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SPENDING CLAUSE LITIGATION IN THE ROBERTS COURT

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ABSTRACT

Throughout the Rehnquist Court's so-called federalism revolution, as the Court cut back on federal power under Article I and the Civil War Amendments, many commentators asserted that the spending power was next to go on the chopping block. But in the last years of the Rehnquist Court, a majority of Justices seemed to abandon the federalism revolution, and in the end, the Rehnquist Court never got around to limiting Congress's power under the Spending Clause. This Article contends that it is wrong to expect the Roberts Court to be so charitable about Congress's exercise of the spending power. But the Court is not likely to limit the spending power in the way some hoped and some feared the Rehnquist Court would—by imposing direct limitations on the kinds of legislation Congress has power to pass under the Spending Clause. Direct limitations such as those proposed by Professors John Eastman, Lynn Baker, and Mitchell Berman are unlikely to find favor in the Roberts Court's cases. Rather, the Court is likely to act indirectly—through doctrines that skew the interpretation and limit the enforceability of conditional spending

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statutes. Those doctrines are both more analytically tractable and less ideologically problematic for conservative Justices than are the direct limitations that might be imposed on the spending power. In other words, the paradigm case for the Roberts Court's restriction of the spending power is likely to be not United States v. Butler*, but rather* Arlington Central School District Board of Education v. Murphy.

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INTRODUCTION

Throughout the Rehnquist Court's "federalism revolution,"[1] as the Court cut back on federal power under Article I and the Civil War Amendments, many commentators asserted that the spending power was next to go on the chopping block. The spending power

1. Various commentators, writing *in medias res*, described the Rehnquist Court's federalism decisions as carrying out a "federalism revolution." *See, e.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 370 (2002); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 618 (2003). *See generally* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). For those who, even at the time, saw those decisions as less than revolutionary, see Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34–45 (1995); Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 48–52 (2003); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1552 (2003) (book review).

seemed to offer Congress a way to circumvent the limitations the Court had imposed on the other legislative powers. Both legislators and scholars therefore offered proposals for reframing as conditional spending legislation those statutes the Court had held to exceed other federal powers.[2] In turn, a number of commentators expressed concern (or in some cases hope) that the enactment of such proposals would prompt the Court to place new limitations on Congress's authority to impose conditions on the receipt of federal money.[3] To defenders of states' rights, the spending power now seemed "[t]he greatest threat to state autonomy,"[4] and was thus likely to be the next front in the federalism revolution.

But a funny thing happened on the way to Yorktown. In the last years of the Rehnquist Court, a majority of the Justices seemed to abandon the federalism revolution and to cast doubt on whether there had even been a revolution at all.[5] In 2003, the Court upheld the

2. *See* S. 928, 107th Cong. (2001) (conditioning federal funding to states on their waiver of sovereign immunity for some violations of the Age Discrimination in Employment Act of 1967); Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1168 (2001); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1375–80 (2001); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 192–93 (2002); *cf.* Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 17 (1998) ("In sum, even in this brave new world of post-post New Deal federalism, there is really no doubt that *South Dakota v. Dole* permits Congress to use the spending power to accomplish indirectly that which it may not accomplish directly."); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 864 n.23 (2000) (stating that the Court's continued acceptance of the conditional spending power "suffuses the Court's federalism jurisprudence, threatening to reduce all of it to a matter of form rather than substance").

3. For prominent examples of scholars making such claims, see Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1914 (1995); Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460–61 (2003); Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 674–80 (1998); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 53–54.

4. Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001).

5. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 509 (2006) ("[I]t seems fairly clear, at least as of 2006, that the 'federalism revolution' has been substantially slowed, if not stopped in its tracks."); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1764 (2006) ("In the last few years of the Rehnquist Court, however, the federalism revolution waned as the Court consistently ruled in favor of federal power."); Mark Tushnet, *"Meet the New Boss": The New Judicial Center*, 83 N.C. L. REV. 1205,

Family and Medical Leave Act as valid Fourteenth Amendment enforcement legislation[6] in a decision whose reasoning seemed inconsistent with the reasoning of earlier cases in the "revolution."[7] And although in 2001 the Court had held that Title I of the Americans with Disabilities Act (ADA) was not valid Fourteenth Amendment enforcement legislation,[8] in 2004 the Court held that Title *II* of the ADA *was*, in at least some circumstances, valid Fourteenth Amendment enforcement legislation[9]—a decision that again seemed to reject much of the reasoning of that earlier case.[10] And in 2005, the Court held that Congress has power under the Commerce Clause to prohibit the purely intrastate possession of home-grown marijuana used for medicinal purposes[11]—a decision that many commentators saw as inconsistent with the decisions in *United States v. Lopez*[12] and *United States v. Morrison*,[13] which were the Lexington and Concord (or, perhaps, the Trenton and Princeton) of the revolution.[14]

In the end, the Rehnquist Court never got around to limiting Congress's power under the Spending Clause.[15] But the Court did not lack cases that might have raised the question. In *Sabri v. United*

1226 (2005) ("The cases are available for more substantial development in the future, but for now the Court has moved back only inches from where the Warren Court left it.").

6. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003).

7. For a strong statement of this point, see Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231, 232–33. Robert Post expressed a similar view in *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11–17 (2003).

8. Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001).

9. Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

10. *See id.* at 538 (Rehnquist, C.J., dissenting) ("Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.").

11. Gonzales v. Raich, 545 U.S. 1, 22 (2005).

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

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

14. *See, e.g.*, Jonathan H. Adler, *Is* Morrison *Dead?: Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 753 (2005) ("While the *Raich* majority purports to be following the doctrinal contours of *Lopez* and *Morrison*, it actually represents a repudiation of these prior cases."); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 918–19 (2006) (contrasting *Lopez* and *Raich*). For a balanced assessment of *Raich*, which considers the case "[a] [b]ad [d]ay for [s]tate [a]utonomy," see Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 21.

15. *See* Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 14 (2006) (noting that, even after the "federalism revolution," "conditional funding remains an effectively unbridled source of federal power").

States,[16] the Court upheld a prohibition on bribing officials in federally funded programs[17]—a case that many thought pressed the limits of Congress's spending power.[18] And in two cases that arose during the late Rehnquist Court, court of appeals judges wrote dissenting opinions in which they argued that Section 504 of the Rehabilitation Act exceeded Congress's conditional spending power.[19] Section 504 requires recipients of federal funds to refrain from discriminating on the basis of disability.[20] Though Section 504 was enacted in 1973, seventeen years before Congress enacted the ADA, the plaintiffs' invocation of Section 504 could readily be seen as an effort to circumvent the limitations that the Court had imposed on the constitutionality of the ADA. Yet the Rehnquist Court repeatedly denied *certiorari* in cases that had upheld the constitutionality of Section 504.[21]

In its first two significant cases addressing the scope of federal power—cases that ruled (narrowly) in favor of federal abrogations of state sovereign immunity—the Roberts Court seemed to follow the same nonrevolutionary line as did the late Rehnquist Court.[22] One

16. Sabri v. United States, 541 U.S. 600 (2004).

17. *Id.* at 602.

18. *See, e.g.*, John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 116 n.118 (2004) (finding *Sabri* "troubling" for this reason); Smith, *supra* note 14, at 919–20 & n.80 (discussing arguments for the unconstitutionality of 18 U.S.C. § 666). An important pre-*Sabri* article argued that § 666 was unconstitutional. *See* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 39–84 (2003). For a (hardly disapproving) discussion of the expansiveness of *Sabri*'s understanding of congressional power, see Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1976–78 (2005).

19. *See* Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1171–75 (D.C. Cir. 2004) (Sentelle, J., dissenting); Jim C. v. United States, 235 F.3d 1079, 1082–84 (8th Cir. 2000) (en banc) (Bowman, J., joined by Beam, Loken & Bye, JJ., dissenting).

20. *See* 29 U.S.C. § 794 (2006).

21. *See Barbour*, 374 F.3d at 1170, *cert. denied*, 544 U.S. 904 (2005); Lovell v. Chandler, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); Koslow v. Pennsylvania, 302 F.3d 161, 176 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003); Robinson v. Kansas, 295 F.3d 1183, 1192 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); Vinson v. Thomas, 288 F.3d 1145, 1148 (9th Cir. 2002), *cert. denied*, 537 U.S. 1104 (2003); Nihiser v. Ohio Envtl. Prot. Agency, 269 F.3d 626, 628–29 (6th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002); *Jim C.*, 235 F.3d at 1081–82, *cert. denied*, 533 U.S. 949 (2001).

22. *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1005 (2006) (holding that Congress may displace state sovereign immunity when legislating pursuant to the Bankruptcy Clause); United States v. Georgia, 126 S. Ct. 877, 882 (2006) (holding that Title II of the ADA validly abrogates state sovereign immunity as applied to cases in which the conduct that violated the statute also violated the Fourteenth Amendment).

might, therefore, expect the Roberts Court also to be charitable about Congress's exercise of the spending power. If the Court is not attempting to impose revolutionary constraints on Congress's powers under the Commerce Clause and the Fourteenth Amendment, it has no particular reason to stand guard against Congress's "circumvention" of those constraints under the spending power. At least one informed commentator has suggested that advocates of conditional spending legislation have little to fear from the Roberts Court.[23]

In this Article, I contend that it is wrong to expect the Roberts Court to be so charitable about Congress's exercise of the spending power.[24] To the extent that the Roberts Court has a conservative agenda, and the liberal welfare and civil-rights state continues to be built on conditional spending legislation, the Court will have a strong incentive to limit that legislation. But the Court is not likely to do so in the way some hoped and some feared the Rehnquist Court would—by imposing direct limitations on the kinds of legislation Congress has power to pass under the Spending Clause. Rather, the Court is likely to act indirectly—through doctrines that skew the interpretation and limit the enforceability of conditional spending statutes. Those doctrines have a strong pedigree in existing law, and they are both more analytically tractable and less ideologically problematic for conservative Justices than are the direct limitations that might be imposed on the spending power.[25]

In other words, the paradigm case for the Roberts Court's restriction of the spending power is not likely to be *United States v. Butler*[26]—the New Deal–era case that invalidated the first Agricultural Adjustment Act as going beyond Congress's taxing and spending power.[27] Rather, the paradigm case may be *Arlington Central School District Board of Education v. Murphy*.[28] In *Arlington Central*, the Roberts Court held that the Individuals with Disabilities Education Act (IDEA) did not authorize prevailing parents to

23. Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1, 30–35 (2006).

24. I think the Roberts Court is likely to impose at least some limitations on the exercise of other federal powers as well, but that is beyond the scope of my argument here.

25. For a brief suggestion that the Court *ought* to move in this direction, see Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 144–45 (2004).

26. United States v. Butler, 297 U.S. 1 (1936).

27. *Id.* at 78.

28. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006).

recover expert fees.[29] The Court could have reached that result as a matter of ordinary statutory interpretation.[30] But it went out of its way to emphasize (repeatedly) that because "Congress enacted the IDEA pursuant to the Spending Clause," the statute could not impose obligations on states unless Congress provided "*clear* notice"—beyond what would be required outside of the conditional spending context—"regarding the liability at issue."[31]

Arlington Central may seem like a narrow case, and in some respects it is. But the "clear notice" principle it adopts could have far-reaching consequences for the enforcement of such important federal laws as the statutes that set up the Medicare and Medicaid programs.[32] And a panel of the Sixth Circuit has already relied extensively on *Arlington Central* to effect substantial restrictions on the obligations the No Child Left Behind Act places on school districts.[33] (As this article went to press, the Sixth Circuit had granted en banc rehearing but not yet issued a final ruling.) The time is ripe for an assessment of the indirect limitations the Court is likely to place on conditional spending legislation.[34]

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29. *Id.* at 2457.

30. *See id.* at 2464–65 (Ginsburg, J., concurring in part and concurring in the judgment) (agreeing with the Court's conclusion that the statute's language failed to include expert fees without reaching the notice question).

31. *Id.* at 2458–59 (majority opinion) (emphasis added); *see also id.* at 2460 ("Thus, the text of 20 U.S.C. § 1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause."); *id.* at 2461 ("Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds."); *id.* at 2463 ("Whatever weight this legislative history would merit in another context, it is not sufficient here. . . . In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."). For an excellent discussion and critique of *Arlington Central*, see generally Brian Galle, *Federal Grants, State Decisions*, 89 B.U. L. REV. 875 (2008).

32. Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 486–92 (2008).

33. *See* Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 512 F.3d 252, 261–73 (6th Cir. 2008), *vacated on rehearing en banc*, No. 05-2708, 2008 U.S. App. LEXIS 12121 (6th Cir. May 1, 2008).

34. I discuss the most comprehensive previous treatment of indirect limits, Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155 (2004), in Part II. *See infra* text accompanying note 330. (Professor Galle extends those arguments in his more recent work. Galle, *supra* note 31.) It is important to note at the outset the ways in which my analysis differs from Galle's. Galle limits his focus to arguing against the notice principle. My argument, by contrast, is not principally a normative critique. Instead, I (a) show why the Court is *not* likely to impose direct limits but *is* likely to impose indirect limits; (b) attempt to describe, with some precision, the

My argument proceeds as follows. In Part I, I explain why I do not believe that the Court is likely to impose significant direct limitations on the conditional spending power, whether by tightening the limitations set forth in the leading case of *South Dakota v. Dole*[35] or by adopting the proposals put forth by leading commentators. That Part adds to the literature by offering the first comprehensive response to the proposals of Professors Lynn Baker, Mitchell Berman, and John Eastman for invigorating direct limitations on conditional spending legislation. In Part II, I explain why I believe the Court is quite likely to impose more stringent *indirect* limitations on the conditional spending power. Section A addresses the strong contract theory proposed by David Engdahl in the leading modern article on the spending power (under which spending conditions are not "law" at all) and argues that it is possible, but not especially likely, that the Court will endorse that theory. Section B, which considers the notice principle, adds to the prior literature by disaggregating applications of that principle into three basic types, which potentially have different normative implications, and assessing each of those types separately.

My principal goal is analytic and predictive; I focus on the direction Spending Clause litigation is likely to travel in the Roberts Court. A significant part of my argument rests on analytic and normative concerns with some possible directions the Court might travel. But I offer no particular account of what the law *should* look like in this area, except perhaps by implication. I hope my account will convince readers who share my normative views as well as readers who do not share those views.

Moreover, I offer no high-level positive theory about what motivates a majority of the Court. Instead, I explain along the way

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different variants of the notice principle; and (c) assess as well the "strong contract theory" adopted by at least one federal court under which conditional spending legislation is not "law" at all. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 104–08 (1994). Moreover, to the extent that I am also critical of the notice principle, my arguments are different from Galle's; in particular, Galle's arguments would apply to any federalism-based clear-statement rule, but I accept the validity of such rules in general. *See infra* note 315. Professors Peter Smith and David Freeman Engstrom have also discussed the notice principle, though their discussions aim more at identifying how that principle *should* be interpreted (in contexts in which federal agencies interpret ambiguous spending statutes) than on predicting how the Court *will* apply that principle. *See* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197 *passim* (2004); Peter J. Smith, Essay, Pennhurst*,* Chevron*, and the Spending Power*, 110 YALE L.J. 1187 *passim* (2001).

35. South Dakota v. Dole, 483 U.S. 203, 207–11 (1987).

the reasons why I think the Court is or is not likely to adopt particular rules of Spending Clause doctrine. My basic premise is that this is a conservative Court and is likely, all else equal, to serve "conservative" interests.[36] But "'judicial conservatism' is not a coherent single project of constitutional interpretation."[37]

Importantly, the interests of conservative judges fall into several categories. They may be programmatic interests (that is, interests in upholding "conservative" statutes and invalidating "liberal" ones).[38] There are a number of conservative political programs that might come into tension with each other in many cases.[39] Professor Young,

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36. *See* Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 423 (2007) ("Conservatives finally got their court. That is the central message of the Supreme Court's 2006 Term."). For another good discussion of the Roberts Court as a conservative Court, see generally Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675 (2006).

37. Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 817–18 (2005). This is true of judicial liberalism as well. *See* Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 798–800.

38. Professor Richard Fallon argued, before the Rehnquist Court sided with federal power in its last few federalism cases, that "[t]he Court's pro-federalism majority is at least as substantively conservative as it is pro-federalism. When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates." Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002). This is the "policy-focused instrumentalism" that Professor Peter Smith believes was characteristic of Rehnquist Court federalism cases. Smith, *supra* note 14, at 911–15. Professor Frank Cross argues, persuasively in my view, "that federalism is consistently (and I contend inherently) employed only derivatively, as a tool to achieve some other ideological end, rather than as a principled end in and of itself." Frank B. Cross, Essay, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1307 (1999). But even if one does not agree with that statement, it should be plain enough that federalism can be and has been used as such a tool some proportion of the time.

