THE SPENDING POWER

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INTRODUCTION

The pervasive influence of the federal government in modern American life is attributable in significant part to Congress's manipulation of federal funds. The social issues occasioning spending programs, the diminution of choice and diversity many spending conditions entail, and the deficit consequences that have resulted from spending at accustomed levels all have engendered much discussion. However, the constitutional question of Congress's "power" to spend (including its ability to oblige compliance with its wishes as a "condition" of federal financial assistance) has received relatively little attention from legal scholars.¹

As a consequence, the conceptual premises of this extremely important federal activity are almost universally misunderstood. The problems that result from this misunderstanding are not merely problems of theory, for in this realm, legal theory has immediate economic consequences and practical effects. Confused premises tend to subvert rational planning and produce anomalous surprises. Later in this Article the reader will confront several recent U.S. Supreme Court cases incompatible with spending power premises to which the Court still claims to adhere. Some have gone virtually unnoticed, while others have provoked controversy or alarmed surprise. In each category, some have comported with sound constitutional analysis while others have not. As to the latter cases, however, spending power reasoning has been flawed so subtly and for so long that no one among the disaffected has been able to explain what went wrong.

For more than half a century it has been common ground among constitutional scholars and lawyers that "[t]he conception of the spending power advanced by Hamilton... has prevailed over that of Madison...."² Every law student is exposed, at

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¹ The worthwhile articles on this topic can almost be counted on the fingers of one hand, and none of these has undertaken to do what is attempted here.
least in meager fashion, to the classic contrast between those Founders on this point. It therefore should seem rather important to understand Hamilton's view. However, the majority Justices in United States v. Butler, the 1936 case that first explicitly endorsed Hamilton's view, manifestly did not: they declared that Hamilton had it right but so misunderstood him that they actually decided the case according to the contrary, restrictive Madisonian view.

The famous Social Security Act cases of the next year—Steward Machine Co. v. Davis and Helvering v. Davis—typically are viewed as having corrected Butler's error, affirming its endorsement of Hamilton but applying his view correctly. Most editors of constitutional law teaching materials have opted to give students chopped versions of one or both of the 1937 opinions and then change the subject. No casebook, nor either of the major constitutional law treatises, attempts any critique of Helvering or Steward.

A rigorous critique is warranted, however. While the bare results in Steward and Helvering (unlike those in Butler) are consistent with Hamilton's view, the opinions certainly are not. Rather, they display essentially the same conceptual error, the same profound misunderstanding of Hamilton, as the opinion in Butler; the error simply manifests itself in a converse way.

In 1937 the Justices were in the midst of difficult intellectual struggles, not only against one another but each within himself. Several were beginning to break free of "dual federalism," a twisted view of the Constitution that had risen to dominance after the first third of the nineteenth century, long after Hamilton was dead. The errors of dual federalism were subtle, tenacious, and pervasive, and purging them after a hundred years was not an afternoon's task. The Justices' recovery of classic constitutional principles beginning late in the New Deal era was no simple turn-

(1987); id. at 212-13 (O'Connor, J., dissenting).
3. 297 U.S. 1 (1936).
4. The Butler opinion is examined infra Part II(B).
5. 301 U.S. 548 (1937).
7. Both opinions are examined infra Part II(B).
8. 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW § 5.7, at 349-56 (1986); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-10, at 321-23 (2d ed. 1988).
9. Some features of dual federalism are identified infra notes 21-34 and accompanying text.
around—no "switch in time to save nine"—but rather a complex, difficult, and slow intellectual process. Each Justice willing to reconsider dual federalism at all had to first sense intellectual fault in dual federalism reasoning and then unthink and rethink conceptions that had trammelled good minds for generations. When the Social Security Act cases were decided in 1937, that process had not yet been completed in any of the Justices’ minds.10

Because the immediate impact of the holdings in Steward and Helvering was politically popular, and because the opinions seemed not only eloquent but sufficiently cogent, the conceptual error that prevented the Justices from accurately understanding Hamilton went unnoticed. Not until a few years later had most of the Justices pursued the intellectual ascent from dual federalism far enough that Hamiltonian results in a spending power case could be reached without the misfortune of a seriously confused and misleading rationale.

Part I of this Article systematically examines Hamilton’s view of the power to spend. Part II examines Butler, Steward and Helvering, each of which expressly endorses Hamilton’s view but none of which reflects any real understanding of it. Part III examines the subsequent cases (including the most recent ones), considering to what extent they are consistent with the Hamiltonian view they nominally endorse and how differently others like them must be decided if true conformity to Hamiltonian principle is to be maintained.

I. THE CONCEPTS

A. Hamilton's View of the Spending Power

1. The Principle of Enumerated Powers. No one today candidly denies that Hamilton's view of the spending power was correct. However, most of those who purport to endorse him seriously misconceive what he said. In order to grasp accurately Hamilton's spending power view, one must understand the generic constitutional principles of which it was simply an application.

The prime political postulate of the early Americans was that sovereignty inheres in the people. They therefore maintained that governments "deriv[e] their just powers from the consent of the governed." This principle meant that the only powers governments legitimately could exercise were those delegated to them by the people. When people from the several American states sought a greater degree of national integration than existed under their Articles of Confederation, yet desired that most matters still be governed by their respective states, the "delegated power" concept remained applicable, but the people faced the additional problem of allocating the delegated power of governance between different hands.

It was easily agreed that the nation should handle national matters and govern what the states separately could not, while states should continue to govern what they could. Thus, the delegates to the 1787 Constitutional Convention easily approved the Eighth Randolph Resolution, which provided that the national legislature should be competent "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."12

The delegates also realized, however, that so general a proposition would entail considerable difficulties of application, because it left vast room for disagreement over which characterization should apply to each governable matter conceived. To ameliorate

11. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
this problem, those who framed the Constitution particularized the
generalization by enumerating the powers delegated to the nation.

Enumeration at first had been eschewed, because the miserly
allocation of central authority under the Articles of Confederation
had proved crippling. Madison himself had “a strong bias in favor
of an enmeration [sic]” but also had “doubts concerning its prac-
ticability.”13 The critical step toward enumeration was taken in
the Committee of Detail, a committee of five delegates chosen on
July 24 “To report a Constitution conformable to the Resolutions
passed by the Convention.”14 The lead in translating the sub-
stance of Randolph’s Sixth Resolution into the format of “enu-
merated powers” was taken by Committee member James Wilson,
who had begun thinking about the enumeration technique five
weeks earlier while comparing the Randolph Resolutions with the
alternate plan William Paterson of New Jersey had proposed.
Under Randolph’s generalization, Wilson noted, “the Natl. Legis-
lature is to make laws in all cases to which the separate States are
incompetent,” whereas under Paterson’s Congress “[is] to have
additional power [beyond that of the Confederation Congress] in a
few cases only.”15 By the time the Detail Committee set to work,
Wilson had decided that enumeration would be a useful technique
even though the national government should have power less
restricted than Paterson had urged. The powers enumerated could
be few or many, miserly or grand, but in either event the limits
would be subject to less disagreement than under such general
language as was used in the Randolph plan.

As Wilson later explained at his own state’s ratification con-
vention,

It was easy to discover a proper and satisfactory principle on the
subject. Whatever object of government is confined in its opera-
tion and effects within the bounds of a particular state, should be
considered as belonging to the government of that state; whatev-
er object of government extends in its operation or effects be-
yond the bounds of a particular state, should be considered as
belonging to the government of the United States. But though
this principle be sound and satisfactory, its application to particu-
lar cases would be accompanied with much difficulty; because, in

13. 1 id. at 53 (James Madison).
14. 2 id. at 106 (James Madison).
15. 1 id. at 252 (James Wilson).
its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.\textsuperscript{16}

Enumeration certainly did not obviate all disagreement over the extent of federal power. Room for difference still remained in construing each particular grant,\textsuperscript{17} and as to some, the latitude left was substantial. Wilson was rather too sanguine in claiming that "the enumeration will be found to be safe and unexceptionable; and accurate, too . . . ."\textsuperscript{18} The sufficiency of the enumerated particulars to exhaust all that was comprehended by the agreed generality, as James Madison would note in \textit{The Federalist}, was inevitably affected by the human frailties of perception, conception, and expression.\textsuperscript{19} It still is, of course; now, after two centuries, it also is affected by the changed conditions of later times.

Nonetheless, the principle of enumerated powers still is the fundament of American federalism law. Unfortunately, this principle is commonly misrepresented and misunderstood. Some seem to

\begin{enumerate}
  \item \textsuperscript{17} As Chief Justice Marshall recognized, "This government is acknowledged by all to be one of enumerated powers . . . . But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." \textit{M'Culloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 405 (1819).
  \item \textsuperscript{18} Wilson's complete statement sounds a bit less like Pollyanna.
    It is only in mathematical science, that a line can be described with mathematical precision. But I flatter myself that, upon the strictest investigation, the enumeration will be found to be safe and unexceptionable; and accurate too, in as great a degree as accuracy can be expected in a subject of this nature.
    \textit{Wilson, supra} note 16, at 764.
  \item \textsuperscript{19} \textit{However accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined . . . . Here then are three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between the Federal and State jurisdictions, must have experienced the full effect of them all. \textit{The Federalist} No. 37, at 236–37 (James Madison) (Jacob E. Cooke ed., 1961).}
\end{enumerate}
think it a blockade against federal action on various matters. Others seem to think it a quaint relic of simpler times, worthy of lip service at most. In fact, like any mental construct designed to moderate action (such as a responsible budget), the principle of enumerated powers can work only if and when it is considered worth adhering to. It is far more likely to be esteemed, and thus followed, if it is considered in terms of its purpose and overall design, rather than as a merely formal rule.

There is too little space here for an extensive review of the social and political advantages of federalism or the policy merits of legal differentiation between state and federal roles. The ultimate reason for allocating power between the nation and the states was and is to accommodate the advantages of unity and scale on matters of common interest and the responsibility or accountability essential to popularly representative government. The purpose is not to debilitate governance, but to enhance popular influence on public policy choices and to improve answerability for their consequences. In the practical world, where bare power and lofty motives alike tend to undervalue competing interests, fragmenting and decentralizing authority can increase access and accountability at a price in efficiency that is generally thought to be tolerable to pay.

When interests collide, altercations over allocations of authority are likely. It usually is preferable that such altercations take the form of rational argument rather than defiant, perhaps violent acts. Rational argument employs words, the relations among them, and the ideas that the words and their relations denote or connote. Rational argumentation with words is capable of persuading at least some whose interests otherwise predispose them, because in most humans much of the time the rational function is capable of constraining even the will.

These circumstances give great practical significance to the principle of enumerated powers. Allocating roles or functions by relatively particularized words and phrases rather than a more highly generalized proposition, and doing so in a written text that

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is widely acknowledged to have solemn force, enhances the opportunity for rhetoric and polemics: it multiplies the verbal and grammatical possibilities for argument toward correlating governing power with political responsibility (or, in simpler terms, toward dispersing and limiting governing power).

Unfortunately, the idiom of enumerated "powers" permits imagining governing competence as "territory" or "turf" marked off into segments, or a pie sliced and distributed. That misconception is the essence of "dual federalism," which posits discrete "sovereignties" separately relating to the same people, each with paramount or exclusive competence for certain, different purposes, and each foreclosed from interference with the other.\(^{21}\)

While the idiom of enumerated powers is susceptible to that misconception, however, that is not its import. A "power" is not a "thing," occupying physical space and displacing others. It is merely an abstraction. That noun is verbal shorthand for other nouns,

\(^{21}\) The dual federalism error is seductive enough that even Chief Justice John Marshall gave it some countenance in an ill-considered dictum. Counsel had argued in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824), that Congress's power to regulate interstate commerce imports "full power over the thing to be regulated" and "excludes, necessarily, the action of all others that would perform the same operation on the same thing." Marshall responded for the Court, "There is great force in this argument, and the Court is not satisfied that it has been refuted." \(I d.\) Because the Court found federal and state laws in collision, however, this proffered point was immaterial, and Marshall's hospitable comment a mere dictum. The application of sound principle would have induced either silence or a contrary dictum on the point, and Marshall's statement was in fact taken as encouragement by advocates of the dual federalism view.

James Madison had moved to the dual federalism view early, and he continued to espouse it as a senior statesman. Late in 1830 he wrote,

"The two vital characteristics of the political system of the United States are, first, that the Government holds its powers by a charter granted to it by the people; second, that the powers of Government are formed into two grand divisions—one vested in a Government over the whole community, the other in a number of independent Governments over its component parts . . . ."

". . . Here the established system aspires to such a division and organization of power as will provide at once for its harmonious exercise on the true principles of liberty over the parts and over the whole, notwithstanding the great extent of the whole . . . ."

"As the most arduous and delicate task in this great work lay in the untried demarkation of the line which divides the general and the particular Governments by an enumeration and definition of the powers of the former, more especially the legislative powers; and as the success of this new scheme of polity essentially depends on the faithful observance of this partition of powers, the friends of the scheme, or rather the friends of liberty and of man, cannot be too often earnestly exhorted to be watchful in marking and controlling encroachments by either of the Governments on the domain of the other.

Supplement to the letter of Nov. 27, 1830, from James Madison to Andrew Stevenson, in 9 THE WRITINGS OF JAMES MADISON 411, 430–31 n.1 (Gaillard Hunt ed., 1910).
adjectives, verbs, and adverbs describing relations of action and consequence rather too tedious to describe elaborately.22 In law's manner of speaking, to "have a power" means to be acknowledged as competent to produce legal consequences by taking action concerning some object.

A "power of appointment," for example, might enable one to designate who will fulfill some role with respect to a gift or bequest; a "power of attorney" might enable one to execute some document on another's behalf with the same legal effects as if executed by that other herself. The enumeration of "powers" in the Constitution allocates legal competence to govern.

Thus, describing the principle of enumerated powers, James Wilson spoke in terms of "objects of government."23 It is extremely important to notice the equivocal denotation of the word "object": it can mean a tangible thing, a behavioral act (or acts), an abstraction generalizing a great variety of behavioral acts, or an end or aim. For example, the phrase "objects of government" comprehends automobiles, licensure, driving, and safety. License suspension for drunk driving pertains to several of these differently described "objects"—and others as well, such as alcoholic beverages. Examples like this can be multiplied infinitely, and they illustrate that any particular measure might be associated with any of several different "objects of government." Particular acts or events might be susceptible to governance by exertions of differently described "powers"—much as, in geometry, a single point might be reached on many lines.

This has great significance for the allocation of governing power on a federal model. Of course, some objects of government might deliberately be vested in both levels of government concurrently.24 Even as to those allocated severally, however, different objects of government might intersect on some particular act or event, resulting in concurrent competence pro tanto as to the particular act or event on which the separate powers converge. Indeed, even as to objects foreclosed to one level by exclusive vestment in the other,25 such convergence of different powers on the

22. As Hamilton himself put it, "What is a power, but the ability or faculty of doing a thing?" THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
23. See supra text accompanying note 16.
24. E.g., the raising of revenue by taxation.
25. The U.S. Constitution is generally understood as vesting exclusively in the federal
same particular remains possible, each level of government having some relevant competence albeit each is addressing a different object of government and thus can be said to be exercising a different power. Some provision might be made for preeminence of one level in any or all such circumstances—as it is in our Constitution by the Supremacy Clause—but the essential point remains that merely assigning some object of government to one level rather than the other does not prevent any particular within that object from being simultaneously within a different object of government assigned to the other level of government instead.

This is the point that slipped out of grasp in the middle of the nineteenth century when Justices began their slide into dual federalism, trying to determine, for example, whether particular measures were exercises of a "commerce power" or of a "police power" instead. Hamilton, however, lived and died a generation before such confusion became widespread. In his time the dual federalism idea, which would grow more tenacious and pervasive as it became amalgamated with sectional and partisan interests, still was readily identifiable as simply an intellectual mistake.

Manifesting that he suffered no contamination by the dual federalism error, Hamilton declared that "the national and state systems are to be regarded as ONE WHOLE" and even anticipated that state magistrates routinely would function as the principal instruments for enforcement of federal laws. Dual federalism

government the governance of the national capital district, for example, and the governance of bankruptcy. See U.S. CONST. art. I, § 8, cl. 4, 17. It does not identify any object as exclusively for the states; it merely employs the principle of enumerated powers—which has very different consequences, as will be elaborated in the ensuing text.

26. Id., art. VI, cl. 2.

27. I.e., there may be concurring, or convergent, "power" (using the word to mean the "abstraction of all legally acknowledged competence") even if either level's "power" (using the word to mean "competence concerning some particular object") is deemed "exclusive."


30. Id. To the same effect, at greater length, see also THE FEDERALIST No. 27, at 174–75 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This Hamiltonian thesis—albeit without citation to him—was endorsed again unanimously by the U.S. Supreme Court in Howlett v. Rose, 496 U.S. 356, 367 (1990).
conceives of “separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres,” but in Hamilton’s contrary view, the existence of state power never precludes federal power even as to the very same matter, and the existence of federal power precludes state power only in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.

The first step toward understanding Hamilton’s view of the spending power, therefore, is to recognize that the Constitution’s principle of enumerated powers does not countenance—but in fact repels—dual federalism’s mistaken conclusion that some matters, some activities or events, are shut off from the federal government’s attention and addressable only by the states. The second step is to recognize, as Hamilton did, that while the Constitution enumerates for Congress only a few of the powers a government might conceivably have, each of the enumerated powers is “plenary.” As Chief Justice John Marshall put it three decades later, it “has always been understood” that the governing

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32. Hamilton’s statement applies to the power itself, when unexercised or “dormant.” When federal power is exercised, the Supremacy Clause, U.S. CONST. art. VI, cl. 2, might preclude various applications of state power that otherwise would not be precluded.
33. The Federalist No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Contradiction or repugnancy to federal policy on a matter within federal authority might invoke the Supremacy Clause, but that is not what Hamilton was discussing here: he specified contradiction or repugnancy not to any “policy of” the federal government, but “in point of constitutional authority.” Id. Then he continued that “[t]he necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is . . . a theoretical consequence of that division . . . “ as well as being admitted by “the whole tenor of” the Constitution. Id. at 203.
34. Hamilton wrote, “It can therefore never be good reasoning to say—this or that act is unconstitutional, because it alters this or that law of a State. It must be shewn, that the act which makes the alteration is unconstitutional on other accounts, not because it makes the alteration.” Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 The Papers of Alexander Hamilton 97, 109–10 (Harold C. Syrett ed., 1965).
power of the nation “though limited to specified objects is plenary as to those objects.”\textsuperscript{35} “Plenary” governing competence means the federal government has a free hand in fashioning policy for any “object of government”\textsuperscript{36} within the scope of an enumerated power - (subject, of course, to constitutional restrictions such as those contained in the Bill of Rights). The Supremacy Clause, of course, gives federal policy for such matters priority over any contrary state law.

As to matters not within the Constitution’s enumeration, Congress has no such plenary power. However, as explained in the next several pages, it would be a great mistake to conclude that where the Congress has no plenary power it is powerless to act at all.

2. The Principle of Extraneous Means. Hamilton’s preference initially had been for greater consolidation of power at the center, and he remained too hospitable toward arguments of “implication.” Nonetheless, he understood and accepted the principle of enumerated powers.\textsuperscript{37} Thus, while he argued that implication should have assured it anyway, he based Congress’s competence to incorporate a national bank (for example) squarely on an enumerated power: the power conferred by the Necessary and Proper Clause.\textsuperscript{38}

It is unfortunate that inexact usage has associated this clause with so-called implied powers, for (except in the international realm\textsuperscript{39}) the principle of enumerated powers actually precludes the notion of “implied” federal powers. The power granted by the

\textsuperscript{35} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

\textsuperscript{36} Remember the equivocal denotation of the word “object.” See supra notes 23–27 and accompanying text.

\textsuperscript{37} Hamilton maintained not that the national government under the Constitution “is sovereign in all respects, but that it is sovereign to a certain extent: that is, to the extent of the objects of its specified powers.” Hamilton, supra note 34, at 107. Again, he maintained only that it was “sovereign with regard to its proper objects.” Id. at 98. The shortcomings of the idiom attributing “sovereignty” to governments, rather than to “the People,” need not be elaborated for present purposes.

\textsuperscript{38} U.S. Const. art. I, § 8, cl. 18; see Hamilton, supra note 34, at 101–06.

\textsuperscript{39} The principle of enumerated powers does not operate with regard to international affairs. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–16 (1936); see also David E. Engdahl, Constitutional Federalism 204 (2d ed. 1987) (“Our national government’s legal competence on the international plane is determined by international rather than domestic law.”). The principle therefore does not preclude “implied powers” arguments in that realm.
Necessary and Proper Clause is *enumerated*, not implied. That power is wholly contingent on a relationship of means to end, but it is quite inaccurate to characterize such a telic relationship as a relationship of "implication." Equally obfuscatory are references to "incidental," "auxiliary," or "accessory" powers.

