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Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So

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Getting off the *Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So[†]

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INTRODUCTION

The Rehnquist Court's federalism revival advances a single core purpose: the reduction of national power—at least power exercised by national actors other than the Supreme Court—and the concomitant increase of state power. Though reflecting this single idea, the revival has been worked out across several constitutional loci: the Commerce Clause,[1] Section 5 of the Fourteenth Amendment,[2] and the Tenth[3] and Eleventh Amendments.[4] As is well known, the spending power remains the notable exception, its exercise still governed by the extremely generous 1987 decision in *South Dakota v. Dole*.[5] Consequently, many commentators, writing in this Symposium and elsewhere, have proposed that Congress should respond to the Rehnquist Court's states' rights decisions by using the spending power to circumvent those limitations on congressional power.[6]

We argue in this Article that the strategy urged by these commentators is a risky one that might provoke the Court to abandon *Dole* in favor of something much less hospitable to congressional power. Of course, that the Court *could* tighten its spending doctrine will be news to no one. Accordingly, those who advocate strategic recourse to the spending power might respond in either or both of two ways. First, they may contend that any change in *Dole*, though possible, is unlikely. The Court's "Nationalist Four" (Justices Stevens, Souter, Ginsburg, and Breyer), they might reason, will stand by *Dole*, thereby requiring Chief Justice Rehnquist to abandon the test he authored if there are to be five votes in favor of any change. Pride of authorship and Rehnquist's commitment to the "greater includes the lesser" argument at *Dole*'s core might seem to make change doubtful.[7] Second, they might argue, even if the Court abandons or modifies *Dole*, so what? Those who favor relatively more expansive national power can be no worse off for trying to exploit *Dole*, so long as it remains good law.

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

2. *See Morrison*, 529 U.S. 598; Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

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

4. Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

5. 483 U.S. 203 (1987).

6. *See* Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 51-52 (2003).

7. *See infra* notes 129-30 and accompanying text.

We think each of these contentions is mistaken. To be sure, a new spending doctrine, even if only a tightening of the *Dole* test, is not inevitable. A majority of the Court, including at least one of the "States' Rights Five," may well be prepared to live with *Dole*. But this may depend upon what damage this majority (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) thinks the doctrine does. We predict that not even Rehnquist's pride of authorship would commit him to *Dole* if that test permits—as it very probably would—an unvarnished circumvention of one of the majority's decisions limiting congressional power. And if *Dole* goes, it is anybody's guess what may replace it. The replacement, however, might prove fatal to spending legislation that would have survived *Dole*, and might even prove fatal to legislation that already has survived *Dole*. In short, we believe that those who would urge Congress to exploit *Dole* to check the Rehnquist Court's states' rights revival might benefit from being more sensitive to the context-dependence of the creation of judicial doctrine. Put another way, we are urging a greater sensitivity to the need for strategic thinking.[8]

Part I reviews *South Dakota v. Dole* and canvasses recent lower court decisions to illustrate just how toothless the *Dole* test has been in practice. Part II shows why the test is substantively and conceptually infirm. The upshot of this Part, of course, is that *Dole* should be abandoned. The prevailing scholarly assumption, however, is that it will not be. Indeed, it is precisely this assumption that drives recommendations that Congress use *Dole* as a blueprint for circumventing the Court's more restrictive federalism cases. Part III scrutinizes the assumption of *Dole*'s durability, focusing in particular on the possibility that the Court will soon review challenges to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), an act that, among other things, uses the spending power as a lever with which to extend the free exercise rights of state prisoners. We conclude that RLUIPA is unlikely to prod the Court to overturn or even modify *Dole*. Consequently, Part IV turns attention to the circumventionist strategy, showing just how Congress could exploit the *Dole* test to get around several of the Rehnquist Court federalism decisions explored in this Symposium. Part V argues that the Court is unlikely to tolerate this move. It raises the specter, therefore, of perverse consequences: a too-clever Congress could push a partially reluctant Supreme Court to curb the most important congressional power that the Rehnquist Court's states' rights revival has thus far left untouched.

I. THE *DOLE* TEST

The Court's current spending doctrine derives from its 1987 decision in *South Dakota v. Dole*, and is explicit that "objectives not thought to be within Article I's 'enumerated legislative fields[]' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[9] As applied to the states, the Court's early rationale for this view was that "the powers of the State are not invaded, since [such an offer] imposes no obligations but simply extends an option

8. For a general exploration of the strategic interactions among the Supreme Court and other governmental actors, see William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

9. 483 U.S. 203, 207 (1987) (citing United States v. Butler, 297 U.S. 1, 65-66 (1936)).

which the State is free to accept or reject."[10] Moreover, "[i]f Congress enacted [such a statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."[11]

In 1936, the Court in *United States v. Butler* expressed concern that

> [i]f, 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.[12]

At the same time, however, the *Butler* Court embraced Alexander Hamilton's view that "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."[13] Unfortunately for proponents of federalism, the latter view has survived in modern spending clause doctrine,[14] while the former concern of the *Butler* Court has gone largely unheeded.

A. South Dakota v. Dole

At issue in *Dole* was a federal statute that withheld five percent of federal highway funds from any state "'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.'"[15] Observing that "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages," the Court went on to hold the legislation "within constitutional bounds *even if Congress may not regulate drinking ages directly*."[16]

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10. Massachusetts v. Mellon, 262 U.S. 447, 480 (1923); *see also* Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947) ("We do not see any violation of the State's sovereignty . . . . Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion.") (comparing *Mellon*, 262 U.S. at 482).

11. *Mellon*, 262 U.S. at 482.

12. 297 U.S. 1, 75 (1936); *see also id.* at 74 ("Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.").

13. *Id.* at 66.

14. See *Dole*, 483 U.S. at 207 (quoting *Butler*, 297 U.S. at 66).

15. *Id.* at 205 (quoting 23 U.S.C. § 158 (Supp. III 1982) (omission in original)); *see also id.* at 211.

16. *Id.* at 206 (emphasis added). Even today it is uncertain whether Congress has the power to regulate drinking ages directly in light of the 21st Amendment. *See, e.g., id.* at 206 ("the bounds of [the 21st Amendment] have escaped precise definition"); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 346 (1987) (observing that the Court "has rejected the view 'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned'") (quoting Hostetter v. Idlewild Von Voyage Liquor Corp., 377 U.S. 324, 331-32 (1964)); *see also* Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911, 1983-85 (1995) [hereinafter *Conditional Federal Spending*].

Because a state always has "the 'simple expedient' of not yielding to what she [considers] federal coercion,"[17] 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."[18] 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,"[19] none of the 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,'"[20] is subject to the caveat that "courts should defer substantially to the judgment of Congress" when applying this standard.[21] 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."[22] 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."[23] But it could cite only one instance in which it had found that an enactment did not meet this requirement.[24]

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,"[25] but added that this restriction was merely "suggested (without significant elaboration)" by prior cases.[26] Indeed, the Court could cite no instance in which it had invalidated a conditional grant of federal money to the states on this ground.[27] Fourth, the Court concluded that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[28] That is, Congress may not use its powers under the Spending Clause "to induce the States to engage in activities that

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17. *Dole*, 483 U.S. at 210 (quoting Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947)).

18. *Id.*

19. *Id.* at 207.

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

21. *Id.* (citing *Helvering*, 301 U.S. at 640, 645).

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

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

24. *Id.* Moreover, the import of the Court's holding in *Pennhurst* 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.

25. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

26. *Id.* at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). For an elaboration on this prong, see *infra* Part V.B.1.

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

28. *Dole*, 483 U.S. at 208.

would themselves be unconstitutional."[29] But again, the Court could cite no case in which it had invalidated a conditional grant of federal money to the states on this basis.[30]

In addition, 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.[31] "[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.'"[32] 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.[33]

B. Dole *in Action*

In the fifteen years that *Dole* has been the law of the land, the lower courts, quite predictably, have found little use for three of the five elements of its test. The courts (and thus most litigants) have consistently viewed the first, "general welfare," prong as a complete throw away, consistent with the *Dole* Court's own description.[34] The second prong, requiring a clear statement of the conditions imposed on the federal funds, has seemingly had bite on several occasions, but only in the very limited context

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29. *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.*

30. *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).

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

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

33. *See id.* We explore the coercion prong in greater depth *infra* at Part V.B.2 and V.C.4.

34. *Id.* at 207 n.2. *See also, e.g.*, West Virginia v. U.S. Dep't of Health & Human Servs., 132 F. Supp. 2d 437, 442 (S.D. W.Va. 2001) (concluding without further discussion that "Congress's exercise of the spending power in this regard is in the pursuit of the general welfare"); Nevada v. Skinner, 884 F.2d 445, 448 n.3 (9th Cir. 1989) (concluding without further discussion that "[w]e think it clear that the legislation is reasonably designed to serve the general welfare"). Thus, litigants increasingly do not even raise claims under this prong of *Dole*. *See, e.g.*, Michigan Dep't of State v. U.S. Dep't of Health & Human Servs., 166 F. Supp. 2d 1228, 1233 (W.D. Mich. 2001) (observing that "Michigan concedes that the statute is in pursuit of the general welfare").

A rare exception is Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1427-29 (9th Cir. 1989), in which the "general welfare" prong was a focus of litigation. Plaintiffs argued that the federal spending legislation at issue was not consistent with the "general welfare" because the "proposed highway is contained entirely within the state of Hawaii, and could only carry vehicles from one point in Hawaii to another," and therefore "is of 'local' and not 'national' interest." *Id.* at 1427. The Ninth Circuit disagreed, stating that the highway "was intended to serve the general welfare" and "is part of an interstate highway system which serves important defense functions." *Id.* at 1428. *See also* Hodges v. Shalala, 121 F. Supp. 2d 854, 873 (D.S.C. 2000) (challenging the constitutionality of federal spending condition on the ground that the conditions "are not consistent with the nation's welfare").

of conditional waivers of Eleventh Amendment immunity.[35] But even within that context, many courts have applied the clear-statement requirement with extraordinary leniency. Outside of the Eleventh Amendment context, one federal appeals court went so far as to hold a "postacceptance" or "retroactive" condition on federal funds—"of which the states were unaware at the time they accepted the[] funds"—to be constitutionally permissible under *Dole*'s second prong because the condition was "unambiguous."[36]

As one might expect, the "independent constitutional bar" prong of the *Dole* test has rarely come into play. It did have bite, however, in one very recent case involving the Children's Internet Protection Act.[37] The Act required public libraries to use Internet filters as a condition for receipt of federal subsidies.[38] The federal district court held the relevant sections of the Act facially invalid under the First Amendment, observing that "the proposition that Congress may not pay state actors to violate citizens' First Amendment rights is unexceptionable when stated in the abstract."[39] Because the legislation was found to "induce public libraries to violate the First Amendment," the First Amendment was held to provide an independent bar to the Act's conditional grant of federal funds, consistent with *Dole*'s fourth prong.[40] The Supreme Court will decide the fate of the Act during the October 2002 Term.[41]

At the time *Dole* was decided, the potentially most promising provisions of its test seemed to be its "relatedness" requirement and anti-"coercion" language. The former's promise stemmed in large part from O'Connor's dissent in *Dole*, in which she claimed that the majority misapplied their own relatedness test.[42] She argued that a proper

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35. This is an unusual context because many of the relevant courts have stated that the challenged legislation was invalidated pursuant to the "clear declaration of waiver" requirement of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985)—a pre-*Dole* Eleventh Amendment decision—and not pursuant to the second prong of the *Dole* test. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680-81 (1999); Pugliese v. Ariz. Dept. of Health and Human Serv., 147 F. Supp. 2d 985, 990-91 & n.8 (N.D. Cal. 2001). Indeed, lower courts that have adjudicated challenges to federal grants conditioned on waiver of state sovereign immunity have often viewed the clear-statement rule of *Atascadero* as the *only* constitutional obstacle, failing even to acknowledge *Dole*'s other requirements as applicable. *See* Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How To "Fix"* Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037, 1138-39 (2001).

36. Counsel v. Dow, 849 F.2d 731, 735-36 (2d Cir. 1988) (contending that "*Pennhurst* cannot be read as broadly prohibiting amendments which add retroactive conditions to funding statutes: at most, *Pennhurst* simply requires a clear indication of congressional intent to impose such conditions.").

37. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406-07 (E.D. Pa. 2002), *prob. juris. noted*, 123 S. Ct. 551 (2002).

38. *Id.* at 406-07.

39. *Id.* at 451.

40. *Id.* at 450. The only real issue for the Court was "what exactly a litigant must establish to *facially* invalidate an exercise of Congress's spending power on this grounds." *Id.*

41. *See* 123 S. Ct. 551 (2002) (noting probable jurisdiction over *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002)).

42. O'Connor explained 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

application of the test would lead to invalidation of the legislation at issue in *Dole*.[43] The promise of the anti-"coercion" provision was apparent in the *Dole* majority's strong suggestion that a threatened loss to states of some significant (but unspecified) portion of federal funds might well invalidate the relevant condition as being impermissibly "coercive."[44] During the past fifteen years, however, the lower courts, with few exceptions,[45] have read these two most promising provisions of the *Dole* test to be toothless, even nonjusticiable, en route to sustaining a wide range of conditional federal spending legislation.

Although no court has denied the existence or justiciability of *Dole*'s "relatedness" requirement, nearly all have given it only cursory attention. In most instances in which the requirement has been a focus of litigation, the court has done little more than assert, without analysis or elaboration, that the challenged condition is "reasonably related to the federal interest in the national program."[46] Thus, the lower courts have had little difficulty upholding a wide range of funding conditions without a clearly explained relationship to the underlying legislation, including the condition that the state develop and maintain an automated child support enforcement system in order to receive federal funds under the Temporary Assistance to Needy Families program,[47] the condition that the state provide emergency medical services to illegal aliens in order to receive Medicaid funds,[48] and the condition that the state comply with a

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disagreement on the principle itself." South Dakota v. Dole, 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting). 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).

43. "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.

44. *Id.* at 211 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

45. The few exceptions are *Guillen v. Pierce County*, 31 P.3d 628, 651 (Wash. 2001), *rev'd in part on other grounds*, 123 S. Ct. 720 (2003); *United States v. Sabri*, 183 F. Supp. 2d 1145 (D. Minn. 2002); and *Comm. of Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (per curiam) (en banc).

46. Kansas v. United States, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998). The *Kansas* court added by way of "elaboration," that "[t]he statutory requirements here at issue clearly demonstrate sufficient relationship to the purpose of the federal funding so as to pass constitutional muster." *Id. See also, e.g.*, Litman v. George Mason Univ., 5 F. Supp. 2d 366, 376 (E.D. Va. 1998), *aff'd*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (providing one sentence "analysis" of the application of the relatedness prong: "The Court finds that [the statutory provisions at issue] easily satisfy this requirement, and Defendant does not argue otherwise.").

One lower federal court included the relatedness requirement when setting out the *Dole* test, then completely ignored that requirement when applying *Dole*'s restrictions to the facts at issue. United Seniors Ass'n v. Shalala, 2 F. Supp. 2d 39, 42 (D.D.C. 1998), *aff'd* 182 F.3d 965 (D.C. Cir. 1999). *See also, e.g.*, Texas v. United States, 106 F.3d 661, 666 (5th Cir. 1997) (limiting "analysis" under *Dole* to observation that the "federal law requires states to provide emergency medical care to undocumented aliens only if the states voluntarily choose to receive federal funds from the Medicaid program").

47. *See* Hodges v. Shalala, 121 F. Supp. 2d 854, 877 (D.S.C. 2000), *aff'd sub nom.*, Hodges v. Thompson, 311 F.3d 316 (4th Cir. 2002).

48. *See, e.g.*, California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997), *cert. denied*,

heightened standard of free exercise of religion for prisoners and other individuals in its institutions in order to receive federal funds for those institutions.[49]

To date, the most significant exception to this state of affairs is the Washington Supreme Court's 2001 decision in *Pierce County v. Guillen*,[50] which involved a challenge to federal legislation that, as the Washington Supreme Court construed it, conditioned federal highway-safety improvement funds on a state's making reports and data involved in the preparation of applications for the federal funds privileged and nondiscoverable. The United States Supreme Court decided *Guillen* in January 2003, reversing the Washington Supreme Court.[51] The United States Supreme Court upheld the challenged legislation on Commerce Clause grounds, and thus did not find it necessary to reach the spending power issue.[52] We discuss *Guillen* and what it might signify for the near future of the Court's spending jurisprudence in Part III.A below.

The *Dole* test's "coercion" provision has fulfilled even less of its apparent promise. In finding the provision essentially nonjusticiable, the lower federal courts have repeatedly pointed to the difficulties in drawing the line between "financial inducement" and "coercion,"[53] the failure of other courts to invalidate any funding condition on this ground,[54] and the ability of a state to avoid the condition by simply

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522 U.S. 806 (1997); Texas v. United States, 106 F.3d 661, 666 (5th Cir. 1997); Padavan v. United States, 82 F.3d 23, 29 (2d Cir. 1996).

49. *See* Mayweathers v. Terhune, No. CIVS961582LKKGGHP, 2001 WL 804140 (E.D. Cal. July 2, 2001), *aff'd sub nom.*, Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (affirming lower court's denial of defendant's motion to dismiss); Johnson v. Martin, 23 F. Supp. 2d 820 (W.D. Mich., 2002) (denying state's motion for summary judgment); Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis., 2002) (granting prisoner's motion for injunctive relief); Freedom Baptist Church v. Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (denying Township's motion to dismiss); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (denying defendants' motion to dismiss).

50. 31 P.3d 628 (Wash. 2001), *rev'd in part*, 123 S.Ct. 720 (2003).

51. *See* Pierce County v. Guillen, 123 S.Ct. 720 (2003).

52. *Id.* at 732 n. 9.

53. *See, e.g.*, West Virginia v. U.S. Dep't. of Health and Human Servs., 289 F.3d 281, 288 (4th Cir. 2002) ("[T]he coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application."); *id.* at 289 ("These oft-mentioned 'endless difficulties' in applying the coercion theory have led some courts to conclude, in essence, that the theory raises political questions that cannot be resolved by the courts."); Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) ("The boundary between incentive and coercion has never been made clear . . . ."), *cert. denied*, 531 U.S. 1035 (2000); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method of resolving disputes between federal and state governments."), *cert. denied*, 493 U.S. 1070 (1990); John Doe v. Nebraska, No. 4:CV95-3381, 2002 WL 225907, at *7 (D. Neb. Feb. 14, 2002) (memorandum and order on defendants' renewed motion for summary judgment) ("I, too, question the viability of the coercion theory."); Kansas v. United States, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998) ("The Supreme Court and other courts have recognized that the judiciary should attempt to avoid becoming entangled in ascertaining the point at which federal inducement to comply with a condition becomes compulsion. . . . These cases suggest that the coercion test is ill-conceived and probably unworkable.").

54. *See, e.g.*, *West Virginia*, 289 F.3d at 289 ("[T]he Supreme Court since 1937 has not struck down a Congressional exercise of its spending powers, and we are aware of no decision

foregoing the federal funds.[55] Indeed, the lower courts have consistently failed to find impermissible coercion,[56] even when a state has demonstrated that either the absolute

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from any court finding a conditional grant to be impermissibly coercive.") (footnote omitted); *id.* at 290 ("[M]ost courts faced with the question have effectively abandoned any real effort to apply the coercion theory."); *Kansas*, 214 F.3d at 1201-02 ("The Court has never employed the [coercion] theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it."); *Skinner*, 884 F.2d at 448 ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party."); *John Doe*, 2002 WL 225907, at *8 ("[S]tates have found little, if any, success with the coercion theory in challenging Spending Clause conditions."); Michigan Dep't of State v. United States, 166 F. Supp. 2d 1228, 1236 (W.D.Mich. 2001) (observing that "the state fails to cite any case invalidating Congressional action under the Spending Clause based on coercion"); West Virginia v. U.S. Dep't of Health & Human Servs., 132 F. Supp. 2d 437, 443 (S.D. W.Va. 2001) ("Since *Steward*, no court has invalidated a funding condition as being coercive."), *aff'd*, 289 F.3d 281 (4th Cir. 2002).

Indeed, one federal district court has gone so far as to read the "coercion" test entirely out of *Dole*. *See* Building & Constr. Trades Dep't v. Allbaugh, 172 F. Supp. 2d 138, 151 (D.D.C. 2001) (contending that "contrary to defendants' argument, in upholding spending clause statutes, the Court does not address the question of whether a conditional spending grant is 'voluntary,' or impermissibly 'coercive'"), *rev'd*, 295 F.3d 28 (D.C. Cir. 2002), *cert.* denied, 123 S. Ct. 992 (2003).

55. *See, e.g.*, *Kansas*, 214 F.3d at 1203 ("If Kansas finds the...requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be.... Kansas' options have been increased, not constrained, by the offer of more federal dollars."); Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000), *cert. denied*, 533 U.S. 949 (2001) ("[T]he Arkansas Department of Education can avoid the requirements of Section 504 simply by declining federal education funds. The sacrifice of all federal education funds, approximately $250 million or 12 per cent of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas's choice."); *Michigan Dep't of State*, 166 F. Supp. 2d at 1236 ("This Court similarly finds the coercion theory without merit in light of the clear choice presented to Michigan by Congress. Michigan has a free choice whether to comply with the requirement that it collect SSNs on drivers' license applications and receive federal funds or not."); Padavan v. United States, 82 F.3d 23, 29 (2d Cir. 1996) ("If New York chose not to participate [in the federal Medicaid program], there would be no federal regulation requiring the state to provide medical services to illegal aliens.").

56. Two courts have come close to invalidating a spending provision on grounds of coercion. In *United States v. Sabri*, 183 F. Supp. 2d 1145, 1156 (D. Minn. 2002), a federal district court considering the constitutionality of § 666 of the federal bribery statute, *see infra* note 133, stated that "even if one could describe the federal funds disbursed . . . as the 'financial inducement' by which Congress bargained for federal jurisdiction over offenses traditionally within the purview of state and local governments, that bargain surely is 'so coercive as to pass the point at which pressure turns into compulsion.'"). The Court went on, however, to conclude that "Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as a valid exercise of Congress's power under the Spending Clause." *Id.*

In *Virginia Department of Education. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (per curiam) (en banc), the Fourth Circuit struck down a provision of the Individuals with Disabilities Education Act ("IDEA") that purported to condition receipt of the federal education funds on a state's providing free appropriate public education ("FAPE") to handicapped students expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities. Adopting Judge Luttig's dissenting opinion in the panel below, the en banc court held the

amount or percentage of federal money at stake is so large that it has "no choice but to accept the [federal legislation's] many requirements."[57] It is not surprising that the lower courts have increasingly questioned whether "there is any viability left in the coercion theory"[58] given the courts' willingness to uphold conditions on Medicaid grants, for example, "even where the removal of Medicaid funding would devastate the state's medical system."[59]

II. WHY *DOLE* SHOULD BE ABANDONED

The prevailing view among "liberal" academics and judges seems to be that the Rehnquist Court's "states' rights" revival is one giant wrong turn, and that *Dole* was the Rehnquist Court's rare right move.[60] Our own views on resurgent federalism are

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condition unconstitutional for failing *Dole*'s requirement that the condition be unambiguous. *Id.* at 561, 566-69. In dicta, however, the court explained that the statute also raised "[a] substantial constitutional question" with respect to coercion, *id.* at 561, and strongly intimated that, were the statute sufficiently unambiguous, it would have held that conditioning all IDEA funds on a state's provision of FAPE even to handicapped students expelled or suspended for disability-unrelated misconduct was unconstitutionally coercive. *Id.* at 569-71.

Interestingly, Congress amended the IDEA only months after the *Riley* decision to make clear that IDEA funds were indeed conditioned on a state's ensuring that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1)(A) (2000) (amended by Pub. L. No. 105-17, § 612, 16 Stat. 60 (1997)). Although the Fourth Circuit has acknowledged that the ambiguity it detected in *Riley* has been cured, *see* Amos v.Md. Dep't of Pub. Safety & Corr. Servs., 126 F.3d 589, 603 n.8 (4th Cir. 1997), to our knowledge that court has not been invited to unleash the sword it had left hanging in *Riley* by holding the amended statute unconstitutionally coercive.

57. *Kansas*, 214 F.3d at 120. For an exploration of what it may mean for a state to have "no choice but to accept" a conditional offer, see *infra* Part V.B.2.

58. California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997); *see also, e.g.*, Virginia v. United States, 926 F. Supp. 537, 543 (E.D. Va. 1995) ("[T]he Court has serious doubts whether the coercion inquiry is a viable tool of spending power jurisprudence."), *aff'd*, 74 F.3d 517 (4th Cir. 1996); Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) ("[T]he coercion theory is unclear, suspect, and has little precedent to support its application."). One Court has further

> seriously question[ed] the vitality of the coercion test in light of the Supreme Court's holding in *Garcia* .... If [state] sovereignty is adequately protected by the national political process, we do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise.

Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (citations omitted).

59. *Kansas*, 214 F.3d at 1202; *see also, e.g., California*, 104 F.3d at 1092 (observing that California "argues that while its choice to participate in Medicaid may have been voluntary, it now has no choice but to remain in the program in order to prevent a collapse of its medical system")(citation omitted).

60. *See, e.g.*, Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 90, 93 (2001) (contending that the Court's recent federalism decisions were "misguided" but that "the Supreme Court was right in *South Dakota v. Dole*"); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV.

somewhat more favorable, although not in complete agreement—either with each other or with the Court.[61] However, despite the various respects in which we disagree with each other, and with the Court, over several of its recent federalism decisions, however, we agree that *Dole* was a mistake of substantial import. Further, we are persuaded that everyone should share this view, liberals and conservatives alike. In this Part we explain why. In short, we argue that *Dole* has yielded, and will continue to yield, normatively troublesome results, and is intellectually suspect as well.