39. For a good overview of the point, see Fallon, *supra* note 38, at 446–52. In part for this reason, Professor Young suggests that it makes no sense to treat Supreme Court decisions as "liberal" or "conservative":

> The problem is that it is hard to distinguish between a "preference" for federalism of the sort just described and a good faith legal view about the meaning of the Constitution. In the immunity cases, for instance, how much conceptual daylight is there between a "preference" that states not be subject to suit and a legal conviction that the Constitution contains a strong principle of state immunity? One cannot prove the primacy of political preferences over legal principle if one's definition of political preferences is so broad as to include legal principles.

Young, *supra* note 14, at 14–15 (footnote omitted). It does not particularly matter to me, however, whether one regards the conservative interests I have described as "political preferences" or "good faith legal views." I take no position on the relative weight of "politics" and "law" in Supreme Court decisions (or on whether it makes sense to draw a strong distinction between them). I argue only that conservatism—whether as a "political" or a "legal" principle—is likely to explain and predict the Roberts Court's federalism decisions, all else equal.

for example, identifies six different but overlapping strands in contemporary American political conservatism—economic conservatives, Libertarians, traditionalists, social or religious conservatives, neoconservatives, and anti-Communists[40]—and one can find programmatic disputes within each strand. Conservative judges may seek to maximize the degree to which their decisions support their favored programmatic interests directly—by seeking to advance those interests in each case—or in a rule-consequentialist manner by articulating and defending rules that ensure that, over time, conservative programmatic interests will be upheld to the greatest extent possible, even if in any given case those rules might serve liberal programmatic interests. They may also seek in their decisions to adhere to conservative ideological constructs, regardless of those constructs' effect on conservative programmatic interests. These constructs may be very general, like notions of personal responsibility, or they may be specific to constitutional adjudication, like notions of originalism,[41] states' rights,[42] or judicial restraint. There are many such constructs, and they, too, will stand in tension in many cases.[43] Moreover, all of these conservative interests may in any given case be trumped by other interests—particularly a Justice's interest in following what he or she (not to mention the public) understands to be the practices of careful and principled lawyering.[44] That interest pushes toward adhering to precedent (at least on the surface[45]) and avoiding rules that are analytically unstable.[46]

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40. *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1192–94 (2002).

41. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 562–68 (2006) (reviewing the judicial use of originalism constructs in decisionmaking).

42. For an argument that conservatives should support federalism, irrespective of its effect on conservative programmatic interests, see generally Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006).

43. *See* Young, *supra* note 40, at 1198–202.

44. Professor Young sees this, correctly in my view, as a form of conservatism, *see id.* at 1196, though it is a form of conservatism that is shared by most "conservative" *and* "liberal" judges. Writing of the Rehnquist Court, Professor Mark Tushnet argued that "Justices in the new regime seek to show that they are technically competent lawyers who do small things very well." Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspirations*, 113 HARV. L. REV. 29, 91 (1998). I believe that continues to be true in the Roberts Court.

45. *See* Fallon, *supra* note 38, at 491–92 (discussing the Rehnquist Court).

46. *See id.* at 493 (noting that the Rehnquist Court's federalism cases had "proceeded cautiously along doctrinal paths where previous efforts to protect federalism occasioned embarrassment").

Although the distinctions between and tensions among these various interests can make a great deal of difference to the shape of jurisprudence in general, they are less significant to my project. I hope to show that efforts to impose direct limitations on the spending power are sufficiently analytically intractable, and threaten such an array of conservative interests, that a conservative Court is unlikely to undertake them. My picture of what moves the majority should resonate with observers of the Roberts Court, even if one might quibble with aspects of it. But I make no attempt to defend it here. Doing so would require an article of its own.

I. THE FAILURE OF DIRECT LIMITATIONS

The Supreme Court's *Dole* opinion set forth three possible direct limitations on Congress's exercise of its conditional spending power.[47] The first is the "general welfare" limitation: "the exercise of the spending power must be in pursuit of 'the general welfare.'"[48] The second (stated somewhat more tentatively) is the "nexus" limitation: "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[49] And the third is the "coercion" limitation: "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[50]

None of these direct limitations on the spending power has had any real bite in the cases. In this Part, I contend that none is likely to have any real bite in the future. Some of the reason has to do with the particular limitations themselves: neither the general welfare, nexus, nor coercion limitations impose any analytically tractable limitation on congressional power. Any effort to impose robust limits on the spending power based on these doctrines (or on the various

47. I discuss only those limitations that are internal to the spending power; the Court also recognized that Congress exceeds its spending authority if it conditions a grant on conduct that independently violates the Constitution. *See* South Dakota v. Dole, 483 U.S. 203, 210–11 (1987) ("Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.").

48. *Id.* at 207.

49. *Id.* (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

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

alternatives to these doctrines proposed by leading scholars) is doomed to embarrassment. I explain in Section A.

Analytic embarrassment will not deter a court that is bent on reaching particular results. But as I show in Section B, there is no good reason to believe that the Roberts Court has any particular mission to constrain Congress's spending power. If anything, one should expect the contrary.

A. The Failure of Specific Limiting Doctrines

1. *General Welfare.* Under the Supreme Court's modern doctrine, forged in the 1937 New Deal settlement, the "general welfare" limitation on the spending power is not a limitation at all.[51] In *Helvering v. Davis*,[52] which upheld the old-age benefits of the Social Security Act as a valid exercise of Congress's taxing and spending power,[53] the Court declared that "[w]hen money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress."[54] By the time of *Buckley v. Valeo*[55] nearly forty years later, the Court was flirting with the proposition that the Constitution's "general welfare" language imposes *no* limits on Congress's spending power.[56] In *Dole*, the Court retreated somewhat, but not much; the Court held that "[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress,"[57] and it reaffirmed *Helvering*'s statement "that 'the concept of welfare or the opposite is shaped by Congress.'"[58] *Dole* therefore left little room for judicial enforcement of the general welfare limitation.

Some commentators have advocated a tightening—and invigorated judicial enforcement—of that limitation, however. Professor John Eastman has offered the leading statement of this position: "Congress, I contend, has only the power to spend for the

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51. Professor Michele (Landis) Dauber traces the doctrine even earlier, to the turn of the twentieth century. *See* Michele Landis Dauber, *Judicial Review and the Power of the Purse*, 23 LAW & HIST. REV. 451, 452–53 (2005). But it is fair to say that the New Deal settlement cemented deference firmly in the law.

52. Helvering v. Davis, 301 U.S. 619 (1937).

53. *Id.* at 645.

54. *Id.*

55. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

56. *See id.* at 90–91.

57. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

58. *Id.* at 208 (quoting *Helvering*, 301 U.S. at 645).

'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."[59] Eastman's argument is essentially originalist in nature; he derives his rule from practice under the Articles of Confederation and, up to the Civil War, under the Constitution.[60] Relying on the ratification debates, Professor Robert Natelson similarly contends that "the goal of the General Welfare Clause was to limit all congressional taxation and spending to general interest, as opposed to local or special interest, purposes."[61]

One might agree or disagree with these originalist arguments, but in any event the doctrine they support is very unlikely to have traction in the courts. Any doctrine that would put the courts in the position of second-guessing Congress's determination of what is in the "general welfare" will necessarily raise the concern (one to which conservative judges remain quite attuned)[62] that the courts are repeating what is understood to be the mistake of *Lochner v. New York*[63]—the judicial arrogation of authority to decide whether legislation is in fact in the general interest.[64] Although defenses of *Lochner* and unapologetic judicial activism have gained increasing currency among right-wing legal activists and academics,[65] the public face of judicial conservatism—the face presented in confirmation

59. John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 65 (2001).

60. *See id.* at 72–87.

61. Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 49 (2003).

62. *See* Graber, *supra* note 36, at 685.

63. Lochner v. New York, 198 U.S. 45 (1905).

64. For a good effort to connect invigorated judicial review of "general welfare" with what is understood to be the mistake of *Lochner*, see Larry Yackle, Lochner*: Another Time, Another Place*, 85 B.U. L. REV. 765, 777 (2005).

> It is obvious enough that the legislative branch must be entitled to decide what counts as the public interest in general. The Court could second-guess Congress at that level of generality only by sounding very much like Justice Peckham explaining why the Bake Shop Act didn't further the public health. Just as choosing among public-regarding purposes is for state legislatures in police power cases, selecting among public-regarding ends must equally be left to Congress in spending power cases.

Id. (footnote omitted).

65. *See, e.g.*, David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1521–25 (2005).

hearings and appellate opinions—remains one of Bickellian restraint and deference to the political branches.[66]

The arguments of Professors Eastman and Natelson might seem to avoid that concern. They appear to pose an equal-protection-like inquiry: was Congress's taxing and spending in the general interest or only in someone's (or some region's or state's) particular interest? But (at least on one prominent view) the decisions of the *Lochner* era rested on the closely related notion that "class legislation" (special interest, as opposed to general-interest, legislation) was unconstitutional.[67] It is unlikely that a judicial effort to determine what legislation serves the general as opposed to some region's particular welfare would be any more successful than the *Lochner*-era effort to distinguish class legislation from general-interest legislation.

Intellectual developments since World War II have made it difficult even to conceive of a general welfare distinct from the aggregation of the welfare of various special interests. In particular, interest-group theory persuasively demonstrates that most, if not all, legislation is the outcome of a struggle between groups pursuing their own interests.[68] A number of scholars have drawn on interest-group

66. *See* Graber, *supra* note 36, at 685 ("Prominent conservative scholars have made constitutionally reasonable arguments that the Court in *Lochner v. New York* correctly held that maximum hour laws were constitutionally suspect. Nevertheless, the vast majority of conservative Justices and scholars still maintain that *Lochner* was a gross abuse of the judicial power." (footnotes omitted)). As Professor Simon Lazarus shows, that face of Bickellian restraint was front and center in Justice John Roberts's confirmation hearings. *See* Lazarus, *supra* note 23, at 14–18.

67. *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 47 (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 49–50 (1993); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 246 (2000). *But see* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 21–31 (2003) (arguing that although pre-*Lochner* lower-court cases rested on opposition to class legislation, *Lochner* reflected a shift to a notion of fundamental individual rights); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Era Court*, 78 B.U. L. REV. 1489, 1502–03 (1998) (arguing that the substantive due process decisions of the Taft Court, rather than resting on opposition to class legislation, represented an effort to protect the decisions of "everyday life" from regulation). For a rejoinder to Professors Bernstein and Post, see generally Barry Cushman, *Some Varieties and Vicissitudes of* Lochner*ism*, 85 B.U. L. REV. 881 (2005).

68. Professor Jerry Mashaw best captures the interest-group theory's view of legislation: "[It is the] vector sum of political forces expressed through some institutional matrix which has had profound, but probably unpredictable and nontraceable, effects on the policies actually expressed. There is no reason to believe that these expressions represent either rational instrumental choices or broadly acceptable value judgments." Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI-KENT L. REV. 123, 134 (1989). For a

theory to urge that courts should invalidate (or skeptically construe) legislation that reflects the disproportionate influence of particular interests.[69] But as Professor Einer Elhague has shown, it is impossible to conclude that legislation reflects "disproportionate influence" without some contestable normative theory about what are proper outcomes.[70]

The same problem will occur in attempting to determine whether a federal spending program serves the general welfare. The essential problems are twofold: *every* spending program—even one that gives money to very particular places and projects—will ultimately serve some general interests (if only the interest in Keynesian stimulus); and *no* spending program will ever incontestably serve everyone's interests to precisely the same extent. As a result, any judicial effort to enforce a rule that spending must serve the general welfare will be quite indeterminate and will require courts to make what will look like naked policy decisions.

Consider federal education funding to the states. One might readily agree that education serves the general welfare,[71] but how ought Congress allocate funds? Congress might give each state the same amount per child in a public school, but states with large urban areas—where children require more expensive educational interventions[72]—might legitimately complain that such an allocation unduly subsidizes states without large urban areas. But if Congress were to give more money per student to states with large urban areas, states without those areas might legitimately complain that the program favored "particular regions or states."[73] To decide which of these complaints is correct (if either) requires a substantive theory about how education funds *should* be allocated across the states. But any such theory will be normatively contestable and will raise the question why the courts instead of Congress should be the ones to

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good overview of the theories of regulation that derived from or reacted to post-war pluralism, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 31–86 (1998).

69. *See* Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44–48 (1991).

70. *See id.* at 49–59.

71. Or not. Education funding, one might say, is for the "special" welfare of children, parents, and teachers.

72. *See* Andrew Reschovsky & Jennifer Imazeki, *Let No Child Be Left Behind: Determining the Cost of Improving Student Performance*, 31 PUB. FIN. REV. 263, 265 (2003).

73. Eastman, *supra* note 59, at 65.

decide which of several plausible substantive theories of fairness is the correct one.

Even if we could agree on the correct substantive theory of fairness, determining whether a spending program is unfair under that theory will often depend on the level of abstraction at which the program is described.[74] Consider a different education-funding example. Congress has allocated special funding to the states to educate the children of migrant agricultural workers.[75] That funding is targeted at places with large concentrations of migrant agricultural workers, but it is part of a package of funding that provides for the educational needs of students across the country. Does the federal Migrant Education Program serve "the 'general' welfare" or "the special welfare of particular regions or states"?[76] It all depends on the level of abstraction at which one considers the program at issue, and the notion of "general welfare" does not tell us which level of abstraction is appropriate.

The problem exists even when one considers stand-alone appropriations. After Hurricanes Katrina and Rita, Congress passed a law that gave relief to the affected areas.[77] That law served the special welfare of particular regions or states.[78] But it could also be seen to serve the "general" welfare in at least three ways. First, the massive

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74. To be sure, the "levels-of-abstraction problem" is common in constitutional adjudication, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084–85 (1981); *see also* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1372–73 (1984) (making the same point), and it arises especially frequently when applying theories of equal treatment. For an example from the disability law context, see Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 45–50 (2004).

75. *See* No Child Left Behind Act of 2001, Pub. L. 107-110, tit. I, pt. C, 115 Stat. 1425, 1571–80 (codified at 20 U.S.C. §§ 6391–99 (2006)).

76. Eastman, *supra* note 59, at 65.

77. *See* Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza, 2006, Pub. L. No. 109-148, div. B, 119 Stat. 2680, 2745–82 (2005).

78. *Cf.* Eastman, *supra* note 59, at 79 (stating that "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," because such an appropriation was not for the "general" welfare). There is reason to doubt Professor Eastman's account of the original understanding. As Professor Michele (Landis) Dauber has shown, the federal government frequently provided disaster relief in the early republic; although constitutional limitations were sometimes asserted in opposition to disaster relief bills in Congress, concerns about sectional fairness and the sympathy for particular disaster victims were far more important. *See* Michele L. Landis, *"Let Me Next Time Be 'Tried by Fire'": Disaster Relief and the Origins of the American Welfare State 1789–1874*, 92 NW. U. L. REV. 967, 998–1027 (1998).

dislocation occasioned by the hurricanes affected the nationwide economy. Second, there is no reason to expect that the same relief would be withheld from any other states or regions of the country if they were to experience a comparable disaster; a government that generally gives relief to regions that experience disasters acts in the general welfare whenever it grants such relief. And third, people across the nation felt a sympathetic bond with their fellow Americans; granting relief to the victims of Katrina and Rita increased the welfare of people throughout the country by reaffirming their psychically valuable bonds of citizenship.[79]

Professor Eastman's own examples show that reliance on the notion of a general welfare requires formalistic distinctions that do not hold up analytically. For example, Eastman cites with approval the antebellum practice of allowing federal funding of "navigational improvements below ports of entry" but not allowing *internal* "improvements beyond that line."[80] Thus, "[a]t the same time it was denying a request to fund the dredging of the Savannah River," Congress "approved an appropriation for a lighthouse at the entrance of the Chesapeake Bay."[81] The distinction between the two cases, which Eastman endorses, is that "the lighthouse was of benefit to the entire coastal trade, while the dredging operation was primarily of benefit to the people of Georgia."[82] But, the Chesapeake Bay lighthouse was primarily of benefit not to the entire coastal trade but to the *mid-Atlantic* coastal trade. The benefits to the coastal trade in New England, New York, and the South (where Savannah was one of the most significant ports) were far less significant. And the Savannah River, which forms the border between South Carolina and Georgia, provided the interior areas of those states with access to the ocean. Facilitating shipping entering into the country at Savannah is just as

79. One might object that the last of these is not really about the "general welfare." But that objection rests on the contestable normative view that *economic* welfare is the only kind of welfare that is relevant under the spending power. *Cf.* Elhauge, *supra* note 69, at 49–59 (emphasizing that wealth maximization (that is, economic efficiency) is not the only normative standard that can be used as a baseline for assessing the desirability of a law). For what it's worth, the Supreme Court has long held that the power to spend for the general welfare includes the power to spend to satisfy purely moral obligations. *See* Dauber, *supra* note 51, at 453–56.