The Necessary and Proper Clause enables Congress to take primary action regarding matters extraneous to its otherwise enu-

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40. "Tending toward an end." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2351 (3d ed. 1986); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1846-47 (3d ed. 1992) ("Directing or tending toward a goal or purpose; purposeful."). The word is derived from the Greek *telos*, meaning "end." *Id.* at 1847.

41. The word "imply" is a very imprecise term. It derives from the Latin *implicare*, to enfold, entangle, involve. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 40, at 1135. We use the word to characterize reasoning processes along with another word, "infer" (derived from the Latin *inferre*, to bring on, to conclude, *id.* at 1158); we "infer" conclusions that premises "imply."

But the mind employs many different avenues of inference, and "imply" therefore is used to refer to several different reasoning patterns. Consequently, the statement that something is "implied" can carry any of several very different meanings. To use this imprecise word in connection with the Necessary and Proper Clause, therefore, is to conceal which of the many possible reasoning patterns actually is involved.

The language of the Necessary and Proper Clause itself makes unmistakable that it has no connection whatsoever with any kind of "inference" or "implication" except a telic one—if, indeed, such a connection should be called an "inference" or "implication" at all. The clause has to do only with relations of means and ends. Most arguments of "implication" lack any "means to end" aspect and thus can find no support whatsoever in this Clause.

The classic exposition of this, of course, is in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411-23 (1819). For elaboration of the requisites of the Necessary and Proper Clause, see ENGDAHL, *supra* note 39, at 33-48.

42. Each of these words inevitably causes confusion, because telic relations constitute only a small fraction of what they can comprehend. The words are frequently used with reference to relations of mere concomitance. While they might occasionally be used where the relationship is telic, they apply regardless which is the means and which the end. Therefore, because the Necessary and Proper Clause is applicable only where the end, as distinguished from the means, in the telic relationship is within an enumerated power, the use of these words constantly and inevitably induces misapplications of the Clause.

Another unfortunate phrase, inducing absurd corruptions of the extraneous means principle in the specific context of the commerce power, is the "affecting commerce" idiom. Everything "affects interstate commerce" somehow or other, and more or less, but when the modern use of the "affecting commerce" idiom began late in the New Deal, the Court's rationale was explicitly telic, with express reference to the Necessary and Proper Clause being made. After two generations of sloppy usage, most lawyers today mistakenly assume that the "affecting commerce" idiom warrants ridiculous enlargement of the concept of interstate commerce itself. The fact that this idiom really is an unfortunate and imprecise allusion to the Necessary and Proper Clause has now begun to be recognized at last. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 583-85 (1985) (O'Connor, Powell and Rehnquist, JJ., dissenting).
merated powers, but only in a telic manner—i.e., as a means to promote objects within the enumeration.43 This crucial telic requisite of the Necessary and Proper Clause, plain on its face, makes it very much less than a “sweeping clause”44 bringing all objects of government into Congress’s domain. Hamilton’s mature understanding of this clause (which is the classic and modern view) does bring all matters potentially within Congress’s reach but permits Congress to reach them only insofar as it does so to effectuate one or another of the other enumerated federal powers.

The Necessary and Proper Clause, in other words, imports what I call the “principle of extraneous means.” The earliest elaboration of this principle was Hamilton’s own,47 which Chief Jus-

43. As Hamilton put it, the Necessary and Proper Clause leaves a criterion of what is constitutional, and of what is not so. This criterion is the end to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, . . . it may safely be deemed to come within the compass of the national authority. Hamilton, supra note 34, at 107 (third and fourth emphases added).

To the same effect, Chief Justice Marshall wrote, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, . . . are constitutional.” M’Culloch, 17 U.S. at 421.

44. Alexander Contee Hanson of Maryland, for example, wrote in opposition to ratification of a proposed plan for a federal government by his state, “It is apprehended, that this sweeping clause will afford pretext, for freeing congress from all constitutional restraints.” ALEXANDER CONTEE HANSON, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 217, 233 (Paul L. Ford ed., 1888).

This inapt, derogatory appellation remained popular among critics like Thomas Jefferson. See, e.g., Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), in 10 THE WRITINGS OF THOMAS JEFFERSON 163, 165 (Albert Ellery Bergh ed., 1907). The sufficient answer to it remains the one given by James Wilson during the ratification debates in Pennsylvania:

[W]hen it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, “for carrying into execution the foregoing powers.” It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.


45. Hamilton’s first explication of the Necessary and Proper Clause, deprecating it as “chargeable with tautology or redundancy . . . [but] at least perfectly harmless,” was absurdly fallacious. The FEDERALIST No. 33, supra note 22, at 205. Hamilton never used it again.


47. See Hamilton, supra note 34, at 98–99.
tice Marshall simply paraphrased in his classic *M'Culloch v. Maryland* opinion.

Federal measures regarding otherwise extraneous matters constitute exercises of an enumerated power insofar as they satisfy the telic requisite of the Necessary and Proper Clause. Such measures, therefore, also invoke the Supremacy Clause: no state may frustrate or interfere with the means Congress has chosen for promoting ends that are within some enumerated power.

3. The Principle of Extraneous Ends and Its Corollaries. A third principle, equally irreconcilable with dual federalism, also was a part of Hamilton's view. This may be called the "principle of extraneous ends," and it was nicely articulated generations later in Justice Holmes's famous *Hammer v. Dagenhart* dissent: "It seems to me entirely constitutional for Congress to enforce its understanding [of good policy about anything] by all the means at its command." We are accustomed now to hundreds of federal laws and regulations fitting this pattern. Some govern interstate commerce to promote consumer interests or to combat local crime; others create tax incentives or disincentives to induce behavior Congress could not require; others restrict use of the mails to inhibit extortion, debt collection abuses, or child pornography. None of these ends are within any enumerated power, but the means—control of interstate commerce, manipulation of tax rates and breaks, control of the mails—certainly are.

The principle of extraneous ends is simply a corollary to the proposition that Congress's enumerated powers are plenary: if Congress has a free hand in fashioning policy for those "objects of government" entrusted to it, it may manipulate them even to promote objects of government (in the sense of aims or ends) that are not constitutionally enumerated for it, unless some Bill of Rights type of constitutional restriction forbids. None does—not even the Tenth Amendment.

50. See U.S. CONST. art I, § 8.
51. Refracted by dual federalist lenses, the Tenth Amendment might seem to be such a restriction, but when its words are seen clearly, unbent by that distorting preconception, it is not. The Amendment reserves those powers not delegated to the United States, but it does not pretend to define, delimit, or in any way restrict the use of any
Hamilton's view of Congress's spending power is nothing other than this general principle of extraneous ends applied to the particular function of spending. Hamilton utilized this general principle (and urged Congress to utilize it) from the outset of the Washington administration, and it has been instanced throughout American history. Its use has been almost constant, notwithstanding the misguided (or misconstrued) dictum of Chief Justice Marshall in *M'Culloch v. Maryland* about laws passed "under the pretext of" an enumerated power but "for the accomplishment of objects not entrusted to the government."

Even Justices confounded by dual federalism's errors upheld several federal laws aimed at extraneous ends, but they did so only when they so scrambled this issue with the distinct issue of extraneous means that they thought they were applying the Necessary and Proper Clause. Whenever they recognized that the principle of extraneous ends was actually operating instead, they vigorously denounced it, treating *M'Culloch's* "pretext" dictum as a cardinal precept. Flourishing that dictum, the majority in the powers that are so delegated. See U.S. CONST. amend. X. As to avoiding misconceptions when using the idiom of "powers," see supra notes 21-24 and accompanying text.

52 17 U.S. at 423. In the midst of elucidating the classic and sound (and Hamiltonian) construction of the Necessary and Proper Clause, Marshall attempted to highlight his point with a rhetorical contrast, saying, "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [federal] government[,] it would become the painful duty of this tribunal" to hold them unconstitutional, should some case requiring consideration of them arise. *Id.*

If Marshall was contemplating something like, for example, a measure that could not fairly be said to tax, or one that could not fairly be said to regulate interstate commerce, his statement was unobjectionable. But dual federalists took his statement to mean, for example, that interstate commerce may be regulated only for commercial ends, or that taxes may be imposed only to raise revenue. So taken, this "pretext" dictum is utterly unsound. Nothing in the Constitution precludes Congress from taxing or governing trade, for example, with an eye toward public safety or whatever other end it might choose, regardless whether such end is within an enumerated power.

Dual federalists bandied this pretext dictum for more than a century, misappropriating Chief Justice Marshall as an authority for their error. See, e.g., Linder v. United States, 268 U.S. 5, 17 (1925) ("[A]ny provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power . . . is invalid and cannot be enforced."). It was relied upon heavily in United States v. Butler, 297 U.S. 1, 68-70 (1936) ("[R]esort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.").

53 See, e.g., The Lottery Case (Champion v. Ames), 188 U.S. 321, 355 (1903) (rationalizing shipment prohibition to prevent local gambling as "appropriate mode for the regulation of that particular kind of commerce"—i.e., shipment of lottery tickets).

spending power case of United States v. Butler made adamant denial of the extraneous ends principle integral to its rationale.\textsuperscript{55}

Today, the principle of extraneous ends is so familiar and obvious that we easily forget that it never received clear-sighted and unequivocal affirmation by a Supreme Court majority until 1941. That was the year Justice Stone broke free at last from long-standing misconceptions and separately applied the extraneous means principle\textsuperscript{56} (employing the Necessary and Proper Clause) and the extraneous ends principle\textsuperscript{57} (overruling Hammer v. Dagenhart\textsuperscript{58}) to sustain different provisions of the Fair Labor Standards Act in different parts of the unanimous opinion in United States v. Darby.\textsuperscript{59} It is significant that this first clear judicial recognition of the principle of extraneous ends occurred four years after the landmark spending power cases involving the Social Security Act: when they decided Steward and Helvering, the Justices did not yet have their minds so clear. The fact that those two landmark cases, claiming to follow Hamilton, were decided before the Justices accurately perceived the principle that Hamilton actually employed has occasioned great confusion.

The principle of extraneous ends has very important corollaries. First, while Congress thus may pursue policy objects regarding extraneous matters, those policies remain extraneous to the enumerated powers; therefore, those policies cannot invoke the Necessary and Proper Clause, which avails only for effectuating ends within the enumerated powers.

Simple examples should illustrate this first corollary of the principle of extraneous ends. Congress was not made competent to outlaw lotteries when it prohibited the interstate shipment of lottery tickets,\textsuperscript{60} even though the reason it prohibited those shipments was that it wanted lotteries to cease. And Congress did not gain the power to punish the retailing of butter-colored oleomarga-

\textsuperscript{55} See Butler, 297 U.S. at 68-70 (1936), discussed infra text accompanying notes 127-42.
\textsuperscript{56} See United States v. Darby, 312 U.S. 100, 117-25 (1941).
\textsuperscript{57} See id. at 112-17.
\textsuperscript{58} 247 U.S. at 251.
\textsuperscript{59} Steps of intellectual transition toward Darby's clear grasp of the extraneous ends principle had been taken in United States v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940), and United States v. City & County of San Francisco, 310 U.S. 16, 29-30 (1940).
\textsuperscript{60} See The Lottery Case (Champion v. Ames), 188 U.S. 321, 357 (1903).
rime when it placed a high tax on that product, even though it hoped that a tax would drive the product off the retail market.

As applied to federal spending, this is one point James Madison failed to grasp. Discussing spending with reference to the "general Welfare" phrase of the first clause in Article I, Section 8 of the Constitution, Madison insisted that one must choose between two contrasting propositions: either that clause is "a mere

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61. See McCray v. United States, 195 U.S. 27, 63-64 (1904).

62. The corollary holds even for more complex situations. A good example is United States v. Darby, 312 U.S. 100, 117-25 (1941). Having adopted as its policy for interstate commerce the rule prohibiting shipment of goods produced under certain wage or hour conditions, Congress forbade the production of goods under such conditions. Id. at 110. The Necessary and Proper Clause rationale for the production prohibition was that if fewer goods were produced under the specified conditions, fewer produced under those conditions would be available for interstate shipment, and as a consequence, Congress's interstate commerce policy prohibiting shipment of goods produced under those conditions would be better effected. Thus, the production prohibition was reasonably adapted to attainment of the non-shipment policy, even though production per se was not within Congress's enumerated powers. As the Court said, "Congress, having . . . adopted the policy of excluding from interstate commerce [certain goods, . . . may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities." Id. at 121.

It was obvious in Darby that the production prohibition also was aimed at improving the lot of workers—a matter which, itself, is extraneous to Congress's enumerated powers; that the extraneous end really was the primary objective of the production prohibition; and that the same extraneous objective was the whole reason for the commerce power manipulation (prohibition of interstate shipment) itself. Thus, Darby illustrates that it is constitutionally inoffensive (indeed, immaterial) that a regulation of some extraneous matter, regulation of which serves some enumerated end, also promotes an extraneous one—or even that the extraneous end is manifestly the motivating one. But the telic link to Congress's policy for an enumerated matter was indispensable: the extraneous regulation must be, to quote from Darby, "reasonably adapted to the attainment of the permitted end," id.—"permitted" by virtue of some enumerated power.

In other words, if a measure helps effectuate Congress's policy for some enumerated matter, the fact that it simultaneously helps effectuate Congress's policy for some extraneous policy is constitutionally unobjectionable; a measure is not made constitutional merely because it helps effectuate Congress's policy for some extraneous matter, however, even if that same extraneous policy is simultaneously being promoted by manipulation of an enumerated power.

To uphold an extraneous regulation serving only an extraneous end simply because that extraneous end is simultaneously served by manipulation of some enumerated power would be to commit what I have elsewhere characterized as the "bootstrap" error and discussed at greater length than is possible or necessary here. See, e.g., ENGDAHL, supra note 39, at 65-73.

63. The clause provides: "The Congress shall have the Power To lay and collect Taxes . . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.
introduction to the enumerated powers, and restricted to them, as Madison himself maintained, or else

the power to provide for the common defence and general welfare stands as a distinct substantive power, the first on the list of legislative powers ... coming within the purview of the clause concluding the list, which expressly declares that Congress may make all laws necessary and proper to carry into execution the foregoing powers vested in Congress.

... [T]he alleged power to appropriate money to the "common defence and general welfare" is either a dead letter, or swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes.65

As Hamilton perfectly well understood, however, neither of the propositions between which Madison thought one must choose is sound. The Necessary and Proper Clause cannot be invoked on the ground that the measure in question serves some extraneous end, even if that end is one toward which Congress, in its plenary discretion, has elected also to aim some application of an enumerated power.

A second corollary of the principle of extraneous ends is that extraneous objectives being promoted by taxing, by spending, or by manipulating any other enumerated power may freely be frustrated or countermanded by states. Congress's prerogative to govern, to have its way—and hence, the force of the Supremacy Clause66—cannot extend beyond its enumerated powers. Whatever practical and even very powerful influence it might exert over matters beyond its enumerated powers is not by virtue of any power to govern those extraneous matters; it is accomplished, rather, by the governance of other matters, themselves within some enumerated power. The frustration of Congress's extraneous objectives, therefore, is no affront to the Constitution's allocation of governing power.

Even while the Lottery Act was in force, for example, the states remained free to authorize or operate lotteries (although the tickets would have had to be printed in-state).67 A state may en-

64. Supplement to the letter of Nov. 27, 1830, from James Madison to Andrew Stevenson, supra note 21, at 428.
65. Id. at 424 n.1, 428-29.
66. U.S. CONST. art. VI, cl. 2.
courage, or even require, activities Congress simultaneously is
discouraging by means of a federal tax (although the tax nonethe-
less must be paid). For the same reason, a state may frustrate any
extraneous objective of federal spending by resisting the financial
temptation offered to it, or as to private grantees within the state’s
jurisdiction, by forbidding what the subsidy is designed to induce
(even though no state may alter the terms on which Congress
offers federal funds).

With respect to spending, these two corollaries seem even
more compelling when one reflects on what it means to “spend.”
When I cash my paycheck, I have power to spend the money (or
some disappointing fraction of it) however I might choose, but
that does not mean I can make people take the money, or escape
punishment by pleading that I tendered ample payment if I take
what they refuse to sell. Every transaction (even of donation)
involves at least two parties, and neither can complete the transac-
tion alone.

The point can be illustrated by this reverse example: the Unit-
ed States may accept gifts, and no state may prevent it from doing
so, but a state law outlawing testamentary gifts to the United
States

acts upon the power of its domiciliary to give and not on the
United States’ power to receive. As a legal concept a transfer of
property may be looked upon as a single transaction or it may
be separated into a series of steps. The approach chosen may
determine legal consequences. Where powers flow so distinctly
from different sources as do the power to will and the power to
receive, we think the validity of each step is to be treated sepa-
rately.

... [W]e find nothing in the Supremacy Clause which pro-
hibits the state from preventing its domiciliary from willing prop-
erty to the Federal Government.68

By a parity of reasoning, Congress’s spending power constitutes
competence to offer, but not to oblige acceptance; competence to
tender,69 but not to compel receipt. The spending power by itself

69. Thus, for example, federal assistance in the form of deposit insurance or loan
guarantees constitutes exercise of the spending power, even if no default ever occurs and
money therefore never changes hands.
is not sufficient even to accomplish a transfer from the Treasury: the debit there must find a credit elsewhere or it fails.

Still less, then, can the spending power override opposition to any extraneous end at which federal spending programs or their conditions are aimed. If the end is extraneous, refusal by the intended recipients, or their failure to qualify, does not contravene Congress's spending power even if it utterly frustrates Congress's desire. It can make no difference whether the refusal or failure is by the will of the intended recipient, or under compulsion of some state having jurisdiction.

Hamilton not only understood but emphasized these corollaries to the principle of extraneous ends. As to the first, for example, Hamilton wrote in his 1791 Report on Manufactures that there is "no room for a doubt that whatever concerns the general Interests of learning of Agriculture of Manufactures and of Commerce are within the sphere of the national Councils as far as regards an application of Money." To further emphasize that spending toward such extraneous ends would not bring the ends generally within the scope of federal power, Hamilton continued,

No objection ought to arise to this construction from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the General Welfare. A power

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70. The result obviously is different when more than the spending power itself is involved: spending frequently is used as a means to effectuate enumerated ends, and in such instances not only the spending power, but also the Necessary and Proper Clause is involved. Whenever the latter is used, the Supremacy Clause certainly does apply.

For example, an unwilling merchant may be obliged, when the necessity is "urgent," to exchange goods or services to the Army for money. See United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871) (services); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134–35 (1851) (goods). Likewise, an unwilling owner may be obliged to exchange, for compensation in money, realty sought for a post office building. See, e.g., Kohl v. United States, 91 U.S. 367, 374–75 (1875). It makes no difference whether the recalcitrant owner is a private person or a state or state subdivision. See United States v. Carmack, 329 U.S. 230, 255 (1946) (land held by city in trust for private individual); Wayne County v. United States, 53 Ct. Cl. 417, 424 (1918) (county highway), aff'd, 252 U.S. 574 (1920).

The critical distinction as to whether the end is an enumerated or an extraneous one was well understood when last the constitutionality of federal acquisitions by "eminent domain" was competently litigated; succeeding decades of inattention, however, have obscured it. See David E. Engdahl, State and Federal Power Over Federal Property, 18 Ariz. L. Rev. 283, 338 n.238 (1976).

to appropriate money with this latitude which is granted too in
express terms would not carry a power to do any other thing, not
authorised in the constitution....

The second corollary is reflected in Hamilton’s advice con-
cerning canals. Spending itself—the mere application of money—in
Hamilton’s view was just as permissible for canals as for education,
manufacturing, improvement of agriculture, or any other purpose; yet when he composed his political agenda on the eve of the Sixth
Congress in 1799, Hamilton wrote, “An article ought to be pro-
posed to be added to the constitution for empowering Congress to
open canals....”

He was not being inconsistent. To “open” canals involves
much more than spending money: it involves acquiring rights of
way and constructing and operating the improvements. The per-
sons or companies doing so, whatever their source of funds, would
be subject to the governmental jurisdiction of any states through
which the respective canals might run. On routes crossing state
lines, differences of state law would entail cumulative and some-
times conflicting requirements that easily could make a project
difficult or even impossible, even if it were federally funded,

72. Id. at 303–04.
73. Letter from Alexander Hamilton to Jonathan Dayton (Oct.-Nov. 1799), in 23
74. James Madison in later years repeatedly accused Hamilton of self-contradiction.
For example, writing to Edward Livingston in 1824, Madison said,
It is remarkable that Mr. Hamilton himself, the strenuous patron of an expan-
sive meaning in the text of the Constitution, with the views of the Convention
fresh in his memory, and in a Report contending for the most liberal rules of
interpretation, was obliged by his candour to admit that they could not embrace
the case of canals....
Letter from James Madison to Edward Livingston (Apr. 17, 1824), in 3 CONVENTION RE-
CORDS, supra note 12, at 463. In another letter, Madison said, “It may be remarked that
Mr. Hamilton, in his Report on the Bank, when enlarging the range of construction to
the utmost of his ingenuity, admitted that Canals were beyond the sphere of Federal
Legislation.” Letter from James Madison to Reynolds Chapman (Jan. 6, 1831), in 9 THE
WRITINGS OF JAMES MADISON, supra note 21, at 435, 435; see also Supplement to the
letter of Nov. 27, 1830, from James Madison to Andrew Stevenson, supra note 21 at 424
n.1.