A. Practical Infirmities

Our analysis begins with a consideration of a particularly important function that we believe the judicial enforcement of states' rights—including meaningful judicially enforced limitations on the spending power—serves. It provides "outlier" or "minority" states protection from federal homogenization in areas in which they deviate from the national norm, *whether that deviation is to the left or right of the political center.* In serving this function, judicially enforced limitations on the spending power increase and preserve diversity among the states within the realm of what is constitutionally permitted,[62] thereby ultimately increasing aggregate social welfare.

We go on to consider a core objection that might be raised to these arguments in favor of judicially enforced state autonomy: that even if interstate diversity is more likely to maximize the satisfaction of individual preferences, and therefore more likely

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367, 391 (2002) (observing with approval that "[e]ven though the Court has sharply constrained the power of Congress to act under the Commerce Clause and under Section 5 of the Fourteenth Amendment, many of the goals Congress seeks to achieve may still be pursued through the federal spending power" under *Dole*). Of course, this view is not limited to those who would self-identify as liberal. For a very recent, extended, critique by a distinguished Reagan appointee to the bench, see JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

61. For a sampling of our published views on federalism, see, for example, Baker, *Conditional Federal Spending, supra* note 16; Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001) [hereinafter *Conditional Federal Spending and States' Rights*]; Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. UNIV. L. REV. 923 (1997); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) [hereinafter *Political Safeguards*]; Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002); Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95 (1998) [hereinafter *Revival of States' Rights*]; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195 (2001) [hereinafter *Spending Power*]; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); Berman, Reese & Young, *supra* note 35.

62. As we discuss at greater length *infra* at Part II.A.1, the interstate diversity with which we are concerned is diversity "above" the baseline of what is constitutionally permitted. That is, we are taking existing federal constitutional prohibitions as given, and are concerned solely with diversity among the states in areas in which our nation has not yet arrived at a consensus that it is willing or able (or deems necessary) to enshrine in the U.S. Constitution.

to maximize aggregate social welfare, than is a homogenization of policies dictated or encouraged by Congress, permitting Congress to press states to adopt certain policies, is likely to result in policies that are more just or otherwise preferable as a matter of political morality. We find this defense of *Dole* unpersuasive, and offer three reasons why below.

Because *Dole* authorizes expansive congressional power, it may not be surprising that, notwithstanding Rehnquist's authorship of *Dole* and Brennan's dissent, *Dole* is today more loved by the (typically nationalist) Democrats than by the (typically states' rights) Republicans. Frequently overlooked, however, is the fact that liking *Dole* with a Democratic Congress, in which exploitation of the *Dole* loophole to circumvent the Court's recent states' rights and other "conservative" decisions seemed plausible, is not the same as liking it with a Republican Congress in which use of the spending power to achieve socially conservative outcomes seems far more likely. Thus, we conclude this Part by explaining why liberal "nationalists" too should dislike *Dole* (and celebrate limited federal power), despite their own protestations to the contrary.[63]

1. *Dole* Reduces Aggregate Social Welfare

Our central thesis can be simply stated: in the absence of a nationwide consensus, permitting state-by-state variation will almost always satisfy more people than would the imposition of a uniform national policy, and will almost always therefore increase aggregate social welfare. As Michael McConnell has succinctly demonstrated, state-by-state diversity will generally allow government to accommodate the preferences of a greater proportion of the electorate, as long as those preferences are unequally distributed geographically.[64] And, as one of us has previously explained, this is likely to mean that the imposition of national uniformity in the absence of consensus will reduce aggregate social welfare relative to the existence of state-by-state diversity.[65]

Permitting subnational political communities to choose their own visions of the good society affords individuals the freedom to choose from among various diverse regulatory regimes the one that best suits the individual's preferences.[66] Seth Kreimer has recently illustrated the wide variety of situations in which Americans have invoked this freedom at different points in our history:

> Mormons moved from Illinois to Utah, while African Americans migrated from the Jim Crow South. Rail travel and, later, automobiles and airplanes enabled

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63. For an extended discussion of the larger topic of whether liberals should favor states' rights more generally, see Baker, *Should Liberals Fear Federalism?*, *supra* note 61.

64. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987). Whether the accommodation of more people's preferences actually increases social welfare, of course, depends to some extent on how both preferences and welfare are measured and, in the end, on what the preferences are *for*. A majority preference in a given jurisdiction for slavery, for instance, would raise grave difficulties for any measure of welfare based solely on satisfying the preferences of the greatest number. Our claim here is simply that complications like this are often *not* present and that state-by-state diversity often *will* increase welfare.

65. *See* Baker, *Conditional Federal Spending*, *supra* note 16, at 1947-51, 1970-72.

66. *See id.* at 1947-51.

> residents of conservative states to escape constraints on divorce and remarriage. In the years before *Roe v. Wade*, women from states with restrictive abortion laws sought reproductive autonomy in more sympathetic jurisdictions. Today, the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross a state border to be free of constraining rules. These are liberties that come only with the variations in local norms made possible by federalism.[67]

In sum, state autonomy to create diverse politico-legal regimes, combined with a personal right of exit, is a critical way that American federalism promotes individual welfare.

Because *Dole*'s interpretation of the spending power is so generous, it enhances Congress's authority to drive states toward a single nationwide policy, notwithstanding the preferences of citizens of some states to have a different policy. To the extent that Congress need respond only to the preferences of a majority of states in exercising its spending power, its action may well be at odds with the preferences of a dissenting minority of states.

There are at least three different, if not entirely discrete, scenarios in which some states might seek to use Congress's spending power as an instrument for imposing their preferences on other states. The first and simplest involves a situation in which people in some states simply do not approve of certain activities that are legal in other states, even though the activity in the other state does not otherwise affect them. When the states of Arizona, New Mexico, Oklahoma, and Utah entered the Union, for example, Congress required each, as a condition of admission, to include in its state constitution a provision stating that polygamy is "forever prohibited."[68] As Justice Scalia has pointed out, this requirement amounted to an "effort by the majority of citizens to preserve its view of sexual morality . . . against the efforts of a geographically concentrated and politically powerful minority to undermine it."[69] The preferences of polygamists in the new western states, however, did not "undermine" the marriage laws of the majority of states in any substantial sense. Rather, the majority states most likely acted out of a straightforward desire to impose their own moral code on others in the

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67. Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001); *see also* Baker, *Conditional Federal Spending*, *supra* note 16, at 1947-51 (discussing the relationship between individual mobility and benefits of federalism); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (Winter 1992) (observing that "[f]ederalism works best where it is possible to vote with your feet"); McConnell, *supra* note 64, at 1493-94, 1503-04. On the general importance of exit rights in the American political tradition, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106-12 (1970).

68. *See* Arizona Enabling Act, ch. 310, 36 Stat. 569 (1910); New Mexico Enabling Act, ch. 310, 36 Stat. 558 (1910); Oklahoma Enabling Act, ch. 3335, 34 Stat. 269 (1906); Utah Enabling Act, ch. 138, 28 Stat. 108 (1894). The complying state constitutional provisions—which are still in force—may be found at ARIZ. CONST., art. XX, par. 2; N.M. CONST., art. XXI, § 1; OKLA. CONST., art. I, § 2; UTAH CONST., art. III, § 1. Indeed, the Arizona, New Mexico, and Utah enabling acts required that these provisions be "irrevocable without the consent of the United States and the people of said State."

69. Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

absence of a constitutional amendment reflecting a nationwide consensus on the issue.[70]

A second scenario involves an attempt by some states to capture a disproportionate share of federal monetary or regulatory largesse.[71] Any conditional offer of federal funds is highly likely to make some states better off at the expense of other states.[72] Such an offer implicitly divides the states into two groups: (1) states that already comply, or without financial inducement would happily comply, with the funding condition, and for which the offer of federal money therefore is a gratuity; and (2) states that find the funding condition unattractive and therefore face the choice of foregoing the federal funds in order to avoid complying with the condition, or submitting to undesirable federal regulation in order to receive the offered funds. 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. For the states in the majority (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.

If most states have already set their minimum drinking age at twenty-one, for example, then those states should find it attractive to impose a minimum drinking age of twenty-one as a condition on federal highway funds offered all states.[73] Such a condition would bring about one of two possible results. Either outlier states with minimum drinking ages lower than twenty-one will comply with the condition, accepting the preferences held by the dominant majority, or they will forfeit whatever amount of highway funds are tied to the condition. The latter result, of course, would leave more funds in the general treasury and thus available for the benefit of all states. The ability to impose spending conditions thus presents states in the majority with a "no lose" proposition—"no lose," that is, except to the extent that such measures undermine the autonomy of *all* states in the long run.[74]

A final scenario arises when states seek federal regulation in order to avoid certain costs associated with regulating a particular subject at the state level. Consider, for example, a not-so-hypothetical state of affairs under which a majority of the states

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70. True, some opponents of polygamy in the rest of the Union may also have been concerned that permitting polygamy in the new states could have a corrosive influence on the institution of monogamy in their own states. But this desire to impose their own moral values on others may very well have been a sufficient motivation.

71. *See, e.g.*, Baker, *Conditional Federal Spending*, *supra* note 16, at 1939-51; Baker, *Spending Power*, *supra* note 61, at 199-217.

72. For a more extensive discussion of this argument, see Baker, *Conditional Federal Spending*, *supra* note 16, at 1939-51; Baker, *Spending Power*, *supra* note 61, at 212-17.

73. *See* Baker, *Conditional Federal Spending*, *supra* note 16, at 1943-45, 1978-87.

74. Admittedly, the majority states that engineered this conditional offer could conceivably lose in yet another way. If the majority norm confers upon the states that adhere to it a competitive advantage relative to the minority in the competition for individual and corporate residents and their tax dollars, and if the conditional funding offer causes the minority states to adopt the majority norm, then the majority states will have lost their preexisting competitive advantage. Presumably, then, states would employ the conditional offer strategy only when they expect either that minority states would not comply with the condition or that compliance by the minority would not undermine a competitive advantage enjoyed by the majority.

wishes to discourage homosexual relationships. A solid majority of the citizens in each of these states may share this preference and support state laws making clear that gay partners are not entitled to family benefits, that gay couples cannot adopt children, and the like. Nonetheless, the leaders of these states may know that many private companies are more progressive on these issues, and that the minority states that refuse to enact such laws will have an advantage in attracting corporate facilities to their state. The states in the majority may thus seek to enact their antihomosexual social preferences at the *federal* level, and a condition on federal funds offered the states may be the path of least resistance. The primary goal here, unlike in the first scenario discussed above, need not be the imposition of the majority states' moral code on the remaining states, nor the preservation by the majority states' citizens of their view of sexual morality against the efforts of a politically powerful minority to undermine it. Although the federal legislation that the majority states seek may have these effects, the states' primary motivation is to "level the playing field." Such antihomosexual federal legislation will restrict the competition for residents and tax dollars that would otherwise exist among the states on this issue, and will divest the minority states of any competitive gains afforded by their preference not to enact similar antihomosexual legislation at the state level.[75]

The net result of conditional federal spending legislation in each of the scenarios discussed above is a reduction in the diversity among the fifty states in the package of taxes and services, including constitutional rights and other laws, that each offers its residents and potential residents.[76] Some individuals (and corporations) may no longer find any state that provides a package (including the permissibility of polygamy, a minimum drinking age of eighteen, or the availability of various family benefits for homosexual partners) that suits their preferences, while other individuals and corporations may confront a surfeit of states offering a package (including prohibitions on polygamy, a minimum drinking age of twenty-one, and laws restricting various family benefits to married couples of different genders) that they find attractive. In many instances, this reduced diversity is *likely* to mean a decrease in aggregate social welfare, since the loss in welfare to those with the minority preference is unlikely to yield a comparable gain in welfare for those who oppose that preference.[77]

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75. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For commentary on Tiebout's classic model, see, for example, CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 384-385 (2d ed. 1999); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 506-14 (1991) (offering critique and collecting sources); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 25-34 (1998) (offering critique of "theory of public goods" including Tiebout's article).

76. One caveat though. As Evan Caminker reminded us, an exercise of federal spending power could, in theory, be diversity-protecting if it conditions funds on a state's lifting diversity-squelching restrictions that the state would otherwise impose on local autonomy. For example, it would seemingly foster diversity at the local level were Congress to condition funds to the states on each state's not preventing local governments from deciding for themselves the reach of antidiscrimination laws. This is an important observation. *See also* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 919 (1994). But federal conditions of this sort are sufficiently rare that their hypothetical existence should not be taken to overshadow the arguments we make above.

77. That is, the mere existence of the last remaining state in which polygamy is legal, the

Even if one is persuaded that inter-state diversity increases aggregate social welfare, one might still doubt that judicial review is necessary to secure that benefit. That is, the fact that the *Dole* doctrine permits potentially homogenizing use of the conditional spending power may not be enough to indict that bit of judicial doctrine. "Political safeguards" proponents such as Herbert Wechsler[78] and Larry Kramer[79] have argued that state autonomy (and, therefore, inter-state diversity) is adequately protected by various aspects of the federal political process and that judicial review—under *Dole* of any other doctrine—is therefore not necessary to secure these benefits. As one of us has shown at length elsewhere, however, such arguments are especially unpersuasive when the concern is "horizontal" impositions on state autonomy of the sort described above.[80] Indeed, the particular safeguards identified by Wechsler and Kramer—the

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minimum drinking age is eighteen, or homosexual couples are eligible for family benefits seems *likely* to yield aggregate benefits for individuals with those (minority) preferences that are far greater than the aggregate benefits that individuals with the opposing, majority preferences would realize if there were fifty rather than forty-nine states with laws consistent with those majority preferences. Indeed, for a gay couple, the last remaining state in which same-sex couples are eligible for family benefits may well have a value beyond measure. Of course, the precise measure and calculation of the actual welfare gains and losses in any of these situations is not currently possible, so the above claim seems unlikely to progress any time soon beyond the status of an open empirical question and a theoretical likelihood. *See* Baker, *Conditional Federal Spending*, *supra* note 16, at 1970-71 & n.279.

78. *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 (1954).

79. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

80. In previous work, one of us has found it useful to distinguish between two different potential threats to state autonomy that often are conflated in the federalism debate. One sort of threat, termed "vertical" aggrandizement, involves efforts by the federal government to increase its own power at the expense of the states. Such aggrandizement may occur, for example, when the federal government takes over regulatory functions traditionally exercised by the states, preempts sources of state revenue, or imposes regulatory burdens on state governments. The substantive preferences of the states in these situations are irrelevant to the issue of vertical encroachment. The defining characteristic is that the impetus for the expansion of federal power comes from the federal government or from interest groups operating at the federal level, and *not* from state governmental institutions or geographically based interests primarily concentrated at the state level.

The focus of "horizontal" aggrandizement, in contrast, is precisely on the differences among the states in their substantive policy preferences. Here the federal political process threatens state autonomy insofar as that process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences. Horizontal aggrandizement is typically overlooked in contemporary debates about federalism, but it raises a distinct and potentially more serious criticism of the efficacy of political safeguards than traditional critiques focusing exclusively on vertical issues.

For further discussion of this distinction, see Baker & Young, *supra* note 61, at 107-28; Baker, *Political Safeguards*, *supra* note 61, at 955-56. For an early discussion of the importance of horizontal threats to state autonomy, see Baker, *Conditional Federal Spending*, *supra* note 16, at 1940 (demonstrating that conditional federal spending unfettered by the Constitution's constraints is problematic because it allows "*some states* to harness the federal lawmaking power to oppress *other states*").

Senate and political parties, respectively—ironically are both more likely to threaten than to protect state autonomy.[81]

Contrary to Wechsler's claims, the state-based allocation of representation in the federal lawmaking process facilitates, rather than impedes, federal homogenization of divergent policy preferences. Although the state-based structure of representation facilitates congressional responsiveness to state-based interests and preferences, the majoritarian nature of that process ultimately permits a simple majority of states to impose its will on the minority. It is particularly ironic in this regard that it is the Senate, celebrated by Wechsler as the preeminent safeguard of federalism,[82] that presents the greatest horizontal threat to state autonomy. Because the Senate affords small population states disproportionately greater representation relative to their shares of the nation's population, it ensures small population states a disproportionately large slice, and large population states a disproportionately small slice, of the federal fiscal and regulatory "pie."[83] This systematic wealth redistribution obviously disadvantages the states that are burdened by, rather than beneficiaries of, this redistribution. In the absence of such redistribution, the burdened states would effectively have greater resources and, therefore, greater freedom of choice.[84]

An examination of the primary political safeguards Larry Kramer identifies—the political parties—reveals that they fare no better than Wechsler's candidates as bulwarks against federal homogenization.[85] Under Kramer's view, the modern political party "link[s] the fortunes of officeholders at different levels" of government, fostering "a mutual dependency that induce[s] federal lawmakers to defer to the desires of state officials and state parties."[86] Although parties may therefore (sometimes) "guarantee state official an influential voice in the [federal] lawmaking and budgetary processes,"[87] this seems likely to facilitate, rather than deter, the use of the federal lawmaking process by some states as a means of imposing their majoritarian policy preferences on the minority.

Kramer's own description of the modern political party gives potential outlier states little reason to view political parties as safeguards against federal homogenizing

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81. *See* Baker, *Political Safeguards*, *supra* note 61.

82. Wechsler, *supra* note 78, at 548 (observing that "the Senate cannot fail to function as the guardian of state interests as such," and that "the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control").

83. Baker, *Spending Power*, *supra* note 61, at 199-211; Baker & Dinkin, *supra* note 61, at 24-42.

84. Baker, *Spending Power*, *supra* note 61, at 199.

85. Although Kramer acknowledges that "the parties' effectiveness in safeguarding state government may have been compromised to some degree by twentieth-century developments," he contends that "these same developments have yielded new "political" safeguards that assure and in some respects may even strengthen the states' voice in national politics." Kramer, *supra* note 79, at 283. The primary such safeguard that Kramer identifies is the existence of interlocking state and federal bureaucracies. *Id.* at 283-85. For a brief critique of the effectiveness of this additional, "new" safeguard, see Baker & Young, *supra* note 61, at 117 n.197.

86. Kramer, *supra* note 79, at 278; *see also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1523 (1994).

87. Kramer, *supra* note 79, at 284.

legislation. According to Kramer, the parties' two "critical features" that have shaped their role in American federalism are: (1) the fact that they "are not especially programmatic," being "more concerned with getting people elected than with getting them elected for any specific purpose;"[88] and (2) the fact that they are "basically non-centralized" with their "most conspicuous features [being] flabby organization and slack discipline."[89] Taken together, these features suggest that political parties have neither the interest nor the ability to protect a minority state in Congress against majoritarian encroachments on its sovereignty.[90]

In the end, the issue is not whether the federal political process taken alone is likely to afford some protections for state autonomy. It almost certainly does.[91] The issue rather is whether judicial review is necessary to maintain and reinforce these political safeguards. We contend that substantive judicial review of federalism issues, including conditional federal spending, is necessary both to remind Congress of its own obligation to restrain itself, and to catch any instances of federal overreaching that slip through the system's political and procedural checks.

2. An Objection Considered

The discussion thus far should not be read to suggest that we believe that increased diversity among the states, even within the realm of what is constitutionally permitted, is always a good thing. We acknowledge that federal homogenizing legislation may sometimes increase aggregate social welfare by impeding welfare-reducing interstate races to the bottom,[92] or by reducing the costs that disuniformities may impose on

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88. *Id.* at 278-79; Kramer, *supra* note 86, at 1524.

89. Kramer, *supra* note 79, at 279; Kramer, *supra* note 86, at 1527.

90. For an extended critique of Kramer's arguments, see Baker, *Political Safeguards*, *supra* note 61.

91. *See id.* at 972; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Ernest A. Young, *Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) ("[T]he ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia.").

92. The most obvious examples are laws concerning environmental regulation and poverty relief. *See, e.g.*, WILLIAM J. BAUMOL & WALLACE E. OATES, ECONOMICS, ENVIRONMENTAL POLICY, AND THE QUALITY OF LIFE 75-79 (1979) (giving a classic depiction of environmental pollution as an uninternalized externality); PAUL E. PETERSON, THE PRICE OF FEDERALISM 121-24 (1995) (arguing that devolution of welfare responsibility to the states induces a "race to the bottom" because of interstate competition to avoid becoming a "welfare magnet"); Sherryl D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 552 (1999) (arguing for "a more aggressive framework of national [welfare] standards or incentives that would insulate the disadvantaged poor from the tyranny of the advantaged majority") (alteration added). *See also* Baker, *Conditional Federal Spending*, *supra* note 16, at 1951-52 n.186 (discussing "race to the bottom" in various contexts); 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) (observing that "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

corporations and individuals seeking to act in more than one state.[93] But partisans of *Dole*, and of expansive federal power more generally, often seem to be driven by a different sort of objection. Sometimes this objection takes the form of a claim that there are "right answers" to questions of social policy, which makes inter-state diversity of questionable value.[94] Other times it takes the form of an argument that Congress is more likely than the states to enact "good" social policies, *ceteris paribus*.[95] Underlying both claims, however, is a core belief: Even if interstate diversity is more likely to maximize the satisfaction of individual preferences, and is thereby more likely to maximize aggregate social welfare, than is a homogenization of policies dictated or encouraged by Congress, permitting Congress to press states to adopt certain policies is more likely to result in policies that are more just or otherwise preferable as a matter of political morality. We find this defense of *Dole* unpersuasive for three reasons.

First, it is not clear that this contention is cognizable from a perspective internal to American constitutional law. Our nation has enshrined certain policy choices in the United States Constitution, thereby declaring these to be consensus "right answers" on the relevant social issues. These "right answers" have a unique political legitimacy and morality within our constitutional system. 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,[96] providing free abortions to indigent women,[97] or providing legal recognition of same-sex marriages or "domestic partnerships"[98]—denote areas of significant moral

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[federal environmental statutes and for] the New Deal.") (alteration added).

93. The costs imposed by such disuniformities are among the arguments frequently made in favor of the federal reform of tort law. *See, e.g.*, Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917 (1996).

94. For more extensive discussion of this claim, see Baker & Young, *supra* note 61, at 133-57, and sources discussed therein.

95. *See, e.g.*, Rubin & Feeley, *supra* note 76, at 935 (contending, *inter alia*, that "the United States is a single, functioning nation, and that it generally defines good policy through a national decision-making process"); *see also* Baker & Young, *supra* note 61, at 133-57 (discussing this claim), and sources cited therein.

96. *See, e.g.*, TRACY L. SNELL, CAPITAL PUNISHMENT 1999, BUREAU OF JUSTICE STATISTICS BULL. (U.S. DEP'T OF JUSTICE), Dec. 2000, at 3 tbl. 1 (listing capital offenses, if any, by state).

97. *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 1997)); *see also* Doe v. Maher, 515 A.2d 134, 143-45 (Conn. Super. Ct. 1986) (same result under Connecticut law) (interpreting Conn. Gen. Stat. Ann. § 17-134b (renumbered as § 17b-261), and holding invalid regulation limiting funding to those abortions necessary to save the life of the mother). *See also* Lina M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 441-45 (1996) (discussing state constitutional challenges to state statutes restricting public funding for abortions).

98. VT. STAT. ANN. tit. 15 § 1202 (Supp. 2000) (authorizing establishment of a "civil union" by individuals who are "of the same sex and therefore excluded from the marriage laws of this state" and who meet various other criteria); *see also* Carol Ness, *Couples Flock to Vermont, Only Legal Place to Get Hitched: Vermont Gays' State of the Union*, S.F. EXAMINER, Aug. 7, 2000, at A1, *available at* 2000 WL 6166744 (observing that of the first 263 couples whose civil

disagreement within our society. These are issues on which we, as a nation, have not yet reached a consensus. They are therefore 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.[99]

Should our society reach a substantial consensus that interstate diversity in some area is no longer acceptable, concerned individuals and groups may seek to formally amend the United States Constitution to prohibit the practice(s) agreed to be immoral. Although the amendment process is concededly difficult, [100] history does offer several examples of our willingness and ability to amend the Constitution to reflect such shifts in our moral sensibilities: the Thirteenth, Fourteenth, and Fifteenth Amendments' prohibitions against slavery and race-based and other discrimination;[101] the Eighteenth and Twenty-First Amendments' imposition and repeal, respectively, of prohibition;[102] and the Nineteenth and Twenty-Sixth Amendments' extension of voting rights to women and to all citizens eighteen years of age or older, respectively.[103]

Second, even insofar as the Constitution, as amended and properly interpreted, permits policies that are suboptimal on some plausible, even persuasive, account of political morality, advocates of national power often give too little weight to the value of self-governance by state political communities. A state's freedom from federal interference, like an individual's freedom from governmental restrictions on expression or private choices, is a freedom to make choices, not just a freedom to choose wisely.[104] That is, federalism, including judicially enforced limits on Congress's

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unions had been registered with the Vermont Vital Records Office, eighty-four were from Vermont and 179 were from other states).

99. Some nationalists, most notably Ed Rubin and Malcolm Feeley, do seem to understand this point. *See, e.g.*, Rubin & Feeley, *supra* note 76, at 912 (contending that "the point of federalism . . . is to allow normative disagreement amongst the subordinate [governmental] units so that different units can subscribe to different value systems.").

100. For recognition of occasions on which the Constitution has proven surprisingly difficult to amend, see Baker, *Conditional Federal Spending*, *supra* note 16, at 1950 n.182 (describing failure to adopt Equal Rights Amendment even though from 1972 to 1982 "a majority of Americans consistently told interviewers that they favored this amendment to the Constitution," quoting JANE J. MANSBRIDGE, WHY WE LOST THE ERA 1 (1986)). *See also* Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 152-53 (1995) (discussing difficulties posed by supermajority requirement for constitutional amendments).

