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Federal Funding Conditions: Bursting Through the *Dole* Loopholes

*Celestine Richards McConville**

I. INTRODUCTION

Over the past several years, the Supreme Court steadily has limited the scope of congressional power in the name of federalism. In the context of the Commerce Clause, the Court twice has invalidated federal legislation involving intrastate criminal activity, ruling that such activity lacks the requisite “substantial effect” on interstate commerce necessary to sustain an exercise of the commerce power.¹ The Court also has ruled that, even when

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¹ *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating provision of the Gun-Free School Zones Act prohibiting possession of firearms within 1000 feet of schools); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating provision of the Violence Against Women Act establishing civil damage remedy against persons who commit gender-motivated violent crimes). The substantial effect restriction is necessary, the Court reasoned, because “[t]he Constitution requires a distinction between what is truly national and what is truly local.” *Id.* at 676 (citing *Lopez*, 514 U.S. at 568).

The Court suggested in *Lopez*, and made clear in *Morrison*, that the federal government may not regulate criminal activity under the Commerce Clause if the only basis for the regulation is the activity’s aggregate effect on interstate commerce. *Lopez*, 514 U.S. at 559-68; *Morrison*, 529 U.S. at 676. While the *Morrison* Court carefully noted that it was not “adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity,” it emphasized that its cases “have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Id.* at 673.

Before the Court this Term was another Commerce Clause case, this one challenging the federal government’s regulatory authority under section 404(a) of the Clean Water Act. The government contended it had authority under that section and the Commerce Clause to regulate activity involving wholly intrastate ponds serving as migratory bird habitats. *See Solid Waste Agency of N. Cook County v. United States Army Corp of Eng’rs*, 121 S. Ct. 675 (2001). On January 9, 2001, the Court rejected the government’s interpretation of section 404(a), ruling that the phrase “navigable waters” in that section does not include wholly intrastate ponds that serve as migratory bird habitats when the ponds are “not adjacent to open water.” *Id.* at 680. Because the government’s assertion of authority was improper on statutory grounds, the Court did not address the Commerce Clause question. The Court did state, however, that the government’s position raised “significant constitu-

Congress properly regulates an activity under its commerce power, federalism principles prohibit Congress from using that power to direct the states to enact, administer or enforce a federal program.² Such directives “commandeer” state legislative and executive processes, which are critical aspects of state sovereign authority.³ Finally, the Court has curtailed Congress’s ability to abrogate, and obtain waivers of, state sovereign immunity.⁴

To date, the Court’s federalism campaign has left untouched one of Congress’s most broad and potent powers—the spending power.⁵ As currently interpreted, this power permits Congress to achieve objectives with respect to the states that it otherwise could not achieve using its other Article I enumerated powers.⁶ In other words, Congress may use federal funds to induce the states to enact particular legislation or to regulate in a particular manner, even though Congress could not directly mandate that the states do so.⁷ As several commentators have noted, the current

tional and federalism questions.” *Id.* at 684. Thus, while a decision on the merits of the Commerce Clause issue likely would have provided additional insight regarding the Court’s view of the scope of the commerce power, the Court’s decision reveals its continued interest in examining whether congressional legislation exceeds a federalism-based outer limit on the commerce power.

² Under the so-called “anti-commandeering” rule, Congress may induce states, through the valid use of one of its powers, to enact or enforce a federal program, but it may not *require* the states to enact or enforce a federal program. Thus, in *New York v. United States*, 505 U.S. 144 (1992), the Court invalidated the provisions of the Federal Low Level Radioactive Waste Policy Amendments Act that required states to either “take title” to radioactive waste within their borders or to enact legislation dealing with the disposal of such waste. And in *Printz v. United States*, 521 U.S. 898 (1997), the Court invalidated the Brady Handgun Violence Prevention Act provisions that required, on a temporary basis, state and local chief law enforcement officers to conduct reasonable background checks of prospective handgun purchasers.

³ See, e.g., *Printz*, 521 U.S. at 926-27, 932.

⁴ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Congress may not use its commerce power to abrogate sovereign immunity); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680, 681-85 (1999) (overruling *Parden v. Terminal Ry. of Ala. Docks Dept.*, 377 U.S. 184 (1964), and refusing to imply a waiver because of a “state’s mere presence in a field subject to congressional regulation” or because a state participates in an activity normally engaged in by private entities); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (Congress exceeded its authority under § 5 of the 14th Amendment when it imposed monetary liability on states for patent infringement); *Alden v. Maine*, 527 U.S. 706 (1999) (Congress may not abrogate state sovereign immunity in state courts); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Congress exceeded its authority under § 5 of the 14th Amendment when it permitted damages actions against states for violations of the Age Discrimination in Employment Act); *Board of Trustees of the Univ. of Ala. v. Garrett*, No. 99-1240, 2001 WL 173556, __U.S.__ (Feb. 21, 2001) (Congress exceeded its authority under § 5 of the 14th Amendment when it permitted federal court damages actions by state employees against states for violations of the Americans with Disabilities Act).

⁵ In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a bare majority of the Court declined an opportunity to cut back on the spending power in the name of federalism. For a discussion of *Davis*, see *infra*, notes 124-36 and accompanying text.

⁶ See *South Dakota v. Dole*, 483 U.S. 203 (1987); *New York v. United States*, 505 U.S. 144 (1992).

⁷ See *New York*, 505 U.S. 144.

broad scope of the spending power undermines the Court's recent federalism decisions because it permits an end-run around the federalism limits imposed on other enumerated powers.⁸

The evidence suggests that the spending power is next up on the Court's federalism hit-list. In *South Dakota v. Dole*, the Supreme Court carefully warned that although the spending power has a broad reach, the power also has outer limits.⁹ And it repeated its warning in later cases.¹⁰ As discussed in Part II, "federalism loopholes" built into *Dole's* analysis might be used as tools for cutting back on the scope of the spending power in order to vindicate federalism interests. These loopholes include coercion (the possibility that "pressure might turn into compulsion"), inadequate notice (an ambiguous statement of the funding condition), and insufficient relatedness between the funding condition and the purpose of the federal spending program.¹¹ This article evaluates whether these three federalism loopholes ought to be used

⁸ See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995); Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 15-16 (1998); Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869 (1998); Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 553 (1997).

⁹ 483 U.S. at 207-12.

¹⁰ See *New York*, 505 U.S. at 167 ("[Funding] conditions must (among other requirements) bear some relationship to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority.") (citations omitted); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) ("[I]n cases involving conditions attached to federal funding, we have acknowledged that the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.") (quotations and citations omitted). See also Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 121, 122 (1998) (suggesting that the Court may reevaluate spending power in light of *New York* and *Printz*); but see Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1662 (2000) (increased use of spending power "might eventually force the pro-federalism majority on the Court to rework its spending power jurisprudence or even reconsider *Dole*, although there are few indications of such a development at the present time"); Krotoszynski, *supra* note 8, at 16 ("To date, the Supreme Court has shown no indication to revisit its holding in *South Dakota v. Dole*.").

The existence of similar warnings in the Commerce Clause context cautions us to take the Court's admonitions seriously. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."); cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring) ("[I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce.").

¹¹ *Dole*, 483 U.S. at 207-08. These loopholes did not appear for the first time in *Dole*. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937) (coercion); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981) (notice); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion) (relatedness).

either to promote sovereign accountability or to encourage Congress to be cognizant of federalism concerns when it legislates. All loopholes are not created equal, of course. So while the article discusses all three loopholes, it focuses predominantly on the coercion loophole, which has received much recent attention in both scholarship and case law.¹²

As discussed in Part III, a primary justification for judicial enforcement of the federal balance is to preserve and protect the states' ability to act as sovereigns.¹³ In their capacity as sovereigns the states are charged with the duty to make decisions implementing the will of their people, and the responsibility to be held accountable when they fail in this duty.¹⁴ Accordingly, judicial invocation of the *Dole* loopholes can be justified if the loopholes would protect sovereign accountability by eliminating interference with the states' ability to make decisions implementing the will of their people.

The coercion loophole left open in *Dole* should not be used as a means of enforcing federalism-based limits. As defined in *Dole*, that loophole improperly emphasizes financial inducement, examining whether the amount of money at stake essentially "caused" the state to participate or remain in the federal program. As explained in detail in Part III, in the federalism context, coercion means the loss of sovereign accountability, not subjection to undue influence or financial inducement. Thus, to say that the federal government may not use the federal spending power to coerce a state is simply to restate the rule that the federal government may not interfere with sovereign accountability. If the federal program itself does not interfere with the state's *ability* to make choices on behalf of its people (which federalism protects), then by necessity there is no coercion. While the financial impact of a funding condition may well inform the decision to participate in a federal program, it does not disable the state from choosing to im-

¹² See, e.g., Baker, *supra* note 8, at 1973-77; David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 78-86 (1994); Hoke, *supra* note 10, at 121; Angel D. Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161, 191-93 (1999); see also, e.g., Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); California v. United States, 104 F.3d 1086 (9th Cir. 1997); Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000); Virginia Dept. of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997).

