the death penalty is also available in the remaining twelve states, we do not have any measure of the increase in welfare that these thirty-eight states will realize from the availability of the death penalty in the remaining twelve states. Thus, Statute D cannot be proven to increase (or decrease) aggregate social welfare even if all fifty states accept the conditional offer of funds.

Of course, reimbursement spending legislation such as Statute C will also impose costs on non-complying states. These opportunity costs,

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concept is also and suggestively called potential Pareto superiority: The winners could compensate the losers, whether or not they actually do.

Posner, supra note 280, at 13–14.

It should be noted that my example assumes that there are no third-party effects that need to be considered insofar as each state is presumed to be acting on behalf of its residents. Thus, the only parties to be compensated are the twelve states that do not have the death penalty in the status quo ante.

282. This amount of money is clearly sufficient, but may also be more than necessary, for some or all of the twelve states that did not have the death penalty in the status quo ante to overcome their aversion to the death penalty. In the absence of individualized negotiations, the precise amount of money necessary for each state to overcome its aversion cannot be precisely determined.

283. Since the proffered federal funds are available to all fifty states, and all fifty states have contributed to the federal fisc, each state that accepts the offer is simply getting back a portion of its (corporate and individual residents') earlier contributions to the federal fisc. See supra Part II.A.

which all conditional offers of federal funds impose, may give states some (likely small) incentive to conform with the conditions imposed by reimbursement spending legislation. But regulatory spending enactments such as Statute D impose costs in addition to these opportunity costs, and thus typically provide states a *greater* incentive to conform.[284] This in turn means that regulatory spending legislation is *more likely* than reimbursement spending legislation to yield interstate homogeneity and a concomitant reduction in aggregate social welfare. In the end, then, the normative distinction to be made between reimbursement and regulatory spending is one of degree rather than of kind.

Thus, the problem is to decide where, on the continuum of incentives to conform which conditional offers of federal funds always provide the states, mere "encouragement" ends and "coercion" begins. In *Dole*, the Court simply stated that it would draw the line at the point where the "pressure" exerted by the financial inducement "turns into compulsion."[285] The Court did not acknowledge that since all conditional offers of federal funds to the states provide them some incentive to conform, any determination of the point at which "compulsion" begins is inevitably arbitrary or subjective. The *Dole* Court never defined "compulsion" or "pressure," explained how one should or could consistently distinguish between the two, nor provided any example of an impermissibly "coercive" offer of federal funds to the states.

The "coercion" inquiry of the proposed test, in contrast, is embodied in its distinction between "reimbursement spending" and "regulatory spending" legislation.[286] The proposed test would draw a line between conditional offers of federal funds that impose opportunity costs on non-complying states (permissible reimbursement spending legislation), and offers that impose both opportunity costs and additional costs on non-complying states (impermissible regulatory spending legislation). It should be noted that there is an interesting relationship between the "germaneness" and "coercion" inquiries under the proposed test: the central distinction between "reimbursement spending" and "regulatory spending" legislation embodies both the second portion of the proposed test's germaneness inquiry and its entire coercion inquiry. Offers of federal funds to the states that take the form of regulatory spending legislation signal both (1) that non-complying states will bear costs in addition to the opportunity costs that all federal funding statutes impose (and the offer of funds is therefore, by definition, "coercive"); and (2) that Congress is using its spending power to circumvent simultaneously the limitations of its Article I regulatory powers and the Article V amendment process (thus the condition on federal funds is not sufficiently "germane").

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284. See, e.g., infra text accompanying notes 332–334.

285. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

286. Recall that this distinction also constitutes the second portion of the proposed test's germaneness inquiry. See supra text accompanying note 266.

Offers of federal funds to the states which, if accepted, would regulate them in ways that Congress *could* directly mandate, or which take the form of *reimbursement* spending legislation, involve funding conditions that are always both "germane" and not "coercive" under the proposed test. Under the *Dole* test, in contrast, the "germaneness" and "coercion" inquiries are completely unrelated, and apparently are to serve as their own normative justifications.[287]

In some instances, the line that the proposed test would draw between reimbursement spending and regulatory spending legislation may not comport with our intuitive or subjective notions of when "coercion" begins: the "additional costs" that render a statute impermissible regulatory spending legislation may sometimes seem insignificant in amount. Against this disadvantage, however, one must weigh the substantial advantages of having a line that is bright, straight, readily and consistently drawn, and normatively justifiable.[288]

Instead of employing the proposed test, of course, one could attempt to develop a principled, workable measure of precisely when conditional offers of federal funds provide the states an unacceptably great incentive to conform with the attached condition. The courts could then invalidate only the "coercive" enactments whether they take the "reimbursement spending" form of Statute C or the "regulatory spending" form of Statute D. It is far from obvious, however, that such a measure could ever be found, or even that a sufficiently uncontroversial definition of "unacceptably great incentive" could be formulated. For those who nonetheless would like to cabin the federal spending power, and who see little benefit in simply leaving the Court to apply *Dole*'s vague and seemingly toothless "coercion" standard, the proposed test may therefore be a welcome alternative.

Finally, it should be acknowledged that the proposed test does not explicitly seek to distinguish between conditional funding offers that are aggregate welfare reducing and offers that may well increase aggregate welfare by impeding undesirable interstate races to the bottom or by reducing the costs that disuniformities may impose on multistate actors.[289] For a variety of reasons, this omission is not problematic, however. To begin, it is important to appreciate that many, perhaps most, conditional offers of federal funds to the states will continue to be sustained under the proposed test. Most obviously, Congress will still be permitted to

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287. Compare *Dole*, 483 U.S. at 207–09 (discussing "germaneness" inquiry) with id. at 211–12 (discussing "coercion" inquiry).

