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Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole

"If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once." — James Madison, 1792¹

What is needed more than anything else is a process of reeducation in the values of federalism that the Framers themselves had, and that we must have if the system is going to work properly. No matter how you write it, it won't work if we don't believe in federalism. — Justice Antonin Scalia, 1997²

I. INTRODUCTION

Explaining the character of the federal government, James Madison stated that the government's jurisdiction "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty."³ Madison and other Framers viewed a structure of power divided between the federal and state governments as necessary to protect individual liberties.⁴ The Framers' structure was designed principally to guarantee rights to individuals by creating a system which diffused power by enabling the state governments to restrain the federal government, and enabling the federal government to restrain the state governments.⁵ The individual sovereignty of the federal and state governments

1. See 14 THE PAPERS OF JAMES MADISON 179, 180 (Charles F. Hobson et al. eds., 1981).

2. *On Liberty & Limits: Whose Law, Whose Order?* (PBS television broadcast, Apr. 18, 1997) [hereinafter *Liberty & Limits*].

3. THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961); see also *Printz v. United States*, 117 S. Ct. 2365, 2376-77 (1997).

4. See THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961). Madison explained that dividing power among and within the state and federal governments served to preserve individual liberties. See *id.*, No. 51, at 348-51.

5. See THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that "[i]t may safely be received as an axiom in our political system that the state governments will in all possible contingencies afford complete security against invasions of the public liberties by the national authority").

was critical in order to sustain this delicate balance of power in which the federal and state governments were clearly accountable to the people and neither the federal government nor the state governments retained the ability to exceed their respective authority.⁶ The concept of “federalism” embodies this division of power between the federal and state governments.⁷ Federalism, however, is not merely an unintended consequence of the Constitution⁸ nor a statement of the preferred system of American government.⁹ Instead, the Constitution itself commands a system of federalism.¹⁰

This Comment suggests that although Madison correctly assessed the structure of American government, that structure has evolved over the course of the twentieth century to a point at which the states retain little of the envisioned “residuary and inviolable sovereignty.” The United States Supreme Court has sanctioned, and often initiated, this development.¹¹ This Comment posits that the delicate balance of power between the federal government and the governments of the several states has been tipped ever so slightly in favor of the federal government, blurring the lines of political accountability, and consequently giving rise to the danger of encroachment upon the protections of individual liberties.¹²

The expansion of the Spending Clause power¹³ over the course of the twentieth century has rendered illusory the protections of state sovereignty and ensuing protections against tyranny. In *United States v. Butler*,¹⁴ the Supreme Court unwittingly established a path toward eroding the principles of federalism by interpreting the spending power, as had

6. See THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

7. See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 544 n.46 (1988) (defining federalism as either the balance between state and state power or the balance between state and federal power).

8. See *New York v. United States*, 505 U.S. 144, 157 (1992).

9. See *id.*

10. See *id.*

11. See generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 633 (1993).

12. It is well recognized that the Supremacy Clause grants the federal government a decisive advantage in the balance of power between the federal and state governments. See *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). This Comment analyzes whether the balance has been tipped beyond this point in favor of the federal government.

13. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”). The last portion of this clause is also known as the Welfare Clause.

14. 297 U.S. 1 (1936).

Alexander Hamilton, as restricted only by the General Welfare Clause, and not, as Madison had envisioned, as restricted by the enumerated powers.¹⁵ Thus, the Supreme Court permitted Congress to spend in order to promote the general welfare of the nation, unrestricted by state intervention.¹⁶ In *Steward Machine Co. v. Davis*,¹⁷ *Helvering v. Davis*,¹⁸ and *Buckley v. Valeo*,¹⁹ the Court granted Congress almost unlimited spending power by permitting Congress to define the general welfare. *Berman v. Parker*²⁰ further enhanced the spending power by effectively holding that when Congress spends the object of the expenditure is presumed to be within the general welfare.²¹ Finally, in *South Dakota v. Dole*,²² the Court held that Congress, indeed the federal government, may place conditions on states' receipt of federal funds, so long as the conditions are reasonably related to the federal interest in particular national projects or programs.²³ As Justice O'Connor explained in her dissent in *Dole*, the Court appears to require only *some* relationship—not necessarily a reasonable one.²⁴

Two additional factors contribute to the federal government's ability to use the spending power to achieve federal objectives. First, the Sixteenth Amendment,²⁵ which permits Congress to tax income virtually at will, guarantees that Congress has literally trillions of dollars to spend in furtherance of its objectives. A seemingly insurmountable national debt confirms that Congress has found ways to spend trillions more than its already tremendous revenues.²⁶ Second, federal taxpayers have little, if any, ability to challenge federal spending in the courts, due to the restrictive standing rules imposed upon such challenges.²⁷ Federal spending

15. *See id.* at 65-66.

16. *See id.*

17. 301 U.S. 548, 586-87 (1937).

18. 301 U.S. 619, 640 (1937).

19. 424 U.S. 1, 90-92 (1976).

20. 348 U.S. 26 (1954).

21. *See id.* at 33; *see also infra* notes 221-37 (discussing *Berman*).

22. 483 U.S. 203, 206-09 (1987).

23. *Id.* at 207.

24. *See id.* at 212-18 (O'Connor, J., dissenting).

25. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

26. *See* Christopher Lehmann-Haupt, *What's So Bad About the National Debt?*, L.A. DAILY NEWS, Feb. 9, 1997 (discussing JOHN STEELE GORDON, HAMILTON'S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT (1997)), available in Westlaw.

27. *See infra* notes 274-80 and accompanying text (discussing standing require-

which is not closely related to a federal taxation scheme is virtually insulated from review.²⁸

This Comment discusses the Supreme Court's notion of federalism and asserts that a virtually unrestricted spending power fails to give full credence to the design of our federalist structure. More importantly, an unrestricted spending power fails to adhere to the Constitution's command for dual spheres of federal and state sovereignty.²⁹ This Comment focuses primarily on the Tenth Amendment,³⁰ simply because that Amendment enunciates explicitly the Constitution's requirement of federalism.³¹ This Comment asserts that, while the federal government *should* have broad authority to spend federal revenues, the federal government should not be permitted to use the spending power to regulate beyond its enumerated powers or as a tool for coercing and commandeering the states into implementing federal directives or regulations. In the area of conditional federal funds, the Court could accomplish both of these objectives simply by enforcing its "reasonably related" test, and by requiring more than an "attenuated or tangential relationship."³² Put simply, this Comment maintains that a refusal to confine the spending power, especially in light of the Court's decision in *United States v. Lopez* to confine the federal commerce power, discussed below, permits Congress to regulate—through the spending power—where *Lopez* might otherwise deny

ments for spending challenges).

28. *See id.*

29. This Comment does not suggest that "states' rights" must be given greater weight than federal power in any political sense. Rather, this Comment seeks to explain the federalist design and argues that both federal and state governments have an appropriate and important role in that design. *See generally* *Younger v. Harris*, 401 U.S. 37, 44 (1971). The Court stated:

The [Federalist] concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments

Id. Thus, this Comment merely asserts that the current federal-state system is out of proper balance, and federal power has expanded so as to exclude the states from maintaining their proper role.

30. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

31. *See* *New York v. United States*, 505 U.S. 144, 156 (1992).

32. *See* *South Dakota v. Dole*, 483 U.S. 203, 215 (O'Connor, J., dissenting); *see also* *infra* notes 252-69 and accompanying text (discussing Justice O'Connor's dissent in *Dole*); *infra* notes 398-435 and accompanying text (discussing this Comment's suggestion).

regulation under an enumerated power such as the Commerce Clause. "Although Congress has the power to spend for the general welfare, it has the power to legislate [or regulate] only for delegated purposes. The distinction is crucial if any semblance of a federal government of limited powers is to be preserved."³³

Recently, in *New York v. United States*,³⁴ *United States v. Lopez*,³⁵ and *Printz v. United States*,³⁶ the Court signaled a desire to "resuscitate"³⁷ principles of federalism. Although the Court breathed life into federalism, the Court left federalism's heart lifeless by implicitly approving continued use of the almost limitless spending power. Nevertheless, these decisions should be viewed with optimism as steps toward a goal of realizing the Constitution's command for our federalist structure. This Comment attempts to take the next step in protecting against the blurring of political accountability, by closing the giant loophole around the Tenth Amendment: the Spending Clause power. Specifically, this Comment examines the foundation and operation of federal power not in a vacuum but rather in light of both the Constitutional principles underlying the structure of our government—protection of personal liberties and clear political accountability—and the expansion of federal power. This Comment asserts that continued adherence to the broad interpretation of the spending power is inconsistent with early history and the principles underlying the holdings in *New York*, *Lopez*, and *Printz*. This Comment does not suggest that the federal government should lose its ability to control the destination of federal funds. This Comment instead suggests that the Court at the least adhere to its already-imposed restrictions and

33. Amicus Brief for the National Conference of State Legislatures et al. at 19, *South Dakota v. Dole*, 483 U.S. 217 (1987) (No. 86-260).

34. *Id.*

35. 514 U.S. 549 (1995).

36. 117 S. Ct. 2365 (1997).

37. See Eric W. Hagen, Note, *United States v. Lopez: Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1363 (1996). Before *New York* and *Lopez*, the Court maintained a limited view of state power vis-à-vis federal power. In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court noted that the Tenth Amendment "states but a [mere] truism that all is retained [by the states] which has not been surrendered [to the federal government]." *Id.* at 124. Moreover, Justice Story stated that "this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers . . . what is not conferred, is withheld." *New York*, 505 U.S. at 156 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)).

recognize that its holdings permit Congress to circumvent the Court's enunciated protections of federalism. Ultimately, this Comment concludes that the Court could effectuate principles of federalism in the spending power arena without departing significantly, if at all, from its federalism and spending power jurisprudence.

Part II of this Comment examines Tenth Amendment principles and the revival of those principles emanating from *New York*, *Lopez*, and *Printz*.³⁸ Part III analyzes the origin and current status of the spending power.³⁹ Part IV presents the ramifications of the currently limitless interpretation of the spending power and the need to reassess the current interpretation of that power.⁴⁰ Part V briefly explores alternatives for removing the impediments to a proper federal-state balance.⁴¹ Part VI concludes this Comment, suggesting that the Court give full credence to the Framers' design of self-governance and to the Court's own decisions.

II. REVIVAL OF THE TENTH AMENDMENT AS A LIMITATION ON FEDERAL POWER

Early in the twentieth century, the Court viewed the Tenth Amendment as a mere "truism."⁴² This view, that all powers not conveyed are withheld,⁴³ although perhaps technically correct, has since cramped the Court's Tenth Amendment jurisprudence.⁴⁴ Recently, however, the Court

38. See *infra* notes 42-179 and accompanying text.

39. See *infra* notes 180-280 and accompanying text.

40. See *infra* notes 281-397 and accompanying text.

41. See *infra* notes 398-435 and accompanying text.

42. See *United States v. Darby*, 312 U.S. 100, 124 (1941); see also *supra* note 37 (discussing *Darby* and Justice Joseph Story on this point).

43. This concept is known as enumeration—that is, Congress retains only those powers that are specifically enumerated and delineated in the Constitution, and no others. See *id.*

44. In *Darby*, the Court said:

There is nothing in the history of the [Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment, or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. The Court's recent decisions in *Printz* and *New York* appear to mark a shift toward viewing the Tenth Amendment with greater importance—or at least with greater respect for its affirmation of our system of government. It is interesting to note that some Framers, including Madison, initially opposed a Bill of Rights with the belief (1) that a bill of specific rights might tend to preclude a finding of other rights—that is, if some rights were specified, it might be thought that only those existed; and (2) that a bill of specific rights was unnecessary because, in any event,

has characterized several of its decisions circumscribing and confining federal power as Tenth Amendment cases.⁴⁵ Thus, the Tenth Amendment is the appropriate focus for discussion because it affirmatively states the concept of enumeration, and because the Court itself has recently chosen to consider seriously the Tenth Amendment.⁴⁶

A. *The Proper Balance Between Federal and State Powers:
Why Federalism and the Tenth Amendment Matter*

Justice Sandra Day O'Connor opened her opinion in *New York v. United States*⁴⁷ by stating that the constitutional question regarding the proper balance between the federal and state powers is "perhaps our oldest question of constitutional law . . . as old as the Constitution [itself]."⁴⁸ Indeed, disagreements and perceptions regarding the extent of federal and state powers under a constitutional republic fueled the debates over ratification of the Constitution.⁴⁹ From those debates emerged the Fed-

the federal government was limited in its power by the enumerated powers, and so the federal government could not encroach upon such areas as religion and speech. See Hadley Arkes, *The New Jural Mind: Rights Without Grounds, Without Truths, and Without Things That Are Truly Rightful*, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 191 (Austin Sarat & Thomas R. Kearns eds., 1996); HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990); David Bergland, Comment, *Libertarianism, Natural Rights and the Constitution: A Commentary on Recent Libertarian Literature*, 44 CLEV. ST. L. REV. 499, 506 (1996). In other words, some opponents argued that a Bill of Rights was, in many respects, surplusage. This is ironic, today, given that we view the Bill of Rights, generally, as one of the most important documents—or collection of amendments—in the Constitution. Would we, as a society, tolerate a pronouncement by the Court that the First Amendment, for example, is mere surplusage because the enumerated powers prevent the federal government from encroaching on those liberties outside its sphere of authority? Is not the *Darby* Court's reading of the Tenth Amendment nothing more than a declaration that the Tenth Amendment itself is surplusage? A reading of the Court's opinions in *Printz* and *New York*, however, tends to suggest that the Tenth Amendment is not simply surplusage.

45. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992).

46. In *Printz*, for example, the Court proclaimed the well-recognized principle that the Tenth Amendment rendered express the Constitution's implication that the Constitution "conferr[ed] upon Congress . . . not all governmental powers, but only discrete, enumerated ones." *Printz*, 117 S. Ct. at 2376.

47. 505 U.S. 144 (1992).

48. *Id.* at 149.

49. Alpheus Thomas Mason, *What was the Federalist-Antifederalist Debate About?*,

eralist papers, written by James Madison, Alexander Hamilton, and John Jay, which argued in favor of ratification and sought to elucidate the scope of the new federal government.⁵⁰ Current litigation regarding the boundaries of federal and state authority confirms that similar debates continue today regarding the proper place of the states in our system.⁵¹

The Tenth Amendment embodies the principles of the Constitution's federalist design by proclaiming that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁵² In explaining the interrelationship between the Tenth Amendment and Article I limits on Congress's authority under those powers "herein granted" by the Constitution, Madison asserted the familiar truth that "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined" and that "[t]hose which are to remain in the State Governments are numerous and indefinite."⁵³ During ratification, the preservation of state sovereignty, and the concomitant balance between federal and state authority, was deemed so important that "[e]ight of the nine original states needed to ratify the Constitution did so only after requiring that [such a] statement . . . be added to the document."⁵⁴ That statement was the Tenth Amendment.⁵⁵

One may wonder why a proper balance between federal and state powers is important. The balance is something that one may simply take for granted, having been taught merely that the balance exists rather than the reasons underlying its existence.⁵⁶ No discussion of this issue

in *THE CONFEDERATION AND THE CONSTITUTION* 37-55 (Gordon S. Wood ed., 1979).

50. See generally *THE FEDERALIST* (James Madison, Alexander Hamilton & John Jay).

51. See, e.g., *Printz*, 117 S. Ct. at 2365; *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 104 (1992).

52. U.S. CONST. amend. X.

53. *THE FEDERALIST* No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

54. Douglas W. Kmiec, *Commerce, the Tenth Amendment, and Guns in Schools*, UPDATE ON LAW-RELATED EDUC., Nov. 1995, at 4.

55. See *id.*

56. At most, schools likely teach that the federalist design was implemented as a compromise between federalists and anti-federalists, as a result of anti-federalists' fears that federal power would engulf the states' sovereignty. Unfortunately, presenting the issue in this manner reveals little about the balance between the federal and state governments, that is, the appropriate roles for each. To view the Constitution's design merely as a compromise, although perhaps not historically incorrect, is to ignore the fact that both the state and federal governments have interrelated, not separate and distinct, roles: to protect freedom. Thus, the federalist structure is, and was, more than a mere compromise. Indeed, the structure of federalism was a "way of redefining the European model of securing government in one person—a monarch." *Liberty & Limits*, *supra* note 2. Instead, the "Framers saw this as a way of securing

would be complete nor persuasive without presenting the reasons behind the Framers' federalist design.

1. A Proper Balance Protects Individual Liberties and Guards Against the Blurring of Political Accountability

Principally, the Framers designed the federal-state balance to secure individual liberties by establishing the state and federal governments to guard against abuses of power by the other.⁵⁷ Hamilton, an outspoken advocate of federal power, articulated the principal benefit of a system of government divided between federal and state powers:

Power being almost always the rival of power, the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.⁵⁸

Hamilton thus viewed the federalist design as protecting against "the attempts of [either] government to establish a tyranny."⁵⁹ As Justice O'Connor articulated in *Gregory v. Ashcroft*,⁶⁰ "a healthy balance of

power." *Id.*

57. See *United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring); *Gregory v. Ashcroft*, 510 U.S. 452, 458 (1991); *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting). See generally NELSON ROCKEFELLER, *THE FUTURE OF FEDERALISM* 10 (1962); Richard P. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1241-44 (1977).

58. THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *supra* note 5 and accompanying text. See generally Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 814-20 (1986) (explaining how the process of amending the Constitution has granted the federal government greater authority than under the original Constitution). Interestingly, Hamilton was the "most expansive expositor of federal power," and he was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution." Printz v. United States, 117 S. Ct. 2365, 2375 n.9 (1997) (quoting C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 199 (1964)). Thus, perhaps it is telling that the "greatest expositor" would nevertheless assert the importance of the federal-state balance—or at least recognize that the (proposed and subsequently adopted) Constitution commands such a balance—and suggest the method by which that balance would be maintained.

59. THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

60. 510 U.S. 452 (1991). Justice O'Connor is one of the Court's most outspoken

power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”⁶¹

Madison eloquently expressed a similar view regarding the value of two separate governments over one preeminent government.⁶² For Madison, diffusion of power was a “double security” which served to prohibit tyranny.⁶³

Justice O’Connor echoed Madison in *Gregory*: “If this ‘double security’ is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible.”⁶⁴ As Justice O’Connor succinctly summarized, “[i]n the *tension* between federal and state power lies the promise of *liberty*.”⁶⁵

advocates of maintaining a proper balance between federal and state power. *See generally Lopez*, 514 U.S. at 1634-42 (Kennedy, J., concurring) (Justice O’Connor joining in Justice Kennedy’s concurrence); *New York v. United States*, 505 U.S. 144 (1992) (Justice O’Connor writing for the majority); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Justice O’Connor writing for the majority); *South Dakota v. Dole*, 483 U.S. 203, 212-18 (1987) (O’Connor, J., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 775-97 (1982) (O’Connor, J., dissenting).