¹³ For thorough and informative discussions of the purposes and values of federalism, see Engdahl, *supra* note 12, and Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

¹⁴ These themes sound in both old and new Supreme Court precedent. See, e.g., *Steward Mach. Co.*, 301 U.S. at 593 (concluding that the Social Security Act did not "call for a surrender by the states of powers essential to their quasi sovereign existence"); *New York v. United States*, 505 U.S. 144, 168 (1992) (federalism promotes accountability because "state governments remain responsive to the local electorate's preferences; [and] state officials remain accountable to the people").

plement the people's will, and thus decline the federal funds, if that will is inconsistent with the federal condition. The choice may be difficult, but the *ability* of the state to make a choice remains unimpaired.

Unlike the coercion loophole, the inadequate notice loophole protects sovereign accountability. Adequate notice of a funding condition enables a state to make an informed choice about whether participation would be responsive to the will of its people. Because unambiguous notice of the condition directly affects a state's ability to act as a sovereign, the inadequate notice loophole ought to be used to protect our federalism.

Lastly, use of the insufficient relatedness loophole will not enhance a state's ability to determine whether participation in the federal spending program would implement the preferences of its constituents. The degree of relatedness between the funding condition and the purpose of the federal spending program may well inform a state's decision to participate or not participate. Indeed, a low degree of relatedness might counsel against participation, as it might send a negative signal about the whole program. But the degree of relatedness should not affect a state's *ability* to determine whether the program will enhance or impede its policy choices, and thus should not be used to directly enforce federalism limits.

Part IV examines a second justification for invoking some or all of the *Dole* loopholes—encouraging Congress to be attentive to the federal balance when it enacts legislation involving or affecting the states. While the coercion loophole likely would encourage Congress to be sensitive to federalism concerns, it should not be used for that purpose because doing so would result in the invalidation of proper exercises of the spending power. It therefore is too blunt an instrument to remedy congressional insensitivity. The inadequate notice and insufficient relatedness loopholes, however, serve this encouragement function well. Judicial invalidation of a spending condition for lack of clarity or for insufficient relatedness forces Congress to re-craft its program before it can continue. And even in the initial drafting stage, the threat of possible invalidation likely will pressure Congress to carefully consider state interests.

In short, the inadequate notice and insufficient relatedness loopholes provide possible avenues for vindication of federalism interests. The *Dole* coercion loophole, on the other hand, does not protect federalism interests and thus should not be used as a tool for doing so.

II. THE *DOLE* DECISION — PLANTING THE SEEDS OF FEDERALISM

Article I, section 8, clause 1 of the United States Constitution authorizes Congress to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹⁵ The main debate surrounding the scope of the Spending Clause was the definition of general welfare. James Madison argued that the phrase was limited by the enumerated powers following the Spending Clause, and that Congress could spend only to achieve an object within those enumerated powers.¹⁶ Alexander Hamilton took the opposite view, asserting that the power to spend for the general welfare was not restricted by the enumerated powers, but rather was a distinct power unencumbered by the remaining grants of power.¹⁷ It was not until 1936, in *United States v. Butler*, that the Supreme Court took a position on the issue and rejected Madison’s interpretation as a “mere tautology.”¹⁸ Adopting Hamilton’s position, the Court ruled that the “power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”¹⁹

In *South Dakota v. Dole*, the Supreme Court confirmed *Butler*’s broad vision of the federal spending power.²⁰ South Dakota challenged a federal law that conditioned the receipt of a portion of federal highway funds on the adoption of a minimum drinking age of twenty-one.²¹ Rejecting the challenge, the Court underscored the “breadth” of the spending power, emphasizing that Congress may “further broad policy objectives by conditioning re-

¹⁵ U.S. CONST. art. I, § 8, cl. 1.

¹⁶ See *United States v. Butler*, 297 U.S. 1, 65 (1936).

¹⁷ See Alexander Hamilton, in 10 THE PAPERS OF ALEXANDER HAMILTON, DECEMBER 1791–JANUARY 1792, at 303 (Harold C. Syrett and Jacob E. Cooke eds., 1966) (“This phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues shou’d have been restricted within narrower limits than the ‘General Welfare’ and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.”); see *Butler*, 297 U.S. at 65 (“Hamilton . . . maintained the clause confers a power separate and distinct from those later enumerated is not restricted in meaning by the grant of them”).

¹⁸ 297 U.S. at 65.

¹⁹ *Id.* at 66. *Butler* emphasized that the power was not without limitation, but must be exercised for the general welfare. *Id.* After declaring that the spending power was not limited by the enumerated powers, the Court nevertheless proceeded to strike down the Act under the Tenth Amendment. *Id.* at 68. Because the Act regulated agriculture, it was beyond the federal government’s reach. *Id.* As Professor David E. Engdahl so aptly explains: “The rule of decision in *Butler* . . . is precisely Madison’s view, applied notwithstanding the Court’s simultaneous nominal endorsement of Hamilton’s view. The majority’s seeming obliviousness to this flagrant self-contradiction makes its opinion in *Butler* one of the few truly ridiculous opinions delivered in two centuries of Supreme Court jurisprudence.” Engdahl, *supra* note 12, at 36 (footnote omitted). The 10th Amendment analysis in *Butler* has not been followed.

²⁰ 483 U.S. 203 (1987).

²¹ *Id.*

ceipt of federal moneys upon compliance by the recipient with federal and administrative directives.”²² Thus, the Court held that Congress may use “the spending power and the conditional grant of federal funds” in order to obtain “objectives not thought to be within Article I’s enumerated legislative fields.”²³

Even while it defended a sweeping spending power, the Court warned that the spending power was subject to several restrictions. In this part of the *Dole* analysis we see the creation of federalism loopholes that the states might use to allege that the federal government has overstepped its bounds and intruded on state sovereign authority.

The first restriction—and the only one contained in the text of the Spending Clause—requires that the spending be for the general welfare.²⁴ As to the precise content of this term, the courts must “defer substantially to the judgment of Congress.”²⁵ Invoking the required deference, the Court had no problem concluding that Congress’s desire to address the problem of drinking and driving promoted the general welfare.²⁶ The second restriction requires Congress to state unambiguously the conditions it wishes to place on the receipt of federal funds. This notice requirement ensures that state participation in a federal program is knowing and voluntary.²⁷ It was satisfied easily in *Dole*, where the Court found that “[t]he conditions upon which States receive the funds . . . could not be more clearly stated by Congress.”²⁸

The third restriction requires some degree of relatedness between the spending condition and the purpose of the federal spending program.²⁹ Opting not to define the precise contours of the relatedness requirement, the Court held that the minimum drinking age condition satisfied the requirement because it directly related to a primary purpose of highway expenditures—highway safety.³⁰ Evidence indicated that young persons would drive across state lines in order to consume alcohol legally, thereby increasing the incidence of drinking and driving on our nation’s highways. A uniform minimum drinking age reasonably would prevent this occurrence.³¹

²² *Id.* at 206.

²³ *Id.* at 207.

²⁴ See U.S. CONST. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 207.

²⁵ *Dole*, 483 U.S. at 207.

²⁶ *Id.* at 208.

²⁷ *Id.* at 207.

²⁸ *Id.* at 208.

²⁹ *Id.* at 207.

³⁰ The Court specifically declined to address whether a condition, at a minimum, must directly relate to the purpose of the federal spending program, or whether conditions less directly related would suffice. *Id.* at 208-09 n.3.

³¹ *South Dakota v. Dole*, 483 U.S. 203, 208-09 n.3 (1987).

The fourth restriction recognizes that independent constitutional provisions might bar the spending condition. After reviewing its precedent, the Court concluded that this restriction simply means that the federal spending condition may not require the states to engage in behavior that violates the Constitution.³² The Court rejected South Dakota's argument that this restriction prohibited Congress from using the spending power to achieve objectives it could not achieve under its other enumerated powers.³³ South Dakota's argument urged nothing more than the adoption of Madison's view of the Spending Clause—a view the Court already had rejected. The Court also rejected the idea that funding conditions impermissibly invade state sovereignty in violation of the 10th Amendment.³⁴ As long as the state can choose against the funding condition, there is no violation.³⁵

Finally, the Court noted that a spending condition might be invalidated if the "financial inducement offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion."³⁶ After suggesting that coercion might be difficult to prove, the Court ruled that South Dakota's loss of only five percent of its federal highway funds was insufficient to demonstrate coercion.³⁷

Three potential federalism loopholes appear in *Dole's* spending analysis: inadequate notice, coercion, and insufficient relatedness. Under the inadequate notice loophole, a simple finding of ambiguity can torpedo disfavored spending conditions. The coercion and insufficient relatedness loopholes are such simply because they are still works-in-progress. Some observers have criticized *Dole* for being insufficiently rigorous and for failing to define the scope of the coercion and relatedness restrictions.³⁸ But what was once a weakness might now be a strength from a federalism perspective, for the Court's very failure to give definitive content to the coercion and relatedness restrictions presents a potential opportunity for the federalism movement. By leaving to future cases the job of defining the parameters of these restrictions, the Court has provided an avenue for federalism proponents to challenge spending conditions as disruptive of the federal balance.

³² *Id.* at 210.

³³ *Id.*

³⁴ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

³⁵ *Dole*, 483 U.S. at 210.

³⁶ *Id.* at 211 (quotation omitted).

³⁷ *Id.* at 211-12.

³⁸ See, e.g., Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 86-87, 102-03, 115-23; Kimberly Sayers-Fay, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CAL. L. REV. 1281, 1299 (2000) (describing *Dole* analysis as "extremely generous," and asserting that it "signals [Congress] that it does have substantial latitude").

