Chapman Law Review

Volume 4 Spring 2001 Number 1

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# Standing and Spending—The Role of Legal *and* Equitable Principles

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## INTRODUCTION

The stated purpose of this Conference is to examine the proper scope of the spending power: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, and to pay the Debts and to provide for the common Defence and general Welfare of the United States."[1] My assignment is to track the relationship, if any, between the expansion of the spending power and the articulation of the standing doctrine as a principle of American Constitutional law. The connection, between the two, displays at least historical intimacy. The rise of modern standing doctrine in American Constitutional Law can be traced with some precision to Justice Sutherland's opinion for a unanimous Supreme Court in *Massachusetts v. Mellon*, and its companion case of *Frothingham v. Mellon.*[2]

The substantive dispute in those cases asked whether the so-called Maternity Act[3] lay within the Congress's spending power by authorizing federal expenditures of funds to the states for the purposes of promoting maternal and infant health. The gist of the challenge, had it been heard, was whether Congress could accomplish through grants under Article I, § 8, cl. 1 what it could not

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1 U.S. CONST. art. I, § 8.

2 262 U.S. 447 (1923) (consolidated actions).

3 Act of Nov. 23, 1921, ch. 135, 42 Stat. 224.

accomplish through direct regulation under the restrictive reading of the commerce clause as it was construed in 1923 before the Supreme Court's 1937 decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp*.[4] The serious constitutional attacks on this program were deflected on technical grounds when Justice Sutherland held that neither the state of Massachusetts nor one of its citizens, Mrs. Frothingham, had the standing to bring suit to enjoin Mellon, the Secretary of the Treasury, from distributing funds pursuant to the statutory mandate. The political impulse behind *Mellon*, or at least the political consequence of *Mellon* was at root no different from that behind *Jones & Laughlin*. In both cases, the Court's considered judgment was that no structural limitation found the Constitution blocked—or should be allowed to block—Congress from wielding the dominant oar in the formation of national policy on maternal care, or indeed on just about anything else.

To state that conclusion, however baldly, is one thing. To explain why it was mistaken to press a doctrine of standing to achieve that end is quite another. In this paper, I hope to show against the wisdom of my own teacher, Alex Bickel,[5] that whatever the appropriate interpretation of the spending power—and I endorse Madison's view that it does not give power to Congress to spend for ends that it could not regulate, or which were not incidental to the operation of its other powers[6]—the expansion of Federal power was aided by importing a standing requirement into the Constitution that often operates at cross purposes with the function of judicial review that the Court assumed in *Marbury v. Madison*.[7] Quite simply, the harder it is for individuals to make their way into federal court, the more difficult it is for them to challenge actions as falling beyond the scope of Congress.

In many instances, this point is surely overdrawn. Let this plaintiff be sent packing, and another plaintiff will be able to find a separate platform on which to raise the same claim. On this view, the standing requirement serves the function of seeing to it that the right cases get to the Court in the right sequence, assuming that we know what this is.[8] But in many cases, including *Mellon*, the follow-on charge never came because no one could get standing to challenge the Maternity Act. In other contexts, however, when a party with the standing comes, his arrival is too little

4 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

5 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

6 *See* THE FEDERALIST NO. 41 (James Madison).

7 5 U.S. 137 (1893).

8 See Maxwell Stearns, *Standing Back from the Forest: Justiciability and Social Choice,* 83 CAL. L. REV. 1309 (1995), and Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995), for a discussion of standing as a sequencing device.

and too late with respect to programs that have become embedded in the American political fabric. So understood, the standing doctrine operates as a partial overruling of *Marbury*. In addition, it must be remembered that the doctrine of standing does not operate, as it is sometimes assumed, only for cases that reach the Supreme Court. It also governs all cases and controversies that arise anywhere within the *federal* system as a whole. It is therefore a mistake to understand the doctrine chiefly in its relationship to the Supreme Court and the mysteries of its own docket management. Other tools, such as a simple denial of certiorari can easily accomplish that function. Rather, the doctrine of standing should be understood for what it purports to do—limit the access to federal courts when a particular plaintiff has come forward to voice a specific grievance against the named government defendant.

This dissatisfaction with the standing doctrine is not new, and has been expressed by many commentators. In most cases, the position taken is that the private law doctrines of standing cannot be used to deal with matters of the administrative state. This point is not unique to the American system, for it also frames, without any constitutional baggage, the discussion of standing under English as well as Administrative Law. In their leading treatise on the subject,[9] Wade and Forsyth begin their discussion by an account of the "old law of standing" which notes that the common law system of standing, with its emphasis on individualized injury, does not work in a public law context:

> In private law that principle [of limited standing] can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to anyone in particular. If no one has standing to call it to account, it can disregard the law with impunity—a result that would 'make an ass of the law'. An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down.[10]

These same sentiments have often been expressed, and rightly, about the structure of American law. The basic problem of judicial administration is more or less the same as in England, but the subject has been tied up with such matters as separation of powers, the proper interpretation of Article III, and our general

9 *See* WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW (7th ed. 1994).
10 *Id*. at 696 (footnote omitted).

constitutional legacy. The upshot is that under the current federal constitutional rules of standing, litigants are less able to challenge unconstitutionality or illegality under the American system than their English brethren can challenge illegality under their Parliamentary system. One intriguing explanation for the position, urged by my colleague Cass Sunstein, is that the Supreme Court uses the doctrine of standing to mount a covert rearguard effort to restore the virtues of the *Lochner* era.[11] The basic argument is that *Lochner* privileges are in some sense common law entitlements, and it is just these entitlements that give people access into federal court, so that novel claims brought on behalf of the beneficiaries of the administrative state received a chillier judicial reception than actions sought to vindicate a common law right.[12]

I have little doubt that the American doctrine of standing is in a sad state of disrepair, but differ with Sunstein as to how the issue should be approached. His critique shares one element with the position taken by Wade and Forsyth, namely that a distinctive doctrine of standing is needed to account for the development of public administrative law. It also seeks to locate the American reticence on this point in the rearguard effort to preserve some fragment of the *Lochner* era. I disagree with both points.

Turning to the last point first, historically, the doctrine of standing in American constitutional law was crafted by the progressives who were anxious to insure that their political initiatives, such as the Matrimony Act, and later, the Tennessee Valley Authority,[13] could be shielded from judicial attack.[14] Frankfurter and Brandeis led the initial charge, and Alexander M. Bickel, their protégé, defended their handiwork in the next generation.[15] The variation of the standing litigation that Sunstein attacks is one that allows the regulated party to attack the sanctions imposed while the unregulated beneficiary is not able to spur the Court into action should the regulated party succeed at an administrative level. Yet it is a mistake to assume that most, let alone all, standing cases have assumed that configuration. Equally important in the welfare state are those programs where the direct

11 *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of American Law*, 88 COLUM L. REV. 1432, 1434-36 (1988) [hereinafter Sunstein, *Standing*]; Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992) [hereinafter Sunstein, *After Lujan*].

12 *See* Sunstein, *Standing*, *supra* note 11, at 1434-36. "The use of common-law notions, sharply distinguishing between statutory benefits and nineteenth century private rights, was the central mark of the jurisprudence of the *Lochner* period." *Id*. at 1436.

13 *See, e.g.*, Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938) (competitive injury suffered by private power companies was *damnum absque injuria*); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939). *See* discussion *infra* note 16.

14 *See* Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1443-52 (1988); Sunstein, *After Lujan*, *supra* note 11, at 179.

15 *See* BICKEL, *supra* note 5.

beneficiaries of federal or state largesse are insulated from attack for the receipt of subsidies that either advance comprehensive programs of redistribution on the one hand, as in *Mellon*, or which cause great financial loss to private competitors on the other.[16] In addition, many cases that improperly invoke standing have nothing whatsoever to do with matters of economic liberties, but rather deal with challenges of grants or property distributions to religious organizations or with the operation of the CIA or the scope of the Endangered Species Act. It is hard to see any *Lochner*-like impulse rising up to allow these suits, even though they are clearly warranted on the general approach that I advance here.

In principle, moreover, it is possible to marry any conception of standing with any approach to substantive constitutional provisions. In this context, the modern conservative opponents of *Lochner* include the leading defenders of a restrictive standing doctrine on the Supreme Court, most notably Justice Powell and Justice Scalia.[17] The concerns they raise have nothing to do with a partial effort to resurrect substantive due process, but are directed to the issues that they discuss: judicial competence; separation of powers; concrete instantiation of disputes; and redressibility of grievances. Indeed a close reading of *Mellon* makes it clear that every single argument subsequently used to fortify the standing doctrine is stated with regrettable clarity in Justice Sutherland's initial judicial foray.[18]

Second, on the analytical front, a mistake in both the English and the American systems is to think that the modern doctrine of standing requires a uniquely public law pedigree. Quite the opposite I think that it is better understood and applied by marshaling the full resources of the private law to the task. More specifically, it becomes absolutely critical not to run together the phrases "the common law" and "the private law" as though they were synonymous, when in fact they are different.[19] The private law comprehends all suits between private parties and covers both the common law courts *and* the courts of equity,[20] which before the twentieth Century operated as distinct courts both in England

16 *See, e.g., Alabama Power,* 302 U.S. at 479, discussion *infra* note 57 and accompanying text.

17 See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), for Justice Scalia's decision following his earlier views as stated in Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *Doctrine of Standing*].

18 *See* Massachusetts v. Mellon, 262 U.S. 447 (1923).

19 The equivalence is found through both Sunstein articles. *See, e.g.,* Sunstein, *After Lujan, supra* note 11, at 163. "In the context of standing, the reluctance to take this step has been embodied in a *private law* model of standing—that is, in the idea that standing should be reserved principally to people with *common law* interests and denied to people without such interests." *Id*. at 187 (emphasis added).

20 *See* FREDERICK W. MAITLAND, EQUITY (2d ed. 1969) on the history of this subject.

and in many of the United States, and which were distinguished chiefly by the remedies that they offered for certain violations of law—specific performance, injunctions, foreclosures and the like, often on a discretionary basis. Understanding how the private law works in total requires understanding where these equitable principles reinforce common law rights and where they go still further, particularly in fashioning various kinds of structural injunctions. The modern law of standing does not require any repudiation of private law models. Rather, it calls for their faithful application to both sides of the legal/equitable divide. There is in short no need to develop a distinctive set of standing principles for the administrative state.

Stating the overall problem of standing in this fashion leads to the obvious question: wherein lies the source of this technical obstacle to the assertion of judicial power, not only in the cases involving Congress's spending power, but outside that realm. In seeking to understand the problem, it is surely worth noting at the outset the term "standing" nowhere appears in Article III, which provides that "the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."[21]

In reading this language I assume that a "case" covers any case where the interest of two parties are adverse to each other—that is, that it operates as a word of limitation only insofar as it excludes the use of advisory opinions, which everyone regards as outside the scope of the federal judicial power. But I do not think that it imports any arcane meaning that recognizes only certain kinds of legal disputes count as cases for the purposes of constitutional law. Indeed the words "all" and "extend" carry with them expansive, and not restrictive, meanings. By the same token, the term "equity" refers to the Chancellor's equitable jurisdiction. To be sure, the anti-royalist sentiment of the early founding period made many people reluctant to confer equitable powers on both federal and state courts. But that movement did not win out in the end precisely because injunctions and specific performance are needed in too many ordinary disputes that come into both federal and state court. The key issue here is therefore not the existence of a dispute over the exercise of equitable jurisdiction, but the clean victory that the proponents of equity achieved, as evidence in the parity found in the expression "cases in law and equity."

This reading of course makes good sense wholly without any reference to the term standing or the ideas that it imports. The

21 U.S. CONST. art. III, § 2. The point has been duly noted in Sunstein, *After Lujan*, *supra* note 11, at 168.

want of the word "standing," however, does not necessarily entail the death of a doctrine. By way of comparison, surely the Constitution cries out for some police power limitation on its explicit guarantees of individual rights, even though the words "police power" appear nowhere in the Constitutional text.[22] By the same token, however, the task of implication should never serve as an open sesame for judicial invention. Rather, implied limitations on explicit provisions should always face an uphill struggle, lest they wipe out the substantive guarantees they are supposed to restrain.

The question then arises how any putative limits should be determined and applied. In answering that question, I propose what I believe to be the *only* methodology that allows for the coherent interpretation of difficult constitutional texts. My approach derives the standard doctrines of constitutional law by examining the analogous principles of private law, comprehending both its common law and equity sides. The approach is surely not confined to the standing doctrine. The background constitutional norms—be they of freedom of speech or religion, of private property, of contractual obligation—all gain their salience from the role that freedom, property and contract play in organizing the rights and duties between ordinary private individuals. To determine what it means for the state to take property from a private person, first determine what it means for A to take the private property of B.[23] And so it is that we quickly understand that takings include not only outright dispossession but also lesser limitations on any of the bundle of property rights—the right to exclude, the right to use, and the right to dispose of property—but not the right to use force or commit nuisances against neighbors. Similarly, in determining how far freedom of speech and religion extends, a good place to start is with the rightful restrictions that one person can impose on the speech or religious liberty of another. So assaults, defamation, frauds, and human sacrifice do not gain constitutional protection in order to advance the cause of "freedom." Any individual is entitled to stop these actions by his neighbors. But it is often difficult for any individual to prevent these actions before they take place, for no one knows who the robber or the reckless driver will hit. The state uses public force to coordinate the enforcement of these diverse individual interests in a systematic and disinterested fashion.

The same analytical approach carries over to the law of standing. Private law doctrines contain all sorts of rules that address

22 *See, e.g.,* Mugler v. Kansas, 123 U.S. 623 (1887). See ERNST FREUND, THE POLICE POWER (1904), for one exhaustive account of what it entails.

23 See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35-38 (1985), for a greater elaboration of this approach.

the question of *which* individuals are allowed to seek redress from what wrongs. Once these principles are understood, they supply the necessary vantage point for understanding the uses and limits of the standing doctrine in public law, both in spending clause cases and beyond. In reply, an objection is, that it is treacherous business to move from legal doctrines that govern in courts that have plenary jurisdiction to the federal courts whose jurisdiction is limited to a specific set of cases and controversies. Indeed, it is this point that moves Justice Scalia when he argues that standing, far from being an outgrowth of general private law issues, is treated as part and parcel with the doctrine of separation of powers.[24]

Yet it is possible to offer two strong responses to that position. First, the English courts have plenary jurisdiction and yet they also incorporate into their administrative law some doctrine of standing as a limitation on private suits.[25] It follows therefore that to the extent that these doctrines are at play in connection with courts of unlimited jurisdiction, then they carry over to courts whose powers are confined to specified causes. Second, the distinctive limitations on the federal judicial power do not come from the terms "case" or "controversy" but from the delineation of the three types of case so listed, which is then supplemented by the remaining types of cases so enumerated. The difference between plenary and limited jurisdiction does not need a doctrine of standing to explain it; nor does it require any special meaning be attached to the word "case." It only requires us to read through to the end of Article III, section 2 to find which cases and controversies fall within the jurisdiction of the federal courts.

How then should one understand standing? One common view is that standing does not raise any separate problem at all, but must be understood against the backdrop of the substantive law. Thus Professor Fletcher writes: "The essence of the true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked."[26] But this formulation misses the distinctive nature of the standing claim. To see why, it is instructive to break down the issue into two separate questions. One is whether

24 *See* Scalia, *Doctrine of Standing*, *supra* note 17. His point derives from Sutherland's original decision in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). *See* discussion *supra* note 18.

25 *See* WADE & FORSYTH, *supra* note 9, at 696-718.

26 William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988). *See also*, David P. Currie, *Misunderstanding Standing,* 1981 SUP. CT. REV. 41, 43 ("Whether the answer is labeled 'standing' or 'cause of action,' the question is whether the statute or Constitution implicitly authorizes the plaintiff to sue.").

standing is a *necessary* condition for a cause of action, and the other is whether it is a *sufficient* condition for the cause of action. To the extent that one asserts an equivalence between the standing and the cause of action issues, it looks as though both of these conditions should be satisfied. But clearly it is possible to find cases where a party has standing to sue even though he does not have a cause of action. The defendant shoots the plaintiff. Surely the plaintiff has standing to sue for that injury. Yet standing is not a sufficient condition for recovery. Thus the plaintiff does not have a cause of action if the shooting was accidental, and the substantive law required proof of either negligence or intention for the action to go forward. The point here is that the plaintiff has standing in the sense that he is, as will be developed later, one person who is in the best position to urge that some relief should be granted—and remains in that position even if his case is dismissed on the merits. But the semantic equivalence at common law between standing and a cause of action is broken. Standing looks as though it were a necessary condition for a cause of action, but not a sufficient one.

At this point what establishes the standing as a general matter? One obvious answer is that the standing requirement is met when it is shown that the plaintiff has suffered "harm," even if the other elements of the cause of action are not satisfied. For the moment, I shall put aside all the heavy freight that is attached to this term, and content myself with the observation that the Supreme Court has understood the doctrine of standing, and in good tort-like fashion tied the doctrine to the frequent cases where individuals seek *redress* for personal grievances, usually by invoking principles of corrective justice—that is, those principles, compendiously described that stress the wrong that this defendant has done to that plaintiff. But its effort to locate the doctrine of standing with tort doctrines has led to the fatal mistake in this area, which is to ignore a second class of cases, which commonly were brought in the courts of equity in which a single individual sues not for individual redress, but to preserve the *structural limitations* found in our or any other constitutional order.

The difference lies in the kinds of remedies that are sought: the common law typically awarded damage for invasion of a specific right. The courts of equity could fashion complex remedies by way of injunctions, damages, reorganization, prohibitions, and foreclosure that were designed to stabilize and recreate long-term interests among multiple parties. In some of these cases the equitable relief was designed to regulate conduct between strangers: the injunction of a nuisance for example. Such cases fit easily within the tort category by supplying remedies against strangers. But in other cases, such as derivative actions and reorganizations,

the courts of equity entered into more complex areas by intervening into the governance structure of voluntary associations and other collective entities. It takes a certain ingenuity to find in the phrase "all Cases, in Law and Equity" some magical limitation that prevents the exercise of judicial power when plaintiff asks for equitable relief in cases that fall into this second category. Quite the opposite, the Constitution created a fusion in the federal courts that took a good deal of time to implement in many of the states and in England. The grant of jurisdiction in equity thus invites the use of federal courts to use structural remedies in those cases of equitable jurisdiction that call for it, and to devise remedies to deal with the conflicts of interest that inevitably arise in dealing with these multi-dimensional matters. In this regard the ambiguity in the formulation of the problem offered by Wade and Forsyth should be now evident. It is not correct to say that "no particular person is injured" when the state grants a planning approval or allows the showing of the indecent film. Rather, it is that a great many individuals are all injured by some small but perceptible amount. The task of courts of equity was to develop rules that allowed the amalgamation of small interests. As will become clear, the rise of the standing doctrine has depended at critical junctures on the denigration of the equitable powers of the court.

It is now possible to identify the two ways in which the law of standing has veered from its correct course. The first of these has been to give a narrow and indefensible definition of "harm," which can be traced for the false insistence that standing and cause of action are in some sense equivalent concepts. But even after that mistake is cleared away, a greater vice remains—the insistence that a plaintiff show a redressible interest for some individuated wrong in order to obtain relief from a structural wrong.[27] Unfortunately, the structure of current standing law applies the same requirements for both classes of claim: to the corrective justice claims and the totally different issues raised by the structural challenges. Thus the hornbook requirements of standing under current law hold that for *all* cases the plaintiff must have suffered what is termed an " 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical" '."[28] Next, in good common law style today's hardy plaintiff must show the "causal connection between the injury and the conduct complained

27 *See e.g.*, Valley Forge Christian College v. Americans United, 454 U.S. 464, 488-90 (1982).

28 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (setting out the requirements) (citations omitted).

of."[29] The explication of this doctrine moves unerringly to the doctrines of causal intervention, by stipulating that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' "[30] And last, again in terms that echo the common law requirement for proof of damages, the harm "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'."[31]

It is for good reason that exhaustive examinations of the early law of standing do not reveal any of these requirements.[32] Had they been present, then the entire tradition of equity jurisdiction would have been dismissed as irrelevant to determining the scope of constitutional powers. I think that the direct injury test—which itself has been misunderstood—wholly misunderstands how the doctrines of standing are used in private law adjudication, both at common law and in courts of equity. The simplest way to state the point is to note that the rules for issuing an injunction in equity need not track closely those for awarding damages at common law, and that this distinction turns out to be most relevant in cases that seek to obtain structural relief and not individual redress. The former necessarily depends on the *fungibility* of plaintiff's interests with other persons similarly situated; in contrast, the latter depends on the demonstration of special or distinctive wrong. In order to show the interplay and the distinction among these various issues, I propose to look first at the full range of cases that call into question the standing doctrine—not always under that name—in private law suits both in law and equity. Accordingly, Part I of this paper begins the analysis of the private law doctrine of standing by building on four common law decisions, *—Ashby v. White*,[33] *Vosburg v. Putney*,[34] *Tarleton v. McGawley*,[35] and *Anonymous*,[36] a 1535 decision that articulated the rules for private suits against the creators of private nuisances. I shall then look at the way in which the standing doctrine plays out in contract and corporation cases.

Part II of this paper then carries over the fruits of that analysis to the public law arena in order to dissect the analysis of standing in the Supreme Court case law. I shall begin by providing a

29 *Id*.

30 *Id*. (alteration in original).

31 *Id*. at 561.

32 *See, e.g*., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1443-52 (1988); Sunstein, *After Lujan, supra* note 11, at 167-79. See WADE & FORSYTH, *supra* note 9, at 696-718, for a short English account.

33 90 Eng. Rep. 1188 (1702-03).

34 50 N.W.2d 403 (Wis. 1891).

35 170 Eng. Rep. 153 (K.B. 1793).

36 Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535), *reprinted in* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 706 (7th ed. 2000).

detailed analysis of *Massachusetts v. Mellon*, and then work forward selectively to the modern day, taking into account first those cases in which the "direct harm" requirement is relevant, but misconstrued, and then those cases that deal with structural harms. My purpose is to show the conceptual poverty of a legal approach that seeks to use the same rules to govern individual grievances and structural challenges. In light of this analysis I hope to explain the important role that citizen and/or taxpayer suits should play in determining standing under Article III. These limitations matter, for often times noncitizens, like nonshareholders, should not be entitled to bring suit. But stated in that fashion, the doctrine of standing is far simpler, and far less important, than under the current view.

Finally, in part III, I shall address in connection with the standing doctrine an issue that is implicit in equity cases but largely irrelevant in ordinary tort suits. What should be done in those cases when the individual plaintiff does *not* in fact, either as shareholder or citizen, have an interest that is in common with those of other individuals that he purports to represent. The question here is to ask how, once these equitable suits are allowed in Federal Court, the judicial powers should be exercised in ways that take into account the interests of the full range of parties who support and oppose the initial action. In this regard I shall address questions of joinder of party, choice of remedy, and the ability of Congress to confer standing on citizens and taxpayers by legislation.

## I. The Private Law of Standing: Torts

My first illustration is the famous English decision of *Ashby v. White*.[37] The issue before the Court of King's Bench was whether Matthew Ashby stated a cause of action when he alleged that the defendants, local constables, had wrongfully excluded him from voting at Ailesbury to elect two burgesses to represent that Borough in Parliament. The decision does not say which higher-up, if any, ordered these lowly constables to exclude the plaintiff from the polls; nor does it speculate on their motivation. A majority of the King's Bench denied the plaintiff any relief at all. Holt, C.J. dissented insisting that "it is not at all material whether the candidate, that he would have voted for, were chosen, or likely to be, for the plaintiff's right is the same, and being hindered of that, he has injury done him, for which he ought to have remedy."[38] On appeal the House of Lords sustained his judgment.[39]

37 90 Eng. Rep. 1188 (1702-03).
38 *Id.* at 1189.
39 *Id.*

*Ubi ius*, *ibi remedium*—where there is a right, there is a remedy. In Lord Holt's hands the tort law shows a flexibility that allows it to move far beyond the ordinary cases of beatings and automobile accidents. Alas, it is here that the complications begin. Just what remedy does this plaintiff have? The use of the action on the case indicates that the plaintiff himself had elected to sue for damages, and did so under an all-purpose writ that is not tied to any one substantive theory. Surely, Ashby did not seek to invalidate the election or to install his preferred candidate in office. But now the questions fly thick and fast. What is the appropriate measure of damages? Does it cover only the visible displeasure of being excluded from the exercise of a right? —and to Holt it was a property right "by reason of his freehold."[40] Or does it take into account the possibility that this particular vote could have altered the outcome of the election, even though that did not happen in this case? What should be done if more than one person had been excluded from the polls?

The inquiries can run wider. In thinking about the case, is it permissible to ask whether the exclusion of the plaintiff was anticipated by or known to other potential electors whose own conduct was altered, such that if all their votes had been combined together, the outcome in question would have been changed in a manner to the plaintiff's liking. If it could have been shown that the single vote would have altered the outcome of the election, what then would have been the appropriate measure of damages? Then, there are institutional questions. Parliament (like Congress) normally has control over the admission of members to its ranks. Did the personal action brought by Ashby trench on the power of Parliament to determine who shall sit in its membership? Should other individuals, including the candidates have the power to challenge the outcome of the election even if Ashby had chosen not to sue?

*Ashby* looks quite different from an ordinary torts case such as *Vosburg v. Putney*,[41] in which the plaintiff brought suit for extensive damage below his knee that he claimed had resulted from a intentional kick by the defendant, albeit one that meant no harm. It raises questions about the precarious position of the extra-sensitive plaintiff, the implied license of the playground, the mental state needed to establish unlawful intention, the relationship between assault and battery, and the differences in damage rules for contract and tort. It also sports a complex sociological history about the local tensions that erupted between the plaintiff,

40 *Id.*

41 50 N.W.2d 403 (Wis. 1891).

a sickly local farm boy, and the defendant, the son of one of the most powerful families in town.[42]

Yet the complexities between the two cases conceal what look to be very different centers of gravity, and it is around those differences that much of the law of standing necessarily resolves. In *Vosburg* we have no difficulty—or at least we think we have no difficulty—in answering the threshold question of all lawsuits: why is this plaintiff suing this defendant, and what remedy does he hope to achieve? The obvious plaintiff is the party who sustained the physical injury; and the only remedy that makes any sense for him is damages for redress of this injury, so long as the defendant was its cause. Now that the injury is past, he does not need injunctive relief when the possibility of a recurrence is virtually nil. It looks as though this suit is a pure action for the rectification of a particular harm that falls well within the customary province of the tort law. Aristotle's model of corrective justice calling for compensation from A to B for harms inflicted fits quite well,[43] whether we think corrective justice is an end in itself, or a means to advance some consequentialist—that is, some utility or wealth maximizing goal of the law. The plaintiff, we might say, has *standing* to sue because he has suffered (or claims to have suffered) an injury in fact. And we can think of no plausible definition of harm inflicted that is so narrow as to exclude physical injuries that result from a direct blow.

So *Vosburg* seems to suggest the standing question solves itself in physical injury cases. But we can make the analytical problem more complicated in a perverse but instructive way, by expanding the circle of harm. Thus we can ask whether or not the parents have a separate right of action to recover their medical expenses, or perhaps even the loss of familial rights stemming from his particular injury. At this point we have to expand the doctrine of redressible injury to cover cases of loss of consortium, a move that American (but not English) courts have been prepared to do when the one spouse sues for his or her personal loss from the death or injury of a spouse.[44] But the cases on whether parents can sue for the loss of consortium of a child is a matter that meets divided opinion and stout judicial resistance.[45] Still, does

42 *See* Zigurds Zyle, *Vosburg v. Putney: A Centennial Story*, 1 WIS. L. REV. 877 (1992).

43 *See* ARISTOTLE, NICOMACHEAN ETHICS, Book 5, Ch. 4 *reprinted in* 8 GREAT BOOKS OF THE WESTERN WORLD 339, 379 (W.D. Ross trans., 2nd ed. 1990) (treating "the justice in transactions between man and man").

44 *See* RICHARD A. EPSTEIN, TORTS § 17.10, at 451-53 (1999) for a discussion. *See also* Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. 1950) (for the key decision extending the right of consortium from husbands to wives). *See* Administration of Justice Act, 30 & 31 Eliz. 2 § 2 (1982) (for the abolition of all actions for loss of consortium in England, and abolishing all such actions for parents, children and menial servants).

45 *Compare* Borer v. American Airlines, 563 P.2d 858 (Cal. 1977) (denying action for death of children), *with* Berger v. Weber, 303 N.W.2d 424 (Mich. 1981).

*Vosburg*, or more importantly, the garden variety intentional tort pose a situation in which we can credibly deny that the aggrieved husband, wife, or parent has suffered some injury-in-fact? Certainly we cannot take the position that a husband is indifferent to the death of his wife, the wife to the death of her husband, or either to the death of the child. If there is an injury in fact, then why is there sometimes no right to claim redress for the loss in question?

If we are cleverer still, we can extend the circle one step further and ask whether any person, including those who are unrelated to the plaintiff by blood or marriage—I skip over the case of the second-cousin once removed— could recover for the disruption of friendships and associations that predated the onset of injury. There is some obvious difference between individuals in the third circle and those who inhabit the second. As a general matter, we can be confident that more people inhabit the third circle than do the second, but that each of these suffer smaller disruptions in their personal and professional lives than do putative second tier plaintiffs. But if the question is whether they are indifferent to the physical harms suffered by the person who sustained physical injury, the answer to that question is again an emphatic no. So if they have suffered an injury in fact, then why aren't they all entitled to have standing as well? We have drawn such lines in the bystander emotional distress cases.

Finally—for it hardly pays to go any further—if we are truly clever, we can ask the question of why every person who had some positive probability of forming some gainful association with the plaintiff could not recover for that lost probability. No heroic assumptions are required at least if, to paraphrase Holt, C.J., it is irrelevant that he would have enjoyed the benefits of that relationship, or was likely to enjoy that relationship. Once again, do not ask for whom the bell tolls; it tolls for thee, under the philosophical doctrine of internal relations. If all of us are diminished, why is it that only one of us, the direct victim of the loss is assured standing?

From these hypotheticals, it should be evident that the idea of "harm" associated with some wrongful act is not confined by some logical dictate to the direct physical consequences of a blow. Rather, we can arrange the individuals who suffer from these harms in concentric circles, with the physical victim at the center. The decision on whether or not to allow individuals in the outer rings to bring suit necessarily entails an interplay of social factors that are not captured in any one-dimensional definition of harm. Wholly apart from any constitutional or jurisdictional demands, the social task is to figure out what set of actions should be allowed to serve social objective, such as Guido Calabresi's claim

that the tort law is structured to minimize (the sum of) the costs of these harms, the cost of their prevention and the cost of their adjudication.[46] Trying to approach that question in the round is difficult to say the least since no one carries a social welfare function about in his head. But we can make progress in that direction by asking whether or not the addition of a given cause of action into the mix improves the overall situation. And when we do this, the direct harm requirements that play such a large role in standing decisions turn out to have their sensible common law equivalent.

In *Vosburg* and other physical injury cases, the sensible approach is to start from the center. Clearly a situation that allows any person to strike another person with impunity is an invitation to social chaos, anarchy and vigilante justice. It is easy therefore to make the judgment that it is worth bearing the costs of allowing the victim of the blow to have an action against the injurer, and to do so on the grounds of corrective justice that Aristotle defends. The suit involves one plaintiff against one defendant; the circumstances needed to judge the legality of the act are confined to a tight location and a short time frame. The objective of deterrence is clearly advanced, and the payment of damages helps the victim to return, at least partially, to his pre-accident state of utility. All the pieces come together in a single whole.

It is precisely because conferring on the direct victim the standing to sue is so easy that all other actions in the outer rings become problematic, at least if we take intuitive heed of the three variables in Calabresi's formula. As we move out from the center in physical injury cases, the injuries become more attenuated, the number of parties become more numerous. The cost of administration runs high, yet the *marginal* deterrence from the second suit is not likely to be great, and some of the losses to family members can be built into the basic award to the direct victim himself. In the end it is easy to see why mature legal systems could go different ways on allowing these actions for consortium, and why they are uniformly more willing to allow the action to a single spouse than to a bevy of children: I know of no case where the action for loss of consortium is granted to the children but denied to the spouse.

The balance of convenience swings sharply, however, in the opposite direction when we move to the outer circles. Now the number of parties is so numerous, the perceived damages so small, the costs of suit so great, and the possibilities of abuse so large, that we *categorically* deny that these plaintiffs have standing to sue. It is easy, too easy, to justify this conclusion by saying that people in the outer circles suffer no harm. It is more accurate

46 *See* GUIDO CALABRESI, THE COST OF ACCIDENTS (1970).

to say that their standing to sue in part because the functions of deterrence have already been well served by allowing the tort action to the immediate victim of the harm and perhaps to his close relatives. We make this judgment categorically because we know enough from the basic sketch to be certain that no particularized harm is likely to lead to any sensible exceptions to that rule in sufficient quantity (if any) to justify the high error costs of a case-by-case analysis. We therefore use the standing term to cover these categorical exclusions because it captures the social unwillingness to delve deeper into the circumstances of particular cases.

This pattern of concentric circles does not, however, describe cases like *Ashby*. To be sure, the victim suffers the direct indignity of loss, but the change in the outcome of the election, or in the behavior of voters generally, does not impact that one voter any more than it does anyone else. The idea that we should use individual tort actions to correct for structural features in the operation of elections now seems a bit forced, as a second-best alternative. Ideally, we would appoint an election commission to oversee elections. That body could order the constables to let Ashby vote if he protests before the polls close. It could add his vote to the tally after the polls close. More to the point, its remedies are not limited to the correction of injustices between the immediate parties, nor even to a showing of individual harm. The Commission could impose fines on the constables who kept Ashby out; it could investigate who gave them orders; and it could order a new election if it thought that voting irregularities were widespread. The point here, however, is that the system seems to function far better if Ashby is put in a position to protest to some independent authority so that he need not go through the bother and expense of a tort suit in the first place. Indeed in many cases the true source of uneasiness is that Ashby will not care enough about the outcome of the election to incur the costs of a suit that promises much heartache for small personal damages. The structural harms to the system seem to call for a structural solution. It would hardly seem out of place to prevent the courts from being the forum of individual suits once a workable administrative apparatus were put into place.

We have still not finished the private law side of this story, for we have yet to take into account those cases in which some individuals suffer specific harms and others suffer (not derivative losses) but the general inconveniences from the inefficient operation of some public facility. To see how that situation might be handled, it is useful to see how the common law of public nuisance furnishes yet another benchmark against which the law of standing can be measured. The origin of this doctrine is caught by an anonymous 1535 English case that deals with the right of private

actions for the obstruction of a public highway.[47] The situation can arise when, for example, a private party places an obstruction on a public highway that slows down traffic along the road, and which also places a barrier that makes it impossible for an adjacent landowner to reach the road at all.

The judges in that case were divided in their views on whether the adjacent landowner had standing to sue. Baldwin, C.J. held that the appropriate remedy was not a private suit for this plaintiff but an action brought by the King on his behalf: "there is no reason for a particular private person to have an accion sur son cas; for if one person shall have an action for this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case."[48] The clear model of Baldwin's decisions is that the blocking of the highway is a structural problem for which a single administrative remedy is appropriate. The alternative private actions are too numerous; their harms are too diffuse and difficult to measure. The public action thus achieves a higher level of deterrence at a lower administrative cost. It is a model similar to that used for the public supervision of elections. What is there not to like about his solution?

Plenty, it turns out. The majority opinion of *Fitzherbert* did not take issue with Baldwin's conclusion that the King could have his action with respect to this nuisance. But it held that it did not follow that standing to sue for their harms had to be denied to all the private claimants. Rather, in language that anticipates that of the modern standing cases, the court concludes that it should be possible to carve out, from the general mass of travelers, those few individuals that have suffered "greater displeasure" and "special hurt." But who might those people be? *Fitzherbert* had two answers, one obvious, and one less so. The former is that an action for personal injury should be allowed to any individual who was hurt by crashing into the obstruction. The harder case, which he allowed, was the one before him, that of the adjacent freeholder whose access to the public lands was blocked by the obstruction. At this point, the private losses loom larger, while the number of plaintiffs shrinks. The actions look pretty much like ordinary tort suits.

Our Anonymous 1535 case raises issues that resonate in modern times; indeed the law of England has not moved an iota from this position in nearly 500 years.[49] Suppose now the defendant

47 Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535), *reprinted in* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 706 (7th ed. 2000).

48 *Id.*

49 *See* WADE & FORSYTH, *supra* note 9, at 698 ("If a public right is under threat, a private person may seek an injunction in two cases: if some private right of his is interfered with at the same time (e.g. by obstruction of the highway which also obstructs access to his land); and where he suffers special damage peculiar to himself from the interference

pollutes public waters, causing massive death of the fish that live in the lake. The modern issue raises the same question as before. Do we content ourselves with administrative action against the wrongdoers—fines, clean up campaigns, and the like—or do we allow private rights of action for those parties that are specially aggrieved by the wrongs? The case is a bit more complicated than the older public nuisance, for if one commercial fisherman is allowed to sue for the loss of his catch, then why not all? The modern cases thus allow actions by the commercial fisherman,[50] and in some cases at least the owners of marinas, bait, tackle and boat stops.[51] But by the same token, standing, yes standing, is denied to folks in the next circle out, to wit various seafood wholesalers, retailers, and distributors who marketed the catch of the local commercial fisherman.

In some cases, however, the best plaintiffs may not be located in the inner circle, for this does not take into account the complex law of relational interests and its connection to the law of unfair competition. Thus suppose a defendant shoots at customers of the plaintiff to scare them away from his business or school, as happened in *Tarleton v. McGawley,*[52] or shoots across the bow of a boat of African natives who wished to trade with the plaintiff.[53] Public criminal prosecutions could of course be brought for these deliberate wrongs, but in many contexts may not. Hence we must be concerned with the interplay between public and private suits. No one questions that the direct victims of the assault are entitled to sue for their losses. But once they cut and run, individually they are unlikely to sue for their losses, given that they can go elsewhere for business or education. One way to overcome this difficulty of course is to organize a class action that combines their claims. But another, more ingenious approach, is to allow the action for (intentional) interference with prospective advantage to the business or school that was forced out of business for its overall losses. Here the combined effect of the defections of individual customers means that this firm suffers some special loss above and beyond the ordinary individuals in society, and conferring

with the public right. In other cases it was held that only the Attorney-General could vindicate the public right.").

50 *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

51 *See* Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981) (for the record, in summarizing this case for my torts casebook, I used the language of standing long before this article was written. "Still another difficulty with the private action involves determining which individuals have standing to bring suit for their economic losses." RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 711 (7th ed. 2000)).

52 *See, e.g.*, Tarleton v. McGawley, 170 Eng. Rep. 153 (K.B. 1793).

53 Lord Holt also fits into this category as well, by allowing the action against the schoolmaster of the "antient school" who uses force to keep his young scholars from going to work for a rival. *See* Keeble v. Hickeringill, 103 Eng. Rep. 1127, 1228 (Q.B. 1706) (reported in K.B. 1809) (for his discussion).

standing to sue nicely serves the conventional tort purposes of deterrence and compensation.

At this point the difference between no standing and no cause of action becomes clear. More specifically, we can find cases of standing but no cause of action, as in the many instances where one competitor suffers harm because of the market behavior of another. After all, low prices can easily lead rational customers to defect from their prior vendors. Most of these cases properly deny on categorical grounds any relief whatsoever, given the long-term benefits to society. One great defect of John Stuart Mill's famous harm principle is that it does not purport to assess the differential welfare conditions of physical harms from economic competition.[54]

But even if these plaintiffs should go home empty-handed, surely they should be given an explanation in court as to why they lose, which is not because they have not been hurt unless we take the quixotic view that economic losses just do not matter. Indeed, courts in some cases, have to face the question of whether to recognize actions for predation in economic markets, and even if these are frowned upon under the antitrust laws,[55] the statute books have been filled with protectionist legislation designed to protect everything from labor unions and airlines, to dairy products, from ruinous competition. Those protective actions, whether by common law or statute, may be unwise as a matter of policy. But if, and perhaps because, that is the case, the refusal to supply the desired protection is defended candidly on the grounds that economic protection comes at too high a cost, and not on the ground that the injured competitor has not been harmed by his rival's action.

Indeed to say generally that competitive injury does not count leaves it unintelligible as to why a plaintiff has standing, or the tort law offers protection, against *unfair competition* when illegal means—force intimidation, defamation and the like are used.[56] From this point, it is only a short step to an issue that will turn out to have constitutional significance: Is one competitor entitled to enjoin the actions of a rival who has benefited from illegal subsidies or contracts with another?[57] Here again, the harm principle

54 *See* JOHN STUART MILL, ON LIBERTY (1859) *reprinted in* 40 GREAT BOOKS OF THE WESTERN WORLD 267, 271 (2nd ed. 1990) ("the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."); *see* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY 9-39 (1998) (for my elaborate criticism).

55 *See* Matsushita Elec. Co. v. Zenith, 475 U.S. 574 (1986).

56 See Mogul S.S. Co. v. McGregor, Gow & Co., 23 Q.B.D. 598 (1889) (Bowen, L.J.), for the classic English exposition of the difference.

57 See Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938), *supra* note 13 and accompanying text for a discussion of Justice Sutherland's use of *damnum absque injuria*.

has to be supplemented with a substantive account of what behaviors should be illegal and why.

The definition of harm, moreover, for the purposes of this analysis is not necessarily tied to physical infliction of loss or competitive injury. Just to complete the picture, it is clear that some firms, e.g. common carriers, are under a duty to serve their customers, and these customers have a valid cause of action when they have not been given the service owed to them. But they also have standing to protest the refusal of any ordinary individual to provide them with service. They might well lose that action against an ordinary business at common law, even if they could succeed under the various antidiscrimination statutes. But once again the plaintiff does not have to have a valid cause of action in order to plead his case. Standing is a doctrine that allows people in the court house door to present their claim. It would be odd to see how the law could develop if the only persons who were allowed to plead their cases were those who had already survived a common law demurrer or a motion to dismiss for failure to state a claim.

Thus far the analysis of the harm principle and its relationship to the tort law has proceeded on the assumption that all these various actions were directed against the wrongful conduct of some private party. The cases, especially those devoted to public nuisance and interference with advantageous relations, show how to police the line between general and special damages, and allow the law to combine private rights of action with public administrative action. Clearly the Crown's action brought against the creator of the private nuisance includes the cost of its removal and correction.

However, what should be done when the obstruction on the public road results from an act or lapse by some public official acting within the scope of his authority? Once again the rules for private nuisance offer some useful direction. In those cases of direct harm, the action should lie against either the sovereign or the official, depending on the scope and direction of the interlocking doctrines of sovereign and official immunity. The problem of specific harms therefore does not create any problem for the doctrine of standing in private law. It should come as little or no surprise that cases that allege these harms do not raise a standing question under federal constitutional law either.

The far harder question is what, if anything, should be done in the event that the public obstruction causes widespread and diffuse harms, in circumstances where no single person can claim a discrete harm. That is the precise analogy to the voting case, where no special injury occurs. When a private party creates a public nuisance, the response is to confer an action on the Attor-

ney General. But now that the King (or any other executive) or his agents are the perpetrators, they can hardly be expected to bring actions to control their own misconduct. In order to keep alive Holt's hope of *ubi ius*, *ibi remedium*, the task is to position *someone* to challenge the system-wide irregularities. Where the question turns, moreover, from damages to injunction, the claims of sovereign and official immunity have to yield, for otherwise the inability to impose any restraint on the sovereign entails the end of judicial review because no one can force the President or Congress to toe the line.[58] It follows therefore that injunctive relief is often critical to the enforcement of the structural limitations found in the Constitution, just as it is critical to protect all citizens against voting irregularities. To a lawyer steeped in the private law tradition, the discussion thus immediately gravitates to class or representative actions in which one person champions reforms that help benefit all. At this point, the appropriate set of private analogies to the standing law has to cover more than tort-like cases to the law of contract generally and to the law of voluntary associations corporations more specifically. Here is how the story plays out.

### A. Standing, Contracts and Corporations

A second source for the public law of standing comes from the law of contract. To see how the doctrine of standing evolves within this category, start with the simple case in which A has made a promise to B, which is then breached. The normal rule routinely allows B to sue for that breach of conduct. Indeed, we can take the matter one step further. In the typical case, *only* B is entitled to maintain that action against A. Thus suppose that some party C has entered into a contract with B that B can only perform if A first performs her contract with B. Can C maintain an action for breach of promise against A, even though not a party to the A-B contract? The invariable answer to that question is in the negative, except today in those cases in which C can show that he was an intended third-party beneficiary of the original contract. The basic impulse is that B has a direct stake in his relationships with A and that he should have the right to decide whether to enforce any obligations owing to him, or to waive or to compromise them. In the usual case B will act out of his self-interest in dealing with A, and will seek to secure the maximum return from the arrangement. To allow C an action against A is to divide the control B has over his contractual rights. And if C can come into the picture, then why not D, E, and F? The basic privity limitation in the law of contract—only parties to the agreement

58 *See, e.g*, Ex parte Young, 209 U.S. 123 (1908).

are entitled to maintain actions on it—thus represents an application of the standing doctrine to the law of contract, designed to prevent the endless proliferation of actions for a single breach of duty.[59] These other parties have probably been made worse off by the breach of contract; indeed, given the extensive level of commercial interdependence surely they are. So as with the tort cases we use a standing doctrine as a filtering device to treat some individuals as though they were not harmed even though we know they were.

The law of contracts also links together large numbers of individuals in some collective enterprise through an endless array of partnerships, associations, corporations, and other legal entities. These collective organizations could seek to specify in great detail all the rights and duties of the respective parties. But generally, their broad set of purposes makes it foolhardy to even try to set out the particulars in a complete contingent state contract. In the alternative, what these private organizations do is to adopt their own constitution in order to create an internal governance structure complete with a president and a management team and oversight through some board of directors. These private organizations have many structural resemblances to political organizations.[60] In particular they face the same trade-offs between the necessity for quick and effective action on the one hand, versus the need to prevent factional intrigue that could lead to expropriation of some members of the business for the benefit of others. All these composite organizations are set up by voluntary transactions, and individuals will not participate in them if they think that the expected return on their investment is negative. Any practice therefore that allows one group of investors or shareholders to profit by redirecting the capital of another group to itself will, since it will be anticipated, lead to stillborn associations. The

59 See Moch v. Rensselaer Water Co., 159 N.E. 896, 898-99 (N.Y. 1928), where Cardozo put the point as follows:

> The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with everyone who might potentially be benefited through the supply of water at the hydrants as to give negligent performance, without reasonable notice of a refusal to continue, the quality of a tort. . . . We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. The dealer in coal who is to supply fuel for a shop must then answer to the customers if fuel is lacking. The manufacture of goods, who enters upon the performance of his contract, must answer, in that view, not only to the buyer, but to those who to his knowledge are looking to the buyer for their own sources of supply. *Id*.

Note that in Cardozo's view, the assertion that these claims count as tort claims means that they could not be brought if the defendant did not begin the performance of his agreed-upon work. But if contract doctrine applied, then the defendant could be held liable even if the contract were fully executory.

60 See Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988) for an elaboration of the point.

organizers must put in place safeguards against these abuses in order to induce the initial participation in the joint venture.

One set of techniques used to control the risk of abuse, is to impose certain limitations on the kinds of transactions that can be taken by the executive alone, and even the executive in consultation with the Board of Directors. The traditional doctrine of ultra vires sought to control the problem of abuse by limiting the ends to which the collective assets could be devoted, and do so even at the cost of preventing the firm from engaging in certain profitable transactions. In addition, it was commonplace to insist that the firm's officers set aside the necessary reserves for capital expenditures, and to obtain the necessary bonds and guarantees for the performance of work by outside parties. Likewise, the basic charter could impose limitations on the capacity of the officers and directors of the firm to enter into a reorganization or sale of its assets.

Now suppose that officers and directors do some action, which is arguably in excess of their delegated powers. Who should be in a position to sue? Here the obvious candidates for the suit are those members or shareholders who are aggrieved by the action. In the typical organization, however, many individuals may fall into the same position. It becomes quickly obvious that a multiplicity of individual lawsuits does not offer a rational means to counter abuse at the center. But the response here is never to say that since all shareholders are equally aggrieved, then none are entitled to a cause of action. Rather, it has always been understood that the greater danger is that the stake of any individual member or shareholder will be too small relative to the operation of the system as a whole. The business risk is that no individual will therefore share the entire cost of suit when the benefits inure to all members and shareholders as a class. That result is likely to hold where the relief sought is individual damages to be paid directly into the pocket of the named plaintiff. But here at least the party who sues does not perforce confer a benefit on others who are similarly situated, because it is possible for a defendant to pay money to A without paying it to B.

It is therefore certainly possible to let direct shareholder actions proceed by individual suits or by permissive joinder, especially in cases of ordinary tort harms. But the indivisibility of the relief sought becomes almost a truism when the suit is brought in equity to enjoin a reorganization, to stop the consummation of an improper contract with a third party, or to remove an officer or director. Now we have a case of the creation of a limited public good from which all members or shareholders will benefit equally

whether they support its creation or not.[61] All individuals now stand in the same positions as members or shareholders. To deal with such situations, the courts of equity created the shareholder's derivative action. The basic legal position has been succinctly summarized:

> The claim, however, may be that management's wrongdoing has directly injured the corporation and has thereby prejudiced the shareholders only indirectly. For example, the charge may be that directors or officers have breached their fiduciary duties by taking excessive salaries or appropriating corporate opportunities, or that management has improperly declined to enforce a corporate cause of action against outsiders. In these circumstances, the shareholders' injury (diminution in the value of their shares) derives from the fact that the alleged misconduct has reduced the value of the corporation's assets. Further, this type of derivative injury is suffered in common by all shareholders according to their proportionate interest in the corporation. The shareholders' derivative suit was created by equity courts to permit a shareholder to vindicate wrongs done to the corporation as a whole that management, because of either self-interest or neglect, would not remedy. It allows a shareholder to bring a secondary (or derivative) action on behalf of the corporation (and thus all its shareholders collectively) in contrast to the direct (or primary) cause of action in which shareholders assert their own rights. It may be viewed as a peculiar type of class suit in which the shareholder asserts a right of the corporation for the benefit of all who have an interest in the corporation's success.[62]

Note that the devices in question were created not by common law courts but by courts of equity with their flexible remedial structures. One clear implication from this passage is that the *only* persons who have an "interest in the corporation's success" are the shareholders of the corporation. Here too this conclusion is not meant to describe the economic consequences of corporate misconduct, by setting up the false pretense that the adverse effects of corporate misconduct has no effect on people who have business arrangements with corporate shareholders. Rather, limiting derivative actions to shareholders operates as a standing limitation with respect to equitable actions. So long as the shareholders, or any fraction of them, will proceed with suits, individu-

61 See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) for the classic discussion. Note that a public good need not benefit all members of society equally. It is enough that we can identify any group, all of whose members will benefit so long as one of them does, and the standard corporation implies that all assets of the firm are public goods to its membership.

62 JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS, 785-86 (3rd ed. 1989). Note also the implicit standing limitation in the last sentence. The only people who have "an interest in the corporation's success" are the shareholders. *Id*.

als in the next outer ring should be shut out of bringing suit altogether. No one, except shareholders, has standing to protest any of the forms of corporate misconduct. The limitation derives from an understanding of the complex web of business limitations. It has nothing to do with the limited jurisdiction of the state or federal courts in which these actions are brought.

One possible way to avoid the analogy is to argue that shareholders all suffer injury and thus satisfy the direct injury test of the standing law. But if that is the case, then so do ordinary citizens and taxpayers who stand in the same relationship to their government that shareholders stand to their firm. But in fact the use of the derivative action is meant to cover cases where no particular shareholders have any suffered any special injury at all. Given the need for derivative actions, it is clear that state and federal rules have to accommodate this concern by developing what looks in all but name to be a form of class action. The origins of the equitable class action in federal court long precede the adoption of the Federal Rules of Civil Procedure in 1938 or the major revision of the class action rules in 1966.[63] Accordingly, in its least controversial application, the Federal Rules of Civil Procedure have authorized the use of class actions for all persons similarly situated as against the defendant.[64] The Notes to the 1966 Federal Rules make clear the strength of this case:

> In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class.[65]

So understood, this use of the class action is designed to achieve three organizational goals simultaneously. First, it permits the passive individuals some say in the control and the operation of the lawsuit. Second, in the event of success, it permits the representative of the class to obtain some recovery for the work expended on behalf of the class proper, such as through a cash payment from the association or corporation made defendant in the suit. Third, after some equivocation, it now binds all class

63 See FLEMING JAMES ET AL., CIVIL PROCEDURE, § 10.21 (1992) for a brief account. *See, e.g.,* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (a representative early case).

64 *See* Fed. R. Civ. P. 23.

65 *Id*. at advisory committee's note, clause B (citing *Ben-Hur*, as well as a large number of corporate derivative actions dealing with "the proper recognition and handling of redemption or pre-emption rights").

members, so that if the class action loses, the defendant does not have to face a repetition of suits.[66]

Once again, it is important to see how these equitable conceptions carry over from private associations to governments. The analogous situation is one in which a municipal government enters into a contract that is ultra vires. In dealing with these cases, the uniform nineteenth century rule was that any citizen or taxpayer of the local government, just like any shareholder of the corporation, could sue to enjoin the transaction. Thus in *Crampton v. Zabriskie*,[67] the question was whether a member of the local township could enjoin the completion of a contract on the ground that the local government had entered into a contract for future work for which it had not, in violation of its charter, secured the requisite funding either through cash on hand or taxes already owing. Justice Field had no difficulty in allowing the taxpayer action, noting that it corresponded to the uniform practice of the time:

> Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by State courts in numerous cases; and from the nature of the power exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injury, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens on property-holders.[68]

In the course of his decision Field cited Dillon's well-known treatise on Municipal Corporations.[69] My examination of the 5th Revised edition of 1911 shows the synergy between the Court and treatise writer. Dillon for his part quotes extensively from *Crampton* to support the general proposition that taxpayers and property holders may have an injunction.[70] Earlier he writes as follows:

> In the country, the right of *property-holders* or *taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the property-holders or taxpayers, —such as making an unautho-

66 *See, e.g., Ben-Hur*, 255 U.S. 356; Hansberry v. Lee, 311 U.S. 32 (1940).

67 101 U.S. 601 (1879).

68 *Id.* at 609. *See also* Miller v. Grandy, 13 Mich. 540, 550 (1865).

69 *Crampton,* 101 U.S. at 609; JOHN F. DILLON, MUNICIPAL CORPORATIONS, 5th ed. § 1579-81 (1911).

70 *See* DILLON, *supra* note 69, § 1581, at 2767.

> rized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property. . . —has, without the aid of statutory provisions to that effect, been affirmed or recognized in numerous cases in many of the States. It is the prevailing, we may add, almost universal doctrine on this subject. It can, we think, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate relief against their misuse.[71]

It is worthy of note, moreover, that Dillon immediately justifies this decision by drawing an appeal to the jurisdiction that equity courts have over private corporations where the "the ultimate *cestuis que trust* are the stockholders."[72] Thereafter Dillon insists that the shareholders of a corporation, whether public or private, should be able to maintain an action to restrain unlawful conduct if the officers of that corporation fail to do so:

> But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant who will be adversely affected, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property-owners on whom the loss will eventually fall are without effectual remedy.[73]

Dillon clearly contemplates the aggregation of small fungible claims into one large claim. Consistent with the decision in *Crampton*, he does not contemplate a requirement of a distinctive claim for this particular taxpayer or citizen, nor does he tie the ability to bring suit to the substantive nature of the underlying claim. The same principle that governs incurring a debt in *Crampton* could apply to any other activity, such an illegal contract that calls for services to be rendered to the corporation. In no sense is the logic of Dillon's treatise or *Crampton* limited to cases of liquidated damages. Indeed, an injunction may be all the more necessary when damages are hard to quantify, for that only increases the strength of the claim that damages are not adequate as a matter of law- a hallmark of nineteenth century equity jurisprudence. Nor does it matter whether this shareholder or citizen represents the majority view. Any one party can challenge illegality, just as one party to a contract can insist on its enforcement

71 *Id.* § 1579, at 2763-64.
72 *Id.* § 1580, at 2766.
73 *Id.* at 2766-67.

when all the others wish to abandon the deal. Those who wish to defend the legality of the transaction can intervene on the other side if they think that the corporate (or public) officers have not mounted a spirited defense. But once again, the clear view here is that on issues where defendants have to provide a public good to a class, no party suffers a discrete injury. The common law response may allow no party a cause of action. The equitable response allows *anyone* to bring that suit.

This examination of the private law analogies thus shows, quite clearly, the development of two distinct lines of authority, one in law and one in equity, for determining which parties should have standing to bring suit, for personal redress on the one hand or for structural injunctions on the other. Two very different standing doctrines emerge quite naturally out of the substantive and remedial aspects of both situations, even for suits brought in courts with plenary jurisdiction. In both cases, the doctrine necessarily cuts out from the legal system some individuals who can only show some economic harm that follows in consequence of the wrongdoing of other individuals. But in both cases, the standing doctrine is applied because it proves possible to identify a smaller group of better situated individuals to prosecute the actions at lower cost. In effect, individuals whose interests are derivative and indirect receive a mandatory free ride from those persons whose right of direct action reduces the likelihood of breach in the first place. But more to the point, they are *forced* to accept the role of free riders against their will. In principle, a legislature could change matters by rejecting the standing doctrine and creating a private right of action in, say, the children of injured parties.

Yet there are differences. In common law actions where the plaintiff seeks damages, the action goes to the party whose distinct interest allows him to stand out from the crowd. In contrast on the equity side, relief is meant to protect public goods for a class of individuals of which the named plaintiff is only one. Now the revised remedial focus leads to a transformation in the logic of standing. No longer is it appropriate, let alone necessary, for the plaintiff to show that he has a special or disproportionate interest. Rather, the precise opposite becomes the norm: the success of the class or representative action depends on the ability of the named plaintiff to show that he is *indistinguishable* from other persons in the same class. Distinctive injuries; special burdens; unique connections are no longer prerequisites to a legal action; they become obstacles to it. The great institutions regulated by equity depend on the creation of abstract entities—corporations, partnerships, and associations—to work because they are, to use the new jargony word, scalable. Their interests are additive without limit because they are fungible. Only when those conditions are satis-

fied can one person effectively represent all. Exactly how the class action is managed depends on the complex rules for the selection of the lead plaintiff, the scope and definition of class membership, the allocation of expenses and recovery, and a myriad of other details.

This radical difference in approach between law and equity has profound implications for understanding the constitutional doctrines of standing, to which we now turn. But the upshot should be briefly stated. The Supreme Court's standing jurisprudence uses the standing rules for common law damage actions to govern cases of equitable relief. In so doing the Court manages to realize the worst fears of the traditional, public choice theorist. As writers from Aristotle[74] to Russell Hardin[75] have stressed, one great weakness of a system of individual rights is that it creates this paradox: The public's business becomes nobody's business because no person has the incentive to take steps to protect that interest. The various forms of equitable action count as ways to make the public's business everyone's business, and the judicial response is to make sure that we return to the state of nature in which everybody's business is again nobody's business. As the next section shows, this one conceptual blunder turns everything upside down.

## II. Standing As A Matter of Constitutional Law

### A. *Massachusetts v. Mellon*—A Closer Look

As noted earlier, the standing doctrine was born in fact, but not by name, during the progressive era in *Massachusetts v. Mellon*. Yet the political dynamics of the case are often not well understood so that it is wise to summarize them here. The most obvious question is why Massachusetts sought to nullify a statutory program when it could have escaped its tentacles by refusing to participate in that program at all. The only state agencies that fell under the thumb of the federal Children's Bureau established under the Act were those who sought out its money. Where is the coercion or imposition in that?

The answer to the case starts, perhaps with the appellant's citation in argument to the Supreme Court's then recent decision in *Hammer v. Dagenhart*,[76] in which the Court had invalidated a federal statute that sought to ban from shipment in interstate commerce any product of any firm or its affiliate that had been

74 *See* Aristotle, Politics, Book II, ch. 3 *reprinted in* 8 Great Books Of The Western World 439, 456 (B. Jowett trans., 2nd ed. 1990) ("For that which is common to the greatest number has the least care bestowed on it.").

75 *See* Russell Hardin, Collective Action 8 (1982).

76 247 U.S. 251 (1918).

made in a plant that hired under-aged children in violation of federal child-labor statutes, which were more stringent than their state equivalent. *Hammer* clearly brought into graphic relief the question whether the commerce power could be used as an indirect means to regulate the local conditions of manufacture.[77] Here the United States explicitly stated that the national regulation of child labor was needed in order to prevent what the Solicitor General, John W. Davis, regarded as the ruinous competition among the states, which were, he claimed, in a kind of prisoner's dilemma.[78] Each state would have passed tougher child labor laws if not for the decisions of rival states to have more lenient measures. The claim was that only Congress could prevent the unfair competition between the states and the race to the bottom to which it was said to lead. But the congressional strategy upset the balance between state and local power. Congress could not force all individuals to abandon their ordinary common law rights as a condition for entering into interstate commerce. The firms subject to the regulation were allowed to challenge the congressional power to leverage its control over transportation and interstate sales into control over local manufacture. They were not barred by any notion of consent flowing from their knowledge of the federal statute when they shipped their goods in interstate commerce. To tolerate this congressional strategy in the one case opens the door to comprehensive federal regulation that no business is able to resist: the cost of compliance with these statutes is low compared with the cost of losing gains from all interstate trade. If forced to that choice, everyone will capitulate to the federal terms of trade, so that any enclave of state powers is effectively eroded. What is true, moreover, about direct prohibition on the shipment of goods, applies to a tax equal to ten percent of profits of any firm that uses child labor. So just before *Mellon*, the Court struck down such a tax in the *Child Labor Tax Case*.[79] The clear implication of that decision is that the power to tax (but not necessarily to spend) as contained in Art. I, § 8, cl. 1 was limited, as Madison claimed, to taxes that could be harmonized with the substantive powers contained elsewhere in Art. I, § 8.

Counsel for Massachusetts raised in explicit form the challenge to the aggressive use of spending power as well. Counsel did so because he had to show that he was entitled to protest the carrying on of a program that Massachusetts was free not to join. He

77 See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1427-32 (1987) [hereinafter Epstein, *Commerce Power*], and RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 146-50 (1993), for a more extensive statement of my views.