80. *Id.* at 84. In Professor Eastman's account, Congress typically adhered to this line, but not always. *Id.* at 81.

81. *Id.*

82. *Id.*

much a matter for the general welfare as facilitating shipping entering into the country at Baltimore.

It was not the "generality" of the benefit conferred that distinguished the Chesapeake Bay lighthouse from the Savannah River dredging. What distinguished the two cases was an entirely independent notion that the federal government was properly concerned with "external" but not "internal" improvements to navigation. But I doubt the modern Court is inclined to rest its Spending Clause doctrine on such formalist notions of the proper sphere of federal power. Conservative Justices attempted to create such a doctrine during the *National League of Cities v. Usery*[83] era,[84] but the Court ultimately abandoned the task as unworkable.[85] Even when what many understood to be a pro-states'-rights majority took over in the late Rehnquist era, the Court passed up a clear opportunity to revive such a formalist doctrine.[86]

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83. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985).

84. *See Garcia*, 469 U.S. at 538–40 (citing cases in which the Supreme Court and lower courts attempted to delineate a protected sphere of state government activity by looking to what were "traditional" and "integral" state functions).

85. The Court identified several problems with focusing on formal distinctions in the state immunity context:

> 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 governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

Id. at 546–47.

86. *See* Reno v. Condon, 528 U.S. 141, 148 (2000) (agreeing that the enactment of the Driver's Privacy Protection Act "is a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause," without consideration of whether it constitutes an "integral" or "traditional" government function). In its Dormant Commerce Clause jurisprudence, the Court has continued to invoke the concept, seemingly discredited in *Garcia*, of "traditional government functions." *See, e.g.*, Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1811 (2008) (upholding Kentucky law exempting interest on municipal bonds issued by the state or its subdivisions, but not interest on municipal bonds issued by other states or their subdivisions, from state taxation, and explaining that the contrary ruling would properly spark "apprehension . . . about 'unprecedented . . . interference' with a traditional government function" (second alteration in original) (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1795 (2007))). I do not think that *Davis*, which declined to invalidate "a century-old taxing practice, presently employed by 41 States, and affirmatively supported by all of them," *id.* (citations omitted), suggests that the Court will be comfortable employing formalist notions of traditional state functions to invalidate federal spending legislation. For those who are of a mind to avoid the so-called mistake of *Lochner*, there is a big difference between upholding and invalidating a democratically enacted statute.

No spending legislation affects all regions in exactly the same way, and all spending legislation could be seen as benefiting the people more generally. To decide what spending serves the general welfare requires a normative theory independent of the concept of generality—a normative theory of what substantive areas of policy Congress should be entering. I predict that conservative judges will see that kind of inquiry as coming so close to *Lochner* that they will avoid embarking on it.

2. *Nexus*

a. The Promise of the Nexus Requirement. One might think that the nexus requirement could provide a meaningful limitation on Congress's power to attach conditions to federal grants. Nexus requirements are well established in land-use and takings law—and in unconstitutional conditions law more generally—so courts have a body of precedent from which they can draw analogies in spending power cases.[87] And unlike the general welfare limitation, which seems to require policy judgments that, placed in the hands of courts, are *Lochner*esque, the nexus requirement takes Congress at its word regarding the purpose of the federal outlay.[88] By asking whether the condition imposed by Congress is sufficiently closely related to Congress's own articulated purpose in spending federal funds, the nexus requirement seems to impose nothing more than the sort of pretext analysis that is commonplace in assessments of federal power.[89]

A number of prominent commentators seem to believe that the nexus requirement has the potential to impose meaningful constraints on Congress's exercise of the conditional spending power. Professor Jonathan Adler contends that the Clean Air Act violates the nexus requirement because it withholds federal *highway* funds from states that fail to submit an adequate plan for limiting emissions—including

87. On nexus requirements in land-use law, see Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 741–45 (2007). On the nexus requirement in unconstitutional conditions law generally, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1456–76 (1989).

88. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 208 n.3 (1987) ("Our cases have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power.").

89. On the importance of pretext analysis to assessments of federal power, see J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 408–11 (2003).

emissions from stationary sources.[90] And Professor Lynn Baker contends that 23 U.S.C. § 409, which the Supreme Court upheld on Commerce Clause grounds in *Pierce County v. Guillen*,[91] would have violated the *Dole* nexus test as well: by conditioning federal highway safety funds on state courts' recognition of an evidentiary privilege in government documents compiled or collected for the purpose of identifying hazards on the roads—even if they were documents like ordinary police reports that were not generated for the purpose of identifying such hazards—the statute imposes a condition that does not serve the federal interest in highway safety.[92]

The decided cases offer at least some reason to believe that the nexus requirement is a more likely source of limits on the conditional spending power than is the general welfare requirement. Unlike with the general welfare requirement, leading jurists have invoked the nexus requirement on occasion as a ground for invalidating conditional spending legislation. In *Dole*, Justice O'Connor contended that Congress violated that requirement by conditioning a state's receipt of certain federal highway funds on the adoption of a twenty-one-year-old drinking age.[93] The solicitor general had argued that the imposition of a drinking age related directly to the federal interest in constructing safe highways (by reducing drunk driving), but Justice O'Connor found the condition "far too over and under-inclusive"—most teen drinkers don't drive drunk, and most drunk drivers aren't teenagers.[94] She concluded that a requirement imposed on states as a condition on federal spending is valid only if "the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated"[95]:

> When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway

90. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 447–52 (2005).

91. Pierce County v. Guillen, 537 U.S. 129, 147 (2003).

92. *See* Lynn A. Baker, Lochner*'s Legacy for Modern Federalism:* Pierce County v. Guillen *as a Case Study*, 85 B.U. L. REV. 727, 750–51 (2005).

93. *Dole*, 483 U.S. at 213–14 (O'Connor, J., dissenting).

94. *Id.* at 214.

95. *Id.* at 216 (quoting Brief of the National Conference of State Legislators et al. as Amici Curiae in Support of Petitioner at 19–20, *Dole*, 483 U.S. 203 (No. 86-260)).

use or safety.[96]

Were it otherwise, she argued, "Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."[97] A panel of the Eighth Circuit applied a similar analysis in holding that Section 504 of the Rehabilitation Act of 1973, which prohibits recipients of federal funding from discriminating on the basis of disability,[98] exceeded Congress's spending power.[99]

But Justice O'Connor spoke in dissent in *Dole*, and the Eighth Circuit went en banc and overturned the panel decision invalidating Section 504. And that should not be surprising. For two basic reasons, which I discuss in the next two subsections, courts are unlikely to use the nexus requirement to impose a meaningful limitation on Congress's power to attach conditions to federal spending.

b. The Specter of Lochner. First, contrary to what appears at first glance, stringent application of the nexus requirement will indeed often require courts to make the sorts of policy judgments that conservative judges are likely to consider *Lochner*esque. Consider Justice O'Connor's discussion of the over- and underinclusiveness of the drinking-age condition in *Dole*. Because legislation can rarely if ever achieve its purposes with precision, most if not all laws are over- and underinclusive to some degree. And there is no obvious and nonarbitrary standard for determining how well a statute must achieve its asserted purposes. With the New Deal reaction to *Lochner* still dominant among conservative judges,[100] it is difficult to explain why courts, rather than legislators, should be the ones to decide whether a statute is sufficiently effective to remain the law.[101]

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96. *Id.* at 215.

97. *Id.*

98. 29 U.S.C. § 794 (2006).

99. *See* Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 757 (8th Cir. 1999) ("Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the RA, if it does not want to comply with § 504."), *rev'd en banc sub nom.* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000); *see also* Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1171–75 (D.C. Cir. 2004) (Sentelle, J., dissenting) (arguing that Section 504 violates the nexus requirement).

100. *See supra* note 66.

101. Conservative judges are happy to look for over- and underinclusiveness in cases involving so-called heightened scrutiny. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2755–58 (2007) (plurality opinion). But in those cases they do not look for tightness of means-ends fit for its own sake; rather, they do so either as a way to ensure

Professor Baker's argument for the unconstitutionality of 23 U.S.C. § 409 illustrates the problem. Baker contends that attaching an evidentiary privilege to information compiled or collected for the purpose of identifying hazards on roads did not serve the interest in highway safety that animated the underlying spending program. The government argued, plausibly, that such a privilege will encourage localities to make efforts to identify hazards on roads—without such a privilege, localities might fear that their efforts would actually increase their tort exposure by generating evidence that plaintiffs could use to prove negligence. Baker agrees that an evidentiary privilege limited to documents *originally generated* for purposes of identifying roadway hazards might well serve the interest in highway safety in this way. But she contends that an evidentiary privilege for information that was merely *compiled or collected* for purposes of identifying roadway hazards—even if a locality generated the information wholly independently of such an effort—gives localities more tort immunity than is necessary to incentivize them to participate in the hazard-identification program. By reducing localities' tort exposure without encouraging localities to participate in the hazard identification program, Baker argues, § 409 actually *dis*serves the interest in highway safety.[102]

Professor Baker's argument is plausible. But the opposite argument is at least as plausible. A privilege for all information *compiled or collected* in the hazard-identification program might well be necessary to encourage localities to participate if those localities are risk averse. And Congress might well conclude that the additional increment of effective tort immunity caused by the broader privilege would not meaningfully reduce localities' incentives to take care. Such a conclusion might be based, for example, on doubts about the (positive) deterrent effect of tort liability in general.[103]

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that especially protected interests are not lightly infringed or as a way to smoke out illegitimate intent. *See* Charles Fried, *Types*, 14 CONST. COMMENT. 55, 62–63 (1997). But the conservative Justices have not shown any especial desire to impose a general requirement of tight means-ends fit. For a unanimous example of the Court's deferential approach that highlights the difficulties of a general requirement of tight means-ends fit, see Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003).

102. *See* Baker, *supra* note 92, at 750–51.

103. *See, e.g.*, Margo Schlanger, *Second-Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517, 524–35 (2006) (showing that tort liability can alter defendants' behavior without reducing risk and harm of accidents); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 390, 443, 390–422 (1994) (reviewing the literature concerning whether "tort law, in its various branches, achieves

To decide which of these opposing stories is correct requires an analysis of the available empirical evidence, as well as a more fine-grained theory of local government incentives. Professor Baker provides neither. More importantly, for a *court* to decide which of these opposing stories is correct would necessarily require it baldly to second-guess Congress's resolution of these empirical questions regarding how municipalities will respond to the law. As Professor Larry Yackle has said, this sort of nexus analysis looks a lot like "*Lochner* resurgent in another place,"[104] and courts are likely to see it as such.

c. Analytic Emptiness. There is a second, more fundamental, reason why the courts are unlikely to employ the nexus requirement to impose meaningful limits on Congress's conditional spending authority: as a purely analytic matter, that requirement imposes no limitation at all on Congress's power to attach conditions to federal spending. That is because "germaneness theories founder on the extreme malleability of the concept of germaneness itself. Germaneness to the purpose of a benefit depends crucially on how broadly or narrowly that purpose is defined."[105] Since *United States v. Butler*[106] adopted the so-called Hamiltonian position on Congress's spending authority (although the Court did not appear to heed that position in its bottom-line holding invalidating the Agricultural Adjustment Act),[107] it has been settled law that Congress can spend for any otherwise constitutional purpose it wishes; Congress is not limited to spending in aid of the other enumerated Article I powers.[108] The condition imposed by Congress can therefore *always* be characterized as part of the purpose of a piece of conditional

anything by way of deterrence" and concluding that "while not as effective as economic models suggest, [tort law] may still be somewhat successful in achieving its stated deterrence goals").

104. Yackle, *supra* note 64, at 779.

105. Sullivan, *supra* note 87, at 1474.

106. United States v. Butler, 297 U.S. 1 (1936).

107. *Id.* at 65–66.

108. *See* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987). In his major article on the spending power, Professor David Engdahl argues that "this kind of 'germaneness' requirement assumes the anti-Hamiltonian premise that spending is permissible only for certain specified ends." Engdahl, *supra* note 34, at 57–58. I do not think that is quite true. As the discussion in the text shows, the nexus requirement does not impose any meaningful constraint once one accepts the Hamiltonian view adopted in *Butler* and *Dole*, but the requirement does not *presuppose* the rejection of that view.

spending legislation. *Dole*'s nexus requirement, therefore, "is vacuous."[109]

There is no requirement that federal spending have a single purpose, and both common sense and a basic understanding of politics reveal that federal funding legislation (like any legislation) typically has multiple purposes.[110] A senator may vote for farm subsidies to protect family farmers and stabilize rural communities, to distribute wealth to agribusiness, to bolster the senator's presidential prospects (with the Iowa caucuses in mind), or as part of a deal to ensure the passage of food stamp legislation.[111] Highway subsidies, even without the condition upheld in *Dole*, serve at least the purposes of facilitating commerce, employing construction workers, and bolstering labor unions. When Congress gives states money to build highways on the condition that they raise their drinking ages to twenty-one, that program serves all of the purposes that highway subsidies in general serve, plus the additional purpose of encouraging states to raise their drinking ages by giving them a valuable benefit in exchange for their doing so. By definition, then, the drinking-age

109. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 105. The Court has applied a form of nexus analysis to hold that the National Labor Relations Act (NLRA) preempted a California law that barred recipients of state funds from using those funds to assist or deter union organizing. *See* Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2414–16 (2008). But unlike in the Spending Clause context, in which Congress can generally spend for any purpose it likes, the NLRA limits state conduct—including spending—that the Court finds to have too great an effect on areas the statute leaves to the "free play of economic forces." *Id.* at 2412 (quoting Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976)). Although *Chamber of Commerce* could provide a template for stringent nexus review under the Spending Clause, the significant difference in context—and the fact that the Court has never invalidated a federal spending statute for having an insufficient nexus—suggests that the Justices might well see things differently under the Spending Clause.

110. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990) ("The complex compromises endemic in the political process suggest that legislation is frequently a congeries of different and sometimes conflicting purposes. To be enacted, a statute must be acceptable to a range of interest groups, each of which will have their own reasons for supporting, or at least not opposing, the statute."). For judicial recognition of this point, see Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003).

111. *See* John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, *in* CONGRESS AND POLICY CHANGE 223, 231–45 (Gerald C. Wright, Jr., Leroy N. Rieselbach & Lawrence C. Dodd eds., 1986) (explaining that urban Democrats voted for farm legislation in exchange for Republican support for food stamp legislation); David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1383 n.480 (2004).

condition is directly related to "the federal interest" in the highway funding program.[112]

Similarly, when Congress imposes a cross-cutting condition like Section 504, which provides that states that receive federal funds for *any* of their operations must refrain from disability discrimination in *all* of their operations,[113] the nexus requirement is readily satisfied. After Congress imposes such a condition, any new federal grant takes on at least two purposes: (a) subsidizing whatever activity the grant pays for (highway construction, public education, and so on) and whatever additional purposes that subsidy serves, and (b) encouraging the state to refrain from disability discrimination in all of its operations by providing the state a valuable benefit in exchange. As the Third Circuit has explained, Section 504 "expresse[s] a clear interest in eliminating disability-based discrimination in state departments or agencies," an interest that "flows with every dollar spent by a department or agency receiving federal funds."[114]

d. Justice O'Connor's Variant. Even Justice O'Connor's seemingly narrow view of the conditional spending power, which Professor David Engdahl calls the "harshest" variety of nexus requirement,[115] imposes no meaningful limits. In *Dole*, Justice O'Connor argued that "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying

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

113. *See* 29 U.S.C. § 794(b) (2006).

114. Koslow v. Pennsylvania, 302 F.3d 161, 175–76 (3d Cir. 2002). One scholarly treatment suggests that Section 504 violates the nexus requirement. *See* Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(and How Not To)*, 79 TEX. L. REV. 1037, 1137–42 (2001). But Professors Berman, Reese, and Young do not explain why encouraging the state not to discriminate cannot be a valid purpose of federal spending legislation. The dissenting appellate opinions that have argued that Section 504 violates the nexus requirement have the same problem. *See* Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1172 (D.C. Cir. 2004) (Sentelle, J., dissenting) (asserting that "[t]he purpose of the federal funds WMATA receives is to subsidize the mass-transit services WMATA provides" without explaining why federal funds cannot have multiple purposes); Jim C. v. United States, 235 F.3d 1079, 1084 (8th Cir. 2000) (en banc) (Bowman, J., dissenting) ("Here, the condition (waiver of Eleventh Amendment immunity with respect to Rehabilitation Act claims) bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education. That purpose, broadly stated, is to improve the overall quality of education.").