288. The classic theoretical discussion of the optimal precision of legal rules is Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257 (1974); see also Ian Ayres, Preliminary Thoughts on Optimal Tailoring of Contractual Rules, 3 S. Cal. Interdis. L.J. 1 (1993); Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65 (1983); Gillian K. Hadfield, Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, 82 Cal. L. Rev. 541 (1994); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992).

289. See supra notes 185–187 and accompanying text.

make those offers which, if accepted, would regulate the states in ways that Congress *could* directly mandate.[290] In addition, Congress will still be permitted to use conditional offers of federal funds to seek regulatory objectives beyond the bounds of its direct regulatory powers under Article I so long as the offer takes the form of reimbursement spending legislation—that is, it specifies the purpose for which recipient states are to spend the offered funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose.

Even if Congress *both* seeks to regulate the states in a way that it could *not* directly mandate, *and* is unable or unwilling to seek that regulatory objective through reimbursement spending legislation,[291] it is always free under the proposed test to propose that the Constitution be amended either to include the desired regulation or to give Congress the

290. Notable areas within Congress's direct regulatory powers under the Commerce Clause include aspects of the environment, see, e.g., New York v. United States, 505 U.S. 144, 159–60 (1992) (upholding federal regulation of low level radioactive waste); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 358 (1992) (invalidating waste import restrictions of Michigan statute which prohibit private landfill operators from accepting solid waste that originates outside county in which their facilities are located unless authorized by county plan); the employment relationship, see, e.g., United States v. Darby, 312 U.S. 100 (1941) (upholding federal minimum wage and maximum hour regulations); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act); and various commercial transactions, see, e.g., Perez v. United States, 402 U.S. 146 (1971) (upholding federal Consumer Credit Protection Act); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding federal regulations prohibiting race discrimination by restaurants serving interstate travelers or serving food, of which a substantial proportion had been moved in interstate commerce). The latter four cases were cited, without disapproval, by the Court in United States v. Lopez, 115 S. Ct. 1624, 1636–37 (1995) (Kennedy, J., concurring).

As is demonstrated by the Low-Level Radioactive Waste Policy Amendments Act of 1985, § 101, 42 U.S.C. § 2021b–j (1988), which were at issue in *New York*, 505 U.S. at 144, Congress may sometimes prefer to regulate indirectly, through conditional offers of federal funds, even areas that it *could* regulate directly. Several commentators have suggested that this is because a threatened loss of federal funds may often be the most effective means of enforcing federal regulations. See, e.g., Engdahl, supra note 29, at 93–108 (discussing various ways federal government has to enforce conditions on federal funds, including authorizing third-party beneficiaries to bring enforcement actions); Robert M. O'Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Cal. L. Rev. 443, 468 n.100 (1966) (noting that 1966 report of U.S. Civil Rights Commission "views with satisfaction the use of federal funds . . . to speed desegregation"); Rosenthal, supra note 28, at 1155 ("Threatened withdrawal of federal funds to coerce adherence to federal regulations may in many circumstances be the most effective means for enforcement.").

291. This scenario is most likely to occur when Congress seeks to prohibit states from engaging in an activity, such as marrying individuals of the same sex, which one or more states would prefer to permit or even encourage. As is explained in greater detail infra text accompanying notes 333–334, *reimbursement* spending legislation is not likely to induce states to conform—to induce them, for example, *not* to authorize same-sex marriages—under these circumstances.

requisite regulatory power.[292] If the regulation Congress seeks will in fact increase aggregate social welfare by precluding an interstate race to the bottom or by reducing the costs that disuniformities may impose on multistate actors, state support for the appropriate amendment is likely to be enthusiastic and nearly universal.[293]

In summary, Congress has many means available to impede any welfare-reducing, interstate race to the bottom and to reduce the costs that

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292. Congress might seek an amendment empowering it to do any or all of the following: make offers of federal funds with the previously prohibited condition attached, directly regulate in the previously prohibited area, or commandeer the states to regulate in that area.

293. This is also likely to be true in the realm of legislation, as Steward Machine Co. v. Davis, 301 U.S. 548 (1937), and Helvering v. Davis, 301 U.S. 619 (1937), suggest. These cases involved federal legislation aimed at ensuring that states required employers to provide their employees the optimal amount of unemployment compensation and Old Age Benefits, respectively. The Court in both cases observed that in the absence of federal legislation many states did not impose these requirements on employers. Instead, states embarked on a race to the bottom, fearing that "in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors." *Steward Machine*, 301 U.S. at 588 (citations omitted); accord *Helvering*, 301 U.S. at 644.

It is important to note that neither case challenging such legislation was brought by a state: one (*Steward Machine*) was brought by an Alabama corporation and the other (*Helvering*) by a shareholder of a Massachusetts corporation. Indeed, the Court explicitly observed in *Steward Machine* that the states "would be sorely disappointed" if the legislation were invalidated. *Steward Machine*, 301 U.S. at 589; see also *Helvering*, 301 U.S. at 644 ("A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. . . . Only a power that is national can serve the interests of all.").

Indeed, the only mystery in these cases is why *anyone* chose to challenge this legislation. As was true of the states, employers (and corporate shareholders) had no reason to fear any loss of competitive advantage from a tax that is imposed on all similarly situated companies nationwide. In addition, there is empirical evidence that employers typically supported such seemingly worker-friendly legislation since they were able to pass a significant portion of the added costs on to the workers in the form of wage reductions. See, e.g., Jonathan Gruber & Alan B. Krueger, The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance, *in* Tax Policy and the Economy 111 (David Bradford, ed., 1991); Price V. Fishback & Shawn E. Kantor, Did Workers Pay for the Passage of Workers' Compensation Laws? 18–19 (Aug. 1994 draft) (unpublished manuscript on file with the Columbia Law Review); cf. Michael J. Moore & W. Kip Viscusi, Compensation Mechanisms for Job Risks: Wages, Workers' Compensation, and Product Liability (1990) (employers should support worker-friendly legislation, as costs are borne by workers).