101. U.S. CONST. amend. XIII, § 1 (prohibiting slavery; adopted 1865); *id.* amend. XIV, § 1 (guaranteeing all persons due process and equal protection of the laws; adopted 1868); *id.* amend. XV, § 1 (prohibiting race-based discrimination in voting rights; adopted 1870).

102. *Id.* amend. XVIII, § 1 (prohibiting the manufacture, sale, or transportation of intoxicating liquors within the United States; adopted 1919); *id.* amend. XXI, §§ 1-2 (repealing the Eighteenth Amendment; adopted 1933).

103. *Id.* amend. XIX, § 1 (prohibiting gender-based discrimination in voting rights; adopted 1920); *id.* amend. XXVI, § 1 (guaranteeing the right to vote to all citizens eighteen years of age or older; adopted 1971).

104. Federalism, however, has generally been deplored for the ends to which certain groups in our history have sought to use state autonomy—specifically, as a sanctuary for slavery and segregation. This identification of federalism's intrinsic value with the ends to which it has sometimes been employed is particularly noteworthy in light of the enthusiasm with which liberals are willing to embrace guarantees of many *individual* rights, notwithstanding the fact

spending power, seeks to create a space within which a subnational political community can make choices about how to govern itself without interference from the national government. This is out of respect not for the autonomy or dignity of states *qua* states, but for the capacity of communities at a subnational level to exercise political self-governance. Indeed, in this respect, civic republican values are in keeping with the liberal political tradition, which has not normally equated the appeal of liberty with the normative appeal of what the individual chooses to use it for. Instead, contemporary liberalism distinguishes "between the 'right' and the 'good'—between a framework of basic rights and liberties, and the conceptions of the good that people may choose to pursue within the framework."[105] Just as, say, freedom of speech does not prescribe what the individual shall *do* within this protected sphere of liberty, so too federalism does not dictate that a state political community make any particular substantive choice within the range of options permitted it.

Finally, even putting aside the value of choice to subnational political communities and individuals, and focusing solely on the political morality of policy outcomes, we think that partisans of *Dole* are at once unduly pessimistic about state policies and overly sanguine about national ones. There have always been areas of social policy in which certain states have been more "progressive," more "liberal," than the federal government, and those areas are particularly marked today. For example, many states currently provide constitutional and statutory protection against various forms of discrimination on the basis of sexual orientation, while federal law does not.[106] Other

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that those rights will often protect individuals and activities that they consider unattractive, even evil. In areas such as the freedom of expression guaranteed by the First Amendment, or the Fifth and Fourteenth Amendment rights of due process, liberals have long been eager to defend their enemies' rights in the name of a higher principle of broad applicability. Most famously, in 1977, the "liberal" American Civil Liberties Union ("ACLU") defended the rights of uniformed neo-Nazis to march in Skokie, Illinois, a city with a large Jewish population, including many Holocaust survivors. *See, e.g.*, Martin Finucane, *ACLU to Represent Group that Advocates Sex Between Men and Boys*, AP NEWSWIRE, Aug. 31, 2000, *available at* 2000 WL 25992549 (observing that the "ACLU has long accepted unpopular clients and despised causes, including Ku Klux Klansmen and neo-Nazis. In 1977, the ACLU defended the right of Nazis to march in Skokie, Illinois—home to many Holocaust survivors. Thousands of ACLU members quit and contributions plunged."). For further elaboration on this point, see Baker, *Should Liberals Fear Federalism?*, *supra* note 61, at 442-49; Baker & Young, *supra* note 61, at 133-62.

105. Michael Sandel, *Introduction* to LIBERALISM AND ITS CRITICS 3 (Michael Sandel ed., 1984).

106. *Compare* CONN. GEN. STAT. § 46a-81e (1995) (prohibiting discrimination on the basis of sexual orientation) *and* HAW. REV. STAT. ANN. § 368-1 (Michie 1999) (same) *with* 42 U.S.C. § 3604 (1994) (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 19 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)). *Compare* CAL. LAB. CODE § 1102.1 (West 1989 & Supp. 2001) (prohibiting employment discrimination on the basis of sexual orientation) *and* HAW. REV. STAT. ANN. § 368-1 (Michie 1999)(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.

areas in which some states have been more "progressive" than the federal government include: the right to use marijuana for medical purposes,[107] welfare rights,[108] and freedom of expression.[109] By ignoring the benefits of federalism, nationalists increase the risk that each of these areas of state law will fall victim to federal homogenization by a less "progressive" Congress, whether through conditional federal spending, preemption, or direct regulation.

At the same time that they undervalue interstate diversity, contemporary advocates of strong national power seem to us to be overly sanguine about the normative attractiveness of the policies that Congress is likely to promote with its spending conditions. The view of the federal government as the inevitable purveyor and protector of "good" social policies is an especially easy one for today's liberals to hold because of the Democratic Party's dominance of Congress from 1955 to 1995. The Democrats had a majority of the House for that entire period, and had a majority of the Senate for all but six of those years.[110] Although the November 1994 election yielded a Republican majority in the House that exists to this day,[111] and a Republican majority in the Senate that has existed for all but the period from May 2001 (Jim Jeffords' defection)[112] through the November 2002 elections,[113] liberals may view the past seven

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§ 623 (1994) (prohibiting employment discrimination on the basis of age).

107. Since 1996, Alaska, Arizona, California, Colorado, Maine, Nevada, Oregon, Washington, and Washington, D.C., have adopted laws legalizing the medical use of marijuana. *See* Law, *supra* note 60, at 417 n.307. *Compare* CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2002) (creating exception to California laws prohibiting possession and cultivation of marijuana for seriously ill persons who use it for medical purposes), *and* ME. REV. STAT. ANN. tit. 22 § 2383-B (West Supp. 2001) (making lawful the possession of marijuana for medical use by individuals with certain serious diseases), *with* 21 U.S.C. §§ 801-863 (1994) (prohibiting manufacture and distribution of various drugs, including marijuana), *and* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486 (2001) (holding there to be no "medical necessity exception" to the Controlled Substances Act, 21 U.S.C. §§ 801-971 (1994)).

108. *See, e.g.*, N.Y. CONST. art. XVII, § 1 (providing that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine"); *see also* Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999) (discussing history and judicial interpretation of Article XVII).

109. *See, e.g.*, New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994) (stating that Article I of New Jersey Constitution confers on "citizens an affirmative right of free speech that [is] protected not only from governmental restraint—the extent of First Amendment protection—but from the restraint of private property owners as well").

110. 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, 2000, at 281 tbl. 460 (120th ed. 2000) [hereinafter STATISTICAL ABSTRACT] (1971-1999 statistics). The Republican Party had a majority in the Senate from 1981-1987. *Id.*

111. STATISTICAL ABSTRACT, *supra* note 110 at 281 tbl. 460. *See also*, Editorial, *Protest Vote: An Angry Electorate Hands the Republicans a Landslide*, PITTSBURGH POST-GAZETTE, Nov. 10, 1994, at C2, *available at* 1994 WL 9663339.

112. *See* Katharine Q. Seelye with Adam Clymer, *Balance of Power: The Power Shift; Senate Republicans Step Out and Democrats Jump In*, N.Y. TIMES, May 25, 2001, at A1 (observing that Jefford's departure from the Republican Party to become an independent "tips

years as nothing more than an unfortunate (and surely short lived) aberration. Because recent events are more salient than those of long ago, it may be easy for liberals to forget that the Republican Party, too, has had periods when it has controlled both houses of Congress for several decades.[114]

Given the unpredictability of national elections over the long-term, the rational and risk-averse position, even for those who believe there are "right answers" to important questions of social policy, is to favor states' rights and judicially enforced limits on Congress's spending power. If some measure of state autonomy exists, liberals and conservatives alike can expect there to be at least one state with laws that will reflect one's own views on certain social issues, even when both houses of Congress are controlled by the party one opposes. Liberals, however, rarely seem to appreciate that judicial enforcement of states' rights provides them this long-term benefit.

If all this is right, then *Dole* should strike its present-day supporters (who we assume are disproportionately liberal nationalists) as bad constitutional doctrine because it enables Congress to use the carrot of federal funds to induce states to adopt a raft of policies likely to be favored by conservative Republicans and hated by liberal Democrats. Consider, for example, the following conditional spending schemes: (1) Congress conditions grants for state law enforcement on a state's enactment of right-to-carry laws and on enactment, and enforcement, of the death penalty; (2) Congress conditions Head Start funds on a state's prohibiting affirmative action even by private educational institutions; and (3) Congress conditions a package of funds designed to promote child welfare (perhaps in health and education) on a state's prohibiting homosexual couples from adopting.

Each of these statutes would very likely pass muster under *Dole.* The general welfare, clear statement, and independent constitutional bar prongs would be satisfied with ease. So long, then, as the magnitude of funds at stake is not so great as to pass the point at which pressure becomes compulsion, all comes down to relatedness. And Congress can make a strong argument that, in each case, the condition is related to the expenditure: in hypothetical (1), the expenditures and the condition each serve a purpose in reducing crime; the expenditures and condition in (2) each serve an interest in promoting equal educational opportunity; and, the expenditures and the condition in (3) each promote the well being of children. To be sure, the premises upon which these

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the fragile 50-50 power balance in the Senate to a 50-49 Democratic edge"); *see also* STATISTICAL ABSTRACT, *supra* note 110, at 281 tbl. 460.

113. See Alan Fram, Senate passes jobless-pay bill; The House was due to act today on the measure; About 750,000 people are facing an end to the aid, PHIL. INQUIRER, Jan. 8, 2003 at A3 ("The fall elections turned a narrow Democratic edge in the Senate into a 51-48-1 GOP majority, giving Republicans the control they lost when Sen. James Jeffords of Vermont left the GOP to become an independent in 2001.").

114. HISTORICAL STATISTICS, *supra* note 110, at Y204-10. *See also* Adam Clymer, *Theorists Look at '94 Voting: Was It Major or Minor Trend?*, N.Y. TIMES, Sept. 4, 1995, at 8 (noting that Republican victory of 1894 ushered in a third of a century of Republican congressional dominance); Michael Wines, *Donkey Drop; Bradley's Exit Is Not Just the Democrats' Problem*, N.Y. TIMES, Aug. 20, 1995, § 4, at 1 ("Republicans had ruled politics for 30 years, and Democrats were a husk of a party, too feeble even to repudiate the Ku Klux Klan, only eight years before Franklin D. Roosevelt founded a political dynasty in 1932.").

arguments of relatedness rely are, to say the least, contestable. But the Court is likely to defer to Congress's assessment.

The judicial enforcement of states' rights, including judicially enforced limits on Congress's spending power, would at least sometimes require congressional supporters of homogenization in these areas to secure a federal constitutional amendment to that effect. For an outlier state (such as Vermont in the case of same-sex civil unions[115] or Massachusetts in the case of the death penalty[116]), the advantage of that requirement is clear: It will usually be easier to assemble the coalition of thirteen states necessary to block an amendment to the United States Constitution[117] than to garner the simple majority in either the House or Senate necessary to block a congressional enactment.

B. Conceptual Infirmities

The examples of possible federal legislation discussed at the end of the previous section are designed, of course, to provoke the reader's intuition that Congress should have less power to achieve substantive ends than *Dole* permits. Admittedly though, we are not optimistic that this brief discussion will have changed the minds of many not already persuaded. After all, one could reasonably object on policy grounds to any of the statutes we have hypothesized without believing that the objectionable legislation would exceed Congress's appropriately broad constitutional authority.

That the unwisdom of a congressional action does not entail its unconstitutionality[118] is no doubt true. Nonetheless, there are good reasons of constitutional method to be suspicious of the particular shape that contemporary conditional spending doctrine takes, even if you believe that Congress does enjoy constitutional power to achieve a state of affairs, say, in which, nationwide, affirmative action is abandoned, concealed weapons are permitted, homosexuals are barred from adopting children, and capital punishment is everywhere imposed. That is, even if the Constitution is best interpreted to confer upon Congress sufficient power to set national policy on matters such as these, *Dole* is the wrong way to effectuate that authority.

At least three reasons to doubt *Dole*'s soundness, each independent of the substantive results that the test would seem to permit, stand out. First, *Dole* coheres poorly with the body of current federalism doctrine. As everyone knows, the Hamiltonian conception of the spending power provides Congress a means to achieve ends that it could not achieve through other means. That is not by itself conceptually problematic: laws, like other types of norms commonly proscribe particular means to desired objectives without condemning the objectives themselves. For example, our culture allows individuals to seek to amass great personal wealth, while prohibiting

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115. *See* Ness, *supra* note 98, at A1 (observing that July 1, 2000 "was the date when Vermont became the first and only state to give legal status to gay and lesbian couples").

116. *See, e.g.*, SNELL, *supra* note 96, at 3 tbl. 1 (listing capital offenses, if any, by state).

117. 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.

118. This is plainly one of the Supreme Court's most oft-referenced principles. For a randomly selected example see *Ferguson v. Skrupa*, 372 U.S. 726, 728-30 (1963).

only certain paths to that goal. But to police means rather than ends presupposes that the means permitted will differ from the means prohibited on grounds that matter. To allow Congress to achieve a given end, *x*, by means of conditional spending but not by the means, say, of direct regulation or of commandeering can make sense, then, only if the former means better serves ends that the Constitution can be reasonably understood to care about: ends such as promoting human liberty, welfare, dignity, or the like. We will seek to demonstrate, however, that, over a nontrivial range of cases, *Dole*'s way of operationalizing the Hamiltonian conception of the spending power produces a state of affairs in which the permitted route (spending) is not functionally superior to those regulatory routes that the Court's interpretation of such other constitutional provisions such as the Commerce Clause and the Tenth and Eleventh Amendments rules off limits.[119]

If this is true, then two possibilities suggest themselves: either *Dole* itself is wrong, or the Court has been wrong in foreclosing those other means that prove functionally equivalent to the *Dole*-sanctioned use of the spending power. But while many critics of the Rehnquist Court's recent federalism decisions will be attracted to the latter possibility, this line of argument is hard to sustain. For the internal tension that arises between *Dole* and other aspects of the Court's federalism jurisprudence does not depend upon the narrow particularities of recent innovations by the Rehnquist Court. To the contrary, *Dole* allows extensive circumvention of *whatever* limitations exist on other congressional powers. Thus, while it is true that the *practical significance* of this circumventionist potential increases as the fetters imposed on other congressional powers are drawn tighter, it is the *fact* of federalism-based limitations on congressional power, and not their precise content, that renders *Dole* anomalous. This anomaly, therefore, is one conceptual strike against the *Dole* test.

But if *Dole* fits uncomfortably within one body of law within which it is situated—that body whose *subject matter* is described by federalism—it fits just as uncomfortably within a second body of law—that body whose *structure* is defined by the unconstitutional conditions problem. The unconstitutional conditions problem is said to arise whenever government conditions a benefit on the offeree's waiver of a constitutional right.[120] Familiar instances involve abortion funding,[121] land use exactions,[122] conditions on public employment,[123] plea bargaining,[124] and so on. The conditional spending problem is just another example of this phenomenon, for it involves the federal government's conditioning the benefit of federal funds on an offeree state's waiver of one of its sovereign prerogatives (such as the prerogative to set whatever minimum drinking age it prefers). This is well known. And, equally well known is that *Dole* does not so much as nod to this fact.[125] That is, *Dole* proceeds as

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119. *See infra* Part IV.

120. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421 (1989).

121. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

122. Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

123. *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995).

124. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978).

125. *See, e.g.*, Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's*

though the Court's own resolution of other unconstitutional conditions cases has absolutely no bearing on the conditional spending problem.

This is worrisome, for there is reason to expect that some of the same general principles or considerations will prove at least relevant in helping to resolve cases that share the structure of the unconstitutional conditions problem, even if those cases arise in distinct doctrinal contexts.[126] Surely the possibility cannot sensibly be dismissed out of hand. That *Dole* wholly fails to inquire into such principles—and, as we explain later,[127] adopts standards entirely at odds with those that appear to underlie other manifestations of the unconstitutional conditions problem—constitutes additional reason to doubt that *Dole* gets things right.

In these two respects, the particular shape of the *Dole* test is troubling when viewed with an eye toward the overall coherence or topology of constitutional doctrine. But, *Dole* does not any better even when viewed entirely on its own terms—when assessed, that is, not as a component within a vast and complex web of constitutional law but as though in a doctrinal vacuum. This third problem, very simply, is that *Dole* relies on concepts—most notably "coercion" or "compulsion"—that are, at best, ill-suited for judicial administration and, at worst, incoherent.[128] For all these reasons, even if *Dole* does not grant Congress too much power absolutely (as we believe it does), it remains doubtful that the particular way in which this doctrine allows Congress effectively to set national policy is defensible. It should be reformed.

III. SHORT-TERM PROSPECTS

The criticisms of *Dole* presented in Part II above are not wholly new. We and many others have scrutinized and criticized *Dole* at length en route to proposing alternatives to its seemingly toothless and largely problematic test. Despite *Dole*'s many and obvious weaknesses, however, there is reason to fear that its short-term prospects are good, barring the departure of Chief Justice Rehnquist or one of the current "Nationalist Four." None of the nationalist justices presumably is willing to narrow congressional power nor, therefore, to add bite to the *Dole* doctrine. And Chief Justice Rehnquist, normally a defender of states' rights, may also not be eager to abandon *Dole*, given pride of authorship and his attraction to the "greater includes the lesser" argument at the center of *Dole*.[129] For these reasons, most academic commentators

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Trojan Horse, 1988 SUP. CT. REV. 85, 87.

126. This is a fairly weak assumption. It does not depend upon the far more controversial supposition that unconstitutional conditions cases can be resolved solely by application of general principles without regard for context-specific considerations.

127. *See infra* Part V.C.4.

128. *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992) (explaining that a prior case should be overruled if, among other things, it proves "unworkable").

129. For a discussion of Rehnquist's attraction to the greater-includes-the-lesser reasoning, see, for example, Baker, *Conditional Federal Spending*, *supra* note 16, at 1914-15; Lynn A. Baker, *The Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 390-91 (1997).

Nonetheless, Rehnquist's largely unnoticed conversion in commercial speech cases suggests that his commitment to the greater/lesser may be weaker than is commonly supposed. One of Rehnquist's most notorious applications of the principle that the greater power includes the lesser came a year before *Dole* in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328

have speculated that *Dole* is secure.[130]

We agree that the Court is unlikely to change or abandon Dole in the near future. The spending statute now winding its way through the courts that many Court watchers view as resting on the most shaky constitutional footing[131] is the institutionalized persons section of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[132] We analyze RLUIPA in Part III.B, concluding that the Court is not likely to exploit the RLUIPA litigation as an opportunity to change its spending doctrine regardless of whether it upholds or strikes down the Act.[133]

(1986), a case challenging Puerto Rico's prohibition of casino advertising. In his last opinion as an associate justice, Rehnquist led a bare five-member majority in upholding the advertising ban, reasoning in part that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345-46. Commentators excoriated this reasoning. *See, e.g.*, Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company, *"'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1, and the Court renounced it a decade later. *See* 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 511-13 (plurality opinion). In the years following *Posadas,* Rehnquist maintained an uncharacteristically low profile, neither confessing error in that case nor seeking to defend it. Indeed, it is difficult to discern just what his current view of commercial speech is. In just the past two Terms, for instance, he signed on to one case that invalidated advertising restrictions that would have been upheld on a greater/lesser rationale, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down state restrictions on tobacco advertising), while dissenting from a second, *see Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (dissenting from Court's upholding FDA restrictions on advertising of pharmaceutical compounding). For an argument that Rehnquist was closer to being right in *Posadas* than have been his critics, and that the greater/lesser intuition does have significant force in commercial speech cases (even though the greater power does not "necessarily" include the lesser) see Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "the Greater Includes the Lesser,"* 55 VAND. L. REV. 693 (2002).

130. *See, e.g.*, Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L. REV. 633, 675 (1998); Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 17-18 (1998); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 52 n.240.

131. We exclude from consideration here the Children's Internet Protection Act ("CIPA"), Pub. L. No. 106-554, § 1712, 114 Stat. 2763A-335 (2000), which requires public libraries to use internet filters as a condition for the receipt of certain federal subsidies. As mentioned earlier, *see supra* notes 37-41 and accompanying text, the Court will resolve a challenge to CIPA this Term. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *probable jurisdiction noted*, 123 S. Ct. 551 (2002). We put this aside because, although the "independent constitutional bar" prong of Dole makes this nominally a spending case, we (and others) expect the Court to analyze and decide the case on substantive First Amendment grounds. *See, e.g.*, Linda Greenhouse, *Justices to Review Internet Pornography Filters*, N.Y. TIMES, Nov. 13, 2002, at A24 ("[T]he government must still defend the law in basic First Amendment terms. The main argument in the administration's appeal . . . is that the lower court was fundamentally mistaken in framing the issue as one of speech in a public forum and in viewing the libraries as surrogates for the First Amendment interests of their patrons.").

132. 42 U.S.C. § 2000cc.

133. Another challenge under the spending power that might well reach the Court in the next

few years would involve § 666 of the federal bribery statute, 18 U.S.C. § 666 (2000). Subsection (a)(1) of the statute "makes it a federal offense for *an agent* of an organization or a state, local, or tribal governmental body or agency that receives more than $10,000 in federal funds in a year *to solicit, demand, accept, or agree to accept* anything of value with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of the entity valued at $5000 or more." United States v. Sabri, 183 F. Supp. 2d 1145, 1148 (D. Minn. 2002) (summarizing 18 U.S.C. §666(a)(1)) (emphasis in original)). Subsection (a)(2) is a complementary provision that makes it a federal crime for any person to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward" such an agent under similar circumstances. 18 U.S.C. § 666(a)(2).

Several federal courts that have ruled on the constitutionality of § 666 to date have undertaken an analysis under *Dole*, sometimes simultaneously questioning whether such an analysis was appropriate. *See, e.g.*, United States v. Lipscomb, 299 F.3d 303, 321 (5th Cir. 2002) ("[A]lthough we may debate whether the § 666 peg fits the conditional-grant hole, I shall test it under the four prongs of *Dole*."); United States v. McCormack, 31 F. Supp. 2d 176, 188 (D. Mass. 1998) ("Of the four limits [on the spending power] established in *Dole*, limit (3)—requiring that the conditions be related to the federal interest in particular national projects or programs—provides the most plausible attack on § 666(a)."); United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995) (discussing *Dole*, but concluding that § 666 "does not impose a condition on the receipt of federal funds" and that "the conduct prohibited by § 666 [is not] so remote from the federal interest in protecting federal funds from the effects of local bribery schemes as to exceed the scope of Congressional spending power....").

Several federal courts have held § 666(a)(2) to exceed Congress's authority under the *Dole* doctrine. *See, e.g.*, *Sabri*, 183 F. Supp. 2d at 1156 ("[E]ven if one could describe the federal funds disbursed . . . as the 'financial inducement' by which Congress bargained for federal jurisdiction over offenses traditionally within the purview of state and local governments, that bargain surely is 'so coercive as to pass the point at which pressure turns into compulsion.'") (citation omitted); *McCormack*, 31 F. Supp. 2d at 189 (finding the conduct at issue to be clearly "not 'related to a legitimate national problem' because it is not directed towards protecting the integrity of federal funds" and holding it unconstitutional to prosecute the defendant under § 666); *Lipscomb*, 299 F.3d at 328-29 ("Some district courts have tested § 666 against the Tenth Amendment, treating the statute as an emanation of the spending power, and have come to varying conclusions. Additionally, four of our fellow appellate courts have examined the sweep of § 666, either as a statutory matter or a constitutional one, and are also divided.") (footnotes omitted).

We do not believe that § 666 is a conditional spending statute, however, and we thus do not believe an analysis under *Dole* is appropriate for determining the constitutionality of that statute. *Cf. Sabri*, 183 F. Supp. 2d at 1156 ("Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as a valid exercise of Congress's power under the Spending Clause.").

As the Court itself has observed on multiple occasions, a conditional grant of federal funds to the states is in the nature of a contract: in exchange for federal funds, a state agrees to give something up. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) ("When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'") (quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S 1, 17 (1981); *see also id.* at 655 (Kennedy, J., dissenting) (same); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (observing that a law that "conditions[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds."). So one must ask what is the quo that the state

Before engaging RLUIPA, however, we discuss in Part III.A a *non*-spending decision that the Court handed down in January 2003, *Pierce County v. Guillen*.[134] *Guillen* was the first case in which a court (here, the Supreme Court of Washington) employed *Dole* to strike down a federal statute as exceeding Congress's spending power.[135] The United States Supreme Court granted cert and then unanimously upheld the statute as a valid exercise of Congress's *commerce* power.[136] As we explain briefly, we find the Court's Commerce Clause analysis questionable. More significantly for present purposes, we suggest that the Court's unanimous willingness to resolve the case on dubious—and substantially underdeveloped—Commerce Clause grounds may indicate that the justices are ill-disposed to tinker with existing Spending Clause jurisprudence.

A. Pierce County v. Guillen

The dispute in *Guillen* arose when certain Washington State motorists involved in traffic accidents requested accident reports and other materials and data held by county agencies related to the traffic history of the sites of their accidents.[137] The motorists sought the information in part in order to pursue tort claims that the relevant city and county governments were negligent in their maintenance and operation of the intersections at which the accidents occurred.[138] Pierce County refused to provide the requested reports and data in reliance in part on a federal statute,[139] 23 U.S.C. § 409, as amended in 1995, which states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions,

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relinquishes for all the federal quid to which § 666 attaches? State permission for the federal government to impose criminal penalties on some of its agents and on private individuals who bribe such agents? That, we think, is the only possible answer, but such permission is not something within a state's power to give. Either Congress has the power to enact a given criminal law (most likely under its Commerce authority) or it doesn't. And if it doesn't, then *New York* teaches us that the state's consent doesn't change anything. *See* New York v. United States, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials."). A discussion of whether § 666 is a legitimate exercise of Congress's power under the Commerce Clause is beyond the scope of this Article.