78 *Hammer*, 247 U.S. at 256-57, *discussed in* Epstein, *Commerce Power*, *supra* note 77, at 1429-30.

79 259 U.S. 20 (1922).

also recognized, after a fashion, that his case presented an altered version of the constitutional prisoner's dilemma game raised in *Hammer*. In both cases, the use of a federal program was designed to thwart the competition between states that develops within a federalist system when each state formulates its own system of maternal care.

When the Maternity Act is examined in these structural terms, a state cannot vindicate its constitutional position simply by refusing to accept the proferred statutory benefits, any more than a manufacturer could keep its independence by refusing to ship goods in interstate commerce. Let Massachusetts refuse to participate in the Maternity Act programs, and citizens remain subject to the taxes in question, which are now directed elsewhere. The Maternity Act not only uses tax revenues from the states that participate in the program, but it uses tax revenues from states that refuse to participate in the program. The coercion comes from the linking of the benefit offered to the prior tax. In principle every state could prefer an outcome of no tax/no benefit, but so long as no state can undermine the power to tax, the dominant strategy for each state is to take the benefit. With the tax firmly in place, the fact of consent only allows the state to choose between its second and third choices: participate or don't participate, but by all means pay. Each state knows moreover that once it opts out the deal becomes ever sweeter for the states that remain.

Faced with these constraints, no state has any way to obtain its first alternative—stop the program in its tracks because its scope lies outside the spending clause—unless it can sue to dismantle the program. The upshot is that just carrying on the program, with or without Massachusetts' participation, necessarily skews the balance of power between the central government and the states. Indeed even if a majority of other states are prepared to wink at the Constitutional violation, Massachusetts should still be allowed to challenge its constitutionality. The limits on the spending clause should not be determined by majority vote. Until the scope of the standing clause is changed by explicit constitutional Amendment, then each single state has a vested right to make every other state play by the rules of the game. All these points were well understood by the Assistant Attorney General (Alexander Lincoln) who argued the case for Massachusetts.[80] The case thus offers an ideal setting for a structural injunction, which offers the only chance to stop the program in its tracks.

Justice Sutherland, however, saw none of this. His approach is to divert and conquer. The diversion begins when he confuses standing with political question. Massachusetts, he wrote, did not

80 See Lincoln's argument in, Massachusetts v. Mellon, 262 U.S. 447, 459-66 (1923).

present a "justiciable controversy either in its own behalf or as the representative of its citizens."[81] Mrs. Frothingham is similarly prevented from raising these issues as a citizen or taxpayer. But *Mellon* does not seek to challenge the political judgments of the United States in deciding to enter foreign treaties. Nor does it resemble a case where the governor of one state refuses to honor some "moral obligation" to return a fugitive from justice to the state where the crime was committed. It is strictly and solely a question of the legality of the program under the spending clause.

Having first muddied the waters, Justice Sutherland then turns to the structural issues raised in *Mellon*. He reaches exactly the wrong conclusion about them because he misses the prisoner's dilemma problem. In order to soften the blow for the standing analysis, he writes that "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of this statute, though nothing has been done and nothing is to be done *without their consent*."[82] This point is not essential to his decision, but the reference to consent raises a red herring in light of the overall structural issues that *Mellon*, like the *Child Labor Tax Case*, raises.

Sutherland's analysis fares equally poorly when it turns to Mrs. Frothingham's contention that she should be able to block the transaction as a taxpayer. His first mistake is to write as though she were only seeking a refund of her own money by noting "that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law."[83] The stress is on the *her*, singular. But her claim is not for a refund, but for injunctive relief. Nor did William Rawls, Frothingham's lawyer, make any due process argument. Rather he forcibly directed the attention of the Court to the nineteenth century precedents, such as *Crampton v. Zabriskie* that authorized taxpayer suits at the municipal level in order to prevent ultra vires or illegal actions. Sutherland's recasting of the claim is simply a ruse to convert her structural objection into one about the fate of one lady's dollars. It is now easy to make the transition to the common law tort actions, and to argue that the moneys could have been lost no matter how they had been spent, for if this appropriation fails then another might succeed.[84]

Sutherland's riposte misses the point of Rawls's objection on two counts. First, as in *Crampton* the concern is not just for her dollars, but for the dollars of all persons with whom she has a

81 *Id.* at 480.
82 *Id.* at 483 (emphasis added).
83 *Mellon*, 262 U.S. at 486.
84 *Id.*

position in common. In Rawls's words what was sought was "a proceeding to be maintained by one of a large class affected by a law alleged to be invalid, for the purpose of enjoining a public officer from executing it",[85] citing again *Hammer v. Dagenhart*. The second point is, of course, to enjoin the performance of an illegal act. Treating this as a quasi-class action therefore brings the case within the *Crampton* principle. It also increases the size of the financial stakes substantially, and could easily alter the pattern of government behavior. Enjoin the payments under this statute, and the new revenue measure will not replicate the structural flaws of the one that is overruled. So whether the taxes are reduced, the national debt is trimmed, or new programs are authorized, federal power cannot expand whether individual states take the money or not.

Justice Sutherland never quotes the key passage from *Crampton v. Zabriskie*, which holds the plaintiff must be a citizen or taxpayer of the municipal corporation. The analogous position here is that all citizens of the United States and (perhaps) foreigners who pay local taxes may bring suit to enjoin the operation of the statute, even though foreigners who pay no taxes cannot. The real difference of course is that virtually everyone meets the standing test for suits against the national government even if only a small fraction of the populace meets it for the local government. But the difference does not matter. So long as the interests are fungible, then these interests can be amalgamated without difficulty. And if it be said that some citizens support the measure that is claimed to be ultra vires or illegal, then the same answer can be given here that is given to suits against municipal corporations. Issues of constitutionality and legality are not matters of majority vote. Others who disagree on the outcome should be allowed to intervene to defend the decision if the municipal government will not, but this option goes not to standing, but to joinder of necessary parties—a point that did not seem important in *Mellon* owing to the vigorous defense that the United States made of its own program.

Yet Sutherland is utterly oblivious to the ease with which the rules on municipal corporations transfer to the federal level. Instead he purports to distinguish those cases (without examining them at all) as follows: "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate."[86] But there is nothing to suggest that the right to enjoin illegal behavior in *Crampton* depended on the taxpayer being able

85 *Id*. at 475.
86 *Id*. at 486.

to show some minimum level of financial harm. The words "direct and immediate" formed no part of its logic, which stressed exactly the opposite point of view that the taxpayer's position was one shared "in common" with other members of the community. Sutherland has clearly suppressed the equitable basis for plaintiff's action, and has adopted, though not in so many words the definition of standing needed for common law tort actions:

> The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation [he means municipal corporation] . . .. IV Dillon Municipal Corporations, 5th ed., § 1580 et seq. But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparative minute and indeterminable; and the effect upon future taxation, of any payment out of funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.[87]

So the courts of equity are out of it. But he does not explain why the difference in the number of taxpayers at the federal level works a difference in principle. The theory in the municipal case was that the individual taxpayer was the representative of some larger group. That theory can carry over to this case as well. The theory further said that all these taxpayers cared both about the total amount of moneys in question *and* about enjoining the performance of illegal actions. Both considerations again apply. Nor does it help to describe the matter as one of "public and not of individual concern,"[88] as Sutherland does a moment later, because it is exactly those kinds of public goods that the equity action was designed to deal with in the first place. But once he disposes of the equity side of the court, he introduces the twin themes of separation of powers and the common law tests for direct injury that have proved so ill-suited to this area:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.[89]

87 *Id*. at 487.

88 *Id*.

89 *Id*. at 488.

It all sounds good until we realize that this strong separationist sentiment is flatly inconsistent with judicial review under *Marbury v. Madison*, for the complaint here is not that the law is unwise, but that it lies beyond the power of Congress to enact. Yet such is the nature of standing that it often leads the justices to defend the exact opposite opinion, namely, that they should exercise their powers in ways that allow them to duck the responsibility that *Marbury* places securely in the judicial branch. Justice Sutherland gets to that conclusion in no time:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[90]

This statement does nothing to repair the conceptual damage already done. The use of the term "per se" in the first sentence allows Sutherland to exploit a profound ambiguity. That statement is surely correct if it means that the Court cannot on its own motion examine the statute book and decide that some of its laws are beyond the power of Congress to enact. It must decide in response to a case, but that only means that a plaintiff has cared enough to initiate suit, not that he has suffered the direct injury appropriate for common law actions but irrelevant to the exercise of the Court's (indeed any court's) equitable powers.

## B. Reaping the Whirlwind

I have said enough to show that *Mellon* does not to justice to the equity portion of the Court's judicial power under Article III. But whatever its weaknesses, once we substitute the word "standing" for the clumsy phrase "justiciable controversy," *Mellon* compresses the modern case law on standing in a nutshell where it has since remained. Once that is done, two problems remain: the first is to give content to the idea of direct injury, and the second, more critical issue, is what device allows challenges to structural changes that harmed no one in particular, but everyone equally.

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90 *Id*. at 488 (emphasis added). See United States v. Richardson, 418 U.S. 166, 191 (1974) (Powell, J., concurring), for a modern version of the same argument: "The power recognized in [*Marbury*] is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing."

(1) Direct Injury

The question of what counts as a direct injury came up again 15 years after *Mellon* in *Alabama Power Co. v. Ickes*,[91] where the question was whether a private electrical company had standing to protest loans and grants made under the National Industrial Recovery Act to several Alabama municipalities to help defray their cost of production for a local distribution system. The Power Company's argument was that the grants in question were illegal in that they gave the local municipalities a leg up in their competition with the plaintiffs. To the extent that the suit depended on taxpayer standing, Justice Sutherland dismissed it on the authority of *Massachusetts v. Mellon*. The newer wrinkle in this case was that the plaintiff sought to complain both as a taxpayer and a competitor. In this second capacity, its harm was surely greater and more distinctive than that of ordinary citizens who benefited from the improved local power service even if the cutting back of private services might have inconvenienced them. Yet at this point Sutherland translated the direct injury test into the question of whether the plaintiff has a valid cause of action, to which he gave a negative answer:

> The term "direct injury" is there [i.e. in *Massachusetts v. Mellon*] used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay a foundation of an action . . . ."[92]

So the grounds for argument shift, for now it is not the size of the injury, but whether the competitive harm is compensable as a matter of common law principles. There are of course many economic harms that fall into this category of noncompensable losses, but it requires an independent judgment as to whether that result is sound. In the usual case of competitive harm, the *substantive* judgment is that the gains from competition can be realized only if each competitor must bear the losses inflicted when some rival offers better goods at lower cost. But it takes a distinct substantive leap to conclude that A should be left helpless if B receives illegal payments from C which count as a subsidy that distort the balance of trade between the parties. The subsidy itself, if legal, might not create this effect: after all, I am allowed to bankroll my son's new record store, even if it allows him to undercut the prices

91 302 U.S. 464 (1938). See Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939), where similar issues were raised in this equally unsatisfactory decision.

92 *Id*. at 479.

charged by strangers. Yet even here, an elaborate dispute exists at common law as to whether this result holds when a B acts with malice.[93] Surely a similar debate makes sense when illegal or unconstitutional payments are used to prop up one competitor at the expense of the other. Perhaps the answer should be that the disappointed competitor has no relief, but it is not because of the want of causal connection between the subsidy of one competitor and the financial woes of his rivals. The great vice of the Sutherland position is that it invokes a familiar legal crutch, "*damnum absque injuria,*" to cut off a serious inquiry into the impact of illegal payments on competitive balance, even for a competitor who has suffered a disproportionate injury. The direct injury test has thus become a charade. It should be regarded as a good thing that the more modern cases incorporate elements of the English practice,[94] which is to allow a disappointed party to an administrative procedure to maintain an action to attack an award to a competitor,[95] on grounds of injury in fact. The question of whether there is a valid cause of action still has to be answered, but not in the truncated form that Sutherland adopted.

The confusion over direct injury has also led to a serious confusion in subsequent cases. Thus in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[96] environmental groups had challenged the decision by the Interstate Commerce Commission (ICC) not to suspend surcharges imposed on railroad shipment rates. The National Environmental Policy Act of 1969 (NEPA) requires a detailed environmental impact statement in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[97] In appearances before the ICC, SCRAP and other environmental groups (such as the Environmental Defense Fund), had protested that "failure to suspend the surcharge would cause their members 'economic, recreational and aesthetic harm'," insofar as it interfered with their use of parks, forests and other natural resources in the Washington D.C. area.[98] The plaintiffs then alleged that they counted as persons

93 *See, e.g.,* Allen v. Flood, [1898] App. Cas. 151; Tuttle v. Buck, 119 N.W. 946 (Minn. 1909).

94 *See* WADE & FROSYTH, *supra* note 9, at 702-03.

95 See Association of Data Processing Service v. Camp, 397 U.S. 150, 153 (1970), for the liberalization of standing law, not without problems of its own, which also makes reference to The Administrative Procedure Act to raise "the question whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."

96 412 U.S. 669 (1973).

97 National Environmental Policy Act of 1969 § 102 (2)(C), 42 U.S.C. § 4332 (2)(C) (1994).

98 *SCRAP*, 412 U.S. at 675-76.

who were "adversely affected or aggrieved by agency action"[99] under the *Data Processing Services*' "injury in fact" test. In dealing with the standing issue, the Court held that the allegations of harms to the local environment counted as more than claims of generalized injury and therefore survived the usual standing challenges based on the failure to show a special interest.

The Court's conclusion here seems wrong as a matter of law, given the tortured chain of causation on which the plaintiffs necessarily relied. Most obviously, *SCRAP* did not involve the standard emissions of pollutants and toxic substances. Rather, what the chain of causation envisioned was that the relative increases in price would lead to a relative increase in the use of nonrecyclable goods relative to recyclables, which in turn was said to increase the pressure on the natural resources in forests, streams and mountains. The first thing about the case is to wonder why any environmental group is confident that it knows the direction, if any, of environmental impacts that would follow from the changes in rates for a wide range of goods whose responses to changes in freight rates could be largely uncorrelated. Nor are the consequences confined to the single substitution to which the plaintiff has drawn attention. Holding back a rate increase could lead to the reduction in railroad maintenance along the roads which in turn could increase the number of crashes or spills; or it could lead to railroad bankruptcies that in turn could result in major dislocation in transportation markets that cause far more harm than good.

On this view of the situation, the case should be dismissed, not because of some standing doctrine, but solely on the grounds that it does not meet the requirements of either NEPA or the APA. In light of the multiple directions of the imaginable consequences, the case is not one where there are federal actions "significantly affecting the quality of the human environment." And even if there were, the uncertainty of their direction dooms any claim under the APA that the plaintiff is either "adversely affected or aggrieved" under the APA. For all we know the rate change could have had a positive effect on the environment, or a positive effect in some regions and a negative effect in others—but without any ability to determine which was which.

Results like this are common in ordinary private cases. The issue of causation surfaces in bewildering fashion, for example, in RICO cases when plaintiffs seek to establish ingenious connections between the defendant's wrongful conduct and the injury to plaintiff's property or business. In each of these cases, it is under-

99 The Administrative Procedure Act (APA), 5 U.S.C. § 702 (1994) provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to have judicial review thereof."

stood that the ordinary common law principles of proximate causation apply, and that these principles allow a court to grant summary judgment for the defendant where the plaintiff's causal chain is composed of missing links. Thus in *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*,[100] the court explicitly invoked the language of standing (without any overtones of federal jurisdiction) when it observed that "the Supreme Court stated that a plaintiff's standing to sue under RICO requires 'a showing that the defendant's violation not only was a "but for" cause of his injury, but was the proximate cause as well.' "[101]

*Laborers Local 17* offers a textbook example of applying common law causation principles. The plaintiffs had alleged that the deceptive advertisement campaign of the tobacco companies had so deceived individual union members that they continued to smoke to excess, thereby increasing the medical costs to the health plans of which they were members. There was no allegation that the fraud had worked an effect on the health plans directly, but only that, as in *SCRAP*, the consequences had seeped through the system, causing "infrastructure harms" to the health plans for which compensation was required. No luck, came the response, a decision that makes explicit reliance on ideas of standing. The Court wrote:

> It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting *standing* to sue to those situations where the chain of causation leading to damages is not complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.[102]

This prolonged chain of consequences bears eerie resemblance to the allegations contained in *SCRAP*. To the extent that the causation issue is relevant, therefore, the summary judgment is appropriate on nonconstitutional standing grounds. Indeed, it seems clear that every case in which a court decides that the

100 191 F.3d 229 (2d Cir. 1999).

101 *Id.* at 234 (citing Holmes v. Security Investor Protection Corp., 503 U.S. 258, 268 (1992)).

102 *Laborers Local*, 191 F.3d at 239-40 (emphasis added).

plaintiff's injuries are too remote can be treated after a fashion as one in which the plaintiff is denied standing. But it would strain imagination to argue that the determinations of proximate cause as a matter of tort law shape the constitutional limitations on the jurisdiction of the federal courts.

Next it is useful to examine briefly *Warth v. Seldin*,[103] where plaintiffs, a collection of groups and individuals in the Rochester area brought suit against the nearby Town of Penfield and members of its zoning board, claiming that its illegal policies had excluded persons of low and median income from living in the town. The Court held that none of the plaintiffs had standing to maintain this "generalized grievance," and that, further, "the plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[104] The gist of the complaint was that the behavior of the Town had blocked the ability of outsiders to purchase property within the township. At one level, it is possible to argue, as did Justice Powell, that none of the plaintiffs could show that they had been excluded by the restrictions in question. But the complaint also alleged that developers and builders had been blocked from building homes that they, or at least some of their members could afford. It was not clear who would benefit if the restrictions had been removed and this inability to trace the connection from a relaxation of the zoning restrictions to the new entrants was said to doom the complaint.

*Warth* raises two different variations on the causation question. The first issue, which sometimes goes by the name *ius tertii*, amounts to a claim that the appropriate parties to challenge the refusal of the defendants to issue the appropriate permits are the builders and developers who could apply for them if they chose.[105] Justice Powell did not treat this as an absolute bar to standing, but could easily make it "more difficult" to achieve that claim in light of the fact that only two developers had sought to obtain building permits for subsidized housing, when it could not be said that either of these permits, if awarded, would have resulted in new housing that the plaintiffs could have purchased. Putting the point in this matter raises the question of why these plaintiffs should be allowed to sue when parties closer to the permit process have standing to sue on their own behalf.[106] The second part of the

103 422 U.S. 490 (1975).

104 *Id.* at 499.

105 *Id.* at 504 ("[P]etitioners claim that respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford.").

106 *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding restrictive zoning against an equal protection challenge).

question simply treats the uncertain role of the builders and developers as but additional reason why "the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioner's asserted injury."

As to the first point, the developers and builders might not have sued because they could not see the financial profit in taking on a local government that is determined to fight zoning issues for the long haul. Indeed, it was only the use of third party plaintiffs similar to the plaintiffs that brought to a head New Jersey's interminable litigation in the *Mount Laurel* cases.[107] The situation thus looks like one in which the immediate parties who are harmed will not take up the cudgels, so why cut out parties in the next outer ring from federal courts categorically on constitutional grounds, even when racial discrimination does not count as an element in the case? The better response is one that allows for an amalgamation of cases that raise common challenges so that they can be disposed of in a unified proceeding.

Likewise, *Warth* is mistaken even if it is treated as just another application of the tort rules of proximate cause to the constitutional doctrine of standing. Unlike *SCRAP* (and *Laborers Local 17*), the exclusion of developers, who would sell to members of the plaintiff class, was not some debatable consequence of an action undertaken with reference to some other objective. Justice Powell misses the point that this case looks like an intentional interference (by legal force) with prospective advantage cases in which it is held that the schoolmaster or the trader was allowed a suit even though the guns were deliberately trained on his prospective pupils or trading partners.[108] And like those cases, the consequences at issue here were those that the zoning board (whose business is exclusion) manifestly intended.

The difference between the earlier common law cases and *Warth* is that it is not possible to identify with certainty which individuals were the victims of the defendant's conduct. But again the point does not require the invocation of any special doctrine of standing. Rather, now the case looks like a variation on the market share rule of *Sindell v. Abbott Laboratories*,[109] where the question before the court is what should be done when it is known with certainty that some members of the plaintiffs class have been harmed, in that case by their mother's ingestion of DES, but it cannot be determined which. The key insight of the

107 *See, e.g.,* Southern Burlington County NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983); Southern Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975). See John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987), for an account of the above noted cases.

108 *See*, *supra* note 103 and accompanying text.

109 607 P.2d 924 (Cal. 1980).

market share rule is that the *amalgamation of individual claims* is the most sensible technique to overcome the weaknesses that each individual plaintiff has in making out her case on the issue of causation in fact.[110] Thus it would lead to massive underdeterrence if each of 100 plaintiffs were sent home empty-handed because the probability that her individual injuries were caused by the defendant was only 40 percent. Here it becomes hard to deny that the restrictive zoning practices did not keep out some plaintiffs; so long as the appropriate class contains some of the obvious victims, then they should be allowed to sue as a group if the direct injury test is appropriate.[111] But in *Warth*, as in *SCRAP*, the remedy sought was a lifting of the injunctive relief.

Finally, the element of direct causation of harm took on a somewhat weird coloration in *Lujan v. Defenders of Wildlife*,[112] in which the substantive question before the Court was whether the Secretary of the Interior had properly interpreted section 7 of the Endangered Species Act which required that federal agencies undertaking or funding projects should first consult with the Secretary of the Interior to determine that their projects do not jeopardize endangered or threatened species.[113] The Interior Department promulgated a rule stating that this requirement applied only to actions done within the United States or on the high seas, but not within foreign countries. It is hard to imagine a better organization to challenge the administrative rendering of the ESA, given its long-term commitments. But since prior Supreme Court law blocked this route, the inquiry turned to the question of whether two members of the Defenders could show a sufficient nexus by pleading that they had seen some protected species overseas and wished at some indefinite time to travel abroad to see them again. Justice Scalia conceded that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing,"[114] but balked at allowing a generalized "animal nexus" theory when neither plaintiff had to demonstrate distinct plans to go overseas to the area in which the threatened species lived. Why then bother

110 *See* Comment, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963 (1978).

111 *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 117 (1987).

112 504 U.S. 555 (1992).

113 *See* Section 7(a)(2) of the Endangered Species Act of 1973:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

16 U.S.C. § 1536(a)(2)(1988).

114 *Lujan,* 504 U.S. at 562-63.

with the requirement at all? The travel plans of any given plaintiff make no discernible difference in terms of the ostensible policies behind the standing requirement. The issue under dispute has nothing to do with investigating animals and everything to do with statutory interpretation and administrative law. The animal nexus plaintiff is no better or no worse to push those claims than the direct observer. The suit is tailor made for the equity side of the standing doctrine. I shall discuss those considerations as part of a more detailed consideration of structured injunctions.

C. Structural Injunctions

We are now in position to examine the major confusions of the standing question, which relates to its use in obtaining equitable relief against illegal action. The relationship between standing and the spending clause first raised in *Mellon* resurfaced again forty-five years after *Frothingham* in *Flast v. Cohen*.[115] The Court switched gears by allowing a taxpayer suit to challenge federal aid to religious education under the Elementary and Secondary Education Act of 1965. The specific ground for the challenge was that the establishment clause of the First Amendment limited the power of Congress to spend for the general welfare. In a real sense the case looks like a rerun of *Mellon*, but the plaintiff emerged victorious for reasons whose unintelligibility defies brief summarization. Thus Chief Justice Warren wrote:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.[116]

The Court then held that these conditions were satisfied for reasons that bear no relationship to this obscure excursus into logical links, nexus and incidental expenditures: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was

115 392 U.S. 83 (1968).
116 *Id*. at 102-03.

that the taxing and spending power would be used to favor one religion over another or to support religion in general."[117] Yet what is true of the establishment clause in relation to the general welfare clause is surely true of expenditures in violation of general welfare clause alone: special payments presage illicit redistributions of wealth.[118] The great vice of the Maternity Act was at least as bad, perhaps worse, because it involved both the risk of wealth distribution across states—surely a larger concern in 1787 than in 1923—and the alteration of the balance between state and federal power through the aggressive use of the combined power to tax and to spend. It is an odd use of constitutional history to identify the structural reasons for one clause of the document and to ignore the parallel arguments elsewhere.

What makes the *Flast* episode so curious is that its labored rationale had no legs. Thus in *Valley Forge Christian College v. Americans United Against Church & State*[119], the Defense Department gave away excess property to Valley Forge for free, after deciding to reduce its fair valuation by 100 percent to take into account the public benefit that inured from the transfer. The plaintiff group, committed to the separation of church and state, relied on taxpayer standing to block the transfer. The obvious ground for protest was that the individual transfer violated the establishment clause by turning public property into religious use, the level of subsidy here is as great as if the Defense Department gave the College a sum of money equal to the value of the land, which it then used to purchase it. Nonetheless, *Flast* was held not

117 *Id.* at 103. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, 444 (1990), for a defense of *Flast* in these terms (noting that a difference might exist between those violations of the spending clause that offend a specific guarantee of the Bill of Rights and those which simply lie outside the scope of Congress). But again the distinction makes no difference: standing goes to the plaintiff's stake, which does not get any larger when two constitutional provisions are implicated instead of one.

118 For an effort to resurrect the "general welfare" language as a real limitation on the government power, see John Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001). The position has some real intellectual support. No one doubts that the word "common defense" operates as some kind of limitation on the power to tax and spend. Why then assume that the phrase "general welfare" was meant to be compendious, given that it would render the "common defense" language wholly redundant. Rather, a more sensible approach is that the two terms should be read *in pari marteria* as an effort to limit government expenditures to classical public goods, i.e. those in which it is impossible to exclude benefits from A when they are given to B. Here it would be too restrictive to read that language to say that expenditures must benefit everyone if they are to benefit anyone: that would also make hash of spending for the defense of the West Coast and not for the East Coast. But it does treat the general welfare as covering those expenditures that are intended to apply, under uniform standards to public goods that are nonexcludable with respect to some large fraction of the population. And it certainly allows expenditures that are made for one segment of the population under programs that have application across the board. What it rules out are programs of income redistribution for particular individuals, where the cash or in kind benefits have no classical public goods qualities.

119 454 U.S. 464 (1982).

to apply because this particular executive action had taken place pursuant to Congress's power to dispose of excess property under Article IV, § 3, cl. 2 the property clause—"The Congress shall have [the] Power to dispose of and make all needful Rules and Regulations respective the Territory or other Property belonging to the United States", and therefore was not an general appropriation of funds under the spending clause. The point had a certain element of deja vu because in the oral argument in *Mellon* the ever-resourceful Attorney Rawls had sought to defend the expenditures under the Maternity Act as disposition of excess property under this clause.[120] But the deeper problem is, why should a violation of the establishment clause trigger standing in the one case and not the other, when the risk of faction may, if anything be greater with a specific appropriation than it is with a general rule?

No real answer was given to that question. Instead Justice Rehnquist quickly shifted the discussion back to the general principles governing standing, and noted that the plaintiff had not identified any personal injury beyond the psychological harm of being forced to watch a violation of the Constitution, which hardly distinguishes the case from *Flast*. Thereafter he went on to give a convenient modern rationalization for the rule that was more complete, but no more persuasive than that offered by Justice Sutherland in *Mellon* for his rejection of the basic equity model defended above. Thus Justice Rehnquist argued that the direct injury requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." This point sounds bizarre in connection with the elaborate arguments which could not have been, but were in fact offered in both *Mellon* and *Valley Forge*. The arguments there were fully and adequately made on both sides of the case; no one after the fact has been able to identify a single consideration that was omitted from either discussion that could have been supplied by a more detailed operation of the Maternity Act on the one hand, or the disposition of surplus property on the other.

Indeed, quite the opposite is true. The legal issues presented in *Mellon* rendered adequacies or inadequacies of the federal or state practices, the number of states that signed up, and its benefits programs utterly irrelevant to the *facial* constitutional challenge raised against the statute. Likewise the outright gift of public property to a religious organization raises a clear constitutional question, whether that facility is used for classrooms or dor-

120 Massachusetts v. Mellon, 262 U.S. 447, 446 (1923). The argument was money counted as property under the clause, which seems preposterous in light of the overall structure of the clause and the constitution.

mitories. It is as though the taxpayer suit in *Crampton* should have been turned aside on the ground that no taxpayer could comment intelligently on the quality of brick and mortar specified to be used in the construction of the proposed hospital facility. What stands out in both *Mellon* and *Valley Forge* is that the ineligible plaintiffs raised sensible per se, facial constitutional challenges that they were well able to litigate. The point is especially true in light of the alternative: there is no obvious second tier candidate in *Mellon*, and the only person who *might* have standing in a *Flast* like situation under the direct injury test would be the disappointed second bidder, if any, who could hardly be expected to wage a major legal war to save a few dollars.

As is evident from the nonrandom selection of plaintiffs in both cases, it is manifestly wrong to assume that a direct injury correlates even weakly with the incentives needed to articulate the relevant issues in a protracted legal struggle. Parties surely know their own interests, whether they are financial, intellectual or political. They can decide by themselves what level of resources that they wish to spend in what kind of situation. Indeed it is likely that the ideological plaintiffs, both of the left or the right, will address the issues of principle raised in litigation precisely because they care as much about the structure of American government independent of the impact on their own pocketbooks. To the extent that standing issues are entwined with financial concerns, these equitable actions against the government designed to validate a common interest are no different in form or substantive from the garden variety class action or derivative suits routinely brought against private defendants. The great risk with multiparty litigation is not excessive intervention by strangers but the free-rider problem, whereby parties who cannot secure sufficient funding will let the case pass because the benefits are obtained by outsiders. That objection rings false as a description of the motivation of ideological parties of all persuasions. It is not that they will turn money down; but they will often litigate on issues knowing that the prospect of a financial return is negligible. But even for those litigants who are in it for the money, a standing doctrine is crude beyond belief as a means to sort out the go-getters from the slackers.

What really matters in these cases are the incentives and payoffs that govern these suits. As in ordinary derivative actions, the appropriate inquiries should be directed towards methods of compensation, or about rules used to prevent abuse of process: does the successful plaintiff receive a lien on the proceeds of recovery, or a payment from the corporation benefited by its work? Should the plaintiff be subject to penalties for losing? For bringing frivolous suits? To answer these questions, we need rules that

regulate class actions, intervention, joinder, fee awards, and res judicata. The standing requirement as such addresses none of these issues.

Finally, the tort-based standing requirement is not advanced by the observation that the federal courts are not places for concerned bystanders to ventilate their dissatisfaction with government programs, or that courts should not be converted into "judicial versions of college debating societies." All litigation resembles a debating society given the clash of wills. But litigation is serious business for these parties whether or not they are said to have standing. The plaintiffs who bring these suits are asking to enjoin some activities and to require others. The courts will only be reduced to the level of debating societies if they announce in advance that they will not on principle supply any relief to the parties before it. But reverse the standing rules, and the litigation can proceed to its necessary conclusion. The standard derivative action brought against municipal corporations does not reduce state courts to cheering societies. Parallel actions against the federal government will have no different effects.

The bypass of constitutional adjudication under *Mellon* has been invoked in other structural situations as well. Thus in *Schlesinger v. Reservists to Stop the War*,[121] the plaintiffs, present and former members of the reserves, claimed that the compatibility clause, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," was violated when several members of Congress held commissions in the reserves. The structural elements of the case were systematically disregarded with the observation that the members of the plaintiff organization had no greater stake in this issue than any other citizen. So a constitutional issue is deflected from the courts, without any obvious explanation as to how it might otherwise be resolved.

In a similar vein, the companion case, *United States v. Richardson*,[122] refused to allow the plaintiffs to attack the secrecy surrounding the appropriations to the Central Intelligence Agency on the grounds that it violated Art. I, § 9, cl. 7, which provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Whether that section is subject to a sensible exception for expenditures whose publication could give aid and comfort to the enemy, is not my concern here: the suit could easily be defeated on the ground that the explicit command of this clause is defeated by an implied exception narrowly tailored to the occasion. But the

121 418 U.S. 208 (1974).
122 418 U.S. 166 (1974).

Court, after repeating the observation that the loss in question was "common to all members of the public,"—and hence suitable for equitable relief, held that the issue was one that should be rightly considered by the representative branches of government as a political question. One might as well say that all shareholder derivative suits should never be allowed because minority shareholders are free to lobby the board of directors and their fellow shareholders. Once again the partial rejection of *Marbury* follows as a matter of course.

Finally, the Court's neglect of the equity side of standing bars the articulation of a coherent approach to the structural issues raised by the voting cases. Today we have gone past *Ashby v. White,* and now must routinely confront situations far more difficult than those involving simple exclusion of lawful voters from the polls. Since *Baker v. Carr*[123] the Court has had to face a nonstop set of cases dealing with both the size and the shape of districts for federal and state office.[124] In each and every instant, what is at stake is what individuals should be grouped together in what district and for what reason. No matter what the source of the grievance—unequal numbers, illicit racial grouping—a decision to draw the lines in one way has consequences both for the people included within a district and for those who are, for better or for worse, shipped off to some other district. Some citizens could be upset at being excluded from certain districts or included in others. Or they could be upset at the people who are added in, or taken away from them. But all the grievances are about the overall shape of the electoral distribution, not about the value of the individual vote. To treat district line-drawing as involving some discrete injury to any particular voter is a hopeless and artificial refinement that bears no relationship to any constitutional or statutory challenges to the legality of the action. There is no credible way in which some ostensible personal injury is linked to the ability to raise sustained and principled challenges to the knotty substantive issues that have to be resolved once the standing hurdle has been overcome.

In light of these issues, the Supreme Court should have adopted a rule that allows any aggrieved voter within his or her state to challenge the plan. Yet in United States v. Hays,[125] the Court, speaking through Justice O'Connor, recited the standard litany of cases (including *Lujan* and *Valley Forge)* to insist that an aggrieved citizen show the appropriate direct and immediate in-

123 369 U.S. 186 (1962).

124 *See*, *e.g.*, Shaw v. Reno, 509 U.S. 630 (1993) (holding that irrational voting schemes could be challenged on equal protection grounds when they could only be understood as an effort, without justification, to segregate individuals on the ground of race).

125 515 U.S. 737 (1995).

terest to maintain the challenge. The Court concluded that any individual (no matter of what race) who lives within a district has standing to challenge its outcome, even though citizens outside the district (who might claim to be properly within it) do not.[126] The ostensible rationale for this conclusion is that those within the district suffer "special representational harms", while those outside do not. The term "special" was invoked to make it appear that the voting cases fall within the rule first set out in *Mellon*, but the term loses all its bite given that the one plaintiff within a district shares his position in common with all others within that district. That veral legerdemain is wholly unnecessary, for a simple switch to the equitable model of standing, taking into account the interdependence in the composition of all districts makes it clear that there is only one proper conclusion in these cases. Anyone who lives within the state can sue to protest the composition of the district in which he is included or from which he is excluded. The further refinements simply do not matter. Thus it seems to be a mistake to argue, as John Ely does, that standing should be limited to individuals who are racial minorities in the district in which they are located.[127] And it tends to support, on somewhat different grounds, the conclusion of Samuel Issacharoff and Pamela Karlan that *all* individuals have standing to protest the outcome. They reach this conclusion on the strength of an "expressive, noninstrumental" policy that is triggered to a substantive theory of equal protection that sees race as irrelevant to the districting process.[128] But that view ties the issue of standing too closely to a controversial theory of substantive relief. The simpler, more general, and more cogent explanation for system wide voter standing is that the equitable side of the judicial power is designed to deal with any and all sorts of amalgamated claims that one individual has in common with others.

## III. Complications of the Equitable Method

The major flaw that originated in *Mellon*, and survives to this date, is to treat taxpayer and citizen suits for equitable relief as

126 *Id*. at 745. For learned attacks on this decision see John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 Harv. L. Rev. 576 (1997), and Samuel Issacharoff & Pamela Karlan, *Standing and Misunderstanding in Voting Rights*, 111 Harv. L. Rev. 2276 (1998). Given what I have written above, it seems a mistake to try to find some linkage between the subset of voters who have standing and the substantive theory on which they wish to proceed. Ely's restrictive position on standing—that only individuals who are members of racial minorities in their particular districts have standing—seems a clear mistake. Issacharoff and Karlan seem much closer to the mark when, invoking "expressive" theories of injury.

127 *See* Ely, *supra* note 126, at 594.

128 *See* Issacharoff & Karlan, *supra* note 126, at 2286. "When the government uses race to assign some voters to District X, it tells *all* voters that race matters." *Id*. (emphasis added).

beyond the judicial power under Article III. The counter-argument is that the standing requirement is not the appropriate way to deal with the adjustments that take place when plaintiffs bring either class actions or suits in which they purport to represent the interests that all citizens and taxpayers hold in common. The central point is that amalgamation of individual claims is both possible and necessary only where these claims are largely fungible with each other. It is one thing; however, to invoke the principle of equitable jurisdiction, and quite another to ignore those principles insofar as they relate to the conduct of complex litigation once the plaintiffs seek some structural relief.

To complete the overall picture of a revised standing doctrine, therefore, it becomes imperative to show how the traditional limitations on the use of equitable jurisdiction should influence the treatment of a wide range of cases that are at present wrongly excluded under the standing requirement. In particular three general issues present themselves for discussion. The first is the question of whether a plaintiff's action should be dismissed on the ground that some necessary parties to the litigation have not been joined in the suit. The second question is whether the traditional limitations on the awards of equitable remedies should be respected once the standing obstacles have been overcome. The third question is whether any purported limitations imposed by the standing requirement can be negated by a congressional determination that certain citizens groups should be afforded standing to sue.

### A. Who are necessary parties to litigation?

It is a common premise of the current debates over standing that the case and controversy language of Article III makes it inappropriate for any party to ask the court for an advisory opinion. No matter whether the case rests on legal or equitable principles, at the very least a case or controversy involves a clash between two adverse parties before the Court. A close cousin to the advisory opinion is in practice the collusive lawsuit in which the plaintiff sues the defendant to enjoin a practice that both parties regard as illegal.[129] It is quite clear that these collusive lawsuits present the train of abuses that must be taken into account in suits that seek equitable as well as legal relief. The question then arises: what should be done about the problem? Here there are two possible courses of action. The first is to dismiss the action on the ground that it simply represents an effort by two parties, not one, to obtain an advisory opinion. The second is to join to the lawsuit

129 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (government intervened in a suit brought by a shareholder against his corporation).

a party whose interest is indeed opposed to both parties to the collusive action. The interjection of the third party into the suit—the choice of procedural device does not matter for these purposes—removes the danger that phony litigation will determine the course of American law.[130]

Matters become more difficult when it is not quite clear whether a lawsuit is collusive or not. That situation can easily arise when two unrelated parties engage in litigation whose main concern is the relationship that one party to the transaction has to an unrelated party. It could easily be that the party sued is quite happy, even eager to see its legal relations with third persons altered; or it could be reluctant to see them altered, but not keen on expending the resources needed to keep that relationship alive. The question then arises as to what should be done when it is not known if the initial lawsuit is collusive, but where there is a partial alignment between the interests of the litigants and imperfect alignment with the interests of third parties. This issue gets systematically suppressed in those cases in which the standing requirement is invoked to block suits. But it comes to the fore once the standing is accorded to representative plaintiffs in accordance with traditional equitable criteria.

One early case that raised this problem was *Ashwander v. Tennessee Valley Authority*,[131] where the question before the Court was whether holders of voting preferred stock could sue to enjoin the Alabama Power Company from entering into a contract that called for a sale of assets to the TVA. The objection was that the contract was illegal because the establishment of the TVA was itself unconstitutional. Chief Justice Hughes found that shareholders had standing to pursue the suit against the corporation on grounds of its illegality, and also that the Power Company had in fact defended its right to enter into the contracts. But the entire difficulty on the question was obviated by the joinder of the TVA as a defender in the case, so that it could step up its activities in the event that the Power Company decided to plead its own cause faintly. But if TVA had not been joined, then it might well have been perfectly appropriate to dismiss the case on the ground that the lawsuit could do untold mischief to the status of an absent party. Standing, as it were, becomes a doctrine that is used to weed out cases brought not by the wrong plaintiff, but against the wrong defendant.

That same theme carries over into more modern cases. One of the leading exemplars of modern standing law is *Allen v.*

130 A similar technique is often used in mass torts/products liability cases to prevent removal to federal court.

131 297 U.S. 288 (1936).

*Wright*,[132] in which the parents of black public students enrolled in districts undergoing desegregation sued to require the IRS to stiffen the standards that allowed federal tax-exemptions to private schools operating within these districts, which the plaintiffs claimed had adopted racially discriminatory topics. The suit was dismissed on the ground that the plaintiffs lacked standing, given that the only injuries that they reported individually were that blacks were "stigmatized" by their inability to attend these private schools, and the private schools within the district necessarily denied their children the right to attend an integrated school. The former obviously does not show a particularized injury, and the second depends on elaborate predictions as to what would happen within the district if the tax exemptions were removed, so that Justice O'Connor had little trouble in deciding that the usual tort-like requirements for standing were not satisfied.

Viewed from the perspective taken here, *any* citizen or taxpayer should have standing to challenge this tax exemption. That said, the action still should have been dismissed because none of the local schools whose tax-exemptions were at risk was joined as a party defendant to the case. Here of course, presumably, they would have an opportunity to protest after the fact any IRS decision targeted to them. But if the matter is ripe for litigation from the point of view of the plaintiffs, then it is ripe from the point of view of the defendants. The IRS, moreover, has a long history of equivocation, especially in connection with Bob Jones University, on whether these tax exemptions are properly granted, so it could not be relied upon to defend this lawsuit with the same vigor as the named schools. Once these defendants are introduced, the resistance to the claim is likely to be far more stout, which is again as it should be. And if it turns out that the entire matter becomes one too complex for litigation, then the suit could be dismissed on that ground, at least if some administrative remedy were made available to the plaintiffs—provided that the defendants had at least some opportunity to appear in proceedings directed against them. The individualized tort grievance rarely presents the issues of collateral import that are routine occurrences in equitable cases.

A similar analysis applies to *Simon v. Eastern Kentucky Welfare Rights Organization*.[133] The Internal Revenue Service had issued a ruling that treated as charitable tax-exempt corporations several nonprofit hospitals that had supplied only limited emergency services to indigent patients. Justice Powell denied the relief chiefly on the ground that it was not possible to trace the

132 468 U.S. 737 (1984).
133 426 U.S. 26 (1976).

causal connection between the hospital's favorable tax treatment and the services that it rendered. It could well be that the hospitals would decide to pursue for-profit patients more vigorously if they lost their tax-exempt status. Justice Brennan's dissent did not dispute the conceptual framework for evaluating standing cases, but thought that the "opportunity and ability" to obtain treatment counted as a particularized grievance, even though no particular refusal of service had been shown.

Within the tort-side of the standing doctrine, the hard question is how special is special enough. From the perspective of equitable remedies though, any taxpayer should have standing to enjoin the exemption, but once again the question is whether it can do so with only the IRS on the opposite side. Here again the risks of collusive pressures are evident, so that at the very least notice and an opportunity to intervene should be granted to the nonprofit hospitals whose exemptions were at issue. However, that procedural response is not an argument for the imposition of a standing requirement but rather for a requirement of the exhaustion of administrative remedies, in which the IRS first investigates any complaint filed, after giving the challenged parties a chance to respond administratively to the charges that have been lost. And if the complaints are frivolous, or intended to harass, then monetary sanctions might be used to curb the abuse. The precise details on procedure cannot be decided on in the abstract. But it surely makes far more sense to lay bare the choices about third party practice rather than to enjoin the suit solely by reference to the plaintiff's taxpayer status, given the evident risk of over-inclusion.

The same concern about parties was in fact raised in *Lujan*, in connection with the question of redressibility. The nub of the Secretary's position was that plaintiff could not get (what equity courts used to call) comprehensive relief against the Secretary. The statutory provision required that other federal agencies consult with the Secretary to insure that actions they fund or execute comply with the statute. But these agencies were not joined in the suit. But to say this is to invoke the standing doctrine to deal with a joinder of parties issue on the defendant's side. Again a court is faced with hard choices. One approach is to limit the relief to a specific project so that the correct Federal agencies can be joined. That hardly seems appropriate in this context until it is determined whether the ESA has effect in foreign countries. On that issue, it seems perfectly proper to allow this plaintiff to seek limited relief without the joinder of additional parties simply by litigating the question of foreign coverage against the Secretary, where the equitable relief requested is not the review of a particular project, but the emendation of the regulations to reflect the

proper interpretation of the statute. The great vice of the current law is that it lumps together the distinct question of who may sue with the question of who must be sued, when the choice of proper defendants depends on the nature of the relief that plaintiff seeks. If that suit proves successful, then in some future case it is open to the Defenders, or indeed any other citizen or taxpayer, to join both the Secretary and the particular agency to see whether some additional relief is requested—which raises questions of discretionary nature of equitable remedies, to which I now turn.

## B. Discretionary Remedies

The next major issue with equitable remedies is whether they issue as of right or at the discretion of the court. As one might expect, the first cut to this problem takes into account the nature of the underlying claims. The more the dispute looks like a two-person dispute over a short period of time, the easier it is to think that equitable remedies should be a matter of right. Thus if the question is whether the plaintiff should be allowed to enjoin a substantial nuisance, the answer to that question could easily be yes, even though some authority allows the court to balance the hardships when the defendant's use is highly valuable, and the plaintiff's of only minor worth.[134] With specific performance in land sale contracts, the presumptive rule is that the remedy is awarded as of right, at least where the rights of third parties do not intervene.[135] In the first case, the legal objective is relatively straightforward, which is to shut down the wrongful acts of an identified stranger. In the second, the order for specific performance can be issued without requiring the court to superintend some ongoing and disputatious relationship. Once the title to the land is transferred, then nothing remains for either party to do.

Matters do not always remain this simple. Equitable relief in land conveyances and nuisances can easily become complicated, for example when third party rights intervene. The equitable remedy of specific performance is systematically excluded in employment contracts, absent a statutory violation, because it places too much of a burden on courts to superintend questions of whether the employee has slacked off on the job, or the employer has increased his demands on the employee. Yet by the same token, courts have been willing to issue an injunction that prevents an employee in breach from working for a competitor, for equity courts can easily ensure that this injunction is observed.

134 For some of the complications, *see* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904).

135 *See* Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355-64 (1978).

The permissible use of equitable remedies is also tested in the context of derivative suits and reorganizations. One reason why the traditional rules focused on enjoining illegal actions is that this remedy looks so clean. But matters take on a different view when courts have to issue supervisory orders to the corporate directors or trustees in reorganizations, which are difficult to formulate in advance, and to evaluate thereafter. This broad set of equitable principles surely carries over to the judicial power in equity as it exists under Article III. It should be relatively easy to order courts to perform specific acts or to refrain from illegal ones. But it is far more difficult for courts to require that administrative parties undertake complex actions that require the appropriation of funds or require the cooperation of particular officials. Of course, no fixed rule prohibits courts from entering that thicket should the occasion require it. But surely there are many occasions in which courts should refrain from getting involved in problems that they cannot supervise. This asymmetry in remedies creates an obvious tension; it is easier for a target of regulation to resist claims that it should be subject to illegal commands then it is for outsiders to insist on the performance of certain actions.

These questions could be lumped together with all the other issues raised under the single banner of standing, but disaggregation often leads to a better understanding of why it may well have been correct for courts to decline to exercise their equitable jurisdiction. For example, it seems clear that the Supreme Court should not have declined to exercise its equitable jurisdiction in *Alabama Power*. If the subsidies supplied by the United States are illegal, then it is simple enough to enjoin their payment. It does not matter for these purposes whether the illegal act took the form of sanctions or subsidy. In the former case the action lies with the target or regulation; in the latter it lies with the disappointed competitor of the firm that received the illegal subsidy.

On the other hand, it is quite clear that no court in exercise of its equitable jurisdiction should take it upon itself to suspend the rate increase in *SCRAP* at the request of the plaintiff. To be sure, the Supreme Court sidestepped this question in *SCRAP* when it held that the Interstate Commerce Act precluded any court from enjoining an ICC order.[136] But it seems clear that the preliminary injunction should not issue even if the ICA contained no statutory bar. The connection between the asserted ICC conduct and the global injury claimed was far from clear; and any rate rollback would have dramatic consequences on all sorts of third parties,

136 *See* Interstate Commerce Act § 15(7), 49 U.S.C. § 15(7) (1964), *as construed in*, Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963).

including a full range of shippers and carriers, and perhaps other environmental groups, that did not see the same causal connection as in *SCRAP*. The case is one where damages are, to say the least, speculative so that the most that could be done would be to ask whether the ICC had taken into account SCRAP's views in the course of its own deliberations, which of course it had.

The problem of discretion in remedies surfaces again with *Warth v. Seldin*, for it is an open question of what relief might be granted once it is assumed that the plaintiff's have standing to pursue their claims. To answer that question, it becomes necessary to first explore the substantive theory of relief that plaintiff's pursue—for example, is it an equal protection claim or a due process claim. Only after one knows what portions of the local zoning ordinance is found defective, and for what reason, does it become possible to decide what relief, if any, should be ordered. At this stage the fact that plaintiffs have not claimed that any specific project has been excluded, renders it impossible to order relief that allows the construction to go ahead subject to only those zoning restrictions that survive constitutional challenge. At this point, therefore, the nebulous nature of the plaintiff's claim comes back to haunt the overall suit. To be sure, it might be possible to give some limited relief to the extent that some portions of the local regulations are shown to be per se unconstitutional. But at this point, the case does not offer enough information about the nature of the claimed violation to support intelligent judgments about the appropriate form of relief. But this insufficiency should not be regarded as a backhanded justification for denying the suit in the first place. Once the standing issue is resolved in favor of these plaintiffs on a class basis, then the substantive development of the suit should give sufficient indication as to the permissible scope of relief. The vice in *Warth* is the premature truncation of the lawsuit. It is not some defect in the exercise of equitable jurisdiction.

A similar analysis of the matter applies to *Lujan*, or more accurately, any subsequent suit that challenges the adequacy of the Secretary of Interior's administration of the program if it is decided that the ESA reaches projects funded or carried out in foreign countries. At this stage, it seems possible to entertain suits that require the Secretary to order his office to apply the same standards of review to projects in foreign nations as he does to domestic projects or to those on the high seas. That judgment in effect states that the Secretary could not apply its budget authorization process exclusively to domestic projects. But it is an open question as to how much further the judicial supervision can go. It may well be more difficult to scrutinize projects that take place overseas; or more difficult to implement American guidelines for

projects that have to meet local requirements that could easily be inconsistent with our own. At some point, it looks as though the budget allocations and the administrative determinations will be shot through with the types of discretion that no court of equity can sensibly second guess. And it could easily turn out that these problems are more acute in foreign projects than in domestic ones. If that is the case, then at some point, the concerns of redressibility, rightly isolated, could lead a decision to refuse to grant equitable relief. But it takes a very different inquiry from the one offered by Justice Scalia who concentrated solely on the one feature that does not matter at all—the travel plans of this plaintiff.

The same issue of relief and discretion was similarly raised in *Linda R.S. v. Richard D.*[137] In that case, Texas law made it a misdemeanor for any parent to willfully desert, neglect or refuse to support or maintain a child under 18.[138] On its face the statute did not distinguish between legitimate and illegitimate children, and plaintiff's class action alleged that Texas Courts had wrongfully invoked the law only to the parents of legitimate and not illegitimate children. Here again it is important to disentangle the question of whether the plaintiff has standing to present the case from the question of whether a court of equity could award a sensible remedy. On the first issue, Justice Marshall took the position that the claim of injury was "speculative," that the chain of causation was not long enough to reach this case: "if the appellant were granted the requested relief, it would result only in the jailing of the child's father."[139] It hardly follows, however, that this plaintiff needs for the prosecutor to act in her individual case in order to gain from a change in the legal rules. The *threat* of a possible suit has for her only an upside and no private downside, so it takes no great imagination to believe that she is better off if it is brought, if only because she could use it as a lever to negotiate a settlement that could then be enforced on ordinary contract grounds. As only individuals in need of support and maintenance are in this position, it appears as though the traditional standing requirement is met, assuming it is relevant.

But the second problem is more difficult to deal with: should the Court issue any equitable relief at all? The nub of difficulty here is that prosecutors have to husband their resources in order to decide which actions should be brought, and which not. The objection looks to be decisive against any individual lawsuit that claims that the prosecutors should have moved in one particular instance. It would simply be an intolerable intrusion on the oper-

137 410 U.S. 614 (1973).

138 TEX. PENAL CODE ANN. § 25.05 (West 1989) (discussed in *Linda R.S.* as Art. 602 of the Texas Penal Code).

139 *Linda R.S.*, 410 U.S. at 618.

ation of a prosecutor's office to let the squeaky wheel get all the grease. But this was a class action lawsuit, which claimed that the Texas Courts had followed a discriminatory practice that violated federal constitutional norms of equal protection. So the suit is one to enjoin an illegal practice that had been sanctioned by the Texas Supreme Court. At this point the argument is only that Texas has to use the same set of discretionary criteria to decide on whether to bring prosecution on the statute for the parents of legitimate and illegitimate children alike. At the outset, it seems within the scope of a court of equity to impose that requirement, without asking it to monitor individual cases. At this point, the resolution of the case starts to look like that appropriate in *Lujan*, for in both the gist of the order sought is to extend the application of a statute to a class of cases from which it has been illegally and systematically excluded. It could well follow that forcing a change in state policies will not cure any illegal situation. But by the same token it could be expected to have at least some substantial effect, even only because of its hortatory effect on local officials. Accordingly, the standing should have been recognized, and assuming that the constitutional violation was made out, a first round of equitable relief ordered. It could wait for a later day to see whether a court of equity should refuse to intervene further in any dispute that might arise over the interpretation and application of the earlier judicial order. It makes no sense for the doctrine of standing to nip the issue in the bud.

## Concluding observations: Tying up a Few Loose Ends

The central thesis of this paper is that the current confusion and dissatisfaction with the doctrine of standing follow from the Court's total failure to appreciate the differences in the way in which the legal and equitable principles that apply to any state court of general jurisdiction carry over to the exercise of equitable jurisdiction in the federal courts.

This account of standing goes a long way to obviate the vexed constitutional question raised in *Lujan* as to whether Congress can fix up the defects in the standing doctrine by authorizing citizen suits in environmental cases. Justice Powell added endless confusion to this question in *Warth* when he suggested that some components of the standing doctrine were "prudential," while others, including the requirement that "plaintiff still must allege a distinct and palpable injury to himself" were not.[140] The distinction makes no sense. Article III says that the "judicial Power shall extend to all Cases in Law and Equity, arising under . . . ." carries with it the clear implication that it does not extend to those cases

140 Warth v. Seldin, 422 U.S. 490, 501 (1975).

that do not "arise under" the appropriate classes of cases. Thus, it seems clear that Congress could not authorize the Court to hear advisory opinions because these do not count as cases at all.

It follows therefore that Justice Scalia was correct insofar as he concluded in *Lujan* that Congress could not simply authorize a citizen suit in federal court if the requirement of a discrete and palpable injury were cut from the same constitutional cloth as the prohibition of an advisory opinion. But it is not. Once the equitable jurisdiction of the Court is acknowledged, then citizen or taxpayer suits to enjoin illegal conduct or to require the issuing of a regulation in accordance with law fall squarely within the judicial power, just as these suits do in private litigation. At this point no congressional authorization of these suits must be supplied. Indeed, to be more emphatic, any effort by Congress to strip the Supreme Court of its appellate jurisdiction to hear these issues would itself raise serious constitutional issues, especially if its purpose was to insulate congressional action from judicial review.

One central task of the courts in a system of judicial review is to make sure that the legislature and the executive do not exceed their respective powers. That much is required by the rule of law. The invocation of a convoluted doctrine of standing, such as that now practiced in the Supreme Court, is wholly antithetical to that objective and amounts to the partial overruling of *Marbury v. Madison* without any textual or structural warrant for that reversal of policy. Herein lies perhaps the greatest irony about our level of collective trust in constitutional safeguards for the rule of law. The English Constitution contains no explicit power of judicial review, and no limitations on Parliamentary power. The doctrine of standing is part and parcel of their judicial law. England too has been subject to the powerful winds of the welfare state, and has adopted many substantive policies that I regard as indefensible and self-destructive. But on this standing issue it has followed a more sensible path. In speaking of its doctrine of standing, Wade and Forsyth disposed of the problems that have plagued American constitutional law in a few sentences when they observed that unless some method is given to challenge illegal administrative actions, "the rule of law breaks down."[141] The irony is of course that the broader view on illegality and standing is taken in a system that has no explicit constitutional guarantees of individual rights. But perhaps one important lesson shines on this bit of comparative history. Perhaps we can learn one lesson. The safety of a nation depends as much on the strength of its institutions and citizens as it does on the written provisions of its Con-

141 *See* WADE & FORSYTH, *supra* note 9, at 696.

stitution. And the sad point here is that, in the case of standing *in law and equity* it need not be this way.

# Restoring the "General" to the General Welfare Clause

*By John C. Eastman*[1]

Over the past decade, the Supreme Court of the United States has, in a series of important cases, reinvigorated the twin doctrines of enumerated powers and federalism, restoring to our constitutional order some semblance of the founders' original vision of a national government that was strong within the sphere of power assigned to it but limited by the extent of that sphere. Whether invalidating acts of Congress that "commandeered" state officials to do Congress's bidding,[2] trimming the sails of Congress's powers under the Interstate Commerce Clause,[3] or setting up sovereign immunity barriers to private enforcement of statutory schemes enacted by Congress,[4] the Court has reasserted its role to hold

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2 New York v. United States, 505 U.S. 144, 146 (1992); *see also* Printz v. United States, 521 U.S. 898 (1997).

3 *See* United States v. Lopez, 514 U.S. 549 (1995); *see also* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001); United States v. Morrison, 529 U.S. 598 (2000).

4 *See* Seminole Tribe of Fla. v. Florida 517 U.S. 44 (1996); *see also* Board of Trustees of Univ. of Ala. v. Garrett, 2001 WL 173556, __ U.S. __ (Feb. 21, 2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997). Unfortunately, the Court's enthusiasm for federalism has sometimes caused it to forget the other half of the founders' vision, namely, that the federal government was to be supreme within the spheres assigned to it. Several of the decisions cited here interpret the Eleventh Amendment in a way that is arguably contrary to that vision. That is not necessarily to disagree with the outcome of these cases, only with their reasoning. In *Seminole Tribe*, for example, the correct holding from the view of the framers would have been that Congress had exceeded the scope of its authority under the Indian Commerce Clause, much as the Court had held in *Lopez* that Congress had exceeded the scope of its authority under the Interstate Commerce Clause. By relying instead on a non-textual reading of the Eleventh Amendment, the Court essentially erected an artificial barrier to an artificial power—producing the correct outcome in the case but creating real analytical problems for future cases where a power clearly given to Congress was at issue. I take up this subject in greater detail in "*Justice David Souter: Partial*

Congress to both the textual and structural limitations of the Constitution.

Some have argued, however, that all of these cases are much ado about nothing. Congress, they contend, can simply re-enact the same restrictions, the same commandeering, the same private causes of action against state governments merely by imposing them as conditions on any of the myriad spending programs that the Congress provides to state and local governments.[5] If Congress wants a Gun Free School Zones Act despite its lack of authority under the Commerce Clause, all it need do is re-enact the identical provision struck down in *United States. v. Lopez*[6] as a condition on education grants to the states or local school districts. Thus far, the Supreme Court has not given any signal to suggest that it would apply its federalism rulings in the Spending Clause context, and the last major precedent on the subject strongly suggests that it would not.[7] Drawing on language in *South Dakota v. Dole*, much of the debate has focused, and undoubtedly will continue to focus, on whether the conditions Congress would seek to impose are closely enough related to the spending grants to which they are attached as to make them constitutionally permissible.[8] But the

*Originalist,*" in THE STRUCTURE OF REHNQUIST COURT JURISPRUDENCE (working title) (Earl Maltz, ed., forthcoming 2001).

5 *See, e.g.*, Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1643 (2000); Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1615 (2000); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 116 ("[A]ny time that Congress finds itself limited by [its] delegated regulatory powers,. . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective"); Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1913-14 (1995) [hereinafter Baker, *Conditional Federal Spending*] (noting President Clinton's contention, after the Supreme Court's decision in *Lopez*, "that Congress would not run afoul of the Constitution if it now chose to 'encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans'"); *see also* Denis Binder, *The Spending Clause As A Positive Source Of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147 (2001); *see also* William E. Thro, *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 ED. LAW REP. 951, 977-79 (2000) (noting that *South Dakota v. Dole* allows in the spending clause context what *United States v. Lopez* forbids in the commerce clause context, and suggesting that the Court will ultimately have to reconcile the conflict).

6 514 U.S. 549 (1995).

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

8 *See, e.g.*, James Leonard, The Shadows Of Unconstitutionality: How The New Federalism May Affect The Anti-Discrimination Mandate Of The Americans With Disabilities Act, 52 ALA. L. REV. 91, 177-78 (2000) (describing the relatedness inquiry as one of the "true issues"); see also Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163 (2001). As Professor McConville rightly contends, the relatedness prong of the Dole test does not carry much water; almost anything can be made to appear "related." The Court should have limited congressional conditions to those that would ensure the federal funding was being used for the intended purpose. Highway funds should be used to build highways, not parks near the mayor's house, etc. That would be a "relatedness" requirement with some teeth. *See generally* Baker, *Conditional Federal Spending*, *supra* note 5; South Dakota v. Dole, 483 U.S. at 213-16 (O'Connor, J., dissenting). **R**

renewed attention to Spending Clause issues affords us an opportunity to revisit the analytically distinct and prior question of whether the spending grants are themselves constitutional. In Part I of this paper, I contend that our view of the Spending Clause since *United States v. Butler*[9] has been wrong; that James Madison rather than Alexander Hamilton had the better argument about the limitations of that clause; that it was not just Madison, but Jefferson and numerous others as well, who subscribed to Madison's position; and that the Election of 1800 was in part fought over this issue. In Part II, I take up an additional limitation found in the text of the Spending Clause that is only implicitly addressed in the dispute between Madison and Hamilton and therefore has largely been overlooked in the last century and a half of our nation's history. Congress, I contend, 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.[10]

These matters are more than simply of historical interest and more is at stake that just constitutional purity. The line between "general" and non-general welfare drawn by the founders makes good policy sense, as well. In his message vetoing the college land grant bill, President James Buchanan cogently described the policy considerations that underlay the constitutional mandate:

> The representatives of the States and of the people, feeling a more immediate interest in obtaining money to lighten the burdens of their constituents than for the promotion of the more distant objects intrusted [sic] to the Federal Government, will naturally incline to obtain means from the Federal Government for State purposes. If a question shall arise between an appropriation of land or money to carry into effect the objects of the Federal Government and those of the States, their feelings will be enlisted in favor of the latter. This is human nature; and hence the necessity of keeping the two Governments entirely distinct . . . . Besides, it would operate with equal detriment to the best interests of the States. It would remove the most wholesome of all restraints on legislative bodies—that of being obliged to raise money by taxation from their constituents—and would lead to extravagance, if not to corruption. What is obtained easily and without responsibility will be lavishly expended.[11]

9 297 U.S. 1, 65 (1936).