Perhaps some employers and corporate shareholders simply did not recognize that no competitive disadvantage was likely to result from the federal legislation, or that the costs could be passed on to the workers in any case. Cf. John J. Donohue, III, Opting for the British Rule, Or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 Harv. L. Rev. 1093, 1118 (1991) ("exceptional intelligence and thorough familiarity with the Coase Theorem cannot guarantee that Coasean bargains will be perceived and struck"); Daniel A. Farber, Commentary, The Case Against Brilliance, 70 Minn. L. Rev. 917, 919 (1986) ("the Coase Theorem is just too contrary to common sense to keep in mind").

Thus, it is possible that some states may not recognize the costs that the race to the bottom imposes, and may therefore not support a constitutional amendment that would increase aggregate social welfare by precluding such a race.

disuniformities may impose on multistate actors. The proposed test would only prevent it from using one means—regulatory spending legislation—to achieve these desirable ends. Of course, a test that would enable the courts to distinguish between aggregate-welfare-increasing and aggregate-welfare-reducing conditional spending legislation so that they could invalidate only the latter would be ideal.[294] Alas, not even economists can offer descriptions of these two categories of legislation that the courts might find useful.[295] So, rather than declare this definitional task

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294. Such a test was Richard Epstein's explicit goal in his larger consideration of the unconstitutional conditions doctrine. See Epstein, supra note 10, at 90–103.

295. Indeed, the economist Kenneth Arrow was awarded the Nobel Prize in Economics in 1972 for his proof that the problem of measuring social welfare is nearly always intractable. See Kenneth J. Arrow, Social Choice and Individual Values (2d ed. 1963); see also Baker, supra note 147, at 726–27; Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 38–62 (1991); Saul Levmore, Parliamentary Law, Majority Decisionmaking, and the Voting Paradox, 75 Va. L. Rev. 971, 984–90 (1989); Pildes & Anderson, supra note 163. But see, e.g., Herbert Hovenkamp, Legislation, Well-Being, and Public Choice, 57 U. Chi. L. Rev. 63, 90 (1990) (arguing "that the conditions for Arrow's theorem must be strictly specified, and that the conditions are not necessarily satisfied in actual [decisionmaking] bodies."); Herbert Hovenkamp, Arrow's Theorem: Ordinalism and Republican Government, 75 Iowa L. Rev. 949, 949 (1990) (arguing that "Arrow's condition of Independence of Irrelevant Alternatives . . . generally fails to obtain in the legislative process").

In any event, I do not believe that the courts are likely to find useful the description of welfare-increasing legislation that Richard Epstein recently offered:

> Now the object of the inquiry is to maximize the total cooperative surplus from the government action. *Given this complex inquiry*, the trick is to fashion a test that can distinguish good conditions from bad ones. The first point is typically to establish some use of monopoly power by the state, as with its control of access to public highways. Then it is necessary to examine the conditions that individuals must accept in order to gain access to public roads. A rule that all persons on the highway must agree to answer for their torts seems to be the benevolent kind of condition. In imposing it the state acts as a mutual agent of all citizens in a way that advances their ex ante welfare by increasing the protection all individuals have against accidents. Alternatively, a toll that is twice for people whose last names begin with A through L, relative to those whose names begin with M through Z, looks like a perverse condition with no allocative gains. Similarly, a condition stipulating that all commercial haulers who use the highway must agree to accept the regulations imposed on common carriers looks like the type of condition that reduces the total size of the social surplus by allowing it to be redistributed through factional intrigue. A strong unconstitutional conditions doctrine is one effective way to control this public abuse and to ensure full preservation of the social surplus created from the use of highways.

Epstein, supra note 10, at 102 (emphasis added) (footnotes omitted); see also Epstein's response to "the problem of valuation within the judicial setting," id. at 87–89. For a critical examination of Epstein's proposed standard of judicial review, see Lynn A. Baker, Bargaining for Public Assistance, 72 Denv. U. L. Rev. (forthcoming 1995) (contribution to symposium on "The Unconstitutional Conditions Doctrine"); see also Jonathan D. Hacker, Book Note, 92 Mich. L. Rev. 1855, 1860 (1994) (reviewing Epstein, supra note 10) ("[T]he reader never learns why an indeterminate social improvement standard is better, for example, than an indeterminate system of historically and institutionally respectful criteria.").

central and then (having found it too hard) delegate it to the courts, I have sought a test that would enable the courts also to avoid this perhaps impossible task.

C. *Four Examples Considered under* Dole *and under the Proposed Test*

In order most clearly to see how the proposed test differs from the *Dole* test, it may be useful to determine the likely fate of the following four enactments (two actual and two hypothetical) if challenged under each:

> (E) In order to ensure the safe disposal of hazardous waste throughout the nation, Federal Radioactive Waste Disposal funds ("Funds") shall be provided any state that complies with a specified series of deadlines toward providing facilities for the disposal of all low level radioactive waste generated within its borders; states shall receive Funds in the amount of fifty percent of their demonstrated costs of meeting the specified deadlines.[296]
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> (F) In order to ensure the safety of our nation's interstate highways, federal Highway funds shall be provided to the states in the amount of their demonstrated costs of maintaining the interstate highways within their borders; these funds shall be provided on the condition that the state use them solely for the repair and maintenance of its interstate highways, *and* that the state prohibit the purchase or public possession of any alcoholic beverage by any person who is less than twenty-one (21) years of age; five percent of a state's annual allotment of Highway funds will be withheld if the state does not prohibit the purchase or public possession of any alcoholic beverage by any person who is less than twenty-one (21) years of age.[297]
>
> (G) In order to promote the educational mission of the nation's public institutions of higher education, any such accredited institution shall be eligible to receive federal Research funds for approved projects in the amount of fifty percent of the demonstrated costs of undertaking the projects; no institution shall be eligible to receive these funds unless it employs an approved program of race-based "affirmative action" when admitting students to undergraduate study.[298]

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296. See supra note 18.