Thus, rather than sanctioning congressional carte blanche, the *Dole* decision leaves open possible opportunities to cut back on congressional authority.³⁹

Parts III and IV evaluate whether and how these loopholes ought to be used to cut back the reach of the federal spending power in the name of federalism.

III. PROTECTING STATE SOVEREIGN AUTHORITY

The federalism structure of our government divides power between the federal and state governments. As is well chronicled in the Supreme Court's federalism decisions, our federalism arrangement serves many purposes, perhaps the most important of which is to promote and protect individual liberty.⁴⁰ Dividing "the atom of sovereignty" ensures that the state and federal governments will act as a check on each other.⁴¹ Alexander Hamilton described this checking function as follows: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."⁴² And the Supreme Court has observed that "[i]n the tension between the federal and state power lies the promise of liberty."⁴³

The division of authority between the state and federal governments also provides the people with an opportunity to participate in their own governance, to have a voice in substantive

³⁹ Although the general welfare restriction arguably could be used as a loophole through which federalism-based interests might emerge, see John Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001), the Court's extreme deference to legislative judgment in this area suggests that it is not a likely candidate for such limitations. Indeed, the *Dole* Court went so far as to suggest that the general welfare restriction might not be "judicially enforceable." *Dole*, 483 U.S. at 208 n.2. Moreover, the Court's Spending Clause cases continually reaffirm the Hamiltonian vision of general welfare, and contain no suggestion that the Court might more narrowly define that term. This is telling when compared to the Court's Commerce Clause precedent, which laid the groundwork for judicial imposition of outer limits on the commerce power. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring).

⁴⁰ See, e.g., *New York v. United States*, 505 U.S. 144, 157-59 (1992); *Printz v. United States*, 521 U.S. 898, 918-22 (1997).

⁴¹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

⁴² THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961). James Madison made the same point in Federalist No. 51: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961).

⁴³ *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

decision-making that inevitably will affect their lives.⁴⁴ Professor David E. Engdahl captured this idea well when he stated that “[t]he purpose [of federalism] is not to debilitate governance, but to enhance popular influence on public policy choices and to improve answerability for their consequences.”⁴⁵ By promoting and protecting state sovereign accountability, federalism enhances both access to the political process and accountability for political decisions.⁴⁶ States must be free to make decisions on behalf of their constituents, choosing which course of action best implements the will of the people.⁴⁷ This decision-making ability is the essence of sovereign accountability.

Judicial enforcement of federalism-based limits is necessary in order to protect state accountability and, ultimately, individual liberty. Accordingly, the courts should invoke only those *Dole* loopholes that are designed to eliminate interference with the states’ ability to make a decision implementing the will of their people. As discussed below, only the inadequate notice loophole is so designed.

A. The Coercion Loophole

Dole suggested that coercion in the spending context occurs when a state simply cannot resist the lure of federal funding; the “financial inducement” of a funding condition might be so strong as to constitute unconstitutional coercion.⁴⁸ Without defining when financial “pressure turns into compulsion,” the Court indicated that the presence or absence of coercion likely would turn on the amount of federal financing at stake.⁴⁹ In *Dole*, South Dakota was not coerced since it lost only five percent of otherwise available highway funds by refusing to participate in the federal spending program.⁵⁰ Following *Dole*’s lead, some lower federal courts have evaluated coercion claims using the amount of federal funding at stake or the impact on the state of losing federal funding.⁵¹

⁴⁴ *Id.* at 458 (federalism “increases opportunity for citizen involvement in democratic processes”).

⁴⁵ Engdahl, *supra* note 12, at 8.

⁴⁶ *Id.*

⁴⁷ See *infra* notes 53-84 and accompanying text. A state’s freedom to make decisions on behalf of its constituents of course may be limited when authorized by the Constitution. Thus, under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the federal government, acting pursuant to an enumerated power, may preempt state legislation. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5, at 656-57 (3d ed. 2000).

⁴⁸ 453 U.S. 203, 211-12 (1987).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See, e.g., *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc); *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996).

Reliance on a financial inducement definition of coercion obviously makes a finding of coercion more likely as the amount of federal funding available to the states increases.⁵² But as demonstrated below, *Dole's* coercion loophole should not be invoked for two reasons. First, the presence or absence of coercion in the federalism context does not turn on the amount of federal funding at stake or the impact on state resources of losing the funding. Instead, it turns on whether the funding condition interferes with the state's sovereign accountability. Second, as defined in *Dole* to mean financial inducement, the coercion loophole does not eliminate interference with the state's ability to make a choice on behalf of its people.

1. Coercion in the Federalism Context

The emphasis on voluntary participation in federal spending programs likely is responsible for the financial inducement definition of coercion that surfaced in *Dole* and that is used by some lower federal courts. The constitutional validity of federal spending conditions depends on each state's voluntary decision to participate in the federal spending program.⁵³ Thus, any evidence that the decision was somehow involuntary would undermine federal authority. A large enough sum of money, the argument goes, might well render a state incapable of rejecting the funding condition and refusing to participate in the spending program.⁵⁴ Under this analysis, the decision to participate would be involuntary, and the funding condition coercive and invalid.

The "financial inducement" analysis misunderstands the meaning of both voluntariness and coercion in the federalism context. In that context, voluntariness and coercion have to do with the ability of a state to make decisions as a sovereign. Thus, coercion exists (and the decision is involuntary) when a state cannot, by reason of the federal action, respond to and implement the will of its people, and the people of that state cannot hold its representatives accountable for the decision.⁵⁵ Coercion implicates a state's ability to act as a representative of its people, not the state's level of temptation in choosing among alternatives.⁵⁶ The

⁵² In 1999, an estimated 26% of the states' expenditures came from federal funds. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (119th ed.) (1999) at 323 (including Puerto Rico).

⁵³ *Dole*, 483 U.S. at 207, 210; *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

⁵⁴ See *supra* note 6 and accompanying text.

⁵⁵ See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens.").

⁵⁶ Cf. Engdahl, *supra* note 12, at 82-83 (asserting that "there is reason to doubt that the concepts of coercion and undue influence 'can ever be applied with fitness to the rela-

prohibition on coercion, then, is nothing more than the prohibition on interfering with sovereign accountability. If the federal program does not interfere with a state's ability to choose whether and how to implement the will of its people, then by necessity there is no coercion. Examples of coercion thus would include providing erroneous information regarding the effect of participation in the program, failing to provide relevant information regarding such participation, and directing the states to legislate, administer or enforce federal policies.⁵⁷

A long line of Supreme Court precedent supports this view of coercion in the federalism context. In *Massachusetts v. Mellon*, the Court confronted a challenge to the Maternity Act, a federal spending program designed to improve maternal and infant health.⁵⁸ To receive federal funding, the states had to comply with certain conditions, including having the relevant state agencies file "reports concerning their operations and expenditures."⁵⁹ Funding would be withdrawn if a state made improper expenditures.⁶⁰ Although the Court ultimately dismissed the case for lack of standing, the Court commented that the federal spending program "impose[d] no obligation" on the state, "but simply extend[ed] an option which the state [was] free to accept or reject."⁶¹ The Court also noted that the federal program did not "require the states to do or to yield anything."⁶² Though not a ruling on the merits, the clear import of this commentary is that the regulation was not coercive because it did not interfere with the state's ability to make decisions implementing (or not implementing) the will of the people. The states remain able to make policy decisions for their citizens, and the citizens in turn may hold their state representatives accountable for those decisions.

The concept of coercion appeared again in *Steward Machine Co. v. Davis* and the Court dealt with it in much the same manner.⁶³ *Steward Machine* involved a challenge to provisions of the Social Security Act imposing a tax on employers, and crediting against that tax payments made by the employers to a state unemployment fund.⁶⁴ The allegation in *Steward* was that the "dominant end and aim [of the statute was] to drive the state Legislatures under the whip of economic pressure into the enact-

tions between state and nation") (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

⁵⁷ See *New York*, 505 U.S. 144 (federal government may not compel states to enact a federal program).

⁵⁸ 262 U.S. 447, 479 (1923).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 480.

⁶² *Id.* at 482.

⁶³ 301 U.S. 548 (1937).

⁶⁴ Employers could obtain a credit of up to 90% of the federal tax owed. See *id.* at 574.

ment of unemployment compensation laws at the bidding of the central government.”⁶⁵ The Court rejected the argument, reasoning that “it confuses motive with coercion.”⁶⁶ In an oft-quoted passage the Court asserted that “to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.”⁶⁷

Steward Machine associated coercion with “destroying or impairing the autonomy of the states.”⁶⁸ In the context of state decision-making, *Steward Machine* placed great reliance on the fact that the federal program did not require the states to “surrender . . . powers essential to their quasi sovereign existence.”⁶⁹ *Steward Machine* thus seems to reject the temptation analysis and to embrace the sovereign accountability analysis.

Sovereign accountability also is at the heart of the Court’s recent anti-commandeering cases—*New York v. United States*⁷⁰ and *Printz v. United States*.⁷¹ Both decisions support the principle that coercion represents interference with sovereign accountability. In *New York*, the Supreme Court addressed certain provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that were designed to induce the states to create plans for disposal of radioactive waste within their own borders.⁷² The question was whether the provisions unconstitutionally commandeered the states by compelling them to “regulate in a particular field or a particular way.”⁷³ Congress may encourage, but may not direct,

⁶⁵ *Id.* at 587.