115. Engdahl, *supra* note 34, at 56.

how the money should be spent."[116] Engdahl contends that under such a rule, "scarcely any conditions could be imposed except those designating authorized uses or specifying accounting methods."[117] But "specifying how the money should be spent" seems to reach further than that. As Engdahl's reference to "accounting methods" suggests, Congress is "specifying how the money should be spent" when it requires federal funding recipients to adopt controls to ensure that the money is not stolen or wasted.[118] When Congress imposes such a requirement, it is effectively saying, "Spend this money (for highways, schools, or whatever) through a process that avoids theft or waste."

But that analysis would permit Congress to do far more than impose accounting methods. As Justice O'Connor recognized, it would also permit Congress to require state employees who worked on federally funded programs to refrain from partisan political activity.[119] Indeed, when the Court upheld the Hatch Act provision that imposed that very requirement, it recognized—in O'Connor-like language—that the provision represented the exercise of Congress's "power to fix the terms upon which its money allotments to states shall be disbursed."[120] In particular, Congress sought to ensure "better public service" in federally funded programs "by requiring those who administer funds for national needs to abstain from active political partisanship."[121] Justice O'Connor endorsed the Court's decision to uphold the Hatch Act, a statute she believed was "appropriately viewed as a condition relating to how federal moneys were to be expended."[122]

If the Hatch Act is a valid exercise of Congress's power to specify how its funds are to be expended, then it is difficult to see how Justice O'Connor's supposedly "harsh" view imposes any real limitation on conditional spending. In requiring the members of the Oklahoma Highway Commission to refrain from partisan political activity, Congress did not tell the state where or on what to spend federal

116. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief of the National Conference of State Legislators et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 19–20).

117. Engdahl, *supra* note 34, at 57.

118. The statute the Court upheld in *Sabri*—18 U.S.C. § 666—is an example of the point. *See supra* text accompanying notes 16–18.

119. *See Dole*, 483 U.S. at 217 (O'Connor, J., dissenting).

120. Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143 (1947).

121. *Id.*

122. *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting).

money. Congress simply declared that federal money must be spent in a context that is free from the kind of "active political partisanship" that may prevent the state from accomplishing the federal program's purpose.[123] By parity of analysis, Congress could require states to keep all items purchased with federal financial assistance in a secure, fenced-in area that is guarded by a police patrol. Congress would be specifying how its money was spent—"Don't buy anything unless you have a secure, fenced-in area with police patrol to put it in"—and it would be doing so to ensure its money was not wasted. Section 504 of the Rehabilitation Act, which effectively tells states that they must spend federal money in a context that is free from disability discrimination,[124] would be constitutional on a similar analysis.[125]

But, in almost exactly the same way, the condition in *Dole* itself could readily be characterized as merely specifying how federal highway funds were spent. As Justice O'Connor acknowledged in her dissent, "[w]hen Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one."[126] By requiring states that receive the full measure of federal highway funds to raise their drinking ages to twenty-one, Congress could be characterized as simply telling those states that they may spend those funds only in conditions that Congress believes conducive to safety on the highways they build. If the Hatch Act merely specified how federal money should be spent, the *Dole* statute did the same thing.

The above discussion should demonstrate that Professor Engdahl was wrong to argue that "any time the notion of a germaneness requirement is even taken seriously it puts Hamilton and his view of the spending power out of reach."[127] If anything, the opposite is true:

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123. *Oklahoma*, 330 U.S. at 143.

124. 29 U.S.C. § 794 (2006).

125. I don't think it particularly matters for these purposes that Section 504's requirements extend to "all of the operations of" a government entity, "any part of which" receives federal funding. *Id.* § 794(b). Congress might legitimately think that proven discrimination in one part of a federally funded entity is evidence of discrimination in other parts that more directly receive federal funds. Or Congress may simply understand that "[m]oney is fungible," Sabri v. United States, 541 U.S. 600, 606 (2004), so that federal funding of one part of a governmental entity will end up financing (and perhaps subsidizing) discrimination in another part of that entity, *see id.* On the fungibility of money in state budgets, see David Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2561 (2005).

126. *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting).

127. Engdahl, *supra* note 34, at 62. In a footnote to an article published over a dozen years after his major spending power article, Professor Engdahl seems to have recognized the point (without acknowledging his prior position). *See* David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 496 n.3 (2007) ("[A]dding any condition(s) to a

once one accepts the Hamiltonian view that Congress's spending power is not limited by the other Article I powers, the nexus requirement is unlikely to impose a meaningful limit on Congress's imposition of conditions on spending.

3. *Coercion*

a. The Problems with the Traditional Coercion Doctrine. Nor is the coercion doctrine likely to impose meaningful limits on the conditional spending power. As two leading scholars have observed, "the lower courts have consistently failed to find impermissible coercion, even when a state has demonstrated that either the absolute amount or percentage of federal money at stake is so large that it has 'no choice but to accept the [federal legislation's] many requirements.'"[128] Since the Supreme Court's 1936 decision in *United States v. Butler*, the closest any court has come to invalidating conditional spending legislation on coercion grounds has been the Fourth Circuit's 1997 en banc decision in *Virginia Department of Education v. Riley*.[129] In *Riley*, six judges concluded that the federal government's withholding of funds to Virginia under the Individuals with Disabilities Education Act raised a serious question of coercion because "the Federal Government has withheld from the Commonwealth 100% of an annual special education grant of $60 million because of the Commonwealth's failure to provide private educational services to less than one-tenth of one percent (126) of the 128,000 handicapped students for whom the special education funds were earmarked."[130] But those six judges did not constitute a majority, and they were unwilling to hold that the withholding of funds *actually* crossed the coercion line in any event.[131]

As with the nexus doctrine, it is easy to see why the coercion doctrine has proven ineffective as a limit on Congress's power to attach conditions to grants of federal funds to states. The basic problem is well rehearsed in the literature: Determinations that a

grant adds *ipso facto* to the purpose(s) of that grant, so that 'unrelated' conditions are logically impossible.").

128. Baker & Berman, *supra* note 3, at 468–69 (quoting Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000)).

129. Va. Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam).

130. *Id.* at 569 (quoting Va. Dep't of Educ. v. Riley, 86 F.3d 1337, 1355 (4th Cir. 1996) (Luttig, J., dissenting)). The majority en banc opinion adopted in whole and reprinted Judge Luttig's dissenting panel opinion.

131. *See id.* (reserving the question).

conditional offer of federal funds coerces the states tend to depend on normatively contestable premises about states' baseline entitlement to federal largesse.[132] Such premises are "especially problematic" when considered "against the backdrop of a constitutional jurisprudence in which most redistribution is permissible and few affirmative obligations on government are imposed."[133] No less a conservative luminary than Justice Scalia has declared, in an opinion for the Court, that "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts."[134] As Professor Kathleen Sullivan has explained, "[t]o hold that conditions coerce recipients because they make them worse off with respect to a benefit than they *ought* to be runs against the ground rules of the negative Constitution on which the unconstitutional conditions problem rests."[135]

As a number of commentators have shown, this problem has doomed efforts by such prominent scholars as Professors Richard Epstein and Seth Kreimer to articulate baselines that would give meaning to the coercion inquiry in conditional-offer cases.[136] And even opponents of lax review of conditional spending such as

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132. My discussion in this paragraph glosses over lots of nuances in the literature, but those nuances do not detract from the basic point. For illuminating discussions of coercion, see generally Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 440–72 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969); ALAN WERTHEIMER, COERCION (1987). For good discussions of the problems, see generally LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 77–90 (1996); Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989); Sullivan, *supra* note 87, at 1442–54.

133. Sullivan, *supra* note 87, at 1450.

134. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686–87 (1999).

135. Sullivan, *supra* note 87, at 1450. My point is not to endorse the notion of the "Negative Constitution," Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990) (criticizing the assumption underlying a "Negative Constitution" and proposing that scholars discard the rhetoric of negative rights), but merely to observe that it is a notion to which conservative judges strongly adhere.

136. For a good instantiation of Epstein's effort, see generally RICHARD EPSTEIN, BARGAINING WITH THE STATE (1993). For Kreimer's effort, see Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352–78 (1984). For discussions of the problems with these efforts, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 13–14 (2001); Louis Michael Seidman, Essay, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 78–80 (1988); sources cited *supra* note 132. Indeed, even Professor Kreimer himself appears to acknowledge that his approach has only limited traction—if that—in practice. *See* Adler & Kreimer, *supra* note 109, at 91–92.

Professors Lynn Baker and Mitchell Berman concede that it is "unlikely" that courts will adopt a test that "provid[es] that a spending condition is impermissibly coercive if it presents a state with either no *rational choice* or no *fair choice* but to accept."[137] The "no-rational-choice and no-fair-choice constructions of impermissible coercion," they assert, "are just too amorphous to be judicially administrable."[138] (This is just another way of saying that under the negative Constitution there is no ready way to determine that the federal government's withholding of largesse to the states denies them a "fair" choice to refuse the federal government's condition.)

But both Professors Baker and Berman have offered their own refinements of the coercion test—refinements that they believe would avoid these difficulties. Neither refinement solves the problem, however.

b. The Problems with Professor Baker's Refinement. When Congress uses its spending authority to impose conditions on states that it could not mandate under its other Article I powers, Professor Baker proposes that courts treat the conditions as coercive unless the conditional spending law is "reimbursement spending" legislation—a law that "specifies the purpose for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose."[139] She reasons that federal offers to states are inherently coercive, because, in her words, "the federal government has a monopoly power over the various sources of state revenue."[140] In particular, she contends, federal revenue essentially comes directly out of the states' pockets—the federal government has plenary power to tax the income of state residents, and every dollar of tax collected by the federal government is a dollar of potential revenue that the state cannot get its hands on.[141] "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."[142]

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137. Baker & Berman, *supra* note 3, at 521.
138. *Id.*
139. Baker, *supra* note 3, at 1916 & n.16.
140. *Id.* at 1935.
141. *Id.* at 1937.
142. *Id.*

Although this analysis would seem to make *any* exercise of the conditional spending power coercive, Professor Baker is particularly concerned with the prospect that a majority of states will impose their policy preferences on outlier states by securing the passage of conditional spending legislation.[143] She gives the example of the death penalty: most states have adopted capital punishment in their criminal justice systems, but those states might someday conclude that they are losing highly educated and mobile workers (who may be less likely to support capital punishment) to states with no death penalty.[144] "But if Congress is permitted to offer the states federal funds on the condition that they make the death penalty available for first degree murder convictions," Baker contends, "a simple majority of states will be able to harness the federal lawmaking power to restrict the competition for residents and tax dollars that would otherwise exist among them."[145]

Professor Baker's reimbursement-spending rule is designed to prevent this situation. Baker illustrates the point, again, with a death penalty example. She contrasts a hypothetical statute that offers "federal Death Penalty Funds" to reimburse states for "their demonstrated cost of executing those sentenced to death for first degree murder" with another hypothetical statute that gives states money apportioned on a population basis "to provide 'beat cops'" for urban neighborhoods on the condition that receiving states "hav[e] the death penalty available for first degree murder convictions."[146] Although both of these statutes "provide states an incentive to make the death penalty available," Baker contends that the former statute would be "surely preferable" for a state that "preferred *not* to have the death penalty."[147] Such a state would give up federal funds for the

143. *See id.* at 1942.

144. *See id.* at 1947–48. Professor Baker uses this example as part of an effort to show that liberals, as well as conservatives, have something to fear from broad conditional spending authority—a point that Baker has frequently made in her work on federalism. *See, e.g.*, Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 442 (2002) (arguing that liberals should favor the judicial enforcement of states' rights). But it all depends on your risk tolerance. To be sure, conditional spending could be used to support conservative legislation—which is one reason why, I explain in Section B, conservative Justices are unlikely to impose significant limitations on that tool. But a liberal who believes in activist government might reasonably conclude that the risk of some bad legislation is worth it for the prospect of enacting some good legislation. It is not hard to see why a liberal might think that Medicaid is worth the Solomon Amendment, for example.

145. Baker, *supra* note 3, at 1948.

146. *Id.* at 1967–68.

147. *Id.* at 1969.

death penalty—but those funds would not be especially tempting for a state that did not want to have the death penalty in the first place. But the latter statute imposes an additional cost on noncomplying states by requiring them to give up federal funds for activities that they *do* undertake—an additional cost that makes the law "*especially* likely to induce otherwise reluctant states to comply."[148]

It seems to me quite unlikely that the courts will adopt Professor Baker's proposal. For one thing, the proposal rests on a notion of coercion that falls prey to the same baseline problems I discussed in this Section. Baker articulates a clear baseline against which to measure coercion: when the federal government spends, it is really spending "the states' money,"[149] so the states are entitled to receive federal assistance in proportion to their share of the federal tax base. But the notion that the federal government has an affirmative obligation to give financial assistance to the states, no less than the baselines proposed by earlier scholars, "runs against the ground rules of the negative Constitution."[150] As a matter of empirical public finance, it is doubtful that federal taxation, particularly at early twenty-first century levels, imposes significant practical limits on states' ability to raise revenue from their residents.[151] And as a normative matter, the notion that federal tax revenues are really "the states' money" seems to pervert the (already perverse) libertarian dictum that taxation is theft. In Baker's view, *federal* taxation is theft—not from the taxpayers, but from the states (who are *really* entitled to the revenues). But there is no normative reason to think of

148. *Id.* at 1970.

149. *Id.* at 1937.

150. Sullivan, *supra* note 87, at 1450; *see also* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686–87 (1999) ("Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.").

151. *See* Galle, *supra* note 34, at 190 & n.221 (noting that federal taxation, by avoiding states' collective action problems, "is able to tap a large base of revenue unavailable to the states," that "Professor Baker offers no evidence that federal tax levels, either now or at any time in history, have been so high that they have exceeded this base," and that "the conventional wisdom is that state and federal tax levels rise and fall together"); Super, *supra* note 125, at 2561 ("[B]ecause states have broad revenue-raising powers on their own and large, diversified budgets, a failure to provide fiscal assistance—a disinterest in federalism—does not necessarily prevent states from acting unilaterally. Because a state can raise another tax when one is struck down or can cut another program when federal mandates make one more expensive, federal policies do not directly constrain the broader scope of states' policymaking."). *But cf. id.* at 2593 ("Congress and the Court have been weakening states' fiscal positions by hobbling states' revenue-raising capacities in ways difficult to reconcile with both institutions' strong pro-state rhetoric . . . .").

the states as *really* entitled to the revenues collected by the federal government. One could much more plausibly argue that adoption of the Sixteenth Amendment reflects the view that the federal government has, and ought to have, the first claim on the tax base.

Moreover, Professor Baker's reimbursement-spending rule is not well tailored to address her concern that majority states are using conditional spending legislation to induce outliers to bring their policies into line with the majority. To return to Baker's two hypothetical death penalty statutes, it is far from clear that a state that opposed capital punishment would prefer the reimbursement-spending law (that provided states funds to pay for death penalty prosecutions) to the regulatory spending law (that conditioned funds for beat cops on the state's adoption of capital punishment). If one accepts Baker's premise that the federal government is spending "the states' money," then a state without capital punishment can easily see the reimbursement-spending law as one that gives pro-death-penalty states a competitive advantage by paying for some of their capital punishment costs and thus freeing up money to spend on other worthy projects. The reimbursement-spending law takes noncomplying states' money, but it gives them nothing in return.

The law that conditions funds for beat cops on a state's adoption of capital punishment, by contrast, might be welcomed by a state without the death penalty. Such a law might well effect a positive-sum transaction between the states. The states that want capital punishment throughout the nation can achieve that goal, but only if they pay the holdout price of the states that do not have the death penalty. Receipt of that holdout price would, by definition, permit states that do not have the death penalty to trade their abolitionism for resources that will pay for projects that matter more to them.[152] Baker rests her arguments on the view that prohibiting "regulatory spending" enhances social welfare,[153] but it is hard to see how social

152. *See* Galle, *supra* note 34, at 186–87 ("[M]inority states will recognize that they can obtain holdout costs from the majority."). For an excellent discussion of the point, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 871–91 (1998).