Madison misrepresented what Hamilton actually had said, however. In the relevant
passage of his bank opinion Hamilton had said only that opinions differed as to whether
the reason for not adopting the canal provision was that it was inexpedient, that it em-
braced too much besides canals, or that it was superfluous (and impolitic) because power
ample for the purpose was already otherwise conferred. See Hamilton, supra note 34, at
97, 110–11.
75. In Madison's own words, interstate canals would “be of hopeless attainment if
unless Congress had more power in the matter than merely the power to spend.

It was this insufficiency of the spending power to override state law obstacles to achieving the targeted end that made Hamilton conclude that a constitutional amendment for canals was necessary. Hamilton’s complete sentence makes it plain that the possibility of incompatible or adverse state policies, and the inability of federal funding alone to override them, is what led him to recommend an amendment—not any fear that spending for canals would otherwise be impermissible. In the very same document, Hamilton urged appropriation to a loan fund for “improvement of the roads” and also called for “funds to encourage Agriculture and the arts,” “to be employed in premiums for new inventions discoveries and improvements in Agriculture and in the Arts.” As to these ends he perceived no risk of frustration by conflicting state policies, and consequently for them—with no need to override state policy—the spending power itself was ample.

B. A Metaphor

Metaphors enhance expression and can facilitate the development as well as the communication of ideas. To the extent that they are inapt, however, they also can reinforce and perpetuate misconceptions.

At some uncertain early date, it became common to discuss the governing competence of the state and federal governments in terms of “fields.” Unfortunately, this geographical metaphor helped perpetuate the dual federalism misconception, which posited the respective jurisdictions of the federal government and of the states, for the most part, as mutually bounded and exclusive, like physical domains. Extension of the metaphor by the military imagery of “occupation” made it usable even where jurisdiction was deemed left to the limited faculties and joint exertions of the States possessing the authority.” Letter from James Madison to Reynolds Chapman, supra note 74, at 436.

76. Hamilton said, An article ought to be proposed to be added to the constitution for empowering Congress to open canals in all cases in which it may be necessary to conduct them through the territory of two or more states or through the territory of a State and that of the UStates. Letter from Alexander Hamilton to Jonathan Dayton, supra note 73, at 603.

77. Id. at 601–02.
78. Id. at 602.
79. Id. at 601.
concurrent until federal power was exercised. So powerful is this geographical metaphor that its continued use even now—though the error of dual federalism is rather widely and well understood—tends to induce a misconception of mutual exclusivity.

Sometimes a metaphor is not only apt, but striking enough that it can embarrass and thus help dislodge misconceptions, which are most powerful when solemnity discourages critical examination. This characterization hopefully will prove true of my likening dual federalism to distributed pieces of pie, with the Tenth Amendment misconceived as forbidding the federal government to nibble at the states’ plate.

A very different metaphor is needed to communicate the fundamental principles of American federalism accurately. Hamilton never used this metaphor, but his insistence that “the national and state systems are to be regarded as ONE WHOLE” invites it. It is the metaphor of ecology.

The Constitution places only a few “species” under the national government’s management and control; species interact with one another, however, and consequently, exercising control over one typically impacts others as well. The Constitution could not have precluded Congress from thus impacting other species, except by radically circumscribing its discretion over the few. So far from being thus circumscribed, except for the few Bill of Rights type of limitations, Congress’s power over the species enumerated for its management and control is “plenary.”

The Supremacy Clause gives priority to whatever Congress might wish regarding its species, and the Necessary and Proper Clause enables Congress to conscript even other species in service to its own (although it is only insofar as it is so used that any of those other species is amenable to Congress’s control).

As to the species designated for it, however, because its power over them is plenary, Congress may utilize them however it will. Nothing forbids Congress from electing to manipulate its species specifically to impact some others that are not designated for management by it, and to the extent such manipulation of its

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80. THE FEDERALIST No. 82, supra note 29, at 556; see supra notes 29–30 and accompanying text.
81. See supra notes 35–36 and accompanying text.
82. U.S. CONST art. VI, cl. 2.
83. Id. art. I, § 8, cl. 18.
own is sufficient to work Congress's will for any such other, it is done. Those others, however, have different masters—the states—who cannot be prevented from resisting or trying to deflect Congress's attempted impacts on theirs. The states are free to frustrate Congress's will for those species not enumerated for its control. All that the Constitution forbids to the states, as masters of those species not enumerated, is to countermand Congress's management of the enumerated species or to impair Congress's right to conscript any of the others insofar as it is employed to service Congress's own.

II. THE PRACTICE

A. Spending Power Theory and Practice Before the New Deal

Hamilton's view of the spending power clearly predominated during the earliest years under the Constitution. Joseph Story afterwards observed, "There is no doubt that President Washington fully concurred in [Hamilton's spending power] opinion, as his repeated recommendations to Congress of objects of this sort, especially of the encouragement of manufactures, of learning, of a university, of new inventions, of agriculture,... abundantly prove."84

Addressing the four-decade period including not only the Federalist administrations of Washington and Adams, but also the Republican hegemony from the turn of the century to the time of his own writing in the 1830s, Story said, "Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense."85 As examples, he included

appropriations... to aid internal improvements of various sorts, in our roads, our navigation, our streams,... appropriations to aid destitute foreigners and cities laboring under severe calamities; as in the relief of the St. Domingo refugees, in 1794, and

84. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 718 n.1 (5th ed. 1891). I omit from this passage Story's reference to Washington's recommendation of spending for encouragement "of commerce and navigation" and for "a military academy," id., because those might more readily be conceived as means to enumerated ends.

85. 1 id. at 727.
the citizens of Venezuela, who suffered from an earthquake in 1812[;]... the bounty given in the cod-fisheries....

James Madison had asserted as early as 1791 his contrary view that Congress's fiscal powers under the first clause in Article I, Section 8 are "limited and explained by the particular enumeration subjoined." Nonetheless, misgivings about the constitutionality of spending toward extraneous ends seem not to have become prominent until Jefferson's administration. Recommending in his annual message to Congress, on December 2, 1806, that a federal revenue surplus be used to fund internal improvements and education, Jefferson supposed that a constitutional amendment would be necessary "because the objects now recommended [public education, roads, rivers, canals, and other objects of public improvement] are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied." But the predominant opinion in Congress still (as from the beginning) was that spending toward extraneous ends already was permitted. Therefore, without troubling to propose an amendment, Congress passed an appropriation to pay for constructing a few miles of the "Cumberland Road," an improvement projected to extend from Cumberland, Maryland westward to the Ohio River. Jefferson signed the bill.

The issue then became unimportant for several years, because trade policy and war eliminated surplus federal revenues. When next it arose, Congress acted on the same premise as before, but President James Madison adhered to his contrary view. Madison repeated that the phrases "common Defence" and "general Welfare" in the clause commonly regarded as the source of power to spend operate "merely as general terms, explained & limited by the subjoined specifications." On this view, the whole effect of

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86. 1 id. at 727-28.
88. 16 ANNALS OF CONG. 11, 15 (1806).
89. Act of Mar. 29, 1806, ch. 19, § 1, 2 Stat. 357, 358.
90. U.S. CONST. art. I, § 8, cl. 2.
91. Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON, supra note 21, at 411, 418-19. He used virtually the same language in a supplement to that letter to Andrew Stevenson: "general terms, limited and explained by the particular clauses subjoined to the clause containing them." Supplement to the letter of Nov. 27, 1830, from James Madison to Andrew Stevenson, supra note 21, at 428 n.6.
those phrases (although limited to fiscal matters) is redundant to the Necessary and Proper Clause. Madison therefore vetoed the 1817 "Bonus Bill," saying he found "insuperable difficulty" in "reconciling [it] with the Constitution":

The legislative powers vested in Congress are specified and enumerated . . . and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers; or that it falls, by any just interpretation, within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.93

Madison claimed the prevailing "Hamiltonian" view (which he grossly misconceived) "would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms 'common defense and general welfare' embracing every object and act within the purview of a legislative trust."94

Others, even if they rejected Hamilton's spending power view, might have defended the Bonus Bill as "necessary and proper" to commerce and defense ends: the Bill did recite that the contemplated internal improvements were to be made "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the


93. James Madison, Veto Message (1817), reprinted in 1 A Compilation of the Messages and Papers of the Presidents 584, 584 (James D. Richardson ed., 1896) [hereinafter 1 Messages and Papers of the Presidents].

94. Id. at 585. Senator James Barbour from Jefferson and Madison's (and the new President Monroe's) Virginia introduced a resolution to propose a constitutional amendment authorizing Congress "to pass laws appropriating money for constructing roads and canals, and improving the navigation of water-courses," and adding certain restrictions. Kelly & Harbison, supra note 92, at 245. This amendment not only would have conferred no new power (since, as most senators understood, Congress already had power merely to spend for such purposes), but would have diminished political discretion by the restrictions it imposed. The Senate killed the Barbour proposal. Id.
means and provisions necessary for their common defence.\textsuperscript{95} Madison, however, could not accept it on this ground, for he also rejected the orthodox view of the Necessary and Proper Clause. He adhered instead to the miserly view Jefferson had articulated in opposing incorporation of the Bank of the United States, namely that it required “a necessity invincible by any other means”\textsuperscript{96} and authorized only “those means without which the grant of the power would be nugatory.”\textsuperscript{97} In other words, Madison not only restricted the spending power to the reach of the Necessary and Proper Clause, but compounded the restriction with a Jeffersonian view of the latter.

James Monroe, who succeeded Madison as President in 1817, at first shared Madison’s restrictive view of the spending power. He said of Madison’s view, “To this construction I was inclined in the more early stage of our Government; but on further reflection and observation my mind has undergone a change . . . .”\textsuperscript{98} Monroe was converted to Hamilton’s spending power view, and consequently, before revenue shortfalls temporarily mooted the point again, Monroe signed appropriations for additional work on the Cumberland Road.\textsuperscript{99}

Monroe also grasped the crucial point in Hamilton’s analysis that Madison had completely missed. Monroe clearly understood the difference between spending toward extraneous ends and otherwise acting toward or achieving them. Monroe made this distinction the basis for his veto of the more ambitious Cumberland Road Bill presented in 1822.\textsuperscript{100} The 1822 bill was not just an appropriation measure: it also provided for maintenance and protection of the Road and the collection of tolls and even asserted

\begin{itemize}
\item \textsuperscript{95} 30 ANNALS OF CONG. 186 (1817).
\item \textsuperscript{97} Id. at 278.
\item \textsuperscript{98} JAMES MONROE, VIEWS OF THE PRESIDENT OF THE UNITED STATES ON THE SUBJECT OF INTERNAL IMPROVEMENTS (1822), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 144, 165 (James D. Richardson ed., 1897) [hereinafter 2 MESSAGES AND PAPERS OF THE PRESIDENTS].
\item \textsuperscript{99} Act of Apr. 14, 1818, ch. LX, 3 Stat. 426; see also Act of Feb. 28, 1823, ch. XVII, 3 Stat. 728 (appropriating further funding for repair and improvement of Cumberland Road).
\item \textsuperscript{100} JAMES MONROE, VETO MESSAGE TO THE HOUSE OF REPRESENTATIVES (1822), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS, supra note 98, at 142–43.
\end{itemize}
governmental jurisdiction over the Road within the states through which it would pass.\textsuperscript{101} Explaining his veto, Monroe wrote,

The right of appropriation is nothing more than a right to apply the public money to this or that purpose. It has no incidental\textsuperscript{102} power, nor does it draw after it any consequences of that kind. All that Congress could do under it in the case of internal improvements would be to appropriate the money necessary to make them. For every act requiring legislative sanction or support the State authority must be relied on. The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent.

\ldots [T]he power "to pay the debts and provide for the common defense and general welfare[\]" \ldots conveys nothing more than a right to appropriate the public money[s] \ldots although the right to appropriate the public money to such improvements affords a resource indispensably necessary to such a scheme, it is nevertheless deficient as a power in the great characteristics on which its execution depends.\textsuperscript{103}

Were he not already two decades dead at that time, Hamilton (unlike Monroe) surely would have approved even the nonspending features of the 1822 Cumberland Road Bill. He would have approved them, however, not by virtue of the spending power, but rather as "necessary and proper" to carry into execution Congress's policy for the mails, for interstate commerce, and for the

\begin{itemize}
  \item \textsuperscript{101}Id. at 142.
  \item \textsuperscript{102}This was a denial (an accurate denial) that the Necessary and Proper Clause could support nonspending means to the extraneous ends sought by spending.
  \item \textsuperscript{103}MONROE, supra note 98, at 1168, 173. The House of Representatives a few years earlier had observed the same distinction emphasized by Monroe, passing a resolution that asserted Congress's power to spend for roads and canals while defeating one asserting that Congress had power to construct such improvements. See KELLY \& HARBISON, supra note 92, at 245.
\end{itemize}

Writing in 1830, Madison himself took note of this distinction, saying, "It is not to be forgotten, that a distinction has been introduced between a power merely to appropriate money to the common defence & general welfare, and a power to employ all the means of giving full effect to objects embraced by the terms." Supplement to the letter of Nov. 27, 1830, from James Madison to Andrew Stevenson, supra note 21, at 424 n.1. Madison's discussion of the distinction in that 1830 letter, however, displays his utter failure to comprehend the principle of extraneous ends.
movement of troops and defense materiel. Monroe was unable to approve them on that ground because even though he shared Hamilton's view of the spending power, like Madison he adhered to Jefferson's crabbed view of the Necessary and Proper Clause.

With respect to new states created from the public domain, Congress had followed the practice of earmarking a percentage of the net proceeds from federal land sales to be spent for internal improvements there. This practice began with the admission of Ohio under Jefferson, and continued through Madison's administration as well as Monroe's. The improvements at first were federally selected, and later were left for the states to choose; but in neither case was any federal role contemplated other than paying the bill. In this respect, however, Congress's next attempt to sponsor a specific internal improvement—the Maysville Road Bill of 1830—resembled the Cumberland Road Bill of 1822, and President Jackson vetoed it on reasoning reminiscent of President Monroe's: "Assuming the right to appropriate money to aid in the construction of national works to be warranted by the contemporaneous and continued exposition of the Constitution, its insufficiency for the successful prosecution of them must be admitted by all candid minds." Without "[t]he right to exercise as much jurisdiction as is necessary to preserve the works and to raise funds by the collection of tolls to keep them in repair," Jackson insisted, "nothing extensively useful can be effected." Jackson, however, did not interfere with the practice of making grants to public domain states, and there is no constitutional basis for granting states federal money to use as they wish that is not equally sufficient to uphold federal spending toward extraneous ends specified by Congress itself.

It was not only money that Congress disposed of. Congress repeatedly authorized grants of land for the recipients to sell (or use as security) to finance various activities. It is important to

106. Andrew Jackson, Veto of the Maysville Road Bill (1830), reprinted in 2 Messages and Papers of the Presidents, supra note 98, at 483, 490–91.
107. Id. at 492. Jackson also argued that the Maysville Road, running wholly within Kentucky from the banks of the Ohio River to a town 60 miles inland, would be of merely local benefit rather than for the "general" welfare as he considered required of federal spending. Id. at 487.
108. The classic example is the numerous grants for railroads, but there are many
notice this land grant practice because, as discussed in Section C of this Part, the granting of money and the granting of land are both really applications of the same constitutional power.\textsuperscript{109}

Land grants to locate seats of state government, to locate and support universities, and to support public schools accompanied the admission of every public domain state beginning with Ohio in 1803.\textsuperscript{110} The policy of earmarking one or two sections in each township to support public schools actually antedated the Constitution,\textsuperscript{111} and ultimately “[a]lmost 78 million acres were granted to the states for the support of the common schools.”\textsuperscript{112} Of course, advancement of education is not an end within any enumerated power. In addition, a statute enacted in 1841 (and still on the books) provided for granting every new state thereafter admitted up to half a million acres of public land “for purposes of internal improvement.”\textsuperscript{113}

Nevertheless, when Congress acted in 1854 to authorize granting ten million acres to states to support maintenance of the indigent insane, President Pierce vetoed the bill.\textsuperscript{114} In the terms on which it would have authorized making these grants (including attendant limitations and conditions to be accepted by state legislatures as prerequisites), this 1854 bill anticipated the style of modern federal funding programs. President Pierce did not attribute his veto to these features, however. Instead, he invoked the view of Madison and Jefferson regarding spending—that Congress’s permissible objectives are limited to matters within the scope of the enumerated powers. “I have been unable to discover any distinction on constitutional grounds,” Pierce said, “between an appro-

\begin{footnotes}
\item[109] U.S. Const. art. IV, § 3, cl. 2.
\item[110] Proposals to spread this largesse more broadly, so as to include the older states, emerged periodically for decades but failed to pass. The best synopsis of these proposals as well as the practice of grants on admission is Gates, supra note 104, at 3–28.
\item[111] This policy was initiated by the same Land Ordinance of 1785 that established the rectangular system of surveys for the Northwest Territory. Id. at 65.
\item[112] See Gates, supra note 104, at 341–86.
\item[113] 109. U.S. Const. art. IV, § 3, cl. 2.
\end{footnotes}
priation of $10,000,000 directly from the money in the Treasury for the object contemplated and the appropriation of lands presented for my sanction ...."115 He reasoned that the federal government was formed "for certain specified objects and purposes, and for those only,"116 and said,

I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded.117

President Pierce did not so much as mention the contravening tradition, almost seventy years old at that time, of land grants to finance schools: education certainly is not one of the federal government's "specified objects and purposes." His argument was a triumph of dual federalism, which was in full flower by 1854 and obscured with its false precepts the sound Hamiltonian principles of constitutional analysis reflected in the decades of consistent prior practice regarding land grants.

The modern era of federal spending began shortly after ratification of the Sixteenth and Seventeenth Amendments in 1913. Hamilton had observed that duties, excises, and other taxes on articles of consumption

prescribe their own limit .... If duties are too high they lessen the consumption—the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds.118

Taxes on incomes, in contrast, do not similarly "prescribe their own limit," and not long after the Sixteenth Amendment was adopted it became apparent that with this efficient revenue device the federal government could collect vastly more than was needed for executing the enumerated powers. The excess revenues positioned Congress as potential benefactor and patron, and the Hamiltonian view of the spending power afforded Congress great dis-

115. PIERCE, supra note 114, at 253.
116. Id. at 250.
117. Id. at 249.
cretion in selecting the objects of its largesse.\textsuperscript{119} At the same time, the Seventeenth Amendment's alteration of the Senate's political constituency, providing for election of senators directly by voters rather than by state legislatures, decreased the institutional fitness and disposition of that body to serve as a political safeguard against increasing federal influence.

In modern practice, federal money typically is offered subject to numerous prerequisites and other "conditions," whether the recipients are states, state subdivisions, or private persons or entities, and whether the spending is for procurement or otherwise toward some enumerated end or instead promotes extraneous ends. A great many of these conditions have the evident purpose and probable effect of inducing or deterring acts or practices that no enumerated power authorizes Congress to prohibit or compel.\textsuperscript{120} It is convenient to denominate all of the latter "extraneous" conditions, for whether or not they are integral to the particular grant or its particular policy aims, they are extraneous to any constitutionally enumerated federal power.\textsuperscript{121} Extraneous conditions raise the

\begin{itemize}
\item 119. Once the habit of copious spending toward extraneous ends was established, it was indulged far beyond the point of exhausting surplus, contributing to an enormous accumulation of debt.
\item 120. Others, of course, aim at matters that are within some enumerated power (e.g., policy for interstate commerce, or enforcement of Fourteenth Amendment restrictions on state action), but that Congress in the particular instance elected to influence only through conditional spending rather than by exercise of the relevant enumerated power.
\item 121. Professor Albert Rosenthal discusses "extraneous" conditions, but he uses "extraneous" to mean something very different from what is contemplated here. Rosenthal contrasts "provisions that would regulate extraneous conduct" with "expressions of the purpose of the expenditure itself." See Albert J. Rosenthal, \textit{Conditional Federal Spending and the Constitution}, 39 STAN. L. REV. 1103, 1115 (1987). I use the word, however, not to indicate a lack of germaneness to the purposes of particular expenditures, but to indicate matters beyond the scope of Congress's enumerated powers.
\end{itemize}
same constitutional issue raised by the bare act of spending toward extraneous ends. Because they are so pervasively used, however, extraneous conditions bring this issue even into the context of spending grants and contracts aimed at effectuating enumerated powers.