⁶⁶ *Id.* at 589.

⁶⁷ *Id.* at 589-90. Courts and commentators alike have questioned the possibility of divining a workable standard for detecting unconstitutional coercion. *See id.*; *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Kansas v. United States*, 24 F. Supp. 2d 1192, 1196 (D. Kan. 1998), *cert. denied*, 121 S. Ct. 623 (2000); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 103 (2001); Hoke, *supra* note 10, at 121; Sayers-Fay, *supra* note 38, at 1300-01. One observer even suggested that, since coercion was difficult to discern, funding conditions should be more closely scrutinized under the relatedness restriction if there is a *potential* for coercion. *See Mitchell, supra* note 12, at 191-93. Aside from its reliance on the financial inducement analysis in order to determine coercion, the problem with this particular proposal is that it would create an unacceptable disparity between states and criminal defendants in terms of obtaining relief from governmental overreaching. While the states might obtain relief from federal interference by demonstrating “potential coercion,” criminal defendants who allege they were coerced into confessing cannot obtain relief against either the state or federal government without demonstrating actual coercion. *See Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991) (analyzing totality of circumstances to determine whether defendant was coerced and applying harmless error); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness of confession determined under totality of circumstances); *United States v. Springs*, 17 F.3d 192, 194 (7th Cir. 1994) (same).

⁶⁸ 301 U.S. at 586.

⁶⁹ *Id.* at 593.

⁷⁰ 505 U.S. 144 (1992).

⁷¹ 521 U.S. 898 (1997).

⁷² 505 U.S. at 144.

⁷³ *Id.* at 161.

the states to regulate.⁷⁴ Permissible encouragement occurs when the states retain the ability to choose whether to regulate according to federal standards.⁷⁵ When Congress encourages, “state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”⁷⁶ When Congress directs, states are prevented from responding to local preferences.⁷⁷ The latter represents unconstitutional compulsion.

Critically for present purposes, the Court in *New York* used the spending power as an example of how Congress “may urge a State to adopt a legislative program consistent with federal interests.”⁷⁸ The conditions attached to receipt of federal funds allow the federal government to influence state policy choices. If a state “view[s] federal policy as sufficiently contrary to [its] local interests, then [it] may elect to decline the grant.”⁷⁹ While *New York* did not address specifically the *Dole* coercion loophole, it used the terms coercion and compulsion synonymously, thereby suggesting that the compulsion analysis in the anti-commandeering context might apply to the coercion loophole in the spending context.⁸⁰

The Court in *Printz* continued its protection of state sovereign accountability by invalidating the interim provisions of the Brady Act requiring local law enforcement officers to conduct background checks on prospective handgun purchasers. According to the Court, these provisions “compel[led] the States to . . . administer a federal regulatory program,” in violation of the “very principle of separate state sovereignty.”⁸¹ Like *New York*, *Printz* emphasized that federalism protects “the States as independent and autonomous political entities,”⁸² and that the essence of that independence and autonomy is the ability of the states to make decisions on behalf of their people and remain accountable to their people.⁸³

⁷⁴ *Id.* at 161, 166-67.

⁷⁵ *Id.* at 166-68.

⁷⁶ *Id.* at 168.

⁷⁷ *New York v. United States*, 505 U.S. 144, 169 (1992) (“Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.”).

⁷⁸ *Id.* at 166.

⁷⁹ *Id.* at 168.

⁸⁰ See Sayers-Fay, *supra* note 38, at 1300-01 (suggesting that the “compulsion inquiry” of *New York* and *Printz* was intended to replace the coercion inquiry under the Spending Clause, with the result that, “however powerful conditions may be, they are constitutional so long as states retain the formal option to opt out”).

⁸¹ *Printz v. United States*, 521 U.S. 898, 932-33 (1997) (quotation omitted).

⁸² *Id.* at 928.

⁸³ *Id.* at 920 (“The Constitution . . . contemplates that a State’s government will represent and remain accountable to its own citizens.”); *id.* at 929-30 (Brady Act interfered with state sovereign accountability because states will take blame for defects in federal program even though it was not states choice to enact or enforce the federal program). While the scope of the spending power was not before the Court, it did suggest spending conditions might not be considered mandates. *Id.* at 917-18 (regulatory requirements “con-

Under the principles of *Mellon*, *Steward Machine*, *New York* and *Printz*, coercion and voluntariness are directly tied to a state's ability to respond to the will of its people (or to not respond and risk that its people will hold it accountable). Where the state retains the ability to determine whether to participate in a federal program, which determination of course is based upon an assessment of the impact of participation on the state's chosen policies, the state retains the ability to respond to and implement the will of the local electorate.⁸⁴ This ability represents the essence of sovereignty, and should be the measure for unconstitutional coercion.

2. Coercion in the Spending Context

In the conditional spending context, states must decide whether to participate in the federal program, and if they do participate, they must abide by the conditions set down by Congress. Several commentators have argued that the increased amount of federal money involved in federal spending programs inevitably affects the states' decisions to participate in federal spending programs.⁸⁵ While this assessment undoubtedly is true, it does not lead inevitably to the conclusion that the amount of money at stake *compels* the states to participate in the federal programs. The amount of federal monies dangled in front of the states certainly and logically will inform the states' respective decisions, which likely is why the federal government offered the money in the first place—to entice the states into cooperating with federally chosen policies. But enticement does not equal coercion. As *Steward Machine* warned, we should not “confuse[] motive with coercion.”⁸⁶

Regardless of the amount of federal money at stake, a state retains the ability to evaluate whether participation in the federal

nected to federal funding measures . . . can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States”).

⁸⁴ In addition to promoting the values of federalism, use of the *Steward Machine*, *New York* and *Printz* principles in the spending context would signal consistency in the Court's federalism jurisprudence, thereby undermining claims that the Court invokes federalism as a technique to inject the justices' own values into the decision-making process. See Krotoszynski, *supra* note 8, at 14, 24-25 (calling for the Court to “demarcate a meaningful limiting principle” of federalism that would promote predictability, protect the states “against the centralizing machinations of the federal government,” and defuse accusations that the Court uses federalism to pursue the personal values of the justices).

⁸⁵ Kaden, *supra* note 13, at 896 (“[G]iven the drastic increases in the amounts of federal funds and the formula-based entitlements in aid programs enacted since 1960, it is unrealistic for anything to depend on the state's nominal right not to participate.”); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1162 (1987) (“[W]ith the budgets of state and local governments now so greatly dependent on federal money, the premise that the funds can readily be rejected if the condition is deemed oppressive seems no longer realistic.”); Squire, *supra* note 8, at 907 (“Congress maintains the ability to coerce the states, tempting them with precious resources.”).

⁸⁶ *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589 (1937).

program promotes the state's policy goals, as chosen by its people. In deciding whether to participate, a state must determine whether the conditions imposed by Congress would support or undermine its chosen goals. If the federal conditions support state goals, then the choice would appear relatively easy and the amount of money at stake perhaps largely irrelevant.⁸⁷ The choice becomes more difficult, however, when the federal conditions undermine state policy decisions. In that scenario the state then must choose either to accept the federal money and frustrate achievement of state policy choices, or to reject the federal money and implement those local choices. The level of difficulty, of course, corresponds to the amount of money involved in the federal program. The more money at stake, the more difficult the decision. Nevertheless, as long as the state can evaluate its options and choose the option most suitable to its needs, then the state's decision is voluntary.⁸⁸

For example, in late 2000, Congress passed a law conditioning the continued receipt of up to eight percent of a certain portion of federal highway funds on the enactment of state legislation setting .08 as the minimum blood alcohol content ("BAC") for drunk driving.⁸⁹ As a result of this legislation the states must determine whether the .08 BAC standard is consistent with their respective state policies. If for some reason a state wants to impose either a more liberal or a more stringent BAC standard, then that state must decide whether its policy choice outweighs its need for the forfeited portion of federal highway funding. If the state's financial need is great, then its choice likely will be a difficult one as the state will have to choose between its financial need and its policy goals. As long as the state's ability to make that choice remains unimpaired, however, the choice is voluntary.

A state's choice is not impaired simply because it perceives a great fiscal need for federal funds.⁹⁰ As sovereigns, states possess the power to raise money by alternate means—taxation of their

⁸⁷ See Baker, *supra* note 8, at 1935-36.

⁸⁸ While the state might well experience a "prisoner's dilemma" in choosing between its financial needs and its policy goals, this dilemma does not undermine the validity of federal spending legislation. The federal government has the power to spend for the general welfare, and its power is expansive. *South Dakota v. Dole*, 453 U.S. 203, 206-07 (1987). Along with this power comes the responsibility to spend federal money in a manner consistent with national policy goals, as determined by national policymakers in accordance with the will of the people of the nation as a whole. While a state may disagree with the federal policy choice, that disagreement does not render the federal government powerless to declare its policy choice and to attempt to persuade the states to adopt it. Indeed, *New York* implicitly recognized this point when it spoke approvingly of conditional federal spending. See *New York v. United States*, 505 U.S. 144, 168 (1992).

⁸⁹ Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 2001, and for other purposes, 106 H.R. 5394, § 351 (2000).