153. *See, e.g.*, Baker, *supra* note 3, at 1935 ("[F]ederal regulatory spending is especially likely to reduce aggregate social welfare by reducing the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers to its residents and potential residents."). I follow, without passing judgment on, Professor Baker's treatment of states as unitary actors with relatively stable sets of preferences.

welfare is enhanced by blocking that transaction.[154] It is especially hard to see why a state without the death penalty would prefer that "its" money subsidize *other states'* capital punishment systems.

c. The Problems with Professor Berman's Refinement. Professor Berman argues that we can avoid the baseline problem altogether by adopting a theory of coercion that does not take the states' baseline entitlements as a starting point. Instead, he argues that a conditional offer of federal spending is "coercive for purposes of constitutional law—hence presumptively unconstitutional—if it would violate the Constitution for the [federal government] to carry out its threat" to withhold funds.[155] But that formulation hardly solves the problem. The doctrine looks to coercion as a way of determining whether a piece of conditional spending legislation violates the Constitution; to say that a piece of conditional spending legislation is coercive whenever its embedded threat violates the Constitution simply brings the argument full circle.

Recognizing that point, Professor Berman proposes that it would violate the Constitution for the federal government to withhold federal funds as a penalty for a state's exercise of its Tenth Amendment rights.[156] But even that formulation does not solve the problem because we need to know what a penalty is. Berman's definition of the term is exceptionally broad: "a 'penalty' exists when the [government] imposes a burden for the purpose of discouraging or punishing assertion of a protected right."[157] Because the Tenth Amendment gives states a "protected right" to do anything that is constitutional and is not preempted by valid federal legislation, and because encouragement is the flip side of discouragement, Berman treats a federal funding condition as imposing a penalty whenever the law has the purpose of "influencing the states' behavior."[158]

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154. *See* Super, *supra* note 125, at 2583–84. Professor Super argues,

> In effect, then, disallowing federal conditions on grants to states would be tantamount to denying states the ability to contract to perform services for the federal government. Whatever problems may attend the current approach, . . . treating states as legal incompetents without capacity to enter into binding contracts seems extreme and, indeed, quite insulting.

Id.

155. Berman, *supra* note 136, at 17.

156. *Id.* at 35.

157. *Id.*

158. *Id.* at 37.

Professor Berman offers no normative justification for treating as unconstitutional any conditional-funding statute that, by encouraging states to take an action that they have a Tenth Amendment right not to take, has the purpose of influencing the states' behavior. It is difficult to conceive of what the justification would be. Just like Professor Baker, Professor Berman must explain why the Constitution should prohibit states from contracting away some of their freedom of action (for a temporary period) in exchange for what they deem to be adequate consideration. And the implications of Berman's broad definition of penalty are far-reaching: all conditional spending seeks to influence the states' behavior. Even what Baker calls "reimbursement spending" seeks to influence states—if only by removing the financial barriers that may otherwise keep states from pursuing certain policies.

Professor Berman seems concerned to avoid these possible implications of his proposal. Thus, he insists that, even under his analysis, "[r]eimbursement spending is not coercive."[159] And he states that in "many" cases, even conditional spending laws that go beyond "reimbursement spending" will not be coercive.[160] To accommodate these conclusions, however, Berman must retreat to what is essentially a germaneness analysis: a funding condition is not coercive, even if it seeks to influence state behavior, if it is justified by "whatever national interests explain[ed] Congress's willingness to extend the offer" of federal funds in the first place.[161] Under Berman's analysis, a court should ask whether Congress would have withheld funds for violation of a spending condition if it were motivated solely by the interests that prompted it to appropriate the funds in the first place. If so, the condition is not coercive. Berman suggests that the withholding of highway funds in *Dole* would probably constitute coercion under this test, but the withholding of federal education funds from states that refuse to prohibit guns in schools might not.[162]

At this point, however, Professor Berman's analysis runs into the same problem that has made the nexus limitation so ineffective in constraining the conditional spending power: any given appropriation will serve multiple interests and have multiple motivations, and Congress can spend for any reason it likes. How can a court decide

159. *Id.* at 55.
160. *Id.*
161. *Id.* at 57.
162. *See id.* at 36–42, 55–56.

what was "the" purpose of the spending to which the condition was attached? How deeply must a court inquire into Congress's determination that a funding condition serves the same interests as the original funding stream? The difficulty in answering these questions ties up Berman's proposal and lends a slicing-the-baloney-too-thin quality to his application of that proposal to different fact patterns.[163] Even Professors Baker and Berman acknowledge that there might be no "adequately administrable judicial doctrine" that satisfactorily implements Berman's proposal.[164] It is doubtful judges would even make the effort to create such a doctrine.

B. The Failure of Motivation

I have argued that any effort to put muscle into the general welfare, nexus, and coercion limitations will require analytically embarrassing distinctions. It will also raise serious normative doubts in a Court that does not want to appear *Lochner*esque. But those obstacles would be small, indeed, for judges who were intent on finding a way to impose real limits on the conditional spending power.

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163. Thus, Professor Berman says there is a possibility that a law conditioning federal education funds on a state's enactment of a law prohibiting guns around schools might *not* be coercive if Congress's real purpose was not "to punish or deter, but rather to not waste federal money" (as it might be if "fear of gun violence had a measurable, deleterious effect on the ability of students to learn"). *Id.* at 55–56. He argues that "[i]n all likelihood, an argument along these lines would not, and should not, be credited," *id.* at 56, but how is a court supposed to tell? And why should it make a difference what Congress's *real* purpose is (whatever that means)? Berman also argues that federal matching grants are not coercive, even though withholding funds directed at certain purposes from states that fail to pitch in their own funds seems like a "penalty" based on his definition: "[I]f a state refuses, then whatever national interests explain Congress's willingness to extend the offer are still better served by the contribution than by the withholding of federal dollars." *Id.* at 57. He explains that

> even if the federal government would actually prefer half the loaf to its next most attractive alternative, successful realization of even that partial good is likely to require some action by state actors, and Congress might reasonably worry that state effort would prove lackadaisical . . . if the state is not itself financially committed.

Id. at 58. But why doesn't an analogous argument mean that the federal funding condition in *Dole* was constitutional? Successful realization of the goal of building safe highways is likely to require action by state actors, and Congress might reasonably worry that a state that does not raise its drinking age to the national standard is not serious about highway safety. And Berman endorses what looks like a totally *ad hoc* exception to his analysis for antidiscrimination laws like Section 504: those laws, he says, might be justified by the federal government's "interests in not exacerbating inequality." *Id.* But that is an interest tied to the condition, not to the underlying grant of funds. By parity of analysis, Congress should be able to justify the condition in *Dole* by pointing to its strong interest in not exacerbating teenage drinking.

164. Baker & Berman, *supra* note 3, at 539 ("Whether an adequately administrable judicial doctrine can be crafted to satisfactorily (albeit imperfectly) implement the understandings of coercion and penalty . . . are important questions that the court would have to confront . . . .").

When a majority of the Rehnquist Court sought to impose limits on Congress's commerce power, after all, it relied on a distinction between "economic" and "non-economic" activity—a distinction that approaches analytical incoherence and that has little to recommend it normatively.[165] If a majority of the Supreme Court *wanted* to impose some limits on the conditional spending power, it could easily speed past the normative and analytic problems I have identified.

Contrary to the views of such scholars as Professors Baker and Berman,[166] there is little reason to believe that the conservative Justices have any desire to impose significant direct limitations on the conditional spending power.[167] When the Rehnquist Court imposed direct limitations on the Commerce power in *Lopez* and *Morrison*, it was responding in part to the concern that the failure to do so would abandon all pretense of limitations on federal power—a concern underlined by the solicitor general's oral argument in *Lopez*, in which he was unable to come up with a single hypothetical statute that would be beyond Congress's commerce authority under his theory.[168] Opponents of the *Dole* regime often speak of the conditional spending power as effectively unlimited,[169] but that is not quite right. Even in the absence of judicially imposed limits, the conditional spending power contains an *intrinsic* limit that does not constrain other federal powers: Congress cannot impose Spending Clause regulations on unwilling states; those regulations depend on the consent states are willing to give (and Congress's willingness to find the revenue to purchase that consent).[170] Even a conservative Court

165. *See* United States v. Morrison, 529 U.S. 598, 610–11 (2000); United States v. Lopez, 514 U.S. 549, 559–61 (1995). For criticisms of the economic-noneconomic distinction on analytic and normative grounds, see *Morrison*, 529 U.S. at 643–45 (Souter, J., dissenting); *id.* at 656–61 (Breyer, J., dissenting); *Lopez*, 514 U.S. at 608 (Souter, J., dissenting).

166. *See* Baker & Berman, *supra* note 3, at 461.

167. Here, I reach conclusions similar to Professor Neil Siegel's. *See* Neil S. Siegel, Dole*'s Future: A Strategic Analysis*, 16 SUPREME CT. ECON. REV. 165, 169–89 (2008). But our analyses, although compatible, differ. Whereas Siegel uses game-theory tools and casual observation of the Justices' decisions to support his conclusions, I look to the political stakes in conditional spending cases. Those political stakes, I suggest, underlie the behavior Siegel models and observes. Professor Simon Lazarus reaches similar conclusions based on his reading of the Justice Roberts confirmation hearings. *See* Lazarus, *supra* note 23, at 30–31.

168. *See* Young, *supra* note 14, at 37–38.

169. *See, e.g.*, Baker, *supra* note 3, at 1920 ("[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.").

170. *See* Galle, *supra* note 34, at 169.

has reason to be relatively unconcerned with a broad congressional power to try to *persuade* states to agree to spending conditions.

And there are substantial reasons why a conservative Court would hesitate before imposing meaningful direct limitations on the spending power. One involves the fear of *Lochner*ism. Strengthening the direct limitations on the conditional spending power will require courts to engage in the kind of second-guessing of Congress's means-ends judgments that conservative jurists foreswore in the wake of *Lochner*.

Even aside from their interest in avoiding the appearance of judicial activism, conservative judges have strong reasons to defend a broad conditional spending power. As Professor Baker never tires of pointing out, conditional spending legislation can just as readily be used to achieve conservative ends as it can liberal ones.[171] And robust versions of the nexus and coercion tests could readily be applied beyond the context of conditional funding of the states to more general unconstitutional conditions cases involving conditional funding of individuals and private entities—cases in which these tests will be frequently invoked by funding recipients who seek to vindicate politically liberal rights claims.[172]

If the Court limited Congress to imposing conditions that relate directly to some narrowly defined purpose of the money it gives to states, it would be hard to keep lower courts from applying the same rule to cases in which a federal funding condition implicates the constitutionally protected conduct of *private* entities, for the Court

171. *See supra* note 144.

172. For examples of a cases in which a conservative court has rejected liberal unconstitutional conditions claims that take this form, see Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297, 1313 (2006) (holding that a statute withholding federal funds from universities that did not give military recruiters access to students did not violate the First Amendment); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 537 (2001) (holding that a statute prohibiting recipients of federal legal services funding from challenging welfare laws violated the First Amendment); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73 (1998) (concluding that a statute requiring that "general standards of decency and respect for the diverse beliefs and values of the American public" be considered in the distribution of federal arts funding "neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles"); Rust v. Sullivan, 500 U.S. 173, 203 (1991) (holding that regulations that prohibited federally funded family-planning clinics from abortion counseling did not violate the First or Fifth Amendments). For a sense of the conservative political uses to which conditional funding of private entities can be put, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 676–77 (1992).

has applied some sort of nexus rule in both contexts.[173] And it would be even more difficult to avoid applying a beefed-up *coercion* test to cases involving the funding of private entities: if a state—which is a large entity with the power to tax—is coerced into accepting federal funding conditions, surely a private entity without the power to tax is even more coerced. The threat of taking away all of the federal funding that goes to a private university if it does not permit military recruiters access to its career services facilities[174] is at least as coercive as the threat of taking away all of a state's federal special education funds if it does not provide educational services to disabled students who have been expelled;[175] under definitions of coercion that focus on whether the recipient had any fair or realistic choice but to accept, the university is surely coerced even more than is the state.

To the extent that conservative Justices want to hold the line on private entities' challenges to conditions on the receipt of federal funds, they will resist any effort to strengthen the nexus and coercion limitations on conditional spending to states. Indeed, one might plausibly attribute Chief Justice Rehnquist's seemingly incongruous opinion in *Dole*—in which, contrary to the thrust of Rehnquist's federalism jurisprudence, the Court imposed no meaningful limitations on Congress's conditional spending authority[176]—to a strategic concern that the nexus and coercion doctrines cannot be effectively cabined to protect *states* from funding conditions without also giving *individuals* a tool to challenge the conditions on welfare benefits and other government funding they receive.

Finally, wholly aside from these sorts of rule-consequentialist concerns, a robust coercion limitation seems, ideologically, more in tune with liberal than with conservative jurisprudential style. The notion that coercion can extend beyond the physical, and that the law should take account of the pressures that make an individual unable, as a practical matter, to resist a given course of action, is a notion that is generally associated with the liberal position on a number of doctrinal issues: broad duress defenses in criminal law;[177] narrow

173. *See, e.g.*, *Rust*, 500 U.S. at 197–98 (applying such a test in an individual's First Amendment "unconstitutional conditions" challenge).

174. *See Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1313.

175. *See* Va. Dep't of Educ. v. Riley, 106 F.3d 559, 560 (4th Cir. 1997) (en banc) (per curiam).

176. *See supra* note 58 and accompanying text.

177. *See* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 862 (2003) ("Liberals . . . wish

notions of voluntary confessions, consent to searches, or waiver of constitutional rights;[178] expansive notions of unconscionability in contract;[179] and so forth. In each of these contexts, and many others, it is liberals who urge that the doctrine should take an empathic view that acknowledges the many pressures on one's choices, and it is conservatives who take a thinner, more individualistic view of free choice.[180] If conservative judges are to adopt a strict coercion limitation on conditional spending, however, they will be forced to argue for the sort of empathic view of choice that they typically reject. They will be forced to argue that states have no real choice but to take federal money, even though "nobody is putting a gun to the state's head." Many conservatives are likely to see such an argument as so inconsistent with their typical jurisprudential views as to be undesirable.[181]

II. THE POSSIBILITIES OF INDIRECT LIMITATIONS

In the previous Part, I argue that the Supreme Court is unlikely, in the foreseeable future, to impose meaningful *direct* limitations on Congress's conditional spending power. But it is far more likely to impose *indirect* limitations—limitations that do not prohibit Congress from imposing substantive rules on the states through the conditional spending power, but that either raise the cost of doing so or make it difficult to enforce the rules Congress imposes. One such limitation—the notion that conditions on federal spending are not "law" but are merely contractual obligations—has not fared well in the courts, but it may have brighter prospects in the future. I discuss that limitation in Section A. As I show in Section B, the Supreme Court and some lower courts have already used another such limitation—the requirement that federal spending legislation give states clear notice

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to expand the defense to encompass responses to 'situational duress,' that is, to natural threats that persons of reasonable firmness would be unable to resist.").

178. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 278 (1973) (Marshall, J., dissenting).

179. *See* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 118 (1999) (describing the role of liberal judges in spreading the unconscionability doctrine).

180. Professor Mark Kelman aptly notes that "[i]t is generally easy, in fact, to locate people on our traditional political spectrum by ascertaining to what extent they are committed to describing life in those spheres 'unregulated' by the state as free, chosen." MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 102 (1987).

181. For one account of how this process might work in a private-law context, compare this to Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 10 EUR. REV. PRIVATE L. 7, 13–18, 25 (2001).

of the conditions attached to it—with great frequency. Because both the assertion that spending conditions are not law and the notice requirement derive from the notion that conditional spending is (or is in the nature of) a contract, I call these indirect limitations "contract theories." I call the principle that spending conditions are not law the "strong contract theory," and I call the notice requirement the "weak contract theory."

I argue that, as a normative matter, the Court should not adopt either the strong or the weak contract theory. But, as a predictive matter, the Court is nearly certain to continue to implement the weak contract theory, and there is a chance (though not a big one) that it will adopt the strong contract theory. Unlike the general welfare, notice, and coercion limitations, the indirect limitations offered by the two contract theories do not put courts in the *Lochner*esque position of appearing to second-guess Congress's policy judgments, nor do those indirect limitations lead to especial analytic embarrassment. Perhaps most importantly, the two contract theories do not bar the types of conditional spending legislation that conservatives favor, and they need not lead to liberal results in the sorts of unconstitutional conditions cases in which conservatives defend spending conditions. A conservative Court can therefore employ the contract theories to limit the reach and enforceability of conditional spending legislation passed by more liberal Congresses without threatening any particular harm to legislation passed by more conservative Congresses.