297. See supra note 19.

298. At present, a variety of federal funds are available only to institutions of higher education "with a demonstrated record of enhancing the access of individuals from underrepresented groups including African Americans, Asian Americans, Hispanic Americans, Native Americans, and Native Hawaiians." See, e.g., Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 951-57, 106 Stat. 448, 772-75 (1992) (Faculty Development Fellowship Program; five-year appropriation with $25 million available in first year); id. §§ 1061-1069 (Women and Minorities Science and Engineering Outreach Demonstration Program; five-year appropriation with $10 million available in first year; eligible institutions must have "female and minority enrollment and retention rates significantly higher than the national averages of such rates"); id. § 580A-B (Teacher Placement Program; five-year appropriation with $5 million available in first year; special

(H) In order to improve the health and quality of life of the nation's low income population, Medicare funds shall provided to public health facilities in the amount of their demonstrated costs of providing specified medical care to their state's low income residents; these funds shall be provided on the condition that they are used solely to provide specified medical care to Medicare-eligible patients, *and* that the state in which the public health facility is located does not hinder the national fight against AIDS by officially sanctioning or encouraging the practice of homosexual sex.[299]

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consideration in awarding funds given to schools or departments of education with "enrollments of at least 50 percent minority students in their teacher education programs"); 20 U.S.C. § 1435(a)(2) (Supp. V 1993) (grants for educating special education personnel; four-year appropriation with $25.6 million available in fiscal year 1994; eligible institutions of higher education must have a minority student enrollment of at least 25%).

That public institutions of higher education fear that irreplaceable federal funds currently are, or readily could be made, contingent on employing race-based affirmative action in student admissions was made clear in the action taken by the University of California in July 1995. Although the University of California Regents passed a resolution effective January 1, 1997, which prohibits the University from using " 'race, religion, gender, color, ethnicity or national origin' as criteria in its admissions decisions unless applicants can prove that race or other factors had been barriers to their success," they included a provision specifying that the resolution does not " 'prohibit any action which is strictly necessary to establish or maintain eligibility for any federal or state program, *where ineligibility would result in a loss of federal or state funds to the university.*' " David G. Savage & Amy Wallace, U.S. Backs Away From Threatened UC Funding Cuts, L.A. Times, July 25, 1995, at A1, A13 (emphasis added). At the time of the Regents' action, the nine-campus University of California system was receiving approximately $4.6 billion a year in federal funds. Id. at A1.

That the federal government fully appreciates the power to set policy implicit in its offers of federal funds to universities was evident in the Clinton Administration's initial response to the Regents' resolution:

> The University of California's decision to end affirmative action has prompted a Clinton administration review of the state's eligibility for a variety of federal grants and programs, White House chief of staff Leon Panetta said yesterday.
>
> Panetta called the UC regents' decision "a terrible mistake" and said a number of federal agencies will now take a look at the funds they give the state to make sure California still qualifies.
>
> "We are going to be reviewing our contract laws and the provision of resources to that state," Panetta said on CBS' "Face the Nation." "Obviously, the Justice Department and the other agencies are going to review that relationship with the state."
>
> . . . .
>
> Panetta was not specific about what funds might be jeopardized by the [Regents'] vote, but he clearly signaled that the Clinton administration intends to battle [California's Governor] Wilson on the issue.

Marc Sandalow, UC Affirmative Action Stance Draws Federal Review of Grants, S.F. Chron., July 24, 1995, at A1; see also Ronald J. Ostrow & Sonia Nazario, U.S. to Review Its Funding to State in Wake of UC Vote, L.A. Times, July 24, 1995, at A1.

299. Such a statute could be used to coerce states to repeal (or to refrain from enacting) same-sex marriage laws or other "gay-rights" measures. At present, this statute is

Close approximations to Statutes E and F have actually been sustained by the Court,[300] and Statutes G and H would probably also be upheld. Examining the latter two statutes under the four-prong test set out in *Dole* and recently reaffirmed in *New York,* the Court would likely find that, first, each exercise of the spending power is "in pursuit of 'the general welfare,' "[301] the goals here being promoting the educational mission of the nation's public universities, and improving the health and

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merely hypothetical, but it may not be for long. In Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii held that the prohibition on same-sex marriage implicit in the Hawaii Marriage Law

> (1) . . . is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by *compelling state interests* and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

Id. at 67. The Hawaii Supreme Court vacated the decision of the circuit court and remanded the matter, reminding the lower court that, "the burden will rest on Lewin to overcome the presumption that [the Hawaii Marriage Law] is unconstitutional." Id. at 68.

Although as of November 30, 1995, the Hawaii circuit court had not rendered its decision, other states have already begun to pass legislation aimed at denying recognition to marriages performed elsewhere which do not conform to the requirements of their own marriage laws. In March 1995, such legislation was enacted in Utah and introduced in the Alaska legislature, while a bill rendering any same-sex marriage "null and void" failed by only one vote in the South Dakota Senate. See David W. Dunlap, Some States Trying to Stop Gay Marriages Before They Start, N.Y. Times, Mar. 15, 1995, at A18; see also Dan Harrie, Utah May Ignore Gay Unions; Groups Threaten Lawsuits After Governor Signs Bill, Homosexual Marriages to be Ignored by Utah, Salt Lake Trib., Mar. 17, 1995, at C1. In addition, some conservative organizations, including the Traditional Values Coalition, are considering "push[ing] for an amendment striking down the 'full faith and credit' provision of the U.S. Constitution" if Hawaii ultimately recognizes same-sex marriages. Elaine Herscher, When Marriage Is a Tough Proposal; Women's Suit at Heart of Debate Over Same-sex Unions, S.F. Chron., May 15, 1995, at A1, A1.