⁹⁰ *But see, e.g.*, Rosenthal, *supra* note 85, at 1162; Hoke, *supra* note 10, at 121-22.

constituents.⁹¹ While a federal source of funds might be more politically palatable to a state than taxing its own constituents, federal funding is not the only source of revenue for the state. Thus, a state is not prevented from implementing its policy choices absent federal funding. Professor Lynn A. Baker has argued that the power to tax really does not aid the state in resisting federal pressure, in part because some state laws restrict the state's taxing power, and thus the state's ability to raise revenue.⁹² A state's restriction on its own ability to raise revenue, however, represents a policy decision chosen by the people, not one foisted upon them by the federal government.⁹³ Professor Baker also has argued that the states' taxing power represents an insufficient alternative to federal funding because the states must stand second in line to the federal government, which presumably means less money is available for the taking.⁹⁴ While the states arguably might raise more revenue through taxing its residents and property owners if the federal government were not first in line, this does not mean that the states are *unable* to raise sufficient funds to cover the cost of not participating in a federal program.

When the federal government offers a significant amount of funding in exchange for the state's reordering of its policy choices, the federal government presents a difficult choice to the state. The federal government has not, however, altered the state's ability to make that choice. Using the principle applied in *New York*, the federal government simply (and properly) has attempted to influence state policy choices. Such encouragement is permissible, as *New York* explained, because it does not interfere with the state's decision-making process.⁹⁵

On the whole, the lower federal courts have recognized the principle that coercion relates to sovereign accountability, not financial temptation, and accordingly have not used the *Dole* coercion loophole to limit the spending power. Several courts have

⁹¹ See *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (“[C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?”).

⁹² Baker, *supra* note 8, at 1936 n.129. Professor Baker also argues that when the federal government exercises its spending power, it offers money to the states, with conditions, “that the state[s] readily could have obtained without those conditions through direct taxation.” *Id.* at 1937. But this observation does not undermine the main point here, which is that states retain the ability to invoke their sovereign taxing authority to raise revenue if they are unwilling to accept the conditions attached to federal funds.

⁹³ The Ninth Circuit recognized this point in *Skinner*: “Nevada is, of course, free to raise tax funds in the manner of its own choosing However such restrictions [on its ability to tax] are entirely self-imposed, and the state, as a sovereign entity, is free to change its method of generating public income whenever the people wish to do so.” 884 F.2d at 448 n.5.

⁹⁴ Baker, *supra* note 8, at 1936-37.

⁹⁵ See *supra* notes 70-80 and accompanying text.

rejected coercion arguments precisely because they doubted that states could be coerced into participating in federal spending programs. For example, in *California v. United States*, California challenged the federal Medicaid program, which conditioned Medicaid funds on the provision of emergency medical service to illegal aliens.⁹⁶ California argued that while its initial decision to participate was voluntary, “it now has no choice but to remain in the [Medicaid] program in order to prevent the collapse of its medical system.”⁹⁷ In rejecting California’s argument, the Ninth Circuit questioned the “viability” of the *Dole* coercion theory, as well as the possibility that any “sovereign state which is always free to increase its tax revenues [could] ever be coerced by the withholding of federal funds.”⁹⁸ Instead, the federal program likely presented the state with “hard political choices.”⁹⁹

The Tenth Circuit used similar reasoning in *Kansas v. United States* to reject the state’s challenge to the Temporary Assistance to Needy Families program and Child Support Enforcement Program.¹⁰⁰ Kansas argued that the sheer size of relevant grants — \$130 million annually in 1996 — “coerced [it] into implementing [federal] program requirements.”¹⁰¹ Unmoved by the large amount of money at stake, the court rejected the argument, noting that several other courts reached similar conclusions in similar circumstances.¹⁰² Labelling the coercion theory “unclear” and “suspect,” the court invoked the warning in *Steward Machine* that “motive or temptation” should not be confused with coercion.¹⁰³

California and *Kansas* reflect a trend in the case law against finding coercion in the spending context. Like *California* and *Kansas*, most courts addressing the coercion issue have ruled against the state,¹⁰⁴ with some even questioning their ability to determine

⁹⁶ 104 F.3d 1086 (9th Cir. 1997).

⁹⁷ *Id.* at 1092.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 214 F.3d 1196 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000).

¹⁰¹ *Id.* at 1198 (\$130 million figure accounted for “66% of Kansas’ [Child Support Enforcement] Program operating costs, and 80% of the expenditures relating to its computerized data systems”).

¹⁰² *Id.* at 1201-02 (citing *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981); *California*, 104 F.3d 1086; *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); and *Planned Parenthood v. Dandoy*, 810 F.2d 984 (10th Cir. 1987)).

¹⁰³ *Kansas*, 214 F.3d at 1202.

¹⁰⁴ See *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (“The sacrifice of all federal education funds, approximately \$250 million of 12[%] of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas’ choice.”); *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (no coercion when state would lose approximately 95% of its highway funding by failing to enact a law setting 55 miles per hour as the maximum speed limit); *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997) (no coercion when state loses portion of federal highway funds for failing to comply with requirements of Clean Air Act); *Schweiker*, 655 F.2d 401 (D.C. Cir. 1981) (no coercion when state would lose

whether “the states are faced . . . with an offer they cannot refuse or merely a hard choice.”¹⁰⁵ The reasoning of *California* and *Kansas* and the general trend in the case law against finding coercion undermine the validity of the financial inducement theory. Despite the rather large sums of money at stake, the courts generally have declined to rule that federal spending programs unconstitutionally coerce the states.¹⁰⁶ These decisions accordingly support the idea that coercion is absent when federal spending conditions do not interfere with the states’ ability to make decisions on behalf of their people.

Bucking the trend, the Fourth Circuit invalidated spending legislation under the coercion loophole in *Virginia Department of Education v. Riley*.¹⁰⁷ For the reasons outlined below, this decision uses faulty logic and ultimately fails to persuade. In *Riley*, Virginia challenged the Individuals with Disabilities Education Act (IDEA), which provides federal funding to state agencies that educate disabled students.¹⁰⁸ In order to qualify for that funding, the state agency must, among other things, “assure[] all children with disabilities the right to a free appropriate public education.”¹⁰⁹ The federal government sought to revoke its funding after discovering that Virginia maintained a policy of expelling or suspending disabled students for behavior unrelated to the student’s disability.¹¹⁰ In the federal government’s view, this policy violated the state’s duty to provide a free public education to disabled students. The Fourth Circuit ruled that the spending condition was ambiguous, and, in the alternative, that it was coercive.¹¹¹ Critical to its coercion ruling was the fact that Virginia would lose all of its federal funding under the IDEA for refusing to rescind its state policy.¹¹² In the court’s eyes, the federal government improperly used its financial muscle to impose federal policy preferences on the states.¹¹³

all federal Medicaid funds for failing to follow certain requirements in Social Security Act); *North Carolina v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *judgment aff’d*, 435 U.S. 962 (1978) (no coercion when state would lose only fifty million in federal health funds for failure to comply with requirements of National Health Planning and Resources Development Act of 1974, since state revenues in a prior year totaled \$3.1 billion). *Cf. Padavan*, 82 F.3d at 28-29 (state not coerced under 10th Amendment to incur costs for services to poor because not required to provide services; responsibilities arise, in part, out of state’s choice to participate in Medicaid spending program).

¹⁰⁵ *Schweiker*, 655 F.2d at 414; *see also, e.g., Skinner*, 884 F.2d at 448.

¹⁰⁶ *See supra* note 104 (listing cases).

¹⁰⁷ 106 F.3d 559 (4th Cir. 1997).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 560 (quoting 20 U.S.C. §1412(1)).

¹¹⁰ *Id.* at 569 (federal government threatened to withhold \$60 million, the full amount of the annual special education grant).

¹¹¹ *Id.* at 566-72.

¹¹² *Id.* at 569-72.

¹¹³ *Id.* at 570-72.

Even under a financial inducement analysis, the *Riley* decision crucially fails to evaluate whether the federal spending program actually coerced Virginia. The federal funds at stake in *Riley*—one hundred percent of the funds available under the IDEA—represented only five percent of the funds necessary to educate the state’s disabled students.¹¹⁴ It would appear, then, that the financial pressure facing Virginia to accept the federal money and abandon its policy choice was not all that great.¹¹⁵ Nevertheless, the court refused to give this argument credence, reasoning instead that individual impact is irrelevant.¹¹⁶ What mattered was that the federal government threatened to take away all of Virginia’s financing for a particular program when Virginia failed to comply with a funding condition.¹¹⁷ Notably, while several other courts have declined to enforce the coercion loophole precisely because of the difficulty (and necessity) of evaluating coercion on a case-by-case basis,¹¹⁸ the Fourth Circuit does the exact opposite and declares coercion to exist without examining the facts specific to the underlying case.

The *Riley* court also fails to consider that, rather than coercing the states into adopting federal educational policy, the IDEA merely presents the states with a choice—one that for some states might be more difficult than for other states. Virginia had to choose between maintaining the state’s chosen “disciplinary and instructional tool for instilling in its especially recalcitrant students the sense of responsibility they sorely lack,”¹¹⁹ and accepting the federal funding. Given the apparent degree of devotion to its educational policy,¹²⁰ Virginia faced a difficult decision. But the level of difficulty does not signal coercion. As long as Virginia could decide which alternative better served the interests of its people, then its decision was uncoerced.

¹¹⁴ *Id.* at 570.