For present purposes, it is important only to note that we believe that a Spending Clause analysis of § 666 should provide the Court no opportunity to reconsider existing spending doctrine.

134. 123 S.Ct. 720 (2003).

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

136. 123 S. Ct. 720 (2003).

137. *Guillen*, 31 P. 3d at 632-638.

138. *Id.* at 632-38.

139. *Id.* at 632, 634-35.

> or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[140]

Because the accident reports and other materials that the plaintiffs sought had been collected by the relevant county as part of an application to the state of Washington for federal hazard elimination funds under 23 U.S.C. § 152,[141] the county argued that they were privileged under § 409. The question for the Washington Supreme Court was whether the collecting of certain reports and other materials for this statutorily specified purpose rendered them privileged even if those reports and other materials had been compiled for other purposes, such as routine law enforcement.[142]

To understand the import of the question, consider the following example. A local police officer prepares (compiles) an accident report as he is required to do under long-standing state law. At a later point in time, that report is collected by a state authority pursuant to 23 U.S.C. § 152 in order for the state to determine the twenty intersections in the state where safety improvements are most needed.[143] The state authority prepares a report discussing those twenty intersections, and uses the report and the data on which it was based to set its priorities for spending its annual allotment of federal highway safety funds. Plainly, the report prepared by the state pursuant to § 152 would be covered by the § 409 privilege. The question before the state court, however, was whether the original accident reports—reports that (by hypothesis) would have been prepared even in the absence of the federal scheme, and which were not *prepared* pursuant to § 152—would *also* be covered by the privilege once they were *collected*

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140. 23 U.S.C. § 409 (1995).

141. *Guillen*, 31 P.3d at 634.

142. *Id.* at 644-46.

143. Section 152 states in relevant part:

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

23 U.S.C. § 152(a)(1).

Notice that this provision is stated as an unconditional mandate: apparently, a state's obligation to conduct and maintain an engineering survey of the sort described exists independently of that state's pursuit or receipt of federal funds. If this is the correct understanding of § 152, then the mandate seemingly violates the anticommandeering rules of *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). To save § 152, it could be read, then, as a spending provision that conditions certain federal highway funds on a state's evaluation of its roads. This is how the Supreme Court seemed to view the statute in *Guillen*. See Pierce County v. Guillen, 123 S.Ct. 720, 724-25 (2003).

pursuant to § 152 in order to generate the report of state-wide highway safety priorities.

The Washington Supreme Court held that they were.[144] Under the statute's plain language, it reasoned, materials or data that have been "collected" for a statutorily specified purpose are covered by § 409.[145] Whether the materials or data had been originally compiled for distinct purposes appears irrelevant.[146] Moreover, the history of the evolution of § 409 bolstered this interpretation. When initially enacted in 1987, that section did not contain the words "or collected."[147] Accordingly, the court observed, "most state courts restricted the application of the federal privilege" to materials and data "that had been specifically created for the purpose of applying for federal safety improvement funding or implementing a funded project."[148] Congress amended § 409 in 1995 by adding the words "or collected" after "compiled" specifically in response to these narrow decisions and in order to "clarify" the intended scope of the privilege.[149] And Congress described the privilege's scope as follows:

> It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.[150]

For these reasons, the Washington Supreme Court agreed with Pierce County that any reports or data collected for the statutorily specified purposes became fully privileged.[151]

But Pierce County's victory on the question of the scope of the privilege afforded by § 409 quickly turned pyrrhic. For the Washington Supreme Court proceeded to hold that when construed so broadly the § 409 privilege violated *Dole*'s relatedness requirement:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," . . . *among other reasons*, pursuant to a federal statute for federal purposes.[152]

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144. *Guillen*, 31 P.3d at 646.

145. *Id.*

146. *Id.*

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

148. *Guillen*, 31 P.3d at 641.

149. *Id.* at 644.

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

151. *Guillen*, 31 P.3d at 644.

152. *Id.* at 651 (emphasis in original).

The court therefore held § 409, as amended, to exceed Congress's spending power.[153] It concluded, as well, that § 409 exceeded Congress's commerce power because such an expansive privilege "cannot reasonably be characterized as an 'integral part' of the Federal-aid highway system's regulation."[154] Lastly, relying heavily on its construal of recent Rehnquist Court federalism decisions as displaying a "fundamental respect for state sovereignty,"[155] the court reasoned that § 409 "cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government"[156] because Congress lacks "power to intrude upon the exercise of state sovereignty in so fundamental an area of the law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads."[157]

Three justices of the Washington Supreme Court disagreed with the majority's interpretation of § 409. As Justices Madsen and Johnson and Chief Justice Alexander read the privilege, an individual report originally compiled for an ordinary state or local law enforcement purpose was not covered by § 409 merely because it was later collected, along with other reports or data, for the purpose of applying for a share of the state's federal safety-improvement funds.[158] All that the 1995 amendment clarified, in the view of the concurring justices, was that if these reports were subsequently "collected" pursuant to § 152 or another specified provision of federal law, the *collection* of reports would not itself be discoverable.[159]

In other words, as the concurring justices read the legislative history, in amending § 409 in 1995, Congress was reacting against judicial decisions that permitted plaintiffs "to gain information that was 'collected' by an agency for purposes of preparing an application for federal funding from the agency that 'collected' the information."[160] By adding "or collected" to "compiled," under this view, Congress simply wanted to ensure that a plaintiff could not exploit the state's action of collecting reports to save it from doing its own work in litigation against the state or any of its political subdivisions. It would not follow, Madsen concluded, that plaintiffs should be handicapped when "seeking information or reports from their original source, such as accident reports from a law enforcement agency."[161]

Reversing the Washington Supreme Court, the United States Supreme Court upheld § 409 in a unanimous decision issued on January 14, 2003.[162] In a short opinion by

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153. *See id.* at 655.

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

155. *Id.* at 653.

156. *Id.* at 655.

157. *Id.*

158. *Id.* at 657 (Madsen, J., concurring).

159. *Id.* at 658 (emphasis added).

160. *Id.*

161. *Id.*

162. 123 S.Ct. 720 (2003). Oral argument in the case had been only 10 weeks before, on November 4, 2002.

On August 19, 2002, the authors of this Article filed an Amicus Brief in the U.S. Supreme Court in support of Respondents in *Guillen*. *See* 2002 WL 1964091. The authors received no monetary contribution to, or financial compensation for, the preparation and submission of that brief.

Justice Thomas, the Court interpreted § 409 as the Solicitor General advocated,[163] and much as the concurring justices at the state court had, explaining that § 409

> protects all reports, surveys, schedules, lists, or data actually compiled *or* collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point "collected" by another agency for § 152 purposes.[164]

Thus construed, the Court thought that the statute passed muster under the Commerce Clause with ease. Indeed, its opinion proceeds as a straightforward syllogism. First, "under the Commerce Clause, Congress 'is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'"[165] Second, "both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce."[166] Therefore, "they fall within Congress' Commerce Clause power."[167] In light of this disposition, the Court noted in a footnote, "we need not decide whether [§ 409] could also be a proper exercise of Congress' authority under the Spending Clause . . . ."[168]

We think this is a questionable analysis, all the more remarkable for its brevity.[169] Some readers of the Court's opinion may follow along without resistance. Surely other readers, however, will feel a nagging, if hard to articulate, disquiet. As a first pass, such readers might be drawn to something like the following objection: "But § 409 isn't a regulation of the channels or instrumentalities of interstate commerce; it's a regulation of state court procedure!" An objection of this sort, it seems to us, really contains two analytically distinct elements, each of which has significant (if not ultimately dispositive) force.

The first element of this objection draws a distinction between *what* is being regulated and what such regulation *is for*. Hornbook law holds that, after *Lopez*, the Commerce Clause allows Congress to regulate "three types of activities":[170] the

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163. *Guillen*, 123 S.Ct. at 730.

164. *Id.* (emphasis in original). The Court elaborated:

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

Id.

165. *Id.* at 731(quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

166. *Id.* at 732.

167. *Id.*

168. *Id.* at 732 n. 9.

169. The Court's entire Commerce Clause analysis comprises seven sentences of a seventeen-page slip opinion. *Id.* at 731-32.

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

channels of interstate commerce, the instrumentalities of interstate commerce, and intrastate economic activities that, in the aggregate, substantially affect interstate commerce. But § 409 did not regulate instrumentalities or channels, in the sense that these are not the things upon which the statute operated. It seems more accurate—certainly no *less* accurate—to describe § 409 as a regulation *of* state court procedure adopted *for the purpose* of protecting instrumentalities and channels. That might be a permissible use of the commerce power. But its permissibility is not so obviously established, either by the *Lopez* dictum that the *Guillen* Court quotes or by the previous decisions that *Lopez* had cited, as to be assumed without discussion.[171]

The second point that our imagined objection is meant to capture emerges after its semicolon: It is not only that § 409 does not regulate instrumentalities or channels but that what it does regulate is the rules of evidence to be applied in state court proceedings involving causes of action brought solely under state law. Even insofar as Commerce Clause precedent permits Congress to regulate *some* things other than instrumentalities and channels when the aim is to protect instrumentalities or channels, that precedent is not indifferent to what those other things, matters, or subjects of regulation are. To the contrary, a large number of opinions authored by the States' Rights Five have strongly suggested that the Constitution imposes special constraints upon federal legislation that intrudes upon integral areas of historical state sovereignty.[172] If this is so, then it is not quite enough that "Congress could reasonably

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171. The first premise of what we have called the *Guillen* syllogism quotes *Lopez* for the proposition that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *See supra* note 165 and accompanying text. That statement in *Lopez* was immediately followed by the following string cite: "*See, e.g., Shreveport Rate Cases,* 234 U.S. 342 (1914); *Southern R. Co. v. United States,* 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez v. United States,* 402 U.S. 146, 150 ("[F]or example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)")." *Lopez,* 514 U.S. at 558 (quotation edited for form).

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

172. Then-Justice Rehnquist's plurality opinion in *National League of Cities v. Usery,* 426 U.S. 833, 852 (1976) (invalidating federal legislation because it "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions"), is the most obvious point of reference, especially given his and Justice O'Connor's refusal to accept the legitimacy of *Usery*'s subsequent overruling in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). *See id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting). *See also, e.g.,* United States v. Morrison 529 U.S. 598,

believe that" privileging § 152 data in the relatively modest way that § 409 (as construed by the Court) did "would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads."[173] And the fact that § 409 proceeds by the specific means of regulating the rules of evidence to be applied in state court proceedings involving causes of action brought solely under state law would seem nonetheless to be a matter of constitutional concern.

To be sure, the Court gestures in the direction of this worry when acknowledging in a footnote that "Respondents contend in passing that § 409 violates the principles of dual sovereignty embodied in the Tenth Amendment."[174] But its immediately following assertion, that this contention did not merit discussion because "[t]he court below did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress' enumerated powers,"[175] seems less than wholly candid. For one thing, the Washington Supreme Court did devote an entire section of its opinion—separate from its Commerce Clause, Spending Clause, and Necessary and Proper Clause sections—to a discussion of "State Sovereignty."[176] Yet more fundamentally, the implication of the *Guillen* footnote that the Commerce Clause and Tenth Amendment inquiries are independent of each other seems inconsistent with the Court's explanation in *New York*, that in a case

> involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the

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615 (2000) (criticizing an argument in support of federal legislation on the basis that it could "be applied equally as well to family law and other areas of traditional state regulation"); *Lopez*, 514 U.S. at 564 (invalidating the Gun-Free School Zone Act in part because, under the government's theories, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *id.* at 579-80 (Kennedy, J., concurring) (arguing that although the limits of the Commerce Clause presents "questions of constitutional law not susceptible to the mechanical application of bright and clear lines[,] . . . at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern").

173. *Guillen*, 123 S.Ct. at 731-32.

174. *Id.* at 732 n.10.

175. *Id.* at 732 n.10.

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

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

Id. (emphasis added).

> Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[177]

For this reason, the state court's conclusion that § 409 exceeded Congress's commerce power need not emerge separate and distinct from a conclusion that the statute "violates the principles of dual sovereignty embodied in the Tenth Amendment." To the contrary, the state court opinion is most fairly read, in our view, to reason that § 409 was not a valid exercise of the commerce power precisely because of the way it intruded upon core areas of state sovereignty.[178]

Our point is not that the Court's bottom-line holding that § 409 was a valid exercise of the commerce power was wrong. We are agnostic on this question[179] pending a full exploration of the sort that is beyond the scope of this Article. Our point is only that the Commerce Clause question is far more complex than the unanimity and brevity of the *Guillen* Court's analysis would suggest. That all nine justices were content to proceed in this way might indicate an affirmative wish to steer clear of the Spending Clause thicket. At the least, *Guillen* strongly undermines any guess that members of the present Court are actually eager to revisit *Dole.*

B. RLUIPA

Although the *Guillen* Court escaped the need to apply or reconsider *Dole* by choosing to uphold § 409 on Commerce Clause grounds,[180] the Court is unlikely to find a similar avenue of avoidance open to it if and when it entertains a challenge to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[181] The spending power basis for the Act is important only to the institutionalized persons sections. In essence, that portion of the Act seeks to provide more protection to the religious exercises of prisoners in state and local institutions than they receive under existing Supreme Court doctrine.

Under the Supreme Court's decisions in *Turner v. Safley*[182] and *O'Lone v. Estate of Shabazz*,[183] regulations in state and local prisons, including those that impinge on the prisoners' free exercise of religion, are subject to a "reasonableness" test: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[184]

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177. New York v. United States, 505 U.S. 144, 156 (1992).

178. *See Guillen*, 31 P.3d at 651-54.

179. In the interest of full disclosure, however, we note that in our Amicus Brief filed with the Court in *Guillen* we argued that "[n]o matter how this Court ultimately resolves the various ambiguities in § 409, as amended, . . . enactment of that provision was not within Congress's power under the Commerce Clause." Amicus Brief of Law Professors Lynn A. Baker and Mitchell N. Berman In Support of Respondents, 2002 WL 1964091, at *22.

180. *Guillen*, 123 S.Ct. at 732. *See also* discussion *supra* Part III.A.

181. 42 U.S.C. § 2000cc (2000).

182. 482 U.S. 78 (1987).

183. 482 U.S. 342 (1987).

184. *Turner*, 482 U.S. at 89.

Under RLUIPA, however,

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act . . . , even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.
>
> . . . This section applies in any case in which—(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance . . . .[185]

In the words of one commentator, "RLUIPA replaces minimal scrutiny under *Turner* and *O'Lone* with the compelling interest and least restrictive means tests. The Act also displaces *Smith*, applying this strict scrutiny 'even if the burden results from a rule of general applicability.'"[186]

Does this restriction on state and local governments exceed Congress's power under *Dole*? Several courts have ruled on this question to date and all have found the statute to be a legitimate exercise of Congress' spending power.[187] A plausible case can be made, however, that this portion of the statute fails scrutiny under any one of three aspects of the *Dole* doctrine: the clear-notice requirement,[188] the relatedness test,[189] or the noncoercion requirement.[190]

As we have seen, *Dole* requires that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[191] Possibly, however, RLUIPA does not provide this clarity of notice. Suppose that a state prisoner challenges a practice of a work program instituted at his prison as substantially burdening his religious exercise, and that the state department of prisons received federal financial assistance for building improvements at a different

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185. 42 U.S.C. § 2000cc-1 (2000).

186. Heather Guidry, Comment, *If at First You Don't Succeed . . .: Can the Commerce and Spending Clauses Support Congress's Latest Attempt at Religious Freedom Legislation?*, 32 CUMB. L. REV. 419, 423 (2001-02).

187. *See* Johnson v. Martin, 223 F. Supp. 2d 820, 831 (W.D. Mich. 2002) (denying state's motion for summary judgment); Charles v. Verhagen, 220 F. Supp. 2d 955, 966 (W.D. Wis. 2002) (granting prisoner's motion for injunctive relief); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 849 (S.D. Ohio 2002) (denying defendants' motion to dismiss); Mayweathers v. Terhune, No. CIVS961582LKKGGHP, 2001 WL 804140, at *5 (E.D. Cal. July 2, 2001), *aff'd sub nom.*, Mayweathers v. Newland, 314 F.3d 1062, 1065 (9th Cir. 2002) (affirming lower court's denial of defendant's motion to dismiss).

Two courts, however, recently have held the institutionalized persons sections of RLUIPA to violate the Establishment Clause. *See* Gashiyah v. Dep't of Corrections, 2003 WL 1089526 (E.D. Wis. 2003); Madison v. Riter, 240 F.Supp.2d 566 (W.D. Va. 2003).

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

189. *Id.*

190. *Id.* at 211.

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

prison but none for the work program, and indeed none for the prison that operates the challenged work program. Whether the prisoner can plausibly allege a violation of RLUIPA would depend, then, on whether the "program or activity" that receives the federal funds, and is thereby subject to RLUIPA's strictures, is the construction program or the prison system as a whole. The plain language of the statute suggests the former interpretation. After all, the latter interpretation would be tantamount to reading "program or activity" to mean "department or agency," which is what the statute *could have* said, but does not. On the other hand, because RLUIPA specifically incorporates[192] the extremely broad definition put forth in the Civil Rights Restoration Act of 1988 pursuant to which a "program or activity" encompasses "all of the operations of" any government department or agency that receives federal funding,[193] the latter interpretation is very possibly precisely what is intended.[194]

Were the Court to hold, as is most likely correct, that RLUIPA unambiguously makes every activity at each prison within a state subject to the compelling interest requirement so long as the state department of prisons accepts some federal funding for any purpose, the statute would raise very serious relatedness concerns. *Dole* requires, recall, that the condition on federal funds not be "unrelated 'to the federal interest in particular national projects or programs.'"[195] Yet surely the intuition is strong that requiring all of a prison's programs to satisfy RLUIPA's compelling interest test is unrelated to the federal interest in, say, eliminating prison overcrowding. Now, this intuition might be defeated. It has been argued, for example, that all federal prison money is partly motivated by an interest in promoting either rehabilitation or, at the least, the humane treatment of inmates—interests that are also served by facilitating greater religious exercise by prisoners.[196] But the Court might reject the premise (that

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192. *See* 42 U.S.C. § 2000cc-5(6) (2000).

193. 42 U.S.C. § 2000d-4(a) (2000).

194. Although the statute employs several vague terms—for example, "substantial burden," "compelling governmental interest," and "least restrictive means"—this should not run it afoul of the unambiguousness requirement. Contracts frequently employ comparably loose terms, without raising any notice problems. RLUIPA does give the states clear notice that receipt of federal prison funds renders them subject to the command that they not impose what a factfinder may determine, ex post, is a "substantial burden" unless the compelling-interest and least-restrictive-means requirements are adjudged to be satisfied. Armed with this knowledge, a state may choose to play things more or less close to the line. *See* Mayweathers v. Terhune, No. CIVS961582LKKGGHP, 2001 WL 804140, at *3 ("Contrary to defendants' position, the court concludes that RLUIPA's prohibition is clear. The Act bars the recipient of federal funds from placing substantial burdens on an inmate's free exercise of religion absent a compelling interest and the employment of the least restrictive means.").

195. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

196. *See* Charles v. Verhagen, 220 F.Supp. 2d 955, 963 (W.D.Wis. 2002)("Congress can rationally seek to insure that states receiving federal funds targeted at rehabilitating prisoners are not simultaneously using those funds or other federal money to impede prisoners' exercise of religion and its perceived rehabilitative effects."); *Mayweathers*, 2001 WL 804140 at *4 ("RLUIPA's provisions are directly related to the rehabilitation of federal inmates housed in state prisons."); 139 Cong. Rec. 26,410 (1993) (statement of Sen. Hatch) ("[E]xposure to religion is the best hope we have for rehabilitation of a prisoner.") (commenting on the Religious Freedom Restoration Act).

is, it might conclude that *some* federal prison funds, the receipt of which would make state prisons subject to the RLUIPA condition, do not promote interests in rehabilitation or the like) and could conclude that this relationship is too tenuous in any event.[197] In short, if RLUIPA is interpreted as a condition on any and all federal funds received by a state or local government for any prison-related program, RLUIPA might be held to fail *Dole*'s relatedness prong.

Finally, the Court might find that the condition on federal funds imposed by RLUIPA violates *Dole*'s prohibition against impermissibly "coercive" conditions. The *Dole* Court acknowledged 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.'"[198] The Court went on to focus on the percentage of federal funds at stake and found that because the funds at issue—five percent of "certain federal highway funds"—was a "relatively small percentage" the threat of withholding it did not constitute impermissible coercion.[199] Under RLUIPA, however, seemingly 100 percent of *all* federal funds received by a covered institution would be subject to withholding.[200] If, as the very brief discussion of the matter in *Dole* suggests, the coercion inquiry turns upon the percentage of federal programmatic funds that a state would lose by failing to comply with a funding condition, the Court should hold that the RLUIPA condition rises to the level of impermissible coercion.[201]

To be sure, all of these possible objections apply as well to the civil rights statutes upon which RLUIPA is modeled, most notably Title VI of the Civil Rights Act of 1964, which bars discrimination on the basis of race, color, or national origin by "any program or activity receiving Federal financial assistance."[202] Some may suppose that at least some members of the Court's states' rights majority—Justices O'Connor and Kennedy being the most obvious bets—would be unwilling to strike down these core antidiscrimination provisions, yet unable plausibly to distinguish RLUIPA, in which event RLUIPA would be upheld. This may be right; we cannot know with any confidence whether the Court would hold the Institutionalized Persons provisions of RLUIPA to violate the *Dole* doctrine. What is important for purposes of this Article, however, is that a Court willing (or even eager) to invalidate RLUIPA—perhaps

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197. For discussion of how the Court could tighten *Dole*'s relatedness prong, see *infra* Part V.B.1.

198. *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

199. *Id.*

200. *Cf.* 42 U.S.C. § 2000cc-1(b)(1) (2002).

201. If, instead, whether a condition is impermissibly coercive depends upon the percentage of the funded program's budget that would be lost upon noncompliance, *cf. infra* note 304, RLUIPA would likely survive. Federal funds for prisons constitute only a tiny percentage of state prison budgets. *See, e.g.*, Mayweathers v. Terhune, No. CIVS961582LKKGGHP, 2001 WL 804140, at *5 n.1 (E.D.Cal. July 2, 2001), *aff'd sub nom.*, Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (noting that the federal funding received by the California Department of Corrections in 2001-2002 "amounts to a paltry 1.9 million dollars out of the Department's annual budget of roughly 4.8 million dollars").

202. 42 U.S.C. § 2000d (2002). Similarly, Title IX bars programs or activities receiving federal funds from discriminating on the basis of sex, and § 504 of the Rehabilitation Act bars such discrimination on the basis of disability. *See* 20 U.S.C. § 1681(a) (2002); 29 U.S.C. § 794(a) (2002).

because it views the statute as a bald attempt by Congress to circumvent the Court's free exercise cases[203]—plausibly could do so without abandoning or amending any aspect of existing spending clause doctrine.

IV. EXPLOITING THE *DOLE* LOOPHOLE

Part II reviewed why the Court should get off the *Dole*. Part III, however, bolstered the prevailing wisdom that, at least in the very near term, it probably will not. This Part picks up a thread opposing that of Part II. Whereas some commentators (ourselves included) have criticized *Dole* and proposed alternatives, others have applauded it.[204] Yet more significantly, some observers in this latter camp have urged not merely that Congress should make broad use of its conditional spending powers, but that it should employ its conditional spending power to effectively overturn Supreme Court decisions that have restricted congressional power.[205] Just how that might work is the subject of this Part.

That *Dole* stands in some sort of tension with whatever restrictions on congressional power may otherwise exist was never a secret: allowing Congress to spend for objectives that it could not pursue under its other enumerated powers at least partially undermines the limitations upon those other powers. Indeed, this was obvious to the

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203. *See, e.g.*, Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 HAW. L. REV. 479, 481 (2001):

> Congress's overt circumvention of the Supreme Court's decision in *City of Boerne* is transparently unconstitutional. While RLUIPA is based upon different congressional powers, the result is the same as RFRA: a significant and undue intrusion into the authority of the judiciary and the states in violation of fundamental notions of separation of powers and federalism. Congress cannot override the Supreme Court's explicit holding in *City of Boerne* by simply drawing on different congressional powers. RLUIPA, like its precedent RFRA, is patently unconstitutional.

204. *See, e.g.*, Chemerinsky, *supra* note 60; Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111 (2001); Earl M. Maltz, *Sovereignty, Autonomy and Conditional Spending*, 4 CHAP. L. REV. 107 (2001) (defending *Dole* on political process grounds); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and the Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141 (2002); Jennifer Cotner, Note, *How the Spending Clause Can Solve the Dilemma of State Sovereign Immunity from Intellectual Property Suits*, 51 DUKE L.J. 713 (2001).

205. This argument prevailed with the enactment of RLUIPA. *See supra* Part III.B. *See also, e.g.*, Zietlow, *supra* note 204 (advocating broad use of the spending power to secure waiver of state sovereign immunity); Julian Epstein, *Evolving Spheres of Federalism After* United States v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525, 553-54 (1997) (stating that Congress could use conditional spending to achieve the objectives of the Gun-Free School Zones Act and the Brady Act); *Sheriffs Have Gun Point*, COM. APPEAL (Memphis, Tenn.), Dec. 6, 1996, at A8, *available at* 1996 WL 13667664 (arguing that "[t]he Brady bill makes good sense" and that "[i]f Congress wants universal cooperation by sheriffs, experience suggests that it has only to hold hostage continued federal law-enforcement grants"); Cotner, *see supra* note 204, at 751 ("Congress should adopt the conditional waiver plan advocated by this Note to circumvent the Supreme Court's decisions in *Florida Prepaid* and *College Savings Bank*.").