10 *Cf.* Wickard v. Filburn, 317 U.S. 111 (1942).

11 President James Buchanan to the House of Representatives of the United States (Feb. 24, 1859), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 3074, 3076-77 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

With such policies in mind, we turn to the Constitutional language and the epic dispute between James Madison and Alexander Hamilton about the meaning of the General Welfare clause.

## PART I. THE MADISON-HAMILTON DISPUTE OVER THE MEANING OF THE "GENERAL WELFARE" CLAUSE.

Congress's spending power is derived from Article I, Section 8 of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[12]

On its face, the clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States; and 2) to provide for the common defense and general welfare of the United States.

To the modern reader, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that Congress's power to provide for the "general welfare" is a power to spend for virtually anything that Congress itself views as helpful.[13] The courts have essentially treated whatever limitation the clause might impose as essentially a nonjusticiable political question.[14] Although some of the founders, most notably Alexander Hamilton, expansively interpreted the clause in a way similar to the current understanding,[15] most did not. Thomas Jefferson,

12 U.S. CONST. art. I, § 8, cl. 1.

13 *See*, *e.g.*, South Dakota v. Dole, 483 U.S. at 208; *see also* Erwin Chemerinsky, *Protecting the Spending Power,* 4 CHAP. L. REV. 89, 93 (2001) ("It is hard to imagine a broader statement of the scope of Congress's powers" than the "common defence" and "general welfare" language of the Spending Clause). Professor Chemerinsky argues that the spending power is "virtually infinite," *id.,* and tellingly does not offer a single example of *unconstitutional* spending, *see id.* at 92. Some of his examples, such as defense spending and foreign aid, are clearly within the "general welfare" spending power; others, such as dealing with interstate pollution that does not respect state boundaries, are more properly dealt with under the Compacts Clause, U.S. CONST. art. I, §10, cl. 3; but the remainder, such as redistribution of wealth among the states for which Professor Chemerinsky argues on policy grounds, are not only *not* covered by the General Welfare clause, but are arguably at odds with the uniformity requirement of Art. I, § 8, cl. 1, and the proportionality requirement of Art. I, § 9, cl 4. *See discussion infra* at Part II.C. Indeed, under Professor Chemerinsky's broad reading of the Spending Power, it is hard to imagine why the constitutional convention even bothered enumerating any other powers, since they would all be redundant. *See infra,* note 16. Professor Chemerinsky's position pushes past the limits set even by the broad reading given the clause by the Supreme Court in South Dakota v. Dole, 483 U.S. 203, 207 (1987) (recognizing that Congress must be acting in pursuit of the "general welfare"). R

14 *See* South Dakota v. Dole, 483 U.S. at 208 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all") (citing Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam)).

15 In his Report on Manufactures, for example, Hamilton contended that the only limits on the tax and spend power were the requirements that duties be uniform, that direct

for example, repudiated Hamilton's expansive reading as a "sham limitation."[16] But the most vigorous opponent of Hamilton on this subject was James Madison, who repeatedly argued that the power to tax and spend did not confer upon Congress the right to do whatever it thought to be in the best interest of the nation, but only to further the ends elsewhere specifically enumerated in the Constitution.

It is commonly thought that in the dispute between Madison and Hamilton about the scope of the Spending Clause, Hamilton carried the day before the close of the 18th century. Indeed, both parties in the New Deal-era case of *United States v. Butler* relied upon the Hamiltonian position, and both the majority and dissenting opinions facially accepted the correctness of Hamilton's position even though the majority ruled that the particular tax and regulatory program at issue in the case was unconstitutional.[17] Justice Roberts, writing for the Court, acknowledged the "sharp differences of opinion" on the subject that have persisted "[s]ince the foundation of the nation," but then concluded that the Hamiltonian position, as espoused by Justice Story in his Commentaries on the Constitution, was "the correct one." "While, therefore, the power to tax is not unlimited," he wrote, "its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress."[18] In other words, the Court concluded in this opening

taxes be apportioned by population, and that no tax shall be laid on articles exported from any state. ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONSTITUTION]. The power to raise money was otherwise "*plenary*, and *indefinite*," he argued, "and the objects to which it may be *appropriated* are no less comprehensive. . . ." *Id*. Yet even Hamilton recognized that the clause had a qualification, namely, "[t]hat the object to which an appropriation of money is to be made be *General* and not *local*." *Id.* He simply avoided this limitation by arguing for what we would today call an aggregation principle. *Id. Cf.* Wickard v. Filburn, 317 U.S. 111 (1942).

16 Thomas Jefferson to George Washington (Sept. 9, 1792), *in* THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES (Paul Leicester Ford, ed.) (visited Mar. 6, 2001) <http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj070029))>; *see also* THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE NATIONAL BANK (1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984) [hereinafter WRITINGS](arguing that, by Article I, § 8, the two houses of Congress "are not *to do anything they please* to provide for the general welfare, but only to *lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be good for the Union, would render all the preceding and subsequent enumerations of power completely useless.").

17 297 U.S. 1, 66 (1936); *id.* at 81 (Stone, J., dissenting).

18 *Id.* at 65-66. Jeffrey Renz has described the Story interpretation of Hamilton's position embraced by the *Butler* Court as the "weak" Hamiltonian position. The "strong" Hamiltonian position was that the power to tax and the power to provide for the general welfare are separate powers, and that Congress could therefore enact any law, not just spending laws, in order to further the general welfare. Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution,* 33 J. MARSHALL

section that the only limitation on Congress's power to tax and spend was that the spending be for the "general welfare," and it effectively eviscerated even that limitation by giving virtually unbridled discretion to Congress.[19] This interpretation of *Butler* was reaffirmed without further analysis a year later in *Steward Machine Co. v. Davis*[20] and *Helvering v. Davis*,[21] and is now "so widely recognized that '[n]o one today candidly denies that Hamilton's view of the spending power was correct.'"[22]

There is, however, more to the Madisonian position than was credited by the *Butler* Court. Indeed, it was much more than just Madison's position. In the Kentucky Resolution, for example, Thomas Jefferson directly challenged Hamilton's view of the spending power, stating that the words of the General Welfare clause "ought not to be construed as themselves to give unlimited powers, . . . so taken as to destroy the whole residue of [the Constitution]."[23]

The principles outlined in the Kentucky Resolution (and the parallel Virginia Resolution authored by James Madison) became the platform for Jefferson's emerging political party and the primary grounds on which Jefferson challenged the incumbent President John Adams in the election of 1800. Indeed, Thomas Jefferson was later to write that the different interpretations of the general welfare clause put forward by Hamilton, on the one hand, and Madison and Jefferson, on the other, was "almost the only landmark which now divides the federalists from the republicans. . . ."[24] Thus, although Hamilton's reading carried the day for a while in the Executive branch during the 1790s,[25] the issue remained hotly disputed and Hamilton's view was essentially repu-

L. REV. 81, 87 (Fall 1999) [hereinafter Renz, *What Spending Clause?*]. Hamilton had taken the "strong" position when he proposed his alternative to the Randolph Plan during the 1787 Convention, but his proposal was soundly rejected by the convention. *Id.* at 103 (quoting 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 127 (Jonathan Elliot ed. & rev., 2d ed. 1996) [hereinafter ELLIOT'S DEBATES]; 1 ELLIOT'S DEBATES at 179 ); *see also* MAX FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION 627 (Yale University Press rev. ed., 1937) [hereinafter FARRAND]. Because the remainder of Article I, Section 8 would be redundant (and the doctrine of enumerated powers rendered nugatory) by the "strong" Hamiltonian interpretation, that interpretation is manifestly erroneous.

19 Butler, 301 U.S. at 66.

20 301 U.S. 548 (1937).

21 301 U.S. 619 (1937). The Court in *Helvering* upheld the Social Security Act as within the "penumbra" of the General Welfare Clause. *Id.* at 640.

22 David E. Engdahl, *The Spending Power,* 44 DUKE L.J. 1, 5 (1994); *see also* Renz, *What Spending Clause?, supra* note 18, at 86. R

23 DRAFT OF THE KENTUCKY RESOLUTIONS, *reprinted in* WRITINGS, *supra* note 16, at 452. R

24 Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 2 FOUNDERS' CONSTITUTION, *supra* note 15, at 452. R

25 Actually, it was only the "weak" Hamiltonian position that gained some acceptance during the Washington and Adams administrations, not the "strong" Hamiltonian position.

diated by the election of 1800. What is more, the election of 1800 was not a revolution in thought about the expanse of the spending power,[26] but a return to what had been the common understanding of the phrase employed and the underlying principle it codified that had been in place almost since the new nation was created in 1776. And from 1800 to 1860, almost every President held to the Jeffersonian/Madisonian position by vetoing as unconstitutional various internal improvement bills enacted by Congress, oftentimes explicitly relying upon Madison's views.[27]

In the closing days of his second term as President, for example, Madison himself vetoed an internal improvements bill that would have funded the construction of roads and canals "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence. . . ."[28] Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render "the special and careful enumeration of powers, which follow the clause, nugatory and improper."[29] In what is perhaps the best articulation of his position, Madison rejected both the "strong" and the "weak" Hamiltonian positions:

> Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them; the terms "common defence and general welfare," embracing every object and act within the purview of a legislative trust . . . . A restriction of the power "to provide for the common defence and general welfare," to cases which are to be provided for by the expenditure of money, would still leave within the legislative power of Congress all the great and most important measures of

26 The election of 1800 is therefore not a "constitutional moment" that implicitly ratified an unwritten amendment to the Constitution. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 256-57, 279-81 (1998); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 42-43, 100-104 (1991).

27 *See* discussion *infra* Part II.

28 30 ANNALS OF CONG., Senate, 14th Cong., 2nd Sess. 211 (1817), *available in A Century of Law Making* (visited on Mar. 12, 2001) <http://memory.loc.gov/ammem/amlaw/lwaclink.html> [hereinafter *Annals Website*]. Today, such projects would appear to be clearly within Congress's authority to regulate commerce among the states, or at least within Congress's authority to enact laws that are a "necessary and proper" means of furthering its enumerated power over interstate commerce. In addition to rejecting the Spending Clause as a source of authority for the Act, Madison summarily rejected the Commerce Clause as authority. The limitations the Court has recently re-imposed on the Commerce Clause are therefore still a long way from the original understanding of that clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 588 (1995) (Thomas, J., concurring).

29 30 ANNALS OF CONG., *supra* note 28, at 212, *available in Annals Website, supra* note 28. R R

> Government; money being the ordinary and necessary means of carrying them into execution.[30]

Nearly half a century later, President James Buchanan still adhered to the same position. In his message vetoing the college land grant bill, President Buchanan took it as a given that the funds raised by Congress from taxation were "confined to the execution of the enumerated powers delegated to Congress." The idea that the resources of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support "would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution." "The natural intendment" of those who drafted and ratified the Constitution, he continued,

> would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.[31]

The *Butler* Court did not even consider this nearly uniform historical evidence and practice. Moreover, the *Butler* Court's initial embrace of the Hamiltonian position cannot be reconciled with the actual holding of the case. "*Wholly apart from*" the question "whether an appropriation in aid of agriculture falls within" "the scope of the phrase 'general welfare of the United States,'" the Court held that the Agricultural Adjustment Act was unconstitutional because its purpose was to regulate and control agricultural production, "a matter beyond the powers delegated to the federal government."[32] In other words, Congress could not use its power to tax and spend for the "general welfare" as a means to accomplish some end "not expressly granted, or reasonably to be implied from such [powers] as are conferred," even if the spending itself might

30 *Id.* Madison also contended that an expansive view of the General Welfare clause would have the effect of excluding the judiciary from its role in guarding the boundary between the Federal and State governments, "inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." In this, Madison appears to be deliberately discounting the limitation that spending be for the "general" welfare as opposed to merely local welfare—a limitation that even Hamilton recognized—in order to strengthen his contention that the other enumerated powers were themselves limitations on the Spending Power. As I describe below, it is a concession that Madison did not need to make, since the enumerated powers were themselves drafted with a "general welfare" understanding in mind. *See infra* Part II.

31 President James Buchanan to House of Representatives (Feb. 24, 1859), *in* 7 MESSAGES AND PAPERS , *supra* note 11, at 3079. **R**

32 *Butler*, 297 U.S. at 68 (emphasis added).

be said to be for the "general welfare."[33] Notwithstanding the *Butler* Court's opening embrace of Hamilton, that holding is much closer to Madison's position than to Hamilton's.

Even if the *Butler* holding could somehow be reconciled with the Court's earlier rejection of the Madisonian position, however, both Justice Roberts for the Court and Justice Stone in dissent recognized in *Butler* that the "general welfare" clause imposed another limitation on Congress's spending power, namely, that the purpose of the spending "must be 'general, and not local.'"[34] But again, that restriction is much more consistent with Madison's position than with Hamilton's, once one fully appreciates the principle underlying the doctrine of enumerated powers and its consistency with the historical understanding of the phrase, "general welfare."

The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the convention, Roger Sherman proposed that Congress should have power to legislate "in all cases which may concern the *common interests* of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned."[35] His proposal, and others like it, were referred to the Committee of Detail, which on August 6, 1787 gave substance to his proposal by reporting back a list of enumerated powers that was eventually to become Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states.

Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general welfare" limitation in the spending clause. In the next section, I explore just what the historical understanding of the "general welfare" limitation was.

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33 *Id.*

34 *Id.* at 66-67 (quoting ALEXANDER HAMILTON, REPORT ON MANUFACTURERS, *reprinted in* 3 WORKS OF ALEXANDER HAMILTON 250); *Butler*, 297 U.S. at 87 (Stone, J., dissenting) ("The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national."); *see also infra*, Part II.

35 2 FARRAND, *supra* note 18 at 21 (proposal by Roger Sherman, July 17, 1787) (emphasis added); *see also id.* (proposal of Gunning Bedford) (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent. . . ."). R

## PART II. THE "GENERAL WELFARE" WAS ORIGINALLY UNDERSTOOD AS A LIMITATION ON CONGRESS'S SPENDING POWER, NOT A GRANT OF POWER.

Madison's view that the power to spend for the "general welfare" was limited to spending that furthered one of the other enumerated powers is only an *implicit* limitation, drawn not from the text of the clause itself but from the overall structure and underlying principles of the Constitution. But the Spending Clause also contains an *explicit* limitation, albeit one that is not readily apparent to the modern reader. Spending had to be for the "general," or national welfare, not for regional or local welfare.

In order to understand fully the meaning that the framers attributed to this "general welfare" limitation, it is perhaps best to begin with the document from which the clause was derived. The "general welfare" language of Article I, Section 8 is drawn from two clauses in the Articles of Confederation[36] that were commonly understood as imposing restrictions on the Confederation Congress. And those clauses had a parallel in an important document by which Virginia ceded to the United States her claims over the vast tracts of undeveloped land in the west, a document and controversy to which I now turn.

### A. The Virginia Cession of Lands and the Ohio Land Sales.

On June 7, 1776, when Richard Henry Lee made his famous call for independence—"[t]hat these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved"—his motion included a request "[t]hat a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation."[37] That committee, consisting of one member from each colony,[38] issued its report and proposed articles of confederation to the Congress on July 12, 1776, just one week after the Declaration of Independence was enacted. But the Articles of Confederation was not finally approved until November 1777; and the new government authorized by it did not take effect until 1781, when Maryland finally ratified the document. One of the principal reasons for the delay was a festering dispute over the conflicting claims to the

36 *See, e.g.*, 2 ANNALS OF CONG., House of Representatives, 1st Cong., 3rd Sess. 1946 (1791), *available in Annals Website, supra* note 28 (James Madison noting during debate on the Bank Bill that the terms of the General Welfare Clause were "copied from the articles of Confederation"). R

37 5 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 425, (Worthington Chauncey Ford ed., 1906) [hereinafter JOURNALS].

38 *Id.* at 433.

western lands. As the North Carolina delegates to the Continental Congress wrote home to their state's Governor, Maryland's objection was "that some States should claim and possess vast tracts of vacant unappropriated lands, protected and rescued from the Crown of Great Britain by the joint efforts of the United States which should become a fund for the payment of the national debt."[39]

Several states had claims to the vast western lands, but Virginia's claim, being the oldest, was the strongest. The delegates from Maryland, and to a lesser extent from Delaware, were greatly concerned that their already large and powerful southern neighbor would become oppressively powerful if it was able to vindicate its claim to the western lands. Thus, a precondition of a viable confederation was that Virginia quit her claims. She ultimately did so, offering in 1781 to cede the lands to the United States under certain conditions, including "that all the lands thus ceded be considered a common fund for the Confederation."[40] Virginia's conditions were the subject of much debate over the next three years,[41] but ultimately Virginia's deed of cession contained the following language:

> That all the lands within the territory so ceded to the United States . . . shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and

39 Benjamin Hawkins and Hugh Williamson to Alexander Martin, Governor of North Carolina (September 26, 1783), *in* 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 313 (Edmund C. Burnett ed., 1936) [hereinafter LETTERS].

40 MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 229 (Univ. of Wisconsin Press 1976) (describing Virginia's offer of cession); *see also* 17 JOURNALS, *supra* note 37, at 808 (Sept. 6, 1780) (similar proposal by Virginia delegates to the Continental Congress); *Id*. (providing that any territory ceded would be used for the common benefit of the United States); 23 JOURNALS, *supra* note 37, at 550 (Sept. 5, 1782) ("That it is [the opinion of the committee] that the western lands, if ceded to the United States, would be an important fund for the discharge of the national debt"). The idea that the western lands would provide a common fund for the payment of the national debt first arose soon after the start of the war. JAY A. BARRETT, EVOLUTION OF THE ORDINANCE OF 1787, 4 (G. P. Putman's Sons, 1891, *reprinted by* Arno Press, 1971). R R

41 The debate also involved acrimonious disputes over the validity of claims by land speculators that had purchased land from Indians residing in the territory. When Virginia refused to honor the claims, the speculators petitioned Congress for relief, leading the Virginia legislature to pass a remonstrance challenging Congress's authority even to consider the speculators' petition. *See* JENSEN, *supra* note 40, at 191, 216-18; *see also* 12 JOURNALS, *supra* note 37, at 224-31 (May 1, 1782). It was in large part because Virginia wanted her cession of western lands to redound to the benefit of the whole nation rather than enrich a few land speculators that it imposed the conditions it did. R R

> shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.[42]

A review of the uses to which the lands ceded by Virginia were put and, perhaps more importantly were not put, will indicate just how the grantor Virginia and the grantee United States (through the delegates in the Continental Congress) viewed the "common fund" condition imposed by Virginia.

It was generally understood that the lands ceded by Virginia would immediately be used for two purposes: to provide land bounties to soldiers who fought in the Continental Army, and to retire the national debt.[43] By definition, retiring the national debt met the terms of the Virginia cession because the obligation for repayment of the national debt was, under the Articles of Confederation, owed by the states in the same proportion as the benefits of the Virginia lands were to be distributed.[44] Although less self-evident, the provision of land bounties to former members of the Continental Army also complied with Virginia's condition; lands had been promised to army soldiers, as pay supplement or enlistment inducement, almost from the outset of the Revolutionary War.[45] The land bounties were thus as much payment of the na-

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42 Virginia Act of Cession, (Oct. 20, 1783), *in* 26 JOURNALS, *supra* note 37, at 115 (Mar. 1, 1784); *see also* 25 JOURNALS, *supra* note 37, at 559-64 (Sept. 13, 1783) (Congress's counter proposal to Virginia); 34 JOURNALS, *supra* note 37, at 332 (July 17, 1788) (discussion of same); JUSTIN WINSOR, THE WESTWARD MOVEMENT: THE COLONIES AND THE REPUBLIC WEST OF THE ALLEGHENIES, 1763-1798, (Houghton, Mifflin & Co., 1897). R R

43 *See, e.g.*, Letter from Arthur Lee to Joseph Reed (April 5, 1784) ("The [Virginia] cession . . . will . . . enable us to satisfy the demands of the Army, and sink the public debt by the sale of the Lands"), *in* LETTERS, *supra* note 39, at 485; Letter from North Carolina delegates to Alexander Martin, Governor of North Carolina (Sept. 26, 1783) ("Congress being possessed of both [the New York and Virginia] claims may be enabled to pay off the army and perhaps a considerable part of the national debt"), *in* LETTERS, *supra* note 39, at 313; Letter from David Howell to William Greene, Governor of Rhode Island (Dec. 24, 1783) ("I consider the Western Country as an important fund, and I hope that it will prove . . . a sufficient fund to secure the final payment of the national debt"), *in id.* at 397; New Hampshire delegates to the President of New Hampshire (May 5, 1784) ("It has been in contemplation to render these Lands productive for the purpose of discharging the engagements to the Officers and Soldiers, and defraying other debts contracted in the late War"), *in id.* at 513; Report of Public land Commission, 1880, 46th Cong., 1st Sess., Exec. Doc. No. 47, at 196 ("The western lands were looked upon by all the financiers of this period as an asset to be cashed at once for payment of current expenses of the government and extinguishment of the national debt") (*cited in* George Knight, *History and Management of Land Grants for Education in the Northwest Territory*, *in* PAPERS OF THE AMERICAN HISTORICAL ASS'N, vol 1, no.3, at 10 (G.P. Putnam's Sons, 1885)). R R R

44 *See* ARTICLES OF CONFEDERATION, art. 8 ("All charges of war and all other expenses, that shall be incurred for the common defence or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each State . . . ."). This was the "usual" proportion referred to in the Virginia deed of cession.

45 *See, e.g.*, 5 JOURNALS, *supra* note 37, at 763 (Resolution of Sept. 16, 1776); 17 JOURNALS 726-27 (Resolution of Aug. 12, 1780); 18 JOURNALS, *supra* note 37, at 887-88 (Resolution of Sept. 30, 1780). Indeed, by the end of the war, officers and enlisted men were owed so much in back pay that George Washington feared dismissing the army without making some provision to cover the debts. *See, e.g.*, Letter from George Washington, "Circular Let- R R

tional debt incurred for the "common defence and general welfare"[46] as were the monetary obligations owed by the new government.[47]

Within a few years, however, Congress was making outright gifts of land to local governments in the new territories for the support of churches and schools that were primarily, if not exclusively, of benefit to the local community rather than to the nation as a whole.[48] These "Section 16" land grants on their face do not appear to meet the conditions contained in the Virginia cession, suggesting either that the "common fund" condition imposed by the Virginia cession was quickly ignored or that it was understood much more broadly than described above. But a more careful review of the circumstances surrounding the land grants demonstrates that the Virginia condition was taken quite seriously and that the Section 16 land grants actually satisfied the narrow, literal interpretation of that condition.

After the Virginia Deed of Cession was executed, Thomas Jefferson was appointed to head a committee to draft an ordinance for the disposition of the western lands. His handiwork, the Land Ordinance of 1784, patterned land sales on the New England township model, but contained no grant of lands for education purposes as was common in New England and that had been requested in a plan to pay army officers from the war, which had been submitted to Congress in 1783. This omission is particularly surprising given Jefferson's own strong support for public education.[49] Jefferson apparently thought such a grant would violate the condition in the Virginia deed of cession that all the lands be used for the common benefit of the United States, for in the report accompanying the bill, he wrote, "The monies arising from the sale of warrants shall be applied to the sinking such part of the princi-

ter" to the States, June 14, 1783, and letter to Joseph Jones (Mar. 18, 1783), *in* GEORGE WASHINGTON: A COLLECTION 227-228, 245-46 (W.B. Allen ed., 1988); Letter from Thomas Jefferson to the Marquis de Chastellux, (Jan. 16, 1784), ("There was indeed some dissatisfaction in the army at not being paid off before they were disbanded, and a very trifling mutiny of soldiers in Philadelphia"), *in* 6 THE PAPERS OF THOMAS JEFFERSON 466 (Julian P. Boyd ed., 1958); Letter from Stephen Higginson to Samuel Adams (May 20, 1783), ("The particular situation of Our Affairs at this time was such, that had the Army been broke up, it must have been fatal to Our Cause"), *in* LETTERS, *supra* note 39, at 168. **R**

46 ARTICLES OF CONFEDERATION, art. 8.

47 Moreover, as part of the compensation that was promised to soldiers ex ante or that was offered as back pay, the land bounties are readily distinguishable from individual grants made ex post.

48 Even if the provision of education to the settlers in the new territories could be said to be in the national interest, the grants did not meet the "proportionality" requirement of the Virginia cession.

49 Jefferson had in 1779 introduced in the Virginia legislature his *Bill for the More General Diffusion of Knowledge*, providing for a broad system of public education. *See* THOMAS JEFFERSON, A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), *reprinted in* WRITINGS, *supra* note 16, at 365. **R**

pal of the national debt as Congress shall from time to time direct, and to no other purpose whatsoever."[50]

Only after it became clear that likely land purchasers objected to the 1784 plan drafted by Jefferson did Congress add a provision reserving certain lands for educational purposes.[51] But this reservation was inserted in the Land Ordinance of 1785 not because a different view of the limitation imposed by the Deed of Cession had prevailed,[52] but because Congress by then had realized that such a provision was necessary as a sales inducement.[53] Indeed, there is pretty strong evidence that the reservation was inserted into the land ordinance at the request of Thomas Pickering, an army colonel who had played an active role in submitting

50 7 PAPERS OF THOMAS JEFFERSON, *supra* note 45, at 145. One historian contended that "whether the three southern members [of the committee] objected to supporting a system new to them, or whether the members generally questioned the right of Congress to devote any portion of the public domain to such purposes, will probably never be known." PAYSON JACKSON TREAT, THE NATIONAL LAND SYSTEM, 1785-1820, at 264 (E.B. Treat & Co., 1920). But Julian Boyd has suggested that the "emphatic words in the stipulation that revenues from land sales should be applied to the NATIONAL DEBT . . . AND TO NO OTHER PURPOSE WHATSOEVER indicate [Jefferson's] reluctance to accept [a lack of grants to actual settlers, another of Jefferson's pet projects] on any other ground than inescapable necessity." 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 45, at 148. R

51 Timothy Pickering, an army colonel who had played an active role in submitting the Army Plan to Congress in 1783, strongly objected to Jefferson's proposal, for example, because there was "no provision made for ministers of the gospel, nor even for schools or academies." 1 LIFE OF TIMOTHY PICKERING 509 [hereinafter PICKERING] (quoting Letter to Rufus King); *see also* JOSEPH SCHAFER, THE ORIGIN OF THE SYSTEM OF LAND GRANTS FOR EDUCATION 39-40 (Bulletin of the University of Wisconsin at Madison, History Series No. 63 (1902)).

52 Elsewhere in the 1785 Act, the "common fund" requirement of the Virginia Cession was complied with by assigning to each of the states a proportional amount of the lands that were to be surveyed, according to the quotas assigned to the states under the Articles. 28 JOURNALS, *supra* note 37, at 375, 377 (May 20, 1785); *see also* 34 JOURNALS, *supra* note 37, at 244 (June 19, 1788). On related issues, Congress treated the language of the cession deed quite seriously. For example, after James Madison visited the Ohio valley in 1785 and determined that the size of the new states needed to be larger than was allowed by Congressional resolution of 1780 and by the Virginia deed of cession, he moved to refer the entire matter to a grand committee. The committee report recommended that Virginia modify her act of cession. *See* 30 JOURNALS, *supra* note 37, at 392 (July 7, 1786) ("That it be recommended to the legislature of Virginia, to take into consideration their act of cession, and revise the same, so far as to empower the United States in Congress assembled, to make such a division of the territory of the United States lying northerly and westerly of the river Ohio, into distinct republican states, not more than five nor less than three, as the situation of that country and future circumstances may require"). *See also* 34 JOURNALS, *supra* note 37, at 246 (June 19, 1788) (recognizing and complying with the requirement in the Virginia Cession that certain lands be reserved to honor the land bounties that Virginia had pledged to her own military officers—land that ultimately became known as the "Western Reserve," from which Case Western Reserve University in Cleveland, Ohio derives its name); 28 JOURNALS, *supra* note 37, at 316 (April 28, 1785). R R R R R R

53 *See, e.g.*, William Grayson to George Washington (April 15, 1785) ("The idea of a township, with the temptation of a support for religion and education, holds forth an inducement for the purpose of purchasing and settling together"), *in* TREAT, *supra* note 50, at 31. Grayson was Chairman of the Committee that reported the revised land ordinance. *See also* Knight, *supra* note 43, at 14 ("the [school] reservation clause was finally inserted as an inducement to purchasers. Congress unquestionably expected that the value of the remaining lands would be increased . . . ."); 4 JOURNALS, *supra* note 37, at 520-22 (July 5, 1776). R R R

the Army officer petition to Congress in 1783 and who was trying to arrange for the purchase of a large tract of land for a group of former army officers.[54]

Other provisions in the 1785 ordinance, such as a high minimum price, proved too great a discouragement to land sales, so Congress made another attempt with what became the Northwest Ordinance of 1787. The first draft of the ordinance, reported by a new committee composed of members unversed in the prior western lands disputes, contained no provision for education land grants,[55] but on the same day the draft ordinance received its second reading in Congress, General Parsons, representing the Ohio Company, submitted a memorial to Congress to purchase 1.5 million acres of land in the northwest territory.[56] The offer specifically required that the sale include reservations of land for education and religion (one section in each township was set aside for education, and two whole townships were set aside for a university). By now, Congress had enough experience with attempted land sales in the western territories to know that without such an inducement, the sale would not be consummated.[57] The Committee made revisions to accommodate the Ohio Company's offer, and the ordinance as finally passed contained the following provision: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[58] Ten days later, Congress approved a large sale of land to the Ohio Company in which Section 16 in each township was to be reserved for education, Section 29 for religion, and in addition two whole townships were to be reserved for the support of a university.[59]

Because the education and religious grants were conditions of sale, they did not violate the "common fund" requirement of the Virginia Deed of Cession. The entire country benefited by the reservations because of the enhanced price of the surrounding lands

54 Rufus King to Timothy Pickering (date unknown) 1 PICKERING, *supra* note 51, at 511; *see also* SCHAFER, *supra* note 51, at 40 ("You will find thereby, [in the enclosed plan] that your opinions [regarding school lands] have had weight with the committee that reported this ordinance"). R R

55 *See* 32 JOURNALS, *supra* note 37, at 238-41 (April 25, 1787); SCHAFER, *supra* note 51, at 40. R

56 *See* 32 JOURNALS, *supra* note 37, at 276 (May 9, 1787). R

57 On July 9, 1787, Congress returned the proposed ordinance to the committee to see if it could be brought into conformity with the Ohio Company's purchase offer. 32 JOURNALS, *supra* note 37, at 310 n.3 (July 9, 1787); WINSOR, *supra* note 42, at 283; *see also* Knight, *supra* note 43, at 17 ("The same play of forces which brought about the school reservation in 1785 compelled the grant for a university in 1787. The latter was fairly wrung from the hands of an unwilling Congress"). R R

58 An Act to provide for the Government of the Territory Northwest of the river Ohio, 32 JOURNALS, *supra* note 37, at 340 (July 13, 1787), *recodified* at 1 STAT. 50, 51 n.a (Aug. 7, 1789). R

59 *See* 32 JOURNALS, *supra* note 37, at 400 (July 23, 1787). R

that resulted from it.[60] In contrast, efforts by the original states to obtain payments in support of their own education efforts were refused, despite claims that such support would support "the general welfare of the people."[61]

B. The Articles of Confederation.

As described above, the dispute over the western lands was so significant as almost to derail the efforts by the several states to enter into even the loose confederation proposed in the Articles of Confederation. Virginia's cession of lands eliminated that hurdle, but the language of the Articles of Confederation itself showed that there were similar concerns that went beyond the land question.

Article 3 of the Articles of Confederation specifies that the States "entered into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and *general welfare*. . . ."[62] And article 8 provided:

> All charges of war and all other expenses, *that shall be incurred for the common defence or general welfare*, and allowed by the United States, in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each State, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states, in congress assembled, shall, from time to time, direct and appoint.[63]

During the debates over the ratification of the Constitution, James Madison would later note that the language of Article I, Section 8 was drawn from these provisions of the Articles of Confederation, where it was never thought to give to the Confederation Congress "a power to legislate in all cases whatsoever."[64]

C. Internal Improvements and Bounty Debates in the early Congresses.[65]

Once the new government was in place, there were early efforts by certain members of Congress to obtain funding from the

60 President Buchanan would later make this same point in his message vetoing college land grants. *See infra*, Part II.D.

61 Knight, *supra* note 43, at 19-20 (*citing* State Papers, 4 PUBLIC LANDS 750 (date unavailable for this journal)). **R**

62 ARTICLES OF CONFEDERATION, art. III (emphasis added).

63 *Id.* at art. VIII (emphasis added).

64 THE FEDERALIST NO. 41, 264 (James Madison) (Clinton Rossiter ed., 1961); *see also* 3 ANNALS OF CONG., House of Representatives, 2nd Cong., 1st Sess. 387 (1792), *available in Annals Website, supra* note 28. **R**

65 Professor Erwin Chemerinsky dismisses the evidence cited in this section and the next as merely examples of "the political branches of government choosing not to spend

national treasury for various parochial interests, despite the fact that the constitutional convention had expressly rejected an amendment that would have given Congress the power to fund internal improvements.[66] In the First Congress, for example, Congress refused to make a loan to a glass manufacturer after several members expressed the view that such an appropriation would be unconstitutional.[67] And the Fourth Congress did not even believe it had the power to provide relief to the citizens of Savannah, Georgia after a devastating fire destroyed the entire city.[68]

During the Second Congress, a protracted debate that occurred over a bill to pay a bounty to New England cod fishermen demonstrates just how solicitous of the "general welfare" limitation Congress was. Representative Giles contended that paying a bounty on certain occupations was of "doubtful" constitutionality.[69] Representative Williamson argued that the "general" welfare limitation was parallel to the requirement in Article I, Section 9 that direct taxes could be levied only in proportion to state population. The Spending Clause afforded no power "to gratify one part of the Union by oppressing another," he contended.[70] Any other reading of the clause would render the restriction on direct taxes "meaningless." In remarks that are an uncanny description of contemporary politics, he continued:

> Establish the doctrine of bounties, set aside that part of the Constitution which requires equal taxes, and demands similar distributions, destroy this barrier, and it is not a few fishermen that will enter, claiming ten or twelve thousand dollars, but all manner of persons — people of every trade and occupation — may enter in at the breach, until they have eaten up the bread of our children.[71]

money." Chemerinsky, *supra* note 13, at 90 n.5. The examples cited here demonstrate much more than a decision not to engage in discretionary spending, however; they demonstrate that Congress itself, and in the next section almost every President from 1800 to 1860, believed that such spending was not constitutionally authorized. That the members of the political branches once took seriously their oath "to support this Constitution," U.S. CONST., art. VI, cl. 3, should come as no surprise. As the founders understood the oath clause, each branch of the government, not just the courts, had a similar obligation to comply with the Constitution. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 13 (The University of Chicago Press 1997). Moreover, the failure of the political branches to continue to inquire about the constitutionality of their own actions is no excuse for judicial officers likewise to ignore their own oaths. **R**

66 *See* 2 FARRAND, *supra* note 18, at 615-16. **R**

67 *See* 2 ANNALS OF CONG., House of Representatives, 1st Cong., 2nd Sess. 1686 (1790), *available in Annals Website, supra* note 28. **R**

68 *See* 6 ANNALS OF CONG., House of Representatives, 4th Cong., 2nd Sess. 1712-1727 (1796), *available in Annals Website, supra* note 28. **R**

69 3 ANNALS OF CONG., House of Representatives, 2nd Cong., 2nd Sess. 363 (1792), *available in Annals Website, supra* note 28. **R**

70 *Id.* at 379.

71 *Id.* at 381.

James Madison also weighed in, elaborating on the position he had first articulated in Federalist 41:

> It is supposed by some gentlemen, that Congress have authority not only to grant bounties in the sense here used [as a rebate for a duty previously paid on salt used to preserve fish destined for export], but even to grant them under a power by virtue of which they may do anything which they may think conducive to the "general welfare." This, sir, in my mind, raises the important and fundamental question, whether the general terms which had been cited, are to be considered as a sort of caption or general description of the specified powers, and as having no further meaning, and giving no further power than what is found in the specification; or as an abstract and indefinite delegation of power extending to all cases whatever; to all such, at least, as will admit the application of money, which is giving as much latitude as any Government could well desire.
>
> I, sir, have always conceived—I believe those who proposed the Constitution conceived, and it is still more fully known, and more material to observe that those who ratified the Constitution conceived—that this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms . . . .
>
> It will follow, in the first place, that if the terms be taken in the broad sense they maintain, the particular powers afterwards so carefully and distinctly enumerated would be without any meaning, and must go for nothing. It would be absurd to say, first, that Congress may do what they please, and then that they may do this or that particular thing . . . . In fact, the meaning of the general terms in question must either be sought in the subsequent enumeration which limits and details them, or they convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all.[72]

The cod fisheries bill was ultimately approved, but only after an amendment making clear that Congress was not providing a "bounty," but only issuing a refund of duties previously paid on salt that was used to prepare fish for export, lest the salt duty amount to a tax on exports prohibited by Article I, Section 9.[73]

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72 *Id.* at 386-87.

73 *Id.* at 397-98; *see also* U.S. CONST. art. I, § 9. Professor Chemerinsky cites two cases in which Justice O'Connor and Chief Justice Rehnquist state that Congress may fund programs it believes to be "in the public interest" while refusing to fund alternatives. *See* Chemerinsky, *supra* note 13, at 97 (quoting National Endowment of the Arts v. Finley, 524 U.S. 569, 588 (1998) (O'Connor, J.); Rust v. Sullivan, 500 U.S. 173, 193-94 (1991). While I believe those holdings are accurate statements of current Spending Clause jurisprudence, the "public interest" was simply not synonymous with the "general welfare" when the Constitution was ratified. Justice O'Connor had it right in her *South Dakota v. Dole* dissent: "If **R**

Some appropriations for apparently local projects were approved, but on careful examination those projects were of general benefit and hence within the authority conferred by Article I, Section 8. At the same time it was denying a request to fund the dredging of the Savannah River, for example, Congress approved an appropriation for a lighthouse at the entrance of the Chesapeake Bay.[74] Both measures were important for navigation, but the lighthouse was of benefit to the entire coastal trade, while the dredging operation was primarily of benefit to the people of Georgia, and hence fell on the "local" rather than the "general" side of the public welfare line.[75]

Various appropriations to fund a road across the Cumberland Gap were also approved. The larger appropriation for internal improvements of which the Cumberland Gap road project was a part was rejected on constitutional grounds, however; the Cumberland Road project is therefore a special case, and the authority for it parallels the authority to provide the Section 16 school lands discussed above. The Admission Act for the State of Ohio specifically required the federal government to devote 1/20 of the proceeds arising from the sale of lands in Ohio to the construction of a road "leading from the navigable waters emptying into the Atlantic, to the Ohio [River]." In exchange, the new State of Ohio agreed not to tax any land sold by the federal government for five years.[76] The contractual trade-off thus protected the "general" welfare obliga-

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the spending power is to be limited only by Congress's notion of the general welfare, the reality . . . is that the Spending Clause gives 'power to the Congress . . . to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause." 483 U.S. at 217 (O'Connor, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

74 *See* Act of July 22, 1790, 1 STAT. 53, 54. Congress also authorized funding for the maintenance and repair of existing lighthouses, beacons, buoys, and public piers within "any bay, inlet, harbor, or port of the United States" if such were ceded to the United States. *See id*. As such, these appropriations were authorized under Congress's power "to exercise exclusive legislation" in federal territories (U.S. CONST. art. I, § 8, cl. 17) not under the spending power.

75 President Andrew Jackson drew the line between permissible and impermissible navigation improvements at the ports of entry or delivery established by law. Appropriations for harbor improvements, lighthouses, beacons, buoys, and public piers located on the seaward side of the ports of entry were permissible, but others were not. Message Vetoing "An act to improve the navigation of the Wabash river," 50 H.R. JOURNAL 27, 30 (1834). President Polk went further, persuasively arguing that even seaward-side improvements were to be funded not by general appropriations but by state duties on tonnage, with the consent of Congress pursuant to Article I, Section 10, Clause 3. Veto Message, 65 H.R. JOURNAL 87 (1847); *see also id.* at 93 (criticizing Jackson's position as leaving open "an immense field for expending the public money and increasing the power and patronage of [the national] government" that would result in an unjust "distribution of public burdens and benefits," "fatal encroachment" upon the States, and an "equal danger of consolidation" in the national government).

76 2 STAT. 173, 175 (April 30, 1802)

tion, since the higher price that could be obtained for tax-exempt lands was designed to offset the cost of the road construction.

Indeed, Congress accepted the view that it had no power under the Constitution to open roads and canals in any State; its power to fund the Cumberland Road was the result only of the compact with Ohio "for which the nation receive[d] an equivalent."[77]

D. The Presidential Veto Messages.

The Cumberland Gap measure was enacted during Thomas Jefferson's presidency. Although Jefferson vehemently disagreed with Hamilton's interpretation of the General Welfare clause, he nonetheless saw some utility in federal financing of internal improvements projects, for such projects would open the channels of communication with the western territories and thereby help solidify the union. But for Jefferson, utility did not give rise to constitutional authority. Therefore, in his 1806 State of the Union Address, Jefferson proposed an amendment to the Constitution that would give Congress authority to spend an anticipated surplus to "the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of the federal powers."[78] The amendment was necessary, he noted, "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied."[79]

Jefferson's proposed amendment was never adopted, but within a decade Congress nevertheless passed an internal improvements bill, amendment or no. The bill fell to then-President James Madison's veto pen.[80]

Madison's successor, James Monroe, initially followed the Madisonian line, contending in his first annual message that Congress had no power to spend for internal improvements because such was "not contained in any of the specified powers granted to Congress" nor was it "incidental to, or a necessary means . . . for carrying into effect any of the powers which are specifically

77 29 ANNALS OF CONG., House of Representatives, 14th Cong., 1st Sess. 1252 (1816), *available in Annals Website, supra* note 28. R

78 WRITINGS, *supra* note 16, at 529; 5 H. R. JOURNAL 469 (1806), *available in Journal of the House of Representatives of the United States* (visited on Mar. 10, 2001) <http://memory.loc.gov/ammem/amlaw/lwhj.html> [hereinafter *Journal Website*]; *see also* 4 S. JOURNAL 109 (1806). R

79 Jefferson to William Branch Giles (December 26, 1825), *in* WRITINGS, *supra* note 16, 1509-12. R

80 30 ANNALS OF CONG., *supra* note 28, at 212, *available in Annals Website, supra* note 28. *See also supra* Part I. R R

granted."[81] In his 1822 message to Congress vetoing as unconstitutional a bill to preserve and repair the Cumberland road, however, Monroe rejected Madison's position that the spending power was limited by the ends otherwise enumerated in Article I, Section 8. Instead, he placed stock in the textual limitation found in the General Welfare clause itself. Congress's power to spend, he stated, was restricted "to purposes of common defence, and of general, not local, national, not state, benefit."[82] Monroe was not able to distinguish between appropriations that were of general benefit from those that were merely of local benefit, however, and in the final years of his administration, he signed several bills appropriating funds to survey various harbor obstructions and the routes of proposed roads and canals.[83] Although these appropriations were very modest, the old limitation was nevertheless abandoned in principle. As President Polk would later contend, "the floodgates being thus hoisted, . . . applications for aid from the treasury, virtually to make harbors as well as improve them, clear out rivers, cut canals, and construct roads, poured into Congress in torrents, until arrested by the veto of President Jackson."[84]

The Hamiltonian position was fully resurrected during the administration of President John Quincy Adams, but Adams served only one term, defeated in 1828 by Andrew Jackson in part over the issue of the constitutionality of federal funding of internal improvements. Jackson, as President, promptly put to rest "this dangerous doctrine" which was "apparently proceeding to its final establishment with fearful rapidity" during the Adams administration.[85] He vetoed as unconstitutional bills appropriating upwards of two hundred million dollars to purchase stock in the Maysville and Lexington Turnpike Company and for the direct construction of other "ordinary" roads and canals by the Government itself.[86] So strong was his veto message that for four years Congress did not even try to pass another such bill. When, in 1834, Congress passed an Act to improve the navigation of the Wabash River, Jackson again responded forcefully:

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81 31 ANNALS OF CONG., Senate, 15th Cong., 1st Sess. 18 (1817), *available in Annals Website, supra* note 28. **R**

82 39 ANNALS OF CONG., House of Representatives, 17th Cong., 1st Sess. 1838, 1849 (1822), *available in Annals Website, supra* note 28. **R**

83 *See*, *e.g.*, Act of April 30, 1824, ch. 46, 4 STAT. 22; Act of May 26, 1824, ch. 153, 4 STAT. 38; *see also* President Polk Veto Message, Dec. 15, 1847, *in* 43 H. R. JOURNAL 82 (1847), *available in Journal Website, supra* note 78. **R**

84 *Id.* at 92.

85 28 H. R. JOURNAL 29 (1834), *available in Journal Website, supra* note 78. **R**

86 *Id.* at 30; 6 REGISTER OF DEBATES 133, House of Representatives, 21st Cong., 1st Sess. (1830), *available in U.S. Congressional Documents and Debates, 1774-1863* (visited Mar. 6, 2001) <http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=009.llrd009.db&recNum=572>.

> We are in no danger from violations of the constitution, by which encroachments are made upon the personal rights of the citizen. The sentence of condemnation long since pronounced by the American people upon acts of that character, will, I doubt not, continue to prove as salutary in its effects as it is irreversible in its nature. *But against dangers of unconstitutional acts which, instead of menacing the vengeance of offended authority, proffer local advantages, and bring in their train the patronage of the Government, we are, I fear, not so safe.* To suppose that, because our Government has been instituted for the benefit of the people, it must therefore have the power to do whatever may seem to conduce to the public good, is an error, into which even honest minds are apt to fall. In yielding themselves to this fallacy, they overlook the great considerations in which the federal constitution was founded. They forget that, in consequence of the conceded diversities in the interest and condition of the different States, it was foreseen, at the period of its adoption, that although a particular measure of the Government might be beneficial and proper in one State, it might be the reverse in another—that it was for this reason the States would not consent to make a grant to the Federal Government of the general and usual powers of Government, but of such only as were specifically enumerated . . . . In addition to the dangers to the constitution springing from the sources I have stated, there has been one which was perhaps greater than all. I allude to the materials which this subject has afforded for sinister appeals to selfish feelings, and the opinion heretofore so extensively entertained of its adaptation to the purposes of personal ambition.[87]

Jackson conceded that Congress had power to fund navigational improvements below ports of entry, but the Wabash River Act funded improvements beyond that line; Jackson thus deemed it an unconstitutional appropriation for local improvements rather than improvements in the general welfare.[88]

The next major effort at internal improvements came in 1847. On the last day of the session, the 29th Congress foreshadowed the kind of pork barrel legislation to which we have grown accustomed in recent years. The Act was entitled "An act to provide for continuing certain works in the Territory of Wisconsin, and for other purposes."[89] Although the expenditures in the territory would have been permissible under Congress's plenary power over the territories,[90] the devil was in the "and for other purposes" part of the Act. President Polk noted that only $6,000 was appropriated

87 28 H. R. JOURNAL 28 (1834), *available in Journal Website, supra* note 78 (emphasis added). Lynn Baker's work on the disparate allocation of federal funds to the states confirms Jackson's concerns. *See* Lynn Baker, *The Spending Power and the Federalist Revival,* 4 CHAP. L. REV. 195 (2001) [hereinafter Baker, *The Spending Power*]. **R**

88 *See* 28 H. R. JOURNAL 32 (1834), *available in Journal Website, supra* note 78. **R**

89 43 H. R. JOURNAL 82 (1847), *available in Journal Website, supra* note 78. **R**

90 U.S. CONST. art. IV, § 3, cl. 2.

for Wisconsin territory projects; the remaining $1/2 million in the appropriation bill was for "the improvement of numerous harbors and rivers lying within the limits and jurisdiction of several of the States . . . ."[91] Polk thought that Congress's power to give or withhold consent to the imposition of tonnage duties by the states to fund internal improvements was the only power over the subject of internal improvements held by Congress. For Polk, the mechanism provided by the Constitution was a wise one because it provided some important safeguards:

> Its safeguards are, that both the State Legislatures and Congress have to concur in the act of raising the funds; that they are, in every instance, to be levied upon the commerce of those ports which are to profit by the proposed improvement; that no question of conflicting power or jurisdiction is involved; that the expenditure being in the hands of those who are to pay the money and be immediately benefited, will be more carefully managed and more productive of good than if the funds were drawn from the national treasury and disbursed by the officers of the General Government; that such a system will carry with it no enlargement of federal power and patronage, and leave the States to be the sole judges of their own wants and interests, with only a conservative negative in Congress upon any abuse of the power which the States may attempt.[92]

In addition to the constitutional objection, Polk also argued, with uncanny prescience, that endorsement of such a bill would have disastrous consequences:

> [W]hen the system [of federal funding for internal improvements] prevailed in the General Government, and was checked by President Jackson, it had begun to be considered the highest merit in a member of Congress to be able to procure appropriations of public money to be expended within his district or State, whatever might be the object.[93] We should be blind to the experience of the past, if we did not see abundant evidences that, if this system of expenditure is to be indulged in, combinations of individual and local interests will be found strong enough to control legislation, absorb the revenues of the country, and plunge the government into a hopeless indebtedness.[94]

Polk also predicted that "[s]uch a system could not be administered with any approach to equality among the several States

91 43 H. R. JOURNAL 83 (1847), *available in Journal Website, supra* note 78. **R**

92 *Id.* at 88.

93 *Id.* at 85. I was reminded of this phenomenon on a recent trip to West Virginia, where I was privileged to participate in a symposium at Marshall University commemorating the bicentennial of John Marshall's appointment as Chief Justice of the United States. While there, I witnessed first hand the extraordinarily high merit on this score that had been achieved by Senator Robert Byrd during his extended service as Chairman of the Senate Appropriations Committee.

94 *Id.*

and sections of the Union." "There is no equality among them in the objects of expenditure," he argued, and even "if the funds were distributed according to the merits of those objects, some would be enriched at the expense of their neighbors."[95] Polk also seems to have anticipated our contemporary concern with campaign finance reform and quid pro quo corruption of public officials:

> But a greater practical evil would be found in the art and industry by which appropriations would be sought and obtained. The most artful and industrious would be the most successful; the true interests of the country would be lost sight of in an annual scramble for the contents of the treasury; and the member of Congress who could procure the largest appropriations to be expended in his district would claim the reward of victory from his enriched constituents. The necessary consequence would be sectional discontents and heartburnings, increased taxation, and a national debt, never to be extinguished.[96]

This view of the subject continued to the very eve of the Civil War. President Pierce vetoed as unconstitutional an act granting land for state insane asylums,[97] and President Buchanan vetoed as unconstitutional the act donating public lands to the several states for the establishment of agricultural colleges. He found it "undeniable" that Congress did not have the power to appropriate money, raised by taxes on the people of the United States, for the purpose of educating the people of the respective states. "Should Congress exercise such a power," he wrote,

> this would be to break down the barriers which have been so carefully constructed in the Constitution to separate the Federal from State authority. We should then not only "lay and collect taxes, duties, imposts, and excises" for Federal purposes, but for every State purpose which Congress might deem expedient or useful. This would be an actual consolidation of the Federal and State Governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the

95 *Id.* at 87. Polk's predictions appear to have been correct. *See* Baker, *The Spending Power*, *supra* note 87, at 211, 212. Professor Chemerinsky finds Professor Baker's argument flawed because it is based on a normative assumption that is not constitutionally justified. *See* Chemerinsky, *supra* note 13, at 94 n.16. However, as I describe in this paper, the "general" welfare limitation provides such a normative command. Moreover, even were spending for local benefit to be allowed on a national basis, the uniformity principle of Art. I, § 8, cl. 1 and the proportionality principle of Art. I, § 9, cl. 3, are additional normative commands. *See supra* note 13, 70 *and discussion supra* Part II.C. R R R

96 43 H. R. JOURNAL 87 (1847), *available in Journal Website, supra* note 78. For a more complete elaboration on the connection between the spending power and campaign finance, *see* Bradley Smith, *Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117 (2001). R

97 *See* 45 S. JOURNAL 361 (1854).

> two in the Treasury of the United States, equally ruinous to both.[98]

Perhaps most importantly for present purposes, Buchanan's veto message harkened back to the Virginia cession of land in 1783 and to the first education land grants in 1787. He rejected a claim that Congress could make the grant under its power to dispose of the lands of the United States, noting that the federal lands were held in trust for the whole people of the United States as a result of the cession of those lands from Virginia and other states.[99] On the other hand, the 1787 education land grants were constitutional, in his view, only because they were an inducement to potential settlers to purchase the lands.[100]

Thus, with the exception of only half a dozen years, the nearly unanimous position of every President from Jefferson in 1800 to Buchanan in 1859 was that Congress did not have constitutional authority to make appropriations for internal improvements.

## III. CONCLUSION.

For the first eighty-five years of our nation's history, under both the Articles of Confederation and the Constitution, the language of "general welfare" was viewed as a limitation on the powers of Congress, not as a grant of plenary power. If the Court would re-assert that limitation as it has reasserted the original limitations of the commerce clause, the major federalism decisions of the past decade would be anything but much ado about nothing. The decision about whether to spend would be restored to the people who benefit, so that real responsibility for setting priorities on spending could be restored. We would avoid many of the looming fights over "relatedness of conditions to spending" that we are likely to see in the coming decade. And perhaps best of all, we would restore the original constitutional check on the insatiable appetite of Congress to spend not just our own hard-won earnings but the future earnings of our children as well. Lest we forget, we once fought a revolution over just such an abuse of power. One of the charges leveled against King George III in the Declaration of Independence was that "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance."[101] It is time to restore the "general" to the General Welfare Clause, before Congress eats out any more of our substance.

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98 President James Buchanan to House of Representatives (Feb. 24, 1859), *in* 5 MESSAGES AND PAPERS, *supra* note 11, at 3078. **R**

99 *Id.*; *see also supra* Part II.A.

100 President James Buchanan to House of Representatives (Feb. 24, 1859), *in* 5 MESSAGES AND PAPERS, *supra* note 11, at 3078; *see also supra* Part II.A. **R**

101 THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

# Protecting the Spending Power

*Erwin Chemerinsky**

Throughout American history, federalism has been equated with protecting states' rights. In recent years, the revival of federalism by the Supreme Court has been manifest in limits on the scope of federal powers,[1] the revival of the Tenth Amendment as a limit on Congress's authority,[2] and the expansion of state sovereign immunity.[3] However, this view ignores that federalism must also be concerned with protecting federal power and the interests of the federal government. Normatively, federalism is about how authority should be allocated between federal and state governments. Focusing just on protecting states and limiting federal power fails to consider an equally, if not more important, aspect of federalism: upholding the constitutional authority of the federal government.

This is especially important as courts and commentators consider applying federalism principles to the spending power. Concern for protecting the states should not obscure the need to vindicate the authority of Congress to choose whether and how to spend its money. In this paper, I make three arguments. First, Congress's spending power should be broadly interpreted. Second, the Tenth Amendment should not be applied as a limit on the spending power or on Congress's ability to place conditions on its spending. Third, Congress should have expansive authority to re-

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1 *See* United States v. Lopez, 514 U.S. 549 (1995) (federal Gun-Free School Zone Act is unconstitutional as exceeding the scope of Congress's commerce power); United States v. Morrison, 529 U.S. 598 (2000) (the civil cause of action for gender motivated violence within the Violence Against Women Act is unconstitutional as not within the scope of Congress's Commerce Clause authority).

2 *See* New York v. United States, 505 U.S. 144 (1992) (Congress may not compel state legislative or regulatory activity. The Low Level Radioactive Waste Disposal Act is unconstitutional as an impermissible compulsion of state governments in violation of the Tenth Amendment).

3 *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (state governments may not be sued in federal court for violating the Age Discrimination in Employment Act. The law is not a valid exercise of Congress's Section Five power that authorizes suits against state governments), Alden v. Maine, 527 U.S. 706 (1999) (because of state sovereign immunity a state government may not be sued in state court without its consent); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (the Eleventh Amendment bars a claim against a state for violating patents).

quire that states waive their sovereign immunity as a condition of receiving federal funds.

Throughout this article, I am writing from two perspectives. First, as a critic of the Court's recent federalism decisions, I am arguing that the decisions were misguided and therefore should not be extended. Second, even assuming the "correctness" of these rulings, the spending power is different and should not be constrained by the Tenth or Eleventh Amendment or construed narrowly as the Court has done with the commerce power and section 5 of the Fourteenth Amendment.

## I. Congress's Spending Power Should be Broadly Interpreted

An analysis of the spending power and federalism must begin by considering the nature of the power itself. Article I, Section 8 states: "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[4] Under the Articles of Confederation, the limited federal government had no taxing power and therefore no revenue to spend. The framers of the Constitution recognized a need to give the federal government the authority to tax and spend to further the general welfare.[5]

Alexander Hamilton expressly took this position. Hamilton believed that Congress could tax and spend for any purpose that it thought served the general welfare, so long as Congress did not violate another constitutional provision.[6] As the Supreme Court observed:

> Hamilton . . . maintained that the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only

4 U.S. Const. art. I, § 8, cl. 1.

5 Professor John Eastman argues that the experiences early in American history support limiting the scope of the spending power. *See* John Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chap. L. Rev. 63, 72 (2001). Professor Eastman points to many examples where Congress has rejected spending bills or where the President has vetoed them. However, it is crucial to note that all of Professor Eastman's examples entail the political branches of government choosing not to spend money. Professor Eastman does not provide a single example where the courts struck down a spending program as exceeding the scope of Congress's powers. None exist. The flaw in Professor Eastman's argument is that he attempts to justify a judicial check on the spending power by pointing to examples of political choices.

6 *See* Alexander Hamilton, 1791 Report on the Subject of Manufactures (1791), *reprinted in* 10 Papers of Alexander Hamilton 230, 302-04 (Harold C. Syrett ed., 1966)

> by the requirement that it shall be exercised to provide for the general welfare of the United States.[7]

Indeed, even at a time when the Supreme Court was aggressively protecting states' rights and striking down federal laws, it recognized the need for a broad definition of the scope of the spending power. In 1936 in *United States v. Butler,*[8] the Court considered whether Congress is limited to taxing and spending only to carry out other powers specifically enumerated in Article I or whether Congress has the broad authority to tax and spend for the general welfare. The Court adopted the latter, much more expansive view. *Butler* concerned the constitutionality of the Agricultural Adjustment Act of 1933,[9] which sought to stabilize production in agriculture by offering subsidies to farmers to limit their crops. By restricting the supply of agricultural products, Congress sought to assure a fair price and thus to encourage agricultural production.

*Butler* declared the Agricultural Adjustment Act unconstitutional on the ground that it violated the Tenth Amendment because it regulated production. The regulation of production, according to the Court, was left to the states. This aspect of *Butler* has never been followed. Nor has the Court ever held since 1937, in any context, that control of production is left entirely to the states. However, the *Butler* Court's conclusion that the spending power has broad scope remains good law.

The Court began by noting that the debate over the scope of the taxing and spending power goes back to a dispute between James Madison and Alexander Hamilton. Madison took the view that Congress was limited to taxing and spending to carry out the other powers specifically granted in Article I of the Constitution. The Court expressly adopted Hamilton's competing position as "the correct one."[10] The Court held that Congress has broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions.

Subsequent cases affirmed Congress's expansive authority under the Taxing and Spending Clause. In *Steward Machine Co. v. Davis*,[11] the Court upheld the constitutionality of the federal unemployment compensation system created by the Social Security Act. In *Helvering v. Davis*,[12] the Court upheld the constitutionality of the Social Security Act's old age pension program that was supported exclusively by federal taxes. The Court again spoke broadly

7 United States v. Butler, 297 U.S. 1, 65 (1936).
8 297 U.S. 1 (1936).
9 Agricultural Adjustment Act, Act of May 12, 1933, ch. 25, 48 Stat. 31 (repealed).
10 *Butler,* 297 U.S. at 66.
11 301 U.S. 548 (1937).
12 301 U.S. 619 (1937).

of Congress's power to tax and spend. Justice Benjamin Cardozo, writing for the Court, stated:

> The discretion [to decide whether taxing and spending advances the general welfare] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power [or] not an exercise of judgment. . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation.[13]

This broad definition of the spending power is desirable. First, a virtually infinite range of social needs and problems require federal spending. Sometimes federal spending is needed to carry out tasks that are uniquely federal in nature. For example, defense spending and foreign aid are tasks that could only be undertaken by the federal government. In addition, interstate problems beyond the scope of state power need to be dealt with by the federal government through federal spending. For example, constructing the interstate highway system and providing an air traffic control system require expenditures that must be national in nature. Dealing with interstate crime and pollution, that do not respect state boundaries, requires federal money.

Sometimes federal spending is needed to deal with social problems that are likely beyond the fiscal abilities of an individual state. Federal disaster relief is one example. Federal spending may also be needed to achieve desirable national goals, such as improving the quality of education and maintaining the Social Security system.

There is no way to limit the objectives of federal spending in light of the infinite range of needs for national spending. Nor should the ability of the federal government to achieve these goals be constrained.