61. *Gregory*, 501 U.S. at 458.

62. In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.

THE FEDERALIST NO. 51, at 350-51 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

63. *See Gregory*, 501 U.S. at 459.

64. *Id.*

65. *Id.* (emphasis added). The idea is that the citizens will allocate their favor to either the federal or state governments, and the state and federal governments will compete for the affections of the people. *See THE FEDERALIST NO. 46*, at 317 (James Madison) (Jacob E. Cooke ed., 1961) (observing that even when the citizens tend to favor the federal government, “the State governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered”). In this manner, the respective governments have the ability to check the abuses of the other. *See Lopez*, 514 U.S. at 576 (1995) (Kennedy, J., concurring) (explaining that the Framers believed freedom was enhanced through the creation of two governments as opposed to just one); *New York*, 505 U.S. at 180; *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”).

The underlying premise is one of political accountability and responsibility.⁶⁶ "Federalism serves to assign political accountability, not to obscure it,"⁶⁷ by allocating to citizens the ability to change their favor between the federal and state governments, permitting each government to check abuses of the other.⁶⁸ Thus, for example, when the citizens view the state governments as holding too much power, the citizens, in theory, may allocate their favor towards the federal government to curb the states' abuses and vice versa.⁶⁹

The implicit component of political accountability is citizens' political awareness. In order to allocate their favor, "citizens must have some means of knowing which of the two governments to hold accountable."⁷⁰ If the balance of power is tipped too far in favor of either the state governments or federal government by constitutional interpretation rather than by the people, then "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."⁷¹ Citizens would be uncertain whom to hold responsible for disfavored actions. Likewise, if the federal government tips the balance too far in its own favor by coercing or directing state or local officials to regulate according to federal commands, then the state and local governments are unable to "regulate in accordance with the view of the local electorate."⁷² The federal government may insulate it-

66. See *Printz v. United States*, 117 S. Ct. 2365, 2377-78 (1997).

67. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

68. See THE FEDERALIST NO. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961). "Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

69. See THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For example, by Constitutional amendment, citizens granted to Congress the ability to address civil rights issues. See, e.g., U.S. CONST. amends. XIII, XIV, XV. The citizens also granted to the states the ability to regulate the "transportation", "delivery," or "use" of "intoxicating liquors." See U.S. CONST. amend XXI, § 2. Constitutional amendment is the most express method by which citizens may shift power from the federal government to the state government or vice versa.

70. *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring).

71. See *id.* at 577 (Kennedy, J., concurring). See generally Congressman Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395 (1994) (explaining Congress's ability to obscure accountability through directives to state and local governments).

72. See *New York v. United States*, 505 U.S. 144, 169 (1992); see also *FERC v. Mis-*

self from public disapproval by leaving the state and local officials to bear this burden,⁷³ again rendering the citizens unable to ascertain the entity responsible for disfavored actions.⁷⁴ The resulting inability of the citizens to hold the proper government accountable "is more dangerous even than devolving too much authority to the remote central power."⁷⁵

Thus, a proper balance between federal and state authority helps to ensure that citizens are able to hold accountable those state or federal officials responsible for disfavored actions and implicitly ensures not only that federal and state officials *will be* responsive to the needs of their respective electorates, but that the officials will indeed have the *ability* to be responsive to their electorates. Indeed, a properly balanced system of federalism ensures liberty by maintaining local self-governance.⁷⁶ In our republican democracy, in which citizens choose their

Mississippi, 456 U.S. 742, 790 (1983) (O'Connor, J., dissenting) (observing that "[c]itizens . . . cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature . . . [but] citizens must retain the power to govern . . . their local problems"); D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. REV. 577, 639-65 (1985); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61-62 (1988).

73. See *New York*, 505 U.S. at 169. When the federal government commands the states to implement federal objectives, the federal government is merely passing the buck. See *FERC*, 456 U.S. at 787 & n.19 (O'Connor, J., dissenting) (citing Stewart, *supra* note 57, at 1239-47; Daniel Elazar, Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth*, Hearings on the Federal Role 32 (Oct. 1980) (suggesting that federal officials often force state and local governments to manage unpopular programs, thereby transferring the brunt of the political accountability to state and local officials); Comment, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. PA. L. REV. 1460, 1477-78 (1981); see also *Recent Legislation: Federalism—Intergovernmental Relations—Congress Requires a Separate, Recorded Vote for Any Provision Establishing an Unfunded Mandate*, 109 HARV. L. REV. 1469, 1472-73 (1996) [hereinafter *Recent Legislation*].

74. See *New York*, 505 U.S. at 169; *FERC*, 456 U.S. at 787 (O'Connor, J., dissenting).

75. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

76. Harvard Law Professor Sidel recently expressed the importance of maintaining a proper balance of federalism:

The separation of powers between the national and the state government is an important way of securing liberty. Power has flowed to the national government over the years; but at the same time, we haven't lost the aspiration of self-government. People still want government to be close to home and that aspiration—that people are free if they can get their hands on government, have it closer to home where they can reach it rather than off in distant Washington—that sentiment, that ideal that the Framers debated, is with us today.

representatives, few things are as important as political accountability. Without political accountability, citizens indeed cannot adequately choose how to be governed nor effectively pursue self-governance.

2. By Protecting Individual Freedoms, Federalism Secures Additional Benefits

In addition to guarding against abuses of power and the blurring of political accountability, Professor Deborah Jones Merritt recognizes four major advantages of a properly balanced federalist system.⁷⁷ First, she indicates that the states provide the "wellspring" of political force.⁷⁸ That is, states provide the opportunity for small political groups unable to organize on the national level to organize on the state and local levels thus enabling them to gain momentum from which they may someday influence the national political process.⁷⁹ Second, Professor Merritt observes that state and local governments encourage citizens to participate in the political process by increasing access to democratic decision-making.⁸⁰ Personal participation likewise serves to train citizens in the democratic process, fosters representatives' accountability, and improves faith in democracy.⁸¹ Third, independent state and local governments provide for American cultural diversity by permitting citizens in each locality to design their preferred social and political environment.⁸² Professor Merritt asserts that "this opportunity to express different social and cultural values is essential" to American democracy.⁸³ Finally, related to the third advantage, and as several Justices have observed,⁸⁴ each

Liberty & Limits, *supra* note 2.

77. See Merritt, *supra* note 72, at 67-69.

78. See *id.* at 70.

79. See *id.*; see also Powell, *supra* note 11, at 685-87 (discussing advantages of federalism).

80. See Merritt, *supra* note 72, at 7-8.

81. See *id.*; see also *FERC v. Mississippi*, 456 U.S. 742, 789-90 (1983) (O'Connor, J., dissenting).

82. See Merritt, *supra* note 72, at 8. For example, Alaska may spend \$8627 per pupil for elementary and secondary education, whereas Utah may choose to spend only \$2053. See *id.* at 8-9. Moreover, some states may enact stringent pollution control laws, whereas others may enact less stringent standards. See *id.* at 9. Even more drastic, the City of Santa Monica, California, at least at the time of Professor Merritt's article, had established its own desired form of social welfare programs. See *id.*

83. *Id.* at 9.

84. See *FERC*, 456 U.S. at 788 (O'Connor, J., dissenting) (citing *Chandler v. Flori-*

state acts as a laboratory for experimenting with new and innovative social, economic, and cultural concepts.⁸⁵ The remainder of the nation is free from risk should an experiment ultimately fail.⁸⁶ Furthermore, a successful experiment may provide the foundation for implementing new and innovative ideas on the national level.⁸⁷

3. The Constitution Commands a Proper Balance Between the Federal and State Governments

Although the benefits derived from a proper balance between the federal and state powers are substantial, the Constitution itself commands a proper balance regardless of any benefits conferred.⁸⁸ Thus, the principal response to the question of why federalism matters is not that federalism secures a preferred system of government, but rather that the Constitution requires a system of federalism.⁸⁹ The Supreme Court, in *New York, Lopez*, and *Printz*, has indicated a willingness to read the Constitution's requirement for a properly balanced federalism more seriously.

The benefits derived from federalism, however, are not insignificant: the Constitution's federalism was *designed* to secure liberties and freedoms by guarding against abuses of power. The principal component of federalism is citizens' ability to allocate their favor.⁹⁰ That federalism additionally encourages participation in the democratic process and the development of social and cultural diversity and promotes states as the

da, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *Whalen v. Roe*, 429 U.S. 589, 597 & n.20 (1977); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

85. See Merritt, *supra* note 72, at 9.

86. See *id.*

87. See *id.* Unemployment compensation, no-fault insurance, minimum-wage laws, anti-discrimination laws in housing and unemployment, and cost containment in hospitals were first instituted at the state and local levels. See *id.*; see also *FERC*, 456 U.S. at 788-89 (O'Connor, J., dissenting) (noting that states have pioneered many social innovations, including, *inter alia*, women's right to vote (Wyoming), minimum wage laws for women and minors (Massachusetts), and environmental regulation (Florida)). The welfare reform movement, which spawned Congress's Welfare Reform Bill, also originated at the state level. See Neal R. Pierce, *Welfare Reform: Let the Experiments Begin*, THE BALTIMORE SUN, Sept. 30, 1996, at A9. Additionally, in early 1997 President Clinton proposed a \$1500 college tuition tax credit (the "Hope Scholarship") for students who maintain at least a B average, similar to a plan instituted in Georgia. See Marlene Cimon & Elizabeth Shogren, *Glitches Feared in Clinton Plan for College Aid*, L.A. TIMES, Feb. 9, 1997, at A1.

88. See *New York v. United States*, 505 U.S. 144, 157 (1992).

89. See *id.*

90. See *id.*

laboratory for social innovation⁹¹ should not be at all surprising; without federalism's protections against governmental abuses of power and the blurring of political accountability, citizens would be hard-pressed to engage in self-governance—the heart of our constitutional republic.

B. The Current State of Federalism and the Tenth Amendment

The Tenth Amendment embodies the principles of federalism. The Amendment, however, has traveled a rugged road.⁹² Three recent United States Supreme Court cases illustrate the Court's current understanding of the extent of federal power, and provide some optimism for those who appreciate the importance of maintaining a proper federal-state balance.

1. *New York v. United States*: Reviving the Discussion of the Proper Balance

*New York v. United States*⁹³ is the pivotal case in the developing re-emergence of restricting federal power. In *New York*, the United States Supreme Court invalidated provisions of the Low-Level Radioactive Waste Policy Amendments of 1985 (LLRWPA) as an improper usurpation of state authority and held that the federal government may not commandeer state legislatures to implement a federal regulatory program.⁹⁴

91. See *supra* notes 77-87 and accompanying text.

92. See *New York*, 505 U.S. at 160. Most of the Court's Tenth Amendment cases before *New York* involved Congress's authority to require state governments to abide by generally applicable federal laws. See *id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia*, 469 U.S. at 557; *Fry v. United States*, 421 U.S. 542 (1975); *Maryland v. Wirtz*, 392 U.S. 183 (1968), overruled by *National League of Cities*, 426 U.S. at 855 (1976); *New York v. United States*, 326 U.S. 572 (1946)); see also *EEOC v. Wyoming*, 460 U.S. 260 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

93. 505 U.S. 144 (1992). Justice O'Connor delivered the majority opinion. See *id.* at 147-88. For an in-depth treatment of *New York*, see generally Julius Pohlenz, Note, *New York v. United States—Invalidation of the Take Title Provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 and Its Consequences*, 7 TUL. ENVTL. L.J. 221 (Winter 1993).

94. *New York*, 505 U.S. at 177.

The LLRWPA required the states to provide for the disposal of waste generated within their borders and established three compliance incentives to “aid” the states in attaining this goal.⁹⁵ The Court held that the first two incentives were constitutional as within Congress’s authority, but that the third so-called “incentive” was beyond Congress’s authority and invaded the rights reserved to the states by the Tenth Amendment.⁹⁶ The first set of incentives—monetary incentives—provided for the payment of a certain sum to each state attaining the first wave of deadlines for managing waste generated within its borders.⁹⁷ The second set of incentives—access incentives—provided that sited states could charge states failing to meet the various compliance deadlines up to quadruple the normal surcharge for waste disposal.⁹⁸ The third so-called incentive—the “take-title provision”—rendered any state failing to meet the final compliance deadline liable for all damages resulting from a failure to take possession of the waste generated within its borders.⁹⁹

The Court upheld the monetary and access incentives against constitutional attack,¹⁰⁰ noting that its cases “have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.”¹⁰¹ The Court found the monetary and access incentives governed by two specifically approved methods: First, Congress may condition receipt of federal funds.¹⁰² Second, Congress may offer the states the choice between regulating according to federal guidelines or having federal regulation preempt inconsistent state law—so called “cooperative federalism.”¹⁰³ The Court upheld the monetary incentives, although no federal funds were expended under the Act,¹⁰⁴ as proper under the conditional spending

95. *See id.* 149-54.

96. *See id.* at 144.

97. *See id.* at 152. “Sited” states—those where the waste would be dumped—charged a fee to each state disposing of its waste. *See id.* Each sited state collected the fee and transferred it to an account held by the U.S. Secretary of Energy. *See id.* As a compliance incentive, the Secretary would then make payments from this account to those states attaining the first wave of compliance deadlines. *See id.*

98. *See id.*

99. *See id.*

100. *See id.* at 171-73.

101. *Id.* at 166.

102. *See id.* at 166-67.

103. *See id.* at 167-68; *see* *South Dakota v. Dole*, 483 U.S. 203 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981); *FERC v. Mississippi*, 456 U.S. 742 (1983). Under cooperative federalism, states choose whether they wish to act, or whether they wish to permit the federal government to act. *See New York*, 505 U.S. at 167-68.

104. The Secretary of Energy made the timely compliance payments from a fund generated solely by fees collected from disposing states by sited states. *See supra*

power.¹⁰⁵ The Court noted that it has never construed the spending power to require a particular form of accounting.¹⁰⁶ Similarly, the Court upheld the access incentives as a valid exercise of "cooperative federalism" despite the incentives' severe punishments of increased disposal fees or the denial of disposal access altogether.¹⁰⁷

The Court struck down the take-title provision, however, as beyond the scope of federal power and as "crossing the line distinguishing encouragement from coercion."¹⁰⁸ The Court described the "so-called incentive" as "offer[ing] States, as an alternative to regulating pursuant to Congress's direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages . . . suffer[ed] as a result of the States' failure to do so promptly."¹⁰⁹ Thus, state governments could choose between accepting ownership of waste or regulating according to Congress's commands under the take-title provision.¹¹⁰ This choice was problematic, however, because it did not permit the states to decide *which* government would regulate; states could not decide whether the state or the federal government would act.¹¹¹ Indeed, the take-title provision only provided states with the choice of deciding *how* to regulate; either alternative required the *states* to act.¹¹² Moreover, while the access incentives' cooperative

note 97 and accompanying text (discussing the fee paid by states to the Secretary).

105. "[T]he Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related to the purpose of the expenditure." *New York*, 505 U.S. at 172 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

106. *See id.*

107. *See id.* at 173 ("States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal site."). Thus, because Congress can regulate under its commerce power, it can offer a conditional exercise of that power in the form of a choice to states to regulate according to federal commands or to have state law preempted. Hence, the Court found the access incentives to fall short of "outright coercion" because states retained the ability to determine which regulatory method would be used: federal preemption or state regulation according to federal guidelines. *See id.*

108. *See id.* at 174-76.

109. *Id.* at 174-75.

110. *See id.* at 175.

111. *See id.* at 175-76. States' ability to choose *who* will regulate is the principal component of cooperative federalism. *See id.* at 168.

112. *See id.* at 176-77.

federalism was a proper conditional exercise of the commerce power,¹¹³ *neither* alternative under the take-title provision was within Congress's authority.¹¹⁴

Thus, the Court found that a "choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'"—a method clearly beyond Congress's constitutional authority.¹¹⁵ Moreover, the Court found that although the Framers intended for Congress to have substantial authority under the enumerated powers, the Framers did not intend for Congress to have the ability to require the states to implement Congress's regulations.¹¹⁶ Indeed, the Court found that the Framers intended the federal government's authority to extend directly over individuals, not over the states.¹¹⁷ As Madison and Hamilton explained, "[A] sovereignty over sovereigns, a government over governments . . . as contradistinguished from individuals; as it is a solecism in theory; so in practice, it is subversive of the order and ends of civil polity."¹¹⁸ Thus, the Court found that Congress improperly commandeered the states into

113. *See supra* note 107 and accompanying text.

114. *See New York*, 505 U.S. at 175-77.

On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer . . . would in principle be no different than a congressionally compelled subsidy from state[s] . . . to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes. . . . On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress.

Id. at 175-76. Thus, according to the Court, whereas a proper scheme of cooperative federalism contains one alternative where the federal government may regulate pursuant to its enumerated powers, neither alternative under the take-title provision fell within Congress's enumerated powers. *See id.* at 176-77.

115. *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

116. *See id.* at 180. For a further discussion of whether the Framers intended for the federal government to have the ability to commandeer state processes, see *infra* notes 139-79 and accompanying text (discussing *Printz v. United States*, 117 S. Ct. 2365 (1997)).

117. *See id.* at 180.

118. THE FEDERALIST NO. 20, at 128-29 (James Madison and Alexander Hamilton) (Jacob E. Cooke ed., 1961).

the service of the federal government by providing the states with a choice between two coercive alternatives. Because some of Congress's expenditure methods are often coercive,¹¹⁹ the Court's decision in *New York* is thus crucial to a discussion of the spending power because the Court specifically denounced Congress's use of coercion.