¹¹⁵ Compare *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1996) (coercion when federal funds represented five percent of state education needs for disabled children) with *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (no coercion when federal funds represented approximately 12% of state education budget); *Kansas v. United States*, 214 F.3d 1196, 1198 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000) (no coercion when federal funds represented approximately 66% of child support program operating costs and 80% of computer data systems expenditures); *Nevada v. Skinner*, 884 F.2d 445, 446 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (no coercion when federal funds represented approximately 95% of state highway funds).

¹¹⁶ *Riley*, 106 F.3d at 570.

¹¹⁷ *Id.* The Fourth Circuit apparently believed that Virginia’s expulsion policy substantially complied with the federal condition that fund recipients provide a “free appropriate public education” to disabled students. *Id.* at 560, 570 (“[A] Tenth Amendment claim of the highest order lies where, as here, the Federal Government . . . withholds the entirety of a substantial federal grant on the ground that the states refuse to fulfill their federal obligation in some insubstantial respect.”).

¹¹⁸ See *supra* notes 96-106 and accompanying text.

¹¹⁹ *Riley*, 106 F.3d at 571.

¹²⁰ *Id.*

In sum, *Dole's* coercion loophole should not be used to limit federal spending power. The financial inducement analysis suggested by *Dole* is not the proper test for coercion. Rather, the proper test is whether the federal spending program prevents the state from making decisions on behalf of its people. It is on that basis which funding conditions should be evaluated.

B. The Inadequate Notice Loophole

Unlike the coercion loophole, *Dole's* inadequate notice loophole directly protects sovereign accountability. A state cannot make a full and informed choice regarding whether to participate in the federal program without understanding how the federal program will impact the state's own policy choices. Thus, the conditions imposed on a state in exchange for the receipt of federal funds are critical to a state's decision. If Congress fails to describe clearly the conditions of participation, it interferes with the state's decision-making process and the condition should not be enforced. Indeed, the Supreme Court has likened federal spending legislation to a contract,¹²¹ holding that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract."¹²² In order "to impose a condition on the grant of federal moneys, [Congress] must do so unambiguously."¹²³

Although ultimately unsuccessful, the views of four dissenting justices in *Davis v. Monroe County Board of Education* underscore the importance of the inadequate notice loophole in maintaining the federal balance.¹²⁴ *Davis* involved a challenge to Title IX of the Education Amendments Act of 1972, which prohibited sexual discrimination in educational programs or activities that received federal funds.¹²⁵ The question was whether "a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment."¹²⁶ The answer to that question turned on whether funding recipients had adequate notice that they would be liable financially for certain instances of

¹²¹ *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

¹²² *Id.*

¹²³ *Id.* The federalism principle underlying the notice requirement in the spending context is akin to that underlying the clear statement rule applicable in the Eleventh Amendment context. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

¹²⁴ 526 U.S. 629 (1999).

¹²⁵ *Id.*

¹²⁶ *Id.* at 639.

student-on-student harassment.¹²⁷ Five members of the Court, led by Justice O'Connor, ruled that Title IX provided adequate notice. The prohibition against sexual discrimination in educational programs or activities receiving federal financial assistance included a prohibition against "deliberate indifference to known acts of peer sexual harassment," making such indifference actionable under Title IX.¹²⁸

The dissent vigorously (and rightly) argued that the Court should strictly interpret and enforce the notice requirement, calling it a "vital safeguard for the federal balance."¹²⁹ The dissent warned that, "if wielded without concern for the federal balance, [the spending power] has the potential to obliterate distinctions between national and local spheres of interest."¹³⁰ The dissenters' views emphasize the important function served by the inadequate notice loophole, and signal that at least four members of the Court are interested in seriously reviewing spending conditions for compliance with the notice requirement as a way of preventing federal intrusion "in the most sensitive areas of traditional state concern."¹³¹

The *Davis* dissenters might have another opportunity to persuade their colleagues of their position, for a case before the Court this Term might very well involve application of the inadequate notice loophole. *Alexander v. Sandoval* raises the question whether recipients of federal funding are subject to an implied private right of action for violation of an implementing regulation of Title VI of the Civil Rights Act of 1964.¹³² Title VI prohibits race and national origin discrimination by recipients of federal funding, but does not specifically prohibit programs that result in a disparate impact on groups of a certain race or nationality.¹³³ In-

¹²⁷ *Id.* at 640.

¹²⁸ *Id.* at 648.

¹²⁹ *Id.* at 655 (Kennedy, J., dissenting). Justice Kennedy was joined in dissent by Chief Justice Rehnquist and Justices Scalia and Thomas.

¹³⁰ *Id.* at 654. The private cause of action under Title IX is implied by the judiciary. *Id.* at 656 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)). The dissent points out that determining the scope of a judicially implied cause of action is particularly tricky when the legislation is enacted under the spending power precisely because of the "significant tension with the requirement that the Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Davis*, 526 U.S. at 656. In the dissent's view, Title IX in no way provided adequate notice that educational grant recipients would be financially liable for failing to remedy student-on-student discrimination. *Id.*

¹³¹ *Davis*, 526 U.S. at 655.

¹³² 121 S. Ct. 652 (2000).

¹³³ *Sandoval v. Hagan*, 197 F.3d 484, 495-96 (11th Cir. 1999). Section 601 of Title VI provides in relevant part as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d (2000). In *Guardians Ass'n v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983), a majority of the Court, in a splintered decision, concluded that section 601 requires a showing of intentional discrimination. *Id.* at 607-08

stead, the implementing regulations to Title VI contain the disparate impact prohibition.¹³⁴

From the viewpoint of the *Davis* dissenters, a legitimate question could arise regarding whether implementing regulations provide the requisite notice under spending power principles.¹³⁵ Indeed, that issue arose during oral argument before the Court.¹³⁶ Because the notice requirement promotes federalism interests by protecting state sovereign accountability, there is a strong argument that states should receive actual notice in the text of the statute, rather than through an agency's implementing regulations. Congress, not federal agencies, should shoulder the respon-

and n.1 (opinion of Powell, J., in which Burger, C.J. and Rehnquist, J., joined); *id.* at 612 (opinion of O'Connor, J.); *id.* at 634 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined).

¹³⁴ Section 602 of Title VI delegates to federal agencies the power to implement regulations enforcing Title VI. 42 U.S.C. §2000d-1 (2000). The Department of Justice regulation at issue in *Sandoval* provides as follows:

A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. 28 C.F.R. § 42.104(b)(2) (2000).

The Court also held in *Guardians* that the federal implementing regulations may proscribe disparate impact discrimination, even when the text of the statute proscribes only intentional discrimination. *Guardians*, 463 U.S. at 584 (White, J.); *id.* at 623 n. 15 (opinion of Marshall, J.); *id.* at 634 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined). *See also* *Alexander v. Choate*, 469 U.S. 287, 293-94 (1985) (explaining the *Guardians* decision).

¹³⁵ To the *Davis* dissenters it is an open question whether implementing regulations provide adequate notice under the Spending Clause. *See Davis*, 526 U.S. at 669 ("Even assuming that [Department of Education] regulations could give schools the requisite notice, they did not do so.")

¹³⁶ The following colloquy occurred during oral argument between Solicitor General Seth P. Waxman and a member of the Court:

QUESTION: My only thought, [substantive regulations mandated by statute] may have the force of law, but they may not have the force of the unequivocal for purposes of the Spending Clause.

GENERAL WAXMAN: Well, I don't think I can do better than simply to repeat what I—the point I hope that I had made, which is, there is no case suggesting that for purposes of enforcing a Spending Clause obligation there is a distinction in recognizing a cause of action based on a statute, or on regulations that the funding agency is mandated to put forward. The principle—

QUESTION: But there's no case suggesting there isn't, either. I mean, I think Justice Souter's point was that this is an area where there is no precise authority one way or the other.

GENERAL WAXMAN: Correct. What we have on our side is, I believe, a completely unbroken practice of enforcing obligations under both the Spending Clause and otherwise equally, whether they arise within the four corners of the statute, or under substantive regulations that are mandated by the statute."

Transcript of Oral Argument Before Supreme Court of United States, 2001 WL 55359, at **43-44 (99-1908) (January 16, 2001).

sibility for making difficult policy decisions that implicate sensitive federalism concerns.

Whatever the result in *Sandoval*, the Court's analysis of the notice issue should undertake serious evaluation of whether the states had adequate warning that local regulations and policies causing a discriminatory impact would subject the states to private rights of action. Without such a warning, the states cannot be said to have agreed to the condition, and should not be bound by it.

C. The Insufficient Relatedness Loophole

The Court in *Dole* declined to delineate the "outer bounds" of the relatedness requirement, concluding only that the minimum drinking age condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."¹³⁷ In her dissent, Justice O'Connor disagreed with the Court's application of its relatedness standard, arguing that the minimum drinking age was both "over and under-inclusive," and accordingly had "an attenuated or tangential" relationship with the purpose of highway safety.¹³⁸ She also appeared to urge the adoption of a more strict relatedness standard—one that differentiates between conditions that specify how the federal grant should be spent, and those that do not.¹³⁹ Conditions in the former category would be sufficiently related to the federal program while conditions in the latter category would not.¹⁴⁰

The proper standard for relatedness, however, is irrelevant to the question whether the insufficient relatedness loophole protects sovereign accountability. Whatever the degree of relatedness between the funding condition and the purpose of the federal funding program, it will not impact a state's ability to make a choice regarding whether to participate in the federal program. In fact, with a modicum of effort states considering participation in a federal spending program should be able to discern the degree of relatedness between the funding condition and the purpose of the federal program. Like the amount of funding at stake, the degree of relatedness might very well impact a state's ultimate decision.