Second, and more subtly, federal spending affirms nationhood in an important respect. If the United States were simply a confederacy of states, then each state would be left on its own, with its own resources, to deal with its needs. States with less in the way of natural resources and wealth would be worse off. However, as a nation, the country should be concerned about the welfare of all of its citizens and it is appropriate and necessary for the states that are better off to provide help to those that are worse off. Only the federal spending power can achieve this goal.

There is no meaningful or desirable way to distinguish between spending that benefits a particular state and spending that benefits the nation. If southern California were hit by a devastating earthquake, the federal funds issued to rebuild the area unquestionably would inure to the nations overall benefit. Restoring

13 *Id.* at 640-41 (citations omitted).

the economy of southern California would be important for the national economy. More importantly, the entire nation has an interest in making sure that its citizens do not needlessly suffer. Dealing with local problems inevitably has important national benefits. The United States is not simply a collection of fifty separate states, it is one nation, and helping one part always benefits the whole.

Third, no limits on the scope of the spending power can be reasonably inferred from the text of the Constitution. The commerce power limits Congress to regulating commerce "among the states" and section 5 of the Fourteenth Amendment constricts Congress to adopting laws "to enforce" that amendment. For example, in *City of Boerne v. Flores*,[14] Justice Kennedy relied on this textual language to justify why Congress cannot expand the scope of rights or create new rights. Although I disagree with the Court's recent narrow interpretations of these powers, I do not deny that the Court was construing textual language that defines the scope of the power. No such textual language exists as to the spending power. Quite the contrary, the spending power authorizes Congress to tax and spend to "provide for the common Defence and general Welfare of the United States." It is hard to imagine a broader statement of the scope of Congress's power.

## II. The Tenth Amendment Should Not Be Applied As A Limit On The Spending Power Or On Congress's Ability To Place Conditions On Its Spending

The issue with regard to the spending power is not whether to narrowly construe it or overturn *Butler*'s broad conception of its scope, but rather the extent to which federalism limits its use. Specifically, should constraints, particularly through the Tenth Amendment, be placed on Congress's ability to place strings on federal money; and should Congress's ability to subject states to suit in federal court through use of the spending power be restricted? This section looks at the former issue and the following section focuses on the latter.

My central point in this section is that the Supreme Court was right in *South Dakota v. Dole*[15] in allowing Congress to place conditions on federal money so long as the conditions are expressly stated and relate to the purposes of the federal spending. The first subsection reviews the constitutional grant of power that establishes the authority of Congress to set conditions on state grants. The second subsection argues that this is the correct interpretation for several reasons. First, allowing conditions on federal

14 521 U.S. 507 (1997).
15 483 U.S. 203 (1987).

money implements the broad spending authority discussed in Part I. Second, restricting conditions via the Tenth Amendment would not advance the underlying benefits of federalism. Third, limiting conditions would require an ephemeral and impractical distinction between inducement and coercion. Thus, I strongly disagree with scholars such as Professor Lynn Baker who believe that the spending power should be constrained by judicial enforcement based on federalism considerations.[16]

### A. Congress's Authority To Place Conditions On Federal Spending

The Supreme Court has consistently held that Congress may place strings on such grants, so long as the conditions are expressly stated and so long as they have some relationship to the purpose of the spending program.[17] Although *Dole* is identified as the primary authority for this proposition,[18] the principle predates *Dole*.

In *Oklahoma v. Civil Service Commission*,[19] the Court upheld a provision of the federal Hatch Act, which granted federal funds to state governments on the condition that the states adopt civil service systems and limit the political activities of many categories of government workers. The Court explained that Congress has broad power to set conditions for the receipt of federal funds even as to areas that Congress might otherwise not be able to regulate. The Court stated: "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed."[20]

The Court affirmed this decision in *Dole*.[21] In *Dole*, a federal law sought to create a twenty-one year-old drinking age by withholding a portion of federal highway funds from any state government that failed to impose such a drinking age. Specifically, five

16 *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995). In Professor Baker's most recent article, Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001), she argues that there is a substantial differential between the size of the states and the benefits they receive from federal spending. The flaw in Professor Baker's argument is that she provides a description of spending levels and then concludes that normatively such levels are undesirable. She assumes that there is a normative principle that states should receive money back commensurate with the amount they contribute to the national treasury. This principle is never justified. Nor is the scope of the principle defined in terms of how courts could ever decide what level of spending differences are impermissible.

17 For a discussion of this issue, see Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Thomas R. McCoy & Barry Friedman, *Conditional Federal Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

18 *See, e.g.*, State of Kansas v. United States, 214 F.3d 1196, 1199 (10th Cir. 2000).

19 330 U.S. 127 (1947).

20 *Id*. at 143.

21 South Dakota v. Dole, 483 U.S. 203 (1987).

percent of federal highway funds would be denied to any state that did not create a twenty-one year-old drinking age.

The Court, in an opinion by Chief Justice Rehnquist, approved this condition on federal money. It is notable that the author of the opinion is Chief Justice Rehnquist, a fervent advocate of states' rights and the author of recent decisions, such as *United States v. Lopez*,[22] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[23] and *United States v. Morrison*.[24]

The Court emphasized that the condition imposed by Congress was directly related to one of the main purposes behind federal highway money: creating safe interstate travel. The Court recognized that at some point "the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."[25] However, the Court said that in this case, the condition of federal highway money was a "relatively mild encouragement" and was constitutional "[e]ven if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action . . . is a valid use of the spending power."[26]

*Dole* recognized four general restrictions on Congress's use of the spending power. First, Congress must be acting in pursuit of the "general welfare."[27] Second, if Congress desires to place conditions on states receiving federal funds, it must clearly state what those strings are.[28] This requirement was articulated by the Court in *Pennhurst State School and Hospital v. Halderman*.[29] The Developmentally Disabled Assistance and Bill of Rights Act of 1975[30] ("Act") created a federal grant program for state governments in order to provide for better care for the developmentally disabled. The Act included a "bill of rights" for the developmentally disabled. The Pennhurst State School and Hospital, a facility run by the State of Pennsylvania, was sued for violating the bill of rights contained in the Act. The Court ruled in favor of Pennsylvania, holding that "if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously."[31] The Court explained that conditions must be clearly stated so that states will know the consequences of their choosing to take federal

22 514 U.S. 549 (1995).
23 527 U.S. 627 (1999).
24 529 U.S. 598 (2000).
25 *Dole,* 483 U.S. at 211 (citation omitted).
26 *Id.* at 212.
27 *Id*. at 207.
28 *Id.*
29 451 U.S. 1, 17 (1981).
30 42 U.S.C. § 6010 (1976).
31 *Pennhurst,* 451 U.S. at 28.

funds. The Court concluded that the Act failed to require that states meet the bill of rights as a condition for accepting federal money.

The third *Dole* restriction is that the conditions must be related to the federal interest in the particular program.[32] In *New York v. United States*,[33] the Court held that the conditions must "bear some relationship to the purpose of the federal spending."[34]

The fourth restriction is that there can be no independent constitutional bar to the conditions.[35] In *Dole*, the Court was explicit that the Tenth Amendment is not such a limit. In a later opinion, the Court emphasized, "the fourth *Dole* restriction stands for the more general proposition that Congress may not induce the states to engage in activities that would themselves be unconstitutional."[36]

This proposition does not create an unlimited spending power or unrestrained authority for Congress to place conditions on federal funds. It does, however, give Congress substantial power to decide how it wants to spend federal money.

### B. The Tenth Amendment Should Not Limit The Spending Power

#### 1. Allowing Conditions On Federal Money Implements The Broad Spending Authority

Part I defended a broad conception of Congress's spending authority. Specifically, Congress has the power to select the recipient of federal funds, and how the money should be used. As the Supreme Court explained, Congress's spending power enables it "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[37]

Indeed, in other contexts, the Court has consistently reaffirmed the power of the federal government to choose what to fund by placing conditions on the money. For example, in *National Endowment of the Arts v. Finley*,[38] the Court held that Congress could require that the National Endowment of the Arts consider "decency" and "respect for values" in deciding what to fund. Justice O'Connor, writing for the majority, concluded:

> So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending pri-

32 South Dakota v. Dole, 483 U.S. 203, 207 (1987).
33 505 U.S. 144 (1992).
34 *Id.* at 167.
35 *Dole*, 483 U.S. at 208.
36 State of Kansas v. United States, 214 F.3d 1196, 1199 (10th Cir. 2000).
37 Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).
38 524 U.S. 569 (1998).

> orities. . . . Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[39]

Similarly, in *Rust v. Sullivan*,[40] the Court held that Congress could condition federal funds to Planned Parenthood clinics on a prohibition of their providing abortion counseling or referrals. Chief Justice Rehnquist, writing for the Court, declared:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. . . . [W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.[41]

Although I would criticize these decisions as permitting viewpoint discrimination in violation of the First Amendment,[42] I agree with their view that Congress has broad power to decide how its money will be spent. This power includes placing conditions on receipt of money. Using the Tenth Amendment as a constraint on these conditions would undermine the broad spending power as Congress could no longer choose how and what to subsidize.

### 2. Restricting Conditions Via The Tenth Amendment Would Not Advance Federalism.

The Supreme Court has held that the Tenth Amendment prevents Congress from "commandeering" the state governments through the use of its commerce power.[43] In this section, I argue that these decisions were wrong and should not be extended, and even if correct, should not be applied to the spending power.

In *New York v. United States*,[44] the Court declared unconstitutional the 1985, Low-Level Radioactive Waste Policy Amendments Act, which forced states to clean up their nuclear waste by 1996. The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive waste. However, by a 6-3 margin, the Court held that

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39 *Id.* at 588 (quoting Rust v. Sullivan, 500 U.S. 173, 193) (citations omitted).

40 500 U.S. 173 (1991).

41 *Id*. at 193-94 (citations omitted).

42 *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000).

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

44 *Id.*

the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."[45] Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states. Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation.[46] The Court concluded that it was "clear" that because of the Tenth Amendment and limits on the scope of Congress's powers under Article I, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[47]

The Court followed this principle five years later in *Printz v. United States*.[48] In *Printz*, the Court declared the Brady Handgun Prevention Act unconstitutional.[49] The law required that state and local law enforcement personnel conduct background checks before issuing permits for firearms. The Court held that forcing state and local law enforcement personnel to implement this program violated the Tenth Amendment. Justice Scalia, writing for the 5-4 majority, concluded that compelling state and local activity is inconsistent with dual sovereignty and the Tenth Amendment. The Court said that Congress cannot compel states to administer a federal mandate.

There is nothing in the text of the Constitution that mentions or even hints at an anti-commandeering principle. The Tenth Amendment's text, of course, says only that Congress cannot act unless authorized by the Constitution, while states can act unless prohibited by the Constitution. Nor was the issue discussed at the Constitutional Convention. Neither *New York v. United States* nor *Printz* attempts to justify the anti-commandeering based on the Constitution's text or framers' intent.

In *Printz*, Justice Scalia wrote that "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of the Court."[50] Justice Scalia reviewed the experience in early American history and found that there was no support for requiring states to participate in a federal regulatory scheme. As to history,

45 *Id.* at 175
46 *Id.* at 161.
47 *Id.* at 188.
48 521 U.S. 898 (1997).
49 18 U.S.C. §§ 921-925A (1994).
50 Printz v. United States, 521 U.S. 898, 905 (1997).

Justice Scalia said that Congress, in the initial years of American history, did not compel state activity and since "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."[51]

As Justice Souter pointed out in dissent, there is a strong argument that Justice Scalia is incorrect in terms of the framers' intent.[52] Strong statements exist from Madison and Hamilton that Congress could call upon states to execute federal laws. More importantly, it seems very dubious to rely on the absence of a practice in the first Congresses to establish a constitutional limit. There are countless reasons why the federal government did not require state action then. It is conceivable that they did not think of the possibility, they thought that their goals could best be achieved by direct federal action, they sought to establish the federal government's own authority to act, or political pressures at the time prevented specific mandates. To infer rejection of Congressional power from inaction is to assume the truth of one explanation to the exclusion of all others. The absence of a particular practice at a specific time does not mean that those then in power thought it unconstitutional. There are many explanations for why a type of law was not used at a given moment.

Justice Scalia also justified the anti-commandeering principle in *Printz* by invoking the structure of the Constitution. He stated "[i]t is incontestible that the Constitution established a system of dual sovereignty."[53] Yet, this does not explain why federal mandates to states are inconsistent with dual sovereignty. The argument, as presented by Scalia, is entirely based on a definition of dual sovereignty and what it means in terms of the structure of American government. Indeed, the concept of dual sovereignty is purely descriptive of having both federal and state governments. There must be separate reasons, apart from the existence of dual sovereignty, why a federal law unduly intrudes upon state prerogatives. This requires a normative theory about federalism and the proper relationship of federal and state governments. Justice Scalia did not allude to such a theory, but simply concluded that federal mandates to state governments violate dual sovereignty. Simply put, the anti-commandeering principle has no support in the text of the Constitution, the framers' intent, or historical practice.

The primary reason Justice O'Connor gave in *New York v. United States* for why Congress cannot compel states to act is that it would frustrate democratic accountability because voters would not understand that the state was acting pursuant to a federal

51 *Id*. at 905.
52 *Id.* at 970-76 (Souter, J., dissenting).
53 *Id*. at 918 (internal quotations omitted).

mandate. The Court explained that allowing Congress to commandeer state governments would undermine accountability because Congress could make a decision, but the states would take the political heat and be held responsible for a decision that was not theirs. Justice O'Connor wrote:

> [W]here the federal government compels states to regulate, the accountability of both state and federal officials is diminished . . . . [W]here the federal government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.[54]

The premise for Justice O'Connor's argument is that democratic accountability requires that voters clearly understand which level of government is responsible for actions taken. This premise was simply asserted by the Court without justification as to the constitutional basis for this premise of democratic accountability. Obviously, nothing in the Constitution's text supports this premise, nor is it grounded in prior Supreme Court decisions. Perhaps it can be justified by political theory, but Justice O'Connor made no attempt to do so in her majority opinion.

Nor was there explanation as to why the voters could not understand when the state was acting pursuant to a federal mandate. Justice O'Connor assumes that if Congress forces the states to do something, voters will not hold Congress responsible but will blame the conduct on the primary actor, state governments. Voters, however, can surely comprehend when a state is acting because federal law requires it to do so. Every person does many things that he or she otherwise would not do because of federal mandates. Paying taxes is a simple example. Why then, cannot people understand that a state government, too, might have to do something because of a federal mandate?

State government officials, of course, could explain to the voters that the federal government required the particular actions. Justice O'Connor never explains why the federal government will not be held accountable under such circumstances.

From a matter of constitutional policy, in terms of the goals of federalism, the anti-commandeering principle is undesirable and even counter-productive. For instance, in *New York v. United States* the Court's express purpose is protecting state governments. Yet, the Court's ruling actually could have the exact oppo-

54 New York v. United States, 505 U.S. 144, 168-69 (1992).

site effect. The Court in *New York v. United States* said that Congress could set out detailed standards for how nuclear wastes are to be handled and could require that states comply with them. *New York v. United States*, however, said that what Congress could not do is force states to devise means for dealing with the problem. In other words, it is impermissible for Congress to let the states decide for themselves how to handle the wastes, but it is permissible for Congress to force the states to do so in a particular manner. Yet, the latter would allow the states more discretion and choices and thus be more protective of state sovereignty than the approach that the Court was willing to allow.

More generally, the federal government has the power pursuant to the Supremacy Clause to ensure compliance with federal law. The federal government should be able to regulate state and local governments to ensure that this compliance occurs. The federal government's lawful objectives of cleaning up nuclear wastes, keeping handguns out of dangerous hands, and protecting privacy all warrant ensuring state compliance and enforcement. The anti-commandeering principle interferes with these objectives and should have been overruled.

Furthermore, in *New York v. United States*, the Court expressly recognized the power of Congress, through its spending authority, to induce states to do what could not be compelled through the commerce power. Justice O'Connor's words are extremely important here. She wrote:

> This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . First, under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.'. . . Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.[55]

In other words, the spending power is different from the commerce power relative to the Tenth Amendment. Because states retain a choice whether to take the funds, the states are not "commandeered." Even the seminal case[56] creating the anti-commandeering principle recognizes this distinction.

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55 *Id*. at 166-67 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)) (citations omitted).

56 *Id.* at 144.

3. A Distinction Between Inducement And Coercion Is Impossible To Implement.

Those who urge that the Tenth Amendment be used as a limit on the spending power contend that such a limitation is necessary to protect state governments and to narrow national power. Professor Lynn Baker expressed this view when she stated: "[I]f the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' will have no meaning."[57] Justice O'Connor expressed a similar view in her dissent in *Dole*:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.[58]

The Court's view is that the Tenth Amendment prevents Congress from coercing state governments. In fact, in *Dole*, the Court recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[59]

The Court, however, should not attempt to enforce such a limit on the spending power. To begin with, it is impossible to draw a line between inducement and compulsion. All conditions on financial aid from Congress to the states are meant to be an inducement; there is no way to define when this becomes impermissible compulsion. As the District of Columbia Circuit stated: "The courts are not suited for evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice."[60] It is for this reason that the Supreme "Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it."[61]

The inability to define and draw lines is very important in the Tenth Amendment context. In *Garcia v. San Antonio Metropolitan Transit Authority*,[62] the Supreme Court expressly overruled *Na-*

57 Baker, *supra* note 16, at 1920. **R**

58 South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting), (quoting United States v. Butler, 297 U.S. 1, 78 (1936) (citation omitted)).

59 *Id.* at 211 (citation omitted).

60 Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981).

61 Kansas v. United States, 214 F.3d 1196, 1202 (D.C. Cir. 2000).

62 469 U.S. 528 (1985).

*tional League of Cities v. Usery*,[63] which had held that the Tenth Amendment prevents Congress from interfering with "integral" and "traditional" state activities.[64] One of the primary reasons *Garcia* gave for overturning *National League of Cities* is the impossibility of defining "integral" and "traditional" state functions. Justice Blackmun, who had been in the majority in *National League of Cities*, wrote for the Court in *Garcia*: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is 'traditional' or 'integral.'"[65] Justice Blackmun argued for judicial restraint: "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[66]

Defining a distinction between "inducement" and "coercion" is even more difficult. What type of evidence would be relevant? How much would the state have to prove it needed the money? Even then, how could it be determined whether it is inducement or compulsion?

Furthermore, using coercion in this sense obscures the distinction between a difficult choice and compulsion.[67] States may have to make a hard decision in foregoing federal funds and ultimately may not want to do so, but that is different from compulsion where truly no choice remains. The use of the spending power is different because states always retain a choice, unpleasant as it may be to give up the federal funds.

The Court long has recognized this distinction between hard choices and compulsion. In *Steward Machine*, the first case to mention coercion as a limit on the spending power, the Court declared: "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible."[68]

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63 426 U.S. 833 (1976).

64 *Id*. at 852.

65 *Garcia*, 469 U.S. at 546-47.

66 *Id.* at 546.

67 *See* ALAN WERTHEIMER, COERCION 202-41 (1987) (comparing coercion and hard choice, as well as the idea of coercive offers); *see also* Bailey v. Lally, 481 F. Supp. 203 (D. Md. 1979) (prisoners claimed that participation in a non-therapeutic experiment violated the Constitution because conditions in the prison were so bad that the prisoners' decision to participate was involuntary); *see also* Michael Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 83-84 (1991); *see, e.g.,* Michael Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical Technological Imperatives*, 57 HASTINGS L.J. 1081, 1099-1102 (1996) (discussing pressures on women to go through with stressful and uncomfortable assisted reproduction procedures because their husbands or mates are "there").

68 Steward Mach. Co. v. Davis, 301 U.S. 548, 589-90 (1937).

Thus, the Tenth Amendment should not be construed as limiting the ability of Congress to place conditions on grants to the states. *Dole* should continue to be followed.

## III. Congress Should Have Expansive Authority To Require That States Waive Their Sovereign Immunity As A Condition Of Receiving Federal Funds.

The other issue likely to arise with regard to the spending power is the extent to which Congress can condition receipt of federal funds on a state's consenting to be sued in federal court. For instance, in December 2000, the United States Court of Appeals for the Eighth Circuit, in an *en banc* decision,[69] considered whether Arkansas had waived its sovereign immunity by receiving funds under section 504 of the Rehabilitation Act of 1973.[70] The court concluded that there was such a waiver.

The Eight Circuit's conclusion was correct and should be followed by other circuits and the Supreme Court. First, the Supreme Court has always held that a state may waive its Eleventh Amendment immunity. The Court declared: "[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action."[71] Indeed, the Supreme Court consistently and without exception has held that consenting states may be sued in federal court.[72] If Congress is clear that receipt of funds entails a waiver of sovereign immunity, then by accepting the money, a state has, by definition, consented to suit.

Second, ensuring accountability requires that Congress be able to condition federal funds on a state's waiver of its sovereign immunity. Congress's broad spending power, as defended in Part I of this article, entitles it to decide how funds are spent. If a state is improperly using the money, it should be held accountable. Lawsuits against a state are an obvious, essential way of accomplishing this. Preventing suits against states would allow them to take federal money and disregard the conditions that Congress constitutionally has the right to impose.

Third, the primary argument against allowing Congress to condition money on a waiver of sovereign immunity is that such a condition impermissibly coerces state governments. However, as explained above, this argument assumes that it is possible to define and draw a distinction between inducement and compulsion; also, it wrongly confuses hard choices with coercion. The Eighth

69 Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000).

70 29 U.S.C. § 704 (1994).

71 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

72 *See, e.g.*, Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981); Edelman v. Jordan, 415 U.S. 651 (1974); Clark v. Barnard, 108 U.S. 436 (1883).

Circuit recognized this principle in its recent ruling that receipt of funds under the Rehabilitation Act constitutes a waiver of sovereign immunity. The court stated:

> [T]he Arkansas Department of Education can avoid the requirement of Section 504 simply by declining federal 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. . . . The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.[73]

## CONCLUSION

In the last decade, and particularly in the last five years, the five most conservative Justices on the Court have engaged in great judicial activism in limiting Congress's powers, reviving the Tenth Amendment, and expanding sovereign immunity. The next frontier of litigation is sure to be the Spending Clause. In this article, I have argued that the Spending Clause is different and that it should be limited by neither the Tenth nor the Eleventh Amendments.

73 *Jim C.*, 235 F.3d at 1082 (citations omitted).

# Sovereignty, Autonomy and Conditional Spending

*by Earl M. Maltz**

One of the most conspicuous features of the Rehnquist era has been the revival of the concept of enumerated powers as an important theme in constitutional jurisprudence. In the period from 1937 through 1995, the Court routinely concluded that the Commerce Clause[1] granted the federal government power to regulate private activities which were traditionally relegated to local control.[2] However, in *United States v. Lopez*[3] and *United States v. Morrison*,[4] a majority of the Court concluded that federal power under the Commerce Clause was subject to significant limitations.

By their nature, the decisions in *Lopez* and *Morrison* called into question the scope of other enumerated powers as well. One of the most important issues is raised by cases of "conditional" spending—situations in which Congress seeks to extend the reach of its authority by imposing conditions on states' receipt of federal funds. The early Rehnquist Court decision in *South Dakota v. Dole*[5] suggested that Congress had broad authority to use this device to achieve its objectives.[6] However, some have argued that *Lopez* and *Morrison* implicitly undermine the premises on which *Dole* was founded.[7]

Rather than focusing on the specific reasoning of *Lopez* and *Morrison*, this article will measure the constitutionality of conditional spending against basic principles of constitutional interpretation. The article will first briefly summarize the decision in *Dole* itself. The article will then observe that the spending power by its terms is plenary, and that there is no direct evidence which suggests that the framers considered the issue of conditional spend-

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1 The Commerce Clause permits Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

2 *E.g.*, Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964).

3 514 U.S. 549, 551 (1995).

4 120 S. Ct. 1740, 1748 (2000).

5 483 U.S. 203 (1987).

6 *Id*. at 206-07

7 *E.g.*, Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1911-15 (1995).

ing. Finally, the article will conclude that conditional spending is not inconsistent with constitutionally established principles of state sovereignty or state autonomy.

## SOUTH DAKOTA V. DOLE

*South Dakota v. Dole*[8] is the leading case dealing with the constitutionality of conditional spending by Congress. In *Dole*, Congress decreed that a state would lose five percent of its federal highway funds if it allowed persons under the age of twenty-one to purchase alcoholic beverages or to possess such beverages in public.[9] The state argued that the imposition of this condition exceeded the powers of Congress.[10] Over two dissents, the Court rejected this contention. Speaking for the majority, Chief Justice Rehnquist conceded that the imposition of a condition on spending might be unconstitutional if it was "unrelated 'to the federal interest in particular national projects or programs'"[11] or "pas[t] the point at which 'pressure turns into compulsion.'"[12] However, he concluded that the problem of underage drinking was clearly related to highway safety and, therefore, to the purpose for which the funds were expended.[13] Moreover, Rehnquist rejected the claim that the condition was unduly coercive, noting that only a small portion of highway funds were involved.[14] Thus, the majority concluded that the imposition of the condition was constitutionally unexceptionable.

The tone of the *Dole* opinion is quite different from that of more recent decisions in which a majority of the Court has imposed significant limitations on the power of Congress. Admittedly, the *Dole* majority noted the relatively minor nature of the penalty that states faced for refusing to bow to the will of Congress in that case.[15] Moreover, the Court clearly left open the possibility that it might look less favorably on other attempts to use the mechanism of conditional spending to induce state compliance with congressional wishes. Nonetheless, the emphasis on deference to congressional judgment in *Dole* stands in marked contrast to (for example) the majority opinion in *United States v. Morrison*[16]—also authored by Chief Justice Rehnquist—where the Court explicitly rejected congressional findings of fact in holding

8 483 U.S. 203 (1987).

9 23 U.S.C. § 158 (a)(1) (Supp. III 1982) (amended 1998).

10 *See Dole*, 483 U.S. at 205.

11 *Id.* at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

12 *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1987)).

13 *Id.* at 209-12.

14 *Id*. at 211.

15 *Id*.

16 120 S. Ct. 1740 (2000).

that Congress had exceeded its enumerated powers.[17] Thus, the key question is whether *Dole* can be reconciled with the basic premises underlying the constitutional structure of federalism, as well as the Court's more recent pronouncements on related issues.

## THE ORIGINAL UNDERSTANDING

In an ideal world, the original understanding of conditional spending would provide some guidance to the proper treatment of the constitutional questions presented by *Dole* and similar cases. However, the problem of conditional spending does not seem to have been addressed by the framers of the Constitution. The framers did not contemplate a system in which the states would look to the federal government as a source of revenue. Instead, in the model they envisioned, each government would be responsible for generating revenue for its projects through its own independent financing system. By its nature, the problem of conditional spending simply would not arise under such a regime.

Of course, even without specific guidance from the original understanding, it could still be contended that the use of the conditional spending mechanism violates the basic precepts of federalism established by the constitutional structure. In theory, such an argument could be based on either of two related principles. First, the use of conditional spending programs might be unconstitutional because they are inconsistent with the notion that states retain a quasi-sovereign status within the Union. Second, it might be argued that such programs unduly infringe on state autonomy. These two arguments are sometimes conflated; however, while clearly connected in some important ways, they are in fact analytically quite separate.

## STATE SOVEREIGNTY

The rhetoric of state sovereignty has figured prominently in the federalism jurisprudence of the Rehnquist Court. The majority opinion in *Alden v. Maine*[18] exemplifies this phenomenon. There, citing the Eleventh Amendment, the Court concluded that states could not be held liable in damages for violation of the federal Fair Labor Standards Act.[19] Speaking for the majority, Justice Kennedy argued that "the [Constitution] 'specifically recognizes the States as sovereign entities'"[20] and that "it reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering

17 *Id.* at 1752.
18 527 U.S. 706 (1999).
19 *Id*. at 712.
20 *Id*. at 713 (quoting Seminole Tribe v. Florida, 517 U.S. 44, 71 n.15 (1996)).

in that status."[21] Sounding the same theme, he later concluded that "[t]he States . . . retain 'a residuary and inviolable sovereignty.'[22] They . . . retain the dignity, though not the full authority, of sovereignty."[23]

*Alden* is by no means unique in its appeal to the concept of state sovereignty. Similar threads run through the other Eleventh Amendment cases decided by the Court,[24] as well as *Printz v. United States*,[25] where a majority of the justices concluded that the federal government could not compel state officials to be conduits for the enforcement of federal gun control legislation. Taken together, these decisions clearly reflect an attempt to resuscitate the concept of state sovereignty as an important element of constitutional jurisprudence.

At times, the concept of state sovereignty has been connected to the idea of state autonomy—the power of the states to choose among policy alternatives without interference from the federal government. Thus, for example, in *The Federalist Papers,* Alexander Hamilton argued that any threat to state sovereignty from the Constitution was illusory because, under the Constitution, "the State governments would clearly retain all the rights of sovereignty which they before had[,] and which were not[,] by [the Constitution] *exclusively* delegated to the United States."[26] Similarly, in *Alden*, the majority opinion linked its defense of state sovereignty with the Tenth Amendment,[27] which reserves to the states and the people those powers which are neither delegated to the federal government nor prohibited to the states by the Constitution.[28]

State sovereignty and state autonomy are clearly linked in a general sense. However, the extent of the connection can easily be overstated. Sovereignty is a fairly abstract concept connoting a distinct, independent political community.[29] Autonomy, by contrast, simply requires that a particular government have the right to make policy decisions. A sovereign state might by treaty limit its policy autonomy or even subject itself to the will of another

21 *Id.* at 714.

22 *Id*. at 715 (quoting THE FEDERALIST NO. 39 (James Madison)).

23 *Id.* at 715.

24 *E.g.*, College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd., 527 U.S. 666 (1999).

25 521 U.S. 898 (1997).

26 THE FEDERALIST NO. 32, (Alexander Hamilton) *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 678 (Bernard Bailyn ed., 1993).

27 U.S. CONST. amend. X.

28 *See Alden,* 527 U.S. at 715.

29 *E.g.*, EMER DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 11 (Charles G. Fenwick trans., William S. Hein & Co. 3rd ed. 1995). For a detailed contemporary discussion of the concept of sovereignty and its relationship to constitutional federalism see Andrzej Rapazynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341 (1985).

sovereign for specific purposes.[30] Conversely, state constitutions at times grant a considerable degree of policy autonomy to entities such as cities or counties which clearly lack the attributes of sovereignty.[31]

Whatever measure of policy autonomy they may currently enjoy, state governments in the twenty-first century can hardly be viewed as sovereign in any meaningful sense. Even in the late eighteenth century, it was clear that the Constitution had deprived states of many attributes of sovereignty—a point that was seized upon by many of the Antifederalists who opposed ratification.[32] Subsequent events have diminished the political status of the states even further. Perhaps most importantly, the issue of secession was settled by the Civil War, leaving the states permanently bound to the federal government. The Reconstruction amendments that were adopted after the War sharply circumscribed the ability of the states to define the rights of their own inhabitants. A century later, the Voting Rights Act of 1965[33] and *Reynolds v. Sims*[34] and its progeny imposed stringent federal limits on the forms of government that the states were allowed to choose. Finally, a series of cases beginning with *Graham v. Richardson*[35] greatly limited the ability of states to distinguish between aliens and citizens, thereby undermining the significance of the bond between citizen and government that is central to the idea of a sovereign political community.

Against this background, Eleventh Amendment cases such as *Alden* have an almost quixotic aspect. They seek to preserve the vestige of a political status whose prime features states have lost—seemingly irrevocably—in other contexts. Thus, for example, while the ability of the federal government to dictate the policymaking structure of state governments remained unchallenged, the *Alden* Court protects the ability to determine the wages of the ministerial employees charged with carrying out those policies. Such a regime is hardly well suited to provide truly significant protection for state sovereignty.

Moreover, the *Dole* analysis could survive even a regime based on stronger protection for the political concept of state sovereignty. One of the generally accepted powers of sovereign gov-

30 *See* DE VATTEL, *supra* note 29, at 11.

31 *Id.*

32 *E.g.*, Arthur Lee, *Reply to Wilson's Speech: "Cincinnatus"* [Arthur Lee] V, letter to NEW YORK JOURNAL (November 29, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 114- 20 (Bernard Bailyn ed., 1993).

33 Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

34 377 U.S. 533 (1964).

35 403 U.S. 365 (1971).

ernments is the right to make agreements with other sovereigns.[36] Often such agreements provide that a sovereign will take some action that it might not otherwise undertake in return for receiving a benefit—sometimes money—from another sovereign. Conditional spending measures fit comfortably into this pattern. In *Dole* itself, for example, the states basically agreed to raise the drinking age in return for continuing to receive their full allotment of federal highway funds. Against this background, conditional-spending schemes can hardly be viewed as a threat to state sovereignty; indeed, if anything, they could be seen as exalting the status of state governments by implicitly conceptualizing them as equal partners in a freely bargained relationship. In short, state sovereignty theory provides little if any support for the proposition that conditional spending schemes should be subject to close constitutional scrutiny.

### State Autonomy

On its face, the concept of state autonomy might appear to be a more promising starting point for a constitutional attack on conditional spending. First, unlike state sovereignty, there can be little doubt that (in theory at least) the Constitution is premised on the view that states will retain a significant degree of decision-making autonomy. This premise is implicit in the idea that the federal government is one of enumerated powers, and made explicit by the Tenth Amendment, which reserves to the states "[t]he powers . . . not delegated to the United States by the Constitution nor prohibited by it to the States."[37] The breadth of this concept is embodied in Madison's famous dictum that "[t]he powers reserved to the several States . . . extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."[38]

Second, conditional spending programs have an obvious potential to effectively circumscribe the freedom of action envisioned by the Framers. *Dole* itself is a paradigmatic example. Establishing the eligibility requirements for the purchase of alcoholic beverages is a classic state prerogative; indeed, it is explicitly protected by the Twenty-First Amendment.[39] Admittedly, in formal terms the states remained free to set the age limit after the passage of

36 *See* DE VATTEL, *supra* note 29, at 160.

37 U.S. CONST. amend. X.

38 THE FEDERALIST NO. 45 (James Madison) *reprinted in* 2 THE DEBATE ON THE CONSTITUTION 105 (Bernard Bailyn ed., 1993).

39 The Twenty-First Amendment provides "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

the National Minimum Drinking Age Amendment. However, the loss of even a portion of federal highway funds might be so catastrophic that in reality, the state had no choice except to raise the drinking age to twenty-one. Thus, the argument concludes, significant judicial scrutiny of enactments such as this are necessary to preserve the balance between state and federal power envisioned by the framers.

Although this argument might have some initial appeal, it faces a number of important difficulties. First, the claim in cases such as *Dole* is quite different from that which garnered majority support in *Lopez* and *Morrison*. In *Lopez* and *Morrison*, the contention was that Congress had taken some action that was not within the scope of its enumerated powers. In *Dole*, by contrast, no one questioned the authority of Congress to spend funds for highway construction. The problem was that Congress had *refused* to take an action within its powers—to spend money for the construction of highways in states which refused to raise their drinking age.

Moreover, there would clearly be no constitutional difficulty with congressional action that produced exactly the same result through less formal means. For example, the members of the Senate and the House of Representatives could publicly agree among themselves that they should not provide highway funds to states where the drinking age was below twenty-one, and craft the relevant appropriations bills to delete funding for the projects in those states. The leaders of both parties could then promise to restore funding to states, which raised the drinking age to twenty-one.

Even more importantly, taken as a whole, the highway-funding program actually *enhances* state autonomy. To understand this point, one must begin by envisioning a world in which the federal government plays no role in the construction of highways. In such a world, each state would have two choices. The state could either choose not to construct highways at all, or it could construct the highways and finance the construction through some internal financing mechanism. In either case, of course, the decision to construct or not to construct would be independent of the state decision on the drinking age.

Even after the adoption of the National Minimum Drinking Age Amendment,[40] the federal highway program did not foreclose either of these options for states which had a drinking age that was less than twenty-one. Instead, it provided each of those states with a new alternative—constructing highways with federal funds and increasing the drinking age. Of course, decoupling the funding from the drinking age would have provided the states with

40 23 U.S.C. § 158 (a)(1) (Supp. III 1982) (amended 1998).

still greater flexibility. However, there is no constitutional requirement that federal government programs provide the maximum flexibility to state governments. At most, Congress is prohibited from unduly infringing upon the freedom that states would possess if they were completely independent.

Some might argue that this line of reasoning ignores the practical realities of federalism in the twenty-first century. They might contend that, because of the magnitude of the tax burden already imposed by the federal government, the practical ability of a state to tax its citizenry in order to finance internal improvements is extremely limited. Thus, the option of providing necessary improvements independently of the federal government is essentially foreclosed, and the states are, in effect, forced to rely on federal funding. Under these circumstances, it might be argued placing limits on the conditions that Congress may attach to federal funding is absolutely necessary to provide protection for state autonomy.

The basic thrust of this objection is not that there is anything intrinsically wrong with conditional spending programs, but rather that federal tax policy has in effect significantly limited the states' freedom of action. If this is the concern, then the remedy ought to be to impose constitutional limitations on the magnitude of the taxes that the federal government is allowed to exact. The difficulty is that, except for the provision dealing with direct taxation and the long-irrelevant Slave Trade Clause,[41] the Constitution imposes no such limitations. Indeed, the Framers themselves were well aware that they were creating a system in which the imposition of taxes by one government might, in effect, preempt the ability of other governments to impose similar taxes.

During the ratification debates, some Antifederalists warned that the Constitution created the potential for this problem to arise. They argued that "Congress may monopolise [sic] every source of revenue, and . . . the taxes, duties and excises imposed by Congress may be so high as to render it impracticable to levy further sums on the same articles."[42] Thus, they warned, Congress in effect had the power to "indirectly demolish the state governments."[43]

Responding to this argument, Federalists did not dispute the claim that the federal government had the theoretical authority to impose taxes so massive that states would feel constrained not to increase the tax burden on their citizenry. Instead, they relied on the political system to prevent this eventuality. In *The Federalist*

41 U.S. CONST. art. I, § 9, cl. 1.

42 *Dissent of the Minority of the Pennsylvania Convention* (December 18, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 526, 537 (Bernard Bailyn ed., 1993).

43 *Id.*

*Papers*, Alexander Hamilton first considered the problem in connection with his defense of the view that the grant of taxing power to the federal government left the states generally free to impose taxes of their own:

> It is . . . possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances [but the Constitution would not constrain the policy of either side].[44]

Later, he made an analogous point:

> Though a law . . . for laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controuled [sic]; yet a law for abrogating or preventing the collection of a tax laid by the authority of a State. . . would not be the supreme law of the land, but an usurpation of power not granted by the constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other, in a manner equally disadvantageous to both. It is to be hoped and presumed however that mutual interest would dictate a concert in this respect which would avoid any material inconvenience.[45]

Hamilton's discussion reminds us of an important structural feature of our system of government that is too often lost in modern constitutional theory. Many important decisions, which profoundly affect the nature of federalism—like many decisions dealing with individual rights—are properly left to the political branches of government. Such allocations of authority should be respected not because we agree with them or believe that they provide adequate protection for the interest at stake,[46] but rather because they are mandated by the Constitution itself.

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44 THE FEDERALIST NO. 32 (Alexander Hamilton), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 678, 681 (Bernard Bailyn ed., 1993).

45 THE FEDERALIST NO. 33 (Alexander Hamilton), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 127, 145 (Bernard Bailyn ed., 1993).

46 The classic formulation of the argument that the political structure of the federal government provides sufficient protection for state autonomy may be found in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government*, 54 COLUM. L. REV. 543 (1954).

Recognition of this basic principle reinforces a different but related point. We can create elaborate doctrines which are designed to induce the judiciary to protect federalism, free speech, privacy or any other value that we hold dear; the judicial efforts will be in vain, however, if the citizenry lacks the political will to ensure that those values are protected by the other branches of government. In short, if state autonomy is really an important concern, we should be concerned less about elaborating new, judicially-created doctrines and more concerned about using the political process to insist that Congress respect local prerogatives in its legislative actions.

# Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform

*Bradley A. Smith**

## I. INTRODUCTION

In 1796, Congressman James Madison proposed that the federal government undertake a survey for a national post road from Maine to Georgia, which he suggested would be, "the commencement of an extensive work."[1] Madison's proposal drew the attention of his long-time friend and confidant, Thomas Jefferson, then in temporary retirement at Monticello. In private correspondence, Jefferson inquired of Madison, "[h]ave you considered all the consequences of your proposition respecting post roads? I view it as a source of boundless patronage to the executive, jobbing to members of Congress and their friends, and a bottomless abyss of public money."[2]

Although Madison's proposal appeared to fall under a power specifically granted to Congress by the Constitution, "[t]o establish [p]ost [o]ffices and post [r]oads,"[3] Jefferson nonetheless opposed the measure as being beyond Congress's enumerated powers. "Does the power to *establish* post roads," asked Jefferson, "mean that you shall *make* the roads, or only *select* from those already made those on which there shall be a post? If the term be equivocal, (and I really do not think it so) which is the safest construction?"[4] Jefferson argued that the more liberal construction would open the door to wholesale spending by Congress, in ways that harbored ill for representative government. "[I]t will be a

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1 Joseph H. Harrison, Jr., *Sic Et Non: Thomas Jefferson and Internal Improvement*, 7 J. EARLY REPUB. 335, 339 (1987).

2 Letter from Jefferson to Madison (Mar. 6, 1796), *in* 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 923 (James Morton Smith ed., 1995).

3 U.S. CONST. art. I, § 8, cl. 7.

4 Letter from Jefferson to Madison (Mar. 6, 1796), *in* 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 924 (James Morton Smith ed., 1995).

scene of eternal scramble among the members who can get the most money wasted in their state, and they will always get most who are meanest."[5] Jefferson also expressed concern whether the national government could ever be truly sensitive to local concerns and opinions, rhetorically asking, "[w]hat will it be when a member of N[ew] H[ampshire] is to mark out a road for Georgia?"[6]

In contrast, Jefferson's former cabinet colleague, Treasury Secretary Alexander Hamilton, had no constitutional qualms about federal spending for road construction.[7] Indeed, Hamilton favored an expansive federal role generally, and interpreted the Constitution in that manner.[8]

Today, Jefferson's concerns seem nothing short of quaint. The federal government spends over $1.8 trillion per annum, with federal highway spending alone anticipated to exceed $26.9 billion in fiscal year 2001.[9] The idea that one should interpret Congress's enumerated powers, or its authority to spend money to carry them out narrowly, scarcely remains an element of public discourse. Quite the contrary, a substantial percentage of Congress's extraordinary expenditures are made in support of no enumerated power whatsoever, but merely under a vague constitutional grant of power that we now call the "Spending Clause." Through this spending, the federal government extends its reach into virtually all aspects of human endeavor and local politics. To cite just a few examples, the government attempts to influence the individual consumption of alcohol;[10] how doctors practice medicine;[11] how counselors advise patients;[12] and numerous other areas that would seem remote even under the expansive view that the courts have adopted of the Commerce Clause.[13]

Today, this core power to spend goes more or less unchallenged. Most scholarship accepts the expansive, "Hamiltonian" view of the power. Current legal controversies over the spending

5 *Id*. at 923.

6 *Id*. at 924.

7 Letter from Alexander Hamilton to Jonathan Dayton (Oct.-Nov., 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 599, 601-02 (Harold C. Syrett et al. eds., 1976). Further, though it appears he might have had doubts that the Constitution would allow Congress to actually operate roads, he probably would have favored a constitutional amendment to give the federal government that power. *Id.* at 603 (suggesting a constitutional amendment should be had so that Congress could "open," as opposed to merely spend money for, canals).

8 *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5-24 (1994) [hereinafter Engdahl, *The Spending Power*].

9 EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, FINAL SEQUESTRATION REPORT TO THE PRESIDENT AND CONGRESS, FISCAL YEAR 2001, at 9 (2001).

10 *See* South Dakota v. Dole, 483 U.S. 203 (1987).

11 *See* Harris v. McRae, 448 U.S. 297 (1980); Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986).

12 *See* New York v. Schweiker, 557 F. Supp. 354 (1983).

13 *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942).

power tend to be concerned with whether, or to what extent, the federal government may condition the receipt of funds on the agreement of individual recipients and other program beneficiaries to engage (or to refrain from engaging) in particular behaviors; and on whether, or to what extent, the policies behind such conditional federal spending may be used to preempt state laws which would otherwise frustrate the federal policies at issue.[14] Given the Supreme Court's steadfast adoption of an expansive, "Hamiltonian" interpretation of the spending power,[15] this discussion of what is called the doctrine of "unconstitutional conditions" has a certain practical bent that may be missing from work which would go further toward a full-scale reconsideration of the Spending Clause. Furthermore, a robust doctrine of unconstitutional conditions may go a long way towards restricting federal spending and the reach of even the Hamiltonian view of the spending power, a concern at the heart of this modest essay. However, beyond examination of the unconstitutional conditions doctrine, the core Hamiltonian view of the spending power is generally unchallenged.

In this symposium, surrounded by scholars of the first rank, many of whom have devoted substantial efforts to understanding and interpreting Congress's spending power, my contribution must necessarily be modest. I will refrain from the difficult task of attempting to dissect the efforts of the Supreme Court to explain or limit the spending power. I will not attempt to argue whether or not the prevailing, so-called "Hamiltonian" view of the spending power is "right" or "wrong," either as a matter of textual interpretation or of founding intent. Rather, I will merely suggest that this prevailing interpretation, with or without the limitations of the unconstitutional conditions doctrine, places pressures on the American system of representation that are not easily overcome. In particular, an expansive interpretation of the Spending Clause fosters political rent-seeking, that is, the seeking of special favors from government, through the democratic process. These pressures come to the fore in my area of expertise, campaign finance law, for campaign finance regulation is largely an effort to control political rent-seeking. However, most proposals for campaign finance regulation run directly counter to the First Amendment,

14 *See, e.g.,* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1919 (1995) [hereinafter Baker, *Conditional Federal Spending*]; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1111 (1987); D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

15 *See* United States v. Butler, 297 U.S. 1 (1936); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937); *Dole*, 483 U.S. 203; Rust v. Sullivan, 500 U.S. 173 (1991).

and to a smoothly functioning system of representation. I have, unfortunately, no solution to offer—at least not one which would be politically palatable in these times, or which might not create other, competing pressures on democratic self-government in the United States. However, perhaps merely identifying the problem can be a step forward in our thinking, not only about campaign finance, but also about the purpose of democratic self-government more generally.

Part II of this paper reviews the general contours of the Spending Clause as it has come to be understood, contrasting the Hamiltonian and Madisonian views and suggesting that the triumph of Hamiltonianism is a part of a massive redefinition of the relationship between the federal government, the states, and the people. Part III discusses how the Hamiltonian interpretation creates problems for representative democracy, and discusses campaign finance regulation as a desperate but doomed effort to resolve these dilemmas. I conclude by suggesting that the prevailing interpretation of the Spending Clause has helped to bring us to a political crossroads from which, given current attitudes, there is no obvious way out: it is, I suggest, Hamiltonianism at wits' end.

## II. Evolution of a Clause

### A. The Source of the Spending Power

Some level of authority for Congress to authorize expenditures of money appears to have been considered self-evident to the drafters of the Constitution. Without such power, the Constitution's provisions authorizing Congress to "borrow money,"[16] or to "lay and collect [t]axes,"[17] or to "support Armies"[18] and "maintain a Navy,"[19] for example, would make no real sense. Yet, except for Congress's authorization to draw compensation "paid out of the Treasury of the United States,"[20] the Constitution grants Congress no specific power to spend money for anything. The power appears to be assumed within the framework of the Constitution as an obvious extension of Congress's authority to carry out various enumerated actions—the "necessary and proper" Clause of Article I, Section 8.[21] If congressional spending is limited to that which is "necessary and proper" to effect Congress's enumerated

16 U.S. Const. art. I, § 8, cl. 2.
17 U.S. Const. art. I, § 8, cl. 1.
18 U.S. Const. art. I, § 8, cl. 12.
19 U.S. Const. art. I, § 8, cl. 13.
20 U.S. Const. art. I, § 6, cl. 1.
21 U.S. Const. art. I, § 8, cl. 18 (The Congress shall have the Power, "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

powers, then Congress's power to spend must be quite limited, even under a relatively expansive definition of "necessary and proper." As for spending beyond that pertaining to enumerated powers, there is some question about the source of any such power, and correspondingly, how broad this power, if it exists at all, might be. The most common interpretation is that the locus of the spending power, beyond that necessary and proper to effectuating enumerated powers, is implied in Article I, Section 8, Clause 1, which authorizes Congress to "pay the Debts and provide for the common Defence and general Welfare of the United States."[22] Professor David Engdahl, however, argues that the power is more appropriately found in Article IV, Section 3, Clause 2, which grants Congress the power to "dispose of . . . Property belonging to the United States."[23] Yet another possibility might be an implied power under Article I, Section 9, Clause 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[24]

Two of these possible sources of the spending power place no apparent constraints on that power, at least not without reference to other portions of the document. Indeed, the Appropriations Clause of Article I, Section 9, only grants the power at all through the pregnant inference that money may be drawn from the Treasury if appropriated by law, and offers no guidance as to any potential restraints on the power. It appears that no reported case has relied upon this clause, nor has any major commentary treated it as the source of the spending power. Similarly, the courts have not adopted Engdahl's reliance on Article IV, nor does Engdahl's theory place inherent restraints on the subjects for which Congress may appropriate funds. Indeed, Engdahl argues that Article IV's clear lack of any restraint on the purposes for which funds may be disposed is both the correct Hamiltonian interpretation of the spending power and, correspondingly, a virtue

22 *See, e.g.,* United States v. Butler, 297 U.S. 1, 64 (1936).

23 Engdahl, *The Spending Power*, *supra* note 8, at 50-51; David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995) [hereinafter Engdahl, *The Basis of the Spending Power*]. R

24 So far as I know, others have not sought to find the spending power in this clause; I presume that this is because either my research or logic is faulty, but I leave open the possibility of an original thought. The clause is generally viewed as a check on the authority of the executive to spend. *See* Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 140 (1999). By implication, this view suggests that, technically, the power to spend is not a congressional power at all, but is actually an executive power provided for under the President's duty to see that "the Laws be faithfully executed." *See id.* (quoting U.S. CONST. art. II, § 3, cl. 1.). Our concern remains with the scope of the projects for which Congress may appropriate money, however.

to rooting the power in Article IV.[25] However, Article I, Section 8, Clause 1, is the provision on which the federal courts have hung their collective hat,[26] and where scholars have generally assumed that the authority is found.[27]

Finding the spending authority in Article I, Section 8 is important, because Article I, Section 8 contains language which is susceptible to interpretation as either a limit on the spending power or a potential extension of that power. The central language in debates over the scope of the spending power hinges on what is meant by Congress's authority, in Article I, Section 8, to "provide for the . . . general Welfare." The question, in particular, is whether this language expands or contracts congressional power beyond the powers enumerated elsewhere in the Constitution. Two major schools of thought have existed since the Founding, as indicated by the names given to their respective positions: the "Madisonian" view, for followers of James Madison, and the "Hamiltonian" view, named for the first Secretary of the Treasury.[28] I will not attempt a full and thorough explication of either view or the various nuances that might exist within each camp,[29] but a brief summary of each view is important for our purposes.

25 Engdahl, *The Spending Power, supra* note 8, at 52. Engdahl does not see this formulation as leading to unchecked federal power—quite the contrary, he believes that separating the spending power from Article I, Section 8, with its "general Welfare" clause, does away with the mistaken idea that Congress may engage in non-fiscal measures, where it otherwise lacks enumerated powers under the Constitution, on the theory that it has broad non-fiscal power to "provide for the . . . general Welfare." *Id*.

26 *See*, *e.g.*, *Butler*, 297 U.S. at 64; Helvering v. Davis, 301 U.S. 619, 640 (1937); South Dakota v. Dole, 483 U.S. 203, 207 (1987).

27 *See, e.g.,* Baker, *Conditional Federal Spending, supra* note 14, at 1919; Rosenthal, *supra* note 14 at 1111. Finding any free-standing spending power in the general welfare "clause" is more problematic than most courts and scholars seem to think. A most cursory reading reveals that the "General Welfare Clause" is not really a clause at all, but merely a phrase within a clause. Hence it would seem clearly to be a limitation rather than a grant of power. *See* THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BILL FOR ESTABLISHING A NATIONAL BANK (Feb., 15 1791), *reprinted in* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 191 (1994). R R

28 The two men collaborated, of course, on writing *The Federalist Papers* in an effort to explain and bolster support for the Constitution during the ratification phase in the states.

29 Such discussions can be found in *e.g.*, Renz, *supra* note 24, at 103-142; Engdahl, *The Spending Power*, *supra* note 8, at 5-26; Rosenthal, *supra* note 14, at 1112; *Butler*, 297 U.S. at 63-78; *id*. at 79-88 (Stone, J., dissenting). Some have suggested that there are really three interpretations of the clause: the Madisonian interpretation, and "strong" and "weak" Hamiltonian interpretations. The "strong" Hamiltonian interpretation finds in the "general Welfare" clause the power for Congress to regulate generally, even beyond the enumerated powers that follow in the subsequent clauses of Paragraph 8. The "weak" Hamiltonian position finds no such general, regulatory power, but does hold that Congress has broad authority to spend for the general welfare. *See* Renz, *supra* note 24, at 103, 124. Given that this "strong" interpretation has not been found persuasive by the courts or most commentators, and that we are primarily concerned here with congressional spending, rather than direct regulation, I will not devote space to this "strong" Hamiltonian position. R R R

B. The Conflicting Views, Briefly Described

The Madisonian view of Article I, Section 8 holds that Congress's power to spend for the "general Welfare" is limited to effectuating Congress's enumerated powers. In this view, the inclusion of the General Welfare Clause serves to limit Congress's power, rather than to expand it. Indeed, Madison himself often evinced nothing short of scorn for interpretations of the General Welfare language that would expand Congress's powers beyond those enumerated elsewhere in the Constitution. For example, in *Federalist No. 41*, he wrote:

> It has been urged and echoed that the power 'to . . . provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections [to the Constitution], than their stooping to such a misconstruction . . . .
> [W]hat color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? . . . For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity . . . .[30]

Madison reiterated this view throughout his lifetime. For example, he wrote in 1800 that any interpretation of the General Welfare Clause as a grant of powers beyond those otherwise enumerated would lead to the creation of a government, "without the limitations formed by a particular enumeration of powers."[31] He continued:

> The true and fair construction of this expression ["general Welfare"], both in the original and existing federal compacts, appears . . . too obvious to be mistaken. In both the Congress is authorized to provide money for the common defence and general welfare. In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend . . . . Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question

30 THE FEDERALIST NO. 41, at 262-63 (James Madison) (Clinton Rossiter ed., 1961).

31 JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* JONATHAN ELLIOTT, 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 552 (1891).

> arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made. This [is the] fair and obvious interpretation . . . .[32]

Madison's approach, of course, would have strictly confined congressional spending, even in light of the constitutional authorization for Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[33]

The contrasting Hamiltonian view of Article I, Section 8, concludes that the General Welfare Clause provides a broad grant of power for Congress to spend, effectively, for any purpose. Hamilton viewed the General Welfare Clause as a separate grant of authority, if not to regulate, at least to spend. Wrote Hamilton: "The terms 'general Welfare' were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous exigencies incident to the affairs of a nation would have been left without a provision."[34] Hamilton went on to argue the phrase "general Welfare" was "susceptible neither of specification nor of definition. It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper."[35]

In sum, under the Hamiltonian interpretation, the General Welfare Clause is the only limit on an otherwise plenary spending power.[36] However, because the legislature is the sole determinant of what constitutes the general welfare, the clause provides no real limit whatsoever, nor even guidance to those who would wield the spending power. This appears to be exactly what Hamilton had in mind.[37] Like Madison, Hamilton held steadfastly to his view of the spending power throughout his lifetime.[38]

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32 *Id. See also, e.g.,* James Madison, Speech in Congress (Feb. 2, 1791), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 19, 28 (Gaillard Hunt ed., 1906); *see also* Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 411, 418-19 (Gaillard Hunt ed., 1910).

33 U.S. CONST. art. I, § 8, cl. 18.

34 ALEXANDER HAMILTON, REPORT ON MANUFACTURES TO THE HOUSE OF REPRESENTATIVES (Dec. 5, 1791), *reprinted in* 3 THE WORKS OF ALEXANDER HAMILTON 294, 371 (Henry Cabot Lodge ed., 1885).

35 *Id*. at 372.

36 *See, e.g.*, Rosenthal, *supra* note 14, at 1125. R

37 Engdahl, *The Spending Power*, *supra* note 8, at 12 ("The first step toward understanding Hamilton's view of the spending power, therefore, is to recognize that the Constitution's principle of enumerated powers does not countenance—but in fact repels—. . . [the] mistaken conclusion that some matters, some activities or events, are shut off from the federal government's attention . . . ."). R

38 *See, e.g.*, *id.* at 5-24.

Of course, the debate over the extent of the spending power was not restricted to the two founding giants. Rather, it simmered throughout the nineteenth century and into the early twentieth. Its importance was limited in part by the relatively small size of the federal government, and the reluctance of the federal government to engage in deficit spending outside of wartime. Shifting political demands and fortunes also influenced both the tone of the debate and which view held the upper hand at any particular time.[39] The influential jurist Joseph Story was an early and eloquent advocate of the Hamiltonian view,[40] and later advocates included Justice Holmes, at least indirectly,[41] the eminent counsel and later Chief Justice Charles Evans Hughes,[42] as the Hamiltonian interpretation gradually asserted its dominance. However, the Madisonian view retained influential defenders well into the twentieth century.[43]

## C. The Hamiltonian Victory

From a judicial standpoint, the core issue was finally settled in a series of cases involving "New Deal" programs. The first of these, *United States v. Butler,*[44] involved a challenge to the Agricultural Adjustment Act of 1933, which provided for federal subsidies to farmers who agreed to reduce their planted acreage.[45] The Supreme Court unanimously endorsed the Hamiltonian reading of the Spending Clause.[46] Whether the justices applied it correctly is another matter, as the Court reached the rather Madisonian conclusion that the spending was not in furtherance of the "general Welfare," and so was proscribed by the Constitution.[47] In any event, the next year the Court upheld key portions of the Social Security Act in the paired cases of *Steward Machine Co. v. Davis*[48] and *Helvering v. Davis,*[49] emphatically reaffirming its adherence to the Hamiltonian view. Since then, the Court has not wavered

39 *Id.* at 26-35; Renz, *supra* note 24, at 97-99. **R**

40 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 907-20 at 662-72 (Melville M. Bigelow ed., 5th ed., William S. Hein & Co. 1994) (1833).

41 *See* Hammer v. Dagenhart, 247 U.S. 251, 281 (1918) (Holmes, J., dissenting) ("It seems to me entirely constitutional for Congress to enforce its understanding [of good policy about anything] by all the means at its command.").

42 *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 192-95 (1921) (Hughes position is set forth in his argument for appellees before the Court).

43 *See, e.g.*, CHARLES WARREN, THE MAKING OF THE CONSTITUTION 474-79 (Fred B. Rothman & Co. ed. 1993) (1928).

44 297 U.S. 1 (1936).

45 *Id*. at 54-55.

46 *Id.* at 66.

47 *Id.* at 77-78. This conclusion drew a dissent from three of the justices. The dissenters agreed, however, that the Hamiltonian interpretation of the spending clause was the correct one. *Id.* at 80-81 (Stone, J., dissenting).

48 301 U.S. 548 (1937).

49 301 U.S. 619 (1937).

on the issue—although it has been criticized in specific cases for misapplying the clause.[50] Indeed, judicial fealty to the Hamiltonian interpretation is so complete that one commentator recently claimed that, "No one today candidly denies that Hamilton's view of the spending power was correct."[51]

With this victory for the general Hamiltonian interpretation of the power, the main issue for both courts and commentators became the extent to which Congress could condition the receipt of federal funds on the recipient's willingness to conform to certain behavior dictated by Congress.[52] Even those adhering to a most restrictive view of the spending power must agree that Congress may, when spending to effect an enumerated power, impose corresponding regulations which are necessary to assure that the money is spent to address its goal. Failure to impose such conditions would arguably leave the spending vulnerable to constitutional challenge under a Madisonian view of the power, as it would effectively allow the federal government to spend in ways that do not support its enumerated powers.[53] It would seem equally uncontroverted that Congress, as a condition of granting funds pursuant to one enumerated power, may impose conditions that could have been enacted or imposed pursuant to another enumerated power.[54] More difficult questions arise when Congress attempts to condition funds on the recipients' agreement to engage, or not to engage, in behavior otherwise beyond the enumerated federal powers,[55] or to condition the grant of funds on the recipients' agreement to forego a constitutional right.[56] An effort to address the latter situation has been made, in part, through the slow, difficult development of the complex doctrine of unconstitutional conditions.[57] However, while this doctrine has restricted

50 *See, e.g.*, Engdahl, *The Spending Power, supra* note 8, at 36-37 (criticizing the *Butler* court for a self-contradictory opinion); *See* Sullivan, *supra* note 14, at 1500-06. R R

51 Engdahl, *The Spending Power*, *supra* note 8, at 5. *But see* John Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001). R

52 This issue had been bubbling even before the decision in *Butler* and the Social Security Act cases. Under the Maternity Act of 1921, the federal government sought to provide funds to states that adopted certain plans for promoting maternal and infant welfare, an area of activity traditionally reserved to the states and certainly beyond any enumerated power of Congress. In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Supreme Court dodged a substantive challenge to this conditional spending by dismissing the case for lack of standing.

53 This point is succinctly made in Justice Stone's *Butler* dissent: "Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained." United States v. Butler, 297 U.S. 1, 83 (Stone, J., dissenting).

54 Rosenthal, *supra* note 14, at 1126. R

55 *Id.* at 1127.

56 Sullivan, *supra* note 14, at 1415. R

57 *Id.* at 1416 ("Just when the doctrine appears secure, new decisions arise to explode it.").

government regulatory power in limited circumstances,[58] it has been a minimal check on government power, especially where federal regulation through conditions on spending is concerned.[59]

A second result of the triumph of Hamiltonianism, more important for purposes of this paper, has been the constitutional legitimization of a vast amount of federal spending, often conditioned on the acceptance of regulation otherwise beyond Congress's enumerated powers. This spending has changed the fundamental relationship between the government and the people, and in turn, the fundamental nature of American politics and representation.