A. Unenforceability and the Strong Contract Theory

The strong contract theory begins with the notion that "legislation 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."[182] But to proponents of that theory, conditional spending legislation is not just "in the nature of" a contract; it is *nothing but* a contract. As I show in Section A.1, the strong contract theory would substantially limit the enforceability of spending conditions. Although a number of individual judges have pressed versions of the theory in various opinions, I show in Section A.2 that their positions have not prevailed. In Section A.3, I argue against the strong contract theory, and suggest some reasons why, though it is possible that a conservative court would use that theory to

182. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

restrict Congress's conditional spending power, it is not especially likely.

1. *The Theory.* The strong contract theory is straightforward, if radical. The theory posits that the spending power is not an enumerated legislative power, so the ordinary accoutrements of legislative power do not extend to laws passed pursuant to that power. As Professor David Engdahl, the leading academic exponent of the strong contract theory, explains:

> [C]ongress' power to spend money is not a legislative power. Our Constitution does contemplate—and in some instances, even specifies—that Congress will have certain non-legislative powers. The power to spend—like the powers to receive and hold property, to make contracts, and to sue for injuries like trespass and waste—inhere in every body politic as an artificial person . . . .[183]

Engdahl recognizes that the conditions accompanying the receipt of federal funds "are specified by Congress in statutory form," but he argues that "they are not statutory in their effect: They have no force at all as 'law,' but rather are binding, if at all, only by virtue of contract."[184]

For Professor Engdahl, the contractual nature of conditional spending legislation has a few key consequences. Because spending conditions are not "law," Congress cannot invoke the Necessary and Proper Clause to effectuate the purposes of those conditions,[185] nor can those conditions preempt inconsistent state laws under the Supremacy Clause.[186] And private parties cannot challenge state violations of spending conditions under § 1983, because that statute is limited to enforcing "rights 'secured by' federal 'laws.'"[187] In Engdahl's view, "third-party rights" under conditional spending legislation "are 'secured' (if at all) not by any 'law,' but only by the contract between the recipient and the United States, and section

183. Engdahl, *supra* note 127, at 498–99 (emphasis omitted) (footnotes omitted).

184. *Id.* at 500 (emphasis omitted).

185. *See* Engdahl, *supra* note 34, at 18–24 ("Congress thus may pursue policy objects regarding extraneous matters, those policies remain extraneous to the enumerated powers; therefore, those policies cannot invoke the Necessary and Proper Clause, which avails only for effectuating ends within the enumerated powers.").

186. *See id.* at 20–24, 62–78 ("[E]xtraneous objectives being promoted by taxing, by spending, or by manipulating any other enumerated power may freely be frustrated or countermanded by states.").

187. *Id.* at 104 (quoting 42 U.S.C. § 1983 (2000)).

1983 does not even remotely contemplate causes of action for contract violations."[188] For the same reason, the strong contract theory would bar private parties from suing to enforce spending conditions under the doctrine of *Ex parte Young*.[189] That doctrine "gives life to the Supremacy Clause" by authorizing prospective remedies that are "designed to end a continuing violation of federal law."[190] If spending conditions are not "law," there is no basis for applying the *Ex parte Young* doctrine to enforce them.[191]

2. *The Failure (So Far) in the Cases.* In a 2007 article, Professor Engdahl asserts that "adherents of the contract thesis of the spending power"—by which he appears to mean the strong contract theory I discuss here—"currently comprise a thin, but relatively young and vigorous, majority of the Supreme Court," and that there is thus "good reason to expect important additional developments, at least with regard to third-party beneficiary actions."[192] But although a few Justices have endorsed aspects of the strong contract theory in concurring or dissenting opinions, they have not persuaded a majority to go along. And the courts of appeals have uniformly rejected that theory.

Concurring in *Blessing v. Freestone*[193]—a case that reversed the Ninth Circuit's holding that § 1983 can be used to enforce Title IV-D of the Social Security Act[194]—Justice Scalia suggested some sympathy with the strong contract theory. In his opinion, which Justice Kennedy joined, Justice Scalia went out of his way to observe that the Court's disposition of the case made it "unnecessary to reach the question whether § 1983 *ever* authorizes the beneficiaries of a federal-state funding and spending agreement—such as Title IV-D—to bring suit."[195] He noted that it "appears to have been the law at the time § 1983 was enacted"[196] that a third-party beneficiary was "regarded as

188. *Id.*

189. *Ex parte* Young, 209 U.S. 123 (1908).

190. Green v. Mansour, 474 U.S. 64, 68 (1985).

191. *See* Engdahl, *supra* note 127, at 534 n.266 (citing favorably the district court's decision in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 561–89 (E.D. Mich. 2001), *rev'd*, 289 F.3d 852 (6th Cir. 2002), which held that spending conditions could not be enforced under § 1983 or *Ex parte Young*).

192. Engdahl, *supra* note 127, at 527.

193. Blessing v. Freestone, 520 U.S. 329 (1997).

194. *Id.* at 333.

195. *Id.* at 349 (Scalia, J., concurring).

196. *Id.* at 350.

a stranger to the contract, and could not sue upon it."[197] He therefore declared himself open to the argument that conditional spending laws do not "secure" any rights in third-party beneficiaries for purposes of § 1983.[198] Concurring in the judgment in a later case, Justice Thomas stated that the "contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise," though he declined to reach the questions because the parties had not raised them.[199]

But even in those cases, Justices Scalia and Thomas did not suggest that they would fully endorse the strong contract theory. That theory, after all, denies Congress the *power* to make spending conditions enforceable against states by third parties. But in his *Blessing* concurrence, Justice Scalia suggested that his position was rooted in statutory interpretation—that "the understanding of § 1983 when it was enacted" incorporated the then-dominant rule that third-party beneficiaries could not sue to enforce a contract.[200] And in his *Pharmaceutical Research & Manufacturers of America v. Walsh*[201] opinion, Justice Thomas seemed to say that Congress had the power to give third parties a private right of action to enforce conditional spending laws.[202]

And in other cases, majorities of the Court (joined, in most cases, by Justices Scalia, Kennedy, and Thomas), have rejected key components of the strong contract theory. In *Barnes v. Gorman*,[203] which I discuss in Section B.1.a as an example of the Court employing the weak contract theory, Justice Scalia's majority opinion expressly disclaimed any implication "that suits under Spending Clause

197. *Id.* at 349.

198. *See id.* at 349–50.

199. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in the judgment).

200. *Blessing*, 520 U.S. at 350 (Scalia, J., concurring).

201. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).

202. *See id.* at 683 (Thomas, J., concurring in the judgment) (emphasis added) (citation omitted).

> Under this Court's precedents, private parties may employ 42 U.S.C. § 1983 or an implied private right of action only if they demonstrate an "unambiguously conferred right." Petitioner quite obviously cannot satisfy this requirement and therefore arguably is not entitled to bring a pre-emption lawsuit as a third-party beneficiary to the Medicaid contract. . . . [W]ere the issue to be raised, I would give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action.

Id.

203. Barnes v. Gorman, 536 U.S. 181 (2002).

legislation are suits in contract, or that contract-law principles apply to all issues that they raise."[204] In *Frew v. Hawkins*,[205] Justice Kennedy's opinion for a unanimous Court upheld enforcement of a consent decree that Texas officials had entered into with private plaintiffs to resolve a claim that the state was violating its obligations under the Medicaid program (a conditional spending program).[206] Although the strong contract theory would provide that Medicaid obligations are not "law," the Court stated that the consent decree enforcing those obligations was "a federal decree entered to implement a federal statute" and thus was "consistent with *Ex parte Young*."[207]

And in *Sabri v. United States*,[208] the Court upheld a criminal prohibition on bribery in entities that receive federal funds.[209] The Court explained that Congress had power, under the Necessary and Proper Clause, "to see to it that taxpayer dollars appropriated under [the spending] power are in fact spent for the general welfare."[210] Although the strong contract theory would hold that the Necessary and Proper Clause is inapplicable to the spending power, and that conditional spending laws accordingly cannot bind third parties, every Justice but Justice Thomas signed onto the majority opinion. Justice Thomas voted to uphold the statute on Commerce Clause grounds and thus did not reach the question "whether Congress' power to spend combined with the Necessary and Proper Clause could authorize the enactment of" the statute before the Court.[211] He did not, however, challenge the proposition that Congress may use the Necessary and Proper Clause to support legislation enacted pursuant to the spending power. He merely "f[ou]nd questionable the *scope* the Court g[ave] to the Necessary and Proper Clause as applied to Congress' authority to spend," with a particular focus on the Court's application of the nexus requirement.[212]

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204. *Id.* at 188–89 n.2. Justices Kennedy and Thomas joined Justice Scalia's opinion for the Court.

205. Frew v. Hawkins, 540 U.S. 431 (2004).

206. *Id.* at 436–37.

207. *Id.* at 439.

208. Sabri v. United States, 541 U.S. 600 (2004).

209. *Id.* at 602.

210. *Id.* at 605.

211. *Id.* at 614 (Thomas, J., concurring in the judgment).

212. *Id.* at 611 (emphasis added).

In recent years, only one lower court has endorsed the strong contract theory: the Eastern District of Michigan, in *Westside Mothers v. Haveman*.[213] But the Sixth Circuit reversed the district court's decision in that case and held that conditional spending legislation, rather than being merely a contract, is the supreme law of the land and is enforceable under both § 1983 and *Ex parte Young*.[214] And the other courts of appeals to confront the question have rejected the district court's *Westside Mothers* holding as well.[215] To this point, the strong contract theory has not been successful in the courts.

3. *Assessment.* Despite Professor Engdahl's optimism, I think it quite unlikely that the Supreme Court will adopt the strong contract theory any time soon. The major problem is that too much precedent stands in the way. Although the Court has never squarely confronted the argument that the conditional spending power is not a "legislative" power, it has decided a number of cases that are inconsistent with the strong contract theory. As Engdahl acknowledges,[216] the Supreme Court has repeatedly held that conditional spending statutes preempt inconsistent state legislation pursuant to the Supremacy Clause.[217] That is true even in cases in which the state is not a party to the contract created by the spending statute (as when a state law permits the attachment of funds received by private parties as Social Security or Veterans' Administration benefits).[218] And, as discussed in Section A.2, the Court has held that

213. Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 587–88 (E.D. Mich. 2001) (holding that state obligations under the Medicaid statute are not "law" for purposes of the Supremacy Clause and may not be enforced under § 1983 or *Ex parte Young*), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

214. *Westside Mothers*, 289 F.3d at 860, 862–63.

215. *See, e.g.*, Frazar v. Hawkins, 376 F.3d 444, 446 (5th Cir. 2004) (noting that the panel had "rejected" the "so-called *Westside Mothers* arguments" in a previous appeal); Mo. Child Care Ass'n v. Cross, 294 F.3d 1034, 1040 (8th Cir. 2002) ("[W]e have found no other decision in which any federal court of appeals has held that legislation enacted pursuant to Congress's Spending Clause powers is not part of the supreme law of the land. We agree with the Sixth Circuit's reasoned rejection of this argument and likewise reject the argument here." (citation omitted)); Antrican v. Odom, 290 F.3d 178, 188 (4th Cir. 2002) (rejecting an argument in line with the district court's ruling in *Westside Mothers* as a "novel position" that was "at odds with existing, binding precedent").

216. *See* Engdahl, *supra* note 34, at 62–78.

217. Blum v. Bacon, 457 U.S. 132, 138 (1982); Carleson v. Remillard, 406 U.S. 598, 604 (1972); Townsend v. Swank, 404 U.S. 282, 286 (1971).

218. *See* Bennett v. Arkansas, 485 U.S. 395, 396 (1988) (per curiam) (holding that an Arkansas statute, which permits the state to seize prisoners' property to defray the costs of their incarceration, is preempted to the extent that it is applied to seize property received as Social

Congress has power, under the Necessary and Proper Clause, to regulate (and indeed impose criminal liability on) third parties whose actions might interfere with the administration of federally funded state programs.[219] The Court has also, on three occasions, held that particular conditional spending statutes were "laws" that "secured" rights in private parties for purposes of § 1983.[220]

It is possible that the Court could say that the validity of the strong contract theory was not squarely presented in any of these cases. But in each one, an essential part of the Court's analysis and holding was directly inconsistent with the notion that conditional spending statutes are not "law" but are merely contract. I doubt the Court would adopt a rule that flies in the face of so much precedent.

Precedent aside, there are substantial problems with the strong contract theory. Conditional spending statutes are no less "law" than any other kind of federal legislation.[221] Like all other federal legislation, they must go through the Article I, Section 7 process of bicameralism and presentment. To be sure, the obligations they impose on a state depend on satisfaction of a condition subsequent—the state's acceptance of the conditional offer of federal funds—but that fact does not make their obligations any less binding (or any less a product of "law") than the obligations imposed by any other federal statute. As Professor Erwin Chemerinsky has explained, "[a] State certainly gets to decide whether to participate in a federal program like Medicaid; but once it has made the choice to participate, it must comply with the terms of that law, just as it must follow all federal laws that apply to it."[222]

It bears emphasis that Professor Engdahl's theory is *not* merely a rule for interpreting Spending Clause statutes—a rule, for example, that courts should read those statutes as not authorizing private rights

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Security or benefits); *see also* Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973) (holding that the Social Security Act bars the State of New Jersey from attaching Social Security benefits as reimbursements for state welfare payments).

219. Sabri v. United States, 541 U.S. 600, 605 (2004).

220. *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509–10 (1990) (Boren Amendment to Medicaid Act); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 432 (1987) (Brooke Amendment to the Housing Act of 1937); Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (Aid to Families with Dependent Children Provisions of the Social Security Act).

221. *See* Erwin Chemerinsky, *Ensuring the Supremacy of Federal Law: Why the District Court was Wrong in* Westside Mothers v. Haveman, 12 HEALTH MATRIX 139, 145 (2002) ("Nothing in the Constitution's language, or any Supreme Court precedent, draws a distinction among federal laws, denying some status as the supreme law of the land.").

222. *Id.* at 146.

of action or having preemptive effect unless Congress specifies otherwise. Such a rule would be an instantiation of the weak contract theory, which I discuss below. Engdahl's strong contract theory would, as a matter of constitutional law, bar Congress from giving a Spending Clause statute preemptive effect, authorizing a private right of action for its violation, and enacting additional laws necessary and proper to carrying it out. To justify that position, Engdahl must answer the question why this congressional power is different from all other congressional powers. Engdahl answers the question by asserting that, unlike the other powers, the spending power is not an enumerated legislative power.[223] If the spending power is not such a power, he contends, it is not one of the "Powers vested by this Constitution in the Government of the United States"[224] for purposes of the Necessary and Proper Clause.[225] Nor is a conditional spending statute "supreme Law of the Land,"[226] because it is not a law "made in Pursuance"[227] of the Constitution.[228]

But, as Professor Engdahl himself acknowledges,[229] the Supreme Court has long held that the spending power *is* enumerated in the General Welfare Clause of Article I, Section 8—the section that sets forth most of Congress's legislative powers.[230] And even Alexander Hamilton—a signer of the Constitution, one of the most important Founders, and the person whose understanding of the spending power has been accepted as correct by both the Supreme Court and Engdahl himself—described the General Welfare Clause as the source of Congress's spending power.[231]

Once one accepts the premise that the General Welfare Clause is the source of Congress's spending power, Professor Engdahl's argument falls apart. The General Welfare Clause, after all, is also the

223. *See* Engdahl, *supra* note 127, at 498–500.

224. U.S. CONST. art. I, § 8, cl. 18.

225. *See* Engdahl, *supra* note 34, at 18.

226. U.S. CONST. art. VI, § 1, cl. 2.

227. *Id.*

228. *See* Engdahl, *supra* note 34, at 20.

229. *See id.* at 49–50.

230. U.S. CONST. art. I, § 8 ("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."); *see, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) (citing cases); *see also* Galle, *supra* note 34, at 168 (making this point about Professor Engdahl's argument).

231. *See* Engdahl, *supra* note 34, at 53 ("It is true that even Hamilton attributed the spending power to the Taxing Clause.").

source of Congress's taxing power—a power that no one can doubt is legislative. There is no textual basis in the General Welfare Clause, the Necessary and Proper Clause, or the Supremacy Clause for treating the taxing and spending powers as lacking the entailments of other congressional powers. It would be surprising if a conservative court upended so much precedent to adopt a purportedly textual interpretation of the Constitution that seems so inconsistent with both the text and the original understanding.