One early spending program with extraneous conditions was the Maternity Act of 1921,\textsuperscript{122} which authorized federal matching funds for states submitting plans satisfactory to the Children's Bureau of the Department of Labor for promoting maternal and infant hygiene and welfare. When the Maternity Act was challenged on its face in the 1923 *Mellon* cases,\textsuperscript{123} the Court described the attack as having been made in stark dual federalist terms, writing "that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States."\textsuperscript{124} Instead of being decided in the *Mellon* cases,\textsuperscript{125} however, the issue thus framed was postponed thirteen years, until *United States v. Butler* in 1936.\textsuperscript{126}

B. Butler, Steward, and Helvering

*Butler* involved the Agricultural Adjustment Act of 1933,\textsuperscript{127} which authorized federal payments to individual farmers in exchange for agreements to reduce acreage under production. Six Justices held the Act unconstitutional.\textsuperscript{128}

After declaring that Hamilton's view of Congress's spending power "is the correct one . . . [, i.e.,] the power of Congress to

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Professor Rosenthal also proposes a different distinction, between "classifying" and "coercive" conditions. *Id.* at 1114. He does not regard that distinction as having constitutional significance, however, *see id.* at 1115; certainly on the Hamiltonian view it is immaterial.


\textsuperscript{124} *Mellon*, 262 U.S. at 482.

\textsuperscript{125} The Court held unanimously that neither the state nor the individual litigant had standing to challenge the statute on its face, as they had tried to do. *Id.* at 480.

\textsuperscript{126} 297 U.S. 1 (1936).


\textsuperscript{128} *Butler*, 297 U.S. at 68. Five Justices present for the *Mellon* cases were still on the Court for *Butler*. Four of these (including Sutherland, who wrote the *Mellon* opinion) were among the *Butler* majority, while the fifth (Brandeis) joined the *Butler* dissent.
authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution," Justice Roberts, writing for the Court, proceeded to demonstrate that he simply did not understand what he—or Hamilton—had said.

Applying what he called "another principle embedded in our Constitution," Roberts said, "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government." Powers not delegated to the United States, he continued, "are reserved to the states or to the people . . . . The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden." 129

*Sic transit gloria Hamiltoni!* Having made a show of endorsement, Roberts forthwith renounced him; Roberts's "principle" that prohibits spending for matters "beyond the powers delegated to the federal government" is not a different "principle embedded in our Constitution," but rather the exact converse of Hamilton's precept that spending is "not limited by the direct grants of legislative power." 130 Under *Butler*'s simplistic dual federalism premise that "powers not granted are prohibited," 131 every expenditure other than to effectuate "the direct grants of legislative power found in the constitution" *ipso facto* "invades the reserved rights of the states."

The rule of decision in *Butler*, in other words, 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 132 makes its opin-

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130. *Id.* at 68.
131. *Id.*
132. *Id.*
133. *Id.* at 66.
134. Contrast the more accurate understanding of "powers" discussed supra notes 21–28 and accompanying text.
135. This charge of obliviousness might not be equally fair as to all members of the *Butler* majority. That majority consisted of six Justices, but their split into three camps the next year in Steward Machine Co. v. Davis, 301 U.S. 548 (1937), suggests that even in 1936 they might not have been entirely of one mind.
In *Steward*, Chief Justice Hughes and Justice Roberts joined the *Butler* dissenters. Justices Butler, McReynolds, Sutherland, and Van Devanter all still retained dual federalism's pie-slice error, but only Butler and McReynolds maintained it with undiluted vigor. Justice Butler characterized unemployment compensation as a matter "from which the United States is by the Constitution excluded." *Id.* at 618 (Butler, J., dissenting). Justice McReynolds's opinion consisted for the most part of a nine-page quotation of President Pierce's 1854 message (see supra note 114 and accompanying text) explaining in dual federalist terms his veto of the program of land grants to states to fund indigent assistance. *Steward*, 301 U.S. at 600-09 (McReynolds, J., dissenting). Significantly, Pierce had invoked the spirits of Madison and Jefferson while conspicuously omitting any mention of Hamilton at all. *See id.* at 606-07.

Sutherland and Van Devanter, on the other hand, compromised their dual federalism a bit. They affirmed "the complete supremacy and independence of the state within the field of its powers . . . . The federal government has no more authority to invade that field than the state has to invade the exclusive field of national governmental powers . . . ." *Id.* at 611 (Sutherland and Van Devanter, JJ., dissenting) (citation omitted); *see also id.* at 615. But they were willing for

the federal government and a state government to coöperate to a common end, provided each of them is authorized to reach it. But such coöperation must be effectuated by an exercise of the powers which they severally possess, and not by an exercise, through invasion or surrender, by one of them of the governmental power of the other. *Id.* at 611-12.

Accordingly, Sutherland and Van Devanter dissented only in *Steward*, simultaneously joining the majority in *Helvering v. Davis*, 301 U.S. 619 (1937), in upholding the old-age pension provisions of the same Social Security Act. The old-age provisions, the two Justices said, unlike the unemployment compensation provisions involved in *Steward*, represented cooperation to a common end through exercise of the powers that each respectively possessed and entailed no surrender of power by the participating states, because even though to qualify for support of its old-age assistance program a state must have adopted a plan conforming to federal specifications,

*the state keeps its own funds and administers its own law in respect of them, without let or hindrance of any kind on the part of the federal government; so that we have simply the familiar case of federal aid upon conditions which the state, without surrendering any of its powers, may accept or not as it chooses. Steward*, 301 U.S. at 612 (Sutherland, J., dissenting) (citation omitted). At this point, Sutherland cited the unanimous opinion of the Court in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), which Sutherland himself had written. *Steward*, 301 U.S. at 592 (Sutherland, J., dissenting). In *Mellon*, Sutherland had observed that the Maternity Act did not "require the States to do or to yield anything." *Mellon*, 262 U.S. at 482, but went no further "than to propose to share with the State the field of state power," *id.* at 485. Even though federal aid was forthcoming under the Maternity Act only if the state's own plan was deemed satisfactory, a state could alter its program with no consequence other than ineligibility for the following year's grant. *Id.* at 479.

136. One recent but stunningly anachronistic article baldly reiterates the dual federalism thesis, complete with assertions that legislative objectives not "expressly delegated" to Congress are "retained exclusively to" the states. Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 102, 117. Professors McCoy and Friedman elude the ridicule earned by the *Butler* majority only be-
The Butler majority opinion recites the ill-considered “pretext” dictum from M'Culloch\textsuperscript{137} and repeatedly stresses that theme.\textsuperscript{138} It mistakenly applies the Necessary and Proper Clause as a restriction of the (taxing and) spending power.\textsuperscript{139} It further manifests the dual federalism error by equating “extraneous objects”\textsuperscript{140} with “prohibited ends.”\textsuperscript{141} And its error is punctuated by irony, for Hamilton had specifically \textit{advocated} federal spending to influence agricultural production.\textsuperscript{142}

The Butler dissenters, however, understood Hamilton no better. Penetrating and escaping the misconceptions ensconced by dual federalism was tedious and difficult intellectual work, and no Justice had yet finished it by this time. Writing for the Butler dissenters, Justice Stone showed none of the clear understanding of classic federalism principles he would display five years later when writing for the unanimous Court in \textit{United States v. Darby}.\textsuperscript{143}

\textit{Darby} was not a spending power case, but as the Justices recognized, the principles applied there to uphold the Fair Labor Standards Act (FLSA) are generic. The relevant part of the 1941 \textit{Darby} opinion upheld the portion of the FLSA prohibiting the shipment in interstate commerce of goods produced under wage and hour circumstances unsatisfactory to Congress.\textsuperscript{144} This part of the Court's opinion in \textit{Darby} constitutes the first deliberate and clear-sighted affirmation by any modern Supreme Court majority of the principle of extraneous ends.

\textsuperscript{137} \textit{Butler}, 297 U.S. at 68-69 (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 342 (1819)); \textit{see supra} note 52 and accompanying text.

\textsuperscript{138} E.g., \textit{Butler}, 297 U.S. at 70, 77.

\textsuperscript{139} After quoting from M'Culloch the classic exposition of the Necessary and Proper Clause, M'Culloch, 17 U.S. at 421 (“let the end be legitimate . . .”), the \textit{Butler} majority misapplied it to produce this absolutely anti-Hamiltonian proposition:

The power of taxation [and spending], which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing [and spending] power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.\textit{Butler}, 297 U.S. at 69. Madison himself could not have better articulated the Madisonian view.

\textsuperscript{140} \textit{id.} at 67.

\textsuperscript{141} \textit{id.} at 77.

\textsuperscript{142} \textit{See supra} text accompanying note 71.

\textsuperscript{143} 312 U.S. 100 (1941).

\textsuperscript{144} \textit{id.} at 115.
Citing tax cases—thus illustrating the generic nature of the principle involved—Stone wrote for the *Darby* Court,

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction .... "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.\textsuperscript{145}

Accordingly, the *Darby* Court expressly overruled *Hammer v. Dagenhart*\textsuperscript{146} in favor of "the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved ...."\textsuperscript{147} After *Darby*, a federal measure "nominally" exercising some enumerated power would not again be thought vulnerable merely because "its motive or purpose"\textsuperscript{148} "or its effect"\textsuperscript{149} was "to control in some measure"\textsuperscript{150} a matter within the reserved power of the states.

The *Darby* Justices were not misled by *M'Culloch's* old "pretext" dictum. Indeed, in discussing this extraneous ends principle, the *Darby* Court made no reference at all to *M'Culloch* (or to the Necessary and Proper Clause). The *Darby* Court cited *M'Culloch* only with respect to the different portion of the FLSA that required employers to provide specified wage and hour circumstances for production employees;\textsuperscript{151} unlike the rule against shipment, that rule governing production was a straightforward application of the extraneous means principle of the Necessary and Proper Clause.\textsuperscript{152}

\textsuperscript{145. Id. (citations omitted).  
146. 247 U.S. 251 (1918).  
148. *Id.* at 113.  
149. *Id.* at 116.  
150. *Id.*  
151. *Id.* at 117–24.  
152. See supra note 62. To stress that this extraneous means principle was generic and not peculiar to the commerce context, the *Darby* opinion explained,  

Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.
Darby thus clearly distinguished the principle of extraneous ends from the principle of extraneous means, discussing each in a separate part of the opinion dealing with a different part of the FLSA. But while this distinction is indispensable to understanding and applying Hamilton's view of the spending power, it had not thus been recognized and clarified before Darby was decided in 1941.

Justice Stone's understanding of federalism's analytical principles was not so well developed when Butler was at issue in 1936. Being no more prepared than his brethren at that time to perceive and affirm the principle of extraneous ends, Justice Stone in his Butler dissent scrambled that principle with the principle of extraneous means.

In Butler, Stone said that reductions in agricultural production agreed to by recipient farmers "are but incidents of the authorized expenditure of government money"153 and reasoned that if such "incidents" could be regarded (as he said the Butler majority regarded them) as limiting the granted power, "the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed."154 Stone elaborated his reference to that "time-honored principle"155 by quoting Chief Justice Marshall's famous statement in M'Culloch v. Maryland about means "plainly adapted" to ends "within the scope of the constitution."156

That M'Culloch statement, of course, was a paraphrase of Hamilton, but it was a paraphrase of Hamilton's view only of the Necessary and Proper Clause.157 The "time-honored principle" to which Stone referred in Butler pertains only to ends that are enumerated, authorizing pursuit of them by means that are not; it says

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154. Id.
155. Stone called this the “cardinal guide to constitutional interpretation.” Id.
156. Id. (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).
157. See supra note 43.
nothing at all about using enumerated powers as means to promote extraneous ends—and that was the issue in Butler. In Butler, Stone unwittingly jumbled these distinct issues with the undiscriminating phrases “incident to” and “incidents of.” Hamilton had understood, endorsed, and used both the principle of extraneous means and the principle of extraneous ends, but he never had confused the two, and he never had associated the latter with the Necessary and Proper Clause.

Having so scrambled the egg, Stone assumed that M’Culloch’s language about ends that are “legitimate, ... within the scope of the constitution,” must be relevant to the point at issue in Butler. Indeed, wholly at odds with Hamilton, he assumed that the end, or purpose, of a federal spending program must determine its constitutionality. Thus Stone declared that “[t]he Constitution requires that public funds shall be spent for a defined purpose,” concluding that spending could be “within the granted power” only if adapted to “the end which alone would justify the expenditure.” “Expenditures would ... lose their constitutional sanction,” he reasoned, were there not some assurance that “the permitted end would be attained.”

Hamilton had maintained that the end promoted by spending is immaterial, the consequence being that Congress may spend even for extraneous ends. Stone, however, maintained that the end promoted by spending is determinative, the consequence being that Congress may spend only for the purposes constitutionally “de-

158. Butler, 297 U.S. at 83 (Stone, J., dissenting). With regard to the obfuscatory, ambiguous word “incident,” see supra note 42 and accompanying text.
159. M’Culloch, 17 U.S. at 421.
160. Butler, 297 U.S. at 83 (Stone, J., dissenting).
161. Id. at 85.
162. Id.
163. Id. at 83. Only a confused allusion to the irrelevant Necessary and Proper Clause could have made it seem material to Justice Stone whether conditions accompanying federal financial assistance are “reasonably adapted to the attainment of the end” at which the spending is aimed. Id. at 85; see also id. at 83. Adaptation to a targeted end is material when the end is within some enumerated power and one needs the Necessary and Proper Clause to justify a means that otherwise there would be no power to use; when the measure used as a means is itself an exercise of an enumerated power, however, it cannot possibly be less constitutional by virtue of being adapted poorly, if at all, to some end. For further discussion of the “germaneness” notion, see infra Section III(A).
164. It is immaterial, that is, unless it is forbidden or restricted by some Bill of Rights type of constitutional provision, of course. See supra note 51 and accompanying text.
fined.” Thus, Stone’s position was not Hamilton’s at all. His disagreement with the Butler majority was not as to whether Congress may spend toward ends that are not “within the scope of the constitution”; rather, it was only as to what ends are “within the scope of the constitution.”

As Stone reasoned in his Butler dissent, the “defined purpose” or the “permitted end” of spending is the “general Welfare”—that phrase from the clause that authorizes Congress to “lay and collect Taxes” being treated as definitive of the spending power. But at the same time, Stone took this “permitted end”—the “general Welfare”—to include anything “nation wide in its extent and effects.” What makes this interpretation irreconcilable with Hamilton, of course, is not the vast range of ends it countenances, but rather the notion that all such ends—all matters “nation wide in [their] extent and effects”—are within the enumerated power to spend, and therefore not extraneous at all.

The implications of this confusion are enormous. To be sure, the spending power itself enables Congress to use only the carrot (subsidy, or conditional subsidy), as distinguished from the stick (coercive sanctions), to promote federal policy on such “general Welfare” matters. Conceiving those “general Welfare” matters as themselves within rather than extraneous to the enumerated powers, however, makes it seem that both the Necessary and Proper Clause and the Supremacy Clause must be applicable not just to the spending function itself, but to the “general Welfare” ends thus mistakenly conceived as enumerated. Under this mistaken view, the Necessary and Proper Clause authorizes even nonfiscal, avowedly coercive measures to more fully effectuate any policy about anything that Congress tries to influence somewhat through spending—obliterating the principle of enumerated powers—and the Supremacy Clause gives priority to every federal policy about anything, producing comprehensive, supreme governing power in the federal government.

166. Butler, 297 U.S. at 83 (Stone, J., dissenting).
169. After all, no rule as to purpose could possibly give more latitude for spending than Hamilton’s view that the ends, or objectives, of federal spending are constitutionally immaterial.
These of course are precisely the consolidating, centralizing results that the principle of enumerated powers was devised to preclude.\textsuperscript{170} Thus, by misconceiving "general Welfare" ends as enumerated rather than extraneous, Justice Stone unwittingly abrogated the principle of enumerated powers, surrendering unused the whole rhetorical arsenal it provides against unbounded, general, and supreme national legislative power.

That plainly was not what Stone meant to do; it was a consequence of an intellectual mistake. In 1938 Stone would join in vigorously reaffirming the principle of enumerated powers,\textsuperscript{171} and in 1941 in \textit{Darby} he would distinguish and separate the issues he had merged by mistake in \textit{Butler}. Nonetheless, Stone's mistake—conceiving the phrase "general Welfare" in Article I, Section 8, Clause 1 as placing general welfare ends within the constitutional enumeration—still recurs constantly today, inexorably entailing absurd results.\textsuperscript{172}

In 1937 the \textit{Butler} dissenters emerged as the core of a new majority in the Social Security Act cases, \textit{Steward Machine Co. v. Davis} and \textit{Helvering v. Davis}.\textsuperscript{173} While they had grown in number, however, their analysis had not yet improved.\textsuperscript{174}

As in \textit{Butler}, in \textit{Steward} and \textit{Helvering} the challenges technically were to the taxes imposed. \textit{Helvering} involved the old-age benefits provisions of the Social Security Act and a tax on employers designed to help fund them; the challenger relied on \textit{Butler}.'\textsuperscript{175} \textit{Steward} involved the Act's unemployment compensation

\textsuperscript{170} See supra notes 11–12 and accompanying text.
\textsuperscript{171} See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).
\textsuperscript{172} See infra Part III.
\textsuperscript{173} In both \textit{Steward Machine Co. v. Davis}, 301 U.S. 548 (1937), and \textit{Helvering v. Davis}, 301 U.S. 619 (1937), \textit{Butler} dissenters Justices Stone, Brandeis, and Cardozo were joined by Chief Justice Hughes and Justice Roberts of the \textit{Butler} majority. (Roberts, in fact, had written the \textit{Butler} majority opinion.) In \textit{Helvering}, Justices Sutherland and Van Devanter joined them as well.
\textsuperscript{174} In \textit{Helvering}, Justices Cardozo, Brandeis, Stone, and Roberts urged dismissal because no sufficient cause of action had been either pleaded or proved, \textit{Helvering}, 301 U.S. at 639, but the other five Justices found in the case "extraordinary features making it fitting . . . to determine whether the benefits and the taxes are valid or invalid." Id. at 640.
\textsuperscript{175} Id. at 634. Only two Justices—Butler and McReynolds—were persuaded by the attack on the old-age benefits provisions in \textit{Helvering}. Although Justices Sutherland and Van Devanter joined Butler and McReynolds in dissent regarding the unemployment compensation provisions at issue in \textit{Steward}, they joined the majority in \textit{Helvering} because (for reasons I do not find self-evident, and which they did not explain) they con-
provisions, which were complex enough to require some explanation. The Act authorized administration grants to help states defray the overhead costs of their unemployment compensation programs. To qualify a state for such aid, its program had to satisfy federally prescribed criteria aimed to ensure that the program would provide sufficient and effective financial relief. The same end of effective relief for the unemployed also was targeted by a tax credit provided by the Act to employers in states whose programs satisfied those criteria.

The challenger in Steward considered unemployment relief an "ulterior aim," because it was not within the scope of any enumerated power. Indeed, because to the dual federalist mind any matter not within some enumerated power is foreclosed from any federal attention at all, the argument was that the "ulterior aim" of these provisions was "not only ulterior, but essentially unlawful." Hamilton would have responded simply that Congress may spend even toward ends extraneous to any enumerated power. He could have cited examples from his own day, including cod fishery subsidies, funding of public improvements, and disaster relief. He might also have pointed to his own calls for federal funding of education, agriculture, industry, and trade. Between these on the one hand and pensions for the elderly and compensation for the unemployed on the other, there is no principled difference of constitutional dimension. In Hamilton's view, the fact that all these

sidered old-age assistance (unlike unemployment assistance) to be an end as permissible for the federal government as for the states, and because they concluded that the old-age provisions involved no surrender of the participating states' own power. See Steward, 301 U.S. at 612 (Sutherland, J., dissenting).

176. In Steward, the taxing provisions included a credit tailored for the same purpose as the spending plan accompanying it, and the Court considered both in light of that aim. Steward, 301 U.S. at 585–86.
177. Id. at 577.
178. Id. at 578.
179. The Act imposed a tax on employers and provided for crediting against that tax most of the contributions an employer had made to a state unemployment compensation system if the state program satisfied the criteria qualifying states for administration grants. Social Security Act, ch. 531, §§ 901–902, 49 Stat. 620, 639–40 (1935) (repealed 1939).
180. Steward, 301 U.S. at 585.
181. Id. at 586.
182. See supra text accompanying note 71.
ends are "extraneous" to any enumerated power could not warrant calling any of them "ulterior," let alone "unlawful."

It was not Hamilton, however, but Justice Cardozo who wrote for the Court in both Steward and Helvering. Cardozo professed endorsement of the Hamiltonian position,\(^\text{183}\) but he utterly failed to understand it or to respond as Hamilton would have. Instead, just like Justice Stone in the Butler dissent a year earlier, Cardozo unwittingly abrogated the principle of enumerated powers.