As is usually the case when legal doctrines shift, the timing of the *Butler, Helvering,* and *Steward Machine* cases, solidifying the hold of the Hamiltonian view of the Spending Clause, is not pure chance. The Sixteenth Amendment to the Constitution, ratified in 1913, authorized the federal government to directly tax income, creating a vast new source of revenue for the government. That same year, passage of the Seventeenth Amendment provided for the direct election of Senators, who had formerly been chosen by state legislatures. The effect of the Seventeenth Amendment was to strip from the states one of their primary weapons to fight federal encroachment on state power. United States Senators, suddenly able to appeal directly to popular passions when seeking reelection, rather than to state officials jealously guarding their own power, were no longer a bulwark of states' rights against the federal leviathan. Finally, a changing intellectual climate in the United States created a growing demand for federal involvement in areas traditionally reserved to the states. In such a climate, it is clear, in hindsight at least, that something had to give.

The Spending Clause decisions of the late 1930's were merely part of an enormous change in the relationship between the federal government, the states, and the people at large. The Spending Clause cases were decided more or less simultaneously with a line of cases greatly expanding Congress's regulatory power under the Commerce Clause[60] and eroding constitutional protections under the Due Process Clauses of the Fifth and Fourteenth Amendments.[61] In 1938, the Supreme Court decided *United States v. Carolene Products Company*,[62] upholding against due process challenges a piece of egregiously transparent special interest legislation that sought to benefit the dairy industry by driving pro-

58 *See, e.g.,* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

59 *See* South Dakota v. Dole, 483 U.S. 203 (1987); *see also* Baker, *Conditional Federal Spending, supra* note 14, at 1929-32. R

60 U.S. CONST. art. I, § 8, cl. 3. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

61 U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

62 304 U.S. 144 (1938).

ducers of a competing, legal, non-dairy product out of the market on the phoniest of pretexts.[63] The *Carolene Products* decision "freed the forces of interest group politics from the stumbling block of the federal courts,"[64] and suggested that there would be no due process limits to Congress's ability to regulate in the economic sphere.[65]

Before the decisions in *Butler, Helvering, Steward Machine Co., Wickard v. Filburn*, and *Carolene Products*, one could conceive of the federal government's powers as modest islands, surrounded by a vast sea of rights belonging to the states or to the people.[66] After these decisions, the balance of power changed: indeed, the doctrines of unconstitutional conditions in the realm of the Spending Clause, and of "strict scrutiny" over legislation affecting the rights of "discrete and insular minorities," in the realm of due process,[67] can largely be seen as efforts to shore up small islands of personal liberties now awash in a sea of federal power. In sum, by vastly expanding the regulatory power of the federal government, the judicial revolution of the 1930's opened up unprecedented opportunities for rent-seeking by business, labor, and other interests, especially in the economic sphere.[68] The triumph of the Hamiltonian interpretation of the Spending Clause was a part of this revolution.

## III. The Campaign Finance Connection

### A. The Evil to be Addressed

The threat to civil liberties caused by the demise of the Commerce Clause, the Spending Clause, and substantive due process as significant limits on government power may have been held at bay by the doctrines of unconstitutional conditions and strict scrutiny for civil liberties.[69] However, proponents of activist government have had an even more difficult time creating legal standards that harness the special interest rent-seeking unleashed by these convergent trends.

63 *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 Sup. Ct. Rev. 397.

64 *Id.* at 399.

65 *Id.*

66 *Cf.* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. Const. amend. X ("The powers not delegated to the United States . . . are reserved to the States respectively, or to the people.").

67 The actual language of *Carolene Products* calls not for "strict" scrutiny but for "more exacting" scrutiny. *See Carolene Products,* 304 U.S. at 152 n.4. The Court first adopted the phrase "strict scrutiny" in Skinner v. Oklahoma, 316 U.S. 535 (1942).

68 This paper deals with the problem on a federal level. It should be clear, however, that the rent-seeking problems discussed here also exist at the state level, where checks on government power have been equally eroded.

69 I am by no means certain that this is true.

Rent-seeking by special interests was not, of course, unknown before the New Deal. Indeed, the effort to protect society from rent-seeking was at the heart of many elements of the Constitution. In promoting the American Revolution, the founders had eradicated, in America at least, the notion that government was merely an extension of the private authority of the monarchy. Rather, public and private interests were recognized as separate realms.[70] However, if government policy was not merely to be an extension of the interests of the governed, the founders needed something to replace the monarchy as a source of law and policy above politics and free from the power and pressure of markets. At the time of the Revolution, the nation's founders looked to civic virtue and self-sacrifice to promote the public good, and believed that these attributes were promoted by the very existence of republican government.[71] However, by the time the Constitutional Convention convened in Philadelphia, the men sitting down to write that constitution had become jaded. By then, it seemed plain that civic virtue alone was insufficient to assure the public good against the power of special interests. The writing of a new constitution became, to a substantial extent, an effort to recognize these interests and to put them to use for the public good.[72]

Hamilton understood the difficulty of separating public policy from factional private interest. He was very concerned with finding disinterested men of virtue to give order to public affairs. Though himself a "self-made" man without the leisure of so many of the founders, Hamilton saw a need for legislators to be free from the pressure of markets. He was fearful that legislatures would be dominated by merchants, looking after their parochial interests, and the landed class looking after theirs.[73] Hamilton's only real solution to this problem, put forth in *Federalist No. 35*, was to rely on members of the "learned professions," particularly lawyers, whom Hamilton thought formed "no distinct interest," and would be the "impartial arbiter" between the "different branches of industry."[74] In addition, Hamilton expressed remarkable confidence in the voters to choose such wise and disinterested men for the legislature.[75] Hamilton, simply put, was better at seeing the potential benefits of the new government, than at finding ways to guard against its potential dangers.

70 *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 187-89 (1992); DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 69-72 (1994).

71 *See* WOOD, *supra* note 70, at 190, 252-53. R

72 *Id.* at 253.

73 THE FEDERALIST NO. 35, at 214-16 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

74 *Id.* at 215-16. Not surprisingly, Hamilton was a member of the learned professions.

75 *Id.* at 216-17.

That was not the case with Madison. Whereas Hamilton saw the benefits the nation could reap from the new Constitution, and envisioned the United States as a dynamic, thriving nation of great wealth and power,[76] Madison focused his attention on the potential problems the new Constitution might create.

Madison's best work in the *Federalist Papers* is, to a significant extent, an acknowledgment of the inevitable existence of private interests and an effort to show how a government might be structured so that it would be likely to protect the public good from domination by private interests. *Federalist No. 10*, of course, most frankly acknowledges the tendency toward "faction," as Madison called it. Madison argued that the causes of faction could not be controlled, at least not without "destroying the liberty which is essential to its existence,"[77] but that the worst effects of faction could be ameliorated in two ways. The first is through representative government, rather than direct democracy.[78] The second is through the size of the legislative body—neither too large nor too small.[79] The separation of powers between the states and the federal government is essential for this second feature:

> By enlarging too much the number of electors [relative to the number of representatives], you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, and local and particular to the State legislatures.[80]

In *Federalist No. 56*, Madison responded to the concern that the U.S. House would be too small for members to have adequate knowledge of local affairs by arguing first, that the role of the federal government would be modest and deal with issues for which little particularized local knowledge would be necessary;[81] and second, that at one member for approximately each 30,000 citizens, the ratio of citizens to members would be sufficiently low.[82]

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76 GREGORY S. ALEXANDER, COMMODITY & PROPRIETY 72-78 (1997).

77 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

78 *Id.* at 82-83.

79 *Id.* at 83. *See also* THE FEDERALIST NO. 55 at 343-44 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 56 at 346-50 (James Madison) (Clinton Rossiter ed., 1961).

80 THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

81 THE FEDERALIST NO. 56, at 346-48 (James Madison) (Clinton Rossiter ed., 1961).

82 *Id.* at 348-350. From the U.S. Census 2000 statistics, I estimate that our 435 congressmen each now represent approximately 655,702 constituents, which is twenty-one times the number of constituents in Madison's day. *U.S. Census Bureau, Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000, Table 2* (visited March 3, 2001) <http://www.census.gov/population/www/cen2000/respop.html>.

In *Federalist No. 51*, Madison argued that the principles of federalism would put private interests to work as a bulwark against overreaching government: "[T]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger . . . ."[83] Elsewhere, Madison argued that the separation of powers within the federal government would help to prevent any particular interest from capturing the government.[84] Finally, as we have already seen,[85] the principle of enumerated powers would prevent the federal government from overpowering the states—so much so, in fact, that Madison—and Hamilton too—argued that the states would hold the upper hand against the national government.[86] It was hoped that, through such a carefully structured division of power, the federal government could remain free of special interest dominance, and would, indeed, play the role of the "disinterested and dispassionate umpire in disputes between different passions and interests in the State."[87]

It is an oversimplification, but perhaps a helpful one, to describe Madison's theory as follows. First, factions are an inevitable result of freedom, and efforts to extinguish them are worse than the problems they cause; thus, a major goal of the Constitution was to structure the government in such a way as to control the worst ills of faction, and to give elected officials incentives and a framework to act for the common good. This task could be aided by the large geographic jurisdiction of the proposed federal government, which would cause it to "take in a greater variety of parties and interests[,]"[88] and promote higher quality representation at the federal level. Finally, by strictly limiting the powers of that federal government, so that it would concern itself only with matters of "great and aggregate interests,"[89] factions would be limited to the minor squabbles of local matters and state government, where intimate knowledge of particular local conditions was most necessary in any case. Where the Spending Clause was concerned, that meant that Congress would be largely restricted to appropriating money for the purposes of carrying out powers otherwise enumerated in the Constitution. Or such was the Madisonian case, in a nutshell.

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83 THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

84 THE FEDERALIST NOS. 47, 48 (James Madison) (Clinton Rossiter ed., 1961).

85 *See supra* notes 31-32 and accompanying text.

86 THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 31 at 196-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

87 Letter from Madison to Edmund Randolph (Apr. 8, 1787), *in* WOOD, *supra* note 70, at 253. R

88 THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

89 *Id.*

For the better part of a century, the Madisonian approach largely held sway. For example, although Justice Story argued early on that Congress had never limited appropriations to the specific powers enumerated in the Constitution, spending for non-enumerated purposes appears to have been the exception rather than the rule.[90] During all this time, the government remained small, the opportunities for rent-seeking limited, and campaign finance regulation non-existent.

By the end of the nineteenth century, this period of strictly limited government was reaching its end. Beginning with the creation of the Interstate Commerce Commission in 1881, Congress and the states increasingly took steps to regulate railroad rates, business practices, and working conditions.[91] By 1913, demand for federal action on a variety of fronts led to the adoption of the Sixteenth Amendment and the income tax, providing the federal government with an enormous source of new revenue, as was soon made apparent during the First World War.[92] As government spending and regulation expanded, interested money began to flow into the political system, and calls for campaign finance regulation became common for the first time.[93] Rapid growth in campaign spending, and major campaign finance reform initiatives have ever since followed close behind periods of increased government activism. The first federal acts regulating campaign finance were passed during the "Progressive" era between the turn of the century and World War I. The Federal Corrupt Practices Act was passed during the otherwise quiet 1920's in response to the Teapot Dome scandal, but it was the explosion in government spending during the New Deal of the 1930's that led to campaign finance measures being passed in 1939, 1940, 1943, and 1947.[94] A third wave of campaign finance regulation passed in the 1970's,[95] following the initiation of President Johnson's "Great Society" programs. It was at that time that the creation of Common Cause, Public Citizen, and other groups created a permanent presence to lobby for campaign finance regulation. Meanwhile, the level of govern-

90 *See* Engdahl, *The Spending Power*, *supra* note 8, at 26-33, for a description of many such exceptions.

91 *See, e.g.,* STUART CHASE, GOVERNMENT IN BUSINESS 25 (1936).

92 Income tax rates rose from an initial seven percent on incomes over $500,000 in 1913 to top rates of over 75% during World War I. PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 638-39 (1997).

93 *See generally* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 21-38 (2001) (for a discussion of the progression of regulation of political finance) [hereinafter SMITH, UNFREE SPEECH]; GEORGE THAYER, WHO SHAKES THE MONEY TREE 30-62 (1973) (for a discussion of the sources of campaign cash).

94 Bradley A. Smith, *Campaign Finance Reform: The General Landscape: The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 22-23 (1997) [hereinafter Smith, *Sirens' Song*].

95 *Id*. at 23-26.

ment spending rose inexorably, under both Republican and Democratic presidents and Congresses, to its present level of nearly $2.8 trillion per year,[96] while campaign spending accelerated at rates far greater than inflation, easily exceeding two billion dollars in federal races in the elections of 2000.[97]

The correlation between the growth of government spending and the demand for campaign finance regulation is no coincidence. Higher government spending increases opportunities for private rent-seeking from the government. These opportunities trigger more spending on campaigns as interested parties seek to take advantage of these available rents. The result is a cause and effect relationship by which the growth rate of government spending accounts for eighty percent or more of the growth rate in campaign spending.[98]

Advocates of campaign finance regulation generally argue that large campaign contributions hinder legislative efforts to reach the common good in three ways.[99] The most often heard argument is that it leads to *quid pro quo* corruption in a form not far removed from bribery:[100] the overt exchanges of legislative votes for campaign contributions. This seems to be what the Supreme Court had in mind when it upheld limits on contributions to candidates in *Buckley v. Valeo.*[101] Here the frustration of the public good is obvious—legislators vote to please the particular interests of contributors rather than voting for the good of all. Legislators may continue to debate issues, but the debates will be aimed less at

96 BUREAU OF ECONOMIC ANALYSIS, *Government Current Receipts and Expenditures* (visited Feb. 19, 2001) <http://www.bea.doc.gov/bea/dn/nipaweb/TableViewFixed.asp?SelectedTable=37&FirstYear=1999&LastYear=2000&Freq=Qtr>.

97 *See Center for Responsible Politics* (visited Feb. 20, 2001) <http://www.opensecrets.org> (showing total expenditures of approximately $1.1 billion by Federal Republican and Democratic Party committees, (visited Feb. 20, 2001) <http://www.opensecrets.org/parties/total.asp?Cmte=rpC>, (visited Feb. 20, 2001) <http://www.opensecrets.org/parties/total.asp?Cmte=dpC>; $344 million in spending by presidential campaigns, (visited March 3, 2001) <http://www.opensecrets.org/2000elect/index/AllCands.htm>; $555 million by House candidates, and $437 million by Senate candidates, (visited March 3, 2001) <http://www.opensecrets.org/2000elect/storysofar/index.asp?display=totals>. These amounts do not include spending on internal communications to members of unions and other advocacy and member groups, amounts spent on issue advertising by such groups during the period of the campaign, or amounts spent by presidential candidates defeated in the primaries). Reports may be accessed through (visited March 3, 2001) <http://www.fec.gov>.

98 John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger*, 43 J.L. & ECON. 359, 383 (2000) (attributing 87% of the rise in federal campaign expenditures to increased government spending) [hereinafter Lott, Jr., *Simple Explanation*]; *see also* FILIP PALDA, HOW MUCH IS YOUR VOTE WORTH? 96 (1994) (noting near one-to-one correlation in growth percentages between that of campaign spending and that of government expenditures).

99 The discussion that follows owes much to Daniel Ortiz's analysis, although I ultimately do not break down the interests in quite the way he does. *See* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 897-901 (1998).

100 *See* Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985).

101 424 U.S. 1, 26-27 (1976).

determining any common good than at justifying positions pre-determined by contributions.[102]

A second way in which campaign contributions might frustrate legislation for the common good is by distracting legislators from the pursuit of that good. That is to say, legislators may be required to spend so much time raising money that they shirk their more important legislative duties,[103] in particular that of reasoned debate. The Madisonian view of politics, like that of Edmund Burke, holds that the careful thought and deliberation of elected representatives is an essential part of "refining" public views in a way that helps to determine the public good.[104] If legislators feel compelled to ignore this duty in order to engage in fund raising, the public good may suffer.[105]

Third, limitations on campaign giving and spending may be necessary to enhance debate not just among the legislators, but also among the public. This is the "drowning out" theory. It holds, first, that inequalities among speakers will mean that certain views are not heard, simply because they are "drowned out" by better financed views.[106] Second, it holds that what the voters will hear may not be what they ought to hear. That is, reformers suggest that the mass marketing of political ideas through costly but brief and simplified television ads may hinder, rather than help informed decision making by the public;[107] better, they seem to think, that voters should be forced to wade through long leaflets and attend candidate forum nights. Though not a Madisonian argument *per se*, this argument has echoes of Madison's concern that "[t]he influence of factious leaders" might lead voters to support measures that were against their best, long-term interest.[108]

102 *See, e.g.,* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994).

103 *See, e.g.,* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

104 THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961); Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *in* REPRESENTATION 157, 174-76 (Hanna Fenichel Pitken ed., 1969).

105 This line of thought might be viewed as a modern twist on another belief common to the men who shaped the Constitution, including both Madison and Hamilton: that good legislators would be men of "leisure and easy circumstances," liberally educated, with time to consider and debate the affairs of government—in other words, an American aristocracy. *See* WOOD, *supra* note 70, at 253-55; Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148, 1162 (1989). R

106 *See, e.g.*, Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-10 (1986) [hereinafter Fiss, *Free Speech*]; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018-20 (1976). I have sharply criticized both the theoretical and empirical validity of this view in Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 69-72 (1997) [hereinafter Smith, *Money Talks*].

107 Wright, *supra* note 106, at 1012. R

108 THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

Based on these concerns,[109] the campaign finance regulators seek to put into place structural safeguards that will assure wise political decision-making. The goal, as it was with Madison and the founders, is to structure government in such a way that legislators will reach decisions in the public good, rather than in the interest of one faction or another.[110]

Each of the regulators' theories can be criticized on its own terms. For example, there is precious little in the way of systematic evidence to suggest that campaign contributions are the source of significant *quid pro quo* corruption,[111] and strong theoretical reasons to doubt that such *quid pro quo* corruption is the serious problem portrayed by reformers.[112] Similarly, there is no particular reason to think that, freed from fund-raising responsibilities, officeholders would not simply enjoy more leisure time. Finally, a growing body of literature shows that voter knowledge, including voters' ability to identify candidates, their party affiliation, their stands on issues, and their general place on the ideological spectrum, benefits substantially from mass political

109 A fourth concern is that of political equality. *See, e.g.*, Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789 (1998); Sunstein, *supra* note 102; Ortiz, *supra* note 99, at 899-901. As the size of government grows, and opportunity for rent-seeking increases, inequality in the ability to capture rents becomes a greater perceived problem. *Cf.* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM L. REV. 1369 (1994) [hereinafter Strauss, *Corruption*]. I have not devoted space to this argument in this text because it does not address the type of "good government" arguments—the search for a world above interest group politics—at issue here. I have discussed equality concerns at length in other writings, including Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 612-16 [hereinafter Smith, *Some Problems*] and especially Smith, *Money Talks supra* note 105, at 63-97. R

110 Ortiz, *supra* note 99, at 897-901. Of course, another possible goal may be merely to silence political opposition so as to enhance one's own rent-seeking opportunities or the opportunity to enact one's own policy preferences. I assume, however, that most proponents of regulation argue in good faith. R

111 *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067-71 (1996) [hereinafter Smith, *Faulty Assumptions*]. Typical of the research showing that campaign contributions have little effect on legislative behavior, and that most donors give to candidates who agree with their positions prior to taking office, is John R. Lott, Jr. & Stephen G. Bronars, *Time Series Evidence on Shirking in the U.S. House of Representatives*, 76 PUB. CHOICE 125 (1993).

112 Smith, *Faulty Assumptions*, *supra* note 111 at 1067-71; *See also* SMITH, UNFREE SPEECH, *supra* note 93, at 126-31; Smith, *Some Problems, supra* note 108, at 616-24. Readers interested in a far more sophisticated debate than can be laid out here may want to review the following articles from the 1995 University of Chicago Legal Forum: Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111; David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141; Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163 [hereinafter Lowenstein, *Campaign Contributions and Corruption*]; *see also* Professor Lowenstein's earlier article, Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989) [hereinafter Lowenstein, *The Root of All Evil*], for an excellent work at developing a much more sophisticated model of "corruption" than the simplistic *quid pro quo* model that the Supreme Court seemed to have in mind in *Buckley v. Valeo*, 424 U.S. 1 (1976), and that is portrayed in much popular and some academic literature. R R

advertising.[113] These disputes are, for the most part, fights over empirical matters for which conclusive data is simply not available. Assuming there is some validity to the complaints raised by the reform community, the real question is whether the regulatory community is moving down the right path.

## B. Heirs to Madison?

In certain respects, the proponents of campaign finance regulation in the late twentieth century can claim to be the rightful heirs to the Madisonian tradition. Like Madison, they seek to promote a government dedicated to the public good in a world dominated by private interests. Like Madison and the other framers of the Constitution, they do not believe that the natural interplay of private interests in the political system will inexorably lead to the public good.[114]

In their distaste for "special interests," and their tendency to equate virtually all private campaigning and lobbying as "corrupt,"[115] modern reformers also harken back to a pre-constitutional notion of disinterested, enlightened leadership. Under this model of representation, with which the younger Madison was much taken, legislators themselves had no particular interests to advance or cause to defend, other than the "common good."[116] Yet by the time the Constitution was written, Madison and other leaders were already much jaded by experience, and this concept of representation was under attack. Anti-federalist writers argued that the gentry, hiding behind the veil of disinterestedness, were in fact as interested as was anyone else. They too benefited or lost personally through various government policies. This vested interest was not necessarily a bad thing, indeed the anti-federalists saw it as a good thing, so long as it was recognized that the gentry were an interested cabal like any other group in society.[117]

Much of the same debate goes on today with the campaign reform lobby. For example, in the elections of 1998, the reform group Campaign for America, which seeks to ban all "soft money" ads, nevertheless ran their own "soft money" ads in Kentucky.[118]

113 *See, e.g.*, John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. POL. 757 (2000).

114 *See* WOOD, *supra* note 70, at 253. R

115 *See* SMITH, UNFREE SPEECH, *supra* note 93, at 10-11. R

116 *See* Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution, in* BEYOND CONFEDERATION ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69 (Richard Beeman et al. eds., 1987).

117 *See generally id.*; *see also* WOOD, *supra* note 70, at 255-60; Letter from the Federal Farmer (Jan. 20, 1788), *in* THE ANTI-FEDERALIST 79 (Herbert J. Storing ed., 1985); Letter from Brutus "To the Citizens of the State of New York" (Nov. 15, 1787), *in* THE ANTI-FEDERALIST 122, 125-26 (Herbert J. Storing ed., 1985). R

118 Edward Zuckerman, *Reformer Spent $466,029 to Fix Kentucky Senate Race*, POL. FIN. & LOBBY REP., Nov. 11, 1998, at 1, 4.

Samuel Issacharoff and Pamela Karlan, though sympathetic to reform goals, have noted that most scholarly arguments for regulation would have the predictable effect of giving greater political power to scholars and intellectuals, while reducing the power of business owners and others.[119] The press, which has ardently supported campaign finance regulation, also faces conflicts of interest, as its political power is enhanced by limits on private contributions and spending for political communication.[120]

Even if Madison might still search for disinterested leadership, there remains the question of how to assure it through the structure of government. One might quarrel over whether the Constitution, and in particular the First Amendment, in fact protects campaign giving and spending.[121] But in at least two important ways, efforts to regulate campaign finance are directly at odds with the Madisonian approach to the Constitution. First, whereas Madison sought to create a government structure that would protect individual freedoms as an integral part of any public good, modern campaign finance "reformers" seek to limit individual freedoms in order to produce a government structure that will yield a common good.[122] Campaign finance regulation does not seek to change the structure of government at all, or even the way in which citizens cast votes. Rather, it seeks to change the way in which people discuss issues of government and politics. It seeks to do this through rather straightforward restrictions on the right to speak and participate in politics. Campaign finance regulation turns out not to be a structural approach to government at all, but a policy approach in which the government directly invokes its police power in order to regulate the human conduct at issue. The modern campaign finance reform movement seeks to achieve its goals by, "destroying the liberty which is essential to [faction's] existence."[123] In this respect, it has far more in common with the Alien and Sedition Acts than with any Madisonian approach to government.[124]

119 Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1731 (1999).

120 *See* Arthur N. Eisenberg, *Buckley, Rupert Murdoch, and the Pursuit of Equality in the Conduct of Elections*, 1996 ANN. SURV. AM. L. 451, 459-60 (1996).

121 *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring); *id.* at 410-30 (Thomas, J., dissenting).

122 *See, e.g.*, E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 895-96 (1998); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055 (1999); Fiss, *Free Speech, supra* note 106; Wright, *supra* note 106. R R

123 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

124 The notorious Alien and Sedition Acts of 1798 constituted, among other things, an attempt to make criminal any "false, scandalous and malicious writing" against the government. For a full account of these acts, their passage, and ultimate failure, *see* JAMES MOR-

Second, the modern approach to reform also differs from the constitution making of 1787 in that it seeks to narrow the range of voices, rather than to increase them. Madison argued that the way to alleviate the effects of faction was to "take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it . . . to act in unison"[125] Campaign finance reformers, on the other hand, seek to silence voices. Their argument, that by silencing some they will enhance the voices of others,[126] is almost certainly wrong,[127] and frequently appears to be motivated by bias against the substantive arguments of those they would silence.[128] By silencing one source of potential influence, they seek to boost the power of other interests, which they have determined are underrepresented. In fact, by narrowing the number of players and driving out one of the most fluid sources of political power, they actually entrench a small elite of incumbents, staff, lobbyists, journalists, consultants, celebrities, and lawyers.[129]

## C. Heirs to Hamilton?

When Jefferson criticized Madison's proposal to begin a survey for possible post roads, it was not the knee-jerk reaction of a hopelessly out of touch theorist who was not aware of the highly plausible constitutional sanction for the undertaking. Rather, what Jefferson intuitively realized was that once the structural limits on the federal spending power were ignored, or interpreted to give the federal government broad powers in the domestic sphere, the lid would come off: "[I]t will be a scene of eternal scramble among the members who can get the most money"[130]

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TON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

125 THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

126 *See, e.g.*, Fiss, *Free Speech*, *supra* note 106, at 1414-15; Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1227-28 (1994); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 84-85, 236-39 (1993). R

127 *See, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty, in* THE BILL OF RIGHTS IN THE MODERN STATE 225-53 (Geoffrey R. Stone et al. eds., 1992); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 122-23 (1996).

128 *See, e.g.*, Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 945 (1985); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1061 (1985) [hereinafter BeVier, *Money*]. I discuss the substantive biases of many prominent reform scholars at some length in SMITH, UNFREE SPEECH, *supra* note 93, at 120-21, 146-47, 162 & accompanying notes. R

129 *See* SMITH, UNFREE SPEECH, *supra* note 93, at 201-13. R

130 *See* Letter from Jefferson to Madison (March 6, 1796), *in* 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 923 (James Morton Smith ed., 1995).

Thus, even where spending appeared to be in support of a specifically enumerated federal power, Jefferson felt that the spending power should be construed narrowly. In the case of the post roads, Madison hastened to reassure his friend that his proposal was "limited to the choice of roads where that is presented, and to the opening them, in other cases, so far only as may be necessary for the transportation of the mail."[131] Local governments, he added, would maintain and improve any roads opened by the federal government.[132]

For the most part, those leading the effort to regulate campaign finance have rejected Jefferson's fundamental insight into the nature of federal spending. There are, and have been, to be sure, supporters of limited government, by which I mean a much smaller government role than currently exists in the United States, who have favored restrictions on campaign giving and spending. Barry Goldwater may be the most notable among them.[133] But for the most part, campaign finance regulation in the United States has drawn its support from those who generally favor active government, an expansive interpretation of the Spending and Commerce Clauses, and in particular, high levels of federal spending.[134]

It appears, however, that Jefferson and Madison were correct. Under both Republicans and Democrats, government spending goes up. Agencies are captured by the interests they are intended to regulate. Citizens, in increasing numbers, perceive their government to be run for the benefit of special interests.[135]

The quest to limit campaign speech is a case of Hamiltonianism at wits end. Having broken down the Constitution's structural restraints on federal spending, and seen the federal treasury fueled with direct taxes on income, these modern Hamiltonians find themselves in search of something with which to replace the discipline of a strictly construed Spending Clause.

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131 Letter from Madison to Jefferson (Apr. 4, 1796), *in* 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 929 (James Morton Smith ed., 1995).

132 *Id.*

133 *See* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1128-29 (1994).

134 Lott, Jr., *Simple Explanation*, *supra* note 98, at 385. **R**

135 *See, e.g.*, Rasmussen Research Poll, *Americans Say Government Does Not Reflect Will of the People*, (visited March 3, 2001) <http://www.portraitofamerica.com/html/poll-58.html> (finding that by 46% to 40% respondents felt that "government [does not] accurately reflect the will of the [American] people"); Gallup Poll, *Gallup Poll Surveys—Gallup Poll News Service—October 6-9, 2000* (visited March 3, 2001) <http://www.gallup.com/poll/surveys/2000/topline001006/q25t28.asp> (finding 63% agreed with statement, "no matter what new laws are passed, special interests will always find a way to maintain their power in Washington.").

So far, however, the effort to replace constitutional discipline on the government with statutory speech prohibitions on the citizenry has failed in a manner that should be increasingly apparent to even the casual observer. Few believe that presidential elections, which are funded by the government, are better than senatorial elections, which are not. Few would argue that politics in New York, which bans corporate contributions, are more guided by concern for the public interest than politics in Virginia, where such contributions are legal. Since the passage of the 1974 Amendments to the Federal Election Campaign Act,[136] campaign finance has been more heavily regulated in the United States than ever before. Yet, there is little sense that the effort has been successful at curbing special interest influence. Of course, these issues are far more complex and multi-faceted than these few rhetorical comments might suggest. I resort to this rhetorical technique precisely because a thorough discussion is far beyond the scope of this paper, and even a thorough citation to the literature would take several pages.[137] However, I do want to suggest that, though the issue is complicated, on the mere face of things there is little reason to think that campaign finance regulation has been, or will be, successful on its own terms. Nor can this failure be blamed entirely, or even primarily, on the courts, which have admittedly struck down much campaign finance regulation as unconstitutional.[138]

Though the courts have cut wide swaths through campaign finance regulation, it is not fair to blame the courts for the failure of the enterprise. The cases, though perhaps controversial, are well-grounded in precedent.[139] Furthermore, a growing number of reform-minded advocates and scholars are themselves showing an

136 2 U.S.C. §§ 431, 455 (2000); 26 U.S.C. §§ 9001-9042 (2000).

137 *See* Smith, *Faulty Assumptions*, *supra* note 111, at 1071-91, where I have discussed the failure of campaign finance laws at some length. *See* BeVier, *Money*, *supra* note 128; Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213 (1989); and Daniel D. Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, for a few of the best articles arguing that efforts have failed. More sympathetic treatment of reform failures can be found in Cain, *supra* note 112; Strauss, *Corruption*, *supra* note 109; Sunstein, *supra* note 102; Levinson, *supra* note 128. There is virtually no literature arguing that campaign finance regulation has been successful, although there is a great deal arguing that it could be, if done right. *See* Lowenstein, *The Root of All Evil*, *supra* note 112; Kenneth R. Mayer, *Public Financing and Electoral Competition in Minnesota and Wisconsin* (1998); MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES (1998), for a few of the better pieces.

138 *See* Buckley v. Valeo, 424 U.S. 1 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). These are the most notable cases in this regard at the Supreme Court level.

139 *See, e.g.*, Ralph K. Winter, *The History and Theory of* Buckley v. Valeo, 6 J.L. & POL'Y 93 (1997); L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243; Polsby, *supra* note 137.

understanding, not always present in their predecessors, that the problem may be impossible to solve short of the most radical constitutional surgery, if then. For some, the result is skepticism, coupled with a patient if sometimes pessimistic search for answers within present constitutional norms.[140] For others, the call is for far more radical surgery,[141] including, in some cases, government regulation of the press and strict limits on the amount and/or type of political speech by individuals.[142]

What is perhaps ironic is that even if these most radical solutions were adopted, the core dilemmas of campaign finance, caused by the problem of rent-seeking, would remain.[143] The desire to seek rents would still lead to efforts to influence candidates and campaigns. Indeed, many of those efforts would be moved underground, or take other forms less visible to the public. For example, payments might be made under the table, or through straw donors. Certain individuals would still exercise "undue" influence through media access or ownership, or through communications to groups with large memberships. Other groups would retain influence through their size and ability to lobby.[144] It is extremely difficult to see how such rent-seeking techniques could be regulated.[145]

In fact, one of the great ironies of the debate over campaign finance reform is that reform is posited as a necessity to prevent special interest rent-seeking, yet the reform effort itself has become a major source of rent-seeking.[146] Efforts to pass reform have been stymied as groups attempt to shape such bills in ways that will strengthen their legislative and electoral influence relative to

140 *See, e.g.*, Issacharoff & Karlan, *supra* note 119; Oritz, *supra* note 99; Lowenstein, *Campaign Contributions and Corruption*, *supra* note 112. R R

141 *See, e.g.*, Jamin Raskin & Jon Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993) (calling for mandatory debates, free air time and personal subsidies for candidates, public funding of campaigns, increased reporting requirements, low spending limits, and contribution limits of $20 or less); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 791-92 (1987) (arguing that the state should subsidize viewpoints which are not *adequately represented* in public discourse).

142 *See, e.g.*, Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Foley, *supra* note 126. *See also* Stuart Taylor, Jr., *The President's Least-Favorite Nominee*, February 26, 2000 NAT'L J. *available in* 2000 WL 6436855 (quoting U.S. Senator John McCain on his desire to ban all "negative" ads; and former Senator and presidential candidate Bill Bradley on his proposal to place a 100% tax on all issue-oriented political speech). R

143 *See* Smith, *Sirens' Song*, *supra* note 94, at 26-41; *see also* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Fried, *supra* note 127. R R

144 *See* Charles E. M. Kolb & Christopher Dreibelbis, *Campaign Finance Reform: A Business Perspective*, 50 CATH. U. L. REV. 87 (2000).

145 *See* Smith, *Sirens' Song*, *supra* note 94, at 35-41; Lott, Jr., *Simple Explanation*, *supra* note 98, at 362. R R

146 *See, e.g.*, Lowenstein, *The Root of All Evil*, *supra* note 112 at 309-10. R

that of their competitors.[147] Meanwhile, advocates of reform in the current Congress have been touting it to Republicans on the very much self-interested grounds that it will benefit Republicans and incumbents at the polls,[148] which would seem to be the exact opposite of any pitch to the "public good."

## IV. CONCLUSION

The triumph of the Hamiltonian view of the Spending Clause has created extensive opportunities for private rent-seeking from government appropriations. Although it is not at all clear that campaign donations play anything more than a trivial part in this rent-seeking,[149] the push to regulate campaign contributions and spending is an effort to bring rent-seeking under control. As a structural impediment to rent-seeking, it bears some resemblance to the type of Madisonian designs placed in the Constitution, aimed at creating a legislature that would place the common good ahead of private interests. However, unlike true Madisonian devices, it attempts to perform its magic by restraining private liberty, rather than by creating a structure for government that minimizes the tendencies of citizens to seek rents and government to grant them. The enterprise fails because it attacks a symptom, rather than the cause, of the problem.

Many of the most ardent advocates of campaign finance regulation support the expansive view of the Spending Clause that creates so much incentive for rent-seeking. This is not as odd as it may seem. Their desire for active government creates a corresponding need for something to serve as a check on rent-seeking. Their preference for active government makes them more willing to accept the loss of political freedom inherent in their campaign finance regulation proposals. The problem is that little short of the most draconian regulatory measures are likely to succeed, and even those are probably destined to fail. In other words, high levels of government spending and rent-seeking go together. Campaign regulation has been shown to shift the form of the rent-seeking, but not to reduce its presence. The events culminating in the *Butler, Helvering, Steward Machine Co.,* and *Carolene Products*

147 SMITH, UNFREE SPEECH, *supra* note 93, at 93-94; *see also* Kolb & Dreibelbis, *supra* note 144, at 108 (arguing, in support of regulation, that big business will not be harmed due to its superior lobbying ability). R R

148 *See, e.g.*, Peter H. Stone, *Soft Money and the Senate*, BALTIMORE SUN, Jan. 7, 2001 at 1M (quoting Trevor Potter and Joshua Rosenkranz).

149 *See, e.g.*, GREGORY WAWRO, LEGISLATIVE ENTREPRENEURSHIP IN THE U.S. HOUSE OF REPRESENTATIVES (2000); Jeffrey Milyo, David Primo, and Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. & POL. 75 (2000); Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & ECON. 317 (1997).

cases effectively removed most constitutional restraints on government power and unleashed the forces of rent-seeking in a war of all against all.

The campaign finance regulators, in a futile effort to prevent this rent-seeking, would now have us sacrifice our political liberty as well. Reform efforts have sought to impose a truce in that war by banning or limiting one form of weaponry—campaign money. However, such a truce can only be truly obtained when interests agree to quit trying to pillage one another through the power of government—or at least when government is placed under such restraints that it cannot fulfill the rent-seekers' aims.

Fortunately, it appears that the American people are willing to tolerate some level of rent-seeking, at least if the alternative is the type of campaign regulation commonly proposed by regulators. Polls consistently show that campaign finance reform remains a very low priority with voters,[150] in part because voters may be more realistic than the reformers. Polls also show that voters have little confidence in more regulation leading to a reduction in corruption.[151]

But if Hamilton is at wits' end, so is Madison. For there seems to be little popular support in the United States for reinvigorating checks on the spending power, such as a strict construction of the general welfare phrase or the enumerated powers of Article I. A recent Rasmussen Research survey asked poll respondents:

> 3. The Constitution gave limited powers to the federal government. Sometimes, Congress passes laws that are not authorized by the Constitution. For example, there is no authority in the Constitution for the federal government to pay for 100,000 additional teachers in local school systems.
> In a case like this, is it better for Congress to follow the Constitution or is it better for Congress to pay for 100,000 additional teachers?[152]

Despite the loaded question, which presumed the Madisonian position and presented it as fact to respondents, 51 percent preferred that Congress hire the teachers, with just 36 percent urging Con-

150 For a summary of earlier data, *see* Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 833-36 (1998).

151 Rasmussen Research Poll, *Portrait of America: Americans say Campaign Spending Limits will NOT Clean Up Politics* (visited March 3, 2001) <http://www.portraitofamerica.com/html/poll-266.html> (80% thought more laws would not reduce special interest influence); *see also* Rasmussen Research Poll, *Rush Limbaugh is a Reg Flag for Many Americans; They'd Rather Have Rather* (visited March 3, 2001) <http://www.portraitofamerica.com/html/poll-696.html> (found by a nearly 27% to 14% margin voters would support a candidate who opposed new campaign finance laws in favor of enforcing existing laws, with the large plurality considering it one of many issues).

152 Rasmussen Research Poll, *51% Would Vote for Constitution Today* (visited March 3, 2001) <http://www.portraitofamerica.com/html/poll-1066.html>.

gress to follow the Constitution.[153] This is all the more remarkable given that the issue (hiring a relatively small number of teachers through federal taxation rather than local taxes), though clearly important to voters, hardly seems a matter of immediate and great national concern. A similarly loaded question, after also having described the activity as not authorized by the Constitution, asked, "is it better for Congress to follow the Constitution or is it better for Congress to provide funding for the artistic community?" This time, 38 percent chose the spending and 54 percent urged Congress to follow the Constitution.[154]

I believe it is all but inconceivable that the body politic would tolerate a return to a strict Madisonian reading of the spending power today. This leaves supporters of a strict Madisonian reading with a dilemma as challenging as that faced by their Hamiltonian counterparts. There is little evidence that the American public has the desire to put the spending power back in the bottle. There apparently are other societal goals besides reducing rent-seeking and protecting individual liberty and property rights. Defenders of the latter goals, despite substantial effort, have failed to persuade the majority of voters that freedom and property rights can accomplish these goals. Alternatively, they have failed to persuade their fellow citizens to reorder their priorities. If these modern Madisonians cannot win the underlying battle over the size and scope of the federal government, it is unlikely that the battle over campaign finance regulation will end.

There may be, of course, a way out through compromise. For example, Professor John Nagle has urged legislative recusal as an alternative to the regulatory approach of most campaign finance reforms.[155] This would leave citizens free to engage in political activity without constraint, placing the burden on legislators to step aside in cases of apparent conflict of interest. Professors Ian Ayres and Jeremy Bulow have argued for mandated donor anonymity as a way to avoid corruption and rent-seeking, while simultaneously addressing many of the First Amendment arguments raised against campaign finance regulation.[156] These efforts may be the cutting-edge of a serious effort to move debate away from traditional, highly regulatory campaign finance reform proposals. At least in the foreseeable future, however, it is hard to imagine such proposals gaining any political traction. Further, as is often the case with efforts at compromise, both sides of the reform debate

153 *Id.*

154 *Id.*

155 John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000).

156 Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998).

are likely to find their opponent's proposals woefully inadequate in any case.

The problem of campaign finance is largely a problem of government spending and power, and the perception that rent-seeking results from it. A substantial majority of Americans seem willing to live with an expansive Spending Clause, and a correspondingly expansive central government, in order to accomplish various other goals that, they apparently believe, government can accomplish. Whether or not they will tolerate a full-scale assault on their liberties, in the name of eliminating the corresponding rent-seeking, remains to be seen.

# The Spending Clause as a Positive Source of Environmental Protection: A Primer

*Denis Binder**

## INTRODUCTION

The last third of the Twentieth Century witnessed a veritable explosion of environmental legislation. While some environmental statutes harken back a century,[1] indeed long before the word "environmental"[2] was conceived, most environmental legislation started emerging in the late 1960's, highlighted by the enactment of the National Environmental Policy Act of 1970 (NEPA).[3]

The statutes may be widely known and of broad applicability, such as the Clean Air Act,[4] Clean Water Act,[5] Resource Conservation and Recovery Act (RCRA),[6] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[7] NEPA, and the Endangered Species Act,[8] or of specific application, such as the Surface Mining Control and Reclamation Act (SMCRA),[9] or of little public familiarity, such as the Ports and Waterways Safety Act of 1970.[10]

As the number of statutes approach the century mark, little thought has been given by Congress to the constitutional basis of the legislation. The underlying assumption is that the Commerce

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1 The Rivers and Harbors Act of 1899, 33 U.S.C. § 401 (1986), was enacted to maintain the navigability of bodies of water. It became a major source of environmental protection through much of the Twentieth Century. Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1986), which required a permit for obstructions to navigation, was the predecessor to the permit provisions of section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1986). Section 13, 33 U.S.C. § 407 (1986), was commonly referred to as the "Refuse Act."

2 Professor Rodgers, in a recent article, traces the phrase "environmental law" back to the 1960's. William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law*: *"The Whats*," 2000 U. ILL. L. REV. 1, 14 (2000).

3 42 U.S.C. §§ 4321-4370d (1994).

4 42 U.S.C. §§ 7401-7671q (1995).

5 33 U.S.C. §§ 1251-1376 (1986).

6 42 U.S.C. §§ 6901-6992k (1995).

7 42 U.S.C. §§ 9601-9675 (1995).

8 16 U.S.C. §§ 1531-1544 (1986).

9 30 U.S.C. §§ 1201-1328 (2000).

10 33 U.S.C. §§ 1221-1236 (1986).

Clause[11] grants virtually carte blanche authority to Congress to legislate for environmental protection.

Indeed, because environmental problems often transcend artificial political boundaries, such as state borders,[12] only Congress can comprehensively address major environmental problems. Yet, the environmental statutes have been stretched further and further until they have been applied to isolated wetlands[13] and isolated endangered species.[14] Even Congress has pushed the jurisdictional envelope to the extremes. For example, the Clean Water Act dispenses with the traditional tests of commerce, such as "navigability," and instead uses as its definition "waters of the United States."[15]

Often overlooked since the broad expansion of federal powers during wartime, the New Deal, and the Great Society,[16] is that pursuant to the United States Constitution, the federal government is a government based on *enumerated* powers, rather than a government of omnipotent power. The requisite granting powers may be derived from several provisions of the Constitution, such as the Commerce Clause, the Property Clause,[17] the Taxation

11 The Commerce Clause allows Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

12 *See, e.g.,* Arkansas v. Oklahoma, 503 U.S. 91 (1992); International Paper Co. v. Ouellette, 479 U.S. 481 (1987); City of Milwaukee v. Illinois, 451 U.S. 304 (1981); Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

13 *See, e.g.,* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (Jan. 9, 2001).

14 *See*, *e.g*., Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

15 33 U.S.C. § 1362(7) (1986).

16 With the understandable exception of vast wartime increases in federal power, President Roosevelt's New Deal ushered in modern government with broad regulatory powers and ever-expansive budgets. The "Great Society" was President Johnson's anti-poverty program, consisting of new and vastly expanded program.

17 The Property Clause provides "the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2. The federal government owns approximately one-third of the nation's land. *See* Public Land Law Review Commission, One Third of the Nation's Land: A Report to the President and to the Congress (1970). For example, the federal government controls roughly 44.3% of California's total acreage of 100,206,720 acres. *Id*. at 377. The corresponding figure for Nevada is 86.4%. *Id*. The Supreme Court in *Kleppe v. New Mexico*, 429 U.S. 529, 540 (1976), clearly articulated that the United States acts both as a proprietor and in a legislative capacity over its lands. The United States is free to develop, not develop, control, and regulate development on its lands as it wishes, subject to the limiting provisions of the Constitution, *id*. It may, therefore, ban or limit the use of motorized boats, snowmobiles, all-terrain vehicles, or off-road vehicles on its lands, *id*. It may allow or restrict the harvesting of federal timber resources, or the development or mining of other resources, such as oil and gas, *id*. It may regulate recreational activities in the nation's forests, parks, and deserts, *id*. Unless the federal government clearly, unequivocally waives sovereign immunity, it is not bound by state law. *See, e.g*., United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992); Dalehite v. United States, 346 U.S. 15 (1953).

Clause,[18] and the Spending Clause.[19]

The Commerce Clause was viewed not so long ago as a grant of plenary authority. However, the seemingly inexorable rise of federal hegemony and the corresponding eclipse of state sovereignty has been called into question by a series of 5-4 Supreme Court decisions granting the states' rights with a concomitant diminution of federal power.[20] Of particular note are the cases of *United States v. Lopez*,[21] dealing with the Gun Free School Zone Act of 1990, and *United States v. Morrison*,[22] addressing the Violence Against Women Act. Both cases involved the Supreme Court, again by narrow 5-4 decisions, striking down federal statutes on the ground that an insufficient nexus existed between the proscribed acts and interstate commerce. The current Supreme Court is unwilling to interpret the Commerce Clause and congressional creativity to transform incidental effects on interstate commerce into a carte blanche grant of regulatory power to Congress.

However, Congress may be able to accomplish many of the same legislative goals by expressly basing jurisdiction on the Spending Clause. This provision grants Congress broad powers to

18 "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1. With the major exception of "Superfund," 42 U.S.C. § 9611 (1995), the Taxation Clause has not been widely utilized to further environmental objectives. Under Superfund, the government when necessary may effectuate a cleanup of hazardous substances through a fund created pursuant to CERCLA. Superfund is funded through a tax on the petrochemical industry, utilities, and crude oil importers, and through reimbursement from responsible parties. *See generally* 26 U.S.C. §§ 9611-12, 9631-33, 9661-62, 9671-72 (1995).

On the other hand, a sulfur emissions tax on power plant emissions, The Pure Air Tax Act, was proposed in 1972 by President Nixon, but shortly disappeared from the political radar screen. Adam Chase, *The Efficiency Benefits of "Green Taxes" A Tribute to Senator John Heinz*, 11 UCLA J. ENVTL. L. & POL'Y 1, 36 (1992). President Clinton's proposed BTU tax on energy consumption was defeated in 1993, although other tax increases were approved.

19 U.S. CONST. art. I, § 8, cl. 1. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).

20 See especially the Tenth Amendment case, *New York v. United States*, 505 U.S. 144 (1992), and the Eleventh Amendment cases, *Alden v. Main*, 527 U.S. 706 (1999), *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). The Eleventh Amendment creates a form of state sovereign immunity by precluding lawsuits against states in federal court. The Supreme Court in *Seminole Tribe* held the Commerce Clause did not grant Congress the power to abrogate a state's sovereign immunity. For general discussions of the Eleventh Amendment, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*: *A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), and John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1 (1999).

21 514 U.S. 549 (1995). The Gun Free School Zone Act of 1990, 18 U.S.C. § 921(a)(25)(B) (2000), created a federal offense for knowingly possessing a firearm within 1,000 feet of a school.

22 529 U.S. 598 (2000).

achieve its goals.[23] Indeed, conditions on grants can be traced back to the Hatch Act of 1877.[24]

## Parameters of the Spending Clause

The Supreme Court decided in *South Dakota v. Dole*[25] that Congress could condition the receipt of federal highway funds upon states raising the minimum drinking age to twenty-one. South Dakota argued the condition violated both the Spending Clause and the Twenty-First Amendment.[26]

The Court's interpretation of the Spending Clause was based on an earlier case, *United States v. Butler*.[27] The *Butler* Court held Congress was not limited by the direct grants of legislative power found in the Constitution in authorizing funds.[28] Congress's powers under the Spending Clause were not thereby limited to the other enumerated powers. Congress is free, therefore, to condition the receipt of federal funds upon compliance with federal statutes and administrative directives.[29]

The expansive interpretation of the Spending Clause has not been universally acclaimed. For example, Professor Baker argues the Spending Clause should be construed in congruence with the Commerce Clause and should not be stretched broader than the other enumerated Article I powers.[30] She asserts the *Dole* test should be replaced by a rule that would invalidate any attempt by Congress to regulate states in a manner that Congress could not directly mandate.

The spending power is not unlimited. Several limitations exist. First, spending must be in pursuit of "the general welfare."[31] Courts should generally defer substantially to Congress's judg-

23 *See, e.g.*, Ann Althouse, *Enforcing Federalism after* United States v. Lopez, 38 Ariz. L. Rev. 793 (1996).

24 *See* 7 U.S.C. §§ 361-390(d) (1999); Lewis B. Kaden, *Politics, Money, and State Sovereignty; The Judicial Role*, 79 Colum. L. Rev. 847, 871 n.144 (1979). This statute required annual financial reports from agriculture experimentation stations. *Id*. Truly, big trees can grow out of small acorns.

25 483 U.S. 203 (1987).

26 *Id.* at 205.

27 297 U.S. 1 (1936).

28 *Id.* at 66.

29 *See Dole*, 483 U.S. at 207.

30 *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 Colum. L. Rev. 1911, 1916, 1962-63 (1995). *See also* Candice Hoke, *State Discretion Under New Federal Welfare Legislation; Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 Stan. L. & Pol'y Rev. 115, 122 (1998); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 Harv. L. Rev. 1419, 1434 (1994).

31 *See, e.g.*, Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619, 640 (1937) (explaining courts should substantially defer to Congress's judgment in determining if an expenditure is in pursuit of the general welfare).

ment in determining whether the expenditure is intended to serve general public purposes.[32]

Second, Congress's intent to condition funds in a particular action must be articulated and unambiguous "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequence of their participation."[33] Legislation pursuant to the Spending Clause can be analogized to a contract. The states agree to federally imposed conditions in exchange for the receipt of federal funds. Therefore, the disclosure of conditions must be unambiguous.[34] Precision is especially critical because the fundamental constitutional sovereignty of the federal and state governments is at issue. In this respect, Professor Engdahl posits that "sufficient clarity is required not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation."[35]

Third, the conditions on federal funds must be reasonably related to the articulated grant;[36] a valid exercise of the Spending Clause occurs when Congress conditions the receipt of federal funds in a way reasonably calculated to address the "particular impediment to a purpose for which the funds are expended."[37]

Finally, other Constitutional provisions may bar the conditional grant of federal funds.[38] *Dole* construed this limitation to mean Congress cannot use the Spending Clause to induce states to engage in conduct that would otherwise be unconstitutional.[39]

The *Dole* majority acknowledged that in some undefined circumstances, the financial inducements might be so coercive as to pass the point at which "pressure turns into compulsion."[40] The federal government may not condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with the federal standards.

The links in *Dole* between raising the drinking age to twenty-one, Congress's purpose of safe interstate travel and the expenditures of federal highway funds seemed clear. However, Justice O'Connor's dissent viewed the statute as an attempt to regulate the sale of liquor, which laid outside Congress's legislative powers

32 *See Dole*, 483 U.S. at 207.

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

34 *Pennhurst*, 451 U.S. at 17. The Supreme Court, though, does not require exact specificity. In *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 665, 665-66 (1985), the Court held Congress simply has to put the party accepting federal funds on notice of its prescribed or proscribed conduct.

35 David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 78 (1994).

36 *See Dole*, 483 U.S. at 207; Massachusetts v. United States, 435 U.S. 444, 461 (1978).

37 *Dole*, 483 U.S. at 209.

38 *See* Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985).

39 *See Dole*, 483 U.S. at 210.

40 *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). For a detailed analysis of the coercion issue, see Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the* Dole *Loopholes*, 4 CHAP. L. REV. 163, 172 (2001).

because of the Twenty-First Amendment.[41] Justice O'Connor also felt the drinking age conditions were "far too over and under inclusive."[42]

The coercion theory was tested by the Ninth Circuit in *Nevada v. Skinner*,[43] which involved a challenge to the federally mandated speed limit of fifty-five miles per hour.[44] Nevada claimed the potential loss of ninety-five percent of its highway funds deprived it of any choice, forcing it to adhere to the national speed limit.

The *Skinner* court felt the difficulty of assessing a state's financial capabilities "renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."[45] This approach has been followed by other courts.[46] As a practical matter, federal courts have been reluctant to invalidate funding conditions.[47]

However, the court did not base its opinion on the coercion theory. Instead, it held the Congressional statute could be independently supported by another enumerated power, the Commerce Clause.[48] Congress clearly has the power to enact a uniform speed limit pursuant to the Commerce Clause. The threatened withholding of substantial highway funds is in fact a lesser form of coercion than the direct, federal enactment of a flat mandate.[49]

The *Skinner* court, in a significant footnote, saw no need to "min[e] history" for evidence of legislative intent.[50] Indeed, the court held Congress was not required to identify the precise source of its authority in enacting legislation. Rather, the court's task is to determine if Congress acted within its authority. The court emphasized Congress can use its spending power to encourage states to participate in voluntary and cooperative ventures within the parameters of the Commerce Clause.[51]

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41 The Twenty-First Amendment, which repealed prohibition, gave great powers to the states to regulate the sale of alcoholic beverages. *See* U.S CONST. amend. XXI, § 2.

42 *Dole,* 483 U.S. at 214-15.

43 884 F.2d 445, 447-48 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

44 The 55 mph speed limit was enacted in 1973 as part of the Emergency Highway Conservation Act. States were required to impose the 55 mph speed limit or risk losing 95% of federal highway funds on all highways. *Id.*

45 *Skinner*, 884 F.2d at 448.

46 *See, e.g.,* Kansas v. United States, 214 F.3d 1196, 1201-02 (10th Cir. 2000); California v. United States, 104 F.3d 1086, 1093 (9th Cir. 1997) (complaining about federal mandates for illegal aliens); Virginia v. Browner, 80 F.3d 869, 881 (4th Cir. 1996); Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981); Missouri v. United States, 918 F. Supp. 1320, 1330 (E.D. Mo. 1996).

47 *See, e.g*., Kansas v. United States, 214 F. 3d 1196, 1201 (10th Cir 2000).

48 The court deferred to the congressional findings of fact. *Skinner*, 884 F.2d at 451.

49 *Id.* at 449.

50 *Id.* at 448 n.8.

51 *Id*. at 448.

*Dole* did not specify the degree of relationship necessary to pass muster under the Spending Clause. The Supreme Court subsequently reaffirmed in *New York v. United States*[52] that the conditions on receipt of federal funds must bear "some relationship"[53] to the purpose of the funding.

The Court upheld the use of Congress's spending powers in an effort to solve the nation's nuclear waste disposal problems, but struck down a "Take Title" provision pursuant to which states would have to take title to the commercial nuclear wastes in their states unless a solution was reached.

A critical Tenth Amendment holding by the Court found Congress lacks the power to direct state legislatures to implement programs under the Commerce Clause. Congress cannot directly compel states to implement state action plans or submit to administering federal regulatory programs, regardless of the paramount national interest.

*New York v. United States* illustrates Congress may choose from a wide range of options in preserving the public safety and environmental protection. It could, for example, condition the receipt of federal funds upon a state's voluntary submission to a condition. It might also directly regulate activities within the confines of the Commerce Clause.

What Congress cannot do, however, is mandate states exercise their police power or enact legislation. It can encourage, but not compel, the states to exercise their police power.

Congress also may not mandate state and local officials to carry out federal enforcement activities. For example, in *Printz v. United States*,[54] the Supreme Court struck down a provision in the Brady Bill,[55] which required state and local law enforcement officers to conduct background checks on proposed handgun transfers. The statute placed local law enforcement officers in charge of the mandated background checks.[56]

Therefore, while Congress can provide grants to states with rationally related conditions attached, it cannot directly mandate states exercise, in any way, their police powers.

The expansive interpretation of the Spending Clause allows Congress to accomplish many goals it might otherwise be precluded from achieving. First, it can extend federal environmental jurisdiction past the limits of the Commerce Clause if states cooperate. For example, even if Congress cannot regulate isolated wetlands, states might be induced to act. Congress may condition the

52 505 U.S. 144 (1992).
53 *Id*. at 167.
54 521 U.S. 898 (1997).
55 18 U.S.C. § 922 (1994)
56 *Id*. at § 922(s)(2).

grants on the state's exercise of police power in areas the federal government cannot directly reach. Second, a state may waive its sovereign immunity. Congress can condition the receipt of federal funds upon a state's waiver of immunity,[57] exposing the state to citizen suit provisions common in federal environmental statutes.[58] Congress can thereby require, for example, adequate provisions for judicial review. The mere acceptance, though, of federal funding does not result in the waiver of a state's Eleventh Amendment immunity.[59]

## Remedies for Violations

The typical remedy for enforcement of spending conditions is for the federal government to terminate funds to the violator,[60] and to recover amounts spent contrary to the terms of the grant.[61] Similarly, a private party may have to return the funds and can be denied participation in the program.[62] Violators may also be barred from receiving additional federal funds or participating in other programs.[63]

## Rescission of Consent

One issue that arises is whether a state may withdraw its consent. Presumably, a state cannot rescind its consent for funds it is currently receiving from the federal government. However, a state might try to prospectively rescind its consent or attempt to return the funds previously received. No direct authority exists, but analogous situations shed light on the issue.

57 *See, e.g.,* Clark v. California, 123 F. 3d 1267 (9th Cir. 1997), *cert. denied.,* 524 U.S. 937 (1998); Tennessee Dep't of Human Servs. v. U.S. Dep't of Educ., 979 F.2d 1162 (6th Cir. 1992); *In re* O.P.M. Leasing Servs., Inc., 21 B.R. 993 (Bankr. S.D.N.Y. 1982).

58 Congress included "citizen suit" provisions in many of the major environmental statutes beginning with the Clean Air Act in 1970. Under these statutes, "any person" may sue "any person" alleged to be in violation of the statute. These suits may be brought against state officials alleged to be violating the statutes. *See, e.g.,* Natural Resources Defense Council, Inc. v. California Dep't of Transp., 96 F.3d 420 (9th Cir. 1996) (holding that although a suit cannot be directly brought against a state pursuant to the Eleventh Amendment, under the doctrine established in *Ex Parte Young*, 209 U.S. 123 (1908), suit can be brought against individually named state officials). For a general discussion of citizen suits, see Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185 (2000), and Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 Ecology L.Q. 1 (1995).

59 *See, e.g.,* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985); Edelman v. Jordan, 415 U.S. 651, 673 (1974).

60 *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

61 *See, e.g.,* Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 663 (1985).

62 *See, e.g.,* United States v. Dierckman, 201 F.3d 915. (7th Cir. 2000).

63 For example, under the "Swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. § 3821 (2000), farm subsidies are barred for farmers who grow crops on converted wetlands. *See Dierckman*, 201 F.3d 915.

In *North Dakota v. United States*,[64] the state attempted to withdraw its approval for easement acquisitions by the United States. The Migratory Bird Hunting Stamp Act[65] authorized the Secretary of the Interior to acquire easements over wetlands suitable for waterfowl breeding and nesting grounds.[66] However, the statute precluded federal acquisitions without the approval of the Governor or an appropriate agency of the state where the land is located.[67] Roughly 1.5 million acres were acquired in North Dakota between 1961 and 1977 with the approval of successive governors.[68]

In the 1970's, the spirit of cooperation between North Dakota and the federal government broke down when North Dakota sought the equivalent of a divorce by withdrawing its approval. North Dakota argued the Governor's consent was revocable at will. The federal government countered that once a state gave permission, "the role assigned to the state by Congress has been exhausted."[69]

The Supreme Court agreed with the government. Legislative history did not indicate Congress intended a state's consent was revocable. In addition, the acquisition program could only take place over several years. Consent, once given by the state, cannot be revoked because the statute does not provide for revocation. The Supreme Court was concerned that a "detailed federal program involving the estimate of needs, setting of priorities, allocation of funds, and negotiations with landowners" could be nullified in an instant by a state's governor.[70]

A highway dispute from thirty years ago also sheds light on the issue. The state of Texas wanted to extend a highway from the San Antonio Airport into downtown San Antonio. The route would go through Brackenridge-Olmos Basin Parklands. The road was planned before enactment of § 4(f) of the Federal Aid to Highways Act[71] and the National Environmental Policy Act of 1970.[72] Amendments to the Highways Act preclude construction of federally funded highways through parklands unless there are no feasible and prudent alternatives, and the proposed program includes all possible planning to minimize harm to the park.

64 460 U.S. 300 (1983).

65 16 U.S.C. § 718(d) (2000).

66 *See North Dakota*, 460 U.S. at 304 (explaining the Prairie Pothole regions of the Dakotas, Minnesota, and Montana are critical breeding grounds of North American waterfowl). *See also* Denis Binder, *Taking v. Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLORIDA L. REV. 1, 22 (1972).

67 16 U.S.C. § 715(f) (2000).

68 *See North Dakota*, 460 U.S. at 305.

69 *Id*. at 312.

70 *Id*. at 314.