Court back in *Butler* when it first confronted the need to choose between the Madisonian and Hamiltonian views of the spending power, and even explains the schizophrenic character of that decision—nominally adopting the Hamiltonian conception, but ruling in seeming accord with the Madisonian.[206] But during the sixty years following *Butler* this observation had more academic than practical significance. The steady expansion of Congress's commerce power rendered the spending power's circumventionist potential relatively inconsequential.[207] For this reason, *Dole* was of no great moment back in 1987.

Its true importance became plain, though, as soon as the Rehnquist Court started to impose constraints.[208] Indeed, mere days after the Court announced its decision in *Lopez*,[209] the *New York Times* already reported that President Clinton was considering conditioning federal education funds on each state's enactment of a state gun-free school zone law that would replicate the provisions of the newly invalidated federal law.[210] Congress ultimately decided against this strategy but only because it happened upon an even more attractive means of circumvention: adding a "jurisdictional element" to the statute.[211]

Although not adopted,[212] this spending-based response to *Lopez* shows clearly just

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206. Recent scholarship has challenged the Court's characterization of Hamilton's position—that Congress may spend so long as it is for the General Welfare, unconstrained by other limits to Article I powers. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994) (arguing that Hamilton understood the spending power to permit Congress to spend for ends beyond those authorized by other powers, but subject to the caveats that such expenditures could gain no leverage from the Necessary and Proper Clause and could be frustrated in their objects by the states); Jeffrey T. Renz, *What Spending Clause?*, 33 J. MARSHALL L. REV. 81, 103-06 (1999) (describing this as the "weak" Hamiltonian position—subsequently championed by Story—and distinguishing it from a "strong" Hamiltonian position that Article I, Section 8, Clause 1 conferred on Congress power even to regulate—not just spend—for the general welfare). We take no position on this historical controversy here. Whether what is commonly termed "Hamilton's position" was really Hamilton's position is immaterial for our purposes.

207. In Professor Rosenthal's oft-quoted terms, "[I]f 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." Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987).

208. This is not to suggest that nobody anticipated the difficulty. For a particularly prescient analysis in the immediate wake of *Dole*, see Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

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

210. *See* Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1.

211. *See* 18 U.S.C. § 922(q)(2)(A) (2000) (criminalizing the possession near schools of guns that have "moved in or that otherwise affects interstate or foreign commerce").

212. Conceivably, the bill could be revisited. The only court to have addressed the question has held the modified § 922(q) constitutional. United States v. Danks, 221 F.3d 1037 (8th Cir. 1999). Many courts, however, have addressed the constitutionality of other statutes containing a jurisdictional element, including, for example, 18 U.S.C. § 922(g), which makes it illegal for a felon to possess, "in or affecting commerce," a firearm. These courts overwhelmingly have held, in response to post-*Lopez* attacks, that § 922(g)'s jurisdictional element makes it constitutional under the Commerce Clause, *e.g.*, United States v. Williams, 128 F.3d 1128, 1133-34 (7th Cir. 1997); United States v. Wells, 98 F.3d 808, 811 (4th Cir. 1996); United States v. Sorrentino, 72

how simple the circumventionist method is. First, Congress must articulate a demand, and do so in terms explicit enough to meet *Dole*'s clear-statement requirement. This proposed statutory response to *Lopez*, for example, would demand that states enact into state law a criminal ban on the possession of guns within a specified distance of schools. Second, Congress must identify a federal purpose or interest that the demand serves. Here, let us suppose, the demand serves an interest in improving public

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F.3d 294, 296 (2d Cir. 1995), and have held that evidence simply showing a gun has previously traveled in interstate commerce is sufficient to satisfy the jurisdictional element, *see, e.g.*, United States v. Crump, 120 F.3d 462, 466 (4th Cir. 1997); United States v. Murphy, 107 F.3d 1199, 1211-12 (6th Cir. 1997); United States v. Garcia, 94 F.3d 57, 65 (2d Cir. 1996).

Commentators, on the other hand, vary in their opinions about the constitutionality of the modified § 922(q). *Cf. e.g.*, Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 805-06 n.99 (1996) ("It would clearly be inconsistent with the majority's conception of the Commerce Clause in *Lopez* for the jurisdictional device to work."); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 799 (1996) (labeling a "stretch" the position "that simply because an article once traveled in commerce, Congress may regulate any activity involving that article," and stating that this stretch "may be one the Supreme Court is ready to eliminate"); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 925 (1997) ("the revised statute is constitutional and will be upheld"); Deborah Jones Merritt, *COMMERCE!*, 94 MICH. L. REV. 674, 697 (1995) ("It is unclear whether a jurisdictional element . . . will resurrect the constitutionality of the Gun-Free School Zones Act.").

We think there are good reasons to doubt the long-term prospects for the revised § 922(q). As most observers recognize, the jurisdictional element provides the flimsiest of fig leaves. Virtually every gun travels in interstate commerce. As far as effective state power and prerogatives are concerned to a state that is home to no firearm manufacture, there is literally *no* difference between the version struck down in *Lopez* and the present version that incorporates the jurisdictional element. To be sure, practical considerations are not all: different treatment of functionally identical statutes could be justified if the difference was demanded by constitutional text. But the text provides little or no support for the jurisdictional element. It is one thing to interpret the Commerce Clause as granting Congress plenary power to regulate the *movement* of things in interstate commerce. That Congress would enjoy equal power (indeed any power) to regulate items merely because they *have moved* in interstate commerce (and not because, for example, the regulation would substantially affect interstate commerce) is something else entirely. And though some precedent may support the jurisdictional element, *see, e.g.*, Scarborough v. United States, 431 U.S. 563 (1973); United States v. Bass, 404 U.S. 336 (1971); Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McClung, 379 U.S. 294 (1964), we think that stare decisis has little force in this case. Among other things, after *Lopez*, the jurisdictional element rule creates just the sort of doctrinal anomaly that justifies its being overruled. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992).

In truth, we think, the jurisdictional element serves mostly to give the States' Rights Five some breathing room by mitigating the impact of *Lopez* and *Morrison* while they work out a coherent post-*Lopez* Commerce Clause jurisprudence. If they can craft a doctrine that adequately serves state interests without causing the upheaval that Thomas's preferred solution—abandoning the substantial effects test—would engender, they could follow the logic of their recent federalism cases and jettison the jurisdictional element. Were this to happen at all, and were it to precede any significant change to *Dole*, then Congress could reconsider the Spending Clause fix that Clinton had initially floated, see *supra* note 210.

education. Third, Congress must identify a federal spending program that pursues that same purpose and then attach the "demand" as a "condition" upon that spending program. Doing all this should ensure that the condition on the federal grant is not "unrelated 'to the federal interest in [the] particular national project[] or program[]' " to which the condition is attached[213] or, put affirmatively, that the condition "bear[s] some relationship to the purpose of the federal spending."[214] Fourth and finally, Congress must set the amount of funding at risk at a level sufficient to secure state acquiescence without running afoul of the coercion restriction. As *Dole* itself suggests, this is not hard: although every single state acceded to the demand, the Court considered the offer at issue in *Dole* "relatively mild encouragement," and dismissed "the argument as to coercion . . . [as] more rhetoric than fact."[215]

Following this formula, plausible responses to each of the Court's recent federalism decisions are easy to imagine. The command that states help administer the Brady Act, for example, is plainly directed by a federal interest in reducing crime. After *Printz*,[216] therefore, Congress could attach the command as a condition on full eligibility for federal grants to state and local law enforcement.[217] Additionally or alternatively,

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213. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

214. New York v. United States, 505 U.S. 144, 167 (1992).

215. *Dole*, 483 U.S. at 211; *cf.* 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, 319-20 (1993) ("Congress sets the terms of its offers quite knowingly—at just the 'right' level—to make them 'irresistible' and, accordingly, no state tends very long to resist."). Dissenting from conventional academic wisdom, Rick Hills has argued that "the evidence does not support the conclusion that the states are so dependent on federal revenue that they cannot just say 'no' to federal grants." Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 862-65 (1998). Perhaps not, but the sort of conditional grant Hills is discussing is much narrower than we contemplate here. *See id.* at 859 (defining "conditional grants" as funds Congress provides to the states "on the condition that the state spend the funds in accordance with federal priorities"). Indeed, Hills acknowledges that the assumption that states cannot resist the federal offer is stronger with respect to "the congressional practice of imposing new 'cross-cutting' conditions on 'old' grant money" because states become addicted to the funds initially and then find it politically impossible to discontinue participation later, when more onerous conditions are added. *Id.* at 865 n.184. Of course, Hills's survey of the terrain is not exhaustive: conditions can be attached when funds are initially offered (and thus not fall into the second category Hills mentions) and yet do more than merely specify how granted funds must be spent (and thus fall outside of Hills's initial definition). In any event, that states do not always accede to federal conditions tells us little, for presumably Congress is sometimes indifferent (or nearly so) regarding whether a state accepts the offered funds on the specified condition. *See supra* Part II.A. (discussing conditions that serve to increase the majority states' share of federal grants). The important question is whether Congress can structure its conditional offers in a way that states find nonacquiescence practically impossible in those situations in which Congress strongly prefers that states accept the condition.

216. Printz v. United States, 521 U.S. 898 (1997).

217. It has been suggested to us that this option was considered but rejected out of fear not that the Supreme Court would have struck it down but that many states would reject the condition, thereby creating political pressure on the administration to backpedal.

federal law enforcement grants could be conditioned on state enactment of an effective civil damages remedy for victims of gender-related crimes of violence. Because existence of such a remedy might deter some of the violence, relatedness appears satisfied and *Morrison*[218] circumvented.[219]

Or turn to the sovereign immunity cases. Abrogation of state sovereign immunity in intellectual property disputes is plausibly driven by an interest in promoting private-sector innovation by increasing the expected value of intellectual property rights. Accordingly, Congress could respond to *Florida Prepaid*[220] by conditioning full federal funding for university research on a state's waiver of its immunity in intellectual property cases.[221] As another example, the Age Discrimination in Employment Act ("ADEA") is designed to promote the dignity, and material and psychological well-being of senior citizens. Naturally, abrogating state sovereign immunity in suits alleging violations of the ADEA promotes the very same goals by increasing the probability that states will comply with the ADEA requirements. A plausible response to *Kimel*,[222] then, would require states to waive immunity in ADEA suits as a condition for receipt of all medicare funds for which the state is otherwise eligible.[223] Similarly, the Americans with Disabilities Act ("ADA"), along with its abrogation of state sovereign immunity, aims broadly to improve the life prospects of disabled persons. So Congress might circumvent *Garrett*[224] by conditioning some portion of federal funds provided to assist disabled persons[225] on a state's waiver of immunity in ADA suits.

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218. United States v. Morrison, 529 U.S. 598 (2000).

219. This circumvention is hypothesized in Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after* Morrison, 25 OKLA. CITY U. L. REV. 843, 857-58 (2000).

220. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

221. For a fuller discussion of possible ways Congress could respond to *Florida Prepaid*, including analysis of proposed bills, see, for example, Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 52 STAN. L. REV. 1331 (2001); Berman, Reese & Young, *supra* note 35. This particular *Dole*-inspired circumvention is discussed *id.* at 1134-37.

222. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

223. Shortly following *Kimel*, the Senate proposed a different sort of circumvention. The Older Workers Rights Restoration Act of 2000, S. 3008, 106th Cong. (2000), followed the model of the civil rights acts, *see supra* Part III.B., in providing that every state program or activity that receives any federal financial assistance must waive its immunity in suits under the ADEA (This bill died in committee but was reintroduced as The Older Workers' Rights Restoration Act of 2001, S. 928, 107th Cong. (2001).). For an explanation of why this broad "program or activity" approach is probably inconsistent with *Dole*, see Berman, Reese & Young, *supra* note 35, at 1137-42.

224. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2000).

225. *E.g.*, 20 U.S.C. § 1411 (2000) (Individuals with Disabilities Education Act); 29 U.S.C. § 3011 (2000) (Assistive Technology Act of 1998); 42 U.S.C. § 1396 (2000) (Grants to States for Medical Assistance Programs).

V. PREDICTING THE REHNQUIST COURT'S RESPONSE

Suppose Congress exploits the *Dole* loophole in one of the ways we have just described or in any similar context to achieve an end that the Court had closed off by an earlier pro-state decision, one interpreting, say, the Commerce Clause or the Tenth or Eleventh Amendments. How might the Rehnquist Court respond to such an assertion of congressional power?

We predict here that such a maneuver is unlikely to succeed and, furthermore, is highly likely to provoke precisely the sort of change to Spending Clause jurisprudence that nationalists will hate. First, we argue in Part V.A, the States' Rights Five would be strongly disposed against such circumvention. In developing this argument, we elaborate upon the notions of circumvention and exploitation that we have thus far used unreflectively. Next, Part V.B shows that if a majority of the Court is committed or strongly disposed to invalidate such circumvention, *Dole* could be "tightened" sufficiently to render many circumventions impermissible and, indeed, to turn *Dole* from a largely ineffectual doctrine into a markedly stringent one. Finally, supposing that Congress were able to enact at least some circumvention statutes in forms impervious even to a reinvigorated version of *Dole*, we argue in Part V.C that the Court could well react by abandoning *Dole* or (what may be much the same thing for advocates of expansive national power) supplementing it. Although we do not hazard a guess as to what the Court would put in *Dole*'s place, we survey a few possibilities. Our aim is to show that replacements are possible and that they are likely to be significantly more hostile to congressional power than is *Dole* itself.

A. The Impulse

1. A Brief Lesson from History

In 1918, in the famous (or notorious) case of *Hammer v. Dagenhart*,[226] the Court struck down a federal statute that barred the interstate shipment of goods in the production in which children under fourteen had been employed. Over a vigorous dissent by Justice Holmes for himself and three other Justices, the Court insisted that were it to uphold the ban, "all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."[227] Congress reacted quickly. Turning from its Commerce Power to the Taxing Power, it had within a year imposed a new 10 percent excise tax on the net profits of mining and manufacturing companies that employed children under specified minimum ages.[228]

The Child Labor Tax Act ("CLTA") appeared to be on solid constitutional footing thanks to a number of Supreme Court decisions including, most notably, the sixteen year-old precedent of *McCray v. United States*.[229] *McCray* had involved a challenge to a scheme of discriminatory federal taxation which taxed white oleomargarine at the rate of one-quarter cents per pound but subjected yellow oleomargarine to a whopping

226. 247 U.S. 251 (1918).
227. *Id.* at 276.
228. Child Labor Tax Act, Pub. L. No. 65-254, 40 Stat. 1138 (1919).
229. 195 U.S. 27 (1904).

tax of ten cents per pound. Responding to the taxpayer's complaint that the tax "is of such an onerous character to make it manifest that the purpose of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article,"[230] the Court flatly rejected the legal premise "that the judiciary may restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."[231] Proceeding, then, to "put[] entirely out of view all considerations based upon purpose or motive," the Court appealed to a single principle en route to concluding that the legislation was a valid exercise of the taxing power: "[I]t is self-evident that on their face [the acts] levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power."[232]

These principles were confirmed in *Doremus v. United States*, a case decided a week after the CLTA was passed.[233] Citing *McCray* and other cases, the Court reiterated

> that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.[234]

And the "reasonable relation" the Court had in mind was simple: "Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue?"[235]

In light of this jurisprudence, Congress had some reason for surprise when, in *Bailey v. Drexel Furniture Co.*,[236] the Court struck down the CLTA by a vote of eight to one. The heart of the Court's reasoning was contained in a proclamation of stirring candor:

> [A] court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?[237]

This is refreshing stuff, surely appealing to all readers who tire of the cant and disingenuousness judges too often foist upon us. The problem, though, is that prior

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230. *Id.* at 51. Presumably Congress sought to suppress yellow margarine, but not white, because the former competed more effectively against butter because the color either confused consumers or simply proved more appealing.

231. *Id.* at 56.

232. *Id.*

233. *Doremus*, 249 U.S. 86 (1919), was decided March 3, 1919, while the CLTA was passed on February 24, 1919.

234. *Id.* at 93 (citing Flint v. Stone Tracy Co., 220 U.S. 107, 147, 153, 156 (1911); McCray v. United States, 195 U.S. 27 (1904); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 541 (1869)).

235. *Id.* at 94.

236. 259 U.S. 20 (1922).

237. *Id.* at 37.

cases did not compel the Court to pretend that Congress's purpose was something other than regulation. They dictated, rather, that the Court treat the purpose as legally immaterial. On this point *McCray* had been unequivocal: "[T]he motive or purpose of Congress in adopting the acts in question may not be inquired into."[238]

McCray was, therefore, a difficult case to distinguish. And the *Bailey* Court's attempt was weak. The oleomargarine tax at issue in *McCray*, it explained, did not "show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."[239] This was sophism. As far as animating regulatory purposes were concerned, the CLTA and the earlier margarine tax were on identical ground. Both taxes were obviously passed for the purpose of discouraging a certain practice that, for different reasons, Congress disfavored. The Court would have had to be no less blind to see this in *McCray* than in *Bailey*, and such a purpose was no more apparent "on the face" of the CLTA than on the face of the Oleo Tax. But there was one respect in which the motivation behind the CLTA was different: Congress sought not only to regulate in ways that it could not achieve through its other Article I powers, but also to circumvent a recent Supreme Court decision that specifically barred such regulation. A reasonable lesson of *Bailey*, then, was that the Court would not tolerate circumvention of its precise holdings.

If the Taft Court would not tolerate circumvention of this sort, it would seem odd to expect anything different from the Rehnquist Court. That this Court is unusually guilty of arrogating power to itself has become an article of faith in some circles, especially after the suite of decisions culminating in *Bush v. Gore*.[240] Others insist that the Court's recent federalism decisions reflect merely its refusal to abdicate its constitutional duty.[241] For present purposes, it is not necessary for us to choose sides in this debate. We need only agree that the present Court is no less concerned than were its predecessors to preserve judicial prerogatives. When the 103rd Congress enacted The Religious Freedom Restoration Act ("RFRA") in a bid to circumvent *Smith*,[242] for example, the Court's rebuff was unequivocal.[243] And there is little reason to dismiss *Boerne* as exceptional. The States' Rights Five have made clear in a variety of contexts that they will not allow their substantive doctrines to be evaded by niceties of

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238. *McCray*, 195 U.S. at 59.

239. *Bailey*, 259 U.S. at 42.

240. 531 U.S. 98 (2000). For discussions of this theme, see Larry D. Kramer, *The Supreme Court 2000 Term, Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

241. *See, e.g.*, Baker, *Revival of States' Rights*, *supra* note 61, at 95 (contending that with its recent federalism decisions "the Court has signaled a willingness to resume its too-long ignored duty to enforce the Constitution's protections for state autonomy"); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (describing *Lopez* as marking a "long overdue revival of the doctrine that the federal government is one of limited and enumerated powers").

242. Employment Div. v. Smith, 494 U.S. 872 (1990).

243. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

pleading.[244] Surely they will be just as committed to ensuring that federalism does not become an ingenious exercise in legislative drafting.

2. An Objection Considered

But maybe this conclusion is too quick. After all, repeatedly in cases that have curbed congressional power, members of the States' Rights majority have taken pains to note that current spending jurisprudence permits Congress to achieve the ends that the invalidated legislation pursued.

In *New York*, for example, even while striking down the "take title" provision of the Low-Level Radioactive Policy Amendments Act of 1985, the Court specifically upheld, as a straightforward conditional exercise of Congress's spending power, "monetary incentives" under which states that achieved a series of milestones in establishing waste disposal sites would receive payments from a dedicated federal fund.[245] And five years later, briefly concurring in *Printz*, Justice O'Connor reconfirmed her acceptance of conditional spending. Insisting that the Court's "holding, of course, does not spell the end of the objectives of the Brady Act," O'Connor explained that, among other things, "Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes."[246] Similarly, in that portion of *Alden* which sounded the same theme as O'Connor's *Printz* concurrence—namely, that the Court's invalidation of federal legislation did not circumscribe congressional power as much as the Court's critics would charge—the majority dropped a "*cf.*" cite to *Dole* in observing that, "subject to constitutional limitations, . . . the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits."[247] Based on evidence such as this, some scholars have supposed that, far from viewing a possible spending-based circumvention with hostility, the States' Rights justices would in fact welcome it.[248]

We do not think so, for the particular uses of the spending power that we have hypothesized in Part IV do not appear to be what these justices meant to invite or to authorize. Notice the words that commentators use to describe the sorts of statutes we have discussed: exploit, evade, circumvent, loophole.[249] We think this nomenclature is

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244. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997) ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992) ("Standing is not 'an ingenious academic exercise in the conceivable'") (citing United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973)).

245. *See* New York v. United States, 505 U.S. 144, 171-72 (1992).

246. Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (citing the highway safety program, 23 U.S.C. § 402 (2000)).

247. Alden v. Maine, 527 U.S. 706, 755 (1999).

248. *See, e.g.*, Zietlow, *supra* note 204, at 190-91 (claiming that the Court "virtually has invited Congress to use its Spending Power to circumvent Tenth Amendment limitations").

249. *See, e.g.*, Choper & Yoo, *supra* note 219, at 857 ("Given the broad sweep of the spending power as currently construed, the federal government would quite clearly have the ability to evade the direct limits on its Commerce Clause powers."); Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1283

not accidental. Instead, it suggests a useful distinction: the States' Rights may have intended to invite Congress to *avoid* some of the consequences of the Court's decisions by using the spending power in a way that would *comply* with *Dole*;[250] they did not intend Congress to *evade* or *circumvent* its holdings by *exploiting Dole*.

Precisely what distinguishes avoidance from evasion and mere rule compliance from rule exploitation are nice questions.[251] But for present purposes exquisite precision is not required, for the root ideas are easy enough to grasp. Start with the idea of a loophole. No rule perfectly fits the considerations that generate it. Relative to its underlying reasons, every rule is overinclusive or underinclusive, or both. As a first, if rough, cut, then, let us stipulate that "loophole" describes the space in which the rule permits conduct that its own underlying considerations, if directly enforced, would prohibit.[252] It is that place where the letter of the rule underenforces the spirit. *Dole*

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n.60 (1997) ("As commentators have noted, the Court's current Spending Clause jurisprudence appears to offer a significant potential loophole to the reach of *New York*."); Angel D. Mitchell, Comment, *Conditional Federal Funding to the States*, 48 U. KAN. L. REV. 161, 168 (1999) ("Although the Court set forth this prohibition against congressional commandeering of the states, it nevertheless preserved a method by which Congress may readily evade this prohibition by simply exercising its spending power."); Brett D. Proctor, Note, *Using the Spending Power to Circumvent* City of Boerne v. Flores*: Why the Court Should Require Constitutional Consistency in its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. REV. 469, 469-70 (2000) ("[T]he spending power has been invoked repeatedly in recent years as the clearest, and perhaps only, tool with which Congress might circumvent the Supreme Court's apparent willingness to enforce federalism-based constitutional norms."); Kimberly Sayers-Fay, Comment, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CAL. L. REV. 1281, 1299 (2000) ("Depending on one's perceptions, *Dole* is either a crack in the constitutional foundation or an opportunity begging to be exploited."); Ryan C. Squire, Note, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869 (1998).

250. It is possible that Justice Scalia, at least, does not truly mean to invite even this. Consider this intriguing passage from *Printz* on the subject of whether Congress has engaged in a historical practice of commandeering state or local officials:

> The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.

Printz, 521 U.S. at 917-18. One might read the last sentence as tipping Scalia's hand. *See* Baker, *Revival of States Rights*, *supra* note 61 at 103. But if he means to hint that some of the measures discussed earlier would not survive a proper challenge, it remains unclear whether that hint is intended to cover the entire preceding sentence or just the measures referenced after the semicolon.

251. For a provocative, if idiosyncratic, exploration, see LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW (1996).

252. It is worth noting that this is apparently not the sense of loophole at work in Celestine

creates a loophole because it is a judge-made rule designed to implement a standard-like constitutional norm. However that norm could conceivably be interpreted, there is little doubt that the States' Rights Five understand it as designed to preserve a sphere for the vibrant exercise of meaningful state sovereignty. Insofar as the particular limitations set forth in *Dole* prove inadequate to that task—a prospect there is every reason to predict[253]—to that extent the doctrine contains a loophole.[254]

Now, the Court might be willing to tolerate some statutes falling into the *Dole* loophole. Loopholes are ubiquitous in law and not always filled. But two other concepts become important: exploitation and circumvention. Sometimes actions fall into loopholes, other times they are deposited there. Borrowing from Meir Dan-Cohen's useful trope of an "acoustic separation" between conduct rules and decision rules,[255] we might imagine that a loophole-containing rule was formulated as a decision rule designed to adjudicate alleged violations of a conduct rule that was articulated in the standard-like terms of the rule's animating considerations. Even were the decision rule acoustically separated from the conduct rule's subjects—and thus the locations and shapes of the decision rule's loopholes unknown—the conduct rule's addressees might nonetheless sometimes act in ways that bring them within the loopholes. But accidents of this sort could not be expected often. Because acoustic separation is a fiction, however, the rule's addressees know just where the loopholes are and therefore enter them far more frequently. We may say, accordingly, that one "exploits a loophole" when she steers her behavior into that space where the hypothetical decision rule safeguards conduct that the hypothetical conduct rule prohibits, and does so with awareness or at least suspicion that the space is just of this sort. This, we think, is no more than the common intuitive sense of what it means to exploit a loophole.

Third, and finally, *circumvention* occurs (as opposed, say, to mere, non-normatively charged, *avoidance*) when one escapes the bite of any given rule precisely by exploiting a loophole in the system, rather than by some other means. Put another way, one *circumvents* Rule B when she achieves an outcome that Rule B is designed to protect against and does so by exploiting a loophole in Rule A. And even though persons will disagree about when the phenomenon occurs,[256] we suspect that many will

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Richards McConville, *Federal Funding Conditions: Bursting Through the* Dole *Loopholes*, 4 CHAP. L. REV. 163 (2001). McConville appears to treat each of the five *Dole* conditions as a "loophole" through which to promote state interests as against national ones.