For a general discussion of some of the conditions that Congress historically has imposed on the receipt of Medicaid funds, see, e.g., Baker, supra note 13, at 1200 nn.47–48, 1228–32; Kaden, supra note 24, at 877–78.

300. See New York v. United States, 112 S. Ct. 2408 (1992) (Statute E); South Dakota v. Dole, 483 U.S. 203 (1987) (Statute F). Statutes E and F differ from the statutes at issue in *New York* and *Dole*, respectively, only with regard to the formula for calculating the amount of federal money which a state that complies with the funding conditions will receive. Compare Statute E ("fifty percent of their demonstrated costs of meeting the specified deadlines"), supra text accompanying note 296, with *New York*, 112 S. Ct. at 2416, 2425–27 (citing the Low-Level Radioactive Waste Policy, Amendments Act of 1985, 42 U.S.C. § 2021b et seq.); compare Statute F ("demonstrated costs of maintaining the interstate highways within their borders"), supra text accompanying note 297, with *Dole*, 483 U.S. at 205 (citing 23 U.S.C. § 158 (Supp. III 1982).

301. *Dole*, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640–41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936)); see also *New York*, 112 S. Ct. at 2426.

Application of this prong of the *Dole* test is made easier by the Court's determination that "[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. Indeed, the Court in *Dole* observed that "[t]he 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." Id. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam)).

quality of life of the nation's low-income population, respectively. Second, each of these conditions on the receipt of federal funds is " 'unambiguous[ ] . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' "[302] And, third, neither condition "induce[s] the States to engage in activities that would themselves be unconstitutional."[303]

Only the fourth prong of the *Dole* test—that the funding condition not be "unrelated 'to the federal interest in particular national projects or programs,' "[304]—would likely engender much discussion in a consideration of Statutes G and H, largely because the Court has never clarified this requirement. Recall that the *Dole* Court simply observed that this requirement was "suggested (without significant elaboration)" by prior decisions, and did not undertake to provide the missing elaboration.[305] It is noteworthy, however, that the *Dole* Court explicitly did not limit the notion of "federal interest" to regulatory objectives that Congress may achieve directly through its other Article I powers.[306] And nothing stronger than the deferential "rational relationship" test of equal protection doctrine appears to be intended by this fourth prong.[307]

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302. *Dole*, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); see also *New York*, 112 S. Ct. at 2426.

303. *Dole*, 483 U.S. at 210; see also id. at 210–11 ("Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power."); *New York*, 112 S. Ct. at 2426; *Dole*, 483 U.S. at 208 ("other constitutional provisions may provide an independent bar to the conditional grant of federal funds").

Even under the Court's recent decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), the affirmative action programs at issue in Statute G likely would pass muster so long as their racial classifications "are narrowly tailored measures that further compelling governmental interests." Id. at 2113; see also id. at 2118 (question of narrow tailoring is resolved by asking, for example, "whether there was 'any consideration of the use of race-neutral means to increase minority . . . participation . . .,' " or whether the program is "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.' "); id. at 2117 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.") (citing with approval United States v. Paradise, 480 U.S. 149 (1987)); id. at 2127–28 (Thomas, J., concurring in part and concurring in the judgment) ("The proposition that fostering diversity may provide a sufficient interest to justify a program [involving racial classifications] is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.").

304. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)); see also *New York*, 112 S. Ct. at 2426 (Spending Clause authorizes conditions "reasonably related to the purpose of" expenditures); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").

305. *Dole*, 483 U.S. at 207–08.

306. See supra note 265.

307. Indeed, *Dole*'s requirement that conditions on federal grants not be "unrelated" to the federal interest in a particular program seems to suggest a level of scrutiny even

Statutes G and H are each arguably an over- *and* under-inclusive means to the stated end.[308] Nonetheless, the use of race-based "affirmative action" in admitting students to undergraduate study (Statute G) is not "unrelated" to the "federal interest" in promoting the educational mission of the nation's public universities. And deterring homosexual sex as a means of curtailing the spread of AIDS (Statute H) is not "unrelated" to the "federal interest" in improving the health and quality of life of the nation's low income population. Thus, both statutes should comfortably meet the fourth *Dole* requirement, and both would likely be sustained under the four-prong *Dole* test if challenged.[309]

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lower than that required by the rational basis test of the equal protection doctrine, if that is possible. *Dole*, 483 U.S. at 207–08. For further discussion of the "rational relationship" tier of equal protection scrutiny, see sources cited supra note 234.

308. If the purpose of Statute G is to "promote the educational mission of the nation's public universities," it is arguably under-inclusive because selecting the undergraduate student body is only a small part of that mission. And it is arguably over-inclusive because a race-based affirmative action program may preclude admission of some individuals who might "promote the educational mission" of the university more than some of the students actually admitted under the affirmative action program.

Similarly, if the purpose of Statute H is to "improve the health and quality of life of the nation's low-income population," it is arguably over-inclusive because it seeks to prohibit homosexual sex even among individuals who have moderate or high incomes, and among individuals who may have an especially low risk of becoming infected with AIDS, e.g., lesbians. And it is arguably under-inclusive because AIDS is only one of the many health and quality of life problems confronting the nation's low-income population.

The Court has consistently interpreted the minimum rationality test of equal protection doctrine to permit both under- and over-inclusiveness. See supra note 234.