71 49 U.S.C. § 303(c) (2000).

72 42 U.S.C. §§ 4321-4370(d) (1994).

NEPA, of course, requires the preparation of an environmental impact statement on any major federal action significantly affecting the quality of the human environment.[73] Section 4(f) was enacted in 1964[74] and NEPA became effective on January 1, 1970.

The state attempted to avoid § 4(f) by splitting the highway into three sections with only the middle section going through parkland. Texas did not wish to prepare an environmental impact statement or comply with the conditions of § 4(f).

The state tried to avoid the conflict by offering to fully fund the highway itself. The Court of Appeals rejected the state's approach, holding the road became a federal project once the Secretary of Transportation authorized federal participation in the project on August 30, 1970.[75] The court held the state could not subvert the Supremacy Clause "by a mere change in bookkeeping or by shifting funds from one project to another"[76] even though no federal funds had yet exchanged hands. As a result, the state voluntarily submitted itself to federal law:

> It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law. And while this marriage between the federal and state defendants seems to have been an unhappy one, it has produced an already huge concrete offspring whose existence it is impossible for us to ignore.[77]

Congress ultimately resolved the siting dispute through enactment of legislation, which enabled the city and state to construct the highway segment without federal funds.[78]

If we are to respect the core values of federalism, then states need the right to withdraw their consent. If a statutory scheme does not expressly provide for revocation, then courts should imply the right of rescission as a fundamental tenet of federalism.

## Cooperative Federalism

Much of the prominent federal environmental regulatory regime is premised on the concept of "cooperative federal-

73 *See* 49 U.S.C. § 303(c) (2000).

74 The long-standing dispute over Brackenridge Park was the impetus for the enactment of § 4(f). *See* Stanley D. Olesh, *The Roads Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 Wm. & Mary L. Rev. 155, 158-59 (1986).

75 Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971).

76 *Id.* at 1027.

77 *Id*. at 1028. The courts were also unsympathetic to another attempt to "de-federalize" a highway project in an effort to circumvent NEPA. *See* Scottsdale Mall v. Indiana, 549 F.2d 484 (7th Cir. 1977).

78 *See* Lewis F. Fisher, Saving San Antonio 331 (1996). Ironically, the freeway was named in 1981 as one of the three most attractive urban expressways in the nation. *Id*. at 333.

ism"[79] in which the federal and state governments share regulatory duties.[80] Congress enacts an environmental regulatory statute, such as the Clean Air Act or the Clean Water Act, pursuant to which Congress delegates enforcement to a federal agency, such as the Environmental Protection Agency. A state may then assume much of the primary regulatory and enforcement powers under the statute, including the day-to-day administration of the statute, if the state satisfies procedural and substantive standards set by Congress. Indeed, the state essentially manages its own pollution control regime and regulatory program.

The federal government retains concurrent and residual power as well as supervisory or oversight authority. This model reflects the national concern about controlling pollution and recognizes the historic police powers of the states to control pollution.

A state so empowered under cooperative federalism may enforce higher standards than the minimal standards mandated by Congress.[81] However, many states responded to their delegated powers by enacting legislation precluding agencies from promulgating rules more stringent than the minimal federal requirements.[82]

Cooperative federalism is accomplished by a "carrot-and-stick" approach. Benefits to the state include local control, awareness of local problems, and perhaps an infusion of cash. Several of these statutes condition the receipt of federal funds upon adoption of plans acceptable to the federal government. The stick consists of the federal government assuming all the regulatory and enforcement powers if the state demurs. The state would then have no discretion in how the program is to be implemented or administered. The federal statute and ensuing regulatory program would also preempt contrary state action pursuant to the Supremacy Clause.[83]

Implicit in cooperative federalism is the freedom of a state to decide for itself if it wishes to participate in the regulatory pro-

79 *See generally* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996)

80 Statutes subject to cooperative federalism include the Clean Water Act, 33 U.S.C. § 1342(b) (1986), Occupational Safety and Health Act (OSHA), 29 U.S.C. § 667(b) (1999), Resource Conservation and recovery Act (RCRA), 42 U.S.C. § 6926(b) (1995), Safe Drinking Water Act, 42 U.S.C. § 300g-2 (1991), Surface Mining Control and Reclamation Act, 30 U.S.C. § 1253 (1986), and the Underground Storage Tank Program, 42 U.S.C. § 6991b(h)(7)(A) (1995).

81 *See, e.g.*, Clean Air Act § 116, 42 U.S.C. § 7416 (1995); Clean Water Act § 510, 33 U.S.C. § 1370 (1986).

82 *See* James M. McElfish, Jr., *Minimal Stringency: Abdication of State Innovation*, 25 ENVTL. L. REP. (Envtl. L. Inst.) 10,003 (Jan. 1995).

83 U.S. CONST, art. VI, cl. 2.

gram.[84] The Tenth Amendment[85] does not bar cooperative federalism because the federal government may often directly regulate the activity pursuant to the Commerce Clause. Congress may induce a state to cooperate by offering financial incentives and other favors and exacting financial penalties and other disincentives from recalcitrant states.[86]

The freedom of states to decide if they will participate goes to the essence of federalism.[87] States have selectively exercised their discretion in different ways rather than be subject to a monolithic national government dictating uniformity. Thus, while states rushed to participate in the Clean Air and Clean Water Acts, many states have not similarly participated in OSHA.[88]

The 1990 Amendments to the Clean Air Act illustrate the interaction of cooperative federalism, immunity and the Spending Clause. Virginia sought review of an EPA decision disapproving the state's proposed program for issuing air pollution permits.[89] The gist of the EPA's decision was that Virginia's proposal lacked adequate provisions for judicial review of Virginia's permit decisions. The sanctions imposed by the 1990 amendments include the loss of federal highway funds in non-attainment areas.[90] The court of appeals held Congress lacked the power to infringe upon the core of sovereignty retained by the states, including the administration of their judicial systems.[91] However, the court also held that the Clean Air Act's judicial reviewability rules did not

84 *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 589 (1937).

85 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

86 *See, e.g.*, Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975), *vacated and remanded for consideration of mootness sub. nom.,* EPA v. Brown, 431 U.S. 99 (1977) (per curiam); District of Columbia v. Train, 521 F.2d 971, 984-85 (D.C. Cir. 1975).

87 *See Steward Mach. Co*., 301 U.S. at 589.

88 *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulations: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1268 (1995) (explaining that although 40 states operate delegated National Pollution Discharge Effluent Systems (NPDES) permit authority under the Clean Water Act, only two implement § 404 programs). Conversely, 22 states, Puerto Rico, and the Virgin Islands have OSHA-approved state programs, and an additional three, Connecticut, New Jersey, and New York have rules that cover only the public sector. The participating states include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. *OSHA, State Occupational Safety and Health Plans* (visited Feb. 12, 2001) <http://www.osha-slc.gov/fso/osp/>.

89 *See* Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996).

90 42 U.S.C. § 7509(b)(1) (2000). Non-attainment areas are those that have not achieved the National Ambient Air Quality Standards, which define the level of air quality necessary to protect the public health and welfare. These standards exist for a number of pollutants, such as ozone (smog), carbon monoxide, particulate matter, and nitrogen dioxide. *See*, *e.g.*, 42 U.S.C. §§ 7511(a) (ozone), 7512 (carbon monoxide), 7513 (particulate matter), and 7514 (nitrogen dioxide).

91 *See Browner*, 80 F.3d at 879.

cross the forbidden constitutional line because they did not compel the states to change their rules, but only induced them to do so.[92]

The court upheld the highway sanctions provision on two grounds: the Spending Clause and the Commerce Clause. The conditions were reasonably related to the goal of reducing air pollution and did not rise to the level of "outright coercion."[93] The state was free not to participate, leaving the full regulatory program to the federal government.[94] The Clean Air Amendments simply followed a well-established pattern of cooperative federalism.[95]

## Use of the Spending Clause for Environmental Protection

If Congress can address environmental problems directly through the Commerce Clause, then its power through the Spending Clause is superfluous. The only role for the Spending Clause then is to serve as an added inducement to states to voluntarily assent to federal programs, including the critical enforcement powers, and provide an illusion of state concurrence. If, as *Lopez* and *Morrison* indicate, the Commerce Clause has reached its limits, then the Spending Clause becomes of critical importance.

If the Spending Clause continues to be construed to extend the reach of the federal government beyond the limits of the other enumerated powers in the Constitution, then Congress may continue to rely upon the spending power to achieve broad environmental goals, which might otherwise be constitutionally questionable. However, Congress has not, with the major exception of the Federal Aid to Highways Act, extensively relied upon the Spending Clause to achieve such goals.

Congress's powers under the Spending Clause to effectuate environmental goals can be illustrated by two wetlands cases. The Supreme Court held in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[96] that the Corps lacked regulatory power over isolated wetlands because the exercise of such power was beyond the scope of the statute. The familiar 5-4 majority did not address the Commerce Clause issue, but resolved the case on the basis of statutory interpretation. The effect of *Solid Waste Agency* is to renew attention on the Spending Clause.

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92 *Id*. at 880.

93 *Id*. at 881 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

94 *Id.* at 882.

95 *See generally* Jeffrey Geiger, Note, *Canary in a Coal Mine? Federalism and the Failure of the Clean Air Act Amendments of 1990*, 20 Wm. & Mary Envtl. & Pol'y Rev. 81 (1995); William J. Klein, Note, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act of 1990,* 26 Rutgers L.J. 885 (1995).

96 121 S. Ct. 675 (Jan. 9, 2001).

A court of appeals reached a contrary result in *United States v. Dierckman*,[97] which involved 15 acres of "converted" wetlands within the meaning of the "Swampbuster" provisions of the Food Security Act.[98] Farmers are ineligible for United States Department of Agriculture food subsidies if they "convert" a wetland by draining, dredging, filling, leveling or other means for the purpose of producing commodities.

The farmer argued the land involved did not affect interstate commerce. The court held the Food Security Act was enacted pursuant to the Spending Clause rather than the Commerce Clause. Therefore, the Swampbuster provision is not limited to activities affecting interstate commerce.[99]

As a practical matter, states will not reject large sums of money offered by Congress unless the conditions are unduly repressive. Professor Epstein reasons because the states' taxpayers are already paying into the federal treasury, the pressure to return some of these funds will be great, especially since the citizens of neighboring states would be receiving and benefiting from these funds.[100]

Congress has realized that because federal funds account for ninety-five percent of a state's transportation budget, highway funds provide the leverage for Congress to achieve its goals. For example, $4,619,112,289 in highway funds was certified for the 2000 fiscal year, with the largest sum, $437,310,349 going to California.[101] These sums serve as an irresistible lure to the states, even with substantial conditions attached.

As we have seen, South Dakota,[102] Nevada,[103] and Virginia[104] sued to invalidate conditions attached to the receipt of federal highway trust funds. However, upon losing their suits, the states promptly complied with the conditions. Federal funds trumped state principles.

Thus, Congress has used the funds as leverage to impose a national speed limit,[105] a minimum national drinking age of twenty-one,[106] and air pollution conditions, as seen by the EPA's

97 201 F.3d 915 (7th Cir. 2000).

98 16 U.S.C §§ 3801-34 (1994).

99 *See Dierckman*, 201 F.3d at 922.

100 *See* Richard A. Epstein, *Standing and Spending: The Role of Legal and Equitable Remedies*, 4 CHAP. L. REV. 1, 52 (2001).

101 *See* FEDERAL HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., *Revised Apportionment of Fiscal Year 2000 National Highway System Funds* (2000) (visited Feb. 5, 2000) <http://www.fhwa.dot.gov/legsregs/directives/notices/n4510432.htm>.

102 *See* South Dakota v. Dole, 483 U.S. 203 (1987).

103 *See* Nevada v. Skinner, 884 F. 2d 445 (9th Cir. 1989).

104 *See* Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996).

105 *See Skinner*, 884 F. 2d at 446 (the much derided 55 mph speed limit, which was ultimately repealed by Congress).

106 *See Dole*, 483 U.S. 203 (1987).

prohibition of federal highway funding by the Secretary of Transportation to states maintaining non-attainment areas.[107] Congress in 2000 further conditioned receipt of up to 8% of federal highway funds on the enactment by states of a .08 blood alcohol level for drunk driving purposes.[108]

The Clean Water Act can similarly be used to advance environmental goals. The government grants available under its various programs are quite large.[109] For example, The Public Water Systems Supervision Program Grants for the fiscal year 2000 are estimated to be $99,013,000,[110] the Drinking Water State Revolving Fund is $1,196,317, 000,[111] and the Clean Water State Revolving Fund is $1,190,968,000.[112] These sums, similar to those of the Federal Aid to Highway Act, will be very attractive to states.

If Congress chooses to entice states by offering large sums of money through programs such as the Clean Water Act or the Federal Aid to Highways Act, then Congress can achieve three major purposes.

First, states can be induced into directly enforcing federal statutes—an amplification of the existing cooperative federalism scheme.

Second, Congress can indirectly extend federal jurisdiction through the states to regulate activities that would otherwise exceed the reach of the Commerce Clause. An example would be the use of "wetlands preservation grants" to protect isolated wetlands.

The third effect would be to have states waive their Eleventh Amendment sovereign immunity, opening themselves up to environmental citizen suits.

## CONCLUSION

The next few years will witness a reassessment of the federal role in environmental protection. The changes may be great or minor depending upon the further unfolding of the federalism debate in the Supreme Court and political circles.

The recent emphasis on the Eleventh Amendment, accompanied by the narrowing of the scope of the Commerce Clause, necessitates a reappraisal of Congressional constitutional authority to protect the environment. Broad statutes of general application,

107 42 U.S.C. § 7509(b)(1)(A) (2000); 42 U.S.C. § 7410(m) (2000).

108 *See*, McConville, *supra* note 40 at 151.

109 For example, Congress appropriated $33.2 billion from 1972 to 1981 under the construction grants program for municipal wastewater treatment plants. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, 1981 ANNUAL REPORT 74-75 (1981).

110 EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT: BUDGET INFORMATION FOR STATES 150 (2000).

111 *Id*. at 152.

112 *Id*. at 153.

such as the Clean Air or Clean Water Acts, CERCLA, and RCRA, will be upheld in their application to interstate activities. Chief Justice Rehnquist in *Lopez v. United States*[113] cited *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc*.[114] for the principle that where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.[115]

However, the problem arises in the application of such broad statutes to problems of tangential connection to interstate commerce, such as isolated wetlands[116] and isolated species,[117] where no overt or substantial effect on interstate commerce is discernible.

By making almost all of the environmental statutes dependent on one clause, albeit a broad clause of the Constitution, Congress has placed at risk many environmental statutes.

If the Commerce Clause applies, then the Spending Clause is superfluous. If, however, the Commerce Clause does not encompass such environmentally sensitive matters as isolated wetlands or species, then Congress may still accomplish these goals by attaching conditions to federal funds. The conditions can also result in the waiver of a state's Eleventh Amendment sovereign immunity. States would need to be clearly informed of the conditions attached to the federal funds; specifically, any waivers of sovereign immunity and the conditions upon which a state may rescind its consent.

113 514 U.S. 549 (1995).

114 452 U.S. 264 (1981).

115 *Lopez*, 514 U.S. at 559.

116 *See, e.g*., Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (Jan. 9, 2001).

117 *See, e.g*., Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

# Federal Funding Conditions: Bursting Through the *Dole* Loopholes

*Celestine Richards McConville**

## I. INTRODUCTION

Over the past several years, the Supreme Court steadily has limited the scope of congressional power in the name of federalism. In the context of the Commerce Clause, the Court twice has invalidated federal legislation involving intrastate criminal activity, ruling that such activity lacks the requisite "substantial effect" on interstate commerce necessary to sustain an exercise of the commerce power.[1] The Court also has ruled that, even when

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1 United States v. Lopez, 514 U.S. 549 (1995) (invalidating provision of the Gun-Free School Zones Act prohibiting possession of firearms within 1000 feet of schools); United States v. Morrison, 529 U.S. 598 (2000) (invalidating provision of the Violence Against Women Act establishing civil damage remedy against persons who commit gender-motivated violent crimes). The substantial effect restriction is necessary, the Court reasoned, because "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 676 (citing *Lopez*, 514 U.S. at 568).

The Court suggested in *Lopez*, and made clear in *Morrison*, that the federal government may not regulate criminal activity under the Commerce Clause if the only basis for the regulation is the activity's aggregate effect on interstate commerce. *Lopez*, 514 U.S. at 559-68; *Morrison*, 529 U.S. at 676. While the *Morrison* Court carefully noted that it was not "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity," it emphasized that its cases "have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 673.

Before the Court this Term was another Commerce Clause case, this one challenging the federal government's regulatory authority under section 404(a) of the Clean Water Act. The government contended it had authority under that section and the Commerce Clause to regulate activity involving wholly intrastate ponds serving as migratory bird habitats. *See* Solid Waste Agency of N. Cook County v. United States Army Corp of Eng'rs, 121 S. Ct. 675 (2001). On January 9, 2001, the Court rejected the government's interpretation of section 404(a), ruling that the phrase "navigable waters" in that section does not include wholly intrastate ponds that serve as migratory bird habitats when the ponds are "not adjacent to open water." *Id.* at 680. Because the government's assertion of authority was improper on statutory grounds, the Court did not address the Commerce Clause question. The Court did state, however, that the government's position raised "significant constitu-

Congress properly regulates an activity under its commerce power, federalism principles prohibit Congress from using that power to direct the states to enact, administer or enforce a federal program.[2] Such directives "commandeer" state legislative and executive processes, which are critical aspects of state sovereign authority.[3] Finally, the Court has curtailed Congress's ability to abrogate, and obtain waivers of, state sovereign immunity.[4]

To date, the Court's federalism campaign has left untouched one of Congress's most broad and potent powers—the spending power.[5] As currently interpreted, this power permits Congress to achieve objectives with respect to the states that it otherwise could not achieve using its other Article I enumerated powers.[6] In other words, Congress may use federal funds to induce the states to enact particular legislation or to regulate in a particular manner, even though Congress could not directly mandate that the states do so.[7] As several commentators have noted, the current

tional and federalism questions." *Id.* at 684. Thus, while a decision on the merits of the Commerce Clause issue likely would have provided additional insight regarding the Court's view of the scope of the commerce power, the Court's decision reveals its continued interest in examining whether congressional legislation exceeds a federalism-based outer limit on the commerce power.

2 Under the so-called "anti-commandeering" rule, Congress may induce states, through the valid use of one of its powers, to enact or enforce a federal program, but it may not *require* the states to enact or enforce a federal program. Thus, in *New York v. United States*, 505 U.S. 144 (1992), the Court invalidated the provisions of the Federal Low Level Radioactive Waste Policy Amendments Act that required states to either "take title" to radioactive waste within their borders or to enact legislation dealing with the disposal of such waste. And in *Printz v. United States*, 521 U.S. 898 (1997), the Court invalidated the Brady Handgun Violence Prevention Act provisions that required, on a temporary basis, state and local chief law enforcement officers to conduct reasonable background checks of prospective handgun purchasers.

3 *See, e.g.*, *Printz*, 521 U.S. at 926-27, 932.

4 *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (Congress may not use its commerce power to abrogate sovereign immunity); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680, 681-85 (1999) (overruling Parden v. Terminal Ry. of Ala. Docks Dept., 377 U.S. 184 (1964), and refusing to imply a waiver because of a "state's mere presence in a field subject to congressional regulation" or because a state participates in an activity normally engaged in by private entities); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (Congress exceeded its authority under § 5 of the 14th Amendment when it imposed monetary liability on states for patent infringement); Alden v. Maine, 527 U.S. 706 (1999) (Congress may not abrogate state sovereign immunity in state courts); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (Congress exceeded its authority under § 5 of the 14th Amendment when it permitted damages actions against states for violations of the Age Discrimination in Employment Act); Board of Trustees of the Univ. of Ala. v. Garrett, No. 99-1240, 2001 WL 173556, __U.S.__ (Feb. 21, 2001) (Congress exceeded its authority under § 5 of the 14th Amendment when it permitted federal court damages actions by state employees against states for violations of the Americans with Disabilities Act).

5 In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a bare majority of the Court declined an opportunity to cut back on the spending power in the name of federalism. For a discussion of *Davis*, see *infra*, notes 124-36 and accompanying text.

6 *See* South Dakota v. Dole, 483 U.S. 203 (1987); New York v. United States, 505 U.S. 144 (1992).

7 *See New York*, 505 U.S. 144.

broad scope of the spending power undermines the Court's recent federalism decisions because it permits an end-run around the federalism limits imposed on other enumerated powers.[8]

The evidence suggests that the spending power is next up on the Court's federalism hit-list. In *South Dakota v. Dole,* the Supreme Court carefully warned that although the spending power has a broad reach, the power also has outer limits.[9] And it repeated its warning in later cases.[10] As discussed in Part II, "federalism loopholes" built into *Dole's* analysis might be used as tools for cutting back on the scope of the spending power in order to vindicate federalism interests. These loopholes include coercion (the possibility that "pressure might turn into compulsion"), inadequate notice (an ambiguous statement of the funding condition), and insufficient relatedness between the funding condition and the purpose of the federal spending program.[11] This article evaluates whether these three federalism loopholes ought to be used

8 *See, e.g.,* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995); 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, 15-16 (1998); Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole,* 25 PEPP. L. REV. 869 (1998); Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 553 (1997).

9 483 U.S. at 207-12.

10 *See New York*, 505 U.S. at 167 ("[Funding] conditions must (among other requirements) bear some relationship to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority.") (citations omitted); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999) ("[I]n cases involving conditions attached to federal funding, we have acknowledged that the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.") (quotations and citations omitted). *See also* Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 121, 122 (1998) (suggesting that the Court may reevaluate spending power in light of *New York* and *Printz*); *but see* Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1662 (2000) (increased use of spending power "might eventually force the pro-federalism majority on the Court to rework its spending power jurisprudence or even reconsider Dole, although there are few indications of such a development at the present time"); Krotoszynski, *supra* note 8, at 16 ("To date, the Supreme Court has shown no indication to revisit its holding in South Dakota v. Dole.").

The existence of similar warnings in the Commerce Clause context cautions us to take the Court's admonitions seriously. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."); *cf.* Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring) ("[I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce.").

11 *Dole*, 483 U.S. at 207-08. These loopholes did not appear for the first time in *Dole*. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) (coercion); Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) (notice); Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion) (relatedness).

either to promote sovereign accountability or to encourage Congress to be cognizant of federalism concerns when it legislates. All loopholes are not created equal, of course. So while the article discusses all three loopholes, it focuses predominantly on the coercion loophole, which has received much recent attention in both scholarship and case law.[12]

As discussed in Part III, a primary justification for judicial enforcement of the federal balance is to preserve and protect the states' ability to act as sovereigns.[13] In their capacity as sovereigns the states are charged with the duty to make decisions implementing the will of their people, and the responsibility to be held accountable when they fail in this duty.[14] Accordingly, judicial invocation of the *Dole* loopholes can be justified if the loopholes would protect sovereign accountability by eliminating interference with the states' ability to make decisions implementing the will of their people.

The coercion loophole left open in *Dole* should not be used as a means of enforcing federalism-based limits. As defined in *Dole*, that loophole improperly emphasizes financial inducement, examining whether the amount of money at stake essentially "caused" the state to participate or remain in the federal program. As explained in detail in Part III, in the federalism context, coercion means the loss of sovereign accountability, not subjection to undue influence or financial inducement. Thus, to say that the federal government may not use the federal spending power to coerce a state is simply to restate the rule that the federal government may not interfere with sovereign accountability. If the federal program itself does not interfere with the state's *ability* to make choices on behalf of its people (which federalism protects), then by necessity there is no coercion. While the financial impact of a funding condition may well inform the decision to participate in a federal program, it does not disable the state from choosing to im-

12 *See, e.g.,* Baker, *supra* note 8, at 1973-77; David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 78-86 (1994); Hoke, *supra* note 10, at 121; Angel D. Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions,* 48 U. KAN. L. REV. 161, 191-93 (1999); *see also, e.g.*, Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); California v. United States, 104 F.3d 1086 (9th Cir. 1997); Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000); Virginia Dept. of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997).

13 For thorough and informative discussions of the purposes and values of federalism, see Engdahl, *supra* note 12, and Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

14 These themes sound in both old and new Supreme Court precedent. *See, e.g., Steward Mach. Co.*, 301 U.S. at 593 (concluding that the Social Security Act did not "call for a surrender by the states of powers essential to their quasi sovereign existence"); New York v. United States, 505 U.S. 144, 168 (1992) (federalism promotes accountability because "state governments remain responsive to the local electorate's preferences; [and] state officials remain accountable to the people").

plement the people's will, and thus decline the federal funds, if that will is inconsistent with the federal condition. The choice may be difficult, but the *ability* of the state to make a choice remains unimpaired.

Unlike the coercion loophole, the inadequate notice loophole protects sovereign accountability. Adequate notice of a funding condition enables a state to make an informed choice about whether participation would be responsive to the will of its people. Because unambiguous notice of the condition directly affects a state's ability to act as a sovereign, the inadequate notice loophole ought to be used to protect our federalism.

Lastly, use of the insufficient relatedness loophole will not enhance a state's ability to determine whether participation in the federal spending program would implement the preferences of its constituents. The degree of relatedness between the funding condition and the purpose of the federal spending program may well inform a state's decision to participate or not participate. Indeed, a low degree of relatedness might counsel against participation, as it might send a negative signal about the whole program. But the degree of relatedness should not affect a state's *ability* to determine whether the program will enhance or impede its policy choices, and thus should not be used to directly enforce federalism limits.

Part IV examines a second justification for invoking some or all of the *Dole* loopholes—encouraging Congress to be attentive to the federal balance when it enacts legislation involving or affecting the states. While the coercion loophole likely would encourage Congress to be sensitive to federalism concerns, it should not be used for that purpose because doing so would result in the invalidation of proper exercises of the spending power. It therefore is too blunt an instrument to remedy congressional insensitivity. The inadequate notice and insufficient relatedness loopholes, however, serve this encouragement function well. Judicial invalidation of a spending condition for lack of clarity or for insufficient relatedness forces Congress to re-craft its program before it can continue. And even in the initial drafting stage, the threat of possible invalidation likely will pressure Congress to carefully consider state interests.

In short, the inadequate notice and insufficient relatedness loopholes provide possible avenues for vindication of federalism interests. The *Dole* coercion loophole, on the other hand, does not protect federalism interests and thus should not be used as a tool for doing so.

## II. THE *DOLE* DECISION — PLANTING THE SEEDS OF FEDERALISM

Article I, section 8, clause 1 of the United States Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[15] The main debate surrounding the scope of the Spending Clause was the definition of general welfare. James Madison argued that the phrase was limited by the enumerated powers following the Spending Clause, and that Congress could spend only to achieve an object within those enumerated powers.[16] Alexander Hamilton took the opposite view, asserting that the power to spend for the general welfare was not restricted by the enumerated powers, but rather was a distinct power unencumbered by the remaining grants of power.[17] It was not until 1936, in *United States v. Butler*, that the Supreme Court took a position on the issue and rejected Madison's interpretation as a "mere tautology."[18] Adopting Hamilton's position, the Court ruled 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."[19]

In *South Dakota v. Dole*, the Supreme Court confirmed *Butler's* broad vision of the federal spending power.[20] South Dakota challenged a federal law that conditioned the receipt of a portion of federal highway funds on the adoption of a minimum drinking age of twenty-one.[21] Rejecting the challenge, the Court underscored the "breadth" of the spending power, emphasizing that Congress may "further broad policy objectives by conditioning re-

15 U.S. CONST. art. I, § 8, cl. 1.

16 *See* United States v. Butler, 297 U.S. 1, 65 (1936).

17 *See* Alexander Hamilton, *in* 10 THE PAPERS OF ALEXANDER HAMILTON, DECEMBER 1791-JANUARY 1792, at 303 (Harold C. Syrett and Jacob E. Cooke eds., 1966) ("This phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues shou'd have been restricted within narrower limits than the 'General Welfare' and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition."); *see Butler*, 297 U.S. at 65 ("Hamilton . . . maintained the clause confers a power separate and distinct from those later enumerated is not restricted in meaning by the grant of them").

18 297 U.S. at 65.

19 *Id.* at 66. *Butler* emphasized that the power was not without limitation, but must be exercised for the general welfare. *Id.* After declaring that the spending power was not limited by the enumerated powers, the Court nevertheless proceeded to strike down the Act under the Tenth Amendment. *Id*. at 68. Because the Act regulated agriculture, it was beyond the federal government's reach. *Id.* As Professor David E. Engdahl so aptly explains: "The rule of decision in Butler . . . is precisely Madison's view, applied notwithstanding the Court's simultaneous nominal endorsement of Hamilton's view. The majority's seeming obliviousness to this flagrant self-contradiction makes its opinion in Butler one of the few truly ridiculous opinions delivered in two centuries of Supreme Court jurisprudence." Engdahl, *supra* note 12, at 36 (footnote omitted). The 10th Amendment analysis in *Butler* has not been followed.

20 483 U.S. 203 (1987).

21 *Id.*

ceipt of federal moneys upon compliance by the recipient with federal and administrative directives."[22] Thus, the Court held that Congress may use "the spending power and the conditional grant of federal funds" in order to obtain "objectives not thought to be within Article I's enumerated legislative fields."[23]

Even while it defended a sweeping spending power, the Court warned that the spending power was subject to several restrictions. In this part of the *Dole* analysis we see the creation of federalism loopholes that the states might use to allege that the federal government has overstepped its bounds and intruded on state sovereign authority.

The first restriction—and the only one contained in the text of the Spending Clause—requires that the spending be for the general welfare.[24] As to the precise content of this term, the courts must "defer substantially to the judgment of Congress."[25] Invoking the required deference, the Court had no problem concluding that Congress's desire to address the problem of drinking and driving promoted the general welfare.[26] The second restriction requires Congress to state unambiguously the conditions it wishes to place on the receipt of federal funds. This notice requirement ensures that state participation in a federal program is knowing and voluntary.[27] It was satisfied easily in *Dole*, where the Court found that "[t]he conditions upon which States receive the funds . . . could not be more clearly stated by Congress."[28]

The third restriction requires some degree of relatedness between the spending condition and the purpose of the federal spending program.[29] Opting not to define the precise contours of the relatedness requirement, the Court held that the minimum drinking age condition satisfied the requirement because it directly related to a primary purpose of highway expenditures—highway safety.[30] Evidence indicated that young persons would drive across state lines in order to consume alcohol legally, thereby increasing the incidence of drinking and driving on our nation's highways. A uniform minimum drinking age reasonably would prevent this occurrence.[31]

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22 *Id.* at 206.

23 *Id.* at 207.

24 *See* U.S. CONST. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 207.

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

26 *Id.* at 208.

27 *Id.* at 207.

28 *Id.* at 208.

29 *Id.* at 207.

30 The Court specifically declined to address whether a condition, at a minimum, must directly relate to the purpose of the federal spending program, or whether conditions less directly related would suffice. *Id.* at 208-09 n.3.

31 South Dakota v. Dole, 483 U.S. 203, 208-09 n.3 (1987).

The fourth restriction recognizes that independent constitutional provisions might bar the spending condition. After reviewing its precedent, the Court concluded that this restriction simply means that the federal spending condition may not require the states to engage in behavior that violates the Constitution.[32] The Court rejected South Dakota's argument that this restriction prohibited Congress from using the spending power to achieve objectives it could not achieve under its other enumerated powers.[33] South Dakota's argument urged nothing more than the adoption of Madison's view of the Spending Clause—a view the Court already had rejected. The Court also rejected the idea that funding conditions impermissibly invade state sovereignty in violation of the 10th Amendment.[34] As long as the state can choose against the funding condition, there is no violation.[35]

Finally, the Court noted that a spending condition might be invalidated if the "financial inducement offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion."[36] After suggesting that coercion might be difficult to prove, the Court ruled that South Dakota's loss of only five percent of its federal highway funds was insufficient to demonstrate coercion.[37]

Three potential federalism loopholes appear in *Dole's* spending analysis: inadequate notice, coercion, and insufficient relatedness. Under the inadequate notice loophole, a simple finding of ambiguity can torpedo disfavored spending conditions. The coercion and insufficient relatedness loopholes are such simply because they are still works-in-progress. Some observers have criticized *Dole* for being insufficiently rigorous and for failing to define the scope of the coercion and relatedness restrictions.[38] But what was once a weakness might now be a strength from a federalism perspective, for the Court's very failure to give definitive content to the coercion and relatedness restrictions presents a potential opportunity for the federalism movement. By leaving to future cases the job of defining the parameters of these restrictions, the Court has provided an avenue for federalism proponents to challenge spending conditions as disruptive of the federal balance.

32 *Id.* at 210.

33 *Id.*

34 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

35 *Dole*, 483 U.S. at 210.

36 *Id.* at 211 (quotation omitted).

37 *Id.* at 211-12.

38 *See, e.g.,* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 86-87, 102-03, 115-23; Kimberly Sayers-Fay, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CAL. L. REV. 1281, 1299 (2000) (describing *Dole* analysis as "extremely generous," and asserting that it "signals [Congress] that it does have substantial latitude").

Thus, rather than sanctioning congressional carte blanche, the *Dole* decision leaves open possible opportunities to cut back on congressional authority.[39]

Parts III and IV evaluate whether and how these loopholes ought to be used to cut back the reach of the federal spending power in the name of federalism.

## III. Protecting State Sovereign Authority

The federalism structure of our government divides power between the federal and state governments. As is well chronicled in the Supreme Court's federalism decisions, our federalism arrangement serves many purposes, perhaps the most important of which is to promote and protect individual liberty.[40] Dividing "the atom of sovereignty" ensures that the state and federal governments will act as a check on each other.[41] Alexander Hamilton described this checking function as follows: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."[42] And the Supreme Court has observed that "[i]n the tension between the federal and state power lies the promise of liberty."[43]

The division of authority between the state and federal governments also provides the people with an opportunity to participate in their own governance, to have a voice in substantive

39 Although the general welfare restriction arguably could be used as a loophole through which federalism-based interests might emerge, see John Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chap. L. Rev. 63 (2001), the Court's extreme deference to legislative judgment in this area suggests that it is not a likely candidate for such limitations. Indeed, the *Dole* Court went so far as to suggest that the general welfare restriction might not be "judicially enforceable." *Dole*, 483 U.S. at 208 n.2. Moreover, the Court's Spending Clause cases continually reaffirm the Hamiltonian vision of general welfare, and contain no suggestion that the Court might more narrowly define that term. This is telling when compared to the Court's Commerce Clause precedent, which laid the groundwork for judicial imposition of outer limits on the commerce power. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring).

40 *See, e.g.,* New York v. United States, 505 U.S. 144, 157-59 (1992); Printz v. United States, 521 U.S. 898, 918-22 (1997).

41 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

42 The Federalist No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961). James Madison made the same point in Federalist No. 51: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961).

43 Gregory v. Ashcroft, 501 U.S. 452, 459 (1991).

decision-making that inevitably will affect their lives.[44] Professor David E. Engdahl captured this idea well when he stated that "[t]he purpose [of federalism] is not to debilitate governance, but to enhance popular influence on public policy choices and to improve answerability for their consequences."[45] By promoting and protecting state sovereign accountability, federalism enhances both access to the political process and accountability for political decisions.[46] States must be free to make decisions on behalf of their constituents, choosing which course of action best implements the will of the people.[47] This decision-making ability is the essence of sovereign accountability.

Judicial enforcement of federalism-based limits is necessary in order to protect state accountability and, ultimately, individual liberty. Accordingly, the courts should invoke only those *Dole* loopholes that are designed to eliminate interference with the states' ability to make a decision implementing the will of their people. As discussed below, only the inadequate notice loophole is so designed.

### A. The Coercion Loophole

Dole suggested that coercion in the spending context occurs when a state simply cannot resist the lure of federal funding; the "financial inducement" of a funding condition might be so strong as to constitute unconstitutional coercion.[48] Without defining when financial "pressure turns into compulsion," the Court indicated that the presence or absence of coercion likely would turn on the amount of federal financing at stake.[49] In *Dole*, South Dakota was not coerced since it lost only five percent of otherwise available highway funds by refusing to participate in the federal spending program.[50] Following *Dole*'s lead, some lower federal courts have evaluated coercion claims using the amount of federal funding at stake or the impact on the state of losing federal funding.[51]

44 *Id.* at 458 (federalism "increases opportunity for citizen involvement in democratic processes").

45 Engdahl, *supra* note 12, at 8.

46 *Id.*

47 *See infra* notes 53-84 and accompanying text. A state's freedom to make decisions on behalf of its constituents of course may be limited when authorized by the Constitution. Thus, under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the federal government, acting pursuant to an enumerated power, may preempt state legislation. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5, at 656-57 (3d ed. 2000).

48 453 U.S. 203, 211-12 (1987).

49 *Id.*

50 *Id.*

51 *See, e.g.,* Virginia Dept. of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997); Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc); Missouri v. United States, 918 F. Supp. 1320 (E.D. Mo. 1996).

Reliance on a financial inducement definition of coercion obviously makes a finding of coercion more likely as the amount of federal funding available to the states increases.[52] But as demonstrated below, *Dole's* coercion loophole should not be invoked for two reasons. First, the presence or absence of coercion in the federalism context does not turn on the amount of federal funding at stake or the impact on state resources of losing the funding. Instead, it turns on whether the funding condition interferes with the state's sovereign accountability. Second, as defined in *Dole* to mean financial inducement, the coercion loophole does not eliminate interference with the state's ability to make a choice on behalf of its people.

1. Coercion in the Federalism Context

The emphasis on voluntary participation in federal spending programs likely is responsible for the financial inducement definition of coercion that surfaced in *Dole* and that is used by some lower federal courts. The constitutional validity of federal spending conditions depends on each state's voluntary decision to participate in the federal spending program.[53] Thus, any evidence that the decision was somehow involuntary would undermine federal authority. A large enough sum of money, the argument goes, might well render a state incapable of rejecting the funding condition and refusing to participate in the spending program.[54] Under this analysis, the decision to participate would be involuntary, and the funding condition coercive and invalid.

The "financial inducement" analysis misunderstands the meaning of both voluntariness and coercion in the federalism context. In that context, voluntariness and coercion have to do with the ability of a state to make decisions as a sovereign. Thus, coercion exists (and the decision is involuntary) when a state cannot, by reason of the federal action, respond to and implement the will of its people, and the people of that state cannot hold its representatives accountable for the decision.[55] Coercion implicates a state's ability to act as a representative of its people, not the state's level of temptation in choosing among alternatives.[56] The

52 In 1999, an estimated 26% of the states' expenditures came from federal funds. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (119th ed.) (1999) at 323 (including Puerto Rico).

53 *Dole*, 483 U.S. at 207, 210; Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

54 *See supra* note 6 and accompanying text.

55 *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898, 920 (1997) ("The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens.").

56 *Cf.* Engdahl, *supra* note 12, at 82-83 (asserting that "there is reason to doubt that the concepts of coercion and undue influence 'can ever be applied with fitness to the rela-

prohibition on coercion, then, is nothing more than the prohibition on interfering with sovereign accountability. If the federal program does not interfere with a state's ability to choose whether and how to implement the will of its people, then by necessity there is no coercion. Examples of coercion thus would include providing erroneous information regarding the effect of participation in the program, failing to provide relevant information regarding such participation, and directing the states to legislate, administer or enforce federal policies.[57]

A long line of Supreme Court precedent supports this view of coercion in the federalism context. In *Massachusetts v. Mellon*, the Court confronted a challenge to the Maternity Act, a federal spending program designed to improve maternal and infant health.[58] To receive federal funding, the states had to comply with certain conditions, including having the relevant state agencies file "reports concerning their operations and expenditures."[59] Funding would be withdrawn if a state made improper expenditures.[60] Although the Court ultimately dismissed the case for lack of standing, the Court commented that the federal spending program "impose[d] no obligation" on the state, "but simply extend[ed] an option which the state [was] free to accept or reject."[61] The Court also noted that the federal program did not "require the states to do or to yield anything."[62] Though not a ruling on the merits, the clear import of this commentary is that the regulation was not coercive because it did not interfere with the state's ability to make decisions implementing (or not implementing) the will of the people. The states remain able to make policy decisions for their citizens, and the citizens in turn may hold their state representatives accountable for those decisions.

The concept of coercion appeared again in *Steward Machine Co. v. Davis* and the Court dealt with it in much the same manner.[63] *Steward Machine* involved a challenge to provisions of the Social Security Act imposing a tax on employers, and crediting against that tax payments made by the employers to a state unemployment fund.[64] The allegation in *Steward* was that the "dominant end and aim [of the statute was] to drive the state Legislatures under the whip of economic pressure into the enact-

tions between state and nation'") (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

57 *See New York*, 505 U.S. 144 (federal government may not compel states to enact a federal program).

58 262 U.S. 447, 479 (1923).

59 *Id.*

60 *Id.*

61 *Id.* at 480.

62 *Id.* at 482.

63 301 U.S 548 (1937).

64 Employers could obtain a credit of up to 90% of the federal tax owed. *See id.* at 574.

ment of unemployment compensation laws at the bidding of the central government."[65] The Court rejected the argument, reasoning that "it confuses motive with coercion."[66] In an oft-quoted passage the Court asserted that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible."[67]

*Steward Machine* associated coercion with "destroying or impairing the autonomy of the states."[68] In the context of state decision-making, *Steward Machine* placed great reliance on the fact that the federal program did not require the states to "surrender . . . powers essential to their quasi sovereign existence."[69] *Steward Machine* thus seems to reject the temptation analysis and to embrace the sovereign accountability analysis.

Sovereign accountability also is at the heart of the Court's recent anti-commandeering cases—*New York v. United States*[70] and *Printz v. United States.*[71] Both decisions support the principle that coercion represents interference with sovereign accountability. In *New York*, the Supreme Court addressed certain provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that were designed to induce the states to create plans for disposal of radioactive waste within their own borders.[72] The question was whether the provisions unconstitutionally commandeered the states by compelling them to "regulate in a particular field or a particular way."[73] Congress may encourage, but may not direct,

65 *Id.* at 587.

66 *Id.* at 589.

67 *Id.* at 589-90. Courts and commentators alike have questioned the possibility of divining a workable standard for detecting unconstitutional coercion. *See id.*; Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); Kansas v. United States, 24 F. Supp. 2d 1192, 1196 (D. Kan. 1998), *cert. denied*, 121 S. Ct. 623 (2000); Erwin Chemerinsky, *Protecting the Spending Power,* 4 CHAP. L. REV. 89, 103 (2001); Hoke, *supra* note 10, at 121; Sayers-Fay, *supra* note 38, at 1300-01. One observer even suggested that, since coercion was difficult to discern, funding conditions should be more closely scrutinized under the relatedness restriction if there is a *potential* for coercion. *See* Mitchell, *supra* note 12, at 191-93. Aside from its reliance on the financial inducement analysis in order to determine coercion, the problem with this particular proposal is that it would create an unacceptable disparity between states and criminal defendants in terms of obtaining relief from governmental overreaching. While the states might obtain relief from federal interference by demonstrating "potential coercion," criminal defendants who allege they were coerced into confessing cannot obtain relief against either the state or federal government without demonstrating actual coercion. *See* Arizona v. Fulminante, 499 U.S. 279, 285-86 (1991) (analyzing totality of circumstances to determine whether defendant was coerced and applying harmless error); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (voluntariness of confession determined under totality of circumstances); United States v. Springs, 17 F.3d 192, 194 (7th Cir. 1994) (same).

68 301 U.S. at 586.

69 *Id.* at 593.

70 505 U.S. 144 (1992).

71 521 U.S. 898 (1997).

72 505 U.S. at 144.

73 *Id*. at 161.

the states to regulate.[74] Permissible encouragement occurs when the states retain the ability to choose whether to regulate according to federal standards.[75] When Congress encourages, "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."[76] When Congress directs, states are prevented from responding to local preferences.[77] The latter represents unconstitutional compulsion.

Critically for present purposes, the Court in *New York* used the spending power as an example of how Congress "may urge a State to adopt a legislative program consistent with federal interests."[78] The conditions attached to receipt of federal funds allow the federal government to influence state policy choices. If a state "view[s] federal policy as sufficiently contrary to [its] local interests, then [it] may elect to decline the grant."[79] While *New York* did not address specifically the *Dole* coercion loophole, it used the terms coercion and compulsion synonymously, thereby suggesting that the compulsion analysis in the anti-commandeering context might apply to the coercion loophole in the spending context.[80]

The Court in *Printz* continued its protection of state sovereign accountability by invalidating the interim provisions of the Brady Act requiring local law enforcement officers to conduct background checks on prospective handgun purchasers. According to the Court, these provisions "compel[led] the States to . . . administer a federal regulatory program," in violation of the "very principle of separate state sovereignty."[81] Like *New York, Printz* emphasized that federalism protects "the States as independent and autonomous political entities,"[82] and that the essence of that independence and autonomy is the ability of the states to make decisions on behalf of their people and remain accountable to their people.[83]

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74 *Id.* at 161, 166-67.

75 *Id.* at 166-68.

76 *Id.* at 168.

77 New York v. United States, 505 U.S. 144, 169 (1992) ("Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.").

78 *Id.* at 166.

79 *Id.* at 168.

80 *See* Sayers-Fay, *supra* note 38, at 1300-01 (suggesting that the "compulsion inquiry" of *New York* and *Printz* was intended to replace the coercion inquiry under the Spending Clause, with the result that, "however powerful conditions may be, they are constitutional so long as states retain the formal option to opt out").

81 Printz v. United States, 521 U.S. 898, 932-33 (1997) (quotation omitted).

82 *Id.* at 928.

83 *Id.* at 920 ("The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens."); *id.* at 929-30 (Brady Act interfered with state sovereign accountability because states will take blame for defects in federal program even though it was not states choice to enact or enforce the federal program). While the scope of the spending power was not before the Court, it did suggest spending conditions might not be considered mandates. *Id.* at 917-18 (regulatory requirements "con-

Under the principles of *Mellon, Steward Machine, New York* and *Printz*, coercion and voluntariness are directly tied to a state's ability to respond to the will of its people (or to not respond and risk that its people will hold it accountable). Where the state retains the ability to determine whether to participate in a federal program, which determination of course is based upon an assessment of the impact of participation on the state's chosen policies, the state retains the ability to respond to and implement the will of the local electorate.[84] This ability represents the essence of sovereignty, and should be the measure for unconstitutional coercion.

2. Coercion in the Spending Context

In the conditional spending context, states must decide whether to participate in the federal program, and if they do participate, they must abide by the conditions set down by Congress. Several commentators have argued that the increased amount of federal money involved in federal spending programs inevitably affects the states' decisions to participate in federal spending programs.[85] While this assessment undoubtedly is true, it does not lead inevitably to the conclusion that the amount of money at stake *compels* the states to participate in the federal programs. The amount of federal monies dangled in front of the states certainly and logically will inform the states' respective decisions, which likely is why the federal government offered the money in the first place—to entice the states into cooperating with federally chosen policies. But enticement does not equal coercion. As *Steward Machine* warned, we should not "confuse[ ] motive with coercion."[86]

Regardless of the amount of federal money at stake, a state retains the ability to evaluate whether participation in the federal

nected to federal funding measures . . . can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States").

84 In addition to promoting the values of federalism, use of the *Steward Machine, New York* and *Printz* principles in the spending context would signal consistency in the Court's federalism jurisprudence, thereby undermining claims that the Court invokes federalism as a technique to inject the justices' own values into the decision-making process. *See* Krotoszynski, *supra* note 8, at 14, 24-25 (calling for the Court to "demarcate a meaningful limiting principle" of federalism that would promote predictability, protect the states "against the centralizing machinations of the federal government," and defuse accusations that the Court uses federalism to pursue the personal values of the justices).

85 Kaden, *supra* note 13, at 896 ("[G]iven the drastic increases in the amounts of federal funds and the formula-based entitlements in aid programs enacted since 1960, it is unrealistic for anything to depend on the state's nominal right not to participate."); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1162 (1987) ("[W]ith the budgets of state and local governments now so greatly dependent on federal money, the premise that the funds can readily be rejected if the condition is deemed oppressive seems no longer realistic."); Squire, *supra* note 8, at 907 ("Congress maintains the ability to coerce the states, tempting them with precious resources.").

86 Steward Mach. Co. v. Davis, 301 U.S. 548, 589 (1937).

program promotes the state's policy goals, as chosen by its people. In deciding whether to participate, a state must determine whether the conditions imposed by Congress would support or undermine its chosen goals. If the federal conditions support state goals, then the choice would appear relatively easy and the amount of money at stake perhaps largely irrelevant.[87] The choice becomes more difficult, however, when the federal conditions undermine state policy decisions. In that scenario the state then must choose either to accept the federal money and frustrate achievement of state policy choices, or to reject the federal money and implement those local choices. The level of difficulty, of course, corresponds to the amount of money involved in the federal program. The more money at stake, the more difficult the decision. Nevertheless, as long as the state can evaluate its options and choose the option most suitable to its needs, then the state's decision is voluntary.[88]

For example, in late 2000, Congress passed a law conditioning the continued receipt of up to eight percent of a certain portion of federal highway funds on the enactment of state legislation setting .08 as the minimum blood alcohol content ("BAC") for drunk driving.[89] As a result of this legislation the states must determine whether the .08 BAC standard is consistent with their respective state policies. If for some reason a state wants to impose either a more liberal or a more stringent BAC standard, then that state must decide whether its policy choice outweighs its need for the forfeited portion of federal highway funding. If the state's financial need is great, then its choice likely will be a difficult one as the state will have to choose between its financial need and its policy goals. As long as the state's ability to make that choice remains unimpaired, however, the choice is voluntary.

A state's choice is not impaired simply because it perceives a great fiscal need for federal funds.[90] As sovereigns, states possess the power to raise money by alternate means—taxation of their

87 *See* Baker, *supra* note 8, at 1935-36.

88 While the state might well experience a "prisoner's dilemma" in choosing between its financial needs and its policy goals, this dilemma does not undermine the validity of federal spending legislation. The federal government has the power to spend for the general welfare, and its power is expansive. South Dakota v. Dole, 453 U.S. 203, 206-07 (1987). Along with this power comes the responsibility to spend federal money in a manner consistent with national policy goals, as determined by national policymakers in accordance with the will of the people of the nation as a whole. While a state may disagree with the federal policy choice, that disagreement does not render the federal government powerless to declare its policy choice and to attempt to persuade the states to adopt it. Indeed, *New York* implicitly recognized this point when it spoke approvingly of conditional federal spending. *See* New York v. United States, 505 U.S. 144, 168 (1992).

89 Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 2001, and for other purposes, 106 H.R. 5394, § 351 (2000).

90 *But see, e.g.,* Rosenthal, *supra* note 85, at 1162; Hoke, *supra* note 10, at 121-22.

constituents.[91] While a federal source of funds might be more politically palatable to a state than taxing its own constituents, federal funding is not the only source of revenue for the state. Thus, a state is not prevented from implementing its policy choices absent federal funding. Professor Lynn A. Baker has argued that the power to tax really does not aid the state in resisting federal pressure, in part because some state laws restrict the state's taxing power, and thus the state's ability to raise revenue.[92] A state's restriction on its own ability to raise revenue, however, represents a policy decision chosen by the people, not one foisted upon them by the federal government.[93] Professor Baker also has argued that the states' taxing power represents an insufficient alternative to federal funding because the states must stand second in line to the federal government, which presumably means less money is available for the taking.[94] While the states arguably might raise more revenue through taxing its residents and property owners if the federal government were not first in line, this does not mean that the states are *unable* to raise sufficient funds to cover the cost of not participating in a federal program.

When the federal government offers a significant amount of funding in exchange for the state's reordering of its policy choices, the federal government presents a difficult choice to the state. The federal government has not, however, altered the state's ability to make that choice. Using the principle applied in *New York*, the federal government simply (and properly) has attempted to influence state policy choices. Such encouragement is permissible, as *New York* explained, because it does not interfere with the state's decision-making process.[95]

On the whole, the lower federal courts have recognized the principle that coercion relates to sovereign accountability, not financial temptation, and accordingly have not used the *Dole* coercion loophole to limit the spending power. Several courts have

91 *See* Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) ("[C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?").

92 Baker, *supra* note 8, at 1936 n.129. Professor Baker also argues that when the federal government exercises its spending power, it offers money to the states, with conditions, "that the state[s] readily could have obtained without those conditions through direct taxation." *Id.* at 1937. But this observation does not undermine the main point here, which is that states retain the ability to invoke their sovereign taxing authority to raise revenue if they are unwilling to accept the conditions attached to federal funds.

93 The Ninth Circuit recognized this point in *Skinner*: "Nevada is, of course, free to raise tax funds in the manner of its own choosing . . . . However such restrictions [on its ability to tax] are entirely self-imposed, and the state, as a sovereign entity, is free to change its method of generating public income whenever the people wish to do so." 884 F.2d at 448 n.5.

94 Baker, *supra* note 8, at 1936-37.

95 *See supra* notes 70-80 and accompanying text.

rejected coercion arguments precisely because they doubted that states could be coerced into participating in federal spending programs. For example, in *California v. United States,* California challenged the federal Medicaid program, which conditioned Medicaid funds on the provision of emergency medical service to illegal aliens.[96] California argued that while its initial decision to participate was voluntary, "it now has no choice but to remain in the [Medicaid] program in order to prevent the collapse of its medical system."[97] In rejecting California's argument, the Ninth Circuit questioned the "viability" of the *Dole* coercion theory, as well as the possibility that any "sovereign state which is always free to increase its tax revenues [could] ever be coerced by the withholding of federal funds."[98] Instead, the federal program likely presented the state with "hard political choices."[99]

The Tenth Circuit used similar reasoning in *Kansas v. United States* to reject the state's challenge to the Temporary Assistance to Needy Families program and Child Support Enforcement Program.[100] Kansas argued that the sheer size of relevant grants — $130 million annually in 1996 — "coerced [it] into implementing [federal] program requirements."[101] Unmoved by the large amount of money at stake, the court rejected the argument, noting that several other courts reached similar conclusions in similar circumstances.[102] Labelling the coercion theory "unclear" and "suspect," the court invoked the warning in *Steward Machine* that "motive or temptation" should not be confused with coercion.[103]

*California* and *Kansas* reflect a trend in the case law against finding coercion in the spending context. Like *California* and *Kansas*, most courts addressing the coercion issue have ruled against the state,[104] with some even questioning their ability to determine

96 104 F.3d 1086 (9th Cir. 1997).

97 *Id.* at 1092.

98 *Id.*

99 *Id.*

100 214 F.3d 1196 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000).

101 *Id.* at 1198 ($130 million figure accounted for "66% of Kansas' [Child Support Enforcement] Program operating costs, and 80% of the expenditures relating to its computerized data systems").

102 *Id.* at 1201-02 (citing Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981); *California*, 104 F.3d 1086; Padavan v. United States, 82 F.3d 23 (2d Cir. 1996); and Planned Parenthood v. Dandoy, 810 F.2d 984 (10th Cir. 1987)).

103 *Kansas*, 214 F.3d at 1202.

104 *See* Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) ("The sacrifice of all federal education funds, approximately $250 million of 12[%] of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas' choice."); Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (no coercion when state would lose approximately 95% of its highway funding by failing to enact a law setting 55 miles per hour as the maximum speed limit); Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997) (no coercion when state loses portion of federal highway funds for failing to comply with requirements of Clean Air Act); *Schweiker*, 655 F.2d 401 (D.C. Cir. 1981) (no coercion when state would lose

whether "the states are faced . . . with an offer they cannot refuse or merely a hard choice."[105] The reasoning of *California* and *Kansas* and the general trend in the case law against finding coercion undermine the validity of the financial inducement theory. Despite the rather large sums of money at stake, the courts generally have declined to rule that federal spending programs unconstitutionally coerce the states.[106] These decisions accordingly support the idea that coercion is absent when federal spending conditions do not interfere with the states' ability to make decisions on behalf of their people.

Bucking the trend, the Fourth Circuit invalidated spending legislation under the coercion loophole in *Virginia Department of Education v. Riley*.[107] For the reasons outlined below, this decision uses faulty logic and ultimately fails to persuade. In *Riley*, Virginia challenged the Individuals with Disabilities Education Act (IDEA), which provides federal funding to state agencies that educate disabled students.[108] In order to qualify for that funding, the state agency must, among other things, "'assure[ ] all children with disabilities the right to a free appropriate public education.'"[109] The federal government sought to revoke its funding after discovering that Virginia maintained a policy of expelling or suspending disabled students for behavior unrelated to the student's disability.[110] In the federal government's view, this policy violated the state's duty to provide a free public education to disabled students. The Fourth Circuit ruled that the spending condition was ambiguous, and, in the alternative, that it was coercive.[111] Critical to its coercion ruling was the fact that Virginia would lose all of its federal funding under the IDEA for refusing to rescind its state policy.[112] In the court's eyes, the federal government improperly used its financial muscle to impose federal policy preferences on the states.[113]

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all federal Medicaid funds for failing to follow certain requirements in Social Security Act); North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *judgment aff'd*, 435 U.S. 962 (1978) (no coercion when state would lose only fifty million in federal health funds for failure to comply with requirements of National Health Planning and Resources Development Act of 1974, since state revenues in a prior year totaled $3.1 billion). *Cf. Padavan*, 82 F.3d at 28-29 (state not coerced under 10th Amendment to incur costs for services to poor because not required to provide services; responsibilities arise, in part, out of state's choice to participate in Medicaid spending program).

105 *Schweiker*, 655 F.2d at 414; *see also, e.g., Skinner*, 884 F.2d at 448.

106 *See supra* note 104 (listing cases).

107 106 F.3d 559 (4th Cir. 1997).

108 *Id.*

109 *Id.* at 560 (quoting 20 U.S.C. §1412(1)).

110 *Id.* at 569 (federal government threatened to withhold $60 million, the full amount of the annual special education grant).

111 *Id.* at 566-72.

112 *Id.* at 569-72.

113 *Id.* at 570-72.

Even under a financial inducement analysis, the *Riley* decision crucially fails to evaluate whether the federal spending program actually coerced Virginia. The federal funds at stake in *Riley*—one hundred percent of the funds available under the IDEA—represented only five percent of the funds necessary to educate the state's disabled students.[114] It would appear, then, that the financial pressure facing Virginia to accept the federal money and abandon its policy choice was not all that great.[115] Nevertheless, the court refused to give this argument credence, reasoning instead that individual impact is irrelevant.[116] What mattered was that the federal government threatened to take away all of Virginia's financing for a particular program when Virginia failed to comply with a funding condition.[117] Notably, while several other courts have declined to enforce the coercion loophole precisely because of the difficulty (and necessity) of evaluating coercion on a case-by-case basis,[118] the Fourth Circuit does the exact opposite and declares coercion to exist without examining the facts specific to the underlying case.

The *Riley* court also fails to consider that, rather than coercing the states into adopting federal educational policy, the IDEA merely presents the states with a choice—one that for some states might be more difficult than for other states. Virginia had to choose between maintaining the state's chosen "disciplinary and instructional tool for instilling in its especially recalcitrant students the sense of responsibility they sorely lack,"[119] and accepting the federal funding. Given the apparent degree of devotion to its educational policy,[120] Virginia faced a difficult decision. But the level of difficulty does not signal coercion. As long as Virginia could decide which alternative better served the interests of its people, then its decision was uncoerced.

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114 *Id.* at 570.

115 *Compare* Virginia Dept. of Educ. v. Riley, 106 F.3d 559, 570 (4th Cir. 1996) (coercion when federal funds represented five percent of state education needs for disabled children) *with* Jim C. v. United States, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (no coercion when federal funds represented approximately 12% of state education budget); Kansas v. United States, 214 F.3d 1196, 1198 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000) (no coercion when federal funds represented approximately 66% of child support program operating costs and 80% of computer data systems expenditures); Nevada v. Skinner, 884 F.2d 445, 446 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (no coercion when federal funds represented approximately 95% of state highway funds).

116 *Riley*, 106 F.3d at 570.

117 *Id.* The Fourth Circuit apparently believed that Virginia's expulsion policy substantially complied with the federal condition that fund recipients provide a "free appropriate public education" to disabled students. *Id.* at 560, 570 ("[A] Tenth Amendment claim of the highest order lies where, as here, the Federal Government . . . withholds the entirety of a substantial federal grant on the ground that the states refuse to fulfill their federal obligation in some insubstantial respect.").

118 *See supra notes 96-106* and accompanying text.

119 *Riley*, 106 F.3d at 571.

120 *Id.*

In sum, *Dole*'s coercion loophole should not be used to limit federal spending power. The financial inducement analysis suggested by *Dole* is not the proper test for coercion. Rather, the proper test is whether the federal spending program prevents the state from making decisions on behalf of its people. It is on that basis which funding conditions should be evaluated.

## B. The Inadequate Notice Loophole

Unlike the coercion loophole, *Dole*'s inadequate notice loophole directly protects sovereign accountability. A state cannot make a full and informed choice regarding whether to participate in the federal program without understanding how the federal program will impact the state's own policy choices. Thus, the conditions imposed on a state in exchange for the receipt of federal funds are critical to a state's decision. If Congress fails to describe clearly the conditions of participation, it interferes with the state's decision-making process and the condition should not be enforced. Indeed, the Supreme Court has likened federal spending legislation to a contract,[121] holding that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract."[122] In order "to impose a condition on the grant of federal moneys, [Congress] must do so unambiguously."[123]

Although ultimately unsuccessful, the views of four dissenting justices in *Davis v. Monroe County Board of Education* underscore the importance of the inadequate notice loophole in maintaining the federal balance.[124] *Davis* involved a challenge to Title IX of the Education Amendments Act of 1972, which prohibited sexual discrimination in educational programs or activities that received federal funds.[125] The question was whether "a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment."[126] The answer to that question turned on whether funding recipients had adequate notice that they would be liable financially for certain instances of

121 Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

122 *Id.*

123 *Id.* The federalism principle underlying the notice requirement in the spending context is akin to that underlying the clear statement rule applicable in the Eleventh Amendment context. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

124 526 U.S. 629 (1999).