2. *United States v. Lopez*: A Greater Indication of Restoring a Proper Balance

In *United States v. Lopez*,¹²⁰ the Supreme Court, for the first time in nearly sixty years,¹²¹ struck down a Congressional Act passed pursuant to the Commerce Clause thus confining federal commerce power.¹²² Chief Justice Rehnquist, writing for the majority, began by stating the established "first principles" of federalism which confine the federal government to exercising only its enumerated powers.¹²³ The Chief Justice proceeded to examine Commerce Clause precedent,¹²⁴ finding that although the Court's Depression era cases greatly expanded Congress's power,¹²⁵ they had recognized some limit on federal power under the Commerce Clause.¹²⁶

Rejecting the government's construction of how the Gun Free School Zones Act (Act) met the third of the Court's three traditional Commerce

119. See *infra* notes 305-44 and accompanying text (discussing how the spending power permits Congress to coerce state and local governments into adopting federal regulations and guidelines).

120. 514 U.S. 549 (1995). Chief Justice Rehnquist wrote for the majority. For an in-depth treatment of *Lopez*, see generally Hagen, *supra* note 37; Michael J. Trapp, Note, *A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal Power Under the Commerce Clause*, 64 U. CIN. L. REV. 1471 (1994).

121. See Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1911 (1995).

122. See *Lopez*, 514 U.S. at 552. *Lopez* struck down the Gun Free School Zones Act, which prohibited possession of firearms within 1000 feet of any school. See *id.* at 551 & n.1.

123. See *id.* at 552. For the *Lopez* Court, a healthy federal-state balance is a cornerstone principle of American government because a proper balance secures the benefits of liberty by reducing the possibility for excessive accumulation of power in any one government. See *id.*

124. See *id.* at 552-59.

125. See *id.* at 555-57 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

126. See *id.* at 556-57.

Clause tests,¹²⁷ the majority found that the Act extended beyond this recognized limit.¹²⁸ Specifically, the Court characterized the government's explanation as "pil[ing] inference upon inference"¹²⁹ which, if accepted, would permit Congress to legislate in virtually any area under the auspices of the Commerce Clause or any other enumerated power.¹³⁰ Thus, the Court found that handguns near schools do not substantially affect "commerce"¹³¹ and that characterizing the Act in this manner rendered the federal-state balance "illusory."¹³² The Court stated, "To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local."¹³³ The Act in this way extended beyond the limits of the Constitution.¹³⁴ *Lopez* is thus both relevant and important to a discussion of the spending power because it indicates generally the Court's willingness to enforce limits on broad federal powers.

127. *See id.* at 558-59. The Court has found three categories of activity that Congress may regulate pursuant to the Commerce Clause; the Court does not require that Congress categorize or justify its Commerce Clause legislation at passage. *See id.* at 558, 562-63. The first two of the Court's three alternative Commerce Clause tests require either a showing of commerce crossing state lines or a showing of Congress's own rational findings that the regulated activity affects interstate commerce. *See id.* The *Lopez* Court found that the Act could only be sustained, if at all, under the third alternative test requiring that regulated activity substantially affect interstate commerce. *See id.*

128. *See id.* at 565-68. Specifically, in arguing to sustain the Act under the "substantial effects" test, the government contended that firearm possession in a school zone may result in violent crime and that violent crime may in turn affect the national economy through "costs of crime" and decreased national productivity. *See id.* at 563. First, the Government argued that because the costs of crime are substantial, increased insurance costs are spread throughout the nation. *See id.* at 563-64. Second, the Government argued that possession of firearms threatens the learning process and in turn results in a less productive society, which adversely impacts the nation's economic health. *See id.* In rejecting these justifications, the Chief Justice explained that the Act "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Id.* at 561.

129. *Id.* at 567.

130. *See id.* at 564.

131. *See id.* at 560-61.

132. *See id.* at 567-68.

133. *Id.* (citation omitted). In other words, if enumeration does not "presuppose something not enumerated," then all legislative objects would fall within Congress's authority, because the essential premise would be that the Constitution granted Congress all possible powers and left to the States nothing. *See id.* at 567. The Constitution's enumeration of powers, however, presumes that more powers exist than merely those enumerated. *See id.* Otherwise, enumeration of powers makes little sense. *See id.*

134. *See id.*

Although *New York* and *Lopez* indicate a Court trend toward reviewing Congressional legislation to ensure the constitutionally mandated federal-state balance, the decisions nevertheless continue to leave some doubt as to whether the Court may revisit the current view of the spending power. While the *Lopez* Court had no occasion to review the spending power,¹³⁵ the *New York* Court explicitly held that Congress may continue to spend in furtherance of the general welfare by conditioning receipt of federal funds upon states' implementation of federal objectives or otherwise.¹³⁶ Building upon *New York* and *Lopez*, the Court's most recent decision in *Printz v. United States*¹³⁷ indicates that federalism is substantive in nature and that the Tenth Amendment, as the expositor of federalism, is more than a "mere truism." Moreover, *Printz* does not rule out the possibility that the Court may someday review the spending power under its federalism precedent.¹³⁸

3. *Printz v. United States*: The Court Refuses to Confine Principles of Federalism Based on a Technicality

During the 1997 Term, and five years after deciding *New York*, the Supreme Court again confronted the issue of Congress commandeering the states. In *Printz*,¹³⁹ the Court expounded its holding in *New York* and held that the constitutional system of federalism prohibits Congress from "conscripting the State's officers directly"¹⁴⁰ in an attempt to avoid

135. *Lopez* involved only a Commerce Clause challenge to Congress's legislation. See *id.* at 552.

136. See *New York v. United States*, 505 U.S. 144, 171-73 (1992).

137. 117 S. Ct. 2365 (1997).

138. See *id.* at 2376.

139. Justice Scalia delivered the majority opinion, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined. See *id.* at 2368-84. Justice O'Connor filed a concurring opinion. See *id.* at 2385-86 (O'Connor, J., concurring). Justice Thomas also filed a concurring opinion. See *id.* at 2385 (Thomas, J., concurring). Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. See *id.* at 2386-401 (Stevens, J., dissenting). Justice Souter also filed a dissenting opinion. See *id.* at 2401-04 (Souter, J., dissenting). Justice Breyer also filed a dissenting opinion, in which Justice Stevens joined. See *id.* at 2404-05 (Breyer, J., dissenting). For a discussion of *Printz*, see Lang Jin, Note, *Printz v. United States: The Revival of Constitutional Federalism*, 26 PEPP. L. REV. (forthcoming 1999).

140. *Id.* at 2384. *New York* involved commandeering of state legislatures, not state officers, as in *Printz*.

New York's prohibition on Congress compelling the "States to enact or enforce a federal regulatory program."¹⁴¹ The majority's approach in *Printz* provides a useful tool with which to analyze existing and future questions of federalism.

Printz involved a challenge to the Brady Handgun Violence Prevention Act (Brady Act or Act).¹⁴² The Act was named after former White House Press Secretary James Brady, who was shot during the assassination attempt on President Ronald Reagan. In an effort to regulate the sale of handguns, the Brady Act, as enacted, required a firearms dealer to obtain certain information from a prospective firearms purchaser, including the purchaser's identity. The Brady Act required the dealer to provide the state or local "chief law enforcement officer" (CLEO) with this information.¹⁴³ Unless the purchaser "possesse[d] a [proper] state handgun permit" or "state law provide[d] for an instant background check," the dealer had to "wait five business days before consummating the sale" of the firearm.¹⁴⁴

During this waiting period, the Act required the CLEO to conduct a background check on the prospective handgun purchaser.¹⁴⁵ The CLEO was required to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."¹⁴⁶ The Act did not require the CLEO to "take any particular action" if he determined that the prospective purchaser was ineligible.¹⁴⁷ If the CLEO notified the firearms dealer of the purchaser's ineligibility, however, the Act required the CLEO to "provide the would-be purchaser with a written statement of the reasons for that determination [upon request]."¹⁴⁸ Furthermore, upon a finding of eligibility, the Act required the CLEO to destroy any and all documents he possessed relating to the sale.¹⁴⁹ Jay Printz and Richard Mack, CLEOs in Montana and Arizona,

141. *Id.*

142. 18 U.S.C. §§ 922-930 (1994).

143. *See Printz*, 117 S. Ct. at 2369 (citing 18 U.S.C. §§ 922(s)(1)(C) & (D)).

144. *Id.* (citing 18 U.S.C. § 922(s)(1)(A)(ii)). The firearms dealer could proceed with the sale earlier than five days if the CLEO "notifie[d] the dealer that he ha[d] no reason to believe the transfer would be illegal." *Id.*

145. *Printz*, 117 S. Ct. at 2369 (citing 18 U.S.C. § 922(s)(2)).

146. *Id.* (quoting § 922(s)(2)).

147. *See id.*

148. *See id.*

149. *See id.*

respectively, challenged Congress's authority to enact these provisions.¹⁵⁰

Writing for the majority, Justice Scalia found that Congress lacked the power to "direct state law enforcement officers to participate, [even] . . . temporarily, in the administration of a federally enacted regulatory scheme."¹⁵¹ Examining "historical understanding and practice," "the structure of the Constitution," and "the jurisprudence of [the] Court,"¹⁵² the majority invalidated the background check requirement and the implicit requirement to accept the forms and information provided by the firearms dealer.¹⁵³ The Court let stand, however, the provisions requiring CLEOs to destroy records related to the sale and provide ineligible purchasers with a statement of the reasons for ineligibility.¹⁵⁴

First, Justice Scalia examined "historical understanding and practice."¹⁵⁵ Justice Scalia noted the importance of searching the practice of the first Congresses, explaining that "early congressional enactments 'provid[e] 'contemporaneous and weighty evidence of the Constitution's meaning.'"¹⁵⁶ Searching early United States history, Justice Scalia concluded that "[n]ot only do the enactments of the early Congresses . . . contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption."¹⁵⁷ Justice Scalia found that early congressional acts "recommended" that state legislatures enact laws to further certain congressional objectives instead of requiring the states' executives to further the objectives.¹⁵⁸ Thus, Justice Scalia noted "an absence of exec-

150. *See id.*

151. *See id.*

152. *See id.* at 2370.

153. *See id.* at 2384.

154. *See id.* The Court noted that it was unnecessary to invalidate these two provisions because the Court's invalidation of the background check requirement rendered them moot. *See id.*

155. *See id.*

156. *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))). Justice Scalia explained that "if . . . earlier Congresses avoided use of" the power to commandeer state officials, "we would have reason to believe that the power was thought not to exist." *See id.*

157. *Id.* at 2372.

158. *See id.* In one instance, Georgia refused to implement a recommendation. In response, Congress did not command or require Georgia to act. *See id.* Instead, Congress "authorized" but did not require state and local officials to implement the ob-

utive-commandeering statutes in the early Congresses.”¹⁵⁹ Addressing the contentions of the United States, Justice Scalia then stated that “there is an absence of [executive-commandeering statutes] in our later history as well, at least until very recent years.”¹⁶⁰ Significantly, Justice Scalia noted that, until recently, even during wartime, the President respected “state independence” and refrained from attempting to direct state officials.¹⁶¹

Justice Scalia next turned to the structure of the Constitution, in order to “discern among its ‘essential postulate[s]’” guidance on the issues before the Court.¹⁶² Justice Scalia first announced the oft-cited and “incontestable” principle that “the Constitution established a system of ‘dual sovereignty.’”¹⁶³ The majority reiterated that “although the States surrendered many of their powers to the new Federal Government,” the text of the Constitution reflects the fundamental understanding that the states nevertheless “retained ‘a residuary and inviolable sovereignty.’”¹⁶⁴ Perhaps most importantly, “[r]esidual state sovereignty was . . . implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones . . . which implication was rendered express by the Tenth Amendment[.]”¹⁶⁵ Moreover, “the

jective. *See id.*

159. *Id.* at 2375.

160. *Id.* The United States argued that the selective draft law during World War I “authorized the President ‘to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States . . .’” *Id.* (quoting Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81). Justice Scalia responded twofold. First, he noted that it is “far from clear” that the act authorized the President to “compel the service of state officers.” *See id.* Second, he noted that President Wilson, in attempting to achieve the act, “requested the assistance of the States’ governors” instead of attempting to commandeer and direct them. *See id.* (noting that President Wilson “call[ed] upon the Governor of each of the several States . . . and all officers and agents of the several States . . . to perform certain duties,” and that President Wilson “requested” the governor of each State “to act under the regulations and rules prescribed by the President”).

161. *See id.*; *see also supra* note 158 (discussing Georgia’s refusal to implement a Congressional recommendation). Specifically, Justice Scalia proclaimed that “[i]t is impressive that even with respect to a wartime measure . . . President [Wilson] should have been so solicitous of state independence.” *Printz*, 117 S. Ct. at 2376.

162. *See Printz*, 117 S. Ct. at 2376.

163. *See id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

164. *See id.* (quoting THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961) (citing *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), *overruled in part by Morgan v. United States*, 113 U.S. 476 (1885); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869), *superseded by statute in Leitch v. Department of Revenue*, 9 Or. Tax 256 (1982)).

165. *Id.* at 2376-77 (citations omitted).

Framers rejected the concept of a central government that would *act upon and through the States*.¹⁶⁶

The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" . . . The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. . . . This separation of the two spheres is one of the Constitution's structural protections of liberty.¹⁶⁷

Thus, Justice Scalia proclaimed the *substantive* nature of federalism: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them. . . ."¹⁶⁸ The majority explained that the structure of the Constitution, and the Constitution's federalism, support the conclusion that the states are entities separate and distinct from the federal government, and thereby not subject to Congress's direction. Justice Scalia explained that the federal government would grow immensely if Congress could press the states into the service of the federal government at no cost to the national treasury.¹⁶⁹

Finally, Justice Scalia surveyed the Court's jurisprudence and determined that the Court has refused to permit the federal government to conscript the states into attaining federal objectives.¹⁷⁰ The majority noted that, perhaps tellingly, "[f]ederal commandeering of state governments is such a novel phenomenon that this Court's first experience with

166. *Id.* at 2377 (emphasis added). As discussed below, the current interpretation of the spending power effectively permits the federal government to "act upon and through the States," especially when Congress conditions receipt of federal funds upon states implementing federal objectives, especially federal objectives which are either tangentially or wholly unrelated to the destination of the federal funds. See *infra* notes 241-56 and accompanying text (discussing O'Connor's dissenting decision in *South Dakota v. Dole*, 483 U.S. 203, 212-18 (1987) (O'Connor, J., dissenting)).

167. *Printz*, 117 S. Ct. at 2377-78 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)). For an in-depth analysis of *U.S. Term Limits*, see Julie Heintz, Note, *Why Can't a Chicken Vote for Colonel Sanders?* *U.S. Term Limits v. Thornton and the Constitutionality of Term Limits*, 24 PEPP. L. REV. 649 (1997).

168. *Printz*, 117 S. Ct. at 2377 (quoting THE FEDERALIST NO 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961)). Further, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 2381 (citing *White*, 74 U.S. (7 Wall.) at 725).

169. See *id.* at 2378; see also *infra* notes 351-53 (discussing the Unfunded Mandates Reform Act).

170. See *id.* at 2379-83.

it did not occur until the 1970's [sic], when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes.¹⁷¹ Moreover, Justice Scalia noted that the United States government "declined" to defend these requirements after the Court granted certiorari to review their constitutionality.¹⁷² Likewise, the majority cited several of its recent decisions supporting the conclusion that the federal government may not direct states and state officials.¹⁷³ Justice Scalia rejected the United States' attempt to distinguish these cases, specifically, the United States' "untenable" position that the Brady Act did not violate *New York* because it did not "diminish the accountability of state or federal officials."¹⁷⁴ In response, the majority asserted that

by forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.¹⁷⁵

Perhaps at least as important, Justice Scalia established that "[t]o say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance. Indeed, it merits the description 'empty formalistic reasoning of the highest order'" which would otherwise "disembowel" the holding in *New York*.¹⁷⁶ Finally, the majority dismissed the government's proposed test for balancing important policy objectives and purposes, a balancing test appropriately set forth in previous Court decisions but on wholly different circumstances, by stating that "to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate."¹⁷⁷

171. See *id.* at 2379.

172. See *id.* Instead, the government "rescinded some and conceded the invalidity of those that remained." *Id.* at 2379-80.

173. See *id.* at 2380 (citing *New York v. United States*, 505 U.S. 144 (1992); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)).

174. See *Printz*, 117 S. Ct. at 2382.

175. *Id.* (citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 & n.65 (1994)). For example, under the Brady Act, "it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected." *Id.*

176. See *id.* at 2382 (footnote omitted) (citation omitted).

177. See *id.* at 2383.

In an apparent rebuke to the Depression era decisions expanding federal power, the majority opinion concluded by explaining that although measures such as the Brady Act “are typically the product of the era’s perceived necessity,” the Constitution nevertheless “divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”¹⁷⁸

Having thus curbed Commerce Clause power and Congress’s attempts to commandeer state legislatures and state officials, the spending power remains perhaps the broadest federal power upon which the Court has yet to place any substantive limits.¹⁷⁹ In order to predict whether the Court may in the future circumscribe the federal spending power, an understanding of the history and development of the current view of the spending power is essential.

III. THE BASIS OF THE FEDERAL SPENDING POWER

Article I, Section 8, Clause 1 of the United States Constitution states in pertinent part that “[t]he 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.”¹⁸⁰ Over the course of the nation’s history, scholars have debated the scope and meaning of this now-powerful clause. Early this century, the Supreme Court sought to define the meaning of the Clause and has since expanded upon its early interpretation.

178. See *id.* (quoting *New York*, 505 U.S. at 187); see also *infra* note 194 and accompanying text (discussing the importance of adhering to constitutional mandates especially during times in which those constitutional mandates otherwise impede or impair the swift and popular resolution of social or economic crises). Only a few months before delivering the majority opinion in *Printz*, Justice Scalia commented that “[p]opular will’ cannot overcome what the Constitution enshrines.” *Liberty & Limits*, *supra* note 2.

179. See *infra* note 414 and accompanying text (discussing the breadth of the Court’s interpretation of Congress’s spending and commerce powers).

180. U.S. CONST. art. I, § 8, cl. 1 (commonly known as the Spending Clause, or General Welfare Clause). Interestingly, during the period of ratification, Gouverneur Morris attempted to insert a semicolon between “to lay and collect Taxes, Duties, Imposts and Excises” and “to pay the Debts and provide for the common Defence and general Welfare” in order to change the meaning of the sentence. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 264-65 (1985).

A. *United States v. Butler: The Spending Power is Limited to Furtherance of the General Welfare of the United States and Not to Furtherance of the Enumerated Powers*

In *United States v. Butler*,¹⁸¹ the Supreme Court sought to articulate the scope of, and provide an authoritative guide to, the Spending Clause for the first time, finally resolving the debate that had raged between James Madison and Alexander Hamilton more than a hundred years earlier.¹⁸² In doing so, however, the Court left some confusion regarding the Clause's actual scope.