253. *Dole* did not purport to announce anything new. Not only did it merely identify limitations that had emerged from previous Supreme Court spending decisions, *see Dole*, 483 U.S. at 207-08, it provided no reason to suspect that this common law process of doctrine-making had reached a stable resting place. Indeed, the decision upon which *Dole* relied most heavily made clear that the difficult task of articulating precise limits to the spending power was ongoing. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937) ("In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.").

254. *Cf. New York*, 505 U.S. at 167 (explaining that it is necessary to limit conditional spending lest "the spending power . . . render academic the Constitution's other grants and limits of federal authority").

255. *See generally*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

256. Precisely because the reasons underlying a given rule are contestable, it will not always be obvious to any given onlooker just where the loopholes are—where, that is, the rule's letter

share the intuitive sense that there is something at least dodgy, and sometimes plain wrongful, about it.[257] Surely when viewed from a perspective *internal* to a particular normative system, it is presumptively improper to exploit that system's loopholes to circumvent others of its rules.

If this is right, then it misses our point to object that for one to engage in specified conduct "only because the law allows it" is commonplace, indeed desirable.[258] Consciously shaping one's conduct to the demands of the law is concededly what the law desires. Consciously shaping one's conduct to comply with what one suspects are the law's *loopholes* is not.[259] More to the point, for Congress to shape its policy to what it suspects are *Dole*'s loopholes is not what the States' Rights Five desire. Note this telling recent observation by Justice Kennedy, joined by the Chief Justice and Justices Scalia and Thomas: Because, under *Dole*,

> Congress can use its Spending Clause power to pursue objectives outside of Article I's enumerated legislative fields by attaching conditions to the grant of federal funds . . ., the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.[260]

This is a revealing passage. We read it to indicate that at least these four Justices recognize that merely nominal compliance with *Dole*'s strictures might not be enough to maintain the "distinctions between national and local spheres of interest and

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underenforces its spirit—nor whether the loopholer acted inadvertently or exploitatively. Still less, then, could all reasonable onlookers always be in agreement. But sometimes they will be.

257. It is probably true that courts often tolerate exploitation of loopholes. But we suppose that any such tolerance usually occurs when the reviewing court did not create the loophole in the first place. Where a legislature or agency has created the loophole, a common (but not invariable) judicial reaction is to enforce the letter, not the spirit, and leave it up to the rule maker to close the loophole if it can and so wishes. Matters are very different where, as in *Dole*, the Court itself inadvertently created the loophole in the exercise of its power to make constitutional doctrine. Of course, one might be tempted to respond that what we have called the *Dole* loophole is not really a creation of the Court but, rather, the direct and inescapable force of the Constitution itself. We do not doubt that the Constitution does itself create loopholes. But given the richness of interpretive resources at the judiciary's disposal, we cannot agree that this is one of them. The particular requirements that emerge from *Dole*—especially, that the condition not be unrelated to the federal interest in the spending program to which it is attached and that it not be impermissibly coercive—are no more constitutionally compelled than would be a doctrine that closed the loophole by, for example, interpreting the Spending Clause, in conjunction with the Tenth Amendment, to disallow spending conditions that "unduly interfere with state sovereignty."

258. *See, e.g.*, KATZ, *supra* note 251, at 12 ("Why exactly should we disapprove of someone for doing something *only* because of the law?") (emphasis in original).

259. For a persuasive argument to this effect, see Dan M. Kahan, *Ignorance of Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

260. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting) (internal quotations omitted).

power"—distinctions that they, along with Justice O'Connor, plainly deem essential—and, therefore, that they will expect Congress to be guided when exercising its spending power not only by the letter of *Dole* but also by an adequate "concern for the federal balance" (adequate, presumably, by these Justices' lights).[261] How much clearer a signal could they send that they do not intend to sit idly by if Congress, insufficiently motivated by concern for the federal balance, consciously exploits *Dole*'s imperfections to trench upon sensitive areas of traditional state concern—such as those areas that recent precedent has preserved against other sorts of national intrusion?

Of course, even if the States' Rights Five would look with disfavor upon a maneuver by Congress to exploit the *Dole* loophole so as to circumvent one of the Court's recent decisions, that is not enough to establish that it would do something about it. The reason loopholes exist, after all, is that it is often difficult to craft judicial doctrine that both is administrable and closely tracks the underlying policy considerations. Closing a doctrinal loophole almost always comes at the cost of creating overenforcement; sometimes that cost is thought too high. So the question becomes whether the Court could find a way to repulse Congress at a cost it finds tolerable.[262]

B. Tightening Dole

The first possible route to invalidating a circumventionist statute is to tighten *Dole* itself. "Rational basis with bite" provides a useful (though imperfect)[263] analogy. Just as the Court in *Cleburne*[264] (and this very Court in *Romer*)[265] maintained nominal fidelity to the rational basis test while applying it with new-found stringency to strike down discrimination that a majority evidently found obnoxious, perhaps a majority of the present Court could apply *Dole* with greater bite without formally changing or adding to any of its requirements. The relatedness and coercion prongs of the *Dole* test are the most obvious candidates for tightening.[266] Each of these prongs could be

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261. Recall those passages from recent federalism decisions that some commentators have read as authorizing any legislation that complies with *Dole*. *See supra* notes 245-48. We can see now that these passages are most safely interpreted to mean that Congress may realize the ends that the stricken legislation pursued by using its spending power in a way that complied with constitutional strictures, but not to mean that Congress should feel itself free to pursue those ends in any way that existing judge-made spending doctrine permits, insofar as those two things may differ.

262. *Cf.* Choper & Yoo, *supra* note 219, at 858 ("the Court may find it difficult to develop more limiting standards for the Spending Clause—such as by attempting to narrow the nexus it requires between federal spending programs and their related conditions").

263. The analogy is imperfect because "rational basis with bite" involves applying the standard-like terms that constitute the test—"rational" and "substantial"—with greater rigor, whereas the more interesting ways to tighten *Dole* involve reconceptualizing the test's constituent concepts, as we will explain.

264. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

265. Romer v. Evans, 517 U.S. 620 (1996).

266. Perhaps the "general welfare" requirement should be added to this list. Given that the Court had questioned in *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam), "whether 'general welfare' is a judicially enforceable restriction at all," *Dole*, 483 U.S. at 207 n.2, this prong probably has the least bite of all. Yet the most obvious tightening would involve the

applied with greater bite than was applied in *Dole* itself.

1. Relatedness

That the relatedness requirement could be applied more or less rigorously is obvious and was plainly recognized in *Dole* itself by both the majority and the principal dissent. But just how strictly it was applied in *Dole* and what it would mean to apply it more strictly are rather less obvious.

After observing that previous "cases have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power," the *Dole* majority concluded that the condition that a state impose a minimum drinking age of twenty-one did in fact "relate[] directly to the purpose of the expenditure to which it is attached" and, therefore, that it was unnecessary for the Court to determine how directly related the condition and the expenditure need be.[267] Justice O'Connor, in dissent, took issue with the majority on just this score, deeming "the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended . . . cursory and unconvincing,"[268] and insisting that "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."[269] This was so, she explained, because

> if the purpose of [the condition] 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.[270]

In short, the relationship between the condition and the purpose of the federal expenditures was too "attenuated or tangential."[271]

All these modifiers—directly, reasonably, sufficiently, attenuated, tangential—make clear that the relatedness requirement could be applied more or less stringently. That is, the requirement could be operationalized to make it easier or harder to satisfy. Unfortunately, the sheer variety of these modifiers and the wholly unsatisfying analyses in which they feature leave entirely unclear precisely *how* the standard could be applied with greater or lesser bite.[272] Take the majority's assertion that a requirement

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Court's either substituting its own judgment on an ad hoc basis as to whether a particular condition did or did not advance the general welfare or specifying standards or a definition to distinguish "general" welfare from "particular." It would be hard to invigorate this prong in either of these ways without acknowledging that the rules have changed. We therefore pursue this line of thought in the next section. *See infra* Part V.C.2.

267. *Dole*, 483 U.S. at 208-09 n.3.

268. *Id.* at 213.

269. *Id.* at 213-14.

270. *Id.* at 214-15.

271. *Id.* at 215.

272. *Cf.* Proctor, *supra* note 249, at 481-82 (observing that the relatedness "requirement is commonly viewed as the most important of all the *Dole* criteria" but that "[i]ts precise content

of direct relatedness, whether or not constitutionally compelled, was "satisfied in this case in any event."[273] Why so? And if so, what would an indirect relationship look like? Imagine a federal statute that required states to criminalize drunk driving as a condition for receiving their full allotment of federal highway funds. Surely this seems "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[274] A minimum drinking age promotes the same purpose one step removed: it reduces drunk driving by reducing the number of persons who may legally drink. To be sure, it is perfectly reasonable to suppose that reducing the number of legal drinkers (especially among young people) reduces the total amount of drunk driving. But because one more causal link is involved the relationship between the condition and the spending purpose in the actual statute is at least somewhat *less* direct than it is in the hypothetical statute. So if the actual statute is not as directly related to the spending program's purpose as it could be, what makes it directly related at all, as opposed to "indirectly related"? That is, what determines where on the continuum between direct and indirect the critical line gets drawn?[275] The majority offers no hint.

Unfortunately, while the majority's analysis is unsatisfying, Justice O'Connor's is simply confused. In concluding that the "relationship between the supposed purpose of the expenditure . . . and the drinking age condition" is not "reasonable[],"[276] O'Connor relies heavily on notions of under- and overinclusiveness. That the condition is in fact under- and over-inclusive in just the ways she claims is undeniable. But so what? If South Dakota had prevailed against the United States and retained its minimum drinking age of nineteen, and if eighteen year-olds had challenged the law on equal protection grounds, does anyone doubt that the plaintiffs would have been laughed out of court notwithstanding that the same under- and overinclusiveness would be present? Or suppose that after *Dole* Congress finds that many teenagers are drinking and driving despite the nationwide minimum drinking age of twenty-one. In an effort to reduce teenage drinking, and thereby to promote highway safety, Congress authorizes funds to subsidize state-run educational programs designed to urge teenagers to abstain from alcohol. As a means to promote safe highway travel, this spending program would be infected by just the same over- and underinclusiveness that tainted the condition upheld in *Dole*. And yet this statute would pass the test that O'Connor ultimately endorses: "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent."[277] Both of these points suggest that determining the constitutional sufficiency of the relationship

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today is unclear").

273. *Dole*, 483 U.S. at 208 n.3.

274. *Id.* at 209.

275. Indeed, concerns like this have persuaded various of the States' Rights Justices in at least some contexts to eschew tests that depend at all upon "directness" inquiries. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 818 (2000) (plurality opinion) ("Whether one chooses to label this program 'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis.").

276. *Dole*, 483 U.S. at 214 (O'Connor, J., dissenting).

277. *Id.* at 216 (quoting Brief for the National Conference of State Legislatures as Amici Curiae). We assume that O'Connor's proposed test incorporates the negative implication.

between condition and expenditure by reference to the under- and overinclusiveness of means to end is mistaken.[278]

If cashing out *Dole*'s relatedness requirement by reference to degrees of directness between the condition and the "purpose" of the expentidture seems unpromising, and by inquiry into magnitudes of over- and underinclusiveness positively misguided, there may be another possibility.[279] Start with the commonplace idea that every governmental action, like all purposive action, serves a chain of purposes or interests.[280] Consequently, two governmental actions (be they expenditures, regulations, requests, proclamations, etc.) are related more or less closely in inverse proportion to the number of purposive links each must serve before their two chains coincide.

This perhaps obvious point, like many points of comparable intuitiveness, may be brought home more clearly with a graphical representation. The notion of relatedness that Justice O'Connor invokes is famously represented, thanks to Tussman and tenBroek, by Venn Diagrams.[281] That is the classic way to represent the relationship between sets. It is not, however, an apt way to depict the relationship among actions and purposes. A family tree is. Consider, then, this highly schematic view of a tiny piece from a hypothetical tree depicting actions and purposes of the federal government (the actions represented by the shaded rectangles). (See FIGURE 1).

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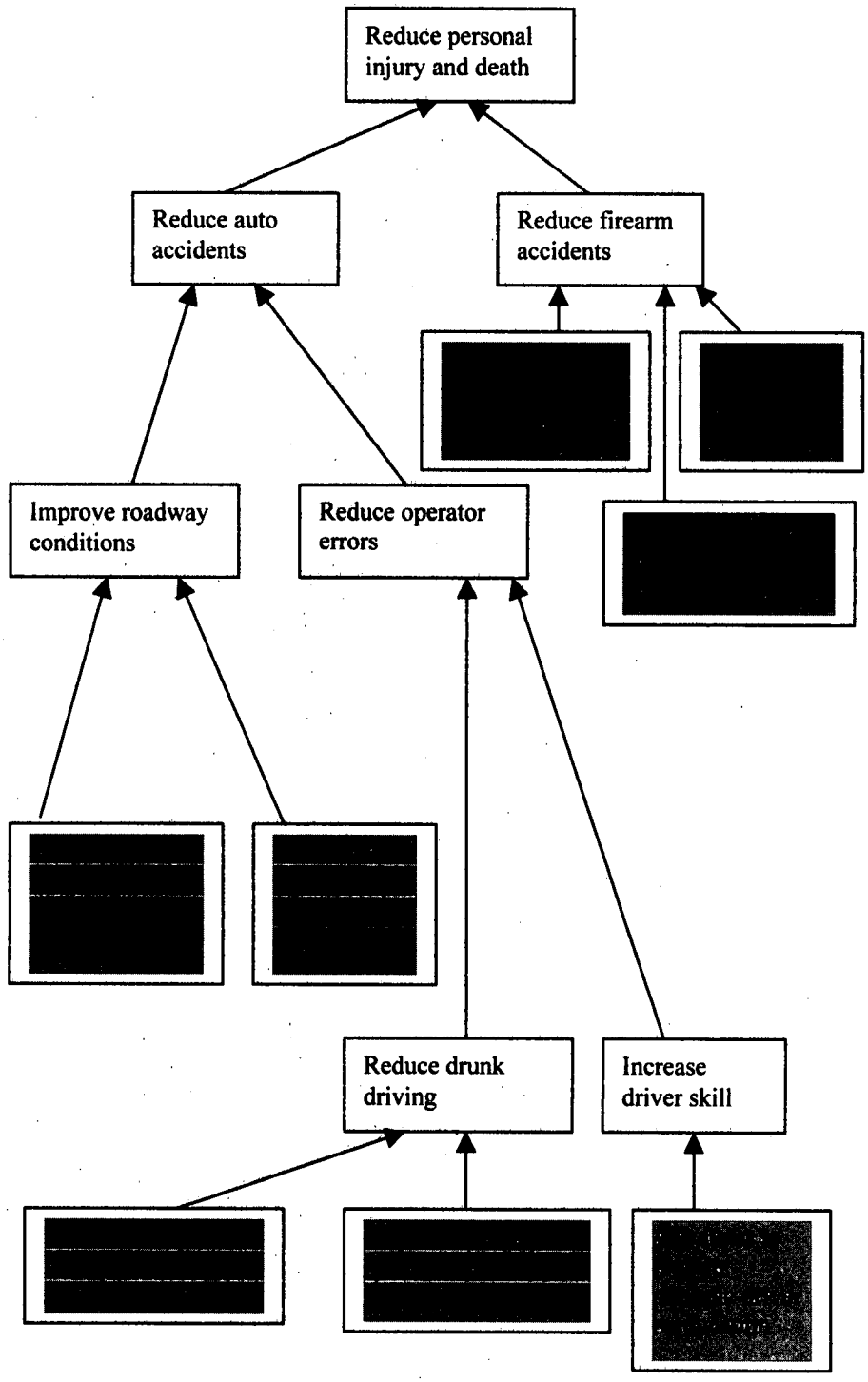
278. Not too surprisingly, then, the cases that *Dole* relied upon for its relatedness requirement—Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion), and Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958)—invoked the barest due-process-style notion of reasonableness; they lend little or no support for the *Dole* majority's seeming interest in directness of relationship or O'Connor's focus on equal-protection-like closeness-of-fit.

279. Others have argued that the Court might hold that the broad "program or activity" language of Titles VI and IX runs afoul of the relatedness requirement. *See, e.g.*, Berman, Reese & Young, *supra* note 35, at 1137-42; Conkle, *supra* note 130, at 675-76. Although we continue to think that is possible, *see supra* note 202 and accompanying text, our analysis here is very different. We here explore ways to make the relatedness prong tighter than it was in *Dole*. It is not at all clear that it requires any tightening of that requirement as it was applied in *Dole* in order to hold Congress not entitled to restrict the behavior of every program or activity of an institution as a condition of that institution's receiving federal funding.

280. This familiar point is nicely made in John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970).

281. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 347 (1949).

FIGURE 1


Reduce personal injury and death
Reduce auto accidents
Reduce firearm accidents
Improve roadway conditions
Reduce operator errors
Reduce drunk driving
Increase driver skill

The family tree metaphor is appropriate. For one thing, a given purpose might be said to generate or sire the subordinate purposes that serve it. More significantly, the distance between actions as measured by the connecting branches seems to capture our intuitive sense of the closeness of their relationship. A federal request that states raise their minimum drinking age, for example, is more closely related to a federal regulation requiring all new cars to be outfitted with ignition locks that will not open unless the operator passes a breathalyzer test than to a federal law imposing criminal penalties upon accidental discharge of a firearm. And each of these actions is more closely related to the other two than to, say, federal funding of the Kennedy Center for the Performing Arts, which presumably serves purposes at some distant remove in the complete tree.

Given this general way to think about the relationships among governmental actions like expenditures and conditions (the relationship is closer the fewer the purposive links that connect them), and given the particular way that this chart characterizes actions and the hierarchy of purposes they subtend, it becomes clear that the relatedness requirement could be applied more stringently than it was in *Dole* itself. Indeed, the directness language of Rehnquist's majority opinion provides a clue, for the relatedness prong could be reformulated to require that the expenditure and the condition be so closely related that the purpose each "directly" (or immediately) serves be the same.[282] Under this formulation of the rule—what we might term, with a nod to the "least restrictive means" test from First Amendment jurisprudence,[283] a "most direct relationship" test—Congress would be permitted to condition funds for highway improvements on a state's agreement to undertake a specified schedule of road maintenance because each would promote the immediate federal purpose in improving roadway conditions, but Congress could not condition the same funds on a state's enacting any specified minimum drinking age because that condition serves the distinct immediate purpose of reducing drunk driving. This formulation, in short, dictates a different result on the very facts of *Dole*. It is, therefore, unmistakably a tightening.

Although we do believe that the twin notions (a) that governmental actions serve a chain of nested purposes and (b) that the conceptual structure of these purposes is best represented by a tree, provide a coherent and sensible way to think about how closely or distantly particular governmental actions are related, we hasten to acknowledge that trying to turn this appreciation into a determinate and administrable judicial rule confronts severe, possibly intractable, difficulties.[284] We do not pursue these concerns here, though, for a variety of reasons, not the least of which being that we are emphatically not recommending that the Court *should* tighten *Dole* in this fashion. However useful or illuminating this way of conceiving the relationship between

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282. Continuing the familial metaphor, this would be to require that the expenditure and condition be "siblings."

283. *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

284. Perhaps the most obvious challenges involve how to choose among competing plausible formulations of purposes and, relatedly, how thinly to slice the purposive chain. And even once the nodes in the tree are set, the problem of measuring distance remains, for the tree depicts topological relations but not geometric ones. Therefore, the fact that funding highway improvements is five links removed from both imposing criminal penalties for accidental discharge of a firearm and asking states to enact a specified minimum drinking age should not entail that each relationship is identically close (or distant).

expenditure and condition may be for some purposes, we do not think it makes sense as a test of constitutionality. In fact, one of the signal benefits of this conceptualization and graphic representation is that they help show why this is so.[285] Be that as it may, so long as the Court requires that each spending condition "bear[s] some relationship to the purpose of the federal spending,"[286] this discussion shows how that relationship could be conceived and articulated to give *Dole* greater bite.

2. Coercion

The *Dole* Court's treatment of coercion is nearly as confusing as its treatment of relatedness.[287] As a purely nominal matter, it is not even clear whether the Court meant to prohibit all coercive offers or just some subset of them. The Court's observation "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,'"[288] suggests the latter: some coercion is permissible so long as the coercion is not so great in magnitude as to constitute compulsion. But the Court's subsequent approval of Justice Cardozo's remark that "'to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties,'"[289] suggests the former: a too-quick finding of coercion would create difficulties only if such a finding would require the law's invalidation.

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285. Two points, the first practical, and the second theoretical. First, the tree makes clear why the *Dole* approach to relatedness becomes easier to satisfy the more Congress does. Whenever Congress desires to induce a given behavior from the states, all it must do (as far as the relatedness requirement is concerned) is look up the tree for the purpose that such behavior would serve and then look down from that purpose for a spending program that also serves it. As Congress expands its spending to serve more and more low-level interests (that is, immediate interests as opposed to ultimate ones), it becomes increasingly unlikely that any demand would be designed to promote an interest that is not already being promoted by a federal funding program. The perverse consequence of this rule designed to protect state prerogatives, then, is that congressional power begets congressional power.

Second, regardless of how extensive federal spending is or becomes, a test which requires that a condition serve the same purpose as the expenditure to which it is attached invites cynical or self-defeating legislation. Suppose that in the shadow of the Second Amendment, Congress has identified only two means to pursue its interest in reducing firearm accidents: asking states to impose their own stringent limits on gun ownership, and funding state-administered firearm safety classes. What the diagram shows, were it not clear enough already, is that conditioning the latter on a state's acquiescence in the former is an all-or-nothing strategy. If a state declines the federal request then the federal interest will not be advanced in that state *at all*, even though (what is not always the case) the condition and the expenditure are in fact fully independent means to realize the purpose that they share.

286. New York v. United States, 505 U.S. 144, 167 (1992).

287. Still, the Court should not be criticized too heavily for this. As one philosopher has noted, "In concept, dimensions, and the realities of phenomena, coercion is indeed laden with ambiguity, complexity, and elusive ingredients." Samuel Dubois Cook, *Coercion and Social Change, in* NOMOS XIV: COERCION 107, 115 (J. Roland Pennock & John W. Chapman eds., 1972). For a recent effort by one of us to unravel some of these complexities, see Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45 (2002).

288. *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

289. *Id.* (quoting *Steward*, 301 U.S at 589-90).

Putting nomenclature aside, though, the Court's general idea is clear enough. In one common sense of the term, coercion stands as an antonym of sorts for freedom or voluntariness:[290] When one is "coerced" (or "compelled") to do *x*, one does not do *x* "voluntarily" or of one's own "free will." And it is this sense that *Dole* has in mind: Congress has not impermissibly coerced[291] "the States to enact higher minimum drinking ages than they would otherwise choose" because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact."[292]

Yet if the *general* idea is clear enough, its specification is not. For what it might mean for a state to accept a condition involuntarily is highly ambiguous. Because this is well-worn ground,[293] we will be brief.

Consider the different ways to make sense of involuntary or compelled conduct by individuals.[294] Sometimes we say that an individual acted "involuntarily" or was compelled to act as she did when her conduct was not preceded by volition at all, as when A forcibly propels B's arm into C.[295] Were B subsequently charged with an assault on C, she would be acquitted precisely on the ground that her conduct was not voluntary. Likewise if B moved her arm as a consequence of hypnosis or while sleep walking.[296]

But this is only one sense of involuntariness and the least interesting at that. Consider another familiar situation in which B is said to be compelled to accept a condition: when in response to a credible threat of death. If B slaps C in response to A's threat to kill B if she does not, we would have no difficulty in adjudging B's action "compelled" or "involuntary," not the product of mere "encouragement" or

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290. An example of this sense of coercion is emphasized in, for example, J. Roland Pennock, *Coercion: An Overview, in* NOMOS XIV: COERCION, *supra* note 287, at 1. There is a distinct sense of coercion in which A coerces B when presenting a certain sort of wrongful proposal. One of us has argued that the Court should revise its conditional spending jurisprudence to operate upon this sense of coercion—one that looks to the character of Congress's conduct—rather than the other sense of coercion—that looks to the voluntariness of the state's choice. Although this revision would still use the word "coercion," the underlying concept would be different. We therefore treat this proposal as an alternative to the *Dole* test not as a tightening of it. *See infra* Part V.C.4.

291. The phrase "impermissible coercion" is intended to meet the ambiguity we have just noted. If the constitutional line is drawn between coercion and compulsion, then read "impermissible" as a modifier: coercion is okay, impermissible coercion (i.e., compulsion) is not. If the line is drawn between encouragement and coercion, then read "impermissible" as a characterization not a qualification: coercion is impermissible.

292. *Dole*, 483 U.S. at 211-12.

293. *See, e.g.*, McConville, *supra* note 252, at 172-83; Donald J. Mizerk, Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159 (1987); Sayers-Fay, *supra* note 249, at 1299-1301.

294. This discussion is indebted to Alan Wertheimer's illuminating analysis. *See* ALAN WERTHHEIMER, COERCION 192-201 (1987). It also draws from Berman, Reese & Young, *supra* note 35, at 1152-54.

295. We anticipate that some readers may resist calling this coercion, deeming only "compulsion" apt. For what it is worth, though, theorists often do classify this as a form of coercion. *See, e.g.*, Michael D. Bayles, *A Concept of Coercion, in* NOMOS XIV: COERCION, *supra* note 287, at16, 17.

296. *See, e.g.*, Model Penal Code § 2.01 (2001).