125 *Id.*

126 *Id.* at 639.

student-on-student harassment.[127] Five members of the Court, led by Justice O'Connor, ruled that Title IX provided adequate notice. The prohibition against sexual discrimination in educational programs or activities receiving federal financial assistance included a prohibition against "deliberate indifference to known acts of peer sexual harassment," making such indifference actionable under Title IX.[128]

The dissent vigorously (and rightly) argued that the Court should strictly interpret and enforce the notice requirement, calling it a "vital safeguard for the federal balance."[129] The dissent warned that, "if wielded without concern for the federal balance, [the spending power] has the potential to obliterate distinctions between national and local spheres of interest."[130] The dissenters' views emphasize the important function served by the inadequate notice loophole, and signal that at least four members of the Court are interested in seriously reviewing spending conditions for compliance with the notice requirement as a way of preventing federal intrusion "in the most sensitive areas of traditional state concern."[131]

The *Davis* dissenters might have another opportunity to persuade their colleagues of their position, for a case before the Court this Term might very well involve application of the inadequate notice loophole. *Alexander v. Sandoval* raises the question whether recipients of federal funding are subject to an implied private right of action for violation of an implementing regulation of Title VI of the Civil Rights Act of 1964.[132] Title VI prohibits race and national origin discrimination by recipients of federal funding, but does not specifically prohibit programs that result in a disparate impact on groups of a certain race or nationality.[133] In-

127 *Id.* at 640.

128 *Id.* at 648.

129 *Id.* at 655 (Kennedy, J., dissenting). Justice Kennedy was joined in dissent by Chief Justice Rehnquist and Justices Scalia and Thomas.

130 *Id.* at 654. The private cause of action under Title IX is implied by the judiciary. *Id.* at 656 (citing Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)). The dissent points out that determining the scope of a judicially implied cause of action is particularly tricky when the legislation is enacted under the spending power precisely because of the "significant tension with the requirement that the Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Davis*, 526 U.S. at 656. In the dissent's view, Title IX in no way provided adequate notice that educational grant recipients would be financially liable for failing to remedy student-on-student discrimination. *Id.*

131 *Davis*, 526 U.S. at 655.

132 121 S. Ct. 652 (2000).

133 Sandoval v. Hagan, 197 F.3d 484, 495-96 (11th Cir. 1999). Section 601 of Title VI provides in relevant part as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d (2000). In *Guardians Ass'n v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983), a majority of the Court, in a splintered decision, concluded that section 601 requires a showing of intentional discrimination. *Id.* at 607-08

stead, the implementing regulations to Title VI contain the disparate impact prohibition.[134]

From the viewpoint of the *Davis* dissenters, a legitimate question could arise regarding whether implementing regulations provide the requisite notice under spending power principles.[135] Indeed, that issue arose during oral argument before the Court.[136] Because the notice requirement promotes federalism interests by protecting state sovereign accountability, there is a strong argument that states should receive actual notice in the text of the statute, rather than through an agency's implementing regulations. Congress, not federal agencies, should shoulder the respon-

and n.1 (opinion of Powell, J., in which Burger, C.J. and Rehnquist, J., joined); *id.* at 612 (opinion of O'Connor, J.); *id.* at 634 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined).

134 Section 602 of Title VI delegates to federal agencies the power to implement regulations enforcing Title VI. 42 U.S.C. §2000d-1 (2000). The Department of Justice regulation at issue in *Sandoval* provides as follows:

> A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. 28 C.F.R. § 42.104(b)(2) (2000).

The Court also held in *Guardians* that the federal implementing regulations may proscribe disparate impact discrimination, even when the text of the statute proscribes only intentional discrimination. *Guardians*, 463 U.S. at 584 (White, J.); *id.* at 623 n. 15 (opinion of Marshall, J.); *id.* at 634 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined). *See also* Alexander v. Choate, 469 U.S. 287, 293-94 (1985) (explaining the *Guardians* decision).

135 To the *Davis* dissenters it is an open question whether implementing regulations provide adequate notice under the Spending Clause. *See Davis*, 526 U.S. at 669 ("Even assuming that [Department of Education] regulations could give schools the requisite notice, they did not do so.").

136 The following colloquy occurred during oral argument between Solicitor General Seth P. Waxman and a member of the Court:

> QUESTION: My only thought, [substantive regulations mandated by statute] may have the force of law, but they may not have the force of the unequivocal for purposes of the Spending Clause.
> GENERAL WAXMAN: Well, I don't think I can do better than simply to repeat what I—the point I hope that I had made, which is, there is no case suggesting that for purposes of enforcing a Spending Clause obligation there is a distinction in recognizing a cause of action based on a statute, or on regulations that the funding agency is mandated to put forward. The principle—
> QUESTION: But there's no case suggesting there isn't, either. I mean, I think Justice Souter's point was that this is an area where there is no precise authority one way or the other.
> GENERAL WAXMAN: Correct. What we have on our side is, I believe, a completely unbroken practice of enforcing obligations under both the Spending Clause and otherwise equally, whether they arise within the four corners of the statute, or under substantive regulations that are mandated by the statute."

Transcript of Oral Argument Before Supreme Court of United States, 2001 WL 55359, at **43-44 (99-1908) (January 16, 2001).

sibility for making difficult policy decisions that implicate sensitive federalism concerns.

Whatever the result in *Sandoval*, the Court's analysis of the notice issue should undertake serious evaluation of whether the states had adequate warning that local regulations and policies causing a discriminatory impact would subject the states to private rights of action. Without such a warning, the states cannot be said to have agreed to the condition, and should not be bound by it.

### C. The Insufficient Relatedness Loophole

The Court in *Dole* declined to delineate the "outer bounds" of the relatedness requirement, concluding only that the minimum drinking age condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[137] In her dissent, Justice O'Connor disagreed with the Court's application of its relatedness standard, arguing that the minimum drinking age was both "over and under-inclusive," and accordingly had "an attenuated or tangential" relationship with the purpose of highway safety.[138] She also appeared to urge the adoption of a more strict relatedness standard—one that differentiates between conditions that specify how the federal grant should be spent, and those that do not.[139] Conditions in the former category would be sufficiently related to the federal program while conditions in the latter category would not.[140]

The proper standard for relatedness, however, is irrelevant to the question whether the insufficient relatedness loophole protects sovereign accountability. Whatever the degree of relatedness between the funding condition and the purpose of the federal funding program, it will not impact a state's ability to make a choice regarding whether to participate in the federal program. In fact, with a modicum of effort states considering participation in a federal spending program should be able to discern the degree of relatedness between the funding condition and the purpose of the federal program. Like the amount of funding at stake, the degree of relatedness might very well impact a state's ultimate decision.

137 South Dakota v. Dole, 483 U.S. 203, 208 n.3 (1987). The Court specifically declined to consider whether the 'directly related' standard was the minimum standard. *Id.*

138 *Id.* at 214-15 (O'Connor, J., dissenting).

139 *Compare id.* at 216 (O'Connor, J., dissenting) (appearing to offer new standard for relatedness) *with* New York v. United States, 505 U.S. 144, 167 (1992) (mentioning the relatedness requirement, but this time stating only that there must be "some relationship" between the condition and the purpose of the federal spending program).

140 *Dole*, 483 U.S. at 215-16. For a persuasive critique of Justice O'Connor's proposal, see Engdahl, *supra* note 12, at 56-62 (arguing that it is far too strict, and that it "reiterate[s] exactly the Butler majority's monumental error, parading Madison in masquerade of Hamilton once more").

It does not, however, literally prevent a state from knowingly choosing for or against the federal program. So while courts might enforce the insufficient relatedness loophole to achieve other goals,[141] they should not do so in order to protect the states from interference with sovereign accountability.

In sum, sovereign accountability lies at the very heart of our federalism structure. It protects individual liberty by ensuring that the states are both responsive and accountable to their citizens. While the *Dole* Court created three possible loopholes through which federalism limits might emerge, only one—the inadequate notice loophole—actually protects and promotes sovereign accountability.

Part IV will consider an alternate justification for enforcing some or all of the *Dole* loopholes. Specifically, Part IV argues that regardless of whether the loopholes implicate sovereign accountability, they nonetheless should be enforced if enforcement would encourage Congress to live up to its constitutional responsibility to respect the federal balance.

## IV. Encouraging Congressional Respect for State Sovereign Accountability

The judicial branch is not alone in its charge to protect our federal structure. Congress too possesses a responsibility to mind the federal balance. As Justice Kennedy asserted in his *United States v. Lopez* concurrence, "the political branches [must not] forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance."[142] When Congress fails in its responsibility, the courts step in to correct the balance.[143] The threat of judicial oversight, and possible invalidation of its legislative efforts, likely would encourage Congress to pursue its constitutional powers in a manner that respects the federal balance.[144] This incentive is a desirable byproduct of judicial review, and provides a justification for courts to weigh in on federalism issues.[145] In addition to

141 *See infra* notes 153-67 and accompanying text.

142 514 U.S. 549, 577 (1995).

143 *Id.* at 578 ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.").

144 This 'congressional encouragement' idea is not grounded in a *Garcia*-type theory. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Unlike *Garcia*, it does not leave the protection of federalism solely with Congress. Rather, it merely acknowledges that judicial enforcement of federalism boundaries can serve the useful purpose of encouraging Congress to be mindful of its own limitations.

145 In a recent article on federalism, Professor Richard E. Levy noted this effect, calling it the "political dynamics of federalism." Levy, *supra* note 10, at 1664 (the Court's federalism jurisprudence has "effected a significant change in the political dynamics of federalism" by forcing Congress to "exercise greater care in its choice of federal powers, develop the

protecting sovereign accountability, the courts should enforce rules that are designed to encourage Congress to mind federalism limits in the first instance.

### A. The Coercion Loophole

Invalidating spending legislation because of the weight of its financial pressure on the states (to use the *Dole* definition of coercion) would send a signal to Congress that it needs to be more sensitive to state sovereignty concerns. It would remind Congress to be cognizant of state interests and authority when it drafts legislation. Nevertheless, there are compelling arguments against using the *Dole* coercion loophole for this purpose. First, the *Dole* coercion loophole would be too blunt an instrument to remedy congressional insensitivity to federalism interests. While Congress likely would get the message that it needs to take state interests into account when legislating under the Spending Clause, the price of communicating that message to Congress is too great, as it would result in the invalidation of proper exercises of the spending power. As argued above in Part III, spending legislation does not cross a constitutional line simply because it seduces the states with financial assistance. Presenting the states with a hard choice is Congress's prerogative.[146] Using the recent BAC legislation as an example, those states that have both a great need for federal funds *and* a state policy inconsistent with the .08 BAC standard face a difficult choice, and ultimately one that might be decided in favor of the particular state's financial needs. However, as long as the decision-making process remains unimpaired, coercion is absent. If the *Riley* decision provides any indication of how courts would enforce the *Dole* coercion loophole, then the danger of unnecessarily curbing Congress's power is indeed too great.

Second, putting aside the question whether, as a general matter, courts should invalidate valid legislation as a means of encouraging Congress to be sensitive to federalism issues, courts should not do so in this situation because it is difficult for Congress to come up with finely calibrated and successful solutions to financial coercion problems. Financial coercion must be determined on a case-by-case basis.[147] What is financially coercive to

necessary record to support its judgments, and express its conditions and requirements clearly and explicitly"). *See also* Epstein, *supra* note 8, at 555 (Even if *Lopez* does not "result in any watershed change in congressional authority, it may enhance congressional care and creativity in the evolving areas of federalism.").

146 *See* Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000); Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981).

147 *See Skinner*, 884 F.2d 445. *But see* Virginia Dept. of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997).

one state might not be financially coercive to another state.[148] A state with a budget surplus, for example, might not be subject to coercion under the financial inducement theory.[149] However, a state without such a surplus would seem more vulnerable to *Dole*-type coercion. If legislation is found coercive with respect to one state, Congress can decrease the financial penalties for failure to comply with the funding condition. It cannot, however, be sure that its "fix" will not coerce *another* state that might be more dependent on federal funds. Unlike problems with notice and relatedness, which are relatively easy to fix,[150] problems with coercion are not. If the goal of judicial intervention is to influence Congress to regulate with due regard for states' interests, sending Congress back to the drawing board for violations of the coercion loophole does not appear to be the most useful exercise. If Congress cannot easily fix the coercion problem, then invocation of the *Dole* coercion loophole serves only to invalidate properly made democratic choices.

## B. The Inadequate Notice Loophole

Cases such as *Davis* and *Sandoval* invite welcome challenges to spending conditions based on the inadequate notice loophole.[151] This loophole directly protects federalism interests by enabling states to make informed decisions regarding whether participation in a federal spending program will be consistent with the wishes of their constituents. If a state persuades the Court to invalidate a spending condition under the inadequate notice loophole,[152] that ruling wipes out the condition, leaving Congress free

148 Indeed, it is arguable that what is coercive to one state at a particular point in time might not be coercive to that same state at an entirely different point in time.

149 *See* North Carolina v. Califano, 445 F. Supp. 532 (E.D. N.C. 1977), *judgment aff'd*, 435 U.S. 962 (1978) (no coercion when state would lose $50 million in federal health funds and state revenues in prior year totaled $3.1 billion). Budget surpluses have become increasingly common. *See* Ronald D. Picur, *Managing Fiscal Slack: You have a Surplus . . . Now What?*, 16 GOV'T FIN. REV. NO. 3, at 7 (discussing how to deal with state budget surpluses, and noting that "the National Association of State Budget Officers . . . reports that fiscal year 2000 will represent the seventh consecutive year that general fund balances (on average) will exceed 5% of annual expenditures"). Several states that have enjoyed recent budget surpluses actually have offered to return some of the surplus to taxpayers. *See* Patrick Cole, *Sales-Tax Rebate Crosses Border [-] Wisconsin Extends Relief to Non-Residents, but there's a Catch*, CHI. TRIB., Nov. 25, 1999, at 1 ("Wisconsin joins a number of other states, including Minnesota, Alaska, Oregon, Missouri, that have had huge budget surpluses in the past year and offered some sort of tax rebates.").

150 *See infra* Part IV, at B, C.

151 *See* Levy, *supra* note 10, at 1655 ("At a practical level, it appears the key question may be how clearly Congress must express the condition in order for the courts to recognize it.").

152 Justice O'Connor is the critical fifth vote in this area, and her role as the author of *Davis* suggests that she would need to see a fairly egregious violation of the notice requirement before signing on with the *Davis* dissenters.

to amend the spending statute to include the appropriate level of clarity.

Aside from correcting problems with individual spending programs, use of the inadequate notice loophole provides guidance to Congress regarding how to respect state boundaries and encourages Congress to provide unambiguous notice of the spending conditions *before* the courts step in. No matter what the outcome of such challenges, whether it is knocking out an ambiguous condition or upholding an unambiguous condition, the challenges will promote congressional compliance with the notice requirement. Invalidating a funding condition obviously vindicates state interests. Even if the state is unsuccessful, the very act of challenging the condition serves the worthwhile purpose of keeping Congress in check. It reminds Congress to consider the federalism implications of its legislation, and encourages Congress to legislate within constitutional limitations.

Improving the clarity of conditions in spending legislation should prove a much easier task than eliminating financial coercion. Using the *Sandoval* case as an example, if the Court were to prohibit disparate impact suits against the states because of the lack of adequate notice in the text of Title VI, it should be fairly simple for Congress to redraft the statute to make clear that the prohibition against discrimination contained in the statute itself covers both discriminatory intent and effect, and that fund recipients will be subject to suit under both theories. Because clarity is an objective concept, once Congress successfully redrafts the statute to provide unambiguous notice, the statute should not be subject to later attack by other fund recipients.

### C. The Insufficient Relatedness Loophole

Like the inadequate notice loophole, enforcing the insufficient relatedness loophole will encourage Congress to be sensitive to federalism boundaries. By requiring a sufficient degree of relatedness between the spending condition and the purpose of the federal spending program, the relatedness requirement represents a limit on the substance of the conditions Congress may impose on the funding recipients. Thus, it implicitly acts as a limit on the extent to which federal legislation may intrude upon traditional state concerns. Only those conditions with a sufficient nexus to the purpose of the federal spending program will be tolerated. Accordingly, enforcing the relatedness requirement should serve to encourage Congress to craft conditions that, while achieving the federal purpose, also respect federalism boundaries.

Here the standard for relatedness becomes relevant, since the standard for any rule must be informed by the purpose the rule is

designed to achieve. Justice O'Connor is not alone in calling for a more strict relatedness standard.[153] Critics of *Dole* argue that a more rigorous standard is necessary in order to rein in the reach of federal power.[154] In Justice O'Connor's view, a loose relatedness requirement would "render academic the Constitution's other grants and limits of federal authority."[155] She accordingly proposed a relatedness standard that would distinguish between spending conditions stating how the federal money should be spent[156] and spending conditions that regulated the states.[157] The former always would be permissible, and the latter would be permissible only when valid under Congress's other enumerated powers.[158] In Justice O'Connor's view, the legislation in *Dole* fell in the latter category as it was simply "a regulation determining who shall be able to drink liquor."[159] Thus, to be valid it must fall under one of Congress's other enumerated powers.

Professor Baker also proposed a relatedness standard designed to limit federal overreaching. Her proposal would invalidate spending conditions that "regulate the states in ways that Congress could not directly mandate," unless the spending program constitutes "reimbursement spending." Reimbursement spending legislation specifies the purpose of the federal spending program and reimburses the state for its expenses in achieving that purpose.[160] Professor Baker's proposal limits (but does not eliminate) Congress's ability to use its spending power to circumvent the limitations on its other enumerated powers.[161]

On the other side of the spectrum is Professor Engdahl, who has argued against having a relatedness requirement. In his view, a relatedness requirement is unnecessary and contradicts the Hamiltonian view of the spending power by restricting the purposes for which Congress may spend: "[A]ny time the notion of a germaneness requirement is even taken seriously it puts Hamilton and his view of the spending power out of reach."[162]

153 *See, e.g.,* Baker, *supra* note 8, at 1962-68; Mitchell, *supra* note 12, at 193-94.

154 483 U.S. 203, 216-17 (1987) (O'Connor, J., dissenting); Baker, *supra* note 8, at 1962-68.

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

156 As an example of this type of condition, Justice O'Connor cites *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947), in which the Court upheld a provision of the Hatch Act prohibiting political activities by state employees whose employment was funded at least in part by federal funds. *Dole*, 483 U.S. at 217.

157 *Dole*, 483 U.S. at 215-16 (O'Connor, J., dissenting).

158 *Id.*

159 *Id.* at 218.

160 Baker, *supra* note 8, at 1962-63.

161 Professor Baker's proposal does not limit Congress's spending authority to its enumerated powers; Congress may spend for purposes beyond its enumerated powers, as long as the spending simply reimburses the states for its efforts to achieve the federal spending purpose. Baker, *supra* note 8, at 1966-67.

162 Engdahl, *supra* note 12, at 54-62; *id.* at 62.

Despite these criticisms of the standard applied in *Dole*,[163] this article endorses the *Dole* standard for two reasons: First, it best reflects the purpose of the relatedness requirement, and second, it preserves the broad scope of the spending power. The spending power permits Congress to spend in the name of the general welfare.[164] In exercising that power, Congress may reach beyond, and is not limited by, its other enumerated powers.[165] Accordingly, any definition of relatedness that limits the substantive scope of the general welfare phrase to those objects contained within the other enumerated powers, as would the proposal by Justice O'Connor and, to some extent, the proposal by Professor Baker, would cut back on the legitimate, sanctioned scope of the spending power.[166] Rather than limiting the purposes for which Congress may spend (and thereby limit the definition of general welfare), the relatedness requirement should be interpreted as limiting the range or substance of conditions Congress may impose when it enacts spending legislation that is within the broad scope of the spending power. This interpretation of the relatedness requirement would limit Congress's ability to interfere with state authority when it spends for the general welfare, but would not limit the general welfare phrase.

While admittedly not an overly stringent standard, the *Dole* standard nevertheless imposes a limit on congressional options. Under this standard, for example, Congress would not be permitted to condition federal highway funds on the states' agreement to provide subsidized general medical care to the elderly. It is difficult to conceive of any purpose of federal highway spending that directly relates to the need to maintain the general health of our nation's elderly. The *Dole* standard accordingly establishes some limits on Congress's ability to interfere with state prerogatives when invoking its spending power. At the same time, however, the direct relationship standard preserves the broad scope of the spending power permitted under the Constitution, because it does not attempt to limit spending purposes to those embodied in the other enumerated powers.

Finally, unlike enforcement of the *Dole* coercion loophole, enforcement of the insufficient relatedness loophole does not cut back on congressional authority in the spending context, since a baseline requirement for all federal legislation is that the means

163 The *Dole* Court found that the condition in *Dole* was directly related to the purpose of the federal spending program—highway safety. It declined to address, however, whether spending conditions must be "directly related" to the purpose of the federal funding program, or whether a less direct relationship would suffice. *Dole*, 483 U.S. at 208 n.3. This article supports the 'direct relationship' standard that was applied in *Dole*.

164 U.S. CONST. art. I, § 8, cl. 1.

165 United States v. Butler, 297 U.S. 1, 65-66 (1936); *Dole*, 483 U.S. at 207.

166 *See* Engdahl, *supra* note 12, at 61-62.

(here the condition) rationally relate to the ends (here the purpose of the federal spending program).[167] The relatedness requirement already exists as a limit on congressional power, and it has the added benefit here of encouraging Congress to take federalism concerns seriously.

## CONCLUSION

The evidence suggests that the Supreme Court's recent federalism campaign will (and should) make one of its next stops at the Spending Clause. The logical question, then, is how the spending power ought to be limited in order to protect federalism interests. The Court created three possible federalism loopholes in its Spending Clause analysis that might be utilized either to impose federalism-based limitations or to encourage Congress to be more sensitive to federalism boundaries and concerns. This article argues that, of the three loopholes, only the inadequate notice and insufficient relatedness loopholes ought to be used to promote federalism interests.

The *Dole* coercion loophole, which the states have pushed rather heavily in recent litigation, should not be used to limit federal spending power. As defined in *Dole* to mean financial inducement, that loophole would seem to invalidate any federal program that is simply too good to pass up. In the federalism context, however, coercion is not about financial pressure or inducement; rather, it is about preserving the states' sovereign accountability. It is about protecting the ability of the states to make decisions implementing the will of the people, and being accountable for those decisions. No matter how much financial pressure a state might feel to take part in a federal program, the federal program is not coercive as long as it does not disable the state from choosing how best to serve the interests of its people. Moreover, even though use of the coercion loophole might actually encourage Congress to be less aggressive in its use of financial conditions, the coercion loophole is too strong a medicine to cure congressional insensitivity because it would cut too far into the legitimate scope of the spending power.

The inadequate notice loophole, on the other hand, should be utilized to promote federalism interests. Requiring sufficient legislative notice regarding the consequences of participating in the spending program enables a state to make choices on behalf of its people. Moreover, invoking this federalism loophole encourages

167 *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3, at 805 (3d ed. 2000) (The rational relationship standard enunciated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "is the primary standard for judicial review of legislative action.").

Congress to draft its legislation more carefully, with due regard for the states' interests. And while the insufficient relatedness loophole does not impact the states' ability to implement the will of their constituents, it should be invoked in order to influence Congress to be sensitive to federalism concerns, thereby limiting the intrusion into state sovereignty.

The inadequate notice and insufficient relatedness loopholes provide the Court ample leeway to implement its federalism goals. As the *Davis* dissenters pointed out, the notice requirement is a "vital link" in preserving federalism. Similarly, the relatedness requirement, as applied in *Dole*, should allow the Court to invalidate programs that unduly interfere with state interests, because it prohibits conditions that bear no direct relationship to achieving the purpose of the spending program. Strictly enforcing these requirements will go a long way toward protecting the federal balance.

# The Spending Power and the Federalist Revival

*Lynn A. Baker**

## INTRODUCTION

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

* Thomas Watt Gregory Professor, University of Texas School of Law. <lbaker@mail.law.utexas.edu> This Article was prepared for a symposium on "The Spending Clause: Enumerated Power or Blank Check?," held at the Chapman University School of Law on January 19, 2001.

My thanks to Professor John Eastman for inviting me to participate, to the Chapman faculty and students for their gracious hospitality, and to the conference panelists and participants for a day of stimulating intellectual exchange. I am grateful to the Editors of the *Chapman Law Review*, especially Richard Tilley and Yvonne Dalton, for their hard work and good cheer throughout the editorial process. University of Texas Law Librarian, Keith Stiverson, went well beyond the call of duty in expeditiously locating various source materials. An earlier version of portions of this Article was presented at the Annual Meeting of the American Political Science Association, Cornell Law School, the University of Iowa College of Law, the University of Virginia School of Law, and the Vanderbilt University Law School; I am grateful for the helpful comments received on each of those occasions.

Special thanks to Sam Dinkin, Ph.D., for assistance both with statistical analysis and with our two-year-old daughter, Mahria.

1 The few exceptions include Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1920 (1995) ("[I]f the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' will have no meaning.") (footnote omitted) [hereinafter Baker, *Conditional Federal Spending*]; Jim C. v. United States, 235 F.3d 1079, 1083 (8th Cir. 2000) (en banc) (Bowman, J., dissenting) (quoting Baker, *supra*, approvingly); South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) ("If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.") (quoting United States v. Butler, 297 U.S. 1, 78 (1936) (citation omitted)).

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

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

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

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

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

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

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

6 Today, the major constitutional constraint on Congress's spending power is the Establishment Clause of the First Amendment. *See, e.g.,* Flast v. Cohen, 392 U.S. 83, 105 (1968) (holding that "the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8"). In addition, the Constitution's other protections for individual rights could be viewed as incidental constraints on the spending power insofar as some laws held to violate those provisions of the Constitution might involve the expenditure of federal funds. For the purposes of this article, it is significant that all of these constraints are aimed at protecting individuals rather than the states and could therefore be expected to be of little use in protecting the states against federal expenditures they find problematic.

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

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

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

8 U.S. CONST. art. I, § 8, cl. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. Fiscal Redistribution Among the States

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

13 Of course, Congress is at present only an imperfectly majoritarian body given the Senate's cloture rule, which requires 60 votes to end debate regardless of the number of Senators present. *See* Baker & Dinkin, *The Senate*, *supra* note 11, at 29 n.28, 61. *See generally* Sarah A. Binder & Steven S. Smith, Politics or Principle? Filibustering in the United States Senate (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181 (1997). R

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There are 100 players (Senators) in the Senate. Thus, there are 100! possible orderings in which a vote can take place. Because each player has the same number of votes (one) on a given piece of proposed legislation, each player has the same likelihood of being the swing vote. And, since each state is represented by the same number of players (two Senators), each *state* has the same likelihood of being the swing vote. Calculated precisely,

ately greater likelihood, relative to their shares of the nation's population, of being the swing vote on any proposed legislation. In the House, in contrast, where each state's representation is substantially proportional to its population,[27] the theoretical likelihood that a small state is the swing vote on any proposed legislation is roughly equal to its share of the population and therefore small.[28] This means that smaller states are less likely than larger states to cast the deciding vote in the House. In sum,

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

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

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

| | | | |
|---|---|---|---|
| A*B*Cd | B*A*Cd | B*C*Ad | BC*d*A |
| A*B*dC | B*A*dC | Bd*A*C | Bd*C*A |
| Ad*B*C | C*A*Bd | C*B*Ad | C*B*dA |
| Ad*C*B | C*A*dB | Cd*A*B | Cd*B*A |
| A*C*Bd | dA*B*C | dC*A*B | dB*C*A |
| A*C*dB | dA*C*B | dB*A*C | dC*B*A |

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34 *See supra* Table 1.

35 *See supra* Table 1.

36 *See supra* Table 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ROBERT SUGDEN, THE POLITICAL ECONOMY OF PUBLIC CHOICE: AN INTRODUCTION TO WELFARE ECONOMICS 148 (1981).

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

| *A* | *B* | *C* |
|---|---|---|
| 1 | 2 | 3 |
| 2 | 1 | 1 |
| 3 | 3 | 2 |

*See* SUGDEN, *supra*, at 140, 147; DENNIS C. MUELLER, PUBLIC CHOICE II, at 114-15 (1989); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 989 n.55, 994-96 (1989).

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

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

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

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

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

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

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

47 *Id.* at 95.

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

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

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

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

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

TEN LARGEST STATES

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

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

50 *See infra* Tables 2 and 3.

51 *See supra* note 50.

52 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

53 *See* HERMAN B. LEONARD ET AL., THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1998 (23rd ed. 1998).

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

TEN SMALLEST STATES

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

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

## B. Conditional Federal Spending

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

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

54 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. Protections of the Political Process

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

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

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

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

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

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

75 Sometimes called the Wechsler-Choper thesis, this argument was presented first in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), and later in JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000) (criticizing Wechsler's particular arguments but contending that there "are 'political safeguards' of federalism, safeguards that have a longer pedigree and a stronger claim to constitutional legitimacy than the current Supreme Court's clumsy bid to impose its will on Congress").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In recent years, highly controversial candidates for governor and the U.S. Senate, notably David Duke and Oliver North, have received as much financial and other campaign support from outside their respective states as from within. On David Duke, *see, e.g.,* Susan Gilmore, *Hundreds in State Donated to Duke*, SEATTLE TIMES, Nov. 29, 1991, at C1 ("More than 200 Washington state residents gave more than $11,000 to David Duke's unsuccessful race . . ."); Anthony Lewis, *Abroad at Home: 'America Be on Guard*,' N.Y. TIMES,

In addition, legislators might thus win the votes of rationally self-interested constituents who believe that certain activities in another state impose negative externalities on them. Consider, for example, the federal regulation at issue in *South Dakota v. Dole*. Voters in a state that, consistent with the regulation, already prohibited "the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age"[90] might reasonably believe that there would be fewer alcohol-related accidents on their own state's highways if their young residents no longer had an incentive to commute to border states where the drinking age is lower and, therefore, were less likely "to combine their desire to drink with their ability to drive."[91]

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

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

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

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

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

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

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

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

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

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

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

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

RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 152 (1993).

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

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

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

### B. Amending the Constitution

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

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

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

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

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

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

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

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

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

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

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

99 U.S. Const. art. V.

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

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

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

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

100 U.S. CONST. art. I, § 8, cl. 1.

101 *See supra* notes 8-9. R

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

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

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

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

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

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

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

106 *See supra* note 19. **R**

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

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

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

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

## CONCLUSION

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

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

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

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

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

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

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

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

# CASE NOTE

# Internet Ambush, Using the Patent and Trademark Office to Shut down a Competitor's Domain-Name

## Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999).

*David P. Collins**

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Trademark owners are increasingly pursuing the protection of their marks in cyberspace.[1] Significant litigation is developing in situations where the same word or words are owned as a federal trademark by one party and registered by a separate party as a domain-name.[2] Another area of potential infringement online[3] in-

1 *See* G. Andrew Barger, *Cybermarks: A Proposed Hierarchical Modeling System of Registration and Internet Architecture for Domain-names*, 29 J. MARSHALL L. REV. 623, 624 n.3 (1996) (computer novelist William Gibson is credited with coining the term cyberspace by using it to describe a dimensionless place where machines communicate with each other without the aid of human intervention).

2 *See, e.g.,* Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998); Avery Dennison Corp. v. Sumpton, 189 F.3d 868 (9th Cir. 1999).

3 Online, cyberspace and the Web are frequently used to refer to the Internet. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 481-83 (E.D. Pa. 1999), for an overview of the Internet, explanations of domain-names, online technology and the various Internet protocols, such as HTTP (hypertext transfer protocol) used for the World Wide Web.

volves the use of another's mark in a web page's meta tags.[4] The Ninth Circuit considered these issues in *Brookfield Communications, Inc. v. West Coast Entertainment Corp*.[5] Although trademark disputes involving domain-names were increasing when the Ninth Circuit addressed the *Brookfield* case, little precedent existed regarding meta tag infringement. This Note is organized into four parts. Part I sets out the requirements for trademark infringement claims including factors to analyze infringement claims and the standard for injunctive relief. Part II discusses the facts of *Brookfield* and the reasoning employed by the court in resolving the issues. Part III critiques three aspects of the *Brookfield* decision and proposes solutions for future guidance. Part IV concludes with a survey of key points made and the practical implications *Brookfield* has for Internet entrepreneurs.

While the decision of the domain-name infringement claim was correct, the court's holding condones the practice of "reverse domain-name hijacking" to obtain previously registered domain-names from other parties.[6] In contrast, the court's analysis of the meta tag infringement claim was questionable and its "initial interest" analogy did not consider the basic differences between offline and online consumers. Finally, the relief granted to the triumphant trademark owner in this cyber-dispute was broader than necessary to address the problem. *Brookfield* demonstrates that courts need to clearly understand Internet technology before creating remedies for online disputes and be cognizant of Internet presumptions regarding domain-name use.

4 A meta tag is a piece of HTML (hypertext mark-up language) code included in the top portion of a web page, which informs a search engine about the contents of the page. Meta tags are included behind the page and only viewable by clicking "View Source" in one's web browser.

5 174 F.3d 1036 (9th Cir. 1999).

6 *See* Danielle Weinberg Swartz, Comments, *The Limitations of Trademark Law in Addressing Domain-name Disputes*, 45 UCLA L. REV. 1487 (1998) (explaining "reverse domain-name hijacking" is where a trademark owner brings suit for infringement against a prior legitimate user of a domain-name that contains the trademark owners mark).

## I. BACKGROUND

### A. Basis For Trademark Infringement: The Lanham Act

#### 1. Scope of Trademark Infringement

The Lanham Act[7] definitions for trademarks[8] and service marks[9] indicate a broad array of listings may serve as marks. Depending on how it is used, a domain-name may be classified as a protectable mark. The Supreme Court has held that in considering the "universe of things that can qualify as a trademark" the language of the Lanham Act describes this protectable "universe" in the "broadest of terms."[10]

Two methods are used to protect a mark. First, common law protects those who are the first to adopt and use a mark. Such users receive the exclusive right to use the mark in any area where they can demonstrate a continued actual use of the mark.[11] The Lanham Act codified this rule under section 33(b)(5) for good faith users who were using a mark before a later party applied for federal registration of the same mark.[12] The second method is to register the mark with the Patent and Trademark Office ("PTO").[13] Once the PTO issues a certificate of registration, the certificate constitutes "prima facie evidence of the validity of the registered mark. . .and the registrant's exclusive right to use the registered mark in commerce."[14]

An infringement claim[15] is normally based on a third party's use of a mark that is the same or confusingly similar to the claim-

7 *See* 15 U.S.C. §§ 1051-1127 (1999) (the Lanham Trademark Act of 1946 is the general basis used for trademark infringement causes of action). The original Lanham Act sections were numbered §§ 1-46 and are still commonly used in judicial opinions. Reference to Lanham Act sections will be based on the original numbers.

8 *See* 15 U.S.C. § 1127 (1999). Section 45 of the Lanham Act defines a "trademark" as "any word, name, symbol, or device, or any combination thereof- (1) used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." *Id*.

9 *See* 15 U.S.C. § 1127 (1999). A "service mark" is defined as "any word, name, symbol or device, or any combination thereof- (1) used by a person . . . to identify and distinguish the services of one person . . . from the services of others and to indicate the source of the services, even if that source is unknown." *Id*.

10 Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162 (1995) (finding trademark protection for the green-gold color of manufacturer's dry cleaning press pads).

11 *See* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916).

12 The defense may be used when a party is charged with infringement by a holder of a valid federally registered trademark, provided the defendant was unaware of the other party's use of the mark, and the defendants use pre-dates the date of the federal application for the trademark. Such protection is only valid where continuous prior use by defendant is proved. 15 U.S.C. § 1115(b)(5) (1999).

13 *See* 15 U.S.C. § 1051 (1999) (the application must indicate the first use of the mark in commerce and state that to the best of the applicant's knowledge no other person has the right to use the mark).

14 15 U.S.C. § 1057(b) (1999).

15 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1047 n.8 (9th Cir. 1999) (explaining infringement claims may be brought under sec-

ant's mark. The claimant must demonstrate the third party's use is likely to cause confusion in the marketplace.[16] The Lanham Act's "use" refers to "use in commerce."[17] Mere registration of a domain-name is not "use in commerce" sufficient to meet the Lanham Act's threshold.[18]

2. Elements of Trademark Infringement

The general remedy for a trademark owner seeking to prevent another from using its mark or a confusingly similar mark is an injunction. To receive a preliminary injunction,[19] a plaintiff must show: (1) probable success on the merits and possible irreparable injury, or (2) serious questions regarding the merits with the balance of hardships tipping in plaintiff's favor.[20] A plaintiff must prove two elements to prevail. First, a plaintiff must demonstrate the validity of its mark[21] and second, that the possibility exists the public will be confused about the sponsorship of a mark and mistakenly associate defendant's mark with plaintiff's.[22] This second requirement is the "likelihood of confusion" standard.[23]

a) Valid Marks

The primary focus of the validity inquiry is in determining who was first in time to use the mark in commerce. After a mark has been registered for over five years, it receives "incontestable" status, meaning its validity and protectability is conclusively pre-

tion 32(1) or section 43(a) of the Lanham Act and although section 43(a) protects against a broader range of practices besides infringement such as false advertising and product disparagement, the analysis under both sections is often identical).

16 *Id*. at 1046 n.6; 15 U.S.C. § 1125(a)(1) (1999) (section 43(a)(1) provides: "Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which (A) is likely to cause confusion, or to cause mistake . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." ).

17 *See* 15 U.S.C. § 1127 (1999) (defining "use" as: "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. [A] mark shall be deemed to be in use in commerce-(1) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce.").

18 *See Brookfield*, 174 F.3d at 1051.

19 *See* 15 U.S.C. §§ 1116-17 (1999) (Section 34 of the Lanham Act provides authority to grant injunctive relief to protect the rights of a mark owner and section 35 permits, subject to principles of equity, for a plaintiff to recover damages, defendants profits and cost of the action).

20 *See* Sardi's Restaurant Corp. v. Sardie, 755 F.2d 719, 723 (9th Cir. 1985).

21 *See Brookfield*, 174 F.3d at 1046-47.

22 *Id.* at 1054.

23 *Id.*

sumed.[24] The party who can demonstrate actual use of a mark first is considered the "senior" user. This user has the right to enjoin a subsequent junior user from using a confusingly similar mark in the same or similar market and to prevent the junior user from competing in any area considered to be the senior user's "natural zone of expansion."[25]

One approach to resolving which party is the senior user is to consider the date the trademark application was filed. A benefit of filing a trademark application is that the applicant receives a constructive use date as of the day the application is filed with the PTO.[26] Under section 7(c) of the Lanham Act, contingent on final approval of the mark, the filing of an application "shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect . . . except for a person . . . who, prior to such filing—(1) has used the mark."[27]

Seniority may also be established where a party can show there was enough pre-sale publicity revolving around the mark such that a significant portion of the public had already formed an association between the mark and the organization.[28] Pre-sale use under these circumstances has been found sufficient to qualify as "use."[29] The "talismanic" test for pre-sale use is whether the mark has become sufficiently public to distinguish the marked goods in a certain segment of the public mind as being related to the adopter of the mark.[30]

Words that are candidates for trademark protection are grouped into four categories, listed from weakest to strongest: generic, descriptive, suggestive, and arbitrary or fanciful.[31] Before a

24 *See* 15 U.S.C. § 1065 (1999) (a mark that has been in "continuous use for five consecutive years subsequent to the date of [federal] registration and is still in use in commerce, shall be incontestable").

25 *See* Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex., 909 F.2d 839, 842-43 (5th Cir. 1990); 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 16:5 (4th ed. 1999) (explaining natural zone of expansion as "[w]hen a senior user of a mark on product line A expands later into product line B and finds an intervening user, priority in product line B is determined by whether the expansion is 'natural' in that customers would have been confused as to source or affiliations at the time of the intervening user's appearance.").

26 *See* 15 U.S.C. § 1057(c) (1999).

27 *Id*.

28 *See* Marvel Comics Ltd. v. Defiant, 837 F. Supp. 546, 547-548 (S.D.N.Y. 1993) (to show pre-sale use, the plaintiff presented evidence it had sold over 13 million comic books announcing new character, "Plasmer," distributed a sales catalog to approximately 12,500 distributors with advertisements for the character, and showed that the character's picture had appeared in a trade magazine with a circulation of 20,000 readers).

29 *Id.*

30 *See* New England Duplicating Co. v. Mendes, 190 F.2d 415, 417 (1st Cir. 1951).

31 *See* Public Service Co. of N.M v. Nexus Energy Software, Inc., 36 F. Supp. 2d 436, 438 (D. Mass. 1999). Generic terms are ineligible for protection, descriptive terms are eligible only if secondary meaning is acquired, suggestive terms require imagination to conclude the source of the goods, and arbitrary or fanciful terms that are unrelated to the good, are eligible for protection without proof of secondary meaning, *id*. *See generally* 1 MCCAR-

descriptive mark is eligible for protection, it must have secondary meaning, which means the public primarily associates the mark with a certain product or service.[32] While generic terms cannot be protected, use of a descriptive mark for over five years is prima facia evidence the mark has become distinctive and therefore valid.[33]

b) Likelihood of Confusion

*Brookfield* used an eight-factor test, detailed in *AMF Inc. v. Sleekcraft Boats*,[34] the "*Sleekcraft*" test, to determine whether a likelihood of confusion existed.[35] The *Sleekcraft* factors do not encompass an "exhaustive" list; other considerations may be relevant depending on the circumstances.[36] Professor McCarthy explains although all the likelihood of confusion factors should be considered, "[n]o mechanistic formula can set forth in advance the variety of elements that comprise. . .the context from which likelihood of confusion must be determined."[37]

## B. Fair Use

If a mark is "used fairly and in good faith only to describe the goods or services of such party," then such use is considered noninfringing.[38] Section 43(c)(4)(A) of the Lanham Act permits "fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark."[39] The fair use defense thereby permits use of a famous mark in the absence of an adequate descriptive substitute. Such use helps avoid having to venture "into absurd descriptive phrases" to convey a concept or message.[40]

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THY, *supra* note 25, § 11:01-26 (for an extensive discussion on the spectrum of words eligible for trademark protection).

32 *See* Bigstar Entertainment, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 202 (S.D.N.Y. 2000).

33 *See* 15 U.S.C. § 1052(e)-(f) (1999).

34 599 F.2d 341 (9th Cir. 1979).

35 *Id*. at 348-49. The *Sleekcraft* test considers: (1) strength of the mark; (2) proximity of the goods; (3) evidence of actual confusion; (4) marketing channels used; (5) types of goods and the degree of care likely to be exercised by the purchaser; (7) defendants intent in selecting the mark; and (8) likelihood of expansion of the product lines. *Id*.

36 *See* Dreamwerks Prod. Group, Inc. v. SKG Studio, 142 F.3d 1127, 1130 (9th Cir. 1998).

37 1 MCCARTHY, *supra* note 25, § 23:19,54 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21, comment a (1995)).

38 15 U.S.C. § 1115(b)(4) (1999).

39 15 U.S.C. § 1125(c)(4)(A) (1999).

40 Playboy Enters, Inc. v. Welles, 7 F. Supp. 2d 1098, 1105 (1998) (finding that since no reasonable alternative existed to describe a playmate's former status, it was fair use to include the phrase "Playmate of the Year 1981" on defendants web pages and in her sites meta tags).

C. Internet Enigmas in Trademark Analysis

An ongoing challenge for the courts is to determine how the practices and technology of the Internet interact with trademark law. One district court stated in *Cardservice Int'l, Inc. v. McGee*,[41] "[t]he terms of the Lanham Act do not limit themselves in any way which would preclude application of federal trademark law to the Internet."[42] Professor McCarthy has pondered the question: "Is a domain-name a trademark?"[43] His answer is: "A domain-name can become a trademark if it is used as a trademark."[44] Courts look to the way the domain-name is used to make this determination. One court stated, "[w]hen a domain-name is used only to indicate an address on the Internet and not to identify the source of specific goods and services, [then] the name is not functioning as a trademark."[45]

The PTO's view is that before a domain-name is eligible for registration as a trademark, the application must show it will be used in a manner as to indicate source and not merely as an indicator of the address to a web site.[46] Some "value added" activity must exist at a web site beyond the mere advertising of goods and services before the site name may be eligible for registration as a trademark.[47] The inclusion of ".com" in a trademark registration by itself is considered as having no trademark significance.[48] However, if ".com" were positioned in the public's mind as having some type of commercial impression (e.g., "amazon.com"), then including it in a trademark registration would make sense.[49]

Another trademark issue involves consideration of the use of another's mark in a competitor's meta tags in an effort to increase site visits. Meta tags are not visible to the person viewing the web page, but are included in the invisible background code of the web page to help identify the contents of the page to search engines.[50] Meta tags assist parties conducting searches for particular topics to find web pages that have included such topics in their meta

41 950 F. Supp. 737 (E.D. Va. 1997).

42 *Id.* at 741.

43 1 MCCARTHY, *supra* note 25, § 7:17.1.

44 *Id.*

45 Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 956 (C.D. Cal. 1997).

46 *See* United States Department of Commerce, Patent and Trademark Office, *Marks Composed, In Whole Or In Part, Of Domain Names,* Examination Guide No. 2-99 at § II-A (visited Feb. 8, 2001) <http://www.uspto.gov/web/offices/tac/notices/guide229.htm> (If the proposed mark will be used as nothing more than an online business card indicating where a person can be contacted, registration must be refused.).

47 *See* 1 MCCARTHY, *supra* note 25, § 7:17.1.

48 *Id.*

49 *Id.*

50 *See* Playboy Enters., Inc. v. Welles, 7 F. Supp. 2d 1098, 1104 (1998).

tags.[51] The most popular meta tags are the keyword and description tags.[52] Search engines receive information about web sites primarily in two ways.[53] The first method involves human effort by page authors ("web masters") who submit new sites to search site editors that are then reviewed and categorized.[54] The second method is achieved automatically by having a web "spider" or "robot" continually scan the Web and automatically categorize results, often putting importance on the content a page includes in its keyword meta tags.[55]

Two controversial uses of meta tags online are "spamdexing" and "competitor use".[56] Spamdexing involves using popular terms (e.g., "George W. Bush") as keywords that are unrelated to the content of a page.[57] Spamdexing web masters attempt to receive a higher ranking from the results of a search by repeating terms more frequently in the meta tags in the web page.[58] However, because search engines have a crucial need to be accurate sources for information on the Web, many search sites are enacting countermeasures against spamdexing, including penalizing spamdexing web sites with lower rankings or ignoring keyword meta tags entirely.[59] The other potential infringing use of a competitor's trademark occurs when a competitor uses another's trademark in its keyword meta tags on its web page.[60]

## D. Remedies

Similar to off-line trademark infringers, Internet trademark infringers may be required to cease use of all infringing marks

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51 *Id*.

52 *See* F. Gregory Lastowka, *Search Engines, HTML, and Trademarks: What's the Meta for?*, 86 VA. L. REV. 835, 844-46 (2000). Keyword tags are specific terms that convey core concepts regarding the page and description tags provide a concise description of the page. *Id*. at 845-46.

53 *Id*. at 847-48.

54 *Id.* at 847 (such an approach is used by Yahoo).

55 *Id.* at 848 (Excite, Alta Vista and Google utilize such techniques); Katherine E. Gasparek, Comment, *Applying the Fair Use Defense in Traditional Trademark Infringement and Dilution Cases to Internet Meta Tagging or Linking Cases*, 7 GEO. MASON L. REV. 787, 789 (1999).

56 *See* Lastowka, *supra* note 52, at 862.

57 *Id*. at 865; Elizabeth Weise, *Some Web Pages Take Search Engines for a Ride*, USA TODAY, Sept. 29, 1997, at 4d. (describing techniques to manipulate search engines as "spamdexing").

58 *See* Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 HARV. J.L. & TECH. 43 (1998) (explaining meta tags are presently used more to spam than to inform).

59 *See* Lastowka, *supra* note 52, at 850 n.74, 867 (explaining Excite claims not to support keyword meta tags any longer).

60 *Id.* at 874-76 (citing Playboy Enters., Inc. v. Asiafocus Int'l, Inc., No. 97-734-A, 1998 U.S. Dist. WL 724000 (E.D.Va. Apr. 10, 1998), as an example of competitor use where an adult site was enjoined from using the word "playmate" in its meta tags).

upon order of a court.[61] Sometimes a defendant is ordered to turn over the infringing domain-name to the trademark owner. For example, defendants who registered "candyland.com" were required to turn over the domain-name to Hasbro.[62]

## E. Trademark Protection Online

Courts generally support trademark owners' rights in the Internet context. A recurring theme in domain-name disputes is that mere registration of a domain-name alone does not supersede federal trademark law.[63] However, a key factor in cases seeking injunctive relief for alleged domain-name infringement is a demonstration by plaintiff of a likelihood of confusion. For example, in *Avery Dennison Corp. v. Sumpton* no likelihood of confusion was found by the defendant's registration and use of the domain-names "avery.net" and "dennision.net."[64] The court held plaintiff failed to demonstrate defendant's use of the domains for an e-mail business would cause confusion in the marketplace.[65]

Only a few Internet related trademark infringement cases were claiming meta tag infringement when *Brookfield* was decided.[66] The court utilized "initial interest confusion" to analyze the situation.[67] Initial interest confusion involves a bait and switch tactic where a competitor lures a customer by using the mark of a competitor.[68] Although the customer is not mislead when an actual purchase is made, some courts feel the initial interest which was piqued by using the mark of a competitor is a usurpation of the mark owner's goodwill, thereby creating "sufficient trademark injury."[69] For example, Playboy Enterprises has been successful in enjoining the use of PLAYBOY in an unaffili-

61 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1043 (9th Cir. 1999). West Coast was prohibited from using "moviebuff.com" for its web site domain-name and "@moviebuff.com" in conjunction with e-mail. *Id.*

62 *See* JONATHAN ROSENOER, CYBERLAW: THE LAW OF THE INTERNET 106-07 (Springer-Verlag 1997) (discussing Hasbro, Inc. v. Internet Entertainment Group, Ltd., 40 U.S.P.Q. 2d 1479 (W.D. Wash. 1996)).

63 *See Brookfield*, 174 F.3d at 1066 ("[R]egistration of a domain-name for a Web site does not trump long-established principles of trademark law."); Cardservice Int'l, Inc. v. McGee, 950 F. Supp. 737, 740 (E.D. Va. 1997) (commenting on the first-come, first-serve policy of domain-name registrar Network Solutions, Inc., (NSI), the court stated "such a policy cannot trump federal law").

64 *See* Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 879-81 (9th Cir. 1999) (defendant sold vanity e-mail addresses to attract customers with the surname Avery or Dennison offering the chance to have an email address like "firstname@avery.net").

65 *Id.*

66 *See, e.g.,* Playboy Enters., Inc. v. Welles, 7 F. Supp. 2d 1098, 1105 (1998) (holding it was permissible for a former playmate to use the phrase "Playmate of the Year 1981" on her web site and in the sites meta tags).

67 *See Brookfield,* 174 F.3d at 1062.

68 *Id.*

69 *See* Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d. 254, 257-58 (2d Cir. 1987).

ated adult web site's meta tags.[70] The Ninth Circuit in *Brookfield* remained consistent with the trend in extending trademark rights in the Internet context.

## II. *BROOKFIELD COMMUNICATIONS, INC. V. WEST COAST ENTERTAINMENT CORP.*

### A. Factual Background

West Coast Entertainment Corporation ("West Coast") is one of the nation's largest video rental chains with over 500 stores.[71] West Coast began using its service mark "The Movie Buff's Movie Store" in 1986 for "advertisements, promotions, and letterhead in connection with retail services featuring videocassettes and video game cartridges."[72] Brookfield Communications, Inc. ("Brookfield") started business in 1987 focusing on the professional movie industry by offering industry specific information on films, submissions, industry credits, and professional contracts.[73] West Coast applied to the PTO for federal registration of its service mark in 1989. It was approved in 1991 and became incontestable in 1996.[74] Brookfield began offering in 1993, a movie industry informational database entitled "MovieBuff" to a broader consumer base.[75]

On February 6, 1996, West Coast registered the domain-name "moviebuff.com" stating it chose the name because the term "Movie Buff" was part of its service mark.[76] Sometime later in 1996, Brookfield tried to register "moviebuff.com" but found it had already been registered to West Coast.[77] Brookfield therefore registered two related domain-names "brookfieldcomm.com" and "moviebuffonline.com" at which it offered the "MovieBuff" products for sale.[78] One of West Coast's initial uses of "moviebuff.com" was in e-mail correspondence with lawyers and customers starting in April 1996.[79] On August 19, 1997, Brookfield applied for a federal trademark[80] and service mark[81] for the term "MovieBuff."

70 *See* Playboy Enters., Inc. v. Calvin Designer Label, 985 F. Supp. 1220, 1221 (N.D. Cal. 1997).

71 *See Brookfield*, 174 F.3d at 1042.

72 *Id*. at 1043.

73 *Id*. at 1041.

74 *Id*. at 1043 n.5.

75 *Id.* at 1041.

76 *Id.* at 1042. West Coast's service mark covered "retail store services featuring video cassette and video game cartridges" and "rental of video cassettes and video game cartridges." *Id.*

77 *Id.*

78 *Id.*

79 *Id.* at 1052-53.

80 *Id.* at 1042. Brookfield stated on its trademark application that the product was "computer software providing data and information in the field of the motion picture and television industries." *Id.*

The PTO issued federal trademark registrations for both marks on September 29, 1998.[82] August 1997 was the first date that Brookfield began offering its "MovieBuff" software and database online.[83]

Brookfield learned West Coast intended to launch a web site at "moviebuff.com" in October 1998, which offered among other things an entertainment database similar to the Brookfield database.[84] Brookfield thereafter delivered a cease-and-desist letter to West Coast on November 10, stating West Coast's planned use of "moviebuff.com" would be a violation of Brookfield's trademark rights.[85] The following day West Coast issued a press release announcing the coming launch of "moviebuff.com" and describing the site as containing "movie reviews, Hollywood news and gossip, provocative commentary, and coverage of the independent film scene and films in production."[86] The press release also described the entertainment database that would be available.[87] Brookfield responded with a suit[88] seeking to enjoin West Coast from using the mark "MOVIEBUFF" in any manner, including as a domain-name or in the meta tags of West Coast's web site.[89]

West Coast argued, based on its prior valid service mark registration, that it was the "senior user" of the mark "MovieBuff."[90] West Coast's federal registration of its service mark became incontestable in 1996 after having been registered with the PTO and in continuous use for five consecutive years.[91] West Coast offered evidence it had spent over $15 million on advertisements and promotions featuring the mark.[92] West Coast contended that since it used "moviebuff.com" prior to Brookfield's offering of an online version of its "MovieBuff" database, West Coast was the senior user for online purposes.[93] West Coast also claimed there would be no likelihood of confusion for Lanham Act purposes as a result of its planned online use of "moviebuff.com."[94]

81 *Id.* Brookfield's service mark application described its service as "providing multiple-user access to an on-line network database offering data and information in the field of the motion picture and television industries," *id*.

82 *Id.*

83 *Id.* at 1051 n.13 (when Brookfield first began offering its "MovieBuff" software and database online was the subject of "bitter dispute" between the parties).

84 *Id.* at 1042.

85 *Id.*

86 *Id.*

87 *See Brookfield*, 174 F.3d at 1042-43.

88 *Id*. at 1043 (along with Brookfield's Lanham Act trademark infringement claim, it also sued for unfair competition, and trademark dilution under Lanham, as well as for violations of California's trademark and unfair competition laws).

89 *Id.* at 1043.

90 *Id.*

91 *Id.*

92 *Id.* at 1043 n.5.

93 *Id.* at 1043.

94 *Id.*

B. Procedural History

The United States District Court for the Central District of California denied Brookfield injunctive relief finding West Coast the senior user of "moviebuff.com" and that no likelihood of confusion existed from the planned use of the domain-name.[95] Brookfield appealed the district court's denial of its motion for a preliminary injunction and filed a motion for an injunction pending appeal, which was denied.[96] West Coast launched "moviebuff.com" on January 16, 1999.[97] Brookfield then filed an emergency motion for an injunction pending an appeal in the United States Court of Appeals for the Ninth Circuit.[98] The appellate court granted Brookfield's motion on February 24, 1999, and entered an order enjoining West Coast:

> [F]rom using, or facilitating the use of, in any manner, including advertising and promotion, the mark MOVIEBUFF, or any other term or terms likely to cause confusion therewith, including @moviebuff.com or moviebuff.com, as the name of West Coast's web site service, in buried code or metatags on its home page or web pages, or in connection with the retrieval of data or information on other goods or services.[99]

Brookfield was required to post a $25,000 bond before the injunction would become effective.[100] West Coast then filed a motion for reconsideration and modification, asking the bond requirement be raised to $400,000 and seeking a stay of the injunction pending appeal.[101] Both requests were denied.[102]

C. Internet Issues

The court recognized the case involved technical aspects of the Internet.[103] The issue was: "[w]hether federal trademark and unfair competition laws prohibit a video rental store chain from using an entertainment-industry provider's trademark in the domain-name of its web site and in its web site's metatags."[104] The court began its analysis with a thorough discussion of the Internet and relevant technology.

The court reasoned domain-names are somewhat analogous to a telephone number or street address and are made up of two components: a second-level domain-name and a top-level domain-

95 *See Brookfield*, 174 F.3d at 1043.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 1044.
103 *Id.* at 1043.
104 *Brookfield*, 174 F.3d at 1041.

name.[105] A second-level domain-name is the original portion of the web site address selected by the party registering the domain-name.[106] The top-level domain is the ".com" portion of the address and is selected by the party registering the domain-name in an effort to describe the nature of the web site.[107]

When the exact web address of a site is not known, an Internet user may attempt to guess the domain-name by typing in the presumed name in the "location window" of the web browser.[108] These "guesses" are often unsuccessful, frustrating, and time consuming. Search engines have emerged to assist a person searching for a specific web site.[109]

1. Validity of Brookfield's Mark

The first issue addressed was whether Brookfield had a valid mark, thereby entitling it to protection. Although Brookfield held a registration certificate from the PTO for "MovieBuff," West Coast could prevail as a senior user by demonstrating its use of the mark pre-dated Brookfield's use.[110] The court held one would be deemed the "senior" user[111] by using an inherently distinctive, suggestive, mark first.[112]

In its defense, West Coast argued Brookfield's online offering of its database, which began in May 1996, was sufficiently dissimilar to West Coast's own web site at "moviebuff.com."[113] Therefore, no likelihood of confusion would exist and West Coast should be entitled to seniority.[114] West Coast urged the court to distinguish between Brookfield's non-Internet sales of the "MovieBuff" software, and its later web service where it offered an online version of the database.[115] The court observed Brookfield had failed

105 *Id.* at 1044.

106 *Id.* The words that come after "www." and before ".com" in a web site address are the second-level domain words (www.second-level domain word.com).

107 *Id.*; Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998). Several top-level domains are available from NSI, depending on the entity, including: ".com" (commercial), ".edu" (educational), ".org" (non-profit and miscellaneous organizations), ".gov" (government), ".net" (networking provider), and ".mil" (military), *id*.

108 *See Brookfield*, 174 F.3d at 1044. Web browsers have a location window, which displays the web site Uniform Resource Locator ("URL") that is the domain-name of the present web site being viewed (e.g., http://www.yourarehere.com).

109 *Id.*

110 *See Brookfield*, 174 F.3d at 1046.

111 *Id.*

112 *Id.* at 1046 n.9. Both parties agreed the mark was inherently distinctive, therefore it was unnecessary for either to demonstrate secondary meaning, *id.* All that was required to receive priority with respect to rights to the mark was to be either first to use the mark or first to obtain a federal trademark registration of the mark, *id*.; *see* discussion *infra* Part III.A.2.a, regarding whether a different result would have occurred had West Coast urged the mark was merely descriptive.

113 *Id.* at 1050-51.

114 *Id.*

115 *Id.*

to produce evidence of a claimed use of the term "MovieBuff" on the web in January 1996.[116] The earliest Brookfield could have launched a site was in May of 1996, when it acquired domain-name registrations.[117] This argument was important for West Coast because Brookfield essentially could have been trying to claim priority in use based on its off-line use of "MovieBuff." In considering whether Brookfield may have had seniority based on its prior off-line sales of "MovieBuff" software, the court recognized a sub-issue as to whether the Web was within Brookfield's "natural zone of expansion."[118] The court concluded since Brookfield's constructive use date[119] from filing for a federal trademark was August 19, 1997, it was the senior user and the matter need not be considered.[120]

West Coast also argued that because it had engaged in pre-web site launch activity by using "moviebuff.com" in e-mail correspondence with lawyers and customers, such activity should have been characterized as sufficient to pre-date Brookfield's use.[121] The court recognized certain activity was sufficient to qualify as pre-sale use, if enough interactions with the public existed to make the impression the mark was associated with an organization. However, the court concluded limited e-mail use did not meet such requirements.[122] Both the district court and the appellate court agreed the February 1996, registration of the domain-name "moviebuff.com" by West Coast was insufficient to qualify as a first use.[123] The district court found domain-name registration combined with an "intent to use it commercially was sufficient to convey trademark rights."[124] The court of appeals disagreed, explaining such a finding was contrary to principles of trademark law.[125] Mere preparation to use a mark does not create any right a competitor is bound to respect.[126] Therefore, the court disregarded West Coast's pre-launch activity and held the earliest West Coast could have established a use of the mark was the date of its widespread press release announcing the web site on November 11,

116 *Id.* at 1051 n.13.

117 *Id.*

118 *Brookfield*, 174 F.3d at 1051.

119 *See* 15 U.S.C. § 1057(c) (1999). Under section 7(c) of the Lanham Act, contingent on final approval of the mark, the filing of an application "shall constitute *constructive use* of the mark, conferring a right of priority, nationwide in effect. . .except for a person . . .who, prior to such filing—(1) has used the mark.. . ." *Id* .

120 *See Brookfield*, 174 F.3d at 1051 n.13.

121 *Id.* at 1052-53.

122 *Id.* at 1052.

123 *Id.*

124 *Id.*

125 *Id.*

126 *See id.* at 1052 (citing Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 504 (7th Cir. 1992); Hydro-Dynamics, Inc. v. Corner Stone Franchises, 176 U.S.P.Q. 535, 538 (T.T.A.B. 1973)).