309. In addition to the four factors just discussed, the *Dole* Court also indicated that a condition on federal funds might be invalidated if it were found to be impermissibly "coercive." *Dole*, 483 U.S. at 211 ("[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). Because only 5% of the federal highway funds otherwise obtainable by each state were at issue in *Dole*, the Court considered this congressional offer to provide "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose," and concluded that South Dakota's claim of coercion was therefore "more rhetoric than fact." Id. (citing *Steward Machine*, 301 U.S. at 589–90 (" '[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.' ")).

Two years after *Dole*, the Ninth Circuit sustained a condition on the receipt of 95% of federal highway funds on the ground that there is no principled basis to distinguish a withholding of 5% of highway funds from a withholding of 95%. See Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990); see also Epstein, supra note 10, at 155; supra note 285 and accompanying text. There is ostensively even less reason to distinguish between withholdings of 95% and 100% of highway funds, or, for example, to distinguish a withholding of 5% of federal highway funds totalling two million dollars (5% of $40 million), from a withholding of 100% of federal law enforcement funds totalling one million dollars.

In any event, neither the Supreme Court nor any lower federal court has ever invalidated a conditional offer of federal funds to the states on the ground that it was impermissibly coercive. Thus, there is little reason to expect a court to invalidate Statute G or H on that ground.

Now let us consider Statutes E through H under the test proposed in this Article. We must first inquire whether the condition attached to the proffered federal funds would, if a state accepts the offer, have a regulatory effect that Congress could not directly mandate. The most likely source of authority for the regulation embodied in each of these enactments is the Commerce Clause of Article I, Section 8, which grants Congress the power "[t]o regulate Commerce . . . among the several States."[310] Does this clause authorize Congress *directly* to regulate the disposal of low level radioactive waste (Statute E), to mandate a nationwide minimum drinking age (Statute F), to mandate the use of race-based "affirmative action" in admitting undergraduates to public universities (Statute G), or to prohibit same-sex marriage (Statute H)?

In *Lopez*, the Court "identified three broad categories of activity that Congress may regulate under its commerce power[,]"[311] and only Statute E clearly falls within them. The Court held, first, that "Congress may regulate the use of the channels of interstate commerce."[312] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[313] And, third, Congress may "regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[314]

The interstate market in radioactive waste disposal at issue in Statute E clearly involves "things in interstate commerce,"[315] and is therefore "well within Congress' [direct regulatory] authority under the Commerce Clause."[316] Since Statute E involves a funding condition that would regulate any state that accepts the offer only in ways that Congress *could* otherwise achieve directly, the inquiry under the proposed test proceeds no further. And, as under the *Dole* test,[317] Statute E would be sustained.

Statute F is more difficult. The Twenty-first Amendment states that "[t]he transportation or importation into any State, Territory, or possession in the United States for delivery or use thereof of intoxicating li-

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310. U.S. Const. art. I, § 8.

311. United States v. Lopez, 115 S. Ct. 1624, 1629 (1995) (citing Perez v. United States, 402 U.S. 146, 150 (1971); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276–77 (1981)).

312. *Lopez*, 115 S. Ct. at 1629 (citing United States v. Darby, 312 U.S. 100, 114 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)).

313. Id. (citing Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Ry. Co. v. United States, 222 U.S. 20 (1911); *Perez*, 402 U.S. at 150).

314. Id. at 1629–30 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (citation omitted)).

315. Id. at 1629; see supra note 313.

316. New York v. United States, 112 S. Ct. 2408, 2419–20 (1992) (citing Philadelphia v. New Jersey, 437 U.S. 617, 621–23 (1978); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S. Ct. 2019, 2023 (1992)).

317. See id. at 2425–26 (applying four-prong *Dole* test and ultimately sustaining challenged condition on federal funds).

quors, in violation of the laws thereof, is hereby prohibited." To this day, however, the extent of the states' power to control drinking age under this amendment remains unclear to both the Court and its commentators.[318] The amendment could plausibly be read to grant the states "broad power to impose restrictions on the sale and distribution of alcoholic beverages," but not to permit sales that Congress seeks to prohibit under its power to regulate interstate commerce.[319] Under this interpretation, the proposed test requires us next to ask whether the Commerce Clause authorizes Congress to enact a national minimum drinking age. There is a clear federal interest in safe interstate travel, and interstate variation in the minimum drinking age arguably adversely affects this interest.[320] Thus, even after *Lopez*, the Court is likely to find that the purchase and possession of alcoholic beverages by individuals below a given age is an activity that Congress may directly regulate under the Commerce Clause.[321] Under this holding, Statute F involves a funding

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318. See, e.g., South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("the bounds of [the Twenty-first Amendment] have escaped precise definition"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274–76 (1984) (expressing doubt about the scope of the Twenty-first Amendment); Craig v. Boren, 429 U.S. 190, 206 (1976) (Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," but the two provisions are interrelated and must be considered in light of the particular circumstances); Rosenthal, supra note 28, at 1136–37 ("whether the 'local option' emanations of the twenty-first amendment, even though not its actual language, might militate against federal regulatory power is still uncertain").

319. This was the argument made by the Secretary of Transportation in *Dole*, 483 U.S. at 206 (citing Brief for Respondent at 25–26 ("[T]he plain language of § 2 [of the Twenty-first Amendment] confirms the States' broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to *permit* sales that Congress seeks to *prohibit*."). The *Dole* Court concluded that "under this reasoning, [the Twenty-first Amendment] would not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than that provided by the various state laws; and it would follow *a fortiori* that the indirect inducement involved here is compatible with the Twenty-first Amendment." Id. McCoy and Friedman have observed that the "anomalous implication" of this argument is that "Congress may 'prohibit' but not 'regulate' the sale of liquor under the Twenty-first Amendment." McCoy & Friedman, supra note 10, at 99 n.64.