The problem of unemployment, Cardozo said, "had become national in area and dimensions,"\(^\text{184}\) and the old-age indigence problem "is plainly national in area and dimensions."\(^\text{185}\) These statements, and the further observation that "laws of the separate states cannot deal with it effectively,"\(^\text{186}\) recall the generality of the Eighth Randolph Resolution, as referred to the Committee of Detail in 1787, that the national legislature should be competent "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent . . . ."\(^\text{187}\) Following the lead of the Committee of Detail, the delegates at the Constitutional Convention deliberately abandoned this high level of generality in order to obtain the distinct advantage offered by enumeration.\(^\text{188}\) Cardozo and his fellow Justices in 1937, however, missed their whole point.\(^\text{189}\)

\(^{183}\) Helvering v. Davis, 301 U.S. 619, 640 (1937).
\(^{184}\) Steward, 301 U.S. at 586.
\(^{185}\) Helvering, 301 U.S. at 644. Cardozo then said, "Congress, at least, had a basis for that belief." Id. If the issue in Helvering, Steward, and Butler had been under the Necessary and Proper Clause, this comment would have been on point: the classic understanding of that Clause, according to which Congress may impose a regulation upon an extraneous matter as a means to promote an enumerated end as long as it has a rational basis to believe that the regulation will conduce to the enumerated end, had begun to emerge again just six weeks earlier, in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). But the Necessary and Proper Clause states the principle of extraneous means, and the issue in these cases concerned, instead, the principle of extraneous ends. This statement by Cardozo, too, was therefore inapt. Hamilton had recognized that "[i]t is . . . of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an appropriation of money is requisite and proper." HAMILTON, supra note 71, at 303. But Hamilton's statement was addressing the "general Welfare" phrase as a possible supervening restriction on the power to spend; he was not discussing the essence of that power itself.

\(^{186}\) Helvering, 301 U.S. at 644.
\(^{187}\) 2 CONVENTION RECORDS, supra note 12, at 131.
\(^{188}\) See supra text accompanying notes 12–16.
\(^{189}\) Neglect of the reason for, and the significance of, the Convention delegates'
Describing a situation as "national in area and dimensions" certainly attributes sufficient incidence or impact to it to implicate the general welfare as distinguished from the welfare of a few. However, that is an entirely different issue from whether the situation having that impact is one within Congress's enumerated powers; to overlook this distinction is to miss the crucial issue separating Hamilton from Madison on the spending power—namely, whether the situation even needs to be one within Congress's enumerated powers in order for Congress to spend regarding it.

Justice Cardozo pointed out that in a period of three and one-half years more than $2.9 billion had been drawn from the Federal Treasury for emergency relief (in addition to sums spent on programs to put victims of the Great Depression back to work).\(^\text{190}\) Hamilton would have upheld such expenditures regardless of whether the Constitution entrusted such concerns to the federal government—indeed, even though it specifically did not. Failing to understand Hamilton, however, Cardozo thought it necessary to deny that economic relief of the unemployed and elderly are "fields foreign to [Congress's] function";\(^\text{191}\) he thought it necessary to claim instead that such welfare ends are "fairly within the scope of national policy and power."\(^\text{192}\) But of course, they are not. They simply are extraneous ends toward which (among innumerable others) Congress may spend.

Perhaps it was true, as Cardozo eloquently wrote, that there was "need of help from the nation if the people were not to starve";\(^\text{193}\) if so, however, that was true exactly—and only—in the same sense that Hamilton had believed there was need in 1791 for federal subsidy of manufacturing if the young nation's scant economy was not to fail. Federal funds may be spent to meet any such need, but neither the generality and urgency of the need nor any decision to meet it can place such a matter among those enumerated by the Constitution for the federal government's concern.\(^\text{194}\) The essence of Hamilton's spending power view is pre-

\(^\text{191}\) Id. at 590.
\(^\text{192}\) Id.
\(^\text{193}\) Id. at 586.
\(^\text{194}\) We might also agree with Cardozo that there is need for the national govern-
cisely that Congress may spend for matters that the Constitution does not designate for the federal government’s concern—that Congress may spend for matters that (in terms of enumerated powers doctrine) are “foreign to [Congress’s] function” and are not “fairly within the scope of national policy and power.”

Since *Darby’s* affirmation of the principle of extraneous ends in 1941, the Supreme Court has prominently acknowledged that principle as the real reason that the holding in *Butler* was wrong and the ones in *Steward* and *Helvering* correct. The Court has upheld spending (and spending conditions) directed toward ends that it frankly recognized as beyond Congress’s constitutional powers, without feeling compelled to repeat the doubletalk about “defined purpose,” “permitted end,” and “end[s] legitimately national” that clutters the Stone and Cardozo opinions of 1936 and 1937 and obfuscates the point.

Its first occasion to do so arose in *Oklahoma v. United States Civil Service Commission*, just six years after *Darby*. Congress had conditioned its offer of certain federal funds on recipient states’ curtailment of partisan political activities by certain officials. The Justices upheld the condition even though “the United States ... has no power to ... regulate local political activities as such of state officials ...”

More recently, when Congress conditioned highway fund grants to states so as to reduce the amount available to states that allowed persons under twenty-one years of age to purchase or possess alcoholic beverages, the Court in *South Dakota v. Dole* recognized that it was immaterial whether the object (diminishing teenage drinking or drunk driving by teenagers) was within any of

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196. *Id.*
199. *Id.* at 143.
200. *Id.*. Contrast the thesis in *Steward*, that the matter sought to be influenced was “legitimately national” and “fairly within the scope of national policy and power.” 301 U.S. at 590–91.
Congress's powers. On behalf of the seven-Justice majority, Chief Justice Rehnquist wrote, "[O]bjectives not thought to be within Article I's 'enumerated legislative fields' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."\(^\text{202}\) That stated the Hamiltonian view well enough that only a purist academician might quibble.\(^\text{203}\) Four years later Chief Justice Rehnquist made the same point again, writing for the Court that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest,"\(^\text{204}\) notwithstanding those activities are not within the federal government's power to control.

Nonetheless, the anti-Hamiltonian errors of conception manifested in Stone's \textit{Butler} dissent and repeated the next year in Cardozo's \textit{Steward} and \textit{Helvering} majority opinions still confound spending power analysis today. Indeed, the consequences go beyond spending issues: the eloquence of expression employed in the \textit{Steward} and \textit{Helvering} opinions, and the prestige of their author, Justice Benjamin Cardozo, have helped to accredit a "sophisticated" modern impression that the principle of enumerated powers is an anachronism, really just a quaint old "fiction,"\(^\text{205}\) and that every problem even arguably "national in area and dimensions"\(^\text{206}\) is, \textit{ipso facto}, "within the scope of national policy and power."\(^\text{207}\) It is true that this sophisticated but consolidating and centralized notion of governing power under the Constitution is precisely the import of what Stone and Cardozo confusedly said;\(^\text{208}\) it is a mistaken view, however, to which neither Stone

\(^{202}\) \textit{Id.} at 207 (citing United States v. Butler, 297 U.S. 1, 65 (1936)).

\(^{203}\) The metaphor of "fields" is a dangerous one; powers other than "legislative" ones are enumerated, and even some legislative powers are enumerated elsewhere than in Article I (e.g., U.S. \textit{ CONST.} art. III, § 3, cl. 2; \textit{id.} art. IV, § 1; \textit{id.} amend. XIV, § 5); such extraneous objectives might be "attained," but they also might be frustrated by states or by private recipients and thus not actually be "attained" at all.

\(^{204}\) Rust v. Sullivan, 500 U.S. 173, 193 (1991). The activities funded in that instance were family-planning services specifically excluding abortion counseling. See also Maher v. Roe, 432 U.S. 464, 474 (1977), in which the Court said that the federal government may "make a value judgment . . . and . . . implement that judgment by the allocation of public funds."


\(^{207}\) \textit{Id.} at 590.

\(^{208}\) \textit{See supra} notes 164–69 and accompanying text.
nor Cardozo wittingly subscribed—a product merely of intellectual mistake, not even of any policy choice.

C. The Foundational Fault: Text Matters

Stone, Cardozo, and the other Butler dissenters and the Steward and Helvering majority members were primed for the analytical mistake they made. They were primed for it by the long-standing habit of attributing Congress's spending power to the clause of the Constitution that authorizes taxes “to pay the Debts and provide for the common Defence and general Welfare of the United States.”

The Taxing Clause, however, does not actually authorize spending at all. The long-standing assumption that it does relies on a course of inference like the one spelled out by Justice Roberts in United States v. Butler:

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation . . . can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. [Therefore t]he necessary implication from the terms of the grant is that the public funds may be appropriated “to provide for the general welfare of the United States.”

Since it is only out of respect for the principle of enumerated powers that one seeks a textual basis for the spending power in the first place, it seems anomalous to stake so significant a power on nothing more than a chain of inferences. Moreover, there is even greater reason for dubiety than this: even if it might be taken to imply authority to spend tax revenues, the Taxing Clause cannot be twisted enough to authorize the spending of Treasury assets derived from gifts, user fees, sales of surplus federal property, or other nontax sources. For generations, public debts were paid and a large part of the federal budget was supported by proceeds from the sale of public domain lands; but nothing in the Taxing Clause even implicitly contemplates spending such funds.

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209. The very next year the Court, with Stone (but not Cardozo) participating, forcefully reaffirmed constant adherence to the principle of enumerated powers, applying it rigorously in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938).
Most significant in light of the modern fact of routine deficit spending, the text of the Taxing Clause is utterly inadequate to authorize spending on the national credit.

The gravest difficulty in associating the spending power with the Taxing Clause, however, is not that the Clause is inadequate (which it is), but that it misleads. When one attributes the spending power to this Clause, as Stone and Cardozo and the 1937 majority did, one can be very easily seduced into thinking that any "general Welfare" objective is an enumerated one—even though were it not being targeted by spending, it readily would be recognized as an objective extraneous to any enumerated power. Once one yields to this seduction, it follows that supremacy attaches to Congress's general welfare objective and even that nonfiscal federal measures to achieve it are warranted. With that, of course, one's alienation from the Constitution's allocation of governing power is complete.

Other language in the Constitution is better adapted than the Taxing Clause to authorize spending. Financial assets are property, no matter whence they derive, and the Constitution without restriction empowers Congress to "dispose of ... the ... Property belonging to the United States." Moreover, the aptness of this

212. Although the confusion thus induced between extraneous and enumerated ends is predominantly detrimental, the confusion has not been wholly without good effect. Probably it is precisely because of this confusion that Justice Roberts and Chief Justice Hughes slipped into alignment with the Butler dissents to comprise the new majority in Steward.

The same confusion likely made it possible for even Justices Sutherland and Van Devanter to join in Helvering: the old-age pension provisions litigated there contemplated what obviously was "welfare" spending, whereas the ends of the Agricultural Adjustment Act of 1933 litigated in Butler were less in the traditional pattern of welfare measures and thus could more readily be characterized as extraneous. The unemployment compensation provisions at issue in Steward also fit the traditional welfare pattern, but Justices Sutherland and Van Devanter objected to them on a different ground, as involving a surrender of some self-governance by states (which they concluded the pension provisions did not). See Steward Mach. Co. v. Davis, 301 U.S. 548, 612 (1937) (Sutherland, J., dissenting). Justice Sutherland's dissent is discussed at greater length supra note 135.

The same confusion between extraneous and enumerated ends might also explain why even Justice Brandeis, having concurred in Holmes's dissent in Hammer v. Dagenhart, 247 U.S. 251 (1918), see supra note 49 and accompanying text, joined quietly both in Stone's Butler dissent and in Cardozo's two 1937 majority opinions without calling attention to the principle of extraneous ends that Holmes's Dagenhart opinion so bluntly expressed: if Brandeis, like Stone and Cardozo, misconceived the general welfare as an enumerated end, he might not have realized that the principle that should dispose of Steward and Helvering was actually the same principle espoused in that Dagenhart dissent.

213. U.S. Const. art. IV, § 3, cl. 2. Most of the litigation under this clause has in-
language to authorize spending is no accident: a careful parsing of the records of the Constitutional Convention indicates that this Article IV Property Clause was specifically designed for the purpose, among several others, of authorizing Congress to spend—even for objects that would not be within any enumerated power. Indeed, several examples of such spending were specifically discussed, and none was disapproved. To detail and document the evidence here would distract from the more important aspects of spending power analysis being elaborated in this Article; that task is undertaken in a separate article.\footnote{14}

This Property Clause basis for spending toward extraneous ends\footnote{15} is sufficient not only as to tax revenues, but also as to nontax receipts like sale proceeds, gifts, and user fees, and even as to borrowed funds: the borrowing power\footnote{16} imports no restriction on the use of any borrowed funds, and borrowed assets and credit both are alienable, or disposable, “property” of the United States.\footnote{17}

The language of the Property Clause places no limit whatever on the objectives toward which dispositions of federal property may be aimed. It does not even restrict spending to objectives comprehensible within so latitudinous a phrase as “general Wel-


\footnote{215. For spending toward enumerated ends—i.e., to carry into execution the enumerated powers—the Property Clause is superfluous because the Necessary and Proper Clause applies. Because funds may be drawn from the Treasury “in Consequence of Appropriations made by Law,” U.S. CONST. art. 1, § 9, cl. 7, that Clause authorizing “all Laws which shall be necessary and proper for” effectuating the enumerated powers, id. § 8, cl. 18, is ample authority to spend for government operations and all other ends within the enumerated powers.}

\footnote{216. \textit{Id.} cl. 2.}

\footnote{217. Even funds held in trust by the United States might be regarded as within the Article IV Property Clause. See New York v. United States, 112 S. Ct. 2408, 2426 (1992), in which the Court rejected the argument that funds held by the United States in an escrow account are not federal funds—albeit with a remarkably bumbling and inadequate rationale.}
fare.” Misplaced anxiety about unlimited federal power might therefore mislead one to think that the Taxing Clause is the safer and more conservative, because more guarded, referent for the spending power. But it manifestly is not. In the first place, the nominal limitation to “general” rather than “particular” welfare has negligible justiciable significance.\(^{218}\) In the second place, and more significantly, the Supreme Court declared in a 1976 *per curiam* opinion that it is a mistake to think of the “general Welfare” phrase as a limitation: “Appellant’s ‘general welfare’ contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause.”\(^{219}\) Indeed, as the last phrase of this pronouncement demonstrates, it really is the reference of the spending power to the language of the Taxing Clause that portends the more sweeping federal competence: the only way the Justices in 1976 could have concluded that the Necessary and Proper Clause would “enlarge” federal power in the spending context was by mistakenly assuming that it could support nonfiscal measures aimed at effectuating extraneous objectives of spending. Reference instead to the scantier language of the Property Clause would not likely have induced that mistake.

Hamilton’s view implements the principle of enumerated powers (and the important values of federalism it is designed to preserve) precisely by distinguishing between the act of spending and the objectives at which various acts of spending might be aimed, holding that Congress may spend regardless how extraneous its objective. By emphasizing this distinction, Hamilton’s thesis refutes the mistaken claim of federal supremacy for extraneous policy ends and exposes misapplications of the Necessary and Proper Clause. Because the Property Clause contains no language about purpose even at a high level of generality, attributing the spending power to it helps avoid confusing extraneous ends with enumerated ones. It thus actually serves more effectively to ensure govern-

\(^{218}\) As the Court wrote in 1937.

The line must still be drawn between one welfare and another, between particular and general . . . . The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. Helvering v. Davis, 301 U.S. 619, 640 (1937).

\(^{219}\) Buckley v. Valeo, 424 U.S. 1, 90 (1976) (per curiam).
ment tempered by a federal distribution of power. In contrast, attributing the spending power to the Taxing Clause with its illusory limits strongly induces confusion between extraneous and enumerated ends, tending to subvert the Constitution's allocation of governing power.

It is true that even Hamilton attributed the spending power to the Taxing Clause. That he did so demonstrates that such misattribution need not necessarily lead one to confuse extraneous with enumerated ends and thereby inadvertently abrogate the principle of enumerated powers in favor of a general federal governing power. It is possible to resolve spending power issues correctly even if the long-standing error as to the source of the spending power remains uncorrected. Propositions that are inherently misleading are unsatisfactory, however, even if they do not always deceive. The misattribution of the spending power to the Taxing Clause helps to perpetuate very great mischief, and therefore it would be beneficial to recognize and correct the mistake now. Recognizing that Congress's power to spend toward extraneous ends derives from the Property Clause can do much to facilitate and encourage clearer analysis of the issues.

Even if this long habit of misattribution proves too deeply ingrained to be purged, however, the commonly made errors of spending power analysis are not unavoidable. The next Part of this Article examines some of those errors and their consequences and elaborates how to avoid them.

220. HAMILTON, supra note 71, at 230, 302-03. Hamilton wrote, "The terms 'general welfare' were doubtless intended to signify more than was expressed or imported in those which Preceded [i.e., the other clauses in Article I, § 8]; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision." Id. at 303.

This statement by itself may be criticized as belittling the scope of the enumerated powers, ignoring those conferred on one or another branch by other Articles and Sections and failing to acknowledge the reach of the Necessary and Proper Clause. However, even if most "affairs of a nation" could be found to be provided for by these, at least some affairs arguably worth national attention could not, and it is these that Hamilton's argument addresses. The phrase "general Welfare," he continued, 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.

Id.
III. CORRECTING CRITICAL MISTAKES

Lawyers under a regime of precedent characteristically fashion rhetorical structures even with crooked stones, not troubling (or not daring) to ascertain whether the masons have cut them askew. But *stare decisis* is a treacherous rule in constitutional law. Much "constitutional" doctrine finds little to work with in the Constitution's own text. Where that is true, the risk of poor policy might be substantial, but the risk of intellectual error is less, and therefore more deference to precedent might be desirable to help moderate zealous policy crusades. The state-federal allocation of governing power, however, is one realm where the text is extensive, and coherent enough if only it be thoughtfully analyzed. Precedents reflecting less adept analysis can gravely, albeit unwittingly, distort, damage, and destroy. Flawed stones make unstable, sometimes dangerously inadequate walls. The obligation of each of us is to the Constitution, not to some judicial oracle living or dead; this obligation is not discharged by reiterating and continuing to fumble with intellectual mistakes just because the Supreme Court has made them before.

Constant recitation of the familiar phrases of the 1937 Social Security Act opinions, without recognizing that those phrases reflect only a transient stage in the long struggle to maintain and apply sound intellectual principles of the Constitution, has kept Hamilton's vision of the spending power out of the Justices' grasp, notwithstanding their repeated affirmations that he was correct. The result is a nonsensical jumble of decisions irreconcilable with anything that Hamilton maintained. We turn now to consider what it should mean if Hamilton's view of the spending power is given more than lip service and is understood and applied.

A. The Inaneness of "Germaneness"

Chief Justice Rehnquist declared in his opinion for the Court in *South Dakota v. Dole* that "our cases have suggested (without significant elaboration) that conditions on federal grants might

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be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' “224 Rehnquist did not elaborate, and the lack of elaboration is significant: Rehnquist's own words were mere dicta,225 as had been the few statements in earlier cases to which he referred.226

Justice O'Connor, however, advanced "germaneness" as a rule of decision. Dissenting in Dole, she exaggerated the prior dicta and asserted, "We have repeatedly said that Congress may condi-

224. Id. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)). The Dole majority also rejected an argument similar to dual federalism's erroneous equation of extraneous ends with forbidden ones. South Dakota urged that the Twenty-First Amendment's confirmation and enhancement of state authority to regulate liquor made it the states' exclusive domain and asserted this supposed foreclosure of federal regulation as an "independent constitutional bar" to the spending condition. Id. at 209.

That was a weird reading of the Twenty-First Amendment, of course: the Eighteenth Amendment had given power to both Congress and the states to enforce Prohibition, but the language of the Twenty-First Amendment is inapt to give any power at all. Moreover, its second section refers to both state and federal laws, prohibiting the violation of either notwithstanding other constitutional considerations that otherwise might inhibit their enforcement, but giving no lawmaking power beyond what already, and independently, was in place. U.S. Const. amend. XXI, § 2. As to states, what was already in place was the "police power," and the Amendment seems tailored to lift whatever inhibition thereon the "dormant commerce clause" otherwise might impose. But there also were already in place all of the federal government's enumerated powers, and the Twenty-First Amendment says nothing to cut back Congress's commerce power (for example), or its power to regulate even extraneous matters—even local production, sale, and consumption—insofar as that might be "necessary and proper" to effectuate its policy for interstate commerce. It therefore is impossible to read candidly the Twenty-First Amendment as reserving liquor regulation exclusively to the states.

Instead of refuting the state's premise, however, the Dole majority simply rebuked the dual federalist inference the state had drawn from it. In doing so, the Court in substance reiterated the principle of extraneous ends, that Congress is not prohibited from influencing a matter just because it is not placed within its governing control, and explained that references to an "independent constitutional bar" can mean only that the spending power "may not be used to induce the states to engage in activities that would themselves be unconstitutional." Dole, 483 U.S. at 210.

225. The state had not pressed the "germaneness" point in Dole or seriously urged that the spending condition at issue there was invalid on that ground. Amici curiae, however, had argued the point at length, id. at 208-09 n.3, and perhaps for that reason Rehnquist added with reference to the condition under consideration that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel . . . . Congress conditioned the receipt of federal funds in a way reasonably calculated to address [a] particular impediment to a purpose for which the funds are expended." Id. at 208-09.