Butler involved a challenge to Congress's Agricultural Adjustment Act of 1933 (Act).¹⁸³ The Act increased farmers' prices for certain farm products by decreasing the quantity harvested.¹⁸⁴ To accomplish this, Congress subsidized those farmers who agreed to produce less.¹⁸⁵ The plaintiff's counsel asserted two principal theories for finding the Act unconstitutional: First, the Act permitted Congress to tax and spend beyond the enumerated powers. Second, *regulation* of agriculture was not within Congress's enumerated powers.

First, the Court formally rejected the proposition that the Constitution limits Congress's spending to furthering an enumerated power.¹⁸⁶ This challenge resurrected the great debate between Madison and Hamilton regarding the interpretation of the phrase "to provide for the . . . general Welfare."¹⁸⁷ Madison argued that the Spending Clause encompassed only Congress's enumerated powers.¹⁸⁸ Madison believed that the "grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress."¹⁸⁹ On the other hand, Hamilton urged that the Spending Clause conferred a power separate and distinct from the enumerated powers.¹⁹⁰ Hamilton believed that Congress could tax and spend as long as such taxing and spending promoted the general welfare of the nation.¹⁹¹ The Court adopted Hamilton's theory, believing that limiting the power to tax and

181. 297 U.S. 1 (1936).

182. *See id.* at 65-66.

183. *See id.* at 53.

184. *See id.* at 53-55.

185. *See id.*

186. *See id.* at 65-66.

187. *See id.*

188. *See id.* at 65.

189. *Id.*

190. *See id.* at 65-66.

191. *See id.*

spend only to the General Welfare Clause, and not to the subsequent enumerated powers, was the most logical reading of the Clause.¹⁹²

While, therefore, the power to tax [and spend] is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.¹⁹³

After rejecting the spending power challenge and broadly defining Congress's spending power, the Court, somewhat surprisingly, held that the Act in question nevertheless violated the Tenth Amendment by placing within Congress's reach an impermissible end.¹⁹⁴ Nearly relegating its foregoing discussion of the spending power to mere dicta, the Court stated,

We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agricul-

192. *See id.* at 66.

193. *Id.*

194. *See id.* at 68. Thus, the actual holding of the case did *not* necessarily limit the spending power to the general welfare, as opposed to the enumerated powers. In order to achieve this result, the Court acknowledged the well-known truth that because "the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states. . . . The same proposition, otherwise stated, is that powers not granted are prohibited." *Id.* Because *regulation* of agricultural adjustment, production, or the like was not an area within the powers conferred to Congress by the Constitution, and because the effect of the Act's expenditures was to regulate agriculture, the act violated the Constitution. *See id.* This result was specifically rejected one year later in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-86 (1937), and *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937). The fact that these cases were decided in 1937 is likely evidence that the Court was attempting to preserve national power to deal with the great difficulties of the nation at the time or perhaps to preserve itself and its members. Whatever the case, the economic exigencies accompanying *Steward Machine* and *Helvering* cannot be ignored. *See* FERC v. Mississippi, 456 U.S. 742, 786 n.16 (1983) (O'Connor, J., concurring and dissenting); John Marshal Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943 (1963) (noting that times of "international unrest and domestic uncertainty" are often "bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to short-cut the processes of change which the Constitution establishes" and that lawyers and judges have a "special responsibility" to guard against this tendency).

ture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the [Act].¹⁹⁵

According to the *Butler* Court, *regulation* of agriculture was not within any of Congress's enumerated powers, explicitly or otherwise.¹⁹⁶ Thus, although the spending power itself was not limited to furthering an enumerated power, the *Butler* Court held that Congress's *regulations* must be supported by an enumerated power, and the effect of the Act was to regulate agriculture, not to spend in its furtherance.¹⁹⁷ Moreover, the Court found that because the end of regulating agriculture was unconstitutional, the means used—the spending power—to achieve the unconstitutional end were likewise objectionable.¹⁹⁸ Referencing *McCulloch v. Maryland*,¹⁹⁹ the Court found that “[t]he power [to tax and spend], which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted.”²⁰⁰ However, to “resort to the . . . power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.”²⁰¹

It is significant that the Court would broadly construe the spending power but nevertheless find that the ends of the federal expenditure were improper. Finding that “[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy,”²⁰² the Court continued by observing that “[a]t best [the Act] is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.”²⁰³ Accordingly, such a “scheme” was unconstitutional.²⁰⁴

Congress has no power to enforce its commands on the farmer to the ends sought by the [Act]. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize.²⁰⁵

195. *Butler*, 297 U.S. at 68.

196. *See id.*

197. *See* *South Dakota v. Dole*, 483 U.S. 203, 216-17 (1987) (O'Connor, J., dissenting).

198. *See Butler*, 297 U.S. 70-71.

199. 17 U.S. 316 (4 Wheat.) (1819). “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* at 421; *see infra* notes 292-308 and accompanying text (discussing a means-ends analysis).

200. *Butler*, 297 U.S. at 69.

201. *Id.*

202. *Id.*

203. *See id.* at 72.

204. *See id.* at 61.

205. *Id.* at 74. Ironically, the Court currently holds that this result is proper. Indirect regulation, unless specifically of the type prohibited in *New York v. United*

Buttressing its position, the Court cited James Monroe, an advocate of the broad Hamiltonian view of the spending power, as having proclaimed that the Constitution does not confer upon Congress the power to tax and spend for any purpose at "their will and pleasure."²⁰⁶ Thus, it is apparent that even some Hamiltonians agreed that the Constitution inherently commands limiting the spending power.²⁰⁷ Referring to the phrase "provide for the general welfare," Hamilton himself noted that Congress's purpose must be "general, and not local."²⁰⁸

Thus, *Butler* establishes that Congress's spending is not limited to furthering the enumerated powers; Congress can tax and spend to promote the general welfare of the nation. The Court found, however, that, even assuming that the Act was within the general welfare, the Act was impermissible under the Tenth Amendment because regulation of agriculture was not within the enumerated powers. During the following term, the Court would find that the ends furthered by spending power means need not originate in one of the explicit textual enumerated powers.

B. *Steward Machine Co. v. Davis* and *Helvering v. Davis*: *Congress May Define the Scope of the General Welfare*

In *Steward Machine Co. v. Davis*,²⁰⁹ and *Helvering v. Davis*,²¹⁰ the Court "specifically rejected" the Tenth Amendment result reached in *Butler*²¹¹ and held that Congress may define the scope of the general welfare.²¹² The Court found that the ends sought to be furthered by spending power means need not originate in an explicit enumerated pow-

States, 505 U.S. 144, 176 (1992), is well within Congress's power. See *infra* notes 320-25 and accompanying text (discussing Congress's ability to indirectly regulate that which it cannot directly regulate).

206. See *Butler*, 297 U.S. at 66-67 (quoting from 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 167 (James D. Richardson ed., 1896)).

207. See *id.* at 77-78 (noting that even Hamilton would not have proposed that the federal government have the ability to regulate local affairs).

208. See *id.* at 66-67 (quoting from 3 ALEXANDER HAMILTON, *Report on Manufacture*, in WORKS 250 (Lodge ed., 1904)); see *supra* note 58 (discussing the well-recognized belief that Hamilton was the greatest expositor of federal power).

209. 301 U.S. 548 (1937).

210. 301 U.S. 619 (1937).

211. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 200 (5th ed., 1995).

212. *Id.*

er.²¹³ *Steward Machine* and *Helvering* both involved constitutional challenges to the then-recently enacted Social Security Act (Act).²¹⁴ *Steward Machine* held that the social security excise tax placed upon employers of eight or more employees was constitutional.²¹⁵ Citing the nationwide depression, the Court said, "It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare."²¹⁶ The Court thus refused even to hear an assertion that Congress's taxing and spending actions through the challenged Act were beyond the scope of the general welfare.

Helvering involved a similar challenge to the social security tax deducted from employees' wages. In a now-famous passage, Justice Cardozo, writing for the majority, elucidated the reasoning in *Steward Machine*.

The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison. . . . Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula. . . . There is a middle ground or certainly a penumbra in which discretion is at large. *The discretion however, is not confided to the courts. The discretion belongs to Congress. . . .*²¹⁷

Thus, the Court held that regardless of whether the Act was beyond Congress's enumerated powers, the power to tax and spend was limited only to promoting the general welfare—the scope of which Congress could define—and not limited, as the *Butler* Court had found, by the Tenth Amendment.²¹⁸ "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."²¹⁹

213. *See id.*

214. *See Steward Mach. Co.*, 301 U.S. at 573-74; *Helvering*, 301 U.S. at 634.

215. *Steward Mach. Co.*, 301 U.S. at 573.

216. *Id.* at 586-87; *see supra* notes 178, 194 (discussing the danger of such a statement).

217. *Helvering*, 301 U.S. at 640 (emphasis added).

218. *See id.* at 644-45; NOWAK & ROTUNDA, *supra* note 211, at 200.

219. *Id.* at 645. Justice O'Connor perhaps best explained the limit of the *Butler* decision in her dissent in *South Dakota v. Dole*, 483 U.S. 217 (1986):

The error in *Butler* was not the Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act was regulatory, but it was regulation that today would likely be considered within Congress' commerce power.

C. *Berman v. Parker and Buckley v. Valeo: Congress Can Choose Any Means It Desires in Furtherance of the General Welfare, and Such a Determination May Not be Judicially Reviewable*

The Supreme Court's view of the general welfare, and the extent to which Congress may further the general welfare, is expansive. In *Helvering*, the Court found that Congress retains the discretion to determine the general welfare.²²⁰ The Court has continued to maintain that view and expanded upon it.

In *Berman v. Parker*,²²¹ the Supreme Court held that Congress has the authority under its power of eminent domain to condemn property and then convey that property to private persons.²²² Finding that "[t]he concept of the public welfare is broad and inclusive,"²²³ the Court noted that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."²²⁴ "In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."²²⁵ Thus, simply by passing a law, Congress de-

Id. at 217 (O'Connor, J., dissenting). It must be remembered that *Dole* preceded the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), which announced some limitation on Congress's commerce power. *See supra* notes 120-38 (discussing *Lopez*). This Comment posits that a refusal to likewise confine the spending power permits Congress to regulate—through the spending power—when *Lopez* might deny the regulation under an enumerated power such as the Commerce Clause.

220. *See supra* note 219 and accompanying text.

221. 348 U.S. 26 (1954).

222. *See id.* at 33-35. The challenged Congressional act condemned certain parcels in the District of Columbia and then conveyed those parcels to private developers, in order to redevelop blighted areas. *See id.* at 28-31. Although this Comment does not concern the power of eminent domain, nor Congress's authority over the District of Columbia, *Berman* is an important case insofar as it further illustrates the Court's expansive view of Congress's discretion in promoting the general welfare. Nor is it necessarily significant that the act involved Congress's police power because the Court nevertheless found that the act was passed to promote the public welfare. *See id.* at 33. *Berman* is somewhat limited, however, in its application to this Comment. *Berman* does not discuss the "general" welfare; *Berman* only elucidates the Court's view of the concept of "welfare."

223. *Id.* at 33 (citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952)). Congress passed the act challenged in *Berman* to promote the welfare of both the residents and the image of the seat of the national government. *See id.* at 28.

224. *Id.* at 32.

225. *Id.* "This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Id.* (citing

clares the public welfare. This harkens to Madison's recognition that no law passed by Congress is unrelated to furthering the public welfare.²²⁶ Thus, it would appear that if Congress writes the check, then the public welfare has been furthered.

In *Buckley v. Valeo*,²²⁷ the Supreme Court addressed various challenges to the constitutionality of the Federal Election Campaign Act (Act).²²⁸ The challenge pertinent to this Comment involved federal financing of presidential primary and general election campaigns and nominating conventions.²²⁹ The Court rejected the claim that these federal expenditures were contrary to the general welfare,²³⁰ noting that the General Welfare Clause is "a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause."²³¹ Because Congress has the power to regulate presidential primaries and elections,²³² public financing of presidential elections is a means within that power.²³³ "It is for Congress to decide which expenditures will promote the general welfare . . ."²³⁴ The Court explained that "Congress was legislating for the 'general welfare'—to reduce the deleterious influence of large contributions on our political process. . . ."²³⁵ Moreover, "[w]hether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the general welfare. . . ."²³⁶ Building on the Court's conception of the pub-

United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946); Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

226. *See infra* notes 282-90 and accompanying text (discussing general welfare spending in relation to enumerated powers).

227. 424 U.S. 1 (1976).

228. *See id.* at 2.

229. *See id.* Specifically, the Act allocated public funds by establishing 3 categories: First, the provision granted "major" parties—those whose candidates received at least 25% of the vote in the immediately preceding presidential election—full matching funds. *See id.* Second, the Act allocated to "minor" parties—those whose candidates received at least 5% but less than 25% of the vote in the immediately preceding presidential election—a certain smaller percentage. *See id.* Third, the Act granted "new" parties a certain smaller percentage of post-election funds upon their respective candidates receiving at least 5% of the vote. *See id.* Additionally, a primary candidate, under certain circumstances, was entitled to matching public funds. *See id.*

230. *See id.* at 90.

231. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819)).

232. *See id.* (citing *United States v. Classic*, 313 U.S. 299 (1941); *Burroughs v. United States*, 290 U.S. 534 (1934)).

233. *See id.*

234. *Id.* at 90-91 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); *United States v. Butler*, 297 U.S. 1, 66 (1936)).

235. *Id.* at 91.

236. *Id.*

lic welfare in *Berman*, and the Court's conception of the general welfare in *Helvering*, the *Buckley* Court thus resolved that Congress is empowered to determine the scope and meaning of the terms "general" and "welfare" and that the determination might not be judicially reviewable.²³⁷

D. South Dakota v. Dole: Congress Retains Broad Deference to Condition States' Receipt of Federal Funds Upon Implementation of Federal Regulations and Guidelines

Perhaps no type of federal expenditure under the spending power affords Congress greater influence over states than the practice of conditioning states' receipt of federal funds upon the implementation of federal regulations and guidelines. The Supreme Court used the opportunity in *South Dakota v. Dole*²³⁸ to synthesize its position on such conditions, holding that conditioned federal funds as a rule are not repugnant to the Constitution.²³⁹ Finding that the spending power is "not unlimited," however, the Court stated four general restrictions.²⁴⁰ First, the expenditure must further the general welfare.²⁴¹ Thus, conditioned funds need not be in furtherance of any enumerated power.²⁴² Second, Congress must condition funds "unambiguously . . . , enabl[ing] the States to exercise their choice knowingly."²⁴³ Third, the conditions must be related to the purpose or destination of the funds.²⁴⁴ Finally, other constitutional provisions may act as an "independent bar" to funding conditions.²⁴⁵

237. *See id.*; *see also* *Berman v. Parker*, 348 U.S. 26, 35-36 (1954); *Helvering*, 301 U.S. at 640 (1937).

238. 483 U.S. 203 (1987). In *Dole*, South Dakota challenged the granting of federal funds for highway construction conditioned upon a state adopting a minimum drinking age of 21. *See id.* at 205-06.

239. *See id.* at 206.

240. *See id.* at 207-08.

241. *See id.* at 207 (citing *Helvering*, 301 U.S. at 640-41 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936)). The Court noted that Congress is due substantial deference in this area. *See id.* *Buckley* leaves doubt as to whether the Court would interfere with such deference. *See supra* note 234 and accompanying text (explaining that the Court permits Congress to decide the scope and meaning of the general welfare).

242. *See Dole*, 483 U.S. at 207.

243. *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (modifications in original)).

244. *See id.* at 207-08 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

245. *See id.* at 208 (citing *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S.

A challenge based on the independent constitutional bar restriction was the principal issue before the Court in *Dole*. Specific to the facts of *Dole*, the Court held that the Twenty-First Amendment is not an independent constitutional bar to conditional funding.²⁴⁶ Examining earlier cases, the Court likewise noted that it previously held that the Tenth Amendment is not an independent bar to conditioned federal grants and thus does not limit the extent of conditions Congress may place on federal funds.²⁴⁷ While recognizing that the independent constitutional bar limitation is not “a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly,”²⁴⁸ the Court also noted that its decisions have acknowledged that in some cases, the “financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”²⁴⁹ Thus, the Court recognized, as it had in *Steward Machine* and *Butler*, the potential for coercion when the federal government pursues state implementation of federal objectives by using conditional funding.²⁵⁰ Nevertheless, the Court reaffirmed its statement in *Steward Machine* that “to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.”²⁵¹

Justice O'Connor dissented,²⁵² objecting not to the majority's principles and limitations but to the application of those limitations in the instant case.²⁵³ Although agreeing that conditions must be reasonably related to the purpose of the expenditure, Justice O'Connor would have held that a minimum drinking age requirement as a condition to federal funds was not sufficiently related to interstate highway construction.²⁵⁴ Justice O'Connor was concerned primarily with permitting Congress to condition funds based upon an “attenuated or tangential relationship” to the destination of the funds.²⁵⁵ In her estimation, the majority's failure

256, 269-70 (1985)). The Court noted that the independent constitutional bar limitation stands at least for the principle that the conditions cannot require a state to act in violation of the Constitution. *See id.* at 210. Thus, a grant of funds conditioned upon the state discriminating invidiously or promoting cruel and unusual punishment would be an invalid use of the spending power. *See id.* at 210-11.

246. *See id.* at 212.

247. *See id.* at 210 (citing *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947)).

248. *See id.*

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

250. *See id.*

251. *Id.* at 211 (quoting *Steward Machine Co.*, 301 U.S. at 589-90). Perhaps our entire system of jurisprudence might be more efficient and simple if we regularly applied an avoidance of “endless difficulties” standard.

252. *See id.* at 212-18 (O'Connor, J., dissenting).

253. *See id.* at 212-14 (O'Connor, J., dissenting).

254. *See id.* at 213-14 (O'Connor, J., dissenting).