B. Notice—The Weak Contract Theory

In his opinion for the Court in *Pennhurst State School and Hospital v. Halderman*,[232] then–Associate Justice Rehnquist did not draw a contractual analogy to support Professor Engdahl's strong contract theory. Instead, he drew that analogy to support a notice requirement:

> [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. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.[233]

"Accordingly," the Court concluded, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[234] The Court applied that rule to hold that the "least restrictive" language of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 did not impose judicially enforceable obligations on the states. That language, which appeared in a statutory "finding," stated that "treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is

232. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

233. *Id.* at 17 (citations omitted).

234. *Id.* (citations omitted).

least restrictive of the person's personal liberty."[235] The Court explained that "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to" such a "largely indeterminate" obligation.[236] And the placement of the "appropriate treatment" and "least restrictive setting" language in a general statement of "findings" fell "well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with" that language.[237]

Although *Pennhurst* seems like a straightforward application of the clear-statement rule that the Court often invokes in cases in which federal legislation alters the federal-state balance,[238] both the Supreme Court and lower courts have gone well beyond ordinary clear-statement principles in applying the notice rule to conditional spending cases. As I show in Section B.1, courts have applied that rule to require a variety of different sorts of notice and have thereby significantly limited the enforceability of a number of important federal spending conditions. Although the Rehnquist Court passed up some opportunities to apply an even *more* stringent notice rule, the possibility remains a very live one. In Section B.2, I assess the likelihood that the Roberts Court will take up that possibility. Although there are substantial normative objections to applying a super-strong clear-statement rule to conditional spending legislation, I conclude that the Court will likely apply just such a rule to a greater and greater extent in the near future.

1. *Possibilities and Limits in the Cases.* Cases in the Supreme Court and the lower courts have interpreted the Spending Clause notice requirement as (more or less stringently) demanding that funding recipients receive three different types of notice before being held liable for violation of a funding condition: (a) notice of the *remedy* for violation of a funding condition, (b) notice of how the substantive rule imposed by that condition *applies* to particular facts, and (c) notice of the *facts* in a given case that violate that condition.

235. *Id.* at 13 (quoting 42 U.S.C. § 6010 (1976)).

236. *Id.* at 24–25.

237. *Id.* at 25.

238. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 189 (treating the *Pennhurst*-derived notice principle as "just a clear statement rule, that functions here just as any clear statement rule").

Each of these applications of the notice rule derives in some way from the holding and discussion in *Pennhurst*.

a. Notice of the Remedy. In a number of cases, the Court has applied *Pennhurst* to hold that particular *remedies* will not be available for violation of a funding condition unless the states were on notice that those remedies would be available at the time they agreed to accept the federal money. For example, in *Gonzaga University v. Doe*,[239] the Court held that the Family Educational Rights and Privacy Act could not be enforced under 42 U.S.C. § 1983.[240] The Court relied on *Pennhurst*'s statement that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State,"[241] and its holding that "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983."[242] Applying these principles, the *Gonzaga* Court held that the statute's institutionally focused language—which prohibits the Department of Education from funding an educational institution with a "policy or practice of permitting the release of education records"—did not unambiguously give *individual* students the right to be free from the release of their records.[243]

In *Barnes v. Gorman*, the Court applied the same principle to hold that, even when a private right of action to enforce a piece of conditional spending legislation exists, plaintiffs may not recover punitive damages unless the statute specifically put recipient states on notice of the availability of that remedy.[244] The Court explained that, when conditional spending legislation gives individuals a right of action, a state that receives funds "is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract."[245] But punitive damages are not traditionally

239. Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).
240. *Id.* at 276.
241. *Id.* at 280 (quoting *Pennhurst*, 451 U.S. at 28).
242. *Id.* (quoting *Pennhurst*, 451 U.S. at 17, 28).
243. *Id.* at 287–88 (emphasis omitted) (quoting 20 U.S.C. § 1232g(b)(1) (2000)).
244. Barnes v. Gorman, 536 U.S. 181, 185–88 (2002).
245. *Id.* at 187.

available for breaches of contract.[246] Moreover, the Court concluded, it is unlikely that a state would ever agree to accept federal funds if doing so exposed it "to such unorthodox and indeterminate liability."[247] In *Arlington Central School District Board of Education v. Murphy*, which I discussed in the Introduction,[248] the Court used the same sort of analysis to conclude that the Individuals with Disabilities Education Act's fee-shifting provision—which entitles prevailing parents to recover "reasonable attorneys' fees as part of the costs" in proceedings to enforce the statute[249]—did not put states on notice that they would be liable to pay those parents' *expert* fees.[250]

The most extreme application of the notice-of-remedy requirement appears in the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Sciences Center*.[251] The case involved Section 504 of the Rehabilitation Act,[252] which prohibits disability discrimination by recipients of federal funds[253] and provides that states that receive federal funds must waive their sovereign immunity against claims under the statute.[254] The Second Circuit agreed that the statutory language "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity."[255] But it concluded that New York had not knowingly waived its sovereign immunity against Rehabilitation Act claims when it accepted federal funds from 1993 to 1995 (when the dispute in *Garcia* arose).[256]

The *Garcia* court's reasoning was somewhat convoluted: Title II of the Americans with Disabilities Act (which became effective in 1992)[257] imposes on *all* states the same substantive obligations that the Rehabilitation Act places on recipients of federal funds,[258] and the ADA contains a provision that expressly abrogates state sovereign

246. *See id.* at 187–88.

247. *Id.* at 188.

248. *See supra* notes 28–31 and accompanying text.

249. 20 U.S.C. § 1415(i)(3)(B) (2006).

250. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459–61 (2006).

251. Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98 (2d Cir. 2001).

252. *Id.* at 104.

253. *See* 29 U.S.C. § 794(a) (2006).

254. *See id.* § 794a; 42 U.S.C. § 2000d-7(a)(1) (2000).

255. *Garcia*, 280 F.3d at 113.

256. *Id.* at 114.

257. Americans with Disabilities Act of 1990, Pub. L. 101-336, § 205(a), 104 Stat. 327, 338 (codified at 42 U.S.C. § 12131 (2000)).

258. *See id.* §§ 12131(1), 12134(b), 12201(a).

immunity[259]—although the Supreme Court held that provision unconstitutional in at least some cases in *Board of Trustees v. Garrett*.[260] If the ADA's abrogation of sovereign immunity was unconstitutional as a whole—as *Garrett* might have been read to suggest—the Rehabilitation Act's requirement of waiver would, to be sure, have a significant legal effect. But between the effective date of the ADA and the *Garrett* decision, "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits [because] by all reasonable appearances, state sovereign immunity had already been lost."[261] In other words, *Garcia* held that spending-power legislation must give states notice not just of the *formal legal consequences* of any conditions attached to the receipt of funds but also of the *baseline legal regime* and the *incremental change* the conditions make to it. A panel of the Fifth Circuit followed *Garcia* in holding that the state's acceptance of federal funds prior to a 2001 case in which that court held the ADA's abrogation of sovereign immunity unconstitutional[262] "did not manifest a *knowing* waiver of that which they could not know they had the power to waive."[263] The panel's ruling on that point was overturned en banc, however.[264] Except for the Fifth Circuit's panel decision, courts outside of the Second Circuit have rejected the *Garcia* requirement of notice of incremental legal effect.[265] But the Second Circuit's formulation illustrates the lengths to which the notice-of-remedies requirement can be pushed.

b. Notice of How the Substantive Rule Applies to Particular Facts. Some courts have read *Pennhurst* as requiring that spending legislation set forth the conditions attached to it with greater

259. *Id.* § 12202.

260. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 368–74 (2001).

261. *Garcia*, 280 F.3d at 114 (citation omitted) (citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)).

262. The case was *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001).

263. Pace v. Bogalusa City Sch. Bd., 325 F.3d 609, 616–17 (5th Cir. 2003), *rev'd en banc*, 403 F.3d 272 (5th Cir. 2005).

264. *See Pace*, 403 F.3d at 277.

265. *See* Constantine v. Rectors & Visitors, 411 F.3d 474, 495 (4th Cir. 2005); Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1166 (D.C. Cir. 2004); Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 129–30 (1st Cir. 2003); Doe v. Nebraska, 345 F.3d 593, 601–04 (8th Cir. 2003); A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 250–54 (3d Cir. 2003); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1292–93 (11th Cir. 2003) (per curiam).

precision than is normally demanded of federal laws. Unless the state receiving federal funds has notice of how the substantive obligation imposed on it applies to particular fact settings, these courts rule, the condition is invalid (or at least cannot be enforced in a private damages action). The Fourth Circuit's en banc decision in *Virginia Department of Education v. Riley* offers an example. In *Riley*, the court addressed the question whether a state may refuse to educate a student with a disability who is expelled from school for reasons unrelated to that student's disability.[266] The statute, as written at the time, required that states receiving federal funds "ha[ve] in effect a policy that assures all children with disabilities *the right to* a free appropriate public education."[267]

Because the statute guaranteed all children with disabilities "the right to" education, but it did not expressly disclaim the proposition that a student may waive that right by misconduct, the court concluded that the statute did not clearly require the state to educate students with disabilities who had been expelled for non-disability-related misconduct:

> Applying the clear statement rule with the required solicitude for the rights of the States in our federalist system, it is apparent that Congress has not spoken through the IDEA with anywhere near the clarity and the degree of specificity required for us to conclude that the States' receipt of special education funds is conditioned upon their continued provision of education to handicapped students expelled for criminal activity or other misconduct unrelated to their disabilities. The majority is unable to cite to a single word from the statute or from the legislative history of IDEA evidencing that Congress even considered such a condition, much less that it confronted the possibility of such a condition and its implications for the sovereignty of the States, and determined to condition the States' funds in this manner.[268]

The *Riley* court thus concluded that Congress's failure to disclaim an *exception* from a broad general statute created an ambiguity that the court was required to read in the state's favor by treating the statute as in fact containing that exception.[269] Needless to say, that is not the

266. Va. Dep't of Educ. v. Riley, 106 F.3d 559, 560 (4th Cir. 1997) (en banc) (per curiam).

267. *Id.* at 563 (quoting 20 U.S.C. § 1412(1)).

268. *Id.* at 567. The opinion refers to "the majority" because the Fourth Circuit sitting en banc simply adopted Judge Luttig's panel dissent as its opinion on this point. *Id.* at 560–61.

269. *Id.* at 567–68.

ordinary practice in interpreting statutes outside of the conditional spending context.[270]

In his opinion in *Guardians Association v. Civil Service Commission*,[271] Justice White applied the same principle to require Spending Clause legislation to be framed in relatively rulelike form to authorize damages liability. *Guardians* involved a claim of disparate-impact discrimination under Title VI of the Civil Rights Act of 1964.[272] Justice White (whose opinion was controlling on this point) held that, because Title VI "is spending-power legislation," funding recipients could not be liable to pay damages for violating the statute's disparate impact prohibition.[273] When that prohibition is at issue, Justice White explained, "it is not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations."[274]

The Supreme Court has not been consistent in requiring that states get such precise notice of the obligations that they undertake when receiving federal funds, however. Indeed, in *Bennett v. Kentucky Department of Education*,[275] the Court held that *Pennhurst* does not require "every improper expenditure" of federal funds to be "specifically identified and proscribed in advance."[276] And two 5–4 decisions in the late Rehnquist Court—*Davis v. Monroe County Board of Education*,[277] and *Jackson v. Birmingham Board of Education*[278]—strongly undercut the notion that Congress must give states precise notice of how spending conditions apply to particular facts.

In *Davis*, the Court (speaking through Justice O'Connor) held that the test for student-on-student sexual harassment under Title IX of the Education Amendments was sufficiently clear to permit a

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270. *Cf.* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (quoting Sedima v. Imrex Co., 473 U.S. 479, 499 (1985))).

271. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).

272. *Id.* at 586 (opinion of White, J., announcing the judgment of the Court).

273. *Id.* at 598–99.

274. *Id.*

275. Bennett v. Ky. Dep't of Educ., 470 U.S. 656 (1985).

276. *Id.* at 666.

277. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

278. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

damages award.[279] That was true even though the test was phrased in quite general terms—actionable harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[280] Indeed, the Court itself acknowledged that "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships,' including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."[281] In a dissenting opinion, Justice Kennedy criticized the Court for failing to "explain how a school is supposed to discern from this mishmash of factors what is actionable discrimination."[282] The Court's "multifactored balancing test," he concluded, "is a far cry from the clarity we demand of Spending Clause legislation."[283]

In *Jackson*, the Court (also speaking through Justice O'Connor) held that Title IX prohibits retaliation even though its text prohibits only "discrimination" that is "on the basis of sex."[284] The Court explained that "the [defendant School] Board should have been put on notice by the fact that our cases . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination."[285] Moreover, the Court explained, regulations prohibiting retaliation under Title IX had "been on the books for nearly 30 years," and "the Courts of Appeals that had considered the question at the time of the conduct at issue" had all "interpreted Title IX to cover retaliation."[286] In dissent, Justice Thomas argued (quite plausibly) that "discrimination on the basis of sex" does not *clearly* encompass retaliation for complaining about sex-based discrimination, that no prior Supreme Court case had held that retaliation was one of the "diverse forms of intentional sex

279. *Davis*, 526 U.S. at 650.

280. *Id.*

281. *Id.* at 651 (citation omitted) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

282. *Id.* at 675 (Kennedy, J., dissenting).

283. *Id.*

284. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a) (2000)).

285. *Id.* at 183.

286. *Id.*

discrimination" covered by the statute, and that the relevant regulation did not state that Title IX itself prohibited retaliation.[287]

But although Justice Kennedy spoke in dissent in *Davis*, and Justice Thomas spoke in dissent in *Jackson*, their position could well be the majority one on the Roberts Court. *Davis* and *Jackson* were 5–4 decisions, in which Justice O'Connor joined Justices Stevens, Souter, Ginsburg, and Breyer to make a majority.[288] Justice Alito, who replaced Justice O'Connor, wrote for the Court in *Arlington Central*.[289] The gratuitous discussion of the requirement for clear notice in his opinion for the Court in that case suggests, even if it does not prove, that Justice Alito embraces a robust understanding of the *Pennhurst* notice doctrine.[290] Had he been on the Court at the time *Davis* and *Jackson* were decided, those cases could easily have come out the other way.[291]

c. Notice of the Facts that Violate the Condition. In two cases, the Supreme Court has read *Pennhurst* as at least presumptively barring a damages remedy for "unintentional" violations of spending conditions. In so doing, the Court has effectively extended the notice principle to demand that the funding recipient have notice of the facts that violated the spending condition at issue—at the time of violation—to be held liable in damages.

The Court first suggested this reading of *Pennhurst*, by negative implication, in *Franklin v. Gwinnett County Public Schools*.[292] In that case, the Court rejected the argument that *Pennhurst* barred monetary relief under Title IX for teacher-on-student sexual harassment. The Court explained, "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged."[293] The Court pointed to

287. *Id.* at 190–92 (Thomas, J., dissenting).

288. *Id.* at 169 (majority opinion); *Davis*, 526 U.S. at 632.

289. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2457 (2006).

290. *See id.* at 2459–63 (holding that the Spending Clause requires Congress to give clear notice to the states when attaching conditions to the acceptance of federal funds).

291. For a similar assessment of the effects of Justice O'Connor's replacement by Justice Alito, see Engdahl, *supra* note 127, at 523–26.

292. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

293. *Id.* at 74–75 (citation omitted).

Consolidated Rail Corp. v. Darrone[294]—a Section 504 case that itself relied on Justice White's controlling opinion in *Guardians*[295]—as "bel[ying]" the "notion that Spending Clause statutes do not authorize monetary awards for intentional violations."[296] *Franklin* thus held that Spending Clause statutes can authorize monetary relief for *intentional* violations of funding conditions.[297] But it also suggested that the notice principle implies that such statutes will not authorize monetary relief for *unintentional* violations.[298] The Court confirmed that suggestion, but also made clear that it rests on an inference about what Congress would have intended, in *Gebser v. Lago Vista Independent School District*.[299]

Like *Franklin*, *Gebser* was a Title IX case involving teacher-on-student sexual harassment.[300] *Franklin* had held that a school district can under some circumstances be liable under the statute for a teacher's sexual harassment of a student,[301] but it had not addressed the circumstances in which the district's liability would attach. The plaintiff in *Gebser* argued that the school district should be liable for a teacher's harassment under either a *respondeat superior* or a constructive notice theory,[302] but the Court rejected those arguments. "If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior*," the Court concluded, funding recipients will often be held liable for discrimination of which they were "unaware."[303] In light of the "central concern" with "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award,'" the Court found it "sensible to assume that Congress did not envision a recipient's liability in damages in that situation."[304] Accordingly, in cases like Gebser's "that do not involve official policy of the recipient entity," the Court fashioned a standard of liability that would ensure that the entity has notice: "a damages remedy will not lie under Title

294. Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984).
295. *See id.* at 630 & n.9.
296. *Franklin*, 503 U.S. at 75.
297. *Id.*
298. *Id.* at 74.
299. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287–88 (1998).
300. *Id.* at 277–79.
301. *Franklin*, 503 U.S. at 75–76.
302. *Gebser*, 524 U.S. at 282.
303. *Id.* at 287.
304. *Id.* at 287–88 (alteration in original) (quoting *Franklin*, 503 U.S. at 74).

IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."[305]

2. *Assessment*

a. Normative Assessment. In many cases in which it has been invoked, the notice principle appears to have done no formal work. In particular, the notice-of-remedy variant largely tracks the restrictive jurisprudence the Supreme Court has applied to determine the existence and scope of private rights of action more generally. In *Pennhurst*, for example, the generally phrased statutory "finding[]" that treatment "should be provided in the setting that is least restrictive"[306] would not suffice to support a private right of action even outside of the Spending Clause context under the Court's jurisprudence of implied private rights of action and § 1983.[307] Indeed, the Court has looked to *Pennhurst* to determine whether statutes adopted under other federal powers are privately enforceable.[308] Similarly, in *Gonzaga*, the statute's lack of "rights-creating language"[309] would likely have doomed any effort to invoke a cause of action under § 1983, even if the statute had not been adopted under the spending power.[310] (It is possible that Spending Clause statutes may be especially likely, as an empirical matter, to lack that sort of language.) And in *Barnes* and *Arlington Central*, the remedies at issue—punitive damages and expert fees, respectively—would not ordinarily have been available under statutes that were not adopted under the spending power.[311]

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305. *Id.* at 290.

306. *Pennhurst State Sch. Hosp.*, 451 U.S. 1, 13 (1981) (quoting 42 U.S.C. § 6010).

307. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979).

308. *See, e.g.*, Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (relying on *Pennhurst* as setting forth part of the standard for determining whether the National Labor Relations Act—a Commerce Clause statute—is enforceable under 42 U.S.C. § 1983).

309. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002).

310. Indeed, the bulk of *Gonzaga*'s analysis proceeds without any discussion of the spending power. *See id.* at 283–87.

311. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2464–65 (2006) (Ginsburg, J., concurring in part and concurring in the judgment) (noting that attorneys' fee–shifting provisions do not address expert witness fees even absent any special spending-power considerations unless Congress makes that clear in the statute); Barnes v. Gorman, 536 U.S. 181, 191–93 (2002) (Stevens, J., concurring in the judgment) (noting that governmental entities "are

In cases like *Pennhurst*, *Gonzaga*, *Barnes*, and *Arlington Central*, then, the notice requirement had little more than rhetorical significance to the Court's holding. To be sure, rhetoric can be important, particularly in the signal it sends lower courts. Although the presence of conditional spending legislation seems to have made no difference to the outcomes of *Pennhurst*, *Gonzaga*, *Barnes*, and *Arlington Central*, lower courts may well take the Court's *language* in those cases seriously and, in practice, be more parsimonious in finding judicial remedies for violations of spending conditions. But it is in the other contexts I discussed in the previous Section that the notice requirement has had, and is likely in the future to have, the greatest bite.

In my view, there is no good justification for the peculiar Spending Clause notice requirement in the cases in which it has bite. That requirement seems to draw on both the general clear-statement rule that applies when "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government'"[312]—and the policies of constitutional avoidance and deliberation that support such a rule[313]—and the doctrine of *contra proferentem* (the principle that ambiguous terms in contracts are construed against their drafters).[314] I have no quarrel with either the standard federalism-based clear-statement rule or the doctrine of *contra proferentem*.[315] But those principles do not justify any requirement for notice of (a) the incremental legal effect of a spending condition, (b) the outcomes that will follow when the

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not subject to punitive damages" even absent any special spending-power considerations unless there is "clear congressional intent to the contrary").

312. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

313. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) (explaining that clear-statement rules "can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly").

314. *See* 11 WILLISTON ON CONTRACTS § 32:12, at 471–82 (4th ed. 1990 & Supp. 2008). Professor Peter Smith calls these two aspects of the notice rule (federalism and *contra proferentem*, respectively) the "accountability model," Smith, *supra* note 34, at 1189, and the "state choice model," *id.* at 1190; he contends that the latter should predominate, *see id. passim*.

315. In this respect I disagree with Professor Brian Galle, who has written the most thorough critique of the Spending Clause notice doctrine to date. *See* Galle, *supra* note 34 *passim*. Galle writes in terms that would condemn *all* federalism-based clear-statement rules, *id.* at 199–200, and he entirely ignores the contract-law doctrine of *contra proferentem*. (Galle makes clear that he rejects federalism-based clear-statement rules in Galle, *supra* note 31, at 52–53, 72–73.)

condition is applied to particular facts, or (c) the underlying facts that have occurred and violated the condition.

When, as in the Second Circuit's *Garcia* case, a conditional spending statute gives clear notice of the formal legal effect of accepting funds, but confusion about background legal principles leads the state erroneously to believe that the condition will have no *practical* effect,[316] neither of the justifications for the notice rule would support excusing the state from performing the condition. In such a case, Congress has stated that it intends to alter the "usual constitutional balance"[317] (in *Garcia*, by demanding that states waive sovereign immunity in exchange for accepting federal funds), so the federalism-based clear-statement rule is plainly satisfied.[318] For the same reason, the rule of *contra proferentem* would not apply, because that rule comes into play only when the terms of a contract are ambiguous.[319] If anything, the proper contract analogy is the doctrine of unilateral mistake. But that doctrine could not help a state in the *Garcia* situation. Under that doctrine, a contract is voidable on the grounds of mistake only if it would be in some way unfair to hold the mistaken party to its bargain.[320] But there is hardly any unfairness in holding the state to its bargain in a case like *Garcia*: the state argued that, when it accepted federal funds, it mistakenly thought it was not giving the federal government anything in exchange.[321] The state could not have reasonably expected to get something for nothing.[322]

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316. *See* Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98, 113–14 (2d Cir. 2001).

317. *Will*, 491 U.S. at 65 (quoting *Scanlon*, 473 U.S. at 242).

318. It makes no difference that what the state is waiving is a constitutional right (the right to sovereign immunity). Even in the context of individual rights, the Court has held, for example, that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." Colorado v. Spring, 479 U.S. 564, 574 (1987).

319. *See* 11 WILLISTON ON CONTRACTS, *supra* note 314, § 32:12, at 480.

320. The Restatement of Contracts, for example, states that a unilateral mistake will make a contract voidable only if the mistaken party exercised sufficient diligence and either "the effect of the mistake is such that enforcement of the contract would be unconscionable," RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979), or "the other party had reason to know of the mistake or his fault caused the mistake," *id.* § 154 app. (quoting Albert Elia Bldg. Co. v. Am. Sterilizer Co., 622 F.2d 655, 656 (2d Cir. 1980)).

321. Supplemental Brief for Defendants-Appellees at 11–14, *Garcia*, 280 F.3d 98 (No. 00-9223), 2001 WL 34108906.

322. There is another problem with *Garcia*. Under standard contract law the proper remedy for a unilateral mistake would *not* be to allow the mistaken party to keep the benefits it obtained, while excusing it of its obligations, under the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 158. But that is precisely what the *Garcia* court permitted New York to do. *See Garcia*, 280 F.3d at 114–15.

The notion that conditional spending legislation should provide notice of how it applies to particular facts has more to say for it, but not much more. It is a commonplace of statutory interpretation that laws may have applications that go far beyond what legislators who voted for them might have contemplated. Some of those applications might, indeed, raise significant federalism concerns that do not apply to the rest of the statute's applications. The Fourth Circuit thought it was confronted with such an application in *Virginia Department of Education v. Riley*—the requirement to provide education to students with disabilities even after they have been expelled from school, the court believed, entrenched on the state's core powers of school discipline and law enforcement in ways that went well beyond the IDEA's general requirement to educate children with disabilities.[323] When a statute is truly ambiguous, such unforeseen applications might well be excised by applying the ordinary federalism-based clear-statement rule.[324] There is no reason to require any additional increment of clarity for statutes enacted pursuant to the spending power. And when, as in *Riley*, the state seeks to read an unexpressed exception into a broad statutory requirement,[325] the Court's own settled clear-statement doctrine would find no genuine ambiguity: "[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[326]

Even though there might be some basis in ordinary clear-statement principles to excise particular applications that have unusually large federalism costs, there is no basis for the rule Justice White applied in *Guardians* and four Justices would have applied in *Davis* and *Jackson*—that a funding recipient cannot be liable for violating a federal spending condition unless that condition is framed in such rule-like terms that it is "immediately obvious" what precise conduct violates it.[327] The federalism-based clear-statement doctrine,

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323. *See* Va. Dep't of Educ. v. Riley, 106 F.3d 559, 566–68 (4th Cir. 1997) (en banc) (per curiam).

324. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991).

325. *See Riley*, 106 F.3d at 560.

326. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)). As noted above, *see supra* note 314 and accompanying text, *contra proferentem* principles also require genuine ambiguity.

327. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598 (1983) (opinion of White, J., announcing the judgment of the Court); *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 675 (1999) (Kennedy, J., dissenting) (stating that the majority's "multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation").

as it has been elaborated by the Court, is not concerned with the forms Congress's directives to states take. Rather, it is rooted in a concern that Congress deliberate *before* it alters the "usual constitutional balance."[328] When a bill in Congress explicitly conditions the receipt of federal funds on compliance with a standard rather than a rule, it tees up just the sort of deliberation that the clear-statement principle demands. Defenders of state prerogatives can argue in congressional debates that conditioning federal funds on compliance with open-textured standards will work too great an imposition on the American scheme of federalism. The more open textured are the standards imposed, the more salient those arguments are likely to be in Congress. And when Congress clearly imposes open-textured standards of liability on states in the face of the potential salience of those arguments, it has made a clear "expression of intent to 'alter the usual constitutional balance between the States and the Federal Government.'"[329]

For similar reasons, *contra proferentem* principles ought not be understood to require that contractual duties be framed as rules rather than standards. As Professor Brian Galle points out, modern contract theory recognizes that parties may have good reasons for agreeing to open-textured duties, and that it is utility-maximizing to enforce those duties.[330] When a state agrees to accept federal funds, and the law makes clear that the funds are conditioned on the state's subjecting itself to an open-textured standard of liability, there is no failure of notice. In the context of government contracts, courts have articulated an exception to the *contra proferentem* doctrine in cases in which the ambiguity in a contract is "patent" at the time the parties entered into it.[331] A similar principle ought to apply in the case of the federal government's "contracts" with state funding recipients.

Nor should the notice principle be read to *require* that damages liability under conditional spending statutes be limited to cases in

328. *See Gregory*, 501 U.S. at 460–61 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)).

329. *Yeskey*, 524 U.S. at 208–09 (quoting *Gregory*, 501 U.S. at 460–61). I therefore agree with Professor Peter Smith that Congress should have no obligation to legislate with extraordinary specificity in the conditional spending context, though (unlike him) I believe that *both* the accountability and state choice models support that conclusion. *See* Smith, *supra* note 34, at 1210–12.

330. *See* Galle, *supra* note 34, at 170–74.

331. *See, e.g.*, Interstate Gen. Gov't Contractors, Inc. v. Stone, 980 F.2d 1433, 1434–35 (Fed. Cir. 1992).

which high-level officials of the governmental entity that receives federal funds have knowledge of the acts that violate those statutes. To the extent that *Gebser* rested on the notion that the remedies under Spending Clause legislation must, as a constitutional matter, be so limited,[332] the case was wrongly decided. If Congress gives the states clear notice that a grant of federal funds is conditioned on the state's assumption of negligence liability—or even strict liability—for violations of the grant's requirements, all of the policies of the notice requirement are satisfied. But to the extent that *Gebser* rested on a presumption about what remedial rules Congress would have intended—as important language in the Court's opinion suggests[333]—the decision does not unduly constrain congressional power (though it ought not be extended to statutes for which a contrary congressional intent is apparent).[334]

b. Predictive Assessment. I have argued that substantial normative objections can be raised against some significant possible applications of the notice principle. But my point in this Article is not, principally, normative. The essential question for my argument is whether the Court is likely to agree with my normative concerns. I predict that the Court will not, by and large, agree with those concerns. It will continue on the path it started in *Arlington Central* of expanding the notice principle.

The variant of the notice principle that is most likely to be in play is the notice-of-application variant. Justice O'Connor provided the fifth vote in *Davis* and *Jackson* to demand only general notice of how Spending Clause statutes applied to particular facts. And the gratuitous discussion of the notice requirement in Justice Alito's opinion for the Court in *Arlington Central* suggests that Justice Alito would have joined the dissenters in those cases. There are good reasons to think that the newly strengthened conservative majority will adopt yet more stringent versions of the notice requirement.

First, unlike with the *direct* limitations discussed in Part I, the notice requirement allows the Court to avoid the suggestion that it is

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332. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284–89 (1998).

333. *See id.* at 290 (noting that Title IX's "express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance" and stating that "we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions").

334. *Gebser* may well have been such a case, as Justice Stevens forcefully argued in his dissent. *See id.* at 296–304 (Stevens, J., dissenting).

second-guessing the policy preferences of Congress. Indeed, the Court can solemnly state that it is completely willing to follow Congress's clear instructions. Chief Justice Roberts took this very line in his confirmation hearings to defend cases like *Gonzaga* against claims that they thwarted congressional will.[335] Second, a stricter version of the notice requirement will not pose the same problems of analytic tractability as do the nexus and coercion requirements. Notions of clarity and notice are highly context dependent. A ruling that one statute did or did not satisfy the notice requirement is therefore unlikely to set much precedent for whether any *other* statute satisfies the requirement.

Finally, and perhaps most importantly, the notice requirement in its post-*Guardians* form limits only *private* enforcement (for money damages) in court; it does not limit the federal government from withholding funds from a noncomplying recipient. This difference is significant because most of the spending statutes supported by conservatives depend only on withholding of funds, and not on third-party judicial enforcement, for their success.[336] By contrast, the spending statutes liberals care about—Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act—all require private enforcement because the threat that federal funds will be withheld is remote at best.[337] The notice requirement thus gives conservative Justices a way to limit conditional spending programs supported by liberals without risking much collateral damage to those programs supported by conservatives.

335. Professor Simon Lazarus provides a thorough analysis of this aspect of the Justice Roberts hearings. Lazarus, *supra* note 23, at 22–28.

336. It is no accident that the four most significant unconstitutional conditions cases involving Spending Clause legislation in the past two decades, *Rust*, *Velazquez*, *Finley*, and *FAIR*, have involved situations in which recipients sued to challenge the withholding of funding. *See supra* note 172.

337. *See, e.g.*, STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 294–95 (1995) (noting reluctance of the administrations of both political parties to use the fund-termination sanction). To be sure, there are occasions in which the federal government decides to withhold funds. (*Virginia Department of Education v. Riley* was one.) But the point is that those occasions are an exceedingly tiny proportion of the cases in which funding recipients violate these statutes.

CONCLUSION

I contend that the Roberts Court is likely to limit Congress's conditional spending authority. But it is not likely to do so directly by holding that certain funding conditions are unconstitutional. Instead, the Court is likely to act indirectly by limiting private parties' ability to enforce funding conditions. The Rehnquist Court took some steps in this direction, but it drew back in cases like *Davis* and *Jackson*. Those cases would likely have come out differently in the Roberts Court, and the Court will not want for opportunities to reverse them—in substance if not in form.[338] If and when the Court does so, its decisions will not draw the headlines of cases like *Boerne* and *Garrett*. But those decisions will have as great an effect—if not a greater effect—on the world.

338. As the Court showed when it upheld the Partial-Birth Abortion Ban Act in an opinion that was flatly inconsistent with—but did not formally overrule—its decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court is certainly capable of effectively but not formally overruling prior precedent, *see* Gonzales v. Carhart, 127 S. Ct. 1610, 1635–38 (2007); *see also id.* at 1640–53 (Ginsburg, J., dissenting) (arguing that the Court's decision was inconsistent with *Stenberg* and other precedent).