Protecting the Spending Power

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

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

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

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

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

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

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

I. CONGRESS'S SPENDING POWER SHOULD BE BROADLY INTERPRETED

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

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

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

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4 U.S. CONST. art. I, § 8, cl. 1.

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

6 *See* ALEXANDER HAMILTON, 1791 REPORT ON THE SUBJECT OF MANUFACTURES (1791), *reprinted in* 10 PAPERS OF ALEXANDER HAMILTON 230, 302-04 (Harold C. Syrett ed., 1966)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 330 U.S. 127 (1947).

20 *Id.* at 143.

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

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

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

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

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

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

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

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

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

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

B. The Tenth Amendment Should Not Limit The Spending Power

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

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

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

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

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

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

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

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

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

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

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

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

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

40 500 U.S. 173 (1991).

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

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

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

44 *Id.*

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

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

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

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

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45 *Id.* at 175

46 *Id.* at 161.

47 *Id.* at 188.

48 521 U.S. 898 (1997).

49 18 U.S.C. §§ 921-925A (1994).

50 Printz v. United States, 521 U.S. 898, 905 (1997).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 *Id.* at 144.

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

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

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

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

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

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

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

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

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

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

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

62 469 U.S. 528 (1985).

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

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

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

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

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63 426 U.S. 833 (1976).

64 *Id.* at 852.

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

66 *Id.* at 546.

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

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

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

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

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

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

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

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

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

70 29 U.S.C. § 704 (1994).

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

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

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

> [T]he Arkansas Department of Education can avoid the requirement of Section 504 simply by declining federal funds. The sacrifice of all federal education funds, approximately $250 million or 12 per cent. of the annual state education budget . . ., would be politically painful, but we cannot say that it compels Arkansas's choice. . . . The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.[73]

CONCLUSION

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

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