255. *See id.* at 215 (O'Connor, J., dissenting); *see also Gillmor & Eames, supra note*

to require a closer relationship between the conditions and the destination of the funds permitted Congress to "effectively regulate almost any area of a State's social, political, or economic life."²⁵⁶ In her dissent, Justice O'Connor adopted the view of the National Conference of State Legislatures (National Conference),²⁵⁷ which would limit Congress to placing conditions only on how the federal funds are spent.²⁵⁸ Quoting the National Conference's amicus brief, Justice O'Connor noted that

"Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' [sic] delegated regulatory powers."²⁵⁹

Justice O'Connor explained that she would have returned to the *Butler* Court's understanding of the spending power.²⁶⁰ That understanding holds that Congress may use conditions to exercise its spending power, not to exercise any regulatory authority.²⁶¹ "[T]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."²⁶² The main concern with a broad conditional spending power is Congress's ability to use the spending power to regulate when Con-

71, at 399 (noting that federal state cooperation is strained and federal coercion present when only a "tenuous relationship" exists between the conditions and the purposes of the funding and citing as an example federal highway construction dollars conditioned upon states' implementation of mandatory seat belt and motorcycle helmet laws).

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

257. See *id.* at 215-16 (O'Connor, J., dissenting).

258. See *id.* at 216 (O'Connor, J., dissenting).

259. *Id.* (O'Connor, J., dissenting) (quoting Amicus Brief for the National Conference of State Legislatures et al., *supra* note 33, at 19-20).

260. See *id.* at 216-17 (O'Connor, J., dissenting). Justice O'Connor explained, however, that she believed the Court in *Butler* was misguided as to its understanding of the Commerce Clause and that, under current Commerce Clause doctrine, regulation of agriculture would likely come within the ambit of Congress's Commerce Clause powers. See *id.* Thus, Justice O'Connor would not support the *Butler* position insofar as it stood for the proposition that agriculture was beyond Congress's commerce power. See *id.* at 217.

261. See *id.* at 216 (O'Connor, J., dissenting) (citing *United States v. Butler*, 297 U.S. 1 (1936)); see also *supra* Part III.B. (discussing *Butler*).

262. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 73 (1936)).

gress would not be permitted to regulate pursuant to one of its enumerated powers such as the Commerce Clause.²⁶³ As the *Butler* Court noted, had the Agricultural Adjustment Act in that case been a valid exercise of Congressional authority, “evidently the regulation of all industry throughout the United States [could] be accomplished by similar exercises of the same power.”²⁶⁴ Congress’s ability to “tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people”²⁶⁵ through use of a virtually unregulated spending power “was not the Framers’ plan and . . . is not the meaning of the Spending Clause.”²⁶⁶ Citing *McCulloch v. Maryland*,²⁶⁷ Justice O’Connor concluded by noting that “[t]he immense size and power of the Government of the United States ought not obscure its fundamental character” as a government of enumerated and limited powers.²⁶⁸ Because no authority delegated to Congress by the Constitution justified the conditional grant of the federal funds in *Dole*, Justice O’Connor found the condition requiring adoption of a minimum drinking age unconstitutional.²⁶⁹

E. Congress’s Taxation Authority Under the Sixteenth Amendment Guarantees that Congress Has Trillions of Dollars to Allocate

Congress has the ability to levy an income tax under the Sixteenth Amendment, without any limits.²⁷⁰ Since that Amendment was ratified,

263. See *id.* at 218 (O’Connor, J., dissenting); Amicus Brief for the National Conference of State Legislatures, *supra* note 33, at 20.

All of this is not to say that the Court must invalidate a purported condition on a grant that is found to be a regulation. As a regulation, the condition would be valid if it fell within one of Congress’ delegated regulatory powers. A test that inquires whether the federal requirement is a condition at all, i.e., a specification as to the use of grant funds, rather than a regulation, need not call into question any decision of this Court. *It will merely ensure that the decision in this case and others in the future will reflect the constitutionally imposed limits on Congress’ authority.*

Amicus Brief for the National Conference of State Legislatures, *supra* note 33, at 20 (citations omitted) (emphasis added).

264. *Butler*, 297 U.S. at 75.

265. *Dole*, 483 U.S. at 217 (O’Connor, J., dissenting) (quoting *Butler*, 297 U.S. at 78 (1936)).

266. See *id.* at 217 (O’Connor, J., dissenting).

267. 17 U.S. (4 Wheat.) 316 (1819).

268. See *Dole*, 483 U.S. at 218 (O’Connor, J. dissenting).

269. See *id.* (O’Connor, J., dissenting); see also *infra* notes 404-21 and accompanying text (discussing a recent Fourth Circuit decision embracing Justice O’Connor’s dissent in *Dole*, *Virginia Dep’t of Ed. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), superseded by statute, as recognized by *Amos v. Maryland Dep’t of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997)).

270. U.S. CONST. amend. XVI.

the federal government has collected trillions of dollars in revenue. Additionally, the national debt now exceeds five trillion dollars,²⁷¹ which confirms that not only has Congress spent all that it has assessed, but a great deal more. With such tremendous leverage, Congress is indeed the proverbial six hundred pound gorilla. This leverage is important in considering the spending power as related to the Tenth Amendment because with such leverage Congress maintains the ability to coerce the states, tempting them with precious resources.²⁷²

F. The Supreme Court's Standing Requirements for Spending Power Challenges are Onerous

In addition to the possibility that the scope and meaning of the general welfare when defined by Congress may not be judicially reviewable,²⁷³ the Supreme Court's standing requirements for spending power challenges are onerous and make it virtually impossible for federal taxpayers—perhaps even states—to challenge federal spending. As a general rule, federal taxpayers do not have standing to challenge federal spending,²⁷⁴ although the Court has recognized one exception. In order to have standing, a taxpayer-plaintiff must challenge a federal expenditure both as a violation of the Article I spending power and as a violation of a specific constitutional provision having the purpose of limiting federal spending.²⁷⁵ Alleged Establishment Clause violations satisfy the second

271. See Lehmann-Haupt, *supra* note 26.

272. See *infra* notes 319-60 (discussing the oft-coercive nature of conditioned federal funds).

273. See *supra* note 237 and accompanying text.

274. See *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). The argument appears to be that the causal link between the federal spending and the taxpayers' injury (e.g., higher taxes) is generally uncertain. Moreover, governmental units may not have standing to challenge federal spending. See, e.g., *Duke Power Co. v. Greenwood County*, 302 U.S. 485, 490 (1938); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1938).

275. See *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968). The *Flast* Court also said, "It will not be sufficient to allege an *incidental* expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* at 102 (emphasis added). This statement would appear to presume that Congress enacted the "essentially regulatory statute" pursuant to one of its "enumerated" powers other than the Spending Clause of the General Welfare Clause. If Justice O'Connor, in *Dole*, is correct that *United States v. Butler*, 297 U.S. 1 (1936), prohibits Congress from using the Spending Clause and its conditional spending power to regulate in place of an enumerated power, then it would appear, at least facially, that the *Flast* Court's statement would not necessarily

requirement,²⁷⁶ however, the Court has rejected other possible clauses,²⁷⁷ thereby effectively limiting the taxpayer's ability to challenge federal spending to Establishment Clause cases.²⁷⁸ Because federal taxpayers do have standing to challenge federal taxes, however, it is at least conceivable, albeit unlikely, that a federal taxpayer could challenge federal spending that is closely related to a federal taxation scheme. Notwithstanding this theoretical possibility, the practical impact of the Court's standing requirements bars a plaintiff from challenging federal spending. George Wharton Pepper, in his oral argument in *United States v. Butler*,²⁷⁹ prophesied the danger of an extensive interpretation of the spending power when coupled with limited standing to challenge Congressional spending:

[I]f the spending power is ever thus deliberately invoked to enlarge the area of Congressional control, it might not be impertinent to ask this Court to consider whether, in a democracy, the individual citizen has not a standing to call the legis-

prohibit federal taxpayers from challenging a federal spending program which is itself directly—and not merely incidentally—regulatory. *See supra* notes 252-69 and accompanying text (discussing Justice O'Connor's dissent in *Dole*, and her belief that the Court should read the Constitution as prohibiting Congress from using the spending power to regulate beyond its enumerated powers); *see also supra* notes 194-208 and accompanying text (discussing the *Butler* Court's holding that Congress may not use the spending power to *regulate* beyond its enumerated powers).

276. *See id.*; *see also* *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (reaffirming that taxpayers have standing to challenge federal statutes authorizing expenditures allegedly violating the Establishment Clause).

277. *See, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476-82 (1982) (holding that the conveyance of federal property to a Christian college did not violate the Establishment Clause and thus did not violate the spending power because such a conveyance is not an expenditure but rather a disposal of federal property under Congress's property power, U.S. CONST. art. IV, § 3, cl. 2); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27 (1974) (holding that taxpayers had no standing to challenge Members of Congress's membership in the armed forces reserve under U.S. CONST. art. I, § 6, cl. 2 which prohibits Members of Congress from holding "any office under the United States"); *United States v. Richardson*, 418 U.S. 166, 171-80 (1974) (holding that taxpayers lacked standing to challenge the statute appropriating funds for the Central Intelligence Agency on the ground that such appropriation violated U.S. CONST. art. I, § 9, cl. 7, which requires "a regular statement and account of the receipts and expenditures").

278. *See DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 689 n.19 (11th Cir. 1997) ("[W]ith respect to federal taxpayers, the Supreme Court has generally found they lack standing to contest government spending unless the challenge is to government expenditures which allegedly violate the Establishment Clause of the First Amendment.") (citing *Flast*, 392 U.S. at 83). Concededly, *Schrenko* involved a challenge to *state* expenditures. *See id.* at 689-90. However, *Flast* involved federal expenditures. *See Flast*, 392 U.S. at 102.

279. 297 U.S. 1 (1936).

lature to account, not because of his pecuniary stake but because of his responsible share in government.²⁸⁰

Alas, the Court has all but disregarded Pepper's plea, and federal spending is virtually insulated from review.

IV. CONSTITUTIONAL RAMIFICATIONS INDICATE THE NEED TO REASSESS THE CURRENT INTERPRETATION OF THE SPENDING POWER

The current interpretation of the federal spending power has resulted in serious constitutional ramifications. The concept of enumerated powers and protections of state sovereignty is rendered illusory. The majority's approach in *Printz v. United States*²⁸¹ provides a useful tool toward analyzing the spending power implications for federalism.

A. *The Virtually Limitless Interpretation of the Federal Spending Power has Resulted in Serious Constitutional Ramifications*

1. The Concept of Enumeration is Illusory

In the Virginia Report of 1800, Madison expressed his view that permitting Congress to spend to further the general welfare effectively empowered Congress to legislate generally.²⁸² Madison observed that virtually every legislative action involves the "application of money" and, moreover, that no act of Congress is unrelated to furthering the general welfare.²⁸³ Thus, Madison concluded that "a government with the power to spend for any purpose coming within the notion of the general welfare 'is a government without the limitations formed by a particular enumeration of powers.'²⁸⁴

280. *Id.* at 37 (oral argument of George Wharton Pepper for the respondents).

281. 117 S. Ct. 2365 (1997); see *supra* notes 139-79 and accompanying text (discussing *Printz*).

282. See H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 729 n.159 (1994). By "legislate generally," Madison meant that Congress would be empowered to legislate purely state and local matters. See *id.*

283. See *id.*; see also 4 CONG. DEB. 1632 (1828) ("[I]f Congress can determine what constitutes the general welfare, and can appropriate money for its advent, where is the limitation to carrying into execution whatever can be effected by money?").

284. See H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 662, 664 (1995).

The Constitution, however, forbids Congress from legislating generally. The federal government is one of enumerated powers,²⁸⁵ and enumeration presupposes that powers have been withheld.²⁸⁶ The powers withheld—those not enumerated—are reserved to the States.²⁸⁷ Federalism embodies this allocation of state and federal authority,²⁸⁸ and federalism presumes principally that the federal government is limited in its authority.²⁸⁹ It follows that if Congress is limited in its authority, then, consistent with the Constitution, Congress may not legislate generally.

With the decision in *United States v. Butler*,²⁹⁰ however, the Court unwittingly began a path of effectively permitting Congress to legislate generally, by permitting Congress to spend in order to further the general welfare. In *McCulloch v. Maryland*,²⁹¹ Chief Justice Marshall proclaimed, “Let the end be legitimate, let it be within the scope of the constitution, and all means which . . . consist with the letter and spirit of the constitution, are constitutional”²⁹² In the normal constitutional challenge regarding an enumerated power, therefore, the Court reviews congressional legislation with varying degrees of scrutiny²⁹³ to ensure

285. See *New York v. United States*, 505 U.S. 144, 155 (1992).

286. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)). Were it otherwise, one might be inclined to wonder why the Framers would specify Congress's powers had they intended Congress's powers to be unlimited. See also *New York*, 505 U.S. at 156 (citing 3 SRO-RY, COMMENTARIES, *supra* note 37, at 752).

287. See *New York*, 505 U.S. at 156 (citing *United States v. Oregon*, 366 U.S. 643, 648-49 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941)) (finding that “[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress”). Because Congress is limited to its enumerated powers, states have historically reserved authority over education, criminal law enforcement, and local police power matters. See *Lopez*, 514 U.S. at 561 n.3, 564. See generally Anthony B. Ching, *Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 130-31 (1995) (noting other areas traditionally reserved to the states such as highway and street construction and repair, welfare, housing, health, recreation, and waste disposal).

288. See *New York*, 505 U.S. at 155-56.

289. See *id.* Likewise, the states are limited in their operation insofar as they may not intrude upon the powers granted to Congress. See *id.* at 159. The Supremacy Clause embodies this principle that Congress is supreme and may trump inconsistent state law where Congress has the proper authority to act. See *id.* (citing U.S. CONST. art. VI, cl. 2).

290. 297 U.S. 1 (1936); see *supra* notes 181-208 and accompanying text (discussing *Butler*).

291. 17 U.S. (4 Wheat.) 316 (1819).

292. *Id.* at 421. (emphasis added).

293. See Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1006-07 (1996).

that the legislation is both proper in its end and in its means.²⁹⁴ That is, the Court normally examines whether the Constitution grants the end to Congress, and, if so, whether the means are necessary and proper to effectuate that end.²⁹⁵

Under the Court's decisions, however, spending power review is fundamentally different from review of other enumerated powers. The spending power itself is a means to an end, and the end is the general welfare.²⁹⁶ This end is legitimate under virtually all circumstances because the Court permits Congress to define the scope and meaning of the general welfare.²⁹⁷ Thus, when Congress spends, the end for which the spending is appropriated remains unquestioned, and the Court presumes "well-nigh conclusive[ly]" that the end promotes the general welfare.²⁹⁸ In this way, the ends are unlimited.

Similarly, the means—the power to spend—is virtually unlimited for two reasons. First, unless the expenditure can be challenged as a regulation, standing rules may preclude a plaintiff from even challenging an expenditure in a particular case, thus insulating federal spending from judicial review.²⁹⁹ Second, when a court actually reviews the spending power in a particular case, the act involving the application of money will be upheld except in a few narrow circumstances.³⁰⁰ Thus, the

294. See *McCulloch*, 17 U.S. (4 Wheat.) at 421; see also Pilon, *supra* note 293, at 1007-08 (explaining that "[u]nder the Constitution as written . . . [o]ne asked first whether a power had been granted. If not, that ended the matter. If yes, the next question was whether the means employed, under the Necessary and Proper Clause, were both necessary and proper. If not necessary, that too ended the matter").

295. *McCulloch*, 17 U.S. (4 Wheat.) at 421; Pilon, *supra* note 293, at 1007-08. Pilon, however, argues that the modern methodology for reviewing constitutional questions is fundamentally different than the methodology under the original understanding of the Constitution. See *id.* at 1007. Thus, he argues that the concept of varying degrees of scrutiny is at odds with the text of the Constitution. See *id.*

296. This necessarily assumes that the expenditure is not designed to further one of the enumerated powers. This Comment does not challenge the constitutionality or efficacy of Congress's expenditures in that instance.

297. See *supra* notes 200-17 and accompanying text (discussing *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), *Helvering v. Davis*, 301 U.S. 619 (1937), and *Berman v. Parker*, 348 U.S. 26 (1954)).

298. See *Berman*, 348 U.S. at 32; see also *supra* notes 218-28 and accompanying text (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

299. See *supra* notes 263-69 and accompanying text (discussing the onerous standing requirements which may insulate spending from review).

300. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (synthesizing the Court's four narrow restrictions on conditioned federal funds).

Court effectively permits Congress to use spending power means to achieve any desired ends.³⁰¹ Such a view appears to contravene the understanding of many Framers and early legislators “[t]hat the common defence and general welfare, were the ends proposed to be attained—the enumerated powers which followed, were the means of attaining them; and that money was the instrument, as far as it was necessary, by which those powers were to be executed.”³⁰²

Although a means-ends comparison is important, Madison observed that “it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers.”³⁰³ For Madison, the ability to legislate either by unlimited powers or by unlimited means granted Congress the ability to legislate generally, that is, beyond the confines of the enumerated powers.³⁰⁴ Madison was therefore concerned with confining *both* the means and the ends to the powers enumerated in the Constitution in order to maintain enumeration’s limits on federal power.³⁰⁵ Madisonians were especially con-

301. For example, the spending of federal money in pursuit of what Congress has determined to be the general welfare has evolved to include “virtually every aspect of state and local government operations” ranging from highway and street construction and repair, welfare, housing, health, education, law enforcement, recreation, to waste disposal. See Ching, *supra* note 287, at 130-31. Additionally, in early 1997, President Clinton proposed a \$1500 college tuition tax credit for students who maintain at least a B average. See Cimon & Shogren, *supra* note 87, at A1. The concern, however, is how the federal government and the Internal Revenue Service should police such requirements, and whether the federal government or IRS might require state or university officials to do so. See *id.* Likewise, a few days after presenting the Hope Scholarship, President Clinton proposed national educational testing standards. See Elizabeth Shogren, *Clinton Promotes Education Initiative for National Testing*, L.A. TIMES, Feb. 11, 1997, at A30. In making his case, the President analogized primary education to the army, suggesting “how silly it would be” to have different standards for troops in different states. See *id.* at A31. However, because education is a state, not a federal, function, one wonders how these two education proposals will be carried into effect. See *id.* at A30-31; see also *United States v. Lopez*, 514 U.S. 549, 564 (1995). The Court’s current spending power doctrine leaves little doubt that the federal government could condition education dollars upon states’ implementation of the programs. See *infra* note 397 and accompanying text (discussing President Clinton’s proposal to condition federal education funds on states’ implementation of the Gun Free School Zone Act as a method for subverting the Court’s decision in *Lopez*).

302. See Brief filed by Malcolm Donald as amicus curiae on behalf of the National Association of Cotton Manufacturers at 154, *United States v. Butler*, 297 U.S. 1 (1936) (No. 401) [hereinafter *Manufacturers’ Brief*] (quoting Mr. Smyth of Virginia), in 30 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 846 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *LANDMARK BRIEFS*].