226. The phrase Rehnquist quoted from Massachusetts v. United States was dicta, generalizing cases on different and differing points. Rehnquist also quoted from Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958), in which the suggestion of a restriction to "conditions relevant to federal interest in the project and to the over-all objectives thereof" likewise was dicta. Id.
tion grants under the spending power only in ways reasonably related to the purpose of the federal program."227 Then in 1992, this time on behalf of a six-Justice majority, O'Connor wrote in New York v. United States that while Congress may attach conditions to federal funds, "[s]uch conditions must . . . bear some relationship to the purpose of the federal spending . . . ."228 The occasion for this latest dictum was her gratuitous approval of an aspect of the Low-Level Radioactive Waste Policy Amendments Act of 1985229 that O'Connor specifically acknowledged had not even been challenged in the case.230

This purported "germaneness" requirement appeals to those resentful over decades of fiscal bullying by Congress. Some remediation of Congress's overbearingness, at least, is appropriate, but the apothecaries of "germaneness" have too little science to devise a medicine that could work. The germaneness "cure" they peddle amounts to no more than cheap whiskey and snake oil.

It comes in three varieties, but none can do any good. The harshest is a brew concocted by counsel on behalf of the National Conference of State Legislatures and other amici in South Dakota v. Dole and approved by Justice O'Connor, who quoted it straight from their brief:

Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.231

227. Dole, 483 U.S. at 213 (O'Connor, J., dissenting). Addressing the specific condition at issue in that case, she continued, "In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose." Id. at 213-14.
230. New York, 112 S. Ct. at 2426. She said of the uncontested conditions, "The [funding] conditions imposed are reasonably related to the purpose of the expenditure; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal." Id. (citation omitted).
231. Dole, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures at 19-20). Tracking the amicus brief, which set forth the thesis propounded by Professors McCoy and Friedman, supra note 136, at 102, O'Connor claimed that the Hatch Act condition litigated in Oklahoma v. Civil Service Commission, 330 U.S. 127, 128-29 (1941) (challenging Hatch Act, ch. 314, 24 Stat. 440 (1887) (current version at 7 U.S.C. §§ 362, 365, 368, 377-379 (1988))), is "appropriately viewed as a condition relating to how federal moneys were to be expended." Dole, 483 U.S. at 217.
This medicine would kill the patient to cure the ill. If one were really to disallow any conditions except those directing "how the money should be spent,"232 scarcely any conditions could be imposed except those designating authorized uses or specifying accounting methods. A condition that particular funds be used for schools rather than roads would be acceptable, but a condition, for example, that recipients undertake not to discriminate on the basis of age or handicap—or some other boorish but not unconstitutional ground—probably would not. Indeed, even conditions foreclosing race and sex discrimination would be void as to most spending programs—except insofar as they could be upheld, independently of the spending power, under Section 5 of the Fourteenth Amendment233 as means to combat state action discriminating on such constitutionally forbidden grounds.

The second nostrum is less deadly, but still needlessly astrin- gent. It requires that any funding condition be reasonably related to "the purpose of the expenditure,"234 "the purpose of the federal program,"235 or "the federal interest in [the] particular national project[] or program[]."236 This is the variation articulated by Justice O'Connor in her own words, as quoted above from her Dole dissent237 and also as stated in New York v. United States and alluded to in the Dole majority's dictum.238

This proposition shows little reflection. In the first place, this kind of "germaneness" requirement assumes the anti-Hamiltonian premise that spending is permissible only for certain specified

(O'Connor, J., dissenting). The only relationship she could point to, however, was that the official whose political activities were material in Oklahoma "was employed in connection with an activity financed in part by loans and grants from a federal agency." Id. If that is all that "specifying how the money should be spent means," id. at 216, a condition that persons administering Aid to Families with Dependent Children grants recycle paper, or refrain from smoking, or bathe daily, would be equally "germane."

232. Id.
235. Id.
236. Id. at 212 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
237. See supra text accompanying note 227.
238. Dole, 483 U.S. at 207. It also is prescribed by Professors McCoy and Friedman, who say, "[I]f Congress wishes to spend to achieve 'broad policy objectives,' it may use the power to attach conditions to achieve those objectives. But this does not mean that Congress may attach conditions to achieve policy objectives that are independent of the expenditure." McCoy & Friedman, supra note 136, at 103.
ends. An analogy will illustrate the point: if one were authorized
to buy nothing but groceries and flowers, one’s purchase of a
houseware item even at the same store might raise an issue of ger-
maneness. It might matter, for example, whether the houseware
item were a pan for soup (germane to groceries), a vase (germane
to flowers), or a wrench to fix the car (germane to nothing autho-
rized at all). But the issue of germaneness could arise only be-
cause the authority was restricted in terms of purpose: if instead
one were authorized to buy anything, even if one made a particu-
lar shopping trip specifically for food it would not exceed one’s
authority to pick up film, or motor oil, or shirts, at the same time.

In the second place, even if spending were permissible only
for certain objectives, nothing could prevent promoting one such
objective by means of conditions attached to funds promoting
another. For example, even if the generalities “common Defense”
and “general Welfare” were conceived as comprehending all per-
missible purposes of federal spending, the Constitution would not
prohibit tailoring defense spending to promote welfare ends, nor
would it prohibit grants for one general welfare purpose from
being conditioned also to promote another.

The false notion that conditions must be germane to the pur-
pose of the particular grant had its origin in this passage of Justice
Stone’s *United States v. Butler* dissent:

> Congress may not command that the science of agriculture be
taught in state universities. But if it would aid the teaching of
that science by grants to state institutions, it is appropriate, if not
necessary, that the grant be on the condition, incorporated in the
Morrill Act, that it be used for the intended purpose.

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239. United States v. Butler, 297 U.S. 1, 83 (1936) (Stone, Cardozo, and Brandeis, JJ.,
dissenting) (citation omitted). Similarly, addressing the qualification requisites for state
plans of unemployment compensation under the Social Security Act, Justice Cardozo said
in *Steward*,

> A credit to taxpayers for payments made to a state under a state unemploy-
ment law will be manifestly futile in the absence of some assurance that the
law leading to the credit is in truth what it professes to be . . . . What is basic
and essential may be assured by suitable conditions . . . . In determining essen-
tials Congress must have the benefit of a fair margin of discretion.

*Steward Mach. Co. v. Davis*, 301 U.S. 548, 593–94 (1937). However, “manifestly futile”
does not necessarily mean unconstitutional, and there is no reason why being “basic and
essential” to the attainment of some end that itself has no constitutional relevance should
be a requisite to a condition’s constitutionality.
Standing by itself, however, this statement is a non sequitur. To complete the logical schema one must include another premise, which Stone had articulated earlier in the same paragraph. That premise was that federal expenditures would "lose their constitutional sanction" if they should "fail of their purpose," because "[t]he Constitution requires that public funds shall be spent for a defined purpose." 240

In other words, at its origin the idea that conditions must be germane to the purpose of the particular grant was integral to, and dependent upon, the anti-Hamiltonian notion that the constitutionality of the spending itself depends on the objective at which the spending is aimed.

The third variety of the "germaneness" nostrum is not a cure at all, but the essence of the disease. (The second variety, indeed, is just a tincture of this virulent strain.) This third and most elemental form is the proposition of the Butler dissenters that federal expenditures would "lose their constitutional sanction" if they were not "for a defined purpose" within Congress's constitutional power. 241 But this is precisely the anti-Hamiltonian, Madisonian premise, mistaken for Hamilton's by Justice Stone and the others who became the majority in Steward because—in 1936 and 1937—they did not yet recognize the principle of extraneous ends.

Actually, Hamilton had candidly maintained that Congress may spend even toward objects that the Constitution nowhere authorizes the federal government to pursue. Because he understood the corollaries of the principle of extraneous ends, Hamilton knew perfectly well that this principle leaves the principle of enumerated powers in full vigor and the policy objectives of federalism secure: the power to spend, even toward extraneous objectives, justifies no other steps whatsoever to achieve such extraneous aims, and Congress's will for extraneous matters simply is not supreme.

In Hamilton's view, Cardozo's suggestion in Steward that spending conditions might be invalid unless germane to an object within the federal government's regulatory powers is incongruous

240. Butler, 297 U.S. at 83 (Stone, Cardozo, and Brandeis, JJ., dissenting); see also id. at 85 ("[R]esults become lawful when they are incidents of those [enumerated] powers but unlawful when incident to the similarly granted power to tax and spend.").

241. Id. at 83; see also supra notes 159-63 and accompanying text.
nonsense. Cardozo did indeed say (his statement as to taxing applying to spending as well) that

[i]n ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function . . . . [This is not a case] where the conduct to be stimulated or discouraged is unrelated to . . . any . . . end legitimately national.

But the questions Cardozo said were left open were precisely the questions that actually were at issue in Steward and Helvering, and those holdings—notwithstanding the inapt opinions—put those very questions decisively to rest. The holdings in those cases were faithful to Hamilton; only the opinions (despite nominally endorsing him) were not.

In New York v. United States, Justice O'Connor argued that were it not for a germaneness requirement, "the spending power could render academic the Constitution's other grants and limits of federal authority." She could not have reasoned so, however, had she understood (as Hamilton did) the corollaries to the principle of extraneous ends. Earlier, in her Dole dissent, she had written,

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, as Butler held, was not the Framers' plan and it is not the meaning of the Spending Clause.

242. Professors McCoy and Friedman reiterate this nonsense, insisting that "if achievement of an end is beyond Congress's means regulatorily, it also is invalid as part of a benefit scheme." McCoy & Friedman, supra note 136, at 104.
244. See supra notes 143–52 and accompanying text.
246. See supra notes 60–70 and accompanying text.
O'Connor thus was quick to acknowledge that her “approach harks back to” Butler, but she failed to notice the error that makes Butler’s majority opinion ridiculous. She thought its only error was its “crabbed view of the extent of Congress’ regulatory power under the Commerce Clause. The Agricultural Adjustment Act . . . was regulation that today would likely be considered within Congress’ commerce power.” But while it misjudged the scope of the commerce power, she thought, the Butler majority was correct in restricting the permissible purposes of spending to the effectuation of enumerated powers.

But this is the Madisonian view. Sic transit gloria Hamiltoni—iterare! O’Connor reiterated exactly the Butler majority’s monumental error, parading Madison in masquerade of Hamilton once more.

Concluding her dissent from the Dole majority’s approval of conditioning highway funds on recipient states’ elevating their minimum drinking ages, O’Connor declared, “Because [the condition] cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution.”

Although Justice O’Connor seems to have believed that she was following Hamilton, this concluding proposition could not have
been made more Madisonian even by specific citations to Madison's own equivalent statements.\footnote{254}

In \textit{Dole}, it was unclear whether anyone except Justice O'Connor herself had been fooled; her germaneness dicta in \textit{New York v. United States}, however, appear in a majority opinion.\footnote{255} Nonetheless, the talk about germaneness still is dicta: it remains true (so far) that the Supreme Court never actually has held any spending condition unconstitutional for lack of germaneness—whether to the process of spending, or to the purpose of a particular funding program, or to any enumerated end. Nevertheless, any time the notion of a germaneness requirement is even taken seriously it puts Hamilton and his view of the spending power out of reach.

\section*{B. The "Supremacy" Fallacy and the Contractual Character of Spending Conditions}

Justice Cardozo wrote for the Court in \textit{Helvering v. Davis}, "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states . . . . [T]he locality must yield."\footnote{256} Had Cardozo meant only that Congress alone must judge what spending might do the public good, his point would be well taken. But that is not what he said. Rather, he cited the Supremacy Clause as if it could mean that states and localities must yield not merely to Congress's decision whether and on what conditions federal funds should be offered, but also to whatever policy choices—even about matters

\begin{itemize}
\item \textit{See, e.g., supra notes 90–98 and accompanying text.}
\item \textit{112 S. Ct. 2408, 2431 (1992).}
\item \textit{Helvering v. Davis, 301 U.S. 619, 645 (1937) (citing the Supremacy Clause, U.S. Const. art. VI, cl. 2).} Cardozo made this statement in response to a wholly conjectural supposition: Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? \textit{Helvering, 301 U.S. at 644–45.}

Moreover, the analogies to which Cardozo appealed for support, see id. at 645, were extravagantly inapt. The reason states cannot countermand a protective tariff is that they cannot negate federal taxes. Furthermore, the protective purpose is an exercise of the power over foreign commerce. Also the nullification fiasco had nothing to do with using enumerated powers toward extraneous ends.
\end{itemize}
extraneous to any enumerated power—Congress might try to promote through funding or funding conditions.

I call this logic the "supremacy fallacy." It consists of disregarding what I characterized earlier as the second corollary of the principle of extraneous ends.257

Ironically, this same flaw in logic made by Cardozo and the 1937 majority had been manifested by the opposite, 1936 majority in a famous paragraph of its Butler opinion. The Agricultural Adjustment Act had been defended in that case by a suggestion that objecting states could "prevent those under the state's jurisdiction from complying with"258 the production limits that conditioned the subsidy payments, but the Butler majority had replied,

The argument is plainly fallacious. The United States can make the contract [specifying production limits in exchange for federal payments] only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.259

In this passage, the logical flaw manifested itself as equivocation in the use of the word "reach." Through the Agricultural Adjustment Act, Congress had reached agricultural production only in the sense that it had reached lotteries when it forbade interstate shipment of lottery tickets; it reached lotteries, however, in a very different sense than it reached interstate commerce (or shipping in interstate commerce). The Supremacy Clause precluded any state from countermanding the shipping prohibition, but any state that so wished remained free to permit (or to conduct) lotteries nonetheless (albeit with locally printed tickets, of course). That would have frustrated Congress's manifest anti-lottery policy, but it would not have violated the Supremacy Clause, because Congress had power only over interstate commerce (including interstate shipping), not over lotteries per se. Similarly, any state

257. See supra notes 66–70 and accompanying text.
259. Id.
could have enforced its own law against curtailing agricultural production, even if that would have frustrated the federal aim. By doing so, a state might disable its farmers from qualifying for the subsidy, but it would not affront any federal authority conferred by the Constitution.  

The supremacy fallacy attributes supremacy not to the act of spending itself, but rather to Congress’s will for any matter it might try to influence by financial inducements. Because it fell prey to this fallacy, the Butler majority concluded that a federal policy incapable of supremacy must be void. The Steward majority employed the same fallacy, concluding conversely that if extraneous federal policies can validly be promoted by spending then they must be supreme.  

James Madison fell prey to this supremacy fallacy, too. That is why he thought Hamilton’s approval of spending for ends beyond the scope of enumerated powers would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress.  

But the supremacy fallacy is a mistake Hamilton never made. His point was precisely that Congress can “reach” matters through spending that its enumerated governance powers do not enable it to reach in ways that could invoke the Supremacy Clause. The spending power enables Congress to reach them, but only “as far as regards an application of Money.”  

That any state may frustrate a policy that Congress promotes only through spending (i.e., without also using some other enumer-
ated power) is exactly the reason Hamilton recognized that inter-
state canal projects could not be accomplished through federal
spending alone. It is precisely the reason President Monroe called
the spending power "deficient as a power in the great characteris-
tics on which its execution depends." Had Hamilton or Mon-
roe conceived that the Supremacy Clause could apply to a policy
objective simply because it was being promoted by federal spend-
ing, neither could have considered a constitutional amendment
requisite to the successful implementation of federal plans for in-
ternal improvements.

Whenever any enumerated power is used toward an extrane-
ous end, there obviously is a federal policy with regard to that
extraneous end. It might even be a very important policy, over
which nationwide controversies rage and elections are won and
lost. But federal policies as to extraneous ends have none of the
constitutional significance that attaches to federal policies concern-
ing the "objects of government" committed to the federal gov-
ernment's care by enumeration. Regardless of their social, political,
or cosmic importance, federal policies as to merely extraneous
ends are immaterial for purposes of federalism analysis under the
Constitution. The reason the likes of Justices Stone and Cardozo
in 1936 and 1937 succumbed to the supremacy fallacy is that they
did not then recognize that Hamilton's view of the spending power
is simply an application of the principle of extraneous ends—a
principle that was not even frankly affirmed until 1941, in the
Darby case.

The first opportunity for the Justices to dispel the supremacy
fallacy from spending power doctrine arose six years after Darby,
in Oklahoma v. United States Civil Service Commission. In
Oklahoma, the Court countenanced state frustration of Congress's
policy against partisan political activity of appointed state officials.
Congress had made compliance with that Hatch Act policy a con-
dition to certain funding, even though the matter "reached" by the
condition—state officials' partisan activity—was one that (as the

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265. MONROE, supra note 98, at 173.
266. As to Monroe, see id. As to Hamilton, see Hamilton, supra note 73, at 603.
267. See Wilson, supra note 16, at 764.
268. See United States v. Darby, 312 U.S. 100, 115 (1941).
269. 330 U.S. 127 (1947). The Oklahoma case is discussed supra text accompanying
   notes 198–200. Darby is discussed supra note 62.
Court acknowledged) "the United States . . . has no power to regulate . . ."\textsuperscript{270} Because the federal funds were so conditioned, the state had to forgo the funds, of course; the significant point, however, is that the will of Congress as to partisan activities of state officials was frustrated in \textit{Oklahoma}—quite contrary to the supremacy proposition stated in both \textit{Butler} and \textit{Steward}.

That holding should have been enough to dispel the supremacy fallacy. Unfortunately, however, Justice Stone had died the previous year, and not every Justice had so firm a grasp of the applicable principles as Stone had shown in \textit{Darby}. The opinion of the erstwhile Solicitor, Justice Reed, for the \textit{Oklahoma} plurality typifies the confusion that ensued.

Justice Reed quoted a passage from \textit{United States v. Darby}, but the passage he quoted\textsuperscript{271} was not relevant to the \textit{Oklahoma} case at all. In \textit{Darby}, Justice Stone did use the extraneous ends principle (for which \textit{Oklahoma} rightly stands): Stone used it to overrule \textit{Dagenhart}\textsuperscript{272} and uphold section 15(a)(1) of the Fair Labor Standards Act.\textsuperscript{273} The passage from \textit{Darby} quoted by Justice Reed, however, appears seven pages later, in a separate part of the \textit{Darby} opinion, discussing section 15(a)(2) of that Act and upholding it under the extraneous means principle of the Necessary and Proper Clause. The \textit{Oklahoma} case and the \textit{Darby} passage Justice Reed quoted involved completely different issues.

It therefore is hardly surprising that the syllogism Justice Reed set forth is a colossal non sequitur. First, quoting from \textit{Darby}'s discussion of the principle of extraneous means, he stated as his major premise that "the Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'"\textsuperscript{274} Then, as his minor premise, he said, "The end sought by Congress through the Hatch Act is better public service by requiring those [state officials] who administer funds for national needs to abstain from active political partisanship."\textsuperscript{275} While the

\begin{footnotes}

\footnote{270. \textit{Oklahoma}, 330 U.S. at 143.}

\footnote{271. \textit{Oklahoma}, 330 U.S. at 143 (quoting \textit{Darby}, 312 U.S. at 124).}

\footnote{272. \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918).}


\footnote{274. \textit{Oklahoma}, 330 U.S. at 143 (quoting \textit{Darby}, 312 U.S. at 124).}

\footnote{275. \textit{Id}.}
\end{footnotes}
major premise contemplated extraneous means but enumerated objectives or ends, the phrase “national needs” in this minor premise is equivocal: particularly when used with reference to activities of state officials, it can include congressionally selected extraneous objectives, not just enumerated ones. Indeed, preventing “active political partisanship” by state officials is an end over which Justice Reed in the same opinion declared that Congress “has no power . . . as such.”

This equivocation exacted its toll in the conclusion of Justice Reed’s syllogism, where he said, “So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.” The citations Justice Reed affixed to this statement were to cases illustrating the principle of extraneous ends. That principle—and thus the holding in Oklahoma—is perfectly sound, but it has nothing to do with the major premise Justice Reed articulated.

Justice Reed’s opinion obscured the principle that sustains the Oklahoma holding in other respects too. For example, Justice Reed reasoned that the Hatch Act provision was valid because “[t]he end sought by Congress . . . is better public service” from those state officials “who administer funds for national needs,” but if such “better public service” were an end within Congress’s enumerated powers, surely it would offend the Supremacy Clause for Oklahoma not to comply. On the other hand, if it were an extraneous end there would be no point in distinguishing between state officials who administered funds “for national needs” and those who administered (federally granted) funds for state or local needs. Again, if by specifying “for national needs” Justice Reed meant to include only officials administering grants that were aimed at effectuating enumerated powers, he was not actually applying Hamilton’s view of the spending power; if (consistently with Hamilton’s view) he intended it to include concerns that were extraneous although common to the whole nation, however, the phrase “for national needs” was superfluous.

In spite of the confusion manifest in Justice Reed’s Oklahoma opinion and in some other cases from the following decade,

276. Id.
277. Id.
278. Id.
279. In United States v. Gerlach Live Stock Co., 339 U.S. 725, 730 (1950), govern-
mistakes were avoided at first when the modern Supreme Court began to consider conditions accompanying federal grants for social welfare purposes. In cases with opinions by Chief Justice Warren, Justice Harlan, and Chief Justice Burger, the Court enforced conditions states had agreed to as consideration for the grants, making no reference whatever to the Supremacy Clause. The supremacy fallacy thus was avoided until an otherwise equivalent case in 1971, when Justice Brennan wrote for the Court. Instead of simply holding the state to its bargain, Brennan wrote that a state rule in conflict with conditions accepted by the state to secure financial assistance offered under the Social Security Act for its program of Aid to Families with Dependent Children (AFDC) "violates the Social Security Act and is therefore invalid under the Supremacy Clause."