1998.[127] Since the press release was after Brookfield's first use of "MovieBuff" in conjunction with its online database, Brookfield was found to be the senior user of "MovieBuff."[128]

2. Did West Coast's Mark Create Confusion?

The court began the "likelihood of confusion" analysis with a 1995 statement on the basic objectives of trademark law by the Supreme Court:

> [T]rademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions,' for it quickly and easily assures a potential customer that this item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.[129]

The court then applied the *Sleekcraft* factors.[130] The court cautioned excessive rigidity of the law in the Internet context was unrealistic and such "emerging technologies require a flexible approach."[131] Similarly other courts have recognized web jurisprudence requires recognition of the "highly fluid circumstances" of the Internet when making legal pronouncements.[132] Most of the *Sleekcraft* factors favored Brookfield.[133] However, since Brookfield's mark was relatively weak, the court found the "strength of the mark" factor favored West Coast.[134] The court concluded that a likelihood of confusion was "strongly established."[135]

D. Meta Tag Infringement

In discussing meta tag infringement, the court considered the related Internet technology to explain how such an infringement may arise. The issue was "whether West Coast can use 'MovieBuff' or 'moviebuff.com' in the meta tags of its web site at 'westcoastvideo.com' or at any other domain-name other than 'moviebuff.com' (which [the court] determined that West Coast

127 *See Brookfield*, 174 F.3d at 1053.

128 *Id.*

129 *Id.* at 1053-54 (citing Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995) (internal citations omitted)).

130 *See* AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979); *see supra* note 35 and accompanying text for a listing of the eight *Sleekcraft* factors.

131 *See Brookfield*, 174 F.3d at 1054.

132 *See* Bihari v. Gross, 119 F. Supp. 2d 309, 323 (S.D.N.Y. 2000) (observing "that the lightning speed development of the Internet poses challenges for the common-law adjudicative process").

133 *See Brookfield*, 174 F.3d at 1058-60.

134 *Id.* at 1058.

135 *Id.* at 1060.

may not use)."[136] The court initially explained that if West Coast's "westcoastvideo.com" site included the term "MovieBuff" in its meta tags and one did a search for "MovieBuff," then the search result would likely include both West Coast's site and Brookfield's site.[137] When this result list was scanned to determine which site listed most nearly matched the desired destination, the court concluded there would be less confusion due to the difference in the domain-names.[138] If West Coast was including "MovieBuff" in its meta tags, then when the user saw West Coast's site in the search results, she would be able to determine whether it was the desired destination by looking at the domain-name "westcoastvideo.com" in the result list.[139] Even if the Internet user selected the West Coast site from the list, upon reaching the site and seeing West Coast's name prominently displayed "it is difficult to say that a consumer is likely to be confused about whose site he has reached or to think that Brookfield somehow sponsors West Coast's web site.[140]

Next, the court explained if West Coast were to use "moviebuff.com" in its meta tags at the "www.westcoastvideo.com" site there was potential for initial interest confusion.[141] Internet users who were looking for Brookfield's "MovieBuff" products might be taken by a search engine to "westcoastvideo.com" where they would find a database similar enough to "MovieBuff." They might decide to remain even though they had realized the site is unrelated to Brookfield.[142] The court then held it would be improper for West Coast to use "moviebuff.com" *or* "MovieBuff"[143] in its meta tags explaining:

> Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "MovieBuff" to divert people looking for "MovieBuff" to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark.[144]

The appellate tribunal held that initial interest confusion in trademark law was actionable in the Internet context. The court

136 *Id.* at 1061.
137 *Id.* at 1062.
138 *Id.*
139 *See Brookfield*, 174 F.3d at 1062.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*; *see* discussion *infra* Part III.B.1.c, noting the court's inconsistent analysis of meta tag infringement where it initially finds little confusion would result if West Coast were to use "MovieBuff" in its meta tags, and then contradicts itself by later stating, initial interest confusion would result by use of "MovieBuff" in its meta tags.
144 *Id.*

analogized using another's trademark in a meta tag on the Internet to a person driving their car in search of a video store:

> Suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading—"West Coast Video: 2 miles ahead at Exit 7"—where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast.[145]

The opinion also relied on cases involving Playboy Enterprises. The Ninth Circuit agreed an adult web site's use of the Playboy mark in its meta tags constitutes infringement.[146] The court held the Lanham Act barred West Coast "from including in its meta tags any term confusingly similar with Brookfield's mark" by following cases, which have "addressed trademark infringement through meta tags use."[147]

The contrary approach does not recognize the initial interest doctrine. Essentially, the use is permissible because the confusion is harmless. This view holds such brief confusion, or confusion that does not affect the ultimate decision of a purchaser, is not cognizable under trademark laws.[148] The court rejected West Coast's argument that it should have a fair use right to the term "MovieBuff" in its meta tags, explaining the term was unique and not found in the dictionary.[149] However, the court stated West Coast could use the descriptive term for a movie enthusiast, e.g., a "movie buff," as it pleased.[150] It could also use "MovieBuff" in a comparative context. Thus, West Coast could display an advertisement banner or text on its web page that read: "Why pay for MovieBuff when you can get the same thing here for FREE?"[151]

145 *Brookfield*, 174 F.3d at 1064.

146 *Id.* at 1064-65 (citing Playboy Enters., Inc. v. Asiafocus Int'l, Inc., No. CIV.A. 97-734-A, 1998 U.S. Dist. WL 724000, at *3, * 6-*7 (E.D. Va. Apr.10, 1998); Playboy Enters., Inc. v. Calvin Designer Label, 985 F. Supp. 1220, 1221 (N.D. Cal. 1997).

147 *See Brookfield*, 174 F.3d at 1065.

148 *See* Astra Pharm. Prods. Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 1206-08 (1st Cir. 1983); Teletech Customer Care Management (Cal.), Inc. v. Tele-Tech Co., 977 F. Supp. 1407, 1410, 1414 (C.D. Cal. 1997); BigStar Entertainment, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 207-210 (S.D.N.Y. 2000).

149 *See Brookfield*, 174 F.3d at 1066.

150 *Id.*

151 *Id.*

However, West Coast's use of "MovieBuff" to reference its own product, the domain-name, and to attract people to its web site via the meta tags did not constitute fair use.[152]

### E. Holding

The court concluded preliminary injunctive relief was appropriate to protect Brookfield's interest in the mark. It also explained its conclusion supported the "public interest" in trademarks.[153] The court stated:

> When a firm uses a competitor's trademark in the domain-name of its web site, users are likely to be confused as to its source or sponsorship. Similarly, using a competitor's trademark in the metatags of such web site is likely to cause what we have described as initial interest confusion. These forms of confusion are exactly what the trademark laws are designed to prevent.[154]

The district court's decision was reversed since Brookfield had demonstrated a likelihood of success on the merits for trademark infringement.[155]

## III. Analysis of *Brookfield*

### A. Implicit Approval of Reverse Domain-name Hijacking

*Brookfield* clearly established the principle that Internet practices are not to be displaced by fundamental trademark principles.[156] On the contrary, federal trademark principles govern Internet domain-name disputes. Although the result reached as to the domain-name dispute was correct, some of the stated reasons for the result are inconsistent with the court's reasoning, and some of the presumptions regarding the Internet are inaccurate. This Note considers whether the court's strong support for trademark owners may be construed as tacit approval of reverse domain-name hijacking.

The domain-name "moviebuff.com" was valuable to both West Coast and Brookfield. The court stated: "Both companies, apparently recognizing the rapidly growing importance of Web commerce, are maneuvering to attract customers via the Web."[157] Because an easy to remember domain-name, like "moviebuff.com," would help both companies attract customers, both had legitimate reasons to use it. Realizing West Coast had ownership of the domain-name in 1996, Brookfield effectively barred West Coast from

152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *See Brookfield*, 174 F.3d at 1066.
157 *Id.* at 1057.

using it by obtaining federal trademark registration of the mark "MovieBuff."

1. Reverse Domain-name Hijacking

Reverse domain-name hijacking occurs when a trademark owner with a valid federal trademark registration sues a web site operator who is using the mark in its domain-name.[158] West Coast could be characterized as a victim of reverse domain-name hijacking. West Coast obtained the domain-name "moviebuff.com" in February 1996.[159] When West Coast obtained the domain-name, it had every reason to believe it had a right to use it. No evidence was produced to show West Coast was on actual notice of Brookfield's use of "MovieBuff" when West Coast selected "moviebuff.com" as its domain-name.[160] In fact, Brookfield failed to "come forth with substantial evidence establishing the widespread recognition of its mark."[161] Therefore, West Coast could be considered an innocent infringer because at the time it adopted the mark it had no knowledge of Brookfield's rights. After registering the domain-name, West Coast began development and promotion of the web site and invested substantial sums in launching "moviebuff.com."[162]

Brookfield discovered West Coast had already taken the domain-name, when it attempted to register "moviebuff.com" in 1996. Brookfield could have then contacted West Coast regarding the domain-name before West Coast invested substantial funds in developing its site. The court observed the whole dispute might have been more effectively handled had Brookfield acted in a more "prompt" manner.[163] Instead of contacting West Coast, Brookfield sought a federal trademark registration for "MovieBuff." This act was the first step in blocking West Coast's efforts to use "moviebuff.com." Brookfield could bring suit against West Coast for infringement once it obtained ownership of a trademark registration for "MovieBuff."

Entities like Brookfield would prefer litigating such a dispute based on trademark infringement rather than resolving it through Internet domain-name dispute policies, which would likely fail to provide Brookfield with relief. Such an approach would be prefer-

158 *See* Swartz, *supra* note 6, for an extensive discussion of reverse domain-name hijacking.

159 *See Brookfield*, 174 F.3d at 1051.

160 *Id.* at 1059. The court pointed out Brookfield had failed to establish West Coast knew of Brookfield's rights in "MovieBuff." *Id*.

161 *Id*. at 1058.

162 *Id*. at 1059. West Coast explained it had "invested considerable sums in developing its 'moviebuff.com' web site by the time Brookfield informed it of its rights in the trademark." *Id.*

163 *Id*. at 1061.

able because West Coast had apparently not registered the domain-name in bad faith and had legitimate reasons for selecting the domain-name.[164] Applying a traditional trademark infringement analysis, Brookfield had a better chance of prevailing in the courts since West Coast's intent to infringe would be merely one factor to consider, whereas with the online policies it is a requirement. Furthermore, the online domain-name dispute polices provide that litigating a dispute in a court of competent jurisdiction is an acceptable alternative method for dealing with domain-name disputes, the result of which the domain-name registrar will respect.[165] Once given an order from a court of competent jurisdiction, NSI could then cancel, transfer or otherwise modify West Coast's use of "moviebuff.com" in accordance with the court order.[166] In this regard, Brookfield has successfully prevented West Coast from using its domain.[167]

Although West Coast was not found to have sufficiently used "moviebuff.com" for Lanham Act purposes until November 1998,[168] it was unaware of the potential suit looming before it. West Coast was on the verge of becoming the unknowing victim of reverse domain-name hijacking. Brookfield waited until it received its approved trademark application from the PTO before sending a cease-and-desist letter to West Coast, which was over two and a half years after becoming aware that West Coast had registered "moviebuff.com."[169] The court effectively condoned Brookfield's shrewd business tactics because, although the court briefly men-

164 *See* Network Solutions, Inc., *Network Solutions' Domain-name Dispute Policy* (visited Feb. 8, 2001) <http://www.networksolutions.com/en_US/legal/dispute-policy.html>; Internet Corporation for Assigned Names and Numbers, *Uniform Domain Name Dispute Resolution Policy* (visited Feb. 21, 2001) <http://www.icann.org/udrp/udrp-policy-24oct99.htm>. Pursuant to Internet domain-name dispute policies, a holder of a valid trademark registration can make a claim against a domain-name holder only where: the domain-name is confusingly similar to the trademark, the registrant has no legitimate interest in the domain-name and the domain-name had been registered in bad faith, *id*. at ¶ 4(a). Network Solutions, Inc.'s latest domain-name dispute policy is the same as the Uniform Domain-Name Dispute-Resolution Policy ("UDRP") drafted by the Internet Corporation for assigned Names and Numbers ("ICANN") because ICANN requires all domain-name registrars us to it.

165 *See* Network Solutions, Inc., *Network Solutions' Domain-name Dispute Policy* (visited Feb. 8, 2001) <http://www.networksolutions.com/en_US/legal/dispute-policy.html> at ¶ 4(k).

166 *Id*. at ¶ 3(b).

167 Even though NSI and ICANN have made efforts to draft fair domain-name dispute polices, because the polices logically must provide redress to the courts as an alternative method of resolving disputes, the possibility for reverse domain-name hijacking still exists where *Brookfield*-type circumstances occur.

168 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1053 (9th Cir. 1999)

169 *Id.* at 1042. Brookfield first contacted West Coast via its cease-and-desist letter on November 11, 1998. *Id*. However, Brookfield was aware that West Coast had registered "moviebuff.com" sometime before May 1996 (the opinion explains that after learning of West Coast's prior registration of the domain, Brookfield subsequently registered "brookfieldcomm.com" in May 1996). *Id*. Therefore, Brookfield must have been on notice West

tions Brookfield allowed two years to pass before it took action,[170] the court gave the complete relief requested.[171]

One consequence of the *Brookfield* decision is that trademark registration may become a prerequisite to successful domain-name registration or to maintain rights in a domain-name of a web site currently operating. Furthermore, *Brookfield* demonstrates innocent infringers, like West Coast, may fall victim to reverse domain-name hijacking before the site is launched. One commentator explained, due to the threat of reverse domain-name hijacking, Internet entrepreneurs should trademark their domain-name with the PTO before spending development dollars on a web site.[172]

Seeking trademark registration of domain-names prior to launching the site involves filling an "Intent To Use" (ITU) application with the PTO.[173] Filing the ITU application amounts to constructive use of the mark with full trademark protection being awarded when the applicant provides a statement to the PTO that the mark has been used in commerce.[174] However, since it costs between $25-$50 to register a domain-name[175] and trademark searches can range between $700 to $1000,[176] this cost differential may pose additional expenses previously considered unnecessary. In addition, one commentator has noted the trademark search process became more complex in the 1990's as users invented new frontiers for trademark law while applications for new marks increased.[177] Therefore, if *Brookfield* is construed to mean the PTO may be used to reverse domain-name hijack a web site to obtain its domain-name, then many current sites and those under devel-

Coast had intentions of launching a site at "moviebuff.com" but waited over two and a half years to contact West Coast.

170 *Id*. at 1061.

171 *Id*. at 1043-44.

172 *See* ANDREW R. BASILE, JR., *Rights to Domain-names*, *in* ONLINE LAW 236 (Thomas F. Smedinghoff et al. eds., 1996).

173 *See* 15 U.S.C. § 1051(b) (1999). Intent to Use Applications under the Lanham Act permit "[a] person who has a bona fide intention. . .to use a trademark in commerce [to] request registration of its trademark. . .by paying the prescribed fee and filing in the Patent and Trademark Office an application. . .." *Id.*

174 *See* 1 MCCARTHY, *supra* note 25, § 19:12-13. Upon a showing of "good cause" an ITU applicant may defer presenting its statement of actual use of the mark to the PTO for up to three years, *id.*

175 *See* Network Solutions, Inc., *Web Address Registration* (visited Feb. 8, 2001) <http://www.networksolutions.com/en_US/catalog/domainname/> (NSI's registrations prices are as follows: $25 for ".org", $30 for ".net", $35 for ".com" and $50 for ".tv").

176 *See* Trademark Edge, *Trademark Search Services* (visited Feb. 8, 2001) <http://www.trademarkedge.com/search/services.htm>. Trademark search costs vary considerably ranging from $700 to $1000 with costs increasing dramatically for international searching, *id*.

177 *See* Glenn A. Gunderson, *Expansion of Trademark Law Yields Trickier Search*, 21 NAT'L. L.J., May 31, 1999, at C9. Trademark search firms are finding it harder to maintain the reliability of the search process, *id*. Trademark applications "almost doubled" from about 112,000 filings in 1990 to 200,000 in 1998, *id*.

opment could be subject to litigation. A domain-name will be harder in the future to retain unless one can demonstrate use that is sufficient for Lanham Act purposes or obtain a federal trademark for the domain-name.[178]

2. Advertising Principles and Domain-names

Basic advertising principles apply in selecting a domain-name.[179] A domain-name should be catchy, short, and easy to remember.[180] However, unlike traditional trademark law, only one entity can use a domain-name.[181] The scarcity of domain-names is further impacted by the reality that the only "top-level" domain that has any significance in the publics' mind is the ".com" extension.[182] Although the ".com" domain is primarily for commercial entities, it is also a "catch-all" domain.[183] The significance of ".com" domains is also evidenced by the fact "cyber pirates," who register domain-names in an effort to ransom them back to the trademark owner, generally only select ".com" domains.[184] The coveted ".com" ending, which the majority of firms seek, results in firms obtaining this domain at great cost and effort; therefore organizations focus on ".com" domains when attempting to register domain-names.[185] However, only a finite number of desirable domain-names are available. As more entities engage the Web, se-

178 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1051 (9th Cir. 1999) (explaining use in commerce for Lanham Act purposes means the mark is used in conjunction with "actual sale of goods or services").

179 *See* Barger, *supra*, note 1, at 624. Typically companies prefer short "footprint" advertising names to meet the long-term demands of advertising and marketing and provide consumers with a name that is easy to remember and identify, *id*.

180 *Id.* at 625. As pointed out by Montaigne, "it is advantageous to have a handsome name and one that is easy to pronounce and retain, for thereby kings and queens recognize us more easily and are less apt to forget us," *id*.

181 *See* OBH, Inc. v. Spotlight Magazine, Inc., 86 F. Supp. 2d 176, 181 (W.D.N.Y. 2000) ("a particular domain-name can only identify one web site").

182 *See*, *e.g.*, *Brookfield*, 174 F.3d at 1044. Examples of typical domain-name guessing procedures presented by the court only use ".com," ("Web users often assume. . .the domain-name [will end with] '.com.'") *id.* at 1045; "Web users often assume, as a rule of thumb, that the domain-name of a particular company will be the company name followed by '.com,'" *id.*; Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998) ("The domain-name often consists of . . . a company's name or trademark. For example . . . Pepsi.com.").

183 *See Panavision Int'l*, 141 F.3d at 1318.

184 *Id*. at 1318-19 (describing a "cyber pirate" who attempted to sell many famous trademark domain-names to trademark owners such as: panavision.com to Panavision for $13,000, intermatic.com to Intermatic, Inc., for $10,000, and americanstandard.com to American Standard, Inc., for $15,000). *See also* Barger, *supra*, note 1, at 631 (noting parties other than the trademark owner had registered all of the following trademarks as domain-names: mtv.com, hertz.com, esquire.com, fox.com, coke.com, abc.com, nasdaq.com, mci.com and mcdonalds.com).

185 *See* Gunderson, *supra*, note 177, at C9 (discussing the "rapid transformation of the '.com' domain from technological curiosity to commercial necessity").

curing a ".com" domain will be more difficult.[186] One court explains that because a domain-name, like a mailing address, identifies only one location, the entity that owns "an intuitive domain-name owns a potentially valuable asset."[187] The owner of the intuitive domain has the likely benefit that users will more easily find its web site instead of one of its competitor's since users can more accurately guess the site address.[188]

Furthermore, the practice of omitting spaces between words and squeezing the phrase together to aid in branding the web site has become commonplace.[189] In domain-name registration and domain-name guessing, the practice of "space omission" in relation to multi-term phrases prevails. Any multi-term buzz word or phrase that relates to an entity off-line, when pursued online will be pursued initially without the spaces.[190] Because of this space omission custom, companies intentionally prefer registering multi-term off-line phrases as single term domains without hyphens or underscores. Similarly, the use of a dash or underscore in a multi-term phrase is an undesired alternative for the Johnny-come-lately domain registrant. The domain-name guessing scenarios contemplated by courts in cyber disputes do not indicate Internet users would attempt to guess a domain-name with dashes or underscores.[191]

In light of the space omission custom, West Coast's decision to register "moviebuff.com" instead of "movie-buff.com" (with a dash) or "movie_buff.com" (with an underscore) was perfectly logical and legitimate in light of the level of domain-name knowledge the general public possesses. West Coast's decision to take the salient portion of its service mark[192] "Movie Buff," and register it as

186 *See* Barger, *supra*, note 1, at 654-56. Although a finite number of domain-names are available an estimated 5,200 domain-names are registered every month, *id*.

187 OBH, Inc. v. Spotlight Magazine, Inc., 86 F. Supp. 2d 176, 181 (W.D.N.Y. 2000).

188 *Id*.

189 *See*, *e.g.*, *OBH*, 86 F. Supp. 2d at 188 ("thebuffalonews.com" for "The Buffalo News", "planned parenthood.com" for Planned Parenthood) (citation omitted). Other examples include the major record label, Capitol Records' flagship web site "hollywoodandvine.com" (after the corner where the Capitol Tower is located), americanstandard.com, whitehouse.com, moviebuffonline.com, brookfieldcomm.com, inhollywood.com and westcoastvideo.com.

190 *See* Bigstar Entertainment, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 205 (S.D.N.Y. 2000) (web site addresses are "characterized by the style of uniformly lower case lettering and compressed wording").

191 *See*, *e.g.*, *OBH*, 86 F. Supp. 2d at 191 (web users looking for "The Buffalo News" web site may attempt to enter "thebaffalonews.com"); Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1045 (9th Cir. 1999) (web users looking for Kraft Foods, Inc. might try "kraftfoods.com," users looking for USA Today might try "usatoday.com").

192 *See Brookfield*, 174 F.3d at 1042. West Coast provided examples of ads where the key term "Movie Buff" was included in each ad: "The Movie Buff's Gift Guide", "The Movie Buff's Gift Store", "Calling All Movie Buffs!", "Good News Movie Buffs!", "Movie Buffs, Show Your Stuff!", "the Perfect Stocking Stuffer for the Movie Buff!", "A Movie Buff's Top

"moviebuff.com" in an effort to acquire an intuitive domain, follows basic advertising principles. Had the court recognized that space omission is the general rule, not the exception with regards to domain-names, it may have decided the case differently. West Coast's selection of the domain-name most likely was not intended to be a trademark but as an easy to remember "cyber calling-card."[193]

a) Space Wars and Descriptive Domains

Due to the Internet practice of omitting spaces in domains that include multiple terms, a party's mark, which is viewed as unique and protectable off-line, may be less unique and considered merely a descriptive term in the online context. Although both parties in *Brookfield* agreed the term "MovieBuff" should be classified as suggestive within the spectrum of trademark terms subject to protection,[194] the boundary line between descriptive and suggestive marks has been considered "illusory" and "chimerical."[195] A company that takes two plain words and combines them together to create a descriptive phrase, which directly relates to the company's industry or product, "does not, ipso facto, create an inherently distinctive mark."[196] Brookfield's selection of the plain words "movie" and "buff" and then combining them together to create a trademark, which related to a software database on the film industry, required little imagination. Brookfield's mark is one that arguably sits on the illusory border between descriptive and suggestive marks, and, therefore, the "probability of duplication of words not particularly unique such as ['movie buff'] in entertainment is high."[197]

*Brookfield* would permit West Coast the right to use "appropriate descriptive term[s] in its metatags. However, 'MovieBuff' is not such a descriptive term."[198] The court explained "[e]ven though ['MovieBuff'] differs from "Movie Buff" by only a single

Ten", "The Movie Buff Discovery Program", "Movie Buff Picks", "Movie Buff Series", "Movie Buff Selection Program", and "Movie Buff Film Series." *Id*.

193 *See* 1 MCCARTHY, *supra* note 25, § 7:17.1 (domain-names, like street addresses, permit one to locate a place or a person, do not, without more, function as trademarks).

194 *See Brookfield*, 174 F.3d at 1047 n.9. Had West Coast disagreed with Brookfield that "MovieBuff" was a suggestive term, and instead argued it was merely descriptive, the court may have reached a different result.

195 *Bigstar*, 105 F. Supp. at 198.

196 *Id.* at 199-200 (explaining no "thought gymnastics" are required to span the gap between plaintiff's entertainment products it sold and its mark "BIGSTAR," which plaintiff argued was a suggestive mark).

197 *Id.* at 201 (noting the use of "big star" or some close adaptation of the words in the entertainment industry "increases the element of predictability of some good faith recurrence or resemblance of the name, and diminishes the first user's reasonable expectation of exclusivity and the likelihood of surprise.").

198 *See Brookfield*, 174 F.3d at 1066.

space, that difference *is pivotal*."[199] However, the difference *is not* pivotal in cyberspace as a result of space omission.[200] West Coast registered the salient portion of its well-known service mark, a two-term phrase "movie buff" as "moviebuff.com." One benefit of this domain-name is that it *is* descriptive and indicates that the web site may be related to the motion picture industry. Once West Coast had registered "moviebuff.com," it was perfectly logical for it to include the term in its meta tags since web users searching for West Coast's Movie Buff web site would initially guess the domain with the spaces omitted. Off-line, although spelling "MovieBuff" without the space is uncommon, it is still descriptive of the motion picture industry. However, online, in the language of the World Wide Web and domain-name traditions, Movie Buff and "MovieBuff" would both be initially spelled as "moviebuff.com."

The court in *Brookfield* stated: "The term 'Movie Buff' is a descriptive term, which is routinely used in the English language to describe a movie devotee. 'MovieBuff' is not."[201] However, since most multi-term phrases for domains are squeezed together, the meaning of the term "Movie Buff" in the English language has the same meaning in the language of the World Wide Web when it is spelled as "moviebuff.com." Therefore, due to space omissions practices in domain-names, the use of plain words in a domain, which are combined, should be considered merely a descriptive term, entitled to no trademark protection without secondary meaning.[202] The PTO's present policy regarding registration of domain-names as marks explains where a mark is composed of merely descriptive terms combined with ".com" (or any other top level domain extension) registration should be refused because such is merely a descriptive mark.[203] Where secondary meaning has not been established, a descriptive multi-term domain most likely will belong to the party who registers it. The e-commerce sites dedicated to trading in, auctioning off, and providing brokerage services for domains made up of every type of conceivable de-

199 *Id*. (emphasis added).

200 *See supra* notes 189-91 and accompanying text for a discussion of the practice of space omission online.

201 *See Brookfield*, 174 F.3d at 1066.

202 *See Bigstar*, 105 F. Supp. 2d at 202 (secondary meaning for a descriptive mark occurs where the public primarily associates the term with a certain source).

203 *See* United States Department of Commerce, Patent and Trademark Office, *Marks Composed, In Whole Or In Part, Of Domain Names,* Examination Guide No. 2-99 at § IV (visited Feb. 8, 2001) <http://www.uspto.gov/web/offices/tac/notices/guide229.htm>. The PTO explains by way of example, if the mark were "NATIONAL BOOK OUTLET.COM" for a trademark for a retail book store service, then registration should be denied, *id*. It is interesting to note, the PTO's example does not compress the descriptive terms, nor use underscores, nor hyphens, most likely implying regardless of which approach is used to combine the terms, it would still be considered descriptive.

scriptive phrase suggest evidence of this approach.[204] Clients of domain-name auction sites are entities interested in obtaining a catchy domain-name that in some way directly relates to and will aid visitors in associating the domain-name with the product or service the entity sells, e.g., "bigstar.com" would be attractive to entertainment related entities and "moviebuff.com" could be useful for any film and video industry related entity. In *Brookfield*-type situations, where secondary meaning has arguably not been show, the first party to register a multi-term phrase as a domain should prevail.[205]

b) Concurrent Primary Users

In considering reverse domain-name hijacking, one commentator classified two types of parties who are victims of the practice. "Concurrent users" are users of the same mark but for different products and services.[206] The other group are individuals, "innocent registrants," who registered the domain-name because it had a special meaning to them personally.[207] Both types register their domains "without any improper motive."[208] This Note proposes a third category to recognize: "concurrent primary users." A "concurrent primary user" would be an entity which: (1) could point to a legitimate good faith reason for selection of the phrase; (2) was not involved in competition or only in indirect competition with the reverse domain hijacker or unaware of the hijackers existence; and (3) established its web service prior to the reverse domain hijacker's date of filing for a federal trademark.[209] West Coast satis-

204 Examples of domain brokerage sites include: www.domainbook.com, www.afternic.com, www.greatdomains.com, www.domains.com and www.buydomains.com.

205 The Ninth Circuit found Brookfield's mark a suggestive mark but the reasoning is less than convincing: "Brookfield's trademark is not descriptive because it *does not describe* either the software *product* or its *purpose*. Instead, it is suggestive—and thus strong enough to warrant trademark protection—because it requires a mental leap from the mark to the product." *Brookfield*, 174 F.3d at 1058 (emphasis added). However, a film industry database potentially *does* target consumers who could reasonably be described as motion picture enthusiasts (e.g., movie buffs). Therefore, little imaginative energy is required to make the mental leap from the terms meaning (a person knowledgeable about the film industry) to the source product (a film database) and its purpose (to assist one in acquiring more knowledge about the film industry). A movie buff, like a sports buff or car buff seeks materials, which will further enhance her understanding. A movie buff utilizing Brookfield's MovieBuff database would "not come away with an impression about [Brookfield's] mark[ ] other than that [it] immediately describe[s] [a] product [dealing with] the motion picture industry." *Bigstar*, 105 F. Supp. 2d at 200. Hence, because Brookfield's mark was weak and no secondary meaning was shown, it should have been considered descriptive and unprotected.

206 *See* Swartz, *supra* note 6, at 1495.

207 *Id.*

208 *Id.*

209 Although this note's focus is on the domain-name dispute area, no reason exists to limit the analysis of good faith concurrent primary users to domain-name disputes. Such an approach may be useful in other areas of trademark law such as disputes between two parties as to who has rights to a "1-800" number. For example, if a national herpetologists

fied the first two criteria but had not established its site prior to Brookfield's federal application date.[210]

The reason for the need to recognize this third category is because the *Brookfield* decision may encourage an organization to engage in reverse domain-name hijacking. Such practices are bad for the Internet and the general marketplace.[211] Discouraging the practice of reverse domain-name hijacking is a key objective for Internet organizations such as ICANN and WIPO.[212] *Brookfield* eliminates the popular belief that once a domain-name is successfully registered; it is yours, regardless of when the site is actually

club called the "Vipers" had registered "1-800-Go-Viper" long before Dodge unveiled its new sports car the Viper, should Dodge be able to bring a suit to prevent such a use? If the Viper club can demonstrate a legitimate reason for selecting the number such as making it easier for members to contact the club, the Viper club is not in competition with Dodge, and the Viper club had the number prior to Dodge's date of filing for a federal trademark, then it would be an injustice to prevent the Viper club from continuing its use of "1-800-Go-Viper." Granting Dodge the rights to such a vast number of uses for its federal registration of the mark, even uses that are already underway by other parties for good faith reasons, would be giving trademark owners too much power and introducing a new level of uncertainty into the market with unclear consequences. However, the argument for and application of the concurrent primary user analysis, by no means should be interpreted as discouraging federal trademark registration. The rational for recognition of concurrent primary users is merely for a limited class of good faith parties who satisfy certain elements that qualify them for protection from "reverse domain-name hijacking" type situations.

210 An "established" web site should mean something sufficiently more than placing a page online that is nothing more than a "reserved" mark.

211 A strong public policy encourages trademark registration. It centralizes management and control of marks and is a good system for attempting to avoid duplication and minimize confusion that would result in consumers being unclear as to which mark identified which goods and what level of quality could be expected. However, there are also policy reasons to protect individuals other than corporate America, who have long before set up shop so to speak, and established recognition in their geographic area of their good or service associated with a mark, but failed to take the additional step of registering with the PTO. Section 33(b)(5) of the Lanham Act recognized this interest by protecting the first party to adopt and use a mark in a particular geographical area. *See* 15 U.S.C. § 1115(b)(5) (1999). Because there are other mechanisms at work, which centralize and control the issuing of domain-names and "1-800" numbers, such as domain registrars and telephone companies, by requiring all parties which engage these other mechanisms with the additional requirement of having to obtain a federal trademark before they can safely put the domain or "1-800" number to use is too burdensome and such a view is lopsided in favor of large entities which can afford federal trademark registrations for every concept, product and service developed. It is unfair to require the astronomy club that wants to register the domain-name 'saturn.com' to first obtain PTO registration. *See*, *e.g.*, Mike France, *The Net: How To Head Off Big-Time Regulation*, BUSINESS WEEK, May 10, 1999, *available in* 1999 WL 8227313. The author ponders: "If an astronomy club or New Age religions sect is first to register 'Saturn.com,' . . .why should the car company later be able to boot it off?" *Id*.

212 *See* David McGuire, *ICANN Board Passes Dispute Resolution*, NEWSBYTES, August 26, 1999, *available in* 1999 WL 20019222. The Internet Corporation for Assigned Names and Numbers (ICANN) is a not-for-profit firm supported by the US Commerce Department seeking to create competition into the domain-name registration process, *id*. Minimizing reverse domain-name hijacking is a one of ICANN's primary concerns, *id.* They are seeking to establish rules "sensitive to the rights of individual domain-name holders," *id.*; France, *supra* note 211, at WL 8227313 (explaining the World Intellectual Property Organization (WIPO), an arm of the U.N., is working on resolving domain-name issues in light of reverse domain-name hijacking).

launched.[213] *Brookfield* instructs organizations desiring domain-names already registered to others, that the domain may nevertheless still be obtainable if the organization is willing to engage in selling a product under the same name or registering a trademark under the same name.[214] Since the Web is fast becoming a "natural zone of expansion" for all, *Brookfield* is a green light for major corporations to lay claims to domain-names previously registered to other parties. Entities with significant financial resources may now obtain federal trademark registration of a domain-name registered to another and then threaten the other party into yielding the domain-name or be faced with an expensive lawsuit. Trademark owners will claim that since the Web was within the organizations "natural zone of expansion," the prior domain-registrant is an infringer and must forfeit the domain or cease use of it.[215]

c) Repeat Visitors

West Coast's offering of a consumer targeted film industry database was a way to attract customers to the site. The more "traffic" a site has, the better it looks to potential banner advertisers and investors.[216] West Coast offered the database free as a further enticement.[217] In addition, to West Coast's desire to use "moviebuff.com" because it was the salient part of its service mark, the domain-name was appealing because it helped remind visitors the site offered movie information and trivia. It was logical to name the web site "moviebuff.com" since it catered to film enthusiasts. Although the court recognized West Coast may use the term "Movie Buff" if it desired,[218] West Coast had a better chance of getting visitors to both remember the site and return if

213 *See* Andrew S. Mansfield and James P. Jenal, *'Brookfield' Sets Standards on Domain-name Rights*, NAT'L L.J., May 31, 1999, at C3. The authors point out, the Ninth Circuit's requirements for protecting domain-names though well reasoned are "contrary to the practice of many domain-name holders, who often register, purchase and hold domain-names for years before using them 'in commerce,'" *id*.

214 *Id.* Where a company fails to use a domain-name, *Brookfield* indicates another can do an "end-run around" the company to obtain rights to the name by marketing software or Internet services with the same name, *id*.

215 Exploring whether the "natural zone of expansion" doctrine should not apply for infringement cases involving the Internet would be a worthy research project but is beyond the scope of this note.

216 *See* ACLU v. Reno, 31 F. Supp. 2d 473, 487 (E.D. Pa. 1999) (citing Hoffman Testimony). The level of web "traffic" at a site is a critical factor evaluated by Internet investors. *Id*.

217 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1057 (9th Cir. 1999).

218 *Id*. at 1066.

it could use "moviebuff.com" instead of, or in addition to, "movie_buff.com" or "movie-buff.com."[219]

The *Brookfield* holding is good news for large corporations who have been trying to establish a rule that they are entitled to any domain-names using their trademarks—"no matter who gets there first."[220] WIPO has been holding deliberations in an attempt to resolve some of the problems with domain-name disputes. The solutions however, are lopsided in favor of the multinational corporations who can afford to attend the public hearings in such locations as Brussels and Sydney.[221]

3. Solutions

If the three conditions for status as a "concurrent primary user" are met,[222] then a trademark owner should be unable to use its recently approved federal trademark registration as a tool to hijack the prior domain-name registration. When faced with a domain-name dispute, a court may use the *Brookfield* approach to determine who is the senior user and whether likelihood of confusion exists. However, where a defendant appears to be a "concurrent primary user," then the plaintiff should be prohibited from using the federal trademark registration as a means to prevent the defendant's use of the domain-name.[223] The basic rule of first in time should apply to such situations.

Where concurrent use is at issue, mere registration of the domain should be sufficient to grant priority of online use. If two concurrent users, both with legitimate off-line rights to use a mark, engage the Internet, it is reasonable to award the first party to register the mark as a domain with the rights to use it. For example, "delta.com" does not belong to Delta Airlines or Delta Faucets but to Delta Financial Corporation.[224]

219 Although the court did not address the issue, it appears the *Brookfield* result would have been the same based on the confusion analysis had West Coast registered all three versions of "moviebuff.com" (including movie-buff.com and movie_buff.com).

220 *See* France, *supra* note 211.

221 *Id.*

222 *See supra* note 209 and accompanying text discussing concurrent primary uses. The three conditions are: (1) a legitimate reason for selection of the domain; (2) involvement in indirect competition with the hijacker or unaware of the hijackers existence; and (3) establishment of a web service prior to the hijacker's date of filing for a federal trademark.

223 This rule presumes the defendant has actually launched the web site and the plaintiff has recently obtained the federal trademark registration.

224 *See* OBH, Inc. v. Spotlight Magazine, Inc., 86 F. Supp. 2d 176, 180 (W.D.N.Y. 2000) (using the "delta.com" example to demonstrate that domain-name guessing is not an exact science). It would be interesting to consider whether Delta Airlines, learning "delta.com" was unavailable could then register "delta.net" and Delta Faucets, learning that "delta.com" and "delta.net" were unavailable were able to register "delta.biz." As new top level domains are created to deal with the demand for domain-names, such problems are inevitable, but these considerations are beyond the scope of this paper. *See* Andy McCue, COMPUTING, Nov. 24, 2000, *Cybersquatters Target New Domain Names* (visited Feb. 26, 2001) <http://www.vnunet.com/News/1114457> (warning that due to the approval of seven

## B. Search Engines & Meta Tags

Liability for meta tag infringement[225] is not novel to *Brookfield*.[226] However, *Brookfield's* failure to realistically analyze Internet technology and use of "analogous" off-line infringement situations seriously undermines its analysis of potential meta tag infringement. The traditional trademark law analysis ignored the objective reality of Internet technology and use. For example, some search engines do not rely on meta tags.[227] Furthermore, *Brookfield* confounded the analysis of meta tag infringement by creating suspect real world analogies. Finally, the decision allowed a "fair use" alternative. The court's analysis fails on all three counts.

### 1. Technically Inaccurate

The court presented two scenarios involving the use of Internet search engines to discover the location of a web site in explaining meta tag infringement. The court focused in the first scenario on West Coast's use of "MovieBuff" in its meta tags, concluding if West Coast's domain-name were "westcoastvideo.com," then confusion was unlikely. The court explained in the second scenario that West Coast's use of "MovieBuff" or "moviebuff.com" in its meta tags could result in potential consumer confusion. The confusion was presumed in the second scenario even if West Coast were to use a domain-name other than "moviebuff.com," such as "westcoastvideo.com." The court stated that by using "movie buff.com" in the site's meta tags, visitors would be led to the site under false pretenses.

#### a) Home Pages—"The Welcome Mat"

In the court's first scenario, a web user at a search engine entered what she was looking for and then the search engine produced a "list" of potential web sites which attempted to match the search criteria.[228] The court explained a "web user" in "*scanning*

new top level domains; .aero, .biz., .coop, .info, .museum, .name, and .pro, web entities will have to come up with a domain-name strategy which goes beyond "dot com" to combat a potential new wave of cybersquatting).

225 The phrase "meta tag infringement" is used to describe the phenomenon of a web site that has embedded in its meta tags the trademarks of another company in an effort to increase visitors, divert traffic or other improper purposes.

226 *See* Playboy Enters., Inc. v. Asiafocus Int'l, Inc., No. 97-734-A, 1998 U.S. Dist. WL 724000, at *3 (E.D.Va. Apr. 10, 1998). An operator of an adult web site was found liable for trademark infringement by using the marks "Playboy" and "Playmate" in its HTML code (which would include the sites meta tags). *Id.*

227 *See*, *e.g.*, Lastowka, *supra* note 52, at 847-48 (explaining that Yahoo relies on human effort to categorize web page content, not automated programs which rely on meta tags); Excite also claims to ignore keyword meta tags. *Id*. at 850 n. 74.

228 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1062 (9th Cir. 1999)

the list . . .*chooses*" a site from the list produced.[229] The act of "scanning" demonstrates a web user must read the descriptions of the results on the list and then make a decision as to which site suits her needs. In choosing a site, the user must "click" the mouse on the result that appears the most relevant to her needs. Web users do not blindly jump to web sites but actually read the results of a search and then consciously select the destination that looks most promising.

The court explained because a different domain-name, "westcoastvideo.com" instead of "moviebuff.com" was used, a visitor could confirm she was at the proper destination by not only checking what the web address was, but also by looking at what was displayed on the home page. A visitor would not be confused about whose site she had reached because she would see the home page "prominently displays its own name" along with knowing the web address matches this name.[230]

Problems exist with this example. Initially, the court recognized West Coast's use of "moviebuff.com" was likely to confuse visitors as to who actually sponsored the site.[231] The court did not discuss in this prior analysis what would be displayed on the home page of West Coast's site.[232] Instead the court glossed over exactly what it later stated to help validate this example, which is that West Coast's home page would prominently display West Coast's own name.[233]

In this example, the court discusses one of the most widely understood components of the Web, the home page. Yet the court overlooked the primary purpose of a home page. A home page is the first page displayed when a visitor arrives at a web site. It is similar to the "welcome mat" in that it invites the visitor to enter the site. In welcoming the visitor to the site, a primary objective of a home page is to clearly reveal the nature of the site and what company sponsors the site. Whether West Coast is using the do-

229 *Id.* (emphasis added).

230 The court provided no authority for its general presumption Web users generally take note of the domain-name address when they arrive at a site. The presumption ignores four key observations. First, the location/address bar on the web browser may be turned off so the user cannot see it. Second, when a person arrives at a page, the last place their eyes are focused on is what the location/address bar reads. Third, web site home pages do not necessarily match domain-names (e.g., the domain-name "hollywoodandvine.com" is the web address for the flagship web site of Capitol Records, not "www.capitolrecords.com"). Fourth, the individual may have arrived via a link that does not mention the site name. *See* Lastowka, *supra* note 52, at, 850 (explaining that although most search engine result pages include the listed page's title in the results, search engines vary greatly in what type of additional information will be included on the result page, such as the web site address of the listed page, the last day the page was indexed or the last day the page was updated).

231 *See Brookfield*, 174 F.3d at 1057. "Web surfers are more likely to be confused as to the ownership of a web site than traditional patrons of a brick-and-mortar store." *Id.*

232 *Id.* at 1053-60.

233 *Id.* at 1062.

main-name "moviebuff.com" or "westcoastvideo.com," it will *prominently display* its own name. Nevertheless, *Brookfield* reasoned by changing the domain-name, confusion as to sponsorship will disappear. Since West Coast would display its own name prominently on its home page regardless of which domain-name was used, the opinion over emphasized the importance of a domain-name in its prior analysis. In this later example, it minimized this factor as practically nonexistent.[234]

*Brookfield's* analysis ignored the fact when web users arrive at West Coast's home page, they will see the West Coast name and realize it is not Brookfield's despite what the browser's address or location bar states is the domain-name for the page.[235] Furthermore, web browser options are customizable by users. Any web user has the ability to turn off the address bar or location bar feature in order to view more of the web page, and users with smaller monitors and laptops quickly learn how to customize their web browsers for such reasons. The court therefore erroneously concluded if West Coast were to use a domain-name other than "moviebuff.com," such a change would significantly reduce the prior confusion regarding sponsorship of the site.

b) The Non-Pervasive Internet

In describing the second scenario, the court failed to understand how search engines work. The court explained: "Web surfers looking for Brookfield's 'MovieBuff' products who are *taken by a search engine* to 'westcoastvideo.com' . . .will simply decide to [use] West Coast's offerings instead."[236] This statement is technically incorrect. One cannot be "taken by a search engine" anywhere. Interfacing with a search engine requires reading the listed results and choosing the one that looks the most promising. Unlike television and radio, the Internet is non-pervasive.[237] It does not transmit material to individuals at all times in all locations. A person who wishes to access content on the Internet must actively pursue it by getting connected, searching, reading, and then physically "clicking" a mouse button on the applicable hyperlink to retrieve the content.

234 *Id*. The court states since West Coast's home page "prominently displays its own name, it is difficult to say that a consumer *is likely to be confused about whose site he has reached,*" *id.* (emphasis added).

235 Depending on which options a web user selects to be displayed from a web browsers "view" menu; web browsers can display an "address bar" (for Internet Explorer or "location bar" on Netscape Navigator) at the top of the screen, which will reveal the URL (uniform resource locator) for the web page currently being viewed. Included within this URL is the domain-name for the web site (e.g., http://www.moviebuff.com/index.htm).

236 *Brookfield*, 174 F.3d at 1062 (emphasis added).

237 *See* ACLU v. Reno, 929 F. Supp. 824, 875, 876 n.19 (E.D. Pa. 1996) (explaining the operation of a computer is not as simple as turning on a television and therefore the Internet is not "uniquely pervasive" like broadcast television and radio).

The court stated in its first scenario that reading the results is the way web users interact with search engines, when it explained a "list" of results is produced and by "scanning such list", web users would be able to find the web site they are "seeking."[238] If a web user is going to be "scanning" a list and "seeking" Brookfield's "MovieBuff," then she will be searching for a result which includes: "Home of Brookfield's "MovieBuff" or "The Official Home of Brookfield's 'Movie Buff.'" The Web user is thus more likely to avoid a site by West Coast even if it is returned on the search results since it does not match the sought criteria. The misunderstanding of how search engines are utilized weakens the reasoning offered in the analysis.

c) Inconsistent Analysis

In the first meta tag scenario, the court explained West Coast's use of "MovieBuff" in meta tags would *not* likely lead to confusion due to the domain-name being "www.westcoastvideo.com" and the home page prominently displaying West Coast's own name.[239] In the second scenario, the court explained that the use of "www.moviebuff.com" in meta tags at West Coast's "www.westcoastvideo.com" site would lead to initial interest confusion.[240] However, West Coast would still be prominently displaying its own name at this site regardless of whether West Coast uses "MovieBuff" *or* "www.moviebuff.com" in its meta tags.

The court reasoned that the use of "moviebuff.com" *or* "MovieBuff" in West Coast's meta tags at its "westcoastvideo.com" site would result in initial interest confusion apparently forgetting that in the preceding paragraph it stated confusion as to sponsorship would be unlikely where "MovieBuff" was used in the meta tags. The two scenarios proposed by the court are inconsistent with each other. The first one appeared to provide a situation where it would be unlikely meta tag infringement would be actionable. The second scenario presented a situation where it appeared such conduct would be improper. By later stating that using "MovieBuff" *or* "moviebuff.com" would be improper, it contradicted its prior "MovieBuff" analysis of meta tag infringement where it stated confusion was unlikely.

2. Initial Interest Confusion

"Initial interest confusion" is not recognized in all jurisdictions. *Brookfield* adopts the rationale of courts finding "initial in-

238 *See Brookfield*, 174 F.3d at 1062.
239 *Id.*
240 *Id.*

terest confusion" to be actionable under the Lanham Act.[241] However, to create a cause of action for this practice under the circumstances presented here is not only extending the right of trademark owners to an unreasonable extent, but will create a significant amount of litigation. Other courts considering initial interest confusion have correctly found such "brief confusion is not cognizable under the trademark laws."[242]

The reason initial interest confusion should not be actionable, especially in the Internet context, is due to the brevity of the confusion and the minimal inconvenience to the web user. When a web user arrives at a wrong destination, all she needs to do is press the "back" button on her web browser and attempt a new search. As one court correctly observed, the harm is minimal: "With one click of the mouse and a few seconds delay, a viewer can return to the search engine's results and resume searching for the original website."[243] The *Brookfield* decision is suspect because it appears unfamiliar with the Internet and the general experiences occurring online. In recognizing initial interest confusion online, the court created too high an expectation for the Internet, demanding surfing the Web be a precise experience with exacting results. Although new Internet technologies such as cable modems and digital subscriber lines (DSL) are making web surfing easier and faster, the majority of users still rely on dial-up modems,[244] resulting in an often slow, frustrating process. Arriving at the wrong destination is a common aspect of surfing the Web. True, it can be argued that in the aggregate all of the trips back to a search engine to try again to find the sought-after destination results in a significant waste. Search engines have a profit motive to improve themselves and increase the accuracy of their searches so as to offer their customers a better web experience.[245]

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241 *Id. See also* Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 257-58 (2d Cir. 1987); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1404-05 (9th Cir. 1997), *cert. denied*, 521 U.S. 1146 (1997).

242 *See* Teletech Customer Care Management (Cal.), Inc. v. Tele-Tech Co., 977 F. Supp. 1407, 1410, 1414 (C.D. Cal. 1997). *See also* Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 125 (D. Mass. 1999) (explaining the inconvenience experienced from initial interest confusion online "is not substantial enough to be legally significant").

243 Bihari v. Gross, 119 F. Supp. 2d 309, 320 n.15 (S.D.N.Y. 2000).

244 *See* Sally Blodgett, *Net Ratings Investor Relations* (visited Feb. 8, 2001) <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=NTRT&script=411&layout=-6&item_id=104297>. According to Nielsen//NetRatings data (the Internet audience measurement service of Nielsen Media Research and NetRatings, Inc.), web users in the United States primarily use modems to get online, *id.* A November 1999 survey revealed only 5.9 percent of home users were accessing the Internet via a high-speed connection (including ISDN, T1 lines, satellite, cable modem, DSL), *id.* The majority of modem users access the Internet using mid-speed modems providing access rates of 28.8/33.6Kbps, *id.*

245 *See* Lastowka, *supra* note 52, at 867. The author explains, "Search engines sell their ability to find information on the Web, and the force of market competition requires search engines to become better at what they do. If search engines fail to perform the search function effectively, users will not return," *id*.

Therefore, free market forces will respond to these temporary and ever-changing shortcomings.

3. Unconvincing Analogy

The court supported its rationale for creating a cause of action for initial interest confusion online by using a real world hypothetical of a person driving a car in search of a video.[246] The court explained a driver pulls off the road because she is lured to a store by the display of a competitor's trademark.[247] However, this example is not analogous to having to merely click the "back" button on a browser. The real world of brick-and-mortar stores, traffic signals, traffic jams, bumpy roads, noisy cars, fuel costs and related inconveniences are a poor analogy for the virtual confines of cyber space and the relative ease with which one can surf the Web with a few clicks of a mouse in the proverbial comfort of one's home.

The court, early in its opinion recognized, "[i]n the Internet context, in particular, entering a web site takes *little effort*."[248] Leaving a web site similarly takes little effort. One court critical of the *Brookfield* metaphor explains, "Use of the highway billboard metaphor is not the best analogy to a meta tag on the Internet. The harm caused by a misleading billboard on the highway is difficult to correct. In contrast, on the information superhighway, resuming one's search for the correct website is relatively simple."[249] A commentator cautions the use of off-line metaphors for cyber disputes as in *Brookfield's* billboard analogy "might be persuasive if meta tags were billboards, but unfortunately this is not the case."[250]

The court was concerned that permitting West Coast to use "MovieBuff" would allow it to improperly benefit "from the goodwill that Brookfield developed in its mark."[251] However, where two entities share a mutual connection to a term, which the public can clearly distinguish off-line, then major confusion is unlikely. Therefore, the question to ask is which party in *Brookfield* had more goodwill associated with the term(s) "MovieBuff" in the online world? The court stated Brookfield's "MovieBuff" mark was

246 *See supra* note 145 and accompanying text for a quote of the court's analogy.

247 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1064 (9th Cir. 1999)

248 *Id.* at 1057 (emphasis added).

249 Bihari v. Gross, 119 F. Supp. 2d 309, 320 n.15 (S.D.N.Y. 2000).

250 *See* Lastowka, *supra* note 52, at 857. The author's solution to the temptation of courts to reach for metaphors in an attempt to chart the unfamiliar Internet is to apply more accurate and useful metaphors such as analogizing a search engine results page to a thrift store discount bin filled with anything that vaguely is related to the meta tag keyword, *id.* at 859-60.

251 *Brookfield*, 174 F.3d at 1062.

not only "weak", but it also failed to present evidence of "the widespread recognition of its mark."[252] On the other hand, West Coast's service mark would likely be considered strong with widespread recognition.[253] Because Brookfield's mark was relatively weak whereas West Coast's was relatively strong, then web users, who had learned that West Coast had a web site, would probably attempt domain guessing with either "westcoast.com" *or* "moviebuff.com." Therefore, Brookfield improperly benefits from the goodwill West Coast had developed in its service mark. When the practice of space omission is considered, West Coast would clearly have a larger visitor base seeking its site via "moviebuff.com" than Brookfield. Due to the general perception that multi-term phrases off-line are viewed as single phrases on-line, the goodwill usurpation analysis is similarly unconvincing.

4. Loopholes

After prohibiting use of another's mark in one's own meta tags, the court suggested a fair use alternative that would produce the same results as meta tag infringement. The court permitted the use of "MovieBuff" on a West Coast web page in a comparative advertising context.[254] However, such use by West Coast could have the same results the court is trying to prevent in addressing meta tag infringement. If the court is willing to permit West Coast to place "Why pay for MovieBuff when you can get the same thing here for FREE?" on the visible part of its web page, then in a sense it is still authorizing a derivative version of meta tag infringement.[255]

Considering how savvy some web masters can be, this reasonable fair use alternative will soon be abused. Web masters may now start placing disclaimers and comparative fair use type ads throughout their web pages just to permit the trademark terms that appear in the phrases to be indexed by the search engines.[256] For example an adult web site may display a disclaimer it is not affiliated with "PLAYBOY" and further state throughout the page

252 *See Brookfield*, 174 F.3d at 1058.

253 *Id.* at 1042-43. West Coast's service mark, "The Movie Buff's Movie Store," was registered with the PTO in 1991 and received incontestable status after five years of use, *id.* West Coast claimed it has spent $15 million on advertisements and promotions featuring the mark, *id*. at 1043 n.5. The court described West Coast as "one of the nation's largest video rental store chains with over 500 stores," *id*. at 1042.

254 *See Brookfield*, 174 F.3d at 1066.

255 *Id.* at 1066.

256 *See* Lastowka, *supra* note 52, at 847-50. Some mechanical search engines (e.g., AltaVista) utilize web indexing programs which continually search the Web, parsing and categorizing every web page reviewed based on the terms found in the meta tags or text of the web page, *id*.

it is better than "PLAYBOY." Some[257] search engine programs do not consider whether the site is or is not affiliated with Playboy but instead place relevance on the number of times the term "PLAYBOY" appears on the page or in the keyword meta tags.[258] Search engines which factor in the number of instances of the word "PLAYBOY" found on the web page will put this page higher in the rankings of sites found when one does a search for "PLAYBOY."[259] For search engines relying on the frequency with which a term appears on a page, the result would be the same as meta tag infringement.

Fair use off-line has always granted a competitor the right to use another's mark in a comparative context. However such off-line use never had the hidden implications of search engines monitoring the frequency of the use. The court's concern about meta tag infringement therefore would not be alleviated, unless they specifically limited Internet fair use to one or two mentions of a competitor's mark on the other party's site.

The court's decision extends trademark owners' rights to new heights, granting the trademark owner the ability to challenge any competitor's use of its mark in the competitors meta tags. Such a far-reaching result overlooks the benefit a consumer may receive by permitting such use. One commentator, critical of courts' condemnation of commercial competitor use of trademarks in meta tags noted that such use is unlikely to create any additional confusion, may present an opportunity for comparison shopping, and is no different than off-line situations where retailers often group similar competing products together.[260]

*Brookfield* did not reflect on the above considerations or any benefit that may have been conferred on the public as a result of West Coast's use of "MovieBuff" in its meta tags. A benefit, however, does exist. West Coast was offering a similar product, a film industry database, at a lower price—free of charge.[261] In its efforts to protect Brookfield's mark from any potential infringing

257 An argument can be made that the best search engines would not be susceptible to such abuse. However, what is the "best" search engine online is relative considering some web surfers will continue to use a potentially less sophisticated search engine out of sheer habit. Where even only a few of these inferior search engines are still susceptible to this fair use abuse, *Brookfield's* fair use alternative provides the aggrieved plaintiff with a less than complete legal solution to its problem.

258 *Id*. at 849. The methods search engines use to rank relevant sites vary widely, but one of the primary factors is the number of times a search term appears on a web page, *id*.

259 *Id.* Although mechanical search engines are becoming more sophisticated and implementing penalties for attempts to manipulate search engine results improperly, the counter measures vary greatly in approach and effect, ranging from posting warnings such practices are unacceptable to altogether abandoning use of the keyword meta tag, *id.* at 867 n.157, 868.

260 *Id*. at 876-77.

261 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1057 (9th Cir. 1999).

use, *Brookfield* short-circuited any possibility that the Web may have provided consumers with a free, viable option. However, in trademark law, providing the consumer with a cheaper alternative is not a defense to infringement in trademark law.[262]

## C. The *Brookfield* Remedy

The relief Brookfield received was a broad and immediate injunction against West Coast, effectively "pulling the plug" on West Coast's web site.[263] West Coast was not given the opportunity to place a "we've moved" notice on its site located at "moviebuff.com" to redirect web traffic to its alternate site "westcoastvideo.com."

### 1. Switchboard Relief

The term "cyberspace" does have one important truth; plenty of room exists on the Internet. As such, when a court adjudicates a domain-name dispute, a reasonable remedy should consider this reality. A reasonable alternative in *Brookfield* would have been to have a web page displayed at the "moviebuff.com" address, directing Internet users to select between two different web sites: Brookfield's "moviebuffonline.com" or West Coast's "westcoastvideo.com." A person arriving at the page is presented with a clear choice of clicking one of two links.[264] One link would lead to the online home of Brookfield's "MovieBuff." The other link would lead to the online home of West Coast Entertainment's "Movie Buff's Movie Store." After a period of three to six months, the majority of people should be able to adjust their "favorites" and "bookmarks" to reflect the new locations of the web sites. A switchboard type relief would take up virtually no space on a web server.[265] The court could mandate the infringing party pay the web programming charges for such relief.

An analogous relief was used in *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*,[266] where a court recognized the defen-

262 *See* Neles-Jamesbury, Inc. v. Valve Dynamics, 974 F. Supp. 964, 978 (S.D. Tex. 1997) (explaining, just as good faith is no defense to a claim of infringement, it is similarly no defense to trademark infringement that a defendant is merely presenting consumers with what they demand—inexpensive or price discounted goods).

263 *See Brookfield*, 174 F.3d at 1043.

264 The switchboard relief scenario differs from the court's analysis of search engine result pages discussed previously because the switchboard page would be a special web page with only two buttons. Each button is clearly identified as being the route to either Brookfield or West Coast. This scenario would eliminate any potential confusion because there are only two options on the page and the viewer can take the time to read the descriptions of each site prior to selection.

265 A simple switchboard relief type web page with two simple buttons containing hyperlinks would be small enough in file size to fit on a 3.5-inch 1.44-megabyte floppy disk. Such a solution would pose no file storage concern with regards to the web server hosting the web site's web pages.

266 40 U.S.P.Q. 2d 1479 (W.D. Wash. 1996).

dant's equitable claim it had already committed significant sums of money in advertising for an adult web site "candyland.com."[267] The court permitted the defendant to post a notice page at "www.candyland.com" for approximately three months to give notice to visitors the web site address had changed, but active links to the new site were not allowed.[268] Similar to the defendant in *Hasbro*, West Coast claimed it had invested "considerable sums" in building the web site.[269]

2. E-mail Efficiency

West Coast indicated to the court it was using "@moviebuff.com" in e-mail correspondence.[270] The court enjoined West Coast from any further use of "@moviebuff.com," foreclosing a reasonable means for West Coast to inform customers and associates the domain-name had changed.[271] E-mail is virtually free, practically instantaneous, and very efficient. Because West Coast was prohibited from using "@moviebuff.com," it would have to resort to other less efficient means such as mail, facsimile or telephone to notify users that e-mail would no longer be available from the "@moviebuff.com" domain. An additional efficient and relatively inexpensive resolution would have been e-mail aliases. E-mail aliases could have been set up on servers presently hosting "moviebuff.com." The aliases would automatically redirect all of West Coast's prior "@moviebuff.com" e-mail to "@westcoastvideo.com" addresses with a simple redirect program.

3. Domain Purgatory

Who gets the domain? The court did not decide the fate of "moviebuff.com."[272] Where the infringer is a victim of reverse domain-name hijacking, courts should recommend a forced judicial sale of the domain to the prevailing plaintiff. When a defendant like West Coast is completely enjoined from any use of its domain-name, the domain-name becomes worthless to the defendant, but it still has value to the plaintiff. The court could determine the fair market value of the domain to effectuate this result. Courts should consider several factors in deciding the value of a domain-name: current time left on the annual domain-name registration fee; whether the defendant registered the domain-name in bad

267 *See* ROSENOER, *supra* note 62, at 106-107 (discussing *Hasbro*).

268 *Id*. In *Hasbro* the need for switchboard type relief was important because there was the danger children may stumble upon the adult site and use of candyland.com was diluting a well-known trademark, *id.*

269 *See* Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1059 (9th Cir. 1999).

270 *Id.* at 1052.

271 *Id.* at 1043.

272 *Id.*

faith; what values both parties place on the domain-name; length of time the web site has been online and operational; what the domain would potentially sell for at a domain-name brokerage web site; and the amount of investment the defendant has reasonably made in developing and branding the site with the domain-name. This result will give the defendant a chance to recoup some of its investment in the domain-name and prevent the domain from being placed into cyber-limbo indefinitely.

## IV. CONCLUSION

The Internet will continue to be of great importance in the future. *Brookfield* adopted a traditional approach to handling a domain-name dispute and reached a correct conclusion, but left open a potential window that could create a significant amount of litigation and create uncertainty for Internet entrepreneurs. When considering meta tag infringement, the inquiry should be fact specific, taking into consideration the technology at hand and the typical practices of the web user. Finally, as a new medium which stands to revolutionize the way people conduct themselves, people will make mistakes and controversies will arise, but unique to this medium is the courts' opportunity to foster growth and confidence in it by fashioning remedies which are equitable and supportive in nature instead of harsh and indifferent.