320. Indeed, the Court in *Dole* observed that

> Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. . . . [The goal of safe interstate travel] had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower."

Dole, 483 U.S. at 208–09 (citing Presidential Commission on Drunk Driving, Final Report 11 (1983)).

321. The Court "has rejected the view 'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned.' " 324 Liquor Corp. v. Duffy, 479 U.S. 335, 346 (1987) (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331–32 (1964)). "The question in each

condition that would regulate any state that accepts the offer only in ways that Congress *could* otherwise achieve directly, and the inquiry under the proposed test would proceed no further. As in *Dole*, but for different reasons,[322] Statute F would therefore be sustained.

It is also plausible, however, that the Court would interpret the Twenty-first Amendment to bar direct congressional regulation of the age at which alcoholic beverages may be legally purchased or publicly possessed.[323] Under this reading, Statute F imposes a condition that would regulate any state that accepts the proffered funds in a way that Congress could *not* otherwise achieve. Under the proposed test, the Court would therefore presume the condition invalid and proceed to determine—as we soon shall—whether the statute constitutes "reimbursement spending" legislation and therefore rebuts this presumption of invalidity.[324]

Challenges to Statutes G and H are more easily resolved under the proposed test since the initial inquiry, as in the case of Statute E, focuses solely on Congress's authority to regulate the states directly under the Commerce Clause. Undergraduate admissions and same-sex marriage are neither "channels" nor "instrumentalities" of interstate commerce.[325] Thus, the only remaining question under *Lopez* is whether either of these types of state action has "a substantial relation to" or "substantially affect[s]" interstate commerce.[326] Both seem readily distinguishable from the sorts of "intrastate economic activity" at issue in congressional regula-

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case is 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.' " Id. at 347 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)); see also Brown-Forman Distillers v. New York State Liquor Auth., 476 U.S. 573, 584 (1986) ("[T]he Twenty-first Amendment and the Commerce Clause 'each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.' "(quoting *Hostetter*, 377 U.S. at 332)); *Bacchus Imports*, 468 U.S. at 275 (holding that Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause).

Regulating state drinking ages in order to increase safety on interstate highways would likely be considered regulation of an activity "having a substantial relation to interstate commerce" or which "substantially affect[s] interstate commerce." United States v. Lopez, 115 S. Ct. 1624, 1629–30 (1995); see also Rosenthal, supra note 28, at 1136 ("The relationship between interstate commerce and accident avoidance, even on local roads, would undoubtedly be sufficiently clear to sustain direct federal regulation of the drinking age, as far as the commerce power is concerned.").

322. See supra notes 83–100 and accompanying text.

323. This was the argument made by the petitioner South Dakota in *Dole*, 483 U.S. at 205–06 (citing Brief for Petitioner at 43–44 ("[T]he setting of minimum drinking ages is clearly within the 'core powers' reserved to the States under § 2 of the [Twenty-first] Amendment")); see also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) (The "Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.").

324. See infra text accompanying notes 329–330.

325. *Lopez*, 115 S. Ct. at 1629.

326. Id. at 1629–30.

tions that the Court has sustained under the Commerce Clause.[327] Thus, neither the direct regulation embodied in Statute G nor that embodied in Statute H would likely be upheld as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[328]

The Court's dicta in *Lopez* lend further support to the notion that the regulations at issue in Statutes G and H exceed Congress's power under the Commerce Clause. Recall that both the majority and the primary dissent in *Lopez* seemed to agree that because "the educational process" and "family law (including marriage, divorce, and child custody)" are areas "where States historically have been sovereign," they were beyond the scope of Congress's direct regulatory authority under the Commerce Clause.[329] The selection of students for admission to undergraduate study is arguably central to "the educational process" of the public university, and the legal recognition of same-sex marriages or "domestic partnerships" is unambiguously "family law." Thus, at least since *Lopez*, it seems likely that the Court would find the regulations embodied in Statutes G and H to exceed Congress's authority under the Commerce Clause if they were imposed directly.

Under the proposed test, the Court's inquiry does not end here, however. Assuming that Statutes F, G, and H would all be presumed invalid, the Court next must determine whether any of these enactments constitutes "reimbursement spending" legislation and therefore rebuts the presumption of invalidity. In fact, each of these offers of federal funds includes both a regulatory spending and a reimbursement spending component. Under Statute F, the states receiving Highway funds must not only spend that money solely on maintaining the interstate highways within their borders, but must also prohibit the purchase or public possession of alcoholic beverages by anyone less than twenty-one years old. Under Statute G, the public universities receiving federal Research funds must not only spend that money solely on approved academic research, but must also employ an approved program of race-based "affirmative action" when admitting undergraduate students. And under Statute H, not only must the public health facilities receiving Medicare funds use that money solely to provide specified health care to low income patients, but

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327. Id. at 1630. These activities have included intrastate coal mining, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); intrastate extortionate credit transactions, Perez v. United States, 402 U.S. 146 (1971); restaurants utilizing substantial interstate supplies, Katzenbach v. McClung, 379 U.S. 294 (1964); inns and hotels catering to interstate guests, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); and the production and consumption of home-grown wheat, Wickard v. Filburn, 317 U.S. 111 (1942).

328. *Lopez*, 115 S. Ct. at 1631. Nor, therefore, would either of these regulations likely be sustained under the Court's "cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id.

329. See supra note 6.

the states in which these health facilities are located also are precluded from "officially sanctioning or encouraging the practice of homosexual sex." Under the proposed test, this additional, regulatory component of each statute renders the entire enactment regulatory spending. Thus, none of these statutes constitutes "reimbursement spending" legislation which would rebut the initial presumption of invalidity, and none would therefore be sustained under the proposed test.