Eight years later, in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 294-96 (1958), Justice Clark wrote an account of federal reclamation projects utterly devoid of careful legal analysis, but exuding awe of such feats and evincing determination that nothing should stand in their way. He levelled a barrage of constitutional propositions to drive attackers away, some correct and appropriate but others either unfounded or misapplied. Among the shells that were duds are his statement that "the promotion of agriculture" is "a valid public and national purpose," id. at 294; his proposition that spending conditions must be "relevant to federal interest in the project and to the over-all objectives thereof," id. at 295; and his assertion that the federal government may regulate whatever it subsidizes, id. at 296. For the latter assertion, no rationale was attempted at all, and no authority was cited other than a prior judicial statement that had been made to repel a due process attack and intimated nothing at all about bases of federal power. See infra note 303.

Brennan's misstatement prompted Chief Justice Burger to write a separate concurrence solely to emphasize this single point. The Chief Justice explained that

[while Congress had used its] power of the purse to force the States to adhere to its wishes to a certain extent, ... adherence to the provisions of Title IV [of the Social Security Act] is in no way mandatory upon the States under the Supremacy Clause. The appropriate inquiry in any case should be, simply, whether the State has indeed adhered to the provisions and is accordingly entitled to utilize federal funds in support of its program.\(^{284}\)

It is true that the process of judging whether state rules or actions conform to conditions the state has accepted in order to receive federal funds is virtually identical to the process of deciding "pre-emption" questions, and preemption, of course, is a function of the Supremacy Clause. The similarity of the inquiry, however, does not make the questions the same, any more than the frequent similarity of preemption and "dormant commerce clause" inquiries makes those questions the same. In both instances, profound differences persist despite the frequent similarities.

Despite Chief Justice Burger's attempted clarification, however, Justice Douglas, writing for the Court, articulated the supremacy fallacy again in another AFDC case six months later.\(^{285}\) A year after that, in yet another case about AFDC conditions, while the Justices split 7–2 as to whether the state practice at issue complied, both the majority\(^{286}\) and the dissenting\(^{287}\) opinions espoused the supremacy fallacy, treating the issue as one of preemption under the Supremacy Clause.

In 1981, however, a majority of the Justices moved far toward not only recovering, but reinforcing the point Chief Justice Burger had tried to make a decade before. *Pennhurst State School & Hospital v. Halderman*\(^{288}\) involved a federal statute authorizing federal grants to assist states with programs for the mentally retarded.\(^{289}\) A section of the statute declared that "[p]ersons with de-

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284. Id. at 292 (Burger, C.J., concurring).
287. Id. at 423–32 (Marshall, J., dissenting).
289. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94–103,
developmental disabilities have a right to appropriate treatment, services, and habilitation”; that such services “should be designed to maximize . . . developmental potential . . . and should be provided in the setting that is least restrictive of . . . personal liberty”; and that “the States . . . have an obligation to assure that public funds” are not provided to institutions that are not consistent with these terms. If providing or governing care for the handicapped had been within some enumerated power, certainly the Constitution would have supported enforcement of these terms, even though the precise steps to be taken and the possible costs of compliance were not ascertainable in advance.

However, care for the handicapped is not within any enumerated power. It is, instead, merely an extraneous end that Congress has determined to promote by means of its spending power. Accordingly, the Court said in *Pennhurst*,

Congress may fix the terms on which it shall disburse federal money to the States. . . . However, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.” There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

. . . The crucial inquiry . . . is . . . whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.

Because of the “knowing acceptance” requisite to contract enforceability, the Court reasoned that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . with a clear voice . . .”

Persons might disagree (and the Justices did) as to whether the conditions at issue in *Pennhurst* were clear and unambiguous enough to have been knowingly and voluntarily assumed. But that

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290. Id. § 111(1)-(3), 89 Stat. at 502.
292. Id. at 17 (citations omitted).
question (which is different as to every purported spending condition) was quite beside the Court's major point that federal funding conditions in their essence are creatures of contract. What makes such conditions obligatory is that essence as contract, wholly apart from the circumstance that they happen to be spelled out in a statute or an agency rule. Although articulated in a statute or rule, they have no force as "law"; their only force is contractual. Consequently, they are not among the "Laws of the United States... made in Pursuance" of the Constitution, to which the Supremacy Clause applies.

The inapplicability of the Supremacy Clause to federal policies for extraneous ends promoted through spending does not mean one is free to take federal money and then flout the terms on which it is given. The obligation to do as one has undertaken to do as consideration for money offered on specified terms, however, is an obligation in the nature of contract: it is no more attributable to any "legislative," "regulatory," or "governing" power than are the obligations between private persons arising from agreements between them.

Pennhurst's contractual characterization of spending conditions has been repeatedly reaffirmed. The Court in 1984 reiterated that Congress may attach "unambiguous conditions to federal financial assistance that [recipients] are not obligated to accept," adding that compliance with conditions is required "as a quid pro quo for the receipt of federal funds." In 1986, the Court said, "Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds

293. U.S. CONST. art. VI, cl. 2.
294. Every new regulation pursuant to a "legislative" or "regulatory" power, a power to govern, changes the rules under which going concerns have operated theretofore. It is thus "retroactive," not in the sense that it punishes past behavior, but in the sense that it alters consequences that could have been anticipated when the commitment to a given course of action was made. The Supremacy Clause makes such regulations binding regardless of how they upset contrary expectations.

But spending conditions are different: the Court said in Pennhurst that "Congress' power to legislate under the spending power... does not include surprising participating States with postacceptance or 'retroactive' conditions." Pennhurst, 451 U.S. at 25. A legislature may unilaterally change the rules in mid-game; one party to a contract, however, may not, and since the essence of spending conditions is contract, for this purpose Congress is to be considered not as a legislature but as a contracting party.
triggers coverage under the nondiscrimination provision.\textsuperscript{297} The Court applied the same \textit{Pennhurst} rationale again in 1992.\textsuperscript{298}

Nevertheless, while it cannot be reconciled with the proposition that the obligation of spending conditions is contractual, the supremacy fallacy still persists by default of any effort in any litigated case to make the point. Only a year after \textit{Pennhurst}, for example, Justice Marshall for the Court again attributed the force of AFDC conditions to the Supremacy Clause,\textsuperscript{299} with neither counsel nor any other Justice identifying the error.

Accepted conditions are equally enforceable against a recipient, of course, whether their binding force is attributed correctly to contract or mistakenly to the Supremacy Clause. In cases brought against a recipient, therefore, insisting upon accuracy of statement might seem an inconsequential quibble. But there are other cases, and in some the supremacy fallacy has induced conclusions that could not have been reached without it.

An example is \textit{Philpott v. Essex County Welfare Board},\textsuperscript{300} in which the Court unanimously held that funds derived from Social Security disability benefits are immune from state debt-collection processes even though they are in private hands. A section of the Social Security Act does purport to exempt from “execution, levy, attachment, garnishment, or other legal process” all “moneys paid or payable” under the Act,\textsuperscript{301} and as to moneys “payable” but not yet paid, there is no doubt this provision is valid.\textsuperscript{302} But once they have been transferred to beneficiaries, the sums paid as such disability benefits no longer belong to the United States. What power can Congress claim over funds no longer its own? It is ridiculous to posit a germ of federal power infecting Social Security benefits like a virus incubated in the Federal Treasury.\textsuperscript{303} 

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\textsuperscript{297.} United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986).
\textsuperscript{298.} In \textit{Suter v. Artist M.}, 112 S. Ct. 1360, 1366 (1992), the Court denied an action under 42 U.S.C. § 1983 by affected individuals because the federal measure funding state child-welfare programs failed to indicate “unambiguously,” \textit{id}. at 1370, that acceptance would entail obligations with respect to staff sufficiency and workload efficiency judicially enforceable at the instance of third parties.
\textsuperscript{300.} 409 U.S. 413, 415 (1973).
\textsuperscript{302.} As long as they remain in the hands of the federal government, moneys payable still belong to the United States, and moneys belonging to the United States (it may be conceded) are immune or at least immunizable from all state attempts at control, even by garnishment.
\textsuperscript{303.} The “moneys” involved are not even physical currency or coin, but mere ac-
taging disabled persons (or other Social Security beneficiaries) vis-
à-vis creditors is not within any enumerated federal power—except
perhaps the bankruptcy power, which is not even implicated here. 
Protecting this asset of recipients might serve the aims of a benefi-
cent spending program, but those aims, while permissible constitutionally and imperative politically, certainly are extraneous to 
Congress's enumerated powers.

How could this federal policy regarding an extraneous matter 
override state collection actions or state collection laws? The ex-
emption could not find support in the Necessary and Proper 
Clause, because that Clause avails nothing for extraneous ends. 
The exemption could not be supported on contract grounds, not 
only because the beneficiaries of such Social Security benefits do 
do not contract for them, but also because the rights of creditors 
could not be reduced by an agreement made only between oth-
ers.304

But the briefs, and the Court's very short opinion in Philpott, 
totally overlooked all these issues. By sheer ipse dixit, with no 
attempt to reason, the Court simply declared that collection pro-
cedings against private funds derived from payments under the 
Social Security Act are precluded "[b]y reason of the Supremacy 
Clause."305

Eight years after Philpott, the Court construed federal statutes 
as precluding state courts from treating military retirement pay as 
community property.306 Had the constitutionality of those statutes

304. In Philpott itself the creditor happened to be a state that did participate (con-
tractually) in the Social Security program involved. Philpott, 409 U.S. at 415. As to that 
particular creditor, therefore, it might be possible to rationalize the result by saying that 
the state accepted the restraint on collection as a contracted condition of its own partici-
participation. But 42 U.S.C. § 407 certainly is not phrased as a condition, and the Court made 
no gesture toward such a rationale anyway.

305. Philpott, 409 U.S. at 417.

1989 that subsequent legislation had only modified, not abrogated, that preemption.

counting entries or electronic transfers, or instruments representing financial obligation 
that precipitate electronic transfers or accounting entries when they are deposited for 
collection.

The Supreme Court said in Wickard v. Filburn, 317 U.S. 111, 131 (1942), that "[i]t 
is hardly lack of due process for the Government to regulate that which it subsidizes." 
That might be true, but the statement addresses only the due process issue and says 
nothing to supply a deficiency of federal power. The regulations in Wickard were sup-
ported by the Necessary and Proper Clause in conjunction with the commerce power. Id. 
at 119, 124–25.
been challenged (it was not), they could have been easily sustained; Congress has enumerated power to maintain and provide for armed forces, and "the military retirement system is designed to serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure 'youthful and vigorous' military forces." Community property laws are capable of affecting retirement incentives in ways interfering with the utility of military retirement programs toward these enumerated ends; statutes precluding application of community property laws could be upheld, therefore, under the Necessary and Proper Clause. The possibility of contriving any comparable telic link to some enumerated power in the case of Social Security benefits, however, seems extremely remote.

A decision equivalent to Philpott, applying the same Social Security Act provision, was announced by per curiam opinion in 1988. This time the supremacy fallacy barred a state from attaching funds a prisoner had received as Social Security benefits, under a state statute authorizing recouping from prisoners the costs of their incarceration. Congress presumably intended that Social Security benefits should improve the conditions of recipients' lives, not defray states' incarceration costs, but the same could be said of a prisoner's mother who left him a bequest. How can one justify any difference in result? The import of the principle of enumerated powers is precisely that except insofar as some enumerated power is served, the intent or will of Congress has no more legal force than the intent or will of one's mother. Either certainly could make a gift on conditions that would cause it to fail rather than fall into strangers' hands, but neither may insulate the assets from relevant and otherwise applicable state law.

308. McCarty, 453 U.S. at 234.
309. In any event, more than a conceivable chain of telic links to some enumerated power end is required in order to invoke the Necessary and Proper Clause. See ENGDahl, supra note 39, at 39–43; see also id. at 33–39.
310. Bennett v. Arkansas, 485 U.S. 395, 396 (1988) (per curiam). The Court reasoned that the Social Security Act provision "unambiguously rules out any attempt to attach Social Security benefits. The Arkansas statute just as unambiguously allows the State to attach those benefits. As we see it, this amounts to a 'conflict' under the Supremacy Clause—a conflict that the State cannot win." Id. at 397.
311. Id.
312. See id. at 398.
after the transfer is complete. It cannot matter to whom certain assets belonged before they became a part of the prisoner’s personal estate. But again, as in Philpott, no search for any enumerated end was made. Again, as in Philpott, the supremacy fallacy was unchallenged by counsel and prevailed by default.

An even more bizarre case is Lawrence County v. Lead-Deadwood School District No. 40–1. Lawrence County—a political subdivision of South Dakota whose very existence and every function depends on the will of that state—received federal funds under the Payment in Lieu of Taxes Act. That Act entails no contractual obligations for recipients; they are merely donees. A South Dakota statute required all subdivisions of the state to distribute any funds the federal government paid in lieu of taxes in the same way they distributed general tax revenues. Lawrence County, however, chose to distribute the funds it received differently, claiming that the federal law said it could do so.

The federal statute simply said that recipient units of “general local government” where relevant tax-exempt federal lands were located “may use the [in-lieu-of-tax] payment for any governmental purpose,” and it took some freewheeling contrivance of legislative history for the majority to inflate this provision into an authorization by Congress for state subdivisions to flout the laws of their own existence. What is most remarkable about Lawrence County, however, is not the alchemy of statutory construction but that not even the dissenters (Chief Justice Rehnquist and Justice Stevens) questioned whether the Supremacy Clause could apply even if such a congressional authorization of defiance were found. They dissented only on statutory construction grounds.

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314. The attached benefits of a second petitioner in Bennett had been paid as Veterans’ Administration disability pension benefits, under a different statute having an exemption provision comparable to that of the Social Security Act. Bennett, 485 U.S. at 396. As to veterans’ disability benefits—unlike Social Security benefits—an argument like that sketched above for military retirement benefits might conceivably be ventured.
317. Lawrence County, 469 U.S. at 259.
318. Id.
320. Lawrence County, 469 U.S. at 262–68.
321. Id. at 273 (Rehnquist and Stevens, JJ., dissenting).
Even if it is true, as the majority found, that Congress believes local discretion might cause in lieu receipts to be expended in ways preferable to the federal government (e.g., providing better law enforcement, road maintenance, and public health services for vacationers traveling to national parks, monuments, and forests),\textsuperscript{322} that surely can have no constitutional significance, for expenditures by local governments are not within any enumerated power. (Even the private use of federally owned lands is an extraneous end.) Whether to give federal money to local government units that have less discretion over its expenditure than Congress might desire certainly is up to Congress; enabling a local government to do something that the laws of its creator state forbid, or excusing it from doing something that the laws of its creator state require, however, assumes premises contradictory to the most elementary principles of American government heretofore maintained.\textsuperscript{323}

The majority in \textit{Lawrence County} did not articulate such revolutionary premises, much less try to defend them. Instead, once again the constitutional issue was decided by default. The holding in \textit{Lawrence County} is naked fiat, supported only by the confusion occasioned by intellectual default.\textsuperscript{324}

\textsuperscript{322} Id. at 265–66.

\textsuperscript{323} In a thoughtful recent essay, Professor William Van Alstyne has reasoned that state constitutional provisions should disable states and state agencies from accepting federal funds offered on conditions that conflict with state law, or at least with state constitutional law. William Van Alstyne, \textit{"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law}, 16 HARV. J. L. & PUB. POL'Y 303, 307 (1993). But for the fact that it utterly lacks both rationale and reason, the \textit{Lawrence County} decision would repel Van Alstyne’s sensible suggestion.

\textsuperscript{324} In addition, neither the majority nor the dissenting opinion in \textit{Lawrence County} reckoned adequately with the practical aspects of budgeting and finance.

Federal in-lieu-of-tax payments typically constitute as relatively fixed and stable a sum as property tax revenues. Consequently it is possible to include them in a unified budget that allocates revenues regardless of source. Would a state law requiring such unified budgeting be valid? If so, what material difference would there be from what the South Dakota statute in \textit{Lawrence County} required? Is it credible to read either the federal statute or its legislative history as precluding unified budgeting and requiring separate budgeting for disbursements from in-lieu-of-tax funds instead?

In many states, limited-function local government entities like school districts are not funded by the counties, but are fiscally autonomous, and the counties merely serve, in effect, as collection agents for the property tax levies independently assessed by those other entities. Where that is true, could such entities drive their levies high enough to approach the limits of taxpayer tolerance (or limits set by law), so that counties as a practical matter would be left to fund their general services less out of property tax revenues and more out of any in-lieu-of-tax payments they might receive? If so, the practi-
If Congress offered money to help midwives establish practices even in states whose medical practice laws forbid midwifery, could one’s acceptance of such a grant entitle her to practice midwifery in a prohibiting state? Could she claim in defense to a state prosecution that she was acting in compliance with the terms of her grant? Would she not instead be obliged simply to forgo the grant (or to suffer the consequences of failing to fulfill its conditions)? To imagine supremacy for the federal policy regarding midwifery in such a case would be to resurrect the discredited Butler denial that states could forbid farmers to reduce acreage in production, as the farmers had to do in order to qualify for aid under the first Agricultural Adjustment Act. If case authority against such a mistaken supremacy pretension could be thought necessary, Oklahoma v. Civil Service Commission should suffice.

The point can also be made with humbler analogies. Suppose a family has household rules under which the young daughter is to be home by ten, but her uncle, Sam, tells her she may stay out until twelve when she is spending the money he gives her. What time had she better be home? Suppose the uncle strikes a deal with his teenage nephew, under which the nephew will be relieved of his household chores if he drives the uncle to the store? What should be the parent’s response when the son refuses to help carry the trash because he chauffeured the uncle, as agreed? Can it make no difference that the parent was not party to the deal? There are obvious differences among Philpott, Lawrence County, the midwifery hypothetical, and these family examples, but the material point in them all is the same.

Compare the following two statements:

Statement A: “I’ll give you my money if, but only if, you do X; so if you will not or cannot do X, you cannot have my money.”

Statement B: “I’ll give you my money to do X, and once you accept my money you will be entitled to do X no matter who might wish to prevent you.”

cal result would hardly differ from what the majority in the Lawrence County case eschewed; could any legal difference credibly be pretended?

325. See supra notes 258–60 and accompanying text.
326. 330 U.S. 127 (1947); see supra notes 269–70 and accompanying text.
327. It is immaterial to the supremacy question whether the state rule or policy involved pertains to its own employees—or its own counties, such as in Lawrence County—or instead pertains to private citizens within the state’s governmental jurisdiction.
Statement A is a spending "condition," but Statement B is not. To make Statement B stick would require more than merely an unrestricted power to spend; it would require governance power over the doing or not doing of X—an enumerated federal power, to which Supremacy Clause consequences could attach. Statement A is compatible with the Hamiltonian view of the spending power; Statement B illustrates the supremacy fallacy that easily creeps in unawares.

C. Choice, Acceptance, "Coercion," and Public Policy

Certain implications of the contractual character of spending conditions already are well recognized. The Pennhurst requirement that conditions be stated clearly enough that the recipient "could make an informed choice"328 is one of these. It means that sufficient clarity is required not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation. For example, in Grove City College v. Bell,329 a condition requiring assurances of nondiscrimination as to any "program or activity receiving Federal financial assistance" was held to require assurances only as to the particular activities or programs being assisted, not as to the entire enterprise of a recipient.330 Construing the condition to have greater scope might better promote the political or social goals involved, but that could not matter because unlike statutes, contracts must be construed with respect for the reasonable expectations of both parties, not merely for such credible interpretations as government agencies unilaterally might prefer.331

Another recognized implication is that something fairly amounting to "acceptance" must be shown before spending con-

330. Id. at 573–74.
331. If a tougher condition is desired than the original language fairly imports, the terms can be changed for future grants: agitated political sentiments might even make it easier to muster congressional support for broader language the second time around. After Grove City College, for example, proponents of a more onerous condition could play petitifogger by berating the judges for "narrowing" the original condition, and by calling the revisory legislation they proposed a "restoration" act. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988); see Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1036 (1992).
ditions can be enforced. Conditions are enforceable only "upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds."\(^{332}\)

Even in *Grove City College*, while the private college to which the "assurance of compliance" requirement was applied was not itself the payee of federal funds and had no written contract with the United States, it did elect to cooperate by certifying to the funding agency information that was requisite to the students' eligibility.\(^{333}\) It did so knowing that any funds granted an applicant would be restricted to use for the applicant's expenses related to attending that college, and knowing that federal law treated such flow-through grants to students as no less "assistance to institutions of higher education"\(^{334}\) than grants made to institutions themselves on students' behalf. Although the *Grove City College* opinions did not go beyond statutory construction to the constitutional question in the background, knowing participation even to no greater extent than as elaborated above seems sufficient to give rise to contractual obligations.\(^{335}\)

The contractual character of spending conditions also has other implications. Other spending power issues might best be analyzed in contract terms. One of these is the problem usually discussed in terms of "coercion."