303. Powell, *supra* note 284, at 663 n.58.

304. See generally *id.*

305. See generally *id.*

cerned with the courts' inability to review effectively cases involving questions of the general welfare, and thus proclaimed the dangers of a broad interpretation of the general welfare as permitting unlimited ends or, apparently unlimited means.³⁰⁶ Observing that the Framers intended the General Welfare Clause to limit federal power by confining federal activities to those national and not truly local in character, one scholar has suggested that by "eviscerating the doctrine of enumerated powers, the Court [has] turned shields into swords."³⁰⁷

Recognizing the importance of enumeration, it is probable that the early Congresses avoided using the spending power, as it is now used, to direct states to implement federal objectives. Even assuming that early Congresses adopted the Hamiltonian view of the spending power—an assumption which is by no means conclusive—the great expositor of federal power, Hamilton himself, acknowledged that the Constitution limits federal spending.³⁰⁸

"And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufacturers, and of commerce, are within the sphere of national councils, *as far as regards an application of money . . . A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by a fair implication.*"³⁰⁹

And it was Hamilton who claimed that Congress's objectives must be "general, and not local" in nature.³¹⁰ James Monroe, an adherent to the Hamiltonian view, believed that "the use or application of the money after it is raised is a power altogether of a different character. It imposes no burden on the people, nor can it act on them in a sense to take power from the States[]." ³¹¹

306. See *id.*; see also *supra* notes 238-80 and accompanying text (discussing judicial review, or the lack thereof, in spending power cases).

307. See Pilon, *supra* note 293, at 1005. Pilon also suggests that the Court's New Deal and Depression era jurisprudence commenced "nothing less than a bloodless constitutional revolution." *Id.* at 1006 (quoting Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994)).

308. See *Manufacturers' Brief*, *supra* note 302, at 165, in LANDMARK BRIEFS, *supra* note 302, at 857.

309. *Id.* at 165-66 (quoting 3 HAMILTON, *Report on Manufacture, in WORKS*, *supra* note 208, at 372).

310. See *supra* note 208 and accompanying text.

311. See *Manufacturers' Brief*, *supra* note 303, at 168 (quoting James Madison), in LANDMARK BRIEFS, *supra* note 302, at 860.

One would expect the Hamiltonians, of any group, to proclaim that the spending power grants Congress the ability to regulate within areas reserved to the states. However, at least as expressed by Hamilton and Monroe, that is not the case. Early presidential messages and congressional debates on those messages underscore what these Hamiltonians and Madisonians appear to have recognized: the spending power denies to Congress any ability to regulate matters reserved to the province of the states.³¹² Moreover, a survey of early congressional legislation reveals that while early Congresses typically appropriated funds for affairs beyond the enumerated powers, such appropriations were not necessarily designed to interfere with the authority of the states.³¹³ Finally, it is unsurprising that Hamiltonians expressed an unlimited view of the spending power. The “Hamiltonian view” of the spending power, as it is modernly known,³¹⁴ failed to garner serious support until nearly thirty years after the Constitution was ratified in 1789 and was not first exercised until 1825.³¹⁵ As Justice Scalia indicated in *Printz v. United States*,³¹⁶ if ear-

312. See *id.* at 148-58 (discussing appropriations for roads and canals for the period up to the Civil War), in LANDMARK BRIEFS, *supra* note 302, at 839-50.

313. See *id.* at 180-84, in LANDMARK BRIEFS, *supra* note 302, at 872-76.

314. See *supra* notes 187-93 and accompanying text (discussing the *Butler* Court's analysis of the distinction between Madison's and Hamilton's view of the welfare clause).

315. See *id.* at 156 (quoting James Polk, Veto Message (Dec. 15, 1847), in 4 MESSAGES AND PAPERS OF THE PRESIDENTS 610, 618-20 (1897)), in LANDMARK BRIEFS, *supra* note 302, at 848. This Comment does not address the propriety of the Court's adoption in *United States v. Butler*, 297 U.S. 1, 66 (1936), of the Hamiltonian view of the spending power. That view is now entrenched in our jurisprudence. This Comment does suggest, however, that such a broad interpretation allows Congress to subvert the federal-state balance. The Court should seriously consider Congress's ability to coerce the states into the service of the federal government through spending conditions. Indeed, the Court disavows Congress's ability to commandeer the states through direct regulation; just as the Court is willing to close the front door of regulation, so too should the Court close the back door of regulation through the spending power. See *infra* note 415 and accompanying text (discussing the apparent futility of confining regulation and refusing to confine the spending power). Although the Hamiltonian view of the spending power may have failed to gain serious support until well into the nineteenth century, it is not altogether clear that early Congresses and presidents completely confined federal spending to the enumerated powers. “[I]t was seriously contended as late as 1817 that Congress had adopted the Hamiltonian Doctrine by appropriating money for the payment of the salary of the Senate Chaplain, for the purchase of books for the library at Congress and paintings for the Capitol,” all of which Congress apparently lacked the enumerated power to implement. See *Manufacturers' Brief*, *supra* note 302, at 135, in LANDMARK BRIEFS, *supra* note 302, at 827. Thus, some Members of Congress contended that early Congresses' appropriation of money for a library, a chaplain, and artwork justified and permitted Congress to appropriate money to construct such things as roads and canals for the purpose of carrying mails (a federal power), for the military (a federal power), and

ly public officials sought to avoid the use of a particular "highly attractive" power, then it would suggest that they did not understand the Constitution to permit such a use.³¹⁷

2. The Current Interpretation of the Spending Power Permits Congress to Coerce State and Local Governments into Adopting Federal Regulations and Guidelines

In addition to permitting Congress to promote unenumerated ends, the Court's view of the spending power might also be assailed on the ground that it permits Congress to promote both enumerated and unenumerated ends through illegitimate means such as federal coercion, regulation, and commandeering of the states. This coercion is accentuated when the Court permits Congress to place wholly unrelated conditions on states' receipt of funds. In 1997, one Fourth Circuit judge observed that "[this is] a time when the several States have become increasingly dependent upon the Federal Government for funds, because the Federal Government has increasingly become dependent upon revenues from taxation it receives from the citizens of the several States."³¹⁸

Although the Court explicitly acknowledges that such illegitimate means are inappropriate when Congress legislates pursuant to a specifically enumerated power,³¹⁹ the current interpretation of the spending power empowers Congress to coerce, regulate, and commandeer the states.³²⁰ In addition to presuming that conditioned federal funds are

to regulate commerce. *See id.* at 151-53, in LANDMARK BRIEFS, *supra* note 302, at 843-45.

316. 117 S. Ct. 2365 (1997).

317. *See id.* at 2370; *see also supra* notes 155-61 and accompanying text (discussing the historical underpinnings of *Printz*, and the lack of historical support for federal commandeering of state legislative and executive officials).

318. *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc), *superseded by statute, as recognized by Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997).

319. In *New York v. United States*, 505 U.S. 144 (1992), for example, the Court found that while assuming, *arguendo*, that regulation of low-level radioactive waste was within Congress's Commerce Power, neither of the two choices given the states in the take-title provision were within the Commerce Power. *See id.* at 174-76; *see also supra* notes 88-119 and accompanying text (discussing *New York*).

320. This Comment suggests below that the spending power should not necessarily be viewed as a separate and distinct enumerated power, but rather a power with the purpose of carrying into effect the particular enumerated powers. This Comment

not coercive,³²¹ the Court strongly implies that Congress may indirectly coerce state and local governments into adopting federal regulations or guidelines by using the spending power, although Congress would not be permitted constitutionally to do so *directly* by using any enumerated power. Coercion, it would appear, is immaterial in current spending power cases.³²² The Court permits Congress, through the Spending Clause power, to extend beyond the enumerated powers and regulate areas reserved traditionally to the jurisdiction of state and local governments exclusively.³²³ This result renders the Tenth Amendment, although perhaps theoretically significant, meaningless in practice.³²⁴

Thus, although cases such as *Butler, New York*, and *Printz* invoke the Tenth Amendment to curb federal coercion of state or local govern-

suggests that, at the least, the Court narrow Congress's ability to condition federal funds and eliminate Congress's ability to *regulate* state and local matters by using conditional funding.

321. See, e.g., *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937) (noting that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties").

322. By contrast, in *New York*, the Court held that the take-title provision, a provision *not* passed pursuant to the spending power, crossed the line between encouragement and coercion and was thus invalid. See *New York*, 505 U.S. at 176.

323. See Ching, *supra* note 287, at 141. Thus, Congress is permitted, under its Spending Clause power, to extend beyond the limits of the enumerated powers. See *id.* Through use of conditional grants, "Congress has mandated states' compliance with its conditions in areas far removed from its enumerated powers." See *id.*; *Thorpe v. Housing Auth.*, 393 U.S. 268, 274-84 (1969) (holding that local authority managing federally assisted housing project must abide by federal Housing and Urban Development procedures); see also *Manufacturers' Brief*, *supra* note 302, at 135 (discussing Congress's ability to interfere with areas reserved to the states), in LANDMARK BRIEFS, *supra* note 302, at 848.

324. See generally Ching, *supra* note 287, at 141.

ments,³²⁵ the Court currently views the spending power to be free from such restraint.³²⁶

Whether direct or indirect, coercion is nevertheless troublesome and seems to contradict the essential holdings of *New York* and *Printz* that Congress may not, consistent with the Constitution, commandeer states into the service of the federal government.³²⁷ The take-title provision in *New York* violated this rule by offering states a choice between only two coercive alternatives.³²⁸ Therefore, a principal issue was the extent to which states retained the ability to accept or reject Congress's commands.³²⁹ The Court invalidated the act in *New York* on the basis that the take-title provision failed to provide states with a real "choice" between regulating pursuant to Congress's design, or having Congress preempt the field.³³⁰ For the *New York* majority, the take-title provision provided the states with "no choice at all."³³¹ Congress's command in *Printz* left the states (and state law enforcement officers) with no choice but to implement the federal directive.³³²

325. In *Butler*, the Court declared that "[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy." *United States v. Butler*, 297 U.S. 1, 71 (1936). The *Butler* Court held the challenged act unconstitutional on the ground that it permitted Congress to purchase state submission to federal regulations. *See id.* at 72. In fact, in *Butler*, the Court explicitly held that Congress may not achieve its ends indirectly through the spending power, finding that the Constitution "negatives" any such use. *See id.* at 74; *see also supra* note 196 and accompanying text (discussing the Agricultural Adjustment Act's unconstitutional indirect regulation). In *New York*, the Court found that cooperative federalism requires the States to have a choice between implementing federal regulations themselves or having Congress preempt the field. *See New York*, 505 U.S. at 167-68. Thus, Congress may not require that the states implement federal regulations without providing states with the choice of having the field preempted. *See id.* at 176-77. In this way, state implementation of federal regulations is deemed more voluntary, whereas without this choice, such implementation is an involuntary commandeering. *See id.*

326. *See* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 971 (1985).

327. *See supra* notes 93-119, 139-79 and accompanying text (discussing *New York* and *Printz*).

328. *See New York*, 505 U.S. at 176.

329. *See id.* at 176-77.

330. *See id.*

331. *See id.* at 176.

332. At most, Congress could have argued in *Printz* that state legislatures could circumvent the federal directive by enacting instant state background checks consistent with the Brady Act, thus exempting the CLEOs from the federal directive. The Court could not have accepted such an argument, however, without flatly rejecting its holding in *New York*. A choice between implementing a federal directive or enacting

Similarly, states may have little or no choice but to accept federal funds.³³³ The practical effect of combining the tremendous resources at Congress's command³³⁴ with the often limited resources available to state and local governments is to permit Congress to offer moneys which often cannot be refused.³³⁵ When states become dependent upon federal grants, conditions attached to such grants are indeed coercive because the states cannot survive without the federal funds and must accept the conditions.³³⁶ For example, in order to carry out federal objectives, the federal government provides state and local governments with approximately \$226 billion annually, which amounts to sixteen percent of the total state and local government expenditures.³³⁷ The choice to accept or reject, therefore, is frequently illusory,³³⁸ much like the "choice" presented to the states in *New York*. Likewise, coercion is evident when the

a state law consistent with the federal statute is no more a choice than that presented to the states in *New York* because either alternative requires the states, or state officers, to act. *New York* and *Printz* make clear that the Court soundly repudiates Congress directing and requiring state legislatures, or state officers, to act. *See supra* notes 93-119, 139-79.

333. *See Stewart, supra* note 325, at 971. Naturally, a widely asserted rebuttal to the argument that Congress uses its financial clout to coerce and commandeer states is that states are free to deny federal funds. *See id.* (noting that federal courts have struck down spending power challenges on this basis). This choice may exist in theory. *See Ching, supra* note 287, at 132. This Comment does not challenge the idea that states have every opportunity, again, in theory, to reject federal funding.

334. *See supra* notes 270-72 and accompanying text (discussing Congress's taxing and spending abilities).

335. *See Stewart, supra* note 325, at 971. States are under tremendous pressure to accept federal dollars. *See id.* This is due in part to internal pressures from citizens and in part to external pressures arising from competition with other states. *See id.*; *see also Ching, supra* note 287, at 131-32. States refusing federal money place themselves at an economic disadvantage vis-à-vis the other states. *See Stewart, supra* note 325, at 971. This refusal could require a state to increase state taxes or reduce benefits to its citizens. *See id.* Likewise, the state citizens who contribute to federal coffers through their tax dollars would receive less in benefits in return for their contribution. *See id.* Moreover, and perhaps more importantly, as federal funds become increasingly available for state and local ventures, states become more dependent on such funds and increasingly unable to reject continued federal assistance. *See id.* Therefore, states become dependent upon federal grants as a result of a cycle of continued funding and as a matter of survival among the other states. *See Gillmor & Eames, supra* note 71, at 399. States rely upon continued federal aid after establishing programs to avoid "wasted efforts at half-finished projects." *See id.* Moreover, most state and local officials would give a "blank stare" to anyone asking them how some essential projects, such as highway and bridge maintenance, would be funded without federal aid. *See id.*

336. *See Stewart, supra* note 325, at 971.

337. *See Patricia E. Salkin, National Performance Review: A Renewed Commitment to Strengthening the Intergovernmental Partnership*, 26 URB. LAW. 51, 53 (1994).

338. *See Ching, supra* note 287, at 132.

federal conditions are disproportionate to the aid received by the state or local governments.³³⁹ Moreover, Congress often *intends* to “conscript state and local governmental authority in carrying out federal programs” by using conditional funding schemes.³⁴⁰ There may be no clearer example of coercion.³⁴¹

Federal coercion of states should be eliminated for at least four reasons. First, coercion tends to encourage divisiveness.³⁴² Second, the accountability of both federal and state officials is diminished when the federal government coerces or compels the states to regulate.³⁴³ Third, as the Court emphasized in *New York*, coercion is repugnant to the Constitution’s prescription that the federal government legislate over *individuals*, not over sovereign states.³⁴⁴ Citing a myriad of cases,³⁴⁵

339. Gillmor & Eames, *supra* note 71, at 399 (citing, as examples, provisions of both the federal Clean Air Act and the Intermodal Surface Transportation Efficiency Act of 1991).

340. See Stewart, *supra* note 325, at 971.

341. See Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL’Y 460, 464-65 (1995) (noting that *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), provides the clearest example of federal coercion of states pursuant to the spending power); see also *New York v. United States*, 505 U.S. 144, 176 (1992) (implicitly acknowledging that Congress’s use of the spending power is or can be coercive, but noting that the statute before the Court was not necessarily coercive because “Congress has not held out the *threat* of exercising its spending power” (emphasis added)); Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493, 520-21 (1993) (noting that the federal government uses conditional grants “to procure state implementation of significant federal regulatory programs”); Stewart, *supra* note 325, at 971 (noting that conditional grants are “far more subversive of federalism values” than even some direct federal regulations of state governments).

342. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1048 (1995); see also *New York*, 505 U.S. at 164-65.

343. See *New York*, 505 U.S. at 169.

344. See *id.* at 165. Many scholars have debated whether in fact the Framers intended or contemplated the possibility that Congress could commandeer—that is legislate over—the states as sovereign entities. See, e.g., Caminker, *supra* note 343, at 1042-50; Powell, *supra* note 11, at 660-64. Although more scholars appear to endorse the notion that the Framers contemplated Congress commandeering the state executive and judicial branches, they are perhaps more willing to acknowledge that the Framers may have rejected the notion that Congress could commandeer state legislatures. See Caminker, *supra* note 342, at 1048; Powell, *supra* note 11, at 660-64. Regardless, the Court in *New York* explicitly found that the Constitution permits Congress to legislate over individuals, not states and, moreover, that Congressional com-

Justice O'Connor indicated in *New York* that the Court has "always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts."³⁴⁶ Fourth, and most importantly, when states are required to act by the federal government, state and local officials must divert resources away from local concerns.³⁴⁷ Moreover, when spending conditions require state and local governments to act, those governments accepting funds

mandeering of states is repugnant to the Constitution. See *New York*, 505 U.S. at 166.

345. See *New York*, 505 U.S. at 166 (citing *FERC v. Mississippi*, 456 U.S. 742 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1868), *superseded by statute in Leitch v. Department of Revenue*, 9 Or. Tax 256 (1982)).

346. *New York*, 505 U.S. at 166. For example, the Constitution "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* Some scholars argue that direct federal legislation is a greater threat to state sovereignty than the state's implementation of federal programs attached through conditions on federal funds. See Levy, *supra* note 341, at 524. The idea is that the states maintain some control over implementation of the programs affecting their locality. See *id.* Hamilton and Madison, however, clearly contemplated a system of government whereby the citizens would allocate their "favor" toward either the federal or state governments when necessary. See THE FEDERALIST NO. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961). As discussed above, in order for this to work, the citizens must have some means of knowing to whom to allocate their favor. See *supra* notes 66-75 and accompanying text (discussing the importance of political responsibility and accountability, and how this responsibility and accountability become blurred when federal officials are permitted to unfairly take advantage of the balance of power already skewed in favor of the federal government). A properly balanced federalism helps to ensure that citizens know who to hold politically accountable by helping to keep lines of accountability from being blurred by either the state or federal governments. Therefore, by regulating Congress's ability to condition funds more stringently so as to prohibit Congress from "passing the buck" to the states, a properly balanced federalism should in theory permit the citizens to allocate their favor accordingly. If citizens desire that the federal government legislate directly, pursuant to a federal power, and within the federal sphere of authority, so be it. An effective choice, however, is impossible unless the citizens know which government to hold accountable and which government to direct.