¹³⁷ *South Dakota v. Dole*, 483 U.S. 203, 208 n.3 (1987). The Court specifically declined to consider whether the 'directly related' standard was the minimum standard. *Id.*

¹³⁸ *Id.* at 214-15 (O'Connor, J., dissenting).

¹³⁹ Compare *id.* at 216 (O'Connor, J., dissenting) (appearing to offer new standard for relatedness) with *New York v. United States*, 505 U.S. 144, 167 (1992) (mentioning the relatedness requirement, but this time stating only that there must be "some relationship" between the condition and the purpose of the federal spending program).

¹⁴⁰ *Dole*, 483 U.S. at 215-16. For a persuasive critique of Justice O'Connor's proposal, see Engdahl, *supra* note 12, at 56-62 (arguing that it is far too strict, and that it "reiterate[s] exactly the Butler majority's monumental error, parading Madison in masquerade of Hamilton once more").

It does not, however, literally prevent a state from knowingly choosing for or against the federal program. So while courts might enforce the insufficient relatedness loophole to achieve other goals,¹⁴¹ they should not do so in order to protect the states from interference with sovereign accountability.

In sum, sovereign accountability lies at the very heart of our federalism structure. It protects individual liberty by ensuring that the states are both responsive and accountable to their citizens. While the *Dole* Court created three possible loopholes through which federalism limits might emerge, only one—the inadequate notice loophole—actually protects and promotes sovereign accountability.

Part IV will consider an alternate justification for enforcing some or all of the *Dole* loopholes. Specifically, Part IV argues that regardless of whether the loopholes implicate sovereign accountability, they nonetheless should be enforced if enforcement would encourage Congress to live up to its constitutional responsibility to respect the federal balance.

IV. ENCOURAGING CONGRESSIONAL RESPECT FOR STATE SOVEREIGN ACCOUNTABILITY

The judicial branch is not alone in its charge to protect our federal structure. Congress too possesses a responsibility to mind the federal balance. As Justice Kennedy asserted in his *United States v. Lopez* concurrence, “the political branches [must not] forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.”¹⁴² When Congress fails in its responsibility, the courts step in to correct the balance.¹⁴³ The threat of judicial oversight, and possible invalidation of its legislative efforts, likely would encourage Congress to pursue its constitutional powers in a manner that respects the federal balance.¹⁴⁴ This incentive is a desirable byproduct of judicial review, and provides a justification for courts to weigh in on federalism issues.¹⁴⁵ In addition to

¹⁴¹ See *infra* notes 153-67 and accompanying text.

¹⁴² 514 U.S. 549, 577 (1995).

¹⁴³ *Id.* at 578 (“[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”).

¹⁴⁴ This ‘congressional encouragement’ idea is not grounded in a *Garcia*-type theory. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Unlike *Garcia*, it does not leave the protection of federalism solely with Congress. Rather, it merely acknowledges that judicial enforcement of federalism boundaries can serve the useful purpose of encouraging Congress to be mindful of its own limitations.

¹⁴⁵ In a recent article on federalism, Professor Richard E. Levy noted this effect, calling it the “political dynamics of federalism.” Levy, *supra* note 10, at 1664 (the Court’s federalism jurisprudence has “effected a significant change in the political dynamics of federalism” by forcing Congress to “exercise greater care in its choice of federal powers, develop the

protecting sovereign accountability, the courts should enforce rules that are designed to encourage Congress to mind federalism limits in the first instance.

A. The Coercion Loophole

Invalidating spending legislation because of the weight of its financial pressure on the states (to use the *Dole* definition of coercion) would send a signal to Congress that it needs to be more sensitive to state sovereignty concerns. It would remind Congress to be cognizant of state interests and authority when it drafts legislation. Nevertheless, there are compelling arguments against using the *Dole* coercion loophole for this purpose. First, the *Dole* coercion loophole would be too blunt an instrument to remedy congressional insensitivity to federalism interests. While Congress likely would get the message that it needs to take state interests into account when legislating under the Spending Clause, the price of communicating that message to Congress is too great, as it would result in the invalidation of proper exercises of the spending power. As argued above in Part III, spending legislation does not cross a constitutional line simply because it seduces the states with financial assistance. Presenting the states with a hard choice is Congress's prerogative.¹⁴⁶ Using the recent BAC legislation as an example, those states that have both a great need for federal funds *and* a state policy inconsistent with the .08 BAC standard face a difficult choice, and ultimately one that might be decided in favor of the particular state's financial needs. However, as long as the decision-making process remains unimpaired, coercion is absent. If the *Riley* decision provides any indication of how courts would enforce the *Dole* coercion loophole, then the danger of unnecessarily curbing Congress's power is indeed too great.

Second, putting aside the question whether, as a general matter, courts should invalidate valid legislation as a means of encouraging Congress to be sensitive to federalism issues, courts should not do so in this situation because it is difficult for Congress to come up with finely calibrated and successful solutions to financial coercion problems. Financial coercion must be determined on a case-by-case basis.¹⁴⁷ What is financially coercive to

necessary record to support its judgments, and express its conditions and requirements clearly and explicitly"). See also Epstein, *supra* note 8, at 555 (Even if *Lopez* does not "result in any watershed change in congressional authority, it may enhance congressional care and creativity in the evolving areas of federalism.").

¹⁴⁶ See *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 623 (2000); *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981).

¹⁴⁷ See *Skinner*, 884 F.2d 445. *But see* *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997).

one state might not be financially coercive to another state.¹⁴⁸ A state with a budget surplus, for example, might not be subject to coercion under the financial inducement theory.¹⁴⁹ However, a state without such a surplus would seem more vulnerable to *Dole*-type coercion. If legislation is found coercive with respect to one state, Congress can decrease the financial penalties for failure to comply with the funding condition. It cannot, however, be sure that its “fix” will not coerce *another* state that might be more dependent on federal funds. Unlike problems with notice and relatedness, which are relatively easy to fix,¹⁵⁰ problems with coercion are not. If the goal of judicial intervention is to influence Congress to regulate with due regard for states’ interests, sending Congress back to the drawing board for violations of the coercion loophole does not appear to be the most useful exercise. If Congress cannot easily fix the coercion problem, then invocation of the *Dole* coercion loophole serves only to invalidate properly made democratic choices.

B. The Inadequate Notice Loophole

Cases such as *Davis* and *Sandoval* invite welcome challenges to spending conditions based on the inadequate notice loophole.¹⁵¹ This loophole directly protects federalism interests by enabling states to make informed decisions regarding whether participation in a federal spending program will be consistent with the wishes of their constituents. If a state persuades the Court to invalidate a spending condition under the inadequate notice loophole,¹⁵² that ruling wipes out the condition, leaving Congress free

¹⁴⁸ Indeed, it is arguable that what is coercive to one state at a particular point in time might not be coercive to that same state at an entirely different point in time.

¹⁴⁹ See *North Carolina v. Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), *judgment aff’d*, 435 U.S. 962 (1978) (no coercion when state would lose \$50 million in federal health funds and state revenues in prior year totaled \$3.1 billion). Budget surpluses have become increasingly common. See Ronald D. Picur, *Managing Fiscal Slack: You have a Surplus . . . Now What?*, 16 GOV’T FIN. REV. No. 3, at 7 (discussing how to deal with state budget surpluses, and noting that “the National Association of State Budget Officers . . . reports that fiscal year 2000 will represent the seventh consecutive year that general fund balances (on average) will exceed 5% of annual expenditures”). Several states that have enjoyed recent budget surpluses actually have offered to return some of the surplus to taxpayers. See Patrick Cole, *Sales-Tax Rebate Crosses Border [-] Wisconsin Extends Relief to Non-Residents, but there’s a Catch*, CHI. TRIB., Nov. 25, 1999, at 1 (“Wisconsin joins a number of other states, including Minnesota, Alaska, Oregon, Missouri, that have had huge budget surpluses in the past year and offered some sort of tax rebates.”).

¹⁵⁰ See *infra* Part IV, at B, C.

¹⁵¹ See Levy, *supra* note 10, at 1655 (“At a practical level, it appears the key question may be how clearly Congress must express the condition in order for the courts to recognize it.”).

¹⁵² Justice O’Connor is the critical fifth vote in this area, and her role as the author of *Davis* suggests that she would need to see a fairly egregious violation of the notice requirement before signing on with the *Davis* dissenters.

to amend the spending statute to include the appropriate level of clarity.

Aside from correcting problems with individual spending programs, use of the inadequate notice loophole provides guidance to Congress regarding how to respect state boundaries and encourages Congress to provide unambiguous notice of the spending conditions *before* the courts step in. No matter what the outcome of such challenges, whether it is knocking out an ambiguous condition or upholding an unambiguous condition, the challenges will promote congressional compliance with the notice requirement. Invalidating a funding condition obviously vindicates state interests. Even if the state is unsuccessful, the very act of challenging the condition serves the worthwhile purpose of keeping Congress in check. It reminds Congress to consider the federalism implications of its legislation, and encourages Congress to legislate within constitutional limitations.