"temptation." Surely B had "no choice" but to slap C. As a conceptual matter, though, if perhaps not a normative one, this situation is readily distinguishable from the first. To return to the criminal law, B will still be acquitted, but this time thanks to the affirmative defenses of necessity[297] and duress;[298] her conduct is sufficiently voluntary to satisfy the actus reus requirement.

Extreme situations like this, however, do not exhaust the range of cases in which we commonly seek to excuse, or at least explain, our actions on the grounds of having had "no choice" in the matter—cases in which one's conduct is not the product of one's own "prerogative." For our limited purposes, one example—the destitute widow hypothetical—should suffice. Suppose that a wealthy bachelor offers to house and feed a destitute widow and her three children in exchange for periodic sexual intimacies (with the widow, not the children).[299] Suppose too that the bachelor is no more obligated to these unfortunates than is anyone else and that the widow's best alternatives would be extremely hard on her and her family but far from threatening death. The widow accepts. Feeling a mix of sorrow, anger, and degradation, however, she might find herself explaining, to herself or to others, that she really had "no choice" but to accept. It seems to us that this is an eminently plausible claim. And yet the widow surely had more choice than the gunman's victim did. She might even acknowledge that, yes, she could have chosen to reject the bachelor's offer in a way that B, in the earlier hypothetical, could not.

If all this is so, at least two distinct, but not mutually exclusive, ways to make sense of the widow's claim suggest themselves. The underlying thought might be, first, that her choice predicament was so unfair, her options so far from what the society might deem minimally normatively acceptable, as to justify our thinking her choice not "really" voluntary. Second, regardless of the fairness of her choice predicament, there is a possible sense in which the widow's decision to accept did not issue from the exercise of her own subjective decisional autonomy but, rather, from the demands of rationality itself. Acceptance was so plainly the only thing to do that the choice was not *hers*, but was instead made for her by circumstances.[300]

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297. *See id.* § 3.02 (1)(a) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.").

298. *See id.* § 2.09 (1) (extending an affirmative defense to an actor who was coerced to commit an offense "by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist").

299. This hypothetical is raised in *Commonwealth v. Mlinarich*, 498 A.2d 395, 402 (Pa. Super. Ct. 1985).

300. This is a subtle and potentially controversial take on what "no choice" could mean and might therefore warrant more fleshing out. Perhaps part of what it means to choose among alternatives includes the idea of exercising one's individuality. That is, the act of choosing both expresses and partially constitutes an agent's uniqueness. What makes a choice *my* choice is, in part, precisely that it is *mine,* and not, for example, *yours* or *everyone's*. But if everybody (at least every sane and rational human being) would make the same choice then that distinction cannot be drawn: "my choice" becomes, in a sense, simply "the choice." And we could perhaps go even further: if the notion of a choice includes the notion that there exists an opportunity (even a need?) for an agent to do the choosing (that is, if there exists "a choice" to be made

This brief discussion suggests, then, that we might usefully distinguish four sorts of claimed involuntariness or unfreedom that might arise in response to behavior of another: when the claimant's conduct is "non-volitional" in the sense of having been produced by "no choice at all"; when she has "no practical choice" but to do as she does because doing otherwise would be in a literal or figurative sense suicidal; when she has "no fair choice" because we think the range of alternatives she faced was unacceptably narrow as a normative matter; and when she has "no rational choice" because only one alternative is consistent with the minimum demands of instrumental rationality. This is not an exhaustive division of the terrain but it is at least a plausible start.

Of these four ways to cash out the notion of being compelled to accept a condition attached to a spending program, it is not entirely clear on the face of *Dole* which Rehnquist intended. The first possibility can be ruled out as being simply inapposite when transferred from the domain of human action to that of state action. States cannot be physically manipulated by other states nor are they subject to reflexive or convulsive action.[301] Whatever Rehnquist may have had in mind (even if inchoately), most lower courts seem to read *Dole* as implicating the "no practical choice" conception of what it means to be impermissibly coerced: if a state could reject the condition and still survive essentially as a state, then acceptance of the condition is freely chosen and the condition is not impermissibly coercive.[302] Indeed, this seems the conceptualization most faithful to the precedents upon which *Dole* relies.[303] If this is so, then the ways to tighten the coercion prong become plain. It is not only a matter of the Court's being disposed to find impermissible coercion present at some less onerous point on a single continuum of pressure like that measured by the barometric scale (though the Court could, of course, change its views in just this way). Rather, or more interestingly, the Court could adopt a different *conception* of what it means for a state to be presented with "no choice."[304] The Court could reconceptualize the coercion

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between A and B only when "my choosing" A over B would reflect *my* choosing A over B), then the lack of the opportunity for the exercise of individual agency entails that there is in fact no choice to be made; the act that the presentation of alternatives calls for is not, properly speaking, a "choice" but rather, say, an "identification" of the correct alternative.

301. *Cf.* Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) ("Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.").

302. *See* Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir.) ("According to the coercion theory, the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions.").

303. *Steward*, 301 U.S. at 586 ("There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states."). *See also id.* at 593 (observing, after concluding that the tax was not coercive, that, "The statute does not call for a surrender by the states of powers essential to their quasi sovereign existence.").

304. Lower courts have noted and criticized *Dole*'s seemingly exclusive focus on the percentage of programmatic funds as the window into impermissible coercion, wondering why the relevant metric might not be, for example, total dollars or dollars as a percentage of the offeree state's budget. *See, e.g., Skinner*, 884 F.2d at 448. The deeper point, naturally, is that a choice among these or any other measures would be arbitrary without an understanding of what

prong as providing that a spending condition is impermissibly coercive if it presents a state with either no *rational choice* or no *fair choice* but to accept,[305] even if it leaves the state with a *practical choice* not to.

3. Prospects

We have spent some time exploring what it might mean for the Court to preserve *Dole* but apply it with greater bite. It seems that, in theory, the test's bite could be varied in two principal ways: by assessing the purposes served by the condition and the expenditure to which it is attached at stages of greater or lesser immediacy; and by conceptualizing impermissible coercion as occurring when Congress presents the states with a conditional funding offer that they have no fair choice or no rational choice but to accept, even when the states do enjoy a practical choice not to. In both respects the *Dole* test could be applied with greater rigor than the Court applied it to the facts of that case. That is to say, the Court could maintain at least nominal fidelity to the *Dole* test but operationalize the relatedness and impermissible coercion prongs in ways such that the statute at issue in *Dole* would have failed both of them. The drinking age condition could be held insufficiently related to the expenditure of highway funds because although each serves an interest in reducing the number of highway accidents, the condition does so via the more immediate purpose of reducing the number of intoxicated drivers on the roads whereas the expenditure does so via the immediate purpose of, for example, improving the road surface. And the condition could be found impermissibly coercive on the grounds that the states have no rational choice but to accept given the amount of money at stake and the relatively slight importance to a state of maintaining a minimum drinking age under twenty-one.

The true question, though, is not simply whether the *Dole* test is amenable to being applied with bite and a bite forceful enough to have produced a different result in *Dole.* Rather, having determined that the test *could* be ratcheted up in a manner that would enable a Court bent on invalidating a circumventionist statute to do so without jettisoning *Dole*, the more important question becomes whether this possibility is realistically to be anticipated.[306]

Toughening the coercion prong is, we think, unlikely. Very simply, the no-rational-choice and no-fair-choice constructions of impermissible coercion are just too amorphous to be judicially administrable. It is virtually unimaginable that Justice

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it means for a state to have "no choice" but to accept a condition and thus to be impermissibly coerced into it.

305. A decade prior to *Dole*, one scholar objected that "[d]ebating whether conditions on federal grants . . . 'coerce' the state is an unhelpful anthropomorphism. . . . The question . . . is not whether federal requirements overbear on a hypostasized state 'free will,' but whether they unduly compromise a normative political conception of state autonomy." Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandatory State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1254 (1977). We share this aversion to inquiries that depend at all on notions of a state's free will (or on anyone's "free will" for that matter). Still, Stewart's proposal could be recast in "no choice" terms, in particular as asking whether a conditional offer was coercive because it gave a state "no fair choice" but to accept.

306. For a political-science-inspired discussion that would bear on this question, see Mark Tushnet, *supra* note 6, at 61-62.

Scalia, for instance, would agree to this formulation.[307] Giving significant teeth to the coercion prong is a theoretical but not practical possibility.

Tightening the relatedness prong, in contrast, is feasible. And it would give *Dole* real bite. Consider the circumventionist response to *Printz*.[308] Requiring background checks for gun purchases and providing funds for the hiring of additional police officers both serve an interest in reducing violent crime. But the condition does so via an immediate goal of keeping firearms away from felons while the expenditure does so by increasing the prospects of apprehending criminals and thereby improving deterrence. Because the immediate purposes behind the condition and the expenditure are not the same, the two might be held insufficiently related. A *College Savings Bank*[309] circumvention would fare similarly. Reducing bars to vindicating intellectual property rights promotes the progress of science and the useful arts by increasing expected returns on successful innovations. Funding research promotes scientific and artistic progress by reducing the costs to the would-be innovator: different immediate purposes adopted to serve the same slightly more ultimate purpose.

Our hypothetical exploitations of *Dole* to circumvent *Kimel*[310] and *Garrett*[311] would also be at risk. Sure, the condition that states waive immunity in ADEA cases, like the medicare program, serves an interest in promoting the overall well being of senior citizens. But the condition does so by increasing employment opportunities for the elderly; medicare does so by safeguarding seniors' access to healthcare. And while we earlier suggested that the ADA is designed to promote the interests of disabled persons, it does so by pursuing a more immediate purpose—namely, "to provide a

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307. Scalia's hostility to standards is well known. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For the most recent installment in this ongoing harangue, see *Devlin v. Scardelletti*, 122 S. Ct. 2005, 2013-17 (2002) (Scalia, J., dissenting). Evan Caminker has pointed out to us that Scalia's assertion for the Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 687 (1999), that "where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity" might be viewed as adopting a "no fair choice" conception of coercion. That is to say, that a threat by Congress to bar states from engaging in specified sorts of commercial ventures unless they agree to waive sovereign immunity in certain types of suits arising from such ventures is coercive because this is not a "fair choice" to put to the states. We are not sure that Scalia is thinking in "no fair choice" terms; he might be better understood as viewing the hypothetical as presenting "no constitutionally acceptable choice." *See infra* note 372. In any event, *College Savings Bank* shows at most that Scalia is prepared to operationalize "no fair choice" judgments into categorical rules, not that he would sanction such judgments on an ad hoc basis, and conditional spending does not provide a hospitable context for any such categorical rules. Surely it is not plausible that *all* conditional offers of funds present the offeree state with "no fair choice," and it is not the least bit clear how Scalia might sensibly articulate the *subset* of conditional funding proposals for which the "no fair choice" conclusion would be categorically apt.

308. Printz v. United States, 521 U.S. 898 (1997).

309. *College Sav. Bank*, 527 U.S. at 666.

310. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

311. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2000).

clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[312] If the federal expenditures to which the waiver condition is attached aim to benefit disabled people through a different immediate mechanism, then the condition could be held insufficiently related.

Nonetheless, this tightening may not give *Dole* quite so much bite as would be needed to strike down all possible exploitations of the *Dole* loophole. Consider the *Morrison* circumventions. Imagine that Congress conditioned federal funds for local law enforcement on a state's adopting an effective civil damages remedy for the victims of such violence. Because the expenditure and the condition are each designed to advance an immediate interest in deterring violence, it may be hard to credibly maintain that the relationship between the condition and the spending program could, let alone should, be any closer.[313]

C. Alternatives to Dole

Suppose the Court does not choose to reinvigorate *Dole* by tightening relatedness in the way we have discussed. Perhaps one or more of the States' Rights Five would disfavor this form of tightening as simply too stringent, or as raising problems of administrability comparable to those that, we think, will deter it from tightening the coercion prong. Or suppose the Court finds itself confronted with a circumventionist spending statute that it cannot dispose of consistent with even an invigorated application of the *Dole* test.

We think it would still be premature for self-congratulations by the statute's drafters. For any such congratulations to be in order, one must assume that a majority of the Court either would be content to let such a statute stand or would be unable to craft a doctrine up to the task of defeating it. We gave reasons to doubt the first possibility in Part V.A. Here we give a reason to doubt the second. That reason, in short, is that there already exists a growing menu of possible *Dole* alternatives. We identify some of them here.[314] Our goal is not to assess each in detail or to champion

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312. 42 U.S.C. § 12101(b)(1) (2003).

313. One might be tempted to object that the expenditures are designed to deter violence generally whereas the condition is designed to deter *gender-related* violence in particular, in which case the "most direct relationship" test is not satisfied. That is a tough question. We are disposed to believe that this objection errs by confusing different framings with different steps in a causal chain, but believe too that defending this judgment would demand more space than can be justified here.

314. This is not an exhaustive survey of extant proposals. Ilya Somin, for example, has recently argued that even unconditional grants of federal funds to the states and their subdivisions are unconstitutional (unless properly predicated on Congress's power to enforce the Reconstruction Amendments) because they threaten the values underlying federalism and are inconsistent with both the text of the Spending Clause and the original intent. Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments,* 90 GEO. L.J. 461 (2002). He recognizes, however, that immediate judicial implementation of a categorical ban on all offers of federal funds to the states would be unworkable and therefore proposes that the Supreme Court work toward this goal incrementally. *See id.* at 497-502.

Although an evaluation of Somin's argument is beyond the scope of this Article, it is worth questioning here at least one part of his analysis. Somin contends that *Dole* "need not pose a

one or another. Our more modest ambition is to give credence to the idea that if a majority had sufficient will to strike down a circumventionist statute it could find a way to do so.

1. Return to Madison

The most obvious possibility—and the most staggering—would be to return to the Madisonian idea that Congress may not spend to achieve ends it could not achieve through its other enumerated powers. This alternative would spell a revolution in federalism sufficient to make all the other Rehnquist Court's federalism decisions appear mere frivolities by comparison. Although the scope of the imaginable is ever changing, we think that this falls outside.[315]

2. Giving Meaning to the "General" Welfare

Under current doctrine, the requirement that federal funds be spent only for the general welfare is essentially empty.[316] But it was not always thus. In founding thought, some argue, the qualifier "General" had meaning: it enabled Congress to provide for the welfare of the nation generally, but not for the particular welfare of a single state or region.[317] Were the Court to readopt this view, the narrow holding of *Dole* might survive (the national highway system presumably serving the general welfare) but surely some circumventions would not—not because of anything objectionable about the conditions themselves but because the spending programs as a whole would fall. For example, because federal expenditures to aid local education and local law enforcement might not promote the general welfare,[318] our hypothetical *Lopez* and *Morrison* circumventions would be at risk. To be sure, we would not bet on this sort of

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barrier" to his proposal because that decision "did not consider the danger that even unconditional and wholly noncoercive grants to state governments pose to federalism." Rather, he says, "[t]he sole point at issue [in *Dole*] was whether or not the conditions South Dakota was required to meet were 'so coercive as to pass the point at which pressure turns into compulsion.'" *Id.* at 488. *See also id.* at 489 (asserting that pre-*Dole* cases "also failed to consider the possibility that federal grants may be constitutionally dubious even if not coercive"). Somin's view that a prohibition on impermissibly coercive spending conditions, instead of constituting a de facto *fifth* prong, is the *entirety* of the *Dole* test strikes us as inexplicable.

315. Perhaps this reflects a failure of imagination on our part, for other scholars have not only imagined it, but urged it. *See, e.g.*, John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 66-71 (2001); Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 2 (2001).

316. *See* Buckley v. Valeo, 424 U.S. 1, 90-92 (1976); *supra* text accompanying notes 22-24 & 34.

317. *See, e.g.*, United States v. Butler, 297 U.S. 1, 87 (1935) (Stone, J., dissenting) ("The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national."); Eastman, *supra* note 315.

318. As Eastman puts it, Congress "has only the power to spend for the 'general' welfare and not for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states and therefore might be said to enhance 'general' welfare in the aggregate." Eastman, *supra* note 315, at 65.

revision being adopted, nor do we recommend it.[319] We mention this possibility only to challenge what may be a complacent assumption that an utterly toothless "general welfare" requirement is inescapable.[320]

More significantly in our view, the "general welfare" requirement could be rendered meaningful even without trying to recover the precise historical distinction between general and particular. One possible approach is suggested by Donald Regan's marvelous essay on the commerce power.[321] Regan's suggestion is simply stated: "[W]hen we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask ourselves the question, 'Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?'"[322] Were this the critical inquiry, Regan explains, *Lopez* was probably rightly decided—there being no reason why the states were incompetent to address the problem of guns near schools—notwithstanding the palpable inadequacies of the Court's opinion.[323] Whatever may be said for this approach—and

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319. For some arguments about why this distinction is unworkable, see Chemerinsky, *supra* note 60, at 92-93.

320. Another proposal in a related vein is Laurence Claus's recent suggestion that congressional authorization to provide for the "*general* welfare" be read together with the other provisions of Article I, Section 8, Clause 1—namely, that Congress may provide for "the *common* defense," and that "all Duties, Imposts and Excises shall be *uniform* throughout the United States"—to ensure that federal taxing and spending decisions not discriminate in the distribution of burdens and benefits to the people of the United States by reference to what Claus terms "the political identities of their states." Laurence Claus, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT 517, 520 (2001)(emphasis added). This means, according to Claus, that

> congressional spending via state grants must always be part of a federal spending program which will proceed in all states for the benefit of their populations whether state governments choose to participate or not. State governments may be offered the option of spending federal funds in accordance with the policy requirements of a federal program, but only where the federal government can and will implement the program directly should state governments choose not to do so.

Id. at 546. Thus, "Congress can never validly give states a choice between affording their citizens the benefit of federal money and declining to implement a federal regulatory scheme." *Id.* at 547. An assessment of this proposal is beyond the scope of this Article.

321. Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554 (1995). As Regan explains, inspiration for this approach comes from the sixth of the Virginia Resolutions, approved by the Constitutional Convention, which provided:

> That the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.

Id. at 555-56 (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 380 (W.W. Norton & Co. ed., 1966)).

322. *Id.* at 555.

323. The principal inadequacy, in our view, being the Court's suggestion, strongly reinforced in *Morrison*, 529 U.S. 598 (2000), that the permissibility of Commerce Clause regulation should depend upon whether the activity being regulated was itself commercial in

we are disposed to think there is much to recommend it—it is readily transferred to the spending power too:[324] expenditures and conditions thereto being constitutional only when some general interest of the union lies behind them—interests that would include overcoming collective action problems.[325] Moreover, the general welfare requirement might be thought to give the approach greater textual support as a limitation on the spending power than on the commerce power.

3. O'Connor and the "Regulatory Spending"/"Reimbursement Spending" Distinction

In her dissent in *Dole*, Justice O'Connor claimed to concur in the nominal four-prong test set out by the *Dole* majority,[326] but added that she would *apply* their "germaneness" requirement differently,[327] ultimately reaching a different result in the case.[328] In fact, however, as suggested earlier,[329] O'Connor would have imposed 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,'"[330] and seemed to cash out this requirement in terms of degree of directness. O'Connor, in contrast, would have operationalized the germaneness requirement in terms of acceptable degrees of over- and underinclusiveness. How much over- or underinclusiveness O'Connor would tolerate is unclear.[331] Arguably, though, she may be intending to require a "substantial relationship" between the funding condition and the proclaimed federal interest.[332]

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character. As we discuss above, *Guillen* is in arguable tension with this aspect of *Morrison*. *See supra* notes 170-73 and accompanying text. If the activity being regulated should be commercial for purposes of the "substantial effects" prong of post-*Lopez* Commerce Clause jurisprudence, why ought not a similar restriction apply to the first two prongs of that doctrine?

324. *Cf.* Regan, *supra* note 321, at 613 (opining that "an essay could be written about the spending power much like this essay about the commerce power, justifying most, if not all, of what Congress has done by reference to the general interests of the union or state incapacity").

325. Tellingly, the *Steward* Court relied upon precisely this sort of problem in upholding the federal unemployment compensation scheme created by the Social Security Act. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937):

> But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.

326. South Dakota v. Dole, 483 U.S. 203, 213 (1987) (O'Connor, J., dissenting) ("I agree that there are four separate types of limitations on the spending power."). Conspicuously, O'Connor made no reference to the de facto fifth prong, coercion. *See infra* text accompanying notes 340-41.

327. *Dole*, 483 U.S. at 212-13.

328. *Id.* at 212-13, 218.

329. *See supra* Part V.B.1.

330. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

331. *See supra* text accompanying notes 276-78.

332. *Cf., e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating New York law

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."[333] 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.'"[334]

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 shall be expended."[335] 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"[336] *is* a permissible "condition relating to how federal moneys [are] to be expended."[337] 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.[338] Nor does she elaborate on the difference she sees between the relationship this condition

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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"); 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); *cf. also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 640-44 (6th ed. 2000) (discussing standard of intermediate review in equal protection cases).

333. *Dole*, 483 U.S. at 216 (quoting United States v. Butler, 297 U.S. 1, 73 (1936)).

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

335. *Id.* at 218.

336. 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).

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

338. 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.

Id. at 218.

and the drinking age restriction each have with "the expenditure of funds for highway construction."[339]

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.[340] 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; 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."[341] 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,"[342] "the meaning of the Spending Clause,"[343] and the precedent established by the Court in *Butler*.[344] 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.

The test proposed by one of us (Baker) in 1995 sought to build upon the best elements of O'Connor's test while remedying some of the problems with that test outlined above.[345] Baker's proposed test can be concisely stated: those offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate, will be presumed invalid.[346] 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

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339. *Id.*

340. *Cf. Oklahoma*, 330 U.S. at 129-30 n.1.

341. *Id.*

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

343. *Id.*

344. *See id.*

345. For an extended discussion of this test, see Baker, *Conditional Federal Spending*, *supra* note 16, at 1962-78. For Berman's reservations, see Berman, *supra* note 61, at 55-57.

346. By regulations that Congress *could* "directly mandate" is simply meant regulations that Congress could enact pursuant to the direct regulatory powers granted it by the Reconstruction Amendments and the provisions of Article I other than the Spending Clause of Section 8, Clause 1. It does not include those regulations that Congress could currently enact pursuant to the Spending Clause, of course, because the test seeks to redefine the scope of the spending power, and must therefore start from the assumption that the limits of that power are undefined.

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.

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.[347]

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."[348] Moreover, the Court's notion of a permissible "federal interest" is seemingly boundless, expressly including even those regulatory objectives that Congress cannot achieve directly.[349] 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 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 Congress 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—that is, 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.[350] 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 imposes no clear limits on the

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347. It should also be noted that the germaneness inquiry under the *Dole* test is but one of five (mostly 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.

348. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

349. *See id.* ("[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)).

350. 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.

amount of money that may be made contingent on a state's compliance with a given condition.[351]

In order to understand why the proposed test seeks to distinguish between these two forms of legislation, and would invalidate only the regulatory spending type, consider the following pair of hypothetical enactments. In each case, if a state accepts the offer, the statute would regulate it in ways that Congress could not directly mandate.[352]

> (A) 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.
>
> (B) 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 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.[353]

Statute A is an example of reimbursement spending legislation. It simply specifies the purpose for which the states are to spend the offered 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 B, in contrast, is regulatory spending legislation that has both reimbursement and regulatory spending components. 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

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351. *See Dole*, 483 U.S. at 208-09. *See also supra* Part V.B.1.

352. 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, 514 U.S. 549, 564 (1995).

353. *Cf.* 42 U.S.C. §§ 13,701-13 (2000) ("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.* § 13,703(a), and have in effect laws which require that persons convicted of violent crimes serve not less than 85 percent of the sentence imposed, *id.* § 13,704(a).

The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§13,701-14,223 (2000), also includes the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, *id.* § 14,071, 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 ten percent of the federal funds that would otherwise be allocated to it under §3756 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711-97 (2000). *See* 42 U.S.C. § 14,071(g)(2)(a) (2000). For examples of the formula that the federal government currently uses to distribute "law enforcement" funds to the states, see 42 U.S.C. §§ 13,706, 13,754 (2000).

foot.[354] The regulatory spending component, which renders the entire statute impermissible under the 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 A and B provide states an incentive to make the death penalty available for first-degree murder convictions. From the perspective of a state that, prior to these federal enactments, preferred not to have the death penalty available for first-degree murder convictions, however, Statute A is surely preferable. Under Statute A, the cost to a state of not complying with the condition attached to the offered funds is much lower than it is under Statute B. Although a noncomplying 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 A to such a state is an opportunity cost:[355] 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[356] (and by which it will in fact be burdened)[357] instead of a project that the state would prefer. The cost of Statute B to a non-complying state, in contrast, is (a) the opportunity cost represented by that portion of the federal fisc—including its own

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354. Typically, municipal law enforcement is funded primarily by each locality and has historically constituted approximately five percent of all local expenditures. *See* U.S. Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism, Revenues and Expenditures, vol. 2, at 149 (tbl. 79) (1992) (local expenditures by function, 1948-1990); *id.* at 119 (tbl. 61) (local revenue by source, 1948-1990); *see also* CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 225-373 (2d ed. 1999) (discussing legal relationship between states and their subdivisions); OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 76-137, 156-83 (2d ed. 2001).

355. *See, e.g.*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 137 (17th ed. 2001) (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 higher grade on the exam. The opportunity costs of a decision include all its consequences, whether they reflect monetary transactions or not.
>
> Decisions have opportunity costs because choosing one thing in a world of scarcity means giving up something else. The opportunity cost is the value of the most valuable good or service forgone.

356. Although a noncomplying 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 noncomplying state.

357. Such legislation may burden a noncomplying 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 noncomplying state and who will therefore receive no direct benefit from this use of their tax dollars. Second, a substantial proportion of the residents of the noncomplying 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.