347. See Gillmor & Eames, *supra* note 71, at 398 (noting that federal spending conditions "displace local programs already carefully crafted to fit the specific local need") (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954) (explaining that Congress's views are shaped by national, not local concerns, and as such, congressional directives may aim to solve problems not present in all localities)); see also Powell, *supra* note 11, at 686-87 (articulating that the "imposition of a congressional agenda on state institutions . . . 'drains the inventive energy of state governmental bodies' by commandeering scarce resources of time, attention, and public concern" (footnotes omitted)).

must divert resources toward *ensuring* that the federal conditions are *properly* attained.³⁴⁸ Federal spending is “much more suspect constitutionally than . . . federal regulation, because federal spending co-opts local politicians by increasing the patronage available to them, thus debilitating the alternative sources of power in our federal structure.”³⁴⁹ Thus, state and local leaders often are unable to respond adequately to the concerns of their respective constituencies. This, in turn, subverts citizens’ local will and self-governance.

Recognizing the harms arising from the federal government compelling states to require or prohibit certain acts, the 104th Congress enacted the Unfunded Mandates Reform Act (UMRA).³⁵⁰ As the name suggests, the UMRA deals with unfunded mandates, not funded ones.³⁵¹ Limiting the use of unfunded mandates, however, impacts the use of funded mandates. Assuming that Congress wishes to realize its objectives, the UMRA, in addition to the Court’s holdings in *New York* and *Printz* that Congress cannot compel state officials to act, may effectively increase conditional federal spending as a means to achieve those objectives.³⁵² Congress, therefore, may indeed be *required* to grant conditional funds, insofar as the UMRA, *New York*, and *Printz* restrict Congress’s “unfunded” alternatives.

348. See generally Salkin, *supra* note 337, at 53-54 & n.14 (explaining that Congress does not trust state or local officials to spend the money in accordance with Congress’s commands); Stewart, *supra* note 325, at 957-59.

349. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1141 n.171 (1987).

350. Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501 (1997)). An unfunded federal mandate imposes duties upon state and local governments and directs state and local governments to pay for their implementation. See *Recent Legislation*, *supra* note 73, at 1469-71.

351. See Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. §§ 1501, 1503 (1997)); Pub. L. No. 104-4, 109 Stat. 64 (1995) (codified at 2 U.S.C. §§ 1531, 1534 (1997)); Pub. L. No. 104-4, 109 Stat. 67 (1995) (codified at 2 U.S.C. § 1541 (1997)). The UMRA also contains a broad list of exceptions. See Pub. L. No. 104-4, 109 Stat. 49 (1995) (codified at 2 U.S.C. § 1503 (1997)).

352. See Gillmor & Eames, *supra* note 71, at 415. Gimor and Eames explain that the reverse may likewise be true: that limitations on federal spending through a balanced budget amendment or otherwise might force Congress to impose unfunded mandates in order to realize federal objectives. *Id.* They further explain that in order to circumvent an act prohibiting or limiting unfunded mandates, Congress may instead attach conditions to federal funds, although the “same problems would still exist at the local level” that existed under a system of unfunded mandates. *Id.* at 416.

In light of the Court's holdings that the Constitution prohibits federal commandeering of state legislative and administrative officials, were the Court to reevaluate its presumption of validity of conditioned federal funds in light of states' realistic economic position, the Court would undoubtedly find many conditions to be coercive. As discussed below, this Comment does not suggest that the federal government should terminate funding to state and local governments, but rather that the funds and any attached conditions must be tailored according to the Constitution's limits on federal authority.³⁵³ Realistically, federal conditions are often coercive, and the Court's continued reliance on the presumption that federal spending conditions are not inherently coercive is troubling. Indeed, the nation has undergone vast changes since the Court first maintained this presumption, and "[e]arly in the history of federal government assistance . . . such programs were few and funding small, [and] . . . the states generally had the easy alternative of declining the money and avoiding the condition."³⁵⁴ As discussed above, however, "with the budgets of state and local governments now so greatly dependent on federal money, the premise that the funds can readily be rejected if the condition is deemed oppressive no longer seems *realistic*."³⁵⁵

The *New York* Court appeared to acknowledge the potentially coercive nature of federally conditioned funds. While finding that Congress may not directly regulate states, *New York* indicates that Congress may develop incentives or procedures, "short of outright coercion," that encourage states to regulate in a specific manner.³⁵⁶ The Court noted, however, that conditional spending consistent with *South Dakota v. Dole*³⁵⁷ is acceptable.³⁵⁸ In light of Justice O'Connor's dissent in *Dole* and the Court's opinions in *New York* and *Printz*, it is at least conceivable that the Court will recognize that the current interpretation of the spending power indeed enables the federal government to compel the "States to enact or enforce a federal regulatory program,"³⁵⁹ a result which *New York* and *Printz* otherwise explicitly denounce.

353. See *infra* notes 401-36 and accompanying text (acknowledging Justice O'Connor's approach as the most true to the history and text of the Constitution, and the Court's spending power and Tenth Amendment decisions).

354. See Rosenthal, *supra* note 349, at 1162.

355. See *id.* (emphasis added); see also *supra* notes 270-72, 334-42 and accompanying text.

356. See *New York v. United States*, 505 U.S. 144, 166 (1992).

357. 483 U.S. 203 (1987).

358. See *id.* at 167; *supra* notes 97, 100-08 and accompanying text (discussing the *New York* Court's decision to uphold the monetary incentives in that case).

359. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

3. The Supreme Court Relinquishes Its Proper Role by Permitting Congress to Define the Scope of Federal Power

Perhaps foreshadowing the dangers of an unlimited spending power, George Wharton Pepper, in his oral argument in *United States v. Butler*,³⁶⁰ attempted to persuade the Court to either restrict Congress or relinquish the power of the judiciary and of the people to ensure Constitutional principles.

It seems to me that a reversal of the judgment appealed from³⁶¹ would justify the conclusion that Congress, originating as a federal legislature with limited powers, has somehow transformed into a national parliament subject to no restraint except self-restraint.

I venture to hope that the judicial power of the United States does not extend to working any such transformation and that, to bring it about, we the people of the United States must deliberately resort to the process of constitutional amendment.³⁶²

During the term succeeding *Butler*, the Court refused to heed Pepper's advice, instead rejecting it outright.³⁶³ Thus, before *New York, Lopez*, and *Printz*, the Court's role in assessing the federal-state balance was virtually nonexistent, albeit self-imposed.³⁶⁴ With one broad stroke, the *Steward Machine, Helvering, Berman*, and *Buckley* line of cases³⁶⁵ made evident what Madison proclaimed over 125 years before. Madison believed that if Congress could legislate directly or through the spending power for any "legitimate purpose," the effect would be to

360. 297 U.S. 1 (1936).

361. In *Butler*, the Court's reversal of the circuit court would have approved of the effectively-regulatory nature of the taxing and spending provisions of the Agricultural Adjustment Act.

362. *Id.* at 24 (George Wharton Pepper, in oral argument for the respondents).

363. *See supra* notes 209-19 and accompanying text (discussing the Court's Depression era holdings).

364. This Comment does not discuss the relatively short-lived holding in *National League of Cities v. Usery*, 426 U.S. 833, 840-52 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985), in which the Court saw fit to enforce the federal-state balance. Neither does this Comment discuss the holding in *Garcia*, which overturned *Usery* and relinquished federalism's enforcement to "political safeguards." *See Garcia*, 469 U.S. at 557.

365. *See supra* notes 209-37 and accompanying text (discussing the Court's holdings that the general welfare is shaped by Congress, not by the courts or the states, and that Congress's definition of the general welfare may not be judicially reviewable).

“exclud[e] the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.”³⁶⁶

Federalism was designed to protect individual liberties whereby the federal and state governments compete for the affections of the citizens and guard against abuses of power by the other.³⁶⁷ As a result, Madisonians were concerned with the inability of the courts to ascertain the constitutionality of legislative actions and to actually guard against abuses of power.³⁶⁸ Although an exceptionally broad interpretation of any enumerated power might invoke this concern, a broad interpretation of the spending power, modified by the General Welfare Clause, was of particular consequence. Nearly every congressional act could be characterized as relating to the general welfare, and virtually every legislative act involves the expenditure of money.³⁶⁹ *Steward Machine, Helvering*, and *Buckley* simply evidence the reticence with which courts review the content and meaning of the general welfare and, hence, legislation passed pursuant to the spending power.³⁷⁰

366. Powell, *supra* note 284, at 663 (citation omitted) (quoting Madison's writings in 1817).

367. See *supra* notes 48-76 and accompanying text (discussing the purposes underlying the Framers' federalist design).

368. See Powell, *supra* note 284, at 662-63. Alexander Smyth noted the improbability of “the constitutionality of an appropriation law being brought before the judiciary” as a result of a broad interpretation of the spending power. See *id.* at 663; see also *supra* notes 273-80 and accompanying text (discussing the restrictive standing requirements placed on private citizens challenging federal taxing and spending programs).

369. See Powell, *supra* note 284, at 663. Madison was concerned with the federal government breaching its enumerated powers. See *id.* at 662. Thus, Madison observed that, “The government therefore which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers.” *Id.* An interpretation of the spending power which permits Congress to define the general welfare extends beyond even Hamilton's belief that the legislation must at least be general and national and not local. See Roger Pilon, *On the Folly and Illegitimacy of Industrial Policy*, 5 STAN. L. & POL'Y REV. 103, 109-10 (1993). The danger Madison (and perhaps Hamilton) viewed was that under such an interpretation, Congress would maintain the ability to spend in furtherance of truly local concerns. See *id.* This danger is no more evident than through Congress's use of conditional funding. See *supra* notes 284, 306-18 and accompanying text (discussing spending power implications for the concept of enumerated powers).

370. Various theories have been advanced, as discussed in this section, regarding whether the courts could adequately review the meaning of the “general welfare.” It is perhaps conceivable that the courts, in light of *Lopez*, might well have the ability to review, as Hamilton observed, what is local and what is national—thus “gener-

Some scholars and commentators suggest that this interpretation in fact may be a partial repudiation of *Marbury v. Madison*.³⁷¹ For Professor Van Alstyne, effectively allowing Congress to determine the scope of the Tenth Amendment by permitting Congress to define the general welfare is the "second death of federalism;"³⁷² indeed, before *New York*, the Court was reluctant to review questions of federalism.³⁷³

New York, *Lopez*, and *Printz*, however, indicate the desire on behalf of the Court to review alleged federalism violations. For example, the *New York* Court articulated that at least as far back as the decision in *Martin v. Hunter's Lessee*,³⁷⁴ "the Court has resolved questions 'of great importance and delicacy'" regarding the proper federal-state balance.³⁷⁵ In *New York*, Justice O'Connor further opined that "[t]he Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty

al"—in character. Justice O'Connor has argued,

If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

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

371. 5 U.S. (1 Cranch) 137, 177 (1803) (holding that the Supreme Court, and not Congress, declares "what the law is," by interpreting the Constitution and clarifying constitutional boundaries). See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1717-20 (commenting on the Court's then-recent decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

372. See Van Alstyne, *supra* note 371, at 1720. According to Professor Van Alstyne, federalism first "died" in the wake of the Court's early decisions expanding federal commerce power. See *id.* at 1711-12.

373. See *id.* at 1720 (citing *Garcia*). Professor Van Alstyne notes that *Garcia* found, astonishingly, that the protections of federalism reside within the workings of the national government, and not with the Supreme Court. See *id.* In his dissent, Justice Powell criticized this view as abandoning 200 years of the constitutional understanding of federalism. See *id.* at 1721 (quoting *Nine for the Seesaw*, THE ECONOMIST, Mar. 2, 1985 at 21). According to Professor Van Alstyne, and others, this view appears to abandon the judiciary's role in interpreting and guarding against abuses of the Constitution. See *id.*

374. 14 U.S. (1 Wheat.) 304 (1816).

375. *New York v. United States*, 505 U.S. 144, 155 (1992) (quoting *Martin*, 14 U.S. (1 Wheat.) at 324).

is protected by a limitation on an Article I power.³⁷⁶ This understanding anticipated that of the *Lopez* Court.

Before its decision in *Lopez*, the Court held in *Garcia v. San Antonio Metropolitan Transit Authority*³⁷⁷ that Congress, not the Court, was to decide the scope of the commerce power and the offsetting weight of the Tenth Amendment.³⁷⁸ However, the *Lopez* Court elucidated and expanded the Court's role in assessing the balance of federalism in the Commerce Clause context, as evidenced by its decision to overturn an act passed pursuant to the Commerce Clause for the first time in nearly sixty years.³⁷⁹

Moreover, notwithstanding that the Court often defers to Congress's judgment,³⁸⁰ and that the Constitution provides for the expansion of federal power as the nation grows,³⁸¹ Justice Kennedy, in his concurring opinion in *Lopez*, rejected the proposition that the Court "in every instance . . . lacks the authority and responsibility to review congressional attempts to alter the federal balance."³⁸² Although "[t]he political branches of the Government must fulfill this grave constitutional obligation" to protect and maintain the federal-state balance, "if democratic liberty and the federalism that secures it were to endure,"³⁸³ Justice Kennedy recognized, "the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."³⁸⁴ Summarizing, Justice Kennedy explained that because a proper federal balance was "too essential" to the constitutional structure and "plays too vital a role in securing freedom," the *Lopez* majority recognized its fundamental and unique position to guard against either the state or federal governments from "tipp[ing] the scales too far."³⁸⁵

376. *Id.* at 157; see Levy, *supra* note 341, at 500 (noting that *New York* "clearly contemplates" a role for the Court that *Garcia* fundamentally rejected).

377. 469 U.S. 528 (1985).

378. See Van Alstyne, *supra* note 371, at 1720.

379. See *United States v. Lopez*, 514 U.S. 549 (1995); *supra* note 121 and accompanying text.

380. See *id.* at 573 (Kennedy, J., concurring).

381. See *id.* at 574-75 (Kennedy, J., concurring) (quoting *New York*, 505 U.S. at 157).

382. See *id.* at 575 (Kennedy, J., concurring).

383. See *id.* at 578 (Kennedy, J., concurring) (noting that Madison had envisioned that, to a certain degree, the political (i.e., elected) branches of government would maintain a proper federal state balance according to the desire of the citizens).

384. *Id.* (Kennedy, J., concurring).

385. See *id.* (Kennedy, J., concurring). Justice Kennedy further recognized that the Court has actively engaged in maintaining a proper federal-state balance in numerous

Before *New York*, *Lopez*, and *Printz*, the Court's role in ensuring a proper federal-state balance was uncertain. Indeed, cases like *Garcia*, which rejected a role for the Court, rested on an understanding that "political safeguards" would protect federalism.³⁸⁶ These so-called political safeguards included the states' indirect influence over the election of the President and members of the House of Representatives as provided in Article I, section 2, and Article II, section 1,³⁸⁷ the states' direct influence in the election of senators as provided in Article I, section 3,³⁸⁸ and the provisions in Article IV preventing a state's representation in the Senate from being reduced without that state's consent.³⁸⁹ This premise is flawed, however. While the Framers originally may have designed the Constitution to protect federalism, a conclusion which is by no means foregone, modernly, "questions have been raised as to the extent to which the political structure has changed . . . to reduce the influence of state and local governments . . . upon the selection and decisionmaking of federal officials."³⁹⁰ Of the shift in structural power, one governor recently stated that the Framers intended discussions of federalism to endure and provided the state and federal governments with the tools with which to fight; over the course of the twentieth-century, however, "the states have lost their tools . . . [and] have no way to push back."³⁹¹ Moreover, with respect to federal spending conditions, "political safeguards may be less, rather than more, effective . . . than where direct regulation is proposed" due to the often stealthy regulatory nature of

areas. See *id.* (Kennedy, J., concurring) (citing *Younger v. Harris*, 401 U.S. 37 (1971) (abstention doctrine); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention doctrine); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (rules for determining the primacy of state law); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (the doctrine of adequate and independent state grounds); *Michigan v. Long*, 463 U.S. 1032 (1983) (the doctrine of adequate and independent state grounds); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (doctrine of preemption); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (doctrine of preemption)).

386. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

387. See *id.* at 550-51 (noting that the Constitution gives the states the ability to influence electoral qualifications).

388. See *id.* (noting that the Constitution allows each state an equal representation and that the original Constitution granted the legislature of each state power to select that state's senators).

389. See *id.*

390. See Rosenthal, *supra* note 349, at 1140-41.

391. See *Liberty & Limits*, *supra* note 2.

federal spending conditions.³⁹² Finally, the Court's refusal to limit Congressional action based on "political safeguards" is itself inherently problematic. "At most, the political safeguards argument makes a case for judicial declarations of nonjusticiability. It does not support affirmative judicial declarations that congressional legislation is consistent with the original constitutional design."³⁹³ Therefore, the Court's reliance on political safeguards is troubling and unjustified. *New York, Lopez*, and *Printz* signify the Court's desire to refrain from blindly relinquishing federalism to Congress's whim.

The danger of the Court's broad judicial deference to Congress with respect to spending power questions is no more evident than in reactions to the Court's Tenth Amendment decisions circumscribing federal power. Two examples of the status to which the Tenth Amendment has been relegated may prove useful at this point. In early November 1996, the Supreme Court heard oral argument in *Printz*.³⁹⁴ A newspaper article discussing the case should be disconcerting to both the constitutional scholar and the citizen alike. After asserting that the Court should uphold the constitutional challenge, the author concluded by suggesting a means for attaining the goals of the Brady Act, if indeed the Court struck down the Act. "If Congress wants universal cooperation by sheriffs, experience suggests that it has only to hold hostage continued federal law-enforcement grants. *New cruiser radios trump constitutional scruples almost every time*."³⁹⁵ Without proceeding quite so far, President Clinton suggested as much in a press release responding to the Court's decision in *Lopez*. The President vowed to attain the aims of the Gun Free School Zones Act regardless of the Court's decision, by conditioning federal funds on states' implementation of the act.³⁹⁶

These two examples indicate that the Constitution—its federalist structure—is not the only entity fighting for its life. Indeed, the Court is fighting for its own life. When journalists, scholars, and the President, among others, suggest that the Court's rulings can be circumvented, the Court must reassess its own validity. Unfortunately, not only has the Court weakened the federalist structure, but the Court has weakened its own authority in safeguarding the Constitution and ensuring the Constitution's

392. See Rosenthal, *supra* note 349, at 1142.

393. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 732 (1988) (footnote omitted).