Improving the clarity of conditions in spending legislation should prove a much easier task than eliminating financial coercion. Using the *Sandoval* case as an example, if the Court were to prohibit disparate impact suits against the states because of the lack of adequate notice in the text of Title VI, it should be fairly simple for Congress to redraft the statute to make clear that the prohibition against discrimination contained in the statute itself covers both discriminatory intent and effect, and that fund recipients will be subject to suit under both theories. Because clarity is an objective concept, once Congress successfully redrafts the statute to provide unambiguous notice, the statute should not be subject to later attack by other fund recipients.

C. The Insufficient Relatedness Loophole

Like the inadequate notice loophole, enforcing the insufficient relatedness loophole will encourage Congress to be sensitive to federalism boundaries. By requiring a sufficient degree of relatedness between the spending condition and the purpose of the federal spending program, the relatedness requirement represents a limit on the substance of the conditions Congress may impose on the funding recipients. Thus, it implicitly acts as a limit on the extent to which federal legislation may intrude upon traditional state concerns. Only those conditions with a sufficient nexus to the purpose of the federal spending program will be tolerated. Accordingly, enforcing the relatedness requirement should serve to encourage Congress to craft conditions that, while achieving the federal purpose, also respect federalism boundaries.

Here the standard for relatedness becomes relevant, since the standard for any rule must be informed by the purpose the rule is

designed to achieve. Justice O'Connor is not alone in calling for a more strict relatedness standard.¹⁵³ Critics of *Dole* argue that a more rigorous standard is necessary in order to rein in the reach of federal power.¹⁵⁴ In Justice O'Connor's view, a loose relatedness requirement would "render academic the Constitution's other grants and limits of federal authority."¹⁵⁵ She accordingly proposed a relatedness standard that would distinguish between spending conditions stating how the federal money should be spent¹⁵⁶ and spending conditions that regulated the states.¹⁵⁷ The former always would be permissible, and the latter would be permissible only when valid under Congress's other enumerated powers.¹⁵⁸ In Justice O'Connor's view, the legislation in *Dole* fell in the latter category as it was simply "a regulation determining who shall be able to drink liquor."¹⁵⁹ Thus, to be valid it must fall under one of Congress's other enumerated powers.

Professor Baker also proposed a relatedness standard designed to limit federal overreaching. Her proposal would invalidate spending conditions that "regulate the states in ways that Congress could not directly mandate," unless the spending program constitutes "reimbursement spending." Reimbursement spending legislation specifies the purpose of the federal spending program and reimburses the state for its expenses in achieving that purpose.¹⁶⁰ Professor Baker's proposal limits (but does not eliminate) Congress's ability to use its spending power to circumvent the limitations on its other enumerated powers.¹⁶¹

On the other side of the spectrum is Professor Engdahl, who has argued against having a relatedness requirement. In his view, a relatedness requirement is unnecessary and contradicts the Hamiltonian view of the spending power by restricting the purposes for which Congress may spend: "[A]ny time the notion of a germaneness requirement is even taken seriously it puts Hamilton and his view of the spending power out of reach."¹⁶²

¹⁵³ See, e.g., Baker, *supra* note 8, at 1962-68; Mitchell, *supra* note 12, at 193-94.

¹⁵⁴ 483 U.S. 203, 216-17 (1987) (O'Connor, J., dissenting); Baker, *supra* note 8, at 1962-68.

¹⁵⁵ *New York v. United States*, 505 U.S. 144, 167 (1992).

¹⁵⁶ As an example of this type of condition, Justice O'Connor cites *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947), in which the Court upheld a provision of the Hatch Act prohibiting political activities by state employees whose employment was funded at least in part by federal funds. *Dole*, 483 U.S. at 217.

¹⁵⁷ *Dole*, 483 U.S. at 215-16 (O'Connor, J., dissenting).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 218.

¹⁶⁰ Baker, *supra* note 8, at 1962-63.

¹⁶¹ Professor Baker's proposal does not limit Congress's spending authority to its enumerated powers; Congress may spend for purposes beyond its enumerated powers, as long as the spending simply reimburses the states for its efforts to achieve the federal spending purpose. Baker, *supra* note 8, at 1966-67.

¹⁶² Engdahl, *supra* note 12, at 54-62; *id.* at 62.

Despite these criticisms of the standard applied in *Dole*,¹⁶³ this article endorses the *Dole* standard for two reasons: First, it best reflects the purpose of the relatedness requirement, and second, it preserves the broad scope of the spending power. The spending power permits Congress to spend in the name of the general welfare.¹⁶⁴ In exercising that power, Congress may reach beyond, and is not limited by, its other enumerated powers.¹⁶⁵ Accordingly, any definition of relatedness that limits the substantive scope of the general welfare phrase to those objects contained within the other enumerated powers, as would the proposal by Justice O'Connor and, to some extent, the proposal by Professor Baker, would cut back on the legitimate, sanctioned scope of the spending power.¹⁶⁶ Rather than limiting the purposes for which Congress may spend (and thereby limit the definition of general welfare), the relatedness requirement should be interpreted as limiting the range or substance of conditions Congress may impose when it enacts spending legislation that is within the broad scope of the spending power. This interpretation of the relatedness requirement would limit Congress's ability to interfere with state authority when it spends for the general welfare, but would not limit the general welfare phrase.

While admittedly not an overly stringent standard, the *Dole* standard nevertheless imposes a limit on congressional options. Under this standard, for example, Congress would not be permitted to condition federal highway funds on the states' agreement to provide subsidized general medical care to the elderly. It is difficult to conceive of any purpose of federal highway spending that directly relates to the need to maintain the general health of our nation's elderly. The *Dole* standard accordingly establishes some limits on Congress's ability to interfere with state prerogatives when invoking its spending power. At the same time, however, the direct relationship standard preserves the broad scope of the spending power permitted under the Constitution, because it does not attempt to limit spending purposes to those embodied in the other enumerated powers.

Finally, unlike enforcement of the *Dole* coercion loophole, enforcement of the insufficient relatedness loophole does not cut back on congressional authority in the spending context, since a baseline requirement for all federal legislation is that the means

¹⁶³ The *Dole* Court found that the condition in *Dole* was directly related to the purpose of the federal spending program—highway safety. It declined to address, however, whether spending conditions must be “directly related” to the purpose of the federal funding program, or whether a less direct relationship would suffice. *Dole*, 483 U.S. at 208 n.3. This article supports the ‘direct relationship’ standard that was applied in *Dole*.

¹⁶⁴ U.S. CONST. art. I, § 8, cl. 1.

¹⁶⁵ *United States v. Butler*, 297 U.S. 1, 65-66 (1936); *Dole*, 483 U.S. at 207.

¹⁶⁶ See Engdahl, *supra* note 12, at 61-62.

(here the condition) rationally relate to the ends (here the purpose of the federal spending program).¹⁶⁷ The relatedness requirement already exists as a limit on congressional power, and it has the added benefit here of encouraging Congress to take federalism concerns seriously.

CONCLUSION

The evidence suggests that the Supreme Court's recent federalism campaign will (and should) make one of its next stops at the Spending Clause. The logical question, then, is how the spending power ought to be limited in order to protect federalism interests. The Court created three possible federalism loopholes in its Spending Clause analysis that might be utilized either to impose federalism-based limitations or to encourage Congress to be more sensitive to federalism boundaries and concerns. This article argues that, of the three loopholes, only the inadequate notice and insufficient relatedness loopholes ought to be used to promote federalism interests.

The *Dole* coercion loophole, which the states have pushed rather heavily in recent litigation, should not be used to limit federal spending power. As defined in *Dole* to mean financial inducement, that loophole would seem to invalidate any federal program that is simply too good to pass up. In the federalism context, however, coercion is not about financial pressure or inducement; rather, it is about preserving the states' sovereign accountability. It is about protecting the ability of the states to make decisions implementing the will of the people, and being accountable for those decisions. No matter how much financial pressure a state might feel to take part in a federal program, the federal program is not coercive as long as it does not disable the state from choosing how best to serve the interests of its people. Moreover, even though use of the coercion loophole might actually encourage Congress to be less aggressive in its use of financial conditions, the coercion loophole is too strong a medicine to cure congressional insensitivity because it would cut too far into the legitimate scope of the spending power.

The inadequate notice loophole, on the other hand, should be utilized to promote federalism interests. Requiring sufficient legislative notice regarding the consequences of participating in the spending program enables a state to make choices on behalf of its people. Moreover, invoking this federalism loophole encourages

¹⁶⁷ See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3, at 805 (3d ed. 2000) (The rational relationship standard enunciated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "is the primary standard for judicial review of legislative action.").

Congress to draft its legislation more carefully, with due regard for the states' interests. And while the insufficient relatedness loophole does not impact the states' ability to implement the will of their constituents, it should be invoked in order to influence Congress to be sensitive to federalism concerns, thereby limiting the intrusion into state sovereignty.

The inadequate notice and insufficient relatedness loopholes provide the Court ample leeway to implement its federalism goals. As the *Davis* dissenters pointed out, the notice requirement is a "vital link" in preserving federalism. Similarly, the relatedness requirement, as applied in *Dole*, should allow the Court to invalidate programs that unduly interfere with state interests, because it prohibits conditions that bear no direct relationship to achieving the purpose of the spending program. Strictly enforcing these requirements will go a long way toward protecting the federal balance.