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

Of course, reimbursement-spending legislation such as Statute A will also impose costs on noncomplying states. These opportunity costs, 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 B impose costs in addition to these opportunity costs, and thus typically provide states a *greater* incentive to conform. 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, the normative distinction to be made between reimbursement and regulatory spending is one of degree rather than kind.

Thus, the problem is to decide where, on the continuum of incentives to conform that 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."[358] The 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 test proposed by Baker accepts the *Dole* Court's sense of "coercion" as "too much pressure," and, seeks to capture the distinction between impermissible "coercion" and permissible "encouragement" in its distinction between "reimbursement spending" and "regulatory spending" legislation. The test would draw a line between conditional offers of federal funds that impose opportunity costs on noncomplying states (permissible reimbursement-spending legislation), and offers that impose both opportunity costs and additional costs on noncomplying states (impermissible regulatory spending legislation).[359] Concededly, the line that Baker's

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358. *Dole*, 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

359. 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 noncomplying states will bear costs in addition to the opportunity costs that all federal funding statutes impose (and the offer of funds is therefore, by stipulation, "coercive"); and (2) that Congress is using its spending power to circumvent simultaneously the limitations of its regulatory powers (under Article I and the Reconstruction Amendments) and the Article V amendment process (thus the condition on federal funds is not sufficiently "germane"). 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. *Compare Dole*, 483 U.S. at 207-09 (discussing "germaneness" inquiry) *with id.* at 211-12 (discussing "coercion"

proposed test would draw between reimbursement spending and regulatory spending legislation may not always 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 imperfection, however, one must weigh the test's substantial advantages: the line the test would draw between "coercion" and "encouragement" is bright, straight, and readily and consistently drawn, and the test will afford the states principled and predictable protection from federal regulation to a greater extent than existing doctrine does.[360]

4. Coercion of a Different Color

We observed earlier[361] that *Dole* conceived of impermissible coercion by Congress as a correlative of involuntariness or unfreedom by the states: Congress may not coerce the states to comply with a spending condition where coercion means applying so much pressure—as measured by the disagreeableness to the states of doing without the offered benefit—that the states have no choice but to accept. We observed too that difficulties inherent in the notion of "no choice" make this approach hard to operationalize. Because the states will never have *no choice at all* but to accept, because it is almost unimaginable that a state will have *no practical choice* but to accept, and because other conceptualizations of "no choice" seem unadministrable or misguided, it is unclear what basis can exist upon which a court could conclude that the pressure exerted by any given conditional spending offer was "too much." One lesson would be to abandon all inquiries into coercion.

As we have just seen, however, this conclusion is not inevitable. Adopting a somewhat minimalist approach that denies any need to fully theorize the notion of "no choice but to accept,"[362] the Baker test accepts the core idea underlying the *Dole*

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inquiry).

360. Perhaps the clearest evidence that Baker's test will constrain Congress's spending power more than existing doctrine does is provided by a consideration of the federal legislation at issue in *Dole*. Assuming *arguendo*, as the *Dole* Court did, see 483 U.S. at 206, that the 21st Amendment precludes Congress from regulating drinking ages directly, the condition on funds at issue in *Dole* is presumed to be invalid under Baker's test: the test presumes invalid any conditional spending legislation that seeks to regulate a state that accepts the proffered funds in a way that Congress could not directly mandate. One then proceeds to determine whether the statute constitutes "reimbursement spending" legislation and therefore rebuts the presumption of invalidity. Under the challenged statute, the states receiving federal highway money must not only spend that money on maintaining and improving the highways within their borders (the "reimbursement spending" portion of the statute), they must also prohibit the purchase or public possession of alcoholic beverages by anyone less than twenty-one years old. This additional, regulatory component of the statute renders it regulatory rather than reimbursement spending, and the conditional offer of federal funds would therefore be found unconstitutional under Baker's test. For further discussion of how various enactments would fare under Baker's test and under the *Dole* doctrine, see Baker, *Conditional Federal Spending*, *supra* note 16, at 1978-88.

361. *See supra* Part V.B.2.

362. On judicial minimalism, see generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

Court's concern with "coercion"—namely, that the national government should not be allowed to put "too much pressure" on a state to accept a condition attached to the offer of federal funds—and then seeks to craft a doctrine that could effectuate this intuition without having to rely upon ad hoc gestalt judgments by each reviewing court. To that end, Baker proposes that courts conclusively presume that a spending condition exerts too much pressure when that condition threatens to impose costs on a non-accepting state beyond the opportunity costs that an offeree inescapably incurs by declining an offer. Admittedly, this test can only imperfectly operationalize the intuitive line between impermissible coercion and mere permissible encouragement, but offers substantial benefits in terms of administrability.

There is yet another possibility, though. Appealing loosely to the Dworkinian distinction between concepts and conceptions,[363] we might say that Part V.B.2 brought into question the *Dole* concept of coercion (an offeror—the federal government in these cases—engages in impermissible coercion when it confronts its offeree—here, the states—with a deal that the latter has "no choice" but to accept) by challenging the usefulness of any one of its possible conceptions (no choice simpliciter, no practical choice, no fair choice, no rational choice). If this is right, then before we give up on coercion *tout court* (as many courts have seemingly done),[364] or embrace a potentially very rough proxy (as the Baker test would do),[365] we might consider whether there exists any other concept of coercion (that is, a concept that does not turn upon the freedom or voluntariness of the offeree's choice) that could do appropriate normative work.[366]

Consider this scenario: Cain and Abel have agreed to write a law review article together and have divided responsibilities between them. When Abel is out of town, Cain calls him, threatening to enter Abel's office and rearrange the books unless Abel promises to write all Cain's footnotes. Abel does not much care how his books are organized but, being a generous soul, agrees nonetheless. It seems implausible to claim that Abel accepted involuntarily. Nor does there seem to be a meaningful sense in which Abel had no choice but to accept.[367] Given the "too much pressure" concept of coercion we have been working with, it would follow that no coercion is present here.

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363. RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1978). The appeal is loose because we are agnostic regarding whether the two distinct senses of coercion that we will soon invoke are better understood as distinct concepts or simply as different functions that coercion talk serves.

364. *See supra* notes 53-59.

365. *See supra* Part V.C.3.

366. The classic theoretical discussion of the optimal precision of legal rules is Issac 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).

367. This is a slight overstatement, for Abel's lack of choice would be consistent with determinism. We can ignore this possibility, though, because the very inquiry into whether a given individual had "no choice" in a particular circumstance presupposes either that determinism is false or that the sense of choice on the table is not the one that determinism denies.

But this is mistaken. On a familiar account, coercion is the making of a conditional threat to perform an act that would be wrongful to commit.[368] Because it would be wrongful for Cain to enter Abel's office without permission and rearrange Abel's books (admittedly, not *grievously* wrongful), Cain has engaged in the moral wrong of engaging in coercion notwithstanding that the prospect of the act threatened exerted insufficient pressure upon Abel as to make his acquiescence involuntary or unfree. On this view, what makes a proposal coercive is not that it puts "too much pressure" on the offeree to accept but that, by threatening to inflict a wrong if the offeree does not accept, it exerts a wrongful sort of pressure. To be sure, these two things will often coincide—an offeree will often experience an offeror's threat to do something wrongful as exerting so much pressure as to make his compliance feel unfree. Nonetheless, the measure of coercion on this account is the *character* of the pressure exerted, not its *magnitude.*

This observation has suggested to one of us (Berman) a different way to analyze unconstitutional conditions cases generally.[369] Applying this distinct sense of coercion—a conditional proposal is coercive (within a given normative system) if the act conditionally threatened would be wrongful (within that given system) if carried out—to the particular problem of conditional federal spending, it follows that a conditional spending proposal by Congress should be deemed unconstitutionally coercive if carrying out the act threatened—that is, withholding some or all of the specified federal funds—would be unconstitutional. Strikingly, this is the sense of coercion at work in *New York.*[370] The take-title provision "has crossed the line distinguishing encouragement from coercion," the Court explains,[371] because it threatens to impose a consequence—requiring that the states legislate in a certain fashion—that would be unconstitutional as amounting to forbidden commandeering.[372]

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368. *See, e.g.*, Berman, *supra* note 287, at 53-55; Martin Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL. 247 (1979); Vinit Haksar, *Coercive Proposals (Rawls and Gandhi)*, 4 POL. THEORY 65, 68-70 (1976).

369. The theory is set forth in Berman, *supra* note 61. The discussion in text presents an extremely simplified version of the full theory.

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

371. *Id.* at 175.

372. In proceeding to observe that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all," *id.* at 176, the *New York* Court seems to unite these two senses of coercion: the states have "no choice" but to accept precisely because Congress may not impose upon them the consequence it threatens. Yet "no choice at all" is unhelpful hyperbole. If A gives B the bad news that he, A, is determined either to pinch B's arm or to pull B's hair, and adds (the good news?) that A will allow B to select which unpleasantness she prefers to suffer, it would be a mistake to observe that B is confronted with "no choice at all." B has a very clear and real choice: to suffer an arm-pinching or to suffer a hair-pulling. The same is true of New York. So, in a more precise terminology, the Court may mean something like the take-title provision gives the states "no fair choice." But notice that unfairness in this picture simply means unconstitutionality: What makes the choice unfair is only that, as a matter of positive law, the act threatened would be unconstitutional. It is therefore the unconstitutionality of the act threatened, and not any extraconstitutional sense of unfairness, that is doing all the work in the analysis. This suggests a third possibility: the take-title provision gives the states "no constitutionally acceptable choice."

Now this formulation, finally, is precisely right (so long as we accept the Court's no-

Moving away from the federalism context altogether, this is also the sense of coercion that the Court deployed in *Nollan v. California Coastal Commission*,[373] a takings case decided just three days after *Dole*. In that case, the Court struck down a state offer to grant a land-use variance on the condition that the landowner convey a public easement. Justice Scalia, writing for the Court, explained that the proposal was coercive (a "plan of extortion" was his precise language) because it would have been unconstitutional under these circumstances for the Coastal Commission to carry out its threat not to grant the variance.[374]

One could accept that this rule—a conditional proposal is coercive (within a given normative system) if the act conditionally threatened would be wrongful (within that given system) if carried out—appeals to a coherent sense of coercion that is distinct from the sense, or concept, intimated in *Dole* and embraced by the Baker test, and yet suppose that it inescapably presents a slackening of *Dole*, not a tightening. Because federal funds to the states are a gratuitous benefit, the argument goes, it cannot be unconstitutional for Congress to withhold them. Under this test, then, conditional spending plans would *never* be coercive.

Not so. To be sure, states have no constitutional right correlating with a federal duty to disburse federal funds for local road construction or education or law enforcement or for any other purpose. In this important sense, federal funds are indeed a "benefit" as distinguished from an "entitlement." But they are not a benefit in the stronger sense of being a boon that Congress may withhold *for any reason or no reason at all.* Nothing is a benefit in this very strong sense. In particular, so the claim runs, government may not withhold a benefit (that is, make any entity worse off than it otherwise would be) for the purpose of punishing or discouraging the exercise of a right. Call it a "penalty" when government withholds a "benefit" for these improper reasons. If this is correct, then some conditional spending offers would prove coercive, hence unconstitutional,[375] because they threaten to withhold a putative benefit under circumstances in which what is being threatened is really imposition of a penalty. Furthermore, the conditional spending offer at issue in *Dole* is probably an example of just this sort of coercive proposal.

One may suspect that this approach proves too much because whenever the national government withholds money from a state on noncompliance with a condition it acts for the purpose of "punishing or discouraging" the state's right not to comply.

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commandeering rule as a constitutional given). But it is also woefully unartful. Speaking in terms of the states' choice situation adds nothing to the Court's far more direct point:

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.

Id. And the conclusion follows as an application of the principle, put forth in text, that it is unconstitutionally coercive to threaten what it would be unconstitutional to do.

373. 483 U.S. 825 (1987).

374. *Id. at* 837. For development of this thumbnail sketch of *Nollan* and how its vision of coercion compares to that advanced in *Dole*, *see* Berman, *supra* note 61, at 89-94; Berman, *supra* note 129, at 733-35.

375. Actually, coercion is only a presumptive constitutional wrong—that is, an infringement, not a violation. *See* Berman, *supra* note 61, at 21-22; Berman, *supra* note 287, at 49 n.14.

However, a hypothetical contrasting case helps illustrate both that this suspicion would be mistaken and that were the Court to adopt this different sense of coercion, the actual statute at issue in *Dole* would probably prove unconstitutional.

Suppose that by 1984 every state had a minimum drinking age of twenty-one, save South Dakota, whose drinking age was eighteen, and that every state had a minimum *driving* age of eighteen, save North Dakota which limited driver's licenses to persons over fifty-five. Wishing to induce a change in both state policies, Congress provided that a state would lose five percent of its otherwise allocable highway funds if it maintained a minimum drinking age under twenty-one, and would lose all of its highway funds for maintaining a minimum driving age over eighteen. In each case, Congress is threatening to withhold a benefit. But that alone cannot make either proposal coercive. On the account just sketched, the proposal is coercive if carrying out the threat would be unconstitutional, and carrying out the threat would be unconstitutional if Congress would be withholding the offered benefit for the purpose of punishing the state for, or discouraging it from, standing on its (presumed) sovereign right to set a drinking or driving age as it wishes.

Imagine, then, that the two Dakotas reject the condition. Now what interests justify Congress in withholding highway funds (five percent of funds in the case of South Dakota, 100 percent in the case of North Dakota)? With respect to North Dakota, the story might go like this. An unusually high minimum driving age leads to an unusually small number of cars on the roads, and to a correspondingly small number of accidents. Improving road conditions, therefore, could generate only a very small net reduction in accidents and thus of injuries and deaths. Every federal dollar spent on North Dakota road improvements, as a consequence, produces a much smaller social welfare benefit in North Dakota than it does in the other states. So if North Dakota (or any other state for that matter) insists on maintaining an unusually high minimum driving age, federal funds could produce a higher return in their next best use than in improving highways in that state. Thus, even without denigrating a state's decision to maintain a very high driving age, Congress might reasonably conclude that because the highways in such states will be so underused the national interest is not well served by improving them. In short, withholding the funds on failure of the condition need not serve any interest in punishing North Dakota or shaping state behavior—withholding the funds does not, that is, "penalize" North Dakota—so the conditional threat to withhold such funds is not coercive.[376]

This story is rather less plausible with respect to South Dakota, however.[377] To be

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376. Note that whether the conditional spending proposal threatens a "penalty," hence is "coercive," depends upon the purposes that the national government would have *when carrying out its threat* not to provide the offered funds. It does not depend upon the purposes that the national government has *in extending the proposal*. Naturally extending the proposal will be animated, at least in part, by a purpose of inducing the offeree states to waive their (presumed) sovereign right to legislate in a particular way. But it does not follow that carrying out the threat would likewise be animated by that purpose. And the North Dakota hypothetical is intended to be a case in point.

377. In the real world, of course, this story is not very plausible with respect to North Dakota either. For one thing, Congress could incorporate annual highway miles driven into the ordinary formula for allocating highway funds, in which case introducing driving age as a separate factor would be redundant. In fact it does. *See* 23 U.S.C. § 104(b) (2000). But this driving age

sure, improving road conditions and raising the minimum drinking age (from eighteen to twenty-one) might each increase net social welfare. But that is not the issue. The issue is whether the extent to which improving road conditions increases net social welfare is itself contingent upon the minimum drinking age. Or, put another way, the issue is whether the *increase* in highway safety that Congress would buy by giving a state funds with which to improve its highways varies depending upon that state's minimum drinking age, such that the higher a state's minimum drinking age (within the relevant range), the greater is the increase in highway safety that federal highway dollars purchase. Because if this is *not* the case, then withholding federal highway funds on failure of the condition does not serve a legitimate federal interest except as mediated by the forbidden purpose of punishing a state for its recalcitrance or (more likely) of discouraging the recalcitrant state and others from refusing the federal demand. That is, if $\$x$ spent on highway maintenance and construction would reduce highway accidents (or injuries or accident costs) y amount if the state has a minimum drinking age of eighteen *and* would reduce highway accidents (or injuries or accident costs) by the same y amount (albeit from a presumably lower baseline) if the state had a minimum drinking age of twenty-one, then Congress's withholding of any part of the $\$x$ upon the state's refusal to raise its drinking age could only be explained by a federal interest in punishing the recalcitrant state or in discouraging other states from similarly refusing the federal condition.

All of this is put conditionally. So, we must ask, what are the facts? *Is* the incremental value of road improvements smaller in states with lower drinking ages, all else being equal? A fully adequate analysis will be complex. But, we think, it is more than incidental that nothing in *Dole* or the relevant legislative history suggests even remotely that the answer is yes. And there is good reason to doubt it.[378] Assuming, then, that federal highway funds would produce as great an increase in social welfare when spent in South Dakota as when spent in a similarly situated state that differed only in the respect that it had a higher minimum drinking age, for Congress to carry out its threat not to provide South Dakota with its full allotment of funds would indeed be constitutionally impermissible for serving an impermissible purpose, thus rendering the conditional threat coercive.

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hypothetical is designed merely to show that not all conditional spending proposals involve threats to withhold federal funds under circumstances in which such withholding would be undertaken for an improper reason. It illustrates that proposition by showing what form a counterexample would take even if that counterexample could be challenged on other grounds. In any event, any objection to the example could be met by tweaking the hypothetical. So, for example, we could ask you to imagine that the technology necessary to measure annual highway miles driven does not exist or is prohibitively expensive to employ.

378. For a somewhat cursory discussion, see Berman, *supra* note 61, at 37-40. To be sure, we do not doubt that clever readers can hypothesize facts under which the *increase* in social welfare that federal expenditures on highway construction and improvement purchase does vary in inverse proportion to the minimum drinking age. Given such facts, the conditional funding proposal at issue in *Dole* would not threaten a penalty, hence would not be coercive. But such readers will also understand that the discussion in text is designed merely to illustrate how conditional spending doctrine could operate upon a very different sense of coercion than *Dole* adopted, and that the cogency of this different approach does not depend upon whether the statute upheld in *Dole* was or was not coercive under this alternative conception of that concept.

The upshot is that conditional spending programs could be distinguished from each other on grounds of whether they are coercive if we adopt a different sense of coercion than that featured in *Dole*—a sense that turns not on how onerous it would be for state offerees if Congress carried out its threat to withhold federal funds but on whether carrying out the threat would be wrongful in character because animated by the wrong sorts of reasons. That the spending program upheld in *Dole* would most probably fail this inquiry is strong evidence that a doctrine of this sort would constrain congressional spending power more than existing doctrine does.[379]

Of course, precisely because this approach inquires into congressional purposes and preferences its resolution will often be contestable.[380] Indeed, whether this inquiry is sufficiently determinate in practice as to itself constitute an adequately administrable judicial doctrine and, if not, whether an adequately administrable judicial doctrine can be crafted to satisfactorily (albeit imperfectly) implement the understandings of coercion and penalty just put forth, are important questions that the Court would have to confront were it attracted to this alternative conceptualization.

D. Summary

Whereas Part IV examined how Congress might employ the spending power to circumvent the Rehnquist Court's curtailments of congressional power, this Part has explored what sort of parry such a thrust might provoke. We argued that no Court, least of all the Rehnquist Court, should be expected to tolerate such circumvention.[381] Anticipating the possible objection that the Court could have no qualms about

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379. It warrants mention, if not demonstration, that Statute B hypothesized in the previous subsection, *see supra* text accompanying note 353, would probably be unconstitutionally coercive under this approach, as would the condition imposed by the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration Program, *see supra* note 353. To understand why the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants, *see id.*, in contrast, are probably not coercive, a little background is in order.

All federal spending is conditional: Congress offers $\$x$ on the condition that it be spent in a particular way (e.g., to build roads) or in exchange for a particular good or service. Call the condition, whatever it may be, y. But perhaps because the very notion of "spending" implies at least some conditionality, the phrase "conditional spending" is ordinarily reserved for those situations in which an *additional* condition is imposed, call it z. The conditional spending offer, then, can be represented as "$\$x$ if and only if $y + z$." The statute at issue in *Dole* is the paradigm: Congress offers $\$x$ if and only if y (the state uses that money for specified road improvements) and z (the state establishes or maintains a minimum legal drinking age of 21 or higher). The Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants seem to be different. Here Congress appears to be offering $\$x$ simply for y (juvenile sentencing policies that Congress happens to favor). This is not "conditional spending" as that term is generally used and, therefore, is not coercive because Congress will probably always genuinely prefer not to give out money with the requested quid pro quo. If that is Congress's true preference, then in withholding the offered benefit Congress is not acting with a purpose of punishing or discouraging the state offeree's presumed right not to comply with the congressional request.

380. Some critics will go farther, contending that the inquiry is incoherent. We think this is wrong, but cannot hope to develop the argument in this space.

381. The claim, it bears emphasis, is not that the Court should not tolerate such statutes as we have imagined, but only that it would be mistaken to expect the Court to do so.

Congress using the Court's spending doctrine as a blueprint from which to construct legislation, we explained that, stated so categorically, this view errs by ignoring the well-understood notion of a *loophole,* the related but not identical notion of *exploiting* a loophole, and the widely shared normative principle that exploiting a loophole is (frequently, at least) dirty pool.

We then argued that if the Court wants to strike down an exploitative spending statute designed to circumvent one of the Court's federalism rulings, it would have a variety of means at its disposal. First, the Court could very probably give *Dole* significantly greater bite without ostensibly changing the test at all. The relatedness and coercion prongs could each be tightened, but we think that such tightening is more likely with the former. Relatedness could be tightened in a way that is articulable, administrable and would prove fatal to most or all conceivable circumventions. Second, if tightening relatedness were found unattractive or inadequate for whatever reasons, the Court could replace or supplement the *Dole* test in any number of ways that would constrain conditional spending much more than *Dole* does.

So Parts V.B and V.C reveal, in short, that conditional spending jurisprudence could be much more restrictive of congressional power than it is at present. But they reveal something much more important too. It is critical to recall that we reached this consideration of alternatives by imagining that the Court (or, more precisely, a majority thereof) was provoked to action by what it considered an affront to its authority. An exploitation of the *Dole* loophole to circumvent an already announced judicial decision throws down the gauntlet in a way unlikely to be ignored. A circumventionist statute, therefore, is likely to provoke the Court to extend its states' rights revolution to the spending power even when it might not otherwise have done so, or at least to provoke an extension different in content than might otherwise have come to pass.[382]

This is not fanciful. For surely it is plausible that in other areas where this Court has cut back on congressional power, it was provoked to do so by what it perceived as particularly galling congressional effrontery. *Garrett*, for example, is arguably[383] a straightforward application of *Boerne*, yet without RFRA's challenge to *Smith*, this Court might have found a way to uphold the ADA under Section 5.[384] *Morrison* is arguably a straightforward application of *Lopez*, but had it not been for the GFSZA, this Court—at least Kennedy or O'Connor, either of whom would have been enough—

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382. *See e.g.*, Conkle *supra* note 130, at 680 (noting "a distinct possibility" that the Court might adopt new limits on the spending power "especially in the context of legislation that the Court might regard as a congressional attempt to circumvent its decision in *Boerne*").

383. Also arguably *not* a straightforward application, essentially for reasons put forth by Justice Breyer in dissent. For further development of this view, see, for example, Kramer, *supra* note 240, at 145-53; Post & Siegel, *supra* note 240.

384. *See* Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927, 935 (2000):

> I believe that the best account of *Boerne* is that the Court saw Congress's action in rejecting the Court's interpretation of the Free Exercise Clause as a direct challenge to the Court's authority—akin to a separation of powers concern—and used available federalism doctrine as the hook on which to hang its distaste for what Congress had done. Still, doctrine once articulated can take on a life of its own.

might have applied the pre-*Lopez* rational basis aggregation test to uphold VAWA. If our prediction that *Dole* is secure at least through the very near term proves right, then adoption of a circumventionist spending statute by the proponents of strong national power could be such advocates' biggest mistake.

CONCLUSION

Whenever talk turns to what Congress could or should do in response to the Rehnquist Court's cutting back of congressional power, the possibility of recourse to the spending power comes quickly to everyone's minds, for the reigning precedent, *South Dakota v. Dole*, has yet to be trimmed. Of course, *Dole* could be trimmed soon, perhaps substantially curbing the appeal of any possible spending-based "fixes" to recent federalism decisions. Yet the Court passed on an opportunity to revisit *Dole* this very term in *Guillen*[385] and, we think, is extremely unlikely to tinker with *Dole* either later this Term when resolving the pending challenge to the Children's Internet Protection Act,[386] or some distance down the road when considering RLUIPA.[387] If this prediction proves correct, then proposals to exploit Congress's substantial power of conditional spending to get around some of the recent limits imposed under the Commerce Clause and Tenth, Eleventh, and Fourteenth Amendments will, if anything, gain steam.

Accordingly, we then examined how spending power circumventions of various of the Court's recent federalism decisions might work and argued that this is a risky strategy. The risk is not simply that particular spending legislation may be struck down. That its enactments might be invalidated is a risk Congress always takes. The risk that ought to give Congress pause is that in striking down the circumventionist legislation, the Court could invigorate *Dole*, or replace it, in ways that would prove fatal to noncircumventionist uses of the spending power that would have sailed through in the absence of any such change in judicial doctrine.

This cautionary note may seem to be against interest. Given our view that *Dole* is a misguided and potentially harmful doctrine, we could be expected to stand among the first to applaud its demise. Yet all depends upon what replaces *Dole*. And ill-conceived congressional provocation is apt to engender just the sort of ill-conceived judicial reaction from which sound constitutional doctrine is particularly unlikely to issue.

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385. Pierce County v. Guillen, 123 S. Ct. 720 (2003).

386. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406-07 (E.D. Pa. 2002), *probable jurisdiction noted*, 123 S. Ct. 551 (2002).

387. 42 U.S.C. § 2000cc (2000); *see also supra* Part III.B.