It must be underscored, however, that each of these statutes does have a reimbursement spending component which, if enacted in isolation, would be sustained under the proposed test. The Highway funds at issue in Statute F reimburse the states for some portion of their costs of maintaining the interstate highways within their borders.[330] The Research funds at issue in Statute G reimburse the states for some portion of their costs of conducting research at their public universities.[331] And the Medicare funds at issue in Statute H reimburse the states for some portion of their costs of providing specified health care to low income patients at their public health facilities.[332]

It is also important to appreciate that if Congress's aim in enacting Statute G, for example, is to increase the number of undergraduate students at public universities who are members of historically disadvantaged racial groups, the proposed test still permits Congress to provide states financial inducements toward this end. It would be permissible "reimbursement spending" under the proposed test, for example, for Congress to offer states funds in an amount no greater than that sufficient to reimburse them for the costs of tuition for each member of an historically disadvantaged racial group who attended the state's public universities for undergraduate study.

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330. Thus, Statute F would be sustained under the proposed test if it took the following form:

> (F) In order to ensure the safety of our nation's interstate highways, federal Highway funds shall be provided to the states in the amount of their demonstrated costs of maintaining the inter-state highways within their borders; these funds shall be provided on the condition that the state use them solely for the repair and maintenance of its interstate highways.

331. Thus, Statute G would be sustained under the proposed test if it took the following form:

> (G) In order to promote the educational mission of the nation's public institutions of higher education, any such accredited institution shall be eligible to receive federal Research funds for approved projects in the amount of fifty percent of the demonstrated costs of undertaking the projects.

332. Thus, Statute H would be sustained under the proposed test if it took the following form:

> (H) In order to improve the health and quality of life of the nation's low income population, Medicare funds shall be provided to public health facilities in the amount of their demonstrated costs of providing specified medical care to their state's low income residents; these funds shall be provided on the condition that they are used solely to provide specified medical care to Medicare-eligible patients.

For a state that preferred not to employ an approved program of race-based "affirmative action" when admitting undergraduates to its public universities, this "reimbursement spending" legislation imposes very different costs than does Statute G. A state that chose not to increase the representation of historically disadvantaged racial groups in its undergraduate student body would simply forego (unneeded, given its choice) federal reimbursement for the costs of tuition for those unadmitted students. Under Statute G, in contrast, a non-complying state would instead forego desired research funds in an amount likely to be much greater than the costs of tuition for undergraduate students admitted under an approved program of race-based "affirmative action."[333]

It is equally important to appreciate, however, that if Congress's aim in enacting Statute H, for example, is to preclude legal recognition of homosexual sexual practices or same-sex marriages, the proposed test offers Congress no meaningful way to use conditional spending to achieve this otherwise unattainable end. It would be permissible "reimbursement spending" under the proposed test, for example, for Congress to offer the states funds in an amount no greater than that necessary to reimburse their costs of prosecuting violators of the state's prohibitions against homosexual sexual practices or same-sex marriage. A state that preferred not to prohibit these sexual practices or marriages, however, is unlikely to be induced to do so when offered funds sufficient only to cover its costs of enforcing prohibitions that it prefers not to have. Such a state is much more likely to adopt these prohibitions if Congress instead is permitted to enact Statute H, which conditions the receipt of desirable Medicare funds, totalling millions of dollars a year, on the state's enactment of such prohibitions.[334]

CONCLUSION

With its decision in *Lopez*, the Rehnquist Court made clear that the Commerce Clause does not grant Congress "a plenary police power."[335] Prevailing Spending Clause doctrine, however, permits Congress to use conditional offers of federal funds in order to circumvent seemingly any restrictions the Constitution might be found to impose on its authority to regulate the states directly. In this Article, I have argued that the Court should now reinterpret the Spending Clause to work in concert, rather than in conflict, with its reading of the Commerce Clause.

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333. This is presumably why Congress often prefers to make the latter rather than the former sort of offer: the states are less likely to be able to refuse the latter.

334. In 1992, Medicare payments totalling $91.48 billion were made to the states, ranging from a low of $114 million (Wyoming) to a high of $15.28 billion (New York). See Statistical Abstract, supra note 22, at 115 tbl. 159.

335. United States v. Lopez, 115 S. Ct. 1624, 1633 (1995) (The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.").

This Article has explored three normative arguments in favor of the Court presuming invalid that subset of conditional offers of federal funds to the states which seeks to regulate them in ways that Congress could not directly mandate. First, the federal government has a monopoly power over the various sources of state revenue, which renders any offer of federal funds to the states presumptively coercive. Second, only a small subset of states will actually be posed a choice by many conditional offers of federal funds, and this minority cannot effectively protect themselves against the majority of states through the political process. Third, federal "regulatory" spending legislation is more likely than "reimbursement" spending legislation to decrease aggregate social welfare by reducing the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers to its residents and potential residents.

Consistent with this analysis, I have proposed a new test under which the courts would presume invalid that subset of conditional offers of federal funds to the states which, if accepted, would regulate them in ways that Congress could not directly mandate. In addition, I have offered workable principles for determining when the offer of federal funds is permissible "reimbursement spending" legislation and the presumption of invalidity should therefore be rebutted. In this way, the proposed test seeks to safeguard state autonomy and the related principle of a federal government of enumerated powers, while simultaneously preserving for Congress a power to spend that is greater than its power to regulate the states directly.

My primary aim has been to demonstrate that the proposed test, although not a panacea, is a substantial improvement over both the *Dole* test and the alternatives offered to date. But I also hope that even those who do not choose to embrace my test will nonetheless profit by being provoked to contemplate how best to solve the problem of conditional federal spending after *Lopez*.