394. *Mack v. United States*, 66 F.3d 1025 (9th Cir.), *cert. granted*, *Printz v United States*, 116 S. Ct. 2521 (1996), *rev'd*, 117 S. Ct. 2365 (1997).

395. *Sheriffs Have Gun Point*, THE COMM'L APPEAL, Dec. 6, 1996, at 8A (emphasis added).

396. See Todd S. Purdom, *Clinton Seeks Way to Retain Gun Ban in Schools*, N.Y. TIMES, Apr. 30, 1995, at A1.

commands. The spending power is no longer a means to undermine the Constitution itself, but rather is now a means to subvert decisions of the Supreme Court. Moreover, the Court explicitly approves the means; indeed, by expanding Congress's power, the Court is engaged in judicial euthanasia. Our constitutional system is troubled when the Supreme Court's invalidation of federalism violations may be *constitutionally* ignored.

Although neither *New York*, *Lopez*, nor *Printz* are spending power decisions, each indicates a desire on behalf of the Court to assert its proper authority in protecting the Constitution. More importantly, the decisions indicate the Court's desire to confine federal power according to the Constitution. As such, both cases imply the possibility of reviewing and confining other federal powers.

V. *NEW YORK*, *LOPEZ*, AND *PRINTZ* HINT AT THE POSSIBILITY OF A SHIFT
TOWARD REMOVING THE SPENDING POWER AS AN IMPEDIMENT
TO A PROPER FEDERAL-STATE BALANCE

Should the Court reassess its current interpretation of the spending power, drawing on the above discussion, the Court likely has four alternatives to the current understanding of the spending power. First, the Court may require that federal expenditures further an enumerated power. This was Madison's view, that Congress's spending was limited to furthering the enumerated powers.³⁹⁷ Second, the Court may limit federal spending to furthering the general, that is national, welfare and prohibit Congress's involvement in purely local matters. The Court may involve itself in determining such a balance.³⁹⁸ Third, the Court may review conditions on federal grants less deferentially and with an eye toward the realistic economic positions of the federal and local authorities. Finally, the Court may adopt Justice O'Connor's position in *Dole*, and the majority's position in *Butler*, that conditions on federal funds must not be regulatory in nature.³⁹⁹

397. See *supra* notes 188-90 (discussing the Madisonian view of the spending power).

398. As discussed above, however, even Madisonians recognized the problems courts might face in attempting to review or define the general welfare. See *supra* notes 305-08, 369 and accompanying text (discussing the Madisonian view).

399. See *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting); *United States v. Butler*, 297 U.S. 1, 68 (1936).

If the Court's decisions in *Printz*, *Lopez*, and *New York* are indeed small steps toward a larger principle of effectuating the Constitution's command for a proper federal-state balance, then the Court would most likely begin reassessing the spending power by adopting the fourth alternative. Adopting this alternative would not necessarily alter the Court's precedent,⁴⁰⁰ but would merely require the Court to defer less where Congress appears to be using its conditional spending power to regulate areas solely within the states' sphere of authority.⁴⁰¹

In briefly discussing the spending power, the *Printz* majority indicated that the spending power is not beyond judicial review. Justice Scalia, for the majority, indicated that "it will be time enough [to review Congressional spending provisions] if and when their validity is challenged in a proper case."⁴⁰²

In addition to her *Dole* dissent Justice O'Connor hinted at the possibility of adopting such a position in her *New York* majority opinion. Justice O'Connor somewhat caustically observed that "[w]hile the spending power is 'subject to several general restrictions articulated in our cases,' these restrictions have not been so severe as to prevent the regulatory authority of Congress from generally keeping up with the growth of the federal budget."⁴⁰³

Moreover, although the *New York* decision explicitly holds that conditional federal spending presumptively falls short of an impermissible level of coercion, curiously, Justice O'Connor chose to clarify only one element of *Dole* in her discussion. Justice O'Connor explained that conditions must bear a sufficient relationship to the purpose of the federal spending principally because "otherwise, *of course*, the spending power could render *academic* the Constitution's other grants and limits of federal authority."⁴⁰⁴ Arguably, the Constitution's grants of and limits on

400. See *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting) (noting that the Court has consistently limited federal funding conditions to specifying how the money may or must be spent).

401. Additionally, although the third alternative, deferring less to Congress when conditional grants are involved and invalidating such conditions when coercion realistically appears from the circumstances is appealing, the Court may decline such a standard on the grounds that judicial standards are unworkable. See Soifer, *supra* note 58, at 824-25 (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17 (1981) (noting that this is the case even though a possible majority of the Court believes that "the legitimacy of Congress' [sic] power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'"); Stewart, *supra* note 325, at 970-72.

402. *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997) (alteration in original).

403. *New York v. United States*, 505 U.S. 144, 158 (1992) (quoting *Dole*, 483 U.S. at 207).

404. See *id.* at 167 (emphasis added).

federal authority are rendered academic by not requiring *more* than simply that the conditions bear *some* relationship to the purpose of the federal spending. Justice O'Connor clearly recognized this in her dissenting opinion in *Dole* and would have prohibited Congress from regulating through the spending power.⁴⁰⁵ However, her dissent on this same fine point regarding the required relationship for conditional grants perhaps explains why she chose to make this point in her *New York* opinion, and additionally why she could not expand upon it.⁴⁰⁶

Moreover, it is interesting that only a few terms earlier, Justice O'Connor reiterated the *Butler* Court's warning of the dangers of an uncontrolled spending power:

If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."⁴⁰⁷

Similarly, *Lopez*, although elucidating the extent of the commerce power, is both relevant and important to a discussion of the spending power in two ways. First, *Lopez* indicates the Court's willingness to circumscribe federal power for the first time in over sixty years. Inasmuch, arguably the time is ripe for the Court to develop further its understanding of the Constitution vis-à-vis other federal powers.⁴⁰⁸ Having the duty

405. See *supra* notes 252-69 and accompanying text (discussing Justice O'Connor's dissent).

406. Justice O'Connor, as evidenced by the fact that she dissented in *Dole*, could not command a majority for her view that a greater relationship be required. Likewise, perhaps Justice O'Connor continued to be unable to command a majority on this point in *New York*, but nevertheless wanted to indicate her position again.

407. *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)). Some scholars have suggested that a majority of the Court is likely untroubled by the size and extent of the federal government. See Pilon, *supra* note 293, at 1010. These comments, however, were made before *Lopez*. Perhaps Justice O'Connor's apparent advocacy of the dangers of an uncontrolled spending power, compared with her opinion in *New York* that conditional federal spending does not reach "outright coercion," can be explained by suggesting that a majority of the Court was unwilling at the time *New York* was decided to limit federal power more than absolutely necessary, particularly the spending power.

408. Chief Justice Rehnquist articulated the *Lopez* majority's concern that the early cases broadly interpreting the Commerce Clause "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Con-

to interpret the Constitution,⁴⁰⁹ the Court may reexamine its spending power precedent in view of the development of the federal government since the Court first held in *Butler* that the spending power is limited only to furtherance of the general welfare,⁴¹⁰ and has subsequently reassured in *Steward Machine* and *Helvering* that Congress has virtually limitless deference to define the scope of the general welfare.⁴¹¹ Thus, although the *New York* Court curiously failed to propose a textual construction of federal powers,⁴¹² the *Lopez* Court appears to have done just that. *Printz* would appear to have taken this substantive construction even one step further.

Second the Court may be willing to specifically circumscribe the spending power, given that it has interpreted the Commerce Clause and spending power similarly, producing similar effects on Congressional action.⁴¹³ Both the spending power and Commerce power have been interpreted extremely broadly since the late 1930s, and have permitted Congress the ability to regulate broadly.⁴¹⁴ *Lopez* appears to mark a beginning for the Court to circumscribe federal commerce power; having interpreted both the Commerce Clause and the Spending Clause broadly, it is not implausible that the Court will, in the future, recognize that circumscribing federal enumerated powers does little for federalism without at the same time circumscribing the federal spending power. Moreover, while it may once have been true that “[i]f the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed,”⁴¹⁵ *Lopez* indicates that the Court is willing to reject some solicitors. Not only is it worth confining the spending power, but it makes little sense not to do so.

gress.” *United States v. Lopez*, 514 U.S. 549, 556 (1995).

409. *See id.* at 575; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that the judiciary has the sole duty to declare “what the law is”).

410. *See Butler*, 297 U.S. at 66.

411. *See Helvering v. Davis*, 301 U.S. 619, 640-41, 644-45 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586-87 (1937).

412. *See Powell*, *supra* note 11, at 669.

413. The Court has continually upheld spending power challenges, just as it did in *New York*. However, as discussed, Justice O'Connor may have left open a narrow window for challenging the spending power. *See supra* notes 404-08 and accompanying text (discussing Justice O'Connor's potential narrow window). This Comment merely attempts to draw an analogy to the Court's jurisprudence in related areas and to indicate why continuation of the current spending power doctrine, while at the same time reeling in other federal powers, renders federalism illusory.

414. *See Pilon*, *supra* note 293, at 1005-06; *Pilon*, *supra* note 370, at 110 (noting that “[l]ike the General Welfare Clause, the Commerce Clause has also been converted from a shield to a sword”).

415. Rosenthal, *supra* note 349, at 1131.

Finally, *Printz* indicates the Court's continued commitment to enforcing the guarantees of federalism and the Court's hesitance to distinguish *New York* on a technical basis as the United States Government had argued.⁴¹⁶ This reluctance signifies, the Court's willingness to read federalism as a *substantive* constitutional command. Justice Scalia's approach to the federalism question is also useful for analyzing future questions of federalism. The Court should not hesitate to apply this analysis to all federalism questions, especially to those concerning the spending power. Indeed, even before announcing the *Printz* decision, Justice Scalia noted that the issue of the spending power's infringement on federalism is one of the most serious issues now confronting federalism.⁴¹⁷

One recent decision suggests the possibility that courts may begin to review congressional legislation enacted pursuant to the spending power with greater scrutiny. In *Virginia Department of Education v. Riley*,⁴¹⁸ the Fourth Circuit embraced Justice O'Connor's dissent in *South Dakota v. Dole*.⁴¹⁹ *Riley* involved a federal statute which apparently conditioned states' receipt of federal funds for education of disabled students on the requirement that states "assure[] all children with disabilities the right to a free appropriate public education."⁴²⁰ Pursuant to this requirement, the federal government withheld Virginia's entire sixty million dollar grant for disabled students under the statute upon learning that Virginia had expelled 126 disabled students "for reasons wholly unrelated to their disabilities."⁴²¹ Holding that the statute did not "unambiguously" condition states' receipt of these federal dollars as re-

416. Justice Scalia refused to distinguish *New York* on the ground that the Brady Act did not diminish political accountability. See *Printz v. United States*, 117 S. Ct. 2365, 2382 (1997). Thus, Justice Scalia indicated, at least implicitly, that political accountability, while important, is not necessarily the cornerstone of federalism. Instead, the Constitution requires a proper federal-state balance; the benefits secured by federalism are not dispositive, but are useful in determining federalism violations because the Framers *designed* the federalist system to secure these advantages.

417. See *Liberty & Limits*, *supra* note 2.

418. 106 F.3d 559 (4th Cir. 1997) (en banc), *superseded by statute, as recognized by Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997).

419. See *Riley*, 106 F.3d at 570-71. For a discussion of Justice O'Connor's dissent in *Dole*, see *supra* note 243-59 and accompanying text.

420. *Riley*, 106 F.3d at 560.

421. See *id.*

quired by *Dole*, the court invalidated the federal government's withholding of federal education funds.⁴²² The court explained,

Insistence upon a clear, unambiguous statutory expression of congressional intent to condition States' receipt of federal funds in a particular manner is especially important where, as here, the claimed condition requires the surrender of one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment—the education of our children.⁴²³

The court then proceeded to discuss the federalism and Tenth Amendment implications of the federal government's decision to withhold such education funds.⁴²⁴ Concededly, the court noted that a discussion of federalism and the Tenth Amendment was helpful—although not necessary—to its decision.⁴²⁵ Nevertheless, the court's discussion of federalism is instructive. Citing Justice O'Connor's dissent in *Dole*, and the Supreme Court's opinion in *Butler v. United States*,⁴²⁶ the *Riley* court found that the spending power prohibits such a "condition"—even assuming it was unambiguous.⁴²⁷ The *Riley* court found that the condition at issue was "considerably more pernicious than the 'relatively mild encouragement at issue in *Dole*.'"⁴²⁸ Withholding the *pro rata* share of \$58,000 attributable to the 126 expelled students, for example, "would be 'encouragement.'"⁴²⁹ Withholding all of the sixty million federal education dollars for Virginia's disabled students was not, however, "encouragement."⁴³⁰ The court explained that the condition instead "resemble[d] impermissible coercion."⁴³¹ Moreover, the court explained that the condition took the form of a regulation which Congress could not impose through the Spending Clause power.⁴³²

422. *See id.* at 562-69.

423. *Id.* at 566 (citations omitted). Arguably, the Supreme Court should follow its "germaneness" requirement—requiring a reasonable relationship between the conditions and the destination of the federal funds—for the same reason.

424. *Id.* at 569-71.

425. *Id.* at 569. The court explained that its finding that Congress failed to unambiguously declare the "condition" completely disposed of the case. *Id.*

426. 297 U.S. 1 (1936).

427. *Riley*, 106 F.3d at 569-70.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 569.

432. *Id.* at 570.

Ultimately, if the Court meant what it said in *Dole*, then . . . a Tenth Amendment claim of the highest order lies where, as here, the Federal Government . . . withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign states . . . [In this case,]

Citing in part to Justice O'Connor's dissent in *Dole* and the Supreme Court's opinion in *Butler*, the Fourth Circuit concluded its opinion with a recitation of the impact of such a condition on principles of federalism:

In the end, this case . . . is about the extent to which the Federal Government may, in our system of federalism, impose its policy preferences upon the States by placing conditions upon the return of revenues that were collected from the States' citizenry in the first place . . . [¶] In our federal system of government, such delicate policy decisions [as discipline of students], relating so intimately as they do to matters within the exclusive prerogative of the States, are presumed to be those of the States alone. . . . Even [when the Federal Government properly conditions federal funds], of course, the Federal Government must effectuate that expropriation in a manner that is faithful to the limitations on Federal power that inhere in the Tenth Amendment and in the principles of federalism that undergird our entire democratic system of governance.⁴³³

As *Riley* makes clear, this Comment's suggestion that the Court review federal spending more carefully does not require a significant departure from the Court's spending power cases. Such a review requires only that the Court seriously enforce its already-imposed requirements, namely that the spending power not be used to coerce states, and that spending conditions reasonably relate to the destination of the federal funds. Regarding the latter—the germaneness requirement—the Court's decision in *Butler*, Justice O'Connor's dissent in *Dole*, and the Fourth Circuit's approach in *Riley* make clear that failure to seriously observe a reasonableness requirement permits Congress to impermissibly *regulate* pursuant to the Spending Clause power, where Congress might not be permitted to so regulate pursuant to one of its enumerated powers. This is especially true given the Court's decision in *Lopez* to read the Commerce Clause more carefully: prior to *Lopez*, it is at least conceivable that many spending conditions bordering on impermissible regulation under the Spending Clause might well have been upheld as proper regulations under the Commerce Clause, given the Court's broad deference to Congress's legislation pursuant to the Commerce Clause. *Lopez* draws into question, however, unlimited deference, and suggests that the Court will in the future require more than blind deference to Congress. Finally, this Com-

coercion is an argument of fact [The condition] is . . . an act more akin to forbidden regulation

Id.

433. *Id.* at 570-71. Ultimately, Congress enacted a statute superseding the *Riley* decision. See *Amos v. Maryland Dep't of Public Safety and Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997). Nevertheless, the *Riley* court's enunciated principles of federalism remain sound.

ment suggests that broad and untailed spending conditions permit the federal government to commandeer the states into the service of the federal government, in clear contravention of the Court's recent decisions in *Printz* and *New York*, even when Congress enacts spending conditions which regulate states pursuant to an enumerated power such as the Commerce Clause.

If, as the *Riley* court explained, spending conditions must be unambiguous, especially when "the claimed condition requires the surrender of one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment—the education of our children,"⁴³⁴ so too should courts prohibit spending conditions from coercing states, or impermissibly regulating and thereby commandeering states.

VI. CONCLUSION

Over the course of the twentieth century, the Supreme Court has broadly interpreted and expanded the federal spending power, virtually without limit. Inasmuch, the Court has permitted Congress to define the scope of federal power. The Court has not granted Congress this latitude with regard to any other power, and *New York*, *Lopez* and *Printz* confirm that the Court has recently elected to review federal powers with greater scrutiny. In doing so, the Court has signaled a desire to return to the Constitution's fundamental principles of federalism.

Prior to *New York*, *Lopez* and *Printz*, limitations on federal power were tenuous at best. Limitations on the federal spending power remain even more uncertain, however. This Comment has suggested that in order to effectuate the Constitution's principles of federalism, the Court must realistically examine uses of the spending power with the respective positions and choices of the federal and state governments in mind. Without doing so, the Court permits its rulings to be subverted and renders illusory the protections against tyrannical majorities. The Court's decisions in *New York*, *Lopez* and *Printz* hint at the possibility that the Court will take seriously the federal government's coercive leverage under the spending power as interpreted.

In the end, "states' rights" and "national rights" are not important. The state governments and the federal government each have an appropriate and indispensable role in the constitutional republic. The unique contribution of the Framers to the country, and to the world, was a system of powers divided between these two sets of governments. In this diffusion lies the promise of liberty for all citizens. Without the ability to know precisely which of the two governments to hold accountable for various

434. *Id.* at 566 (citations omitted).

actions, whether disfavored or otherwise, citizens are unable to choose how they wish to be governed. In a nation whose founders fought against "taxation without representation," few things are as important as the ability to hold elected representatives accountable.

In light of the nation's rich history, and in light of its recent decisions, the Court should review the current interpretation of spending power in order to effectuate principles of federalism. Refusal to confine Congress's use of the Spending Power Clause is inconsistent with both history and the constitutional principles underlying the Court's recent jurisprudence. Perhaps Justice Scalia best summarized the greatest problem now facing federalism:

A federalist system will not work when the people have come to look upon the national government as the solution of first resort.⁴³⁵

Lest its teachings be rendered meaningless, the Court should enforce constitutional and jurisprudential limits on the Spending Clause Power.

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435. *Liberty & Limits*, *supra* note 2.

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