A "coercion" objection was raised against the Maternity Act considered in *Massachusetts v. Mellon*.\(^{336}\) Justice Sutherland, writing for the unanimous Court, however, thought it sufficient to answer that the Act "imposes no obligation but simply extends an option which the State is free to accept or reject."\(^{337}\) It did not, he continued, "require the States to do or to yield anything. If


\(^{333}\) *Grove City College*, 465 U.S. at 559.

\(^{334}\) *See id.* at 566 (quoting 20 U.S.C. § 1070(a)(5) (1988)).

\(^{335}\) Numerous Grove City College students received federal "Basic Educational Opportunity Grants." *Id.* at 559. Most institutions whose students receive such aid participate by determining applicant eligibility themselves, calculating the awards, and serving as conduits for the federal funds. *Id.* at 559-60 n.5. Grove City College and some others chose instead to participate no further than to "make appropriate certifications." *See id.* at 559 n.5. It was possible, however, to have declined participating at all, and Grove City College did not so decline.

\(^{336}\) 262 U.S. 447, 461-68 (1923).

\(^{337}\) *Id.* at 480.
Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.\textsuperscript{338} The Maternity Act simply offered matching funds to states willing to undertake maternal and child health programs satisfying federal standards.\textsuperscript{339} States were free to decline, sparing even their own matching shares by having no program at all, or to operate nonconforming programs at their own expense; the costs were modest enough, and the program constituencies had sufficiently little political power, that both of these alternatives were realistic. There was nothing in the Maternity Act comparable to the conditional 90\% tax credit for employers used later in the unemployment title of the Social Security Act\textsuperscript{340} to create political pressure against states' going their own ways. Under these circumstances, the "coercion" claim in \textit{Mellon} was, indeed, very weak.

A majority of the Justices in \textit{Butler}, on the other hand, found the Agricultural Adjustment Act coercive.\textsuperscript{341} The restriction on farmers' production that was a condition of qualifying for federal financial assistance, they said, is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation \ldots. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin\textsuperscript{342} \ldots. This is coercion by economic pressure.\textsuperscript{343}

\textsuperscript{338} \textit{Id.} at 482.
\textsuperscript{339} \textit{Id.} at 479.
\textsuperscript{341} United States v. Butler, 297 U.S. 1, 70-71 (1936).
\textsuperscript{342} Perhaps it might have been ruin, but in fact it was not. The dissent pointed out not only that the coercive impact claimed by the majority was not supported by the records, \textit{id.} at 81 (Stone J., dissenting), but also that a special tax later had to be enacted to offset the profits reaped by nonparticipants in the Agricultural Adjustment Act from the market price improvements attributed to others' production reductions, \textit{id.} at 82-83. The majority replied, "The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. \ldots. [That afterwards the special offsetting tax was enacted] only serves more fully to expose the coercive purpose of the [Agricultural Adjustment Act]." \textit{Id.} at 71.
\textsuperscript{343} \textit{Id.} at 70-71 (citations omitted).
No spending program or condition since Butler has been held invalid on coercion grounds. Even though pressure techniques even more powerful than those of the Agricultural Adjustment Act have become commonplace,\textsuperscript{344} and although a dependency on federal funds akin to addiction may have developed,\textsuperscript{345} the standard response to claims of spending power “coercion” still is the Mellon reply: complaints of coercion should not be heard because the recipient could have employed “the simple expedient of not yielding.”\textsuperscript{346}

Nonetheless, there remains enough concern about coercion that the issue continues to be given lip service, at least. For example, Chief Justice Rehnquist wrote for the Court in 1987, “Our decisions have 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.’”\textsuperscript{347}

The idiom of coercion dates to the regime of dual federalism. To dual federalists, the issue of ultimate moment was whether, under the pretext of spending, Congress was really “regulating” a matter reserved exclusively to the states or interfering with states’ independence of action in their reserved domain. The operative premise was that federal measures nibbling at the states’ plate were void; coercion was only an identifying earmark of such forbidden regulation or interference.\textsuperscript{348}

\textsuperscript{344} For some examples of onerous modern conditions, see, e.g., Kaden, \textit{supra} note 20, at 871–83; Rosenthal, \textit{supra} note 121, at 1137–39.


\textsuperscript{346} Massachusetts v. Mellon, 262 U.S. 447, 482 (1923); \textit{see}, e.g., Oklahoma v. United States Civil Serv. Comm’n, 330 U.S. 127, 143–44 (1947); \textit{see also} Grove City College v. Bell, 465 U.S. 555, 565 n.13 (1984) (noting that if the College found the condition objectionable, it was free to cease participating in the funding program and thus escape the condition).

\textsuperscript{347} South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). Since refusing the condition challenged by South Dakota in that case would disqualify it for only 5\% of the federal funds otherwise available under specified highway grant programs, Rehnquist was able to say that the state’s “argument as to coercion is . . . more rhetoric than fact.” \textit{Id}.

\textsuperscript{348} Coercion, however, was not the only earmark, and its absence was not sufficient to absolve the condition imposed. Therefore the majority’s extended discussion in \textit{Steward} about “draw[ing] the line intelligently between duress and inducement,” \textit{Steward}, 301 U.S. at 586–90, was quite beside the points that troubled the dissenters.
Now that dual federalism has been repudiated, and the principle of extraneous ends has been candidly affirmed, the significance of coercion must be somewhat different. If it is to have any significance at all, "coercion" must be not merely an earmark or an indication of some other fact that in turn has legal consequences, but rather a fact that has legal consequences by itself.

Coercion does have significant consequences in contract law: duress and undue influence have long been regarded as making contracts voidable. For several reasons, however, this branch of contract law is not very useful for dealing with spending power "coercion."

First, as to public-entity grantees there is reason to doubt that the concepts of coercion and undue influence "can ever be applied..."
with fitness to the relations between state and nation," even if "coercion by economic pressure" is a credible concept as to private grantees, proof seems difficult and unlikely, and such speculation as the Butler majority employed to find it seems unlikely to recur.

Second, duress and undue influence have been regarded as rendering a contract voidable at the instance of the victim party, but not void. Consequently, while an unhappy grant recipient might find relief, profound dislocations of governing structure might be accomplished to the extent that the recipients of largesse did not themselves object, despite the protests of affected nonrecipients. The majority in Steward alluded to this possibility when it answered the company's claim that states were coerced by pointing out that the state does not offer a suggestion that in passing the unemployment law [qualifying her for assistance under the Social Security Act] she was affected by duress . . . . For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled.

Third, and probably even more important, while duress or undue influence makes a contract voidable, the victim seeking such relief must tender restitution. Despite their complaints about attendant conditions, recipients of federal funds typically are loath to give them back. Indeed, the threat not even of recoupment but just of future denial of additional funds is what typically induces recipients to endure conditions to which they vigorously object. A "remedy" for coercive spending that obliges restitution of funds to the United States therefore is effectively no remedy at all.

Nevertheless, recognizing that spending conditions are contractual in character can make possible effective and practical solutions for objectionable spending conditions, if the idiom of coer-

349. Id. at 590. "Undue influence" generally has been considered to require a special relationship such as confidence, trust, or subservience and circumstances sufficient to indicate something less than a competent and independent exercise of judgment.


351. Steward, 301 U.S. at 589 (citations omitted). The only reason the Butler majority a year earlier was able to invalidate the Agricultural Adjustment Act even though no participating farmer complained was that the holding was based not on any concept of contract law, but on the concept of dual federalism, which operated as a constitutional restriction whether the contracting farmers liked it or not.
cion is displaced by idioms more congenial to modern contract law usage and not reminiscent of dual federalism. Specifically, it is useful to think in terms of “unconscionability” and “public policy” constraints.

Since the advent of the Uniform Commercial Code, American contract law generally has developed a vigorous disposition against unconscionability. There is no firm or rigorous definition of “unconscionability,” but in modern private law practice the concept is commonly applied when an absence of meaningful choice is shown. Inequality of bargaining power is not enough by itself to convert undesirable terms into unconscionable ones, but far less interference with independent will and free choice need be shown to invoke the unconscionability concept than to satisfy the traditional requirements of coercion by duress or undue influence.

Moreover, the “rule” against unconscionability need not result in contract avoidance; restitution therefore need not be requisite to relief. And unconscionability can result simply in nonenforcement or limitation of the unconscionable terms; therefore, particular conditions could be avoided while others—and the arrangement as a whole—remain in force.

352. The possibility of applying familiar contract law principles poses a minor theoretical problem. First, no state's own law is competent to govern when, how, to what extent, or with what consequences rights in federal property (including federal money) are acquired. See authorities collected in Engdahl, supra note 70, at 297 n.49, 362. Second, “[t]here is no federal general common law.” Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). And third, there is no comprehensive federal statutory law of contracts. The resulting theoretical problem is, to what “law of contracts” might one resort in connection with the spending power?

But this theoretical problem is not a difficult one in fact: federal judges have had no difficulty developing appropriate “federal common law” as needed in cognate areas. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) (fashioning federal common law to govern rights and duties of United States on commercial paper issued by it).

353. U.C.C. § 2–302(1) (1990) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

354. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
"Unconscionability" overlaps the concept of "public policy" as a reason for denying the effect of bargains, or of particular contractual terms. Where either or both of the parties are governments, most of the traditional public policy limitations applicable to private contracts might not hold. On the other hand, there are public policy limitations attributable to constitutional prohibitions that apply specifically and only because it is the federal or state government that is acting.

As to the latter, the public policy of the Constitution is by no means exhausted by its protections of individual liberty. In addition, the policy of federalism pervades it. Contrary to the dual federalists' thesis, this policy does not reserve any realms of behavior for governance exclusively by the several states; it does demand, however, preservation of the integrity of the several states as discrete "political communities" comprised of persons who simultaneously are members of the larger whole. The Constitution contemplates that each of these discrete communities is entitled to maintain and effectively use, without undue interference, subnational governments largely of its own design to serve its members' needs and desires however that changing membership from time to time might independently choose.

This constitutional policy is the basis for a viable principle of "state immunity" untainted by dual federalism and dissociated from the much-abused Tenth Amendment. I have elaborated its sources and some of its applications elsewhere. It is a policy that affords great respect, but not blind capitulation, to determinations of the political branches. It involves neither talismanic labels nor wooden rules, but practical judgment. There is some room (and even a textual basis) for applying it even as to Congress's regulatory powers, but one need not await the eventual correction of the mistake made by the (former) majority in Garcia before

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355. See generally 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 2-66 (1990) (discussing public policies developed by courts or derived from legislation used as grounds for not enforcing a contract).

356. Even in Steward, while finding them not to be contravened in that case, the Court recognized not only that there are "restrictions implicit in our federal form of government," but also that so-called coercion might contravene them. Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937).

357. See supra note 20.


359. See Engdahl, supra note 358, at 93.

applying this state immunity principle in the context of spending conditions, for spending conditions are contractual in character, and the Constitution's policy of federalism should be considered among the public policy constraints enforceable on contract law grounds regardless of whether it might constrain exercises of Congress's regulatory powers.

D. Third-Party Obligations

Contract obligations depend upon the manifestation not only of one's intent to bind another, but also of that other's assent to be bound. This duality distinguishes contracted obligations from legislated ones.

For this reason, contracting parties cannot impose obligations upon someone else solely by agreement between themselves. It can make no difference that one or both of the contracting parties want very much to obligate that third person, or that obligating that third person is crucial to achieving the purpose of the contract, or even that the contract is of benefit to that third person. To obligate another person solely by virtue of contract requires some sufficient manifestation of voluntary assent by that person.

What this means with respect to federal spending conditions can be illustrated with United States Department of Transportation v. Paralyzed Veterans of America. Section 504 of the Rehabilitation Act of 1973 (which conditions federal grants made after its enactment) prohibits discrimination on the basis of handicap under “any program or activity receiving Federal financial assis-

at 557, a bare majority of the Court (including several Justices who no longer sit) overruled National League of Cities v. Usery, 426 U.S. 833 (1976). Garcia is commonly viewed as relegating the preservation of federalism to politics. See, e.g., Martha A. Field, Garcia v. Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 HARV. L. REV. 84 (1985). But see ENGDAHL, supra note 39, at 388-89 (noting that even in Garcia, 469 U.S. at 554, the Court reserves without elaboration a judicial role “tailored to compensate for possible failings in the national political process . . . ”).

Garcia has been undercut and seems likely to be increasingly marginalized and disregarded if not actually overruled. See, e.g., New York v. United States, 112 S. Ct. 2408, 2423 (1992) (stating that Congress is not authorized to "regulate state governments' regulation of interstate commerce"); Gregory v. Ashcroft, 501 U.S. 452 (1991) (construing statute to avoid arguable state immunity impediment). Once Garcia is gone, what should replace it is not an exact revival of the National League of Cities rationale, but rather a rule of reasoned judgment. See Engdahl, supra note 358, at 106-07.

Since section 504 was enacted, airport operators have received substantial federal financial assistance, and much of this assistance has been for the construction and development of terminals, runways, and other airport facilities that are of particular benefit to air carriers. Nevertheless, the Supreme Court held that section 504 does not bind those air carriers who are not parties to the grant agreements.

The majority opinion in *Paralyzed Veterans* treated the issue merely as one of statutory construction, concluding that Congress limited the scope of § 504 to those who actually "receive" federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds . . . . By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds. In this case the only parties in that position are the airport operators.

It seems likely, however, that the majority's construction of the statute was influenced by the underlying constitutional point; if one ignores that point, the less crabbed construction advanced by Justice Marshall (joined by Justices Brennan and Blackmun) in dissent makes a great deal more sense. That constitutional point is that the handicap antidiscrimination requirement was not one Congress had any enumerated power to impose but was merely a funding condition; its obligation therefore was merely contractual, and no merely contractual term could bind non-parties to the funding contract even if they benefitted from the airport improvements so funded.

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363. See *Paralyzed Veterans*, 477 U.S. at 604–05.
364. *Id.* at 605–06.
365. *Id.* at 613 (Marshall, J., dissenting).
366. Discrimination on the basis of handicap has not been held to be constitutionally prohibited even when supported by state action, and no statutory prohibition applies independently of § 504.
367. Of course, wholly apart from the spending power and attendant conditions, air carriers (and even handicap discrimination by air carriers) might be regulable by Congress not only insofar as the carriers do interstate commerce, but also in other respects insofar as might be "necessary and proper" to effectuate Congress's will with respect to interstate commerce. Those possibilities, however, are separate from the questions of whether and how Congress may control the carriers by virtue of the spending condition involved in *Paralyzed Veterans*. 
Certainly one contracting party may insist, as a condition to its assent, that another contracting party undertake to require specified behavior of others with whom the latter has some dealings. So for example (assuming a sufficient delegation of authority), the responsible federal agency could have conditioned grants to airport operators on those operators' agreement to include language precluding handicap discrimination by air carriers in all leases of airport facilities to such carriers.\textsuperscript{368} Even if that had been done, however, the carriers' obligations would have resulted from their own lease agreements with the operators; the funding agreement between the federal government and the airport operators still would not, because it could not, have obligated the air carriers.

This point has other applications as well. For example, a federal funds recipient cannot alter or abrogate the contract rights of its employees by a funding agreement to which the employees do not accede. If a recipient agreed in a funding agreement to discharge employees acting contrary to conditions the recipient accepted, any such discharge nonetheless would be unlawful unless it were consistent with the employee's employment contract as well. This would be true even if the employee's action were attributable to the recipient employer under applicable principles of agency or employment law so as to constitute a breach of the recipient's obligation under the funding agreement,\textsuperscript{369} for—except insofar as


\textsuperscript{369} There is a comment in the Court's opinion in Rust \textit{v.} Sullivan, 500 U.S. 173 (1991), that might be taken to suggest that employees are bound personally by funding agreement terms accepted by their recipient employers. The Court wrote,

\begin{quote}
Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral . . . [T]his limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.
\end{quote}

\textit{Id.} at 198.

But \textit{Rust} was only a facial challenge to regulations elaborating eligibility conditions for federal assistance. The relevant statute provided: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a–6 (1988). Employees who counseled inconsistently with the regulation of course would imperil their employers' continued funding; in that sense—i.e., if they wished not to cause a loss of funding (and thus, perhaps, of their jobs)—they were indeed "required" to observe the counseling and referral restriction. But the Court in \textit{Rust} was not even considering whether such abortion counseling could be the basis for consequences personal to the employee. The quoted statement therefore should not be
respects matters that are themselves within the scope of the enumerated powers—not even the federal government may affect a person’s legal rights without the affected person’s own assent.

For the same reason, no term agreed to solely between a recipient and the federal funds provider could subject any third person to any liability or penalty. Governing power can impose obligations and attach penalties regardless of a purported obligor’s consent, but power merely to contract cannot; furthermore, the governing power of the federal government is circumscribed by the principle of enumerated powers. These implications of the contractual character of spending conditions, however, seem not to have occurred yet to counsel in any case; consequently, they have not been examined by any court.

*FDIC v. Mallen,* 7 a recent case involving federal insurance of bank deposits, is illustrative. The Federal Deposit Insurance Act (FDIA) 3 provides as a condition to be accepted by institutions receiving such federal financial backing that the FDIC under certain circumstances may suspend any officer of an insured depository institution from office or prohibit that officer from participating further in the institution’s affairs. 372 FDIC’s insuring agreements, including this condition, of course are contracts with the insured institutions as corporate bodies, not with any such officer personally.

In *Mallen*, the Supreme Court held that a bank president suspended by the FDIC under this provision has a personal property right in his position sufficient to invoke due process protection. 373 But neither Mallen’s own legal counsel nor the Court acting *sua sponte* thought to question whether or how the bank’s agreement with the FDIC could have given the FDIC any power at all over that personal right of Mallen. A funding condition obligating the bank to suspend an officer at FDIC’s request might have been

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372. Id. § 1818(g).
373. *Mallen*, 486 U.S. at 240. The Court went on to find that due process had been satisfied in Mallen’s case. *Id.* at 248.
valid and effective; officers typically serve at a corporate board’s pleasure, and Mallen therefore probably would have had no employment contract rights against the bank. But that was not the case. The FDIC had not insisted that the bank suspend Mallen; rather, the FDIC itself had removed Mallen (as the statute declared it could do) and simply notified the bank that it had done so.\(^{374}\) The crucial litigable issue in Mallen, therefore, was not whether postsuspension FDIC procedures without any presuspension hearing were adequate to satisfy due process, but rather whether the Constitution conferred any power at all upon the federal government itself to suspend Mallen from his job at the bank.

Had that question been perceived, evidence might have been mustered to show that Mallen somehow had manifested his personal assent, or conceivably, some rationale might have been devised for holding executives (or chief executives) of federally insured banks personally accountable on conditions accepted on behalf of the corporations they serve.\(^{375}\) No such evidence or rationale was even attempted in Mallen, however, because no one even thought to question the FDIC’s dubious assertion of the constitutionality of this power.

There is another recent case even more remarkable than Mallen. In 1986, Congress enacted the Emergency Medical Treatment and Active Labor Act (EMTALA) as an amendment to the Medicare provisions of the Social Security Act.\(^{376}\) EMTALA adds conditions to the provider agreements hospitals must execute in order to qualify for Medicare payments. The hospitals themselves are the contracting parties and the recipients of the relevant funds. The EMTALA conditions require recipient hospitals to treat all persons entering their emergency departments according to terms prescribed in the Act. In particular, by accepting funds to which EMTALA applies, a hospital agrees not to withhold emergency-room services from anyone who is medically unstable, regardless of ability to pay.\(^{377}\)

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374. Id. at 238.
375. Or perhaps some constitutional basis might be found for the FDIA other than the spending power alone.
377. Id. § 1395dd(b)(1).
Penalties are specified for participating hospitals that violate these conditions. In addition, EMTALA provides that the “responsible physician” is “subject to a civil money penalty of not more than $50,000 for each such violation,” whether that physician is “employed by or under contract with the participating hospital.” These physicians, however, are not parties to the Medicare provider agreements between the hospitals and the government. They are not the recipients of funds under those provider agreements, and typically they have not even remotely agreed personally to be bound by EMTALA.

Nonetheless, although the EMTALA physician penalty was earnestly litigated the first time it was applied, with even some rather farfetched, so-called constitutional arguments being advanced, neither counsel nor the courts ever thought to inquire what constitutional basis might conceivably exist for it. Neither counsel nor the court realized that there exists no constitutional basis at all for federal imposition of such a personal penalty upon persons who have not personally agreed to such a condition and are not themselves recipients of the federal assistance involved.

There also are other provisions, equally insupportable, for which no support ever has been asked or offered. For example, a section of the federal penal code added in 1984 makes it a felony for any employee of a recipient state or local agency or recipient private organization to steal, embezzle, or misapply property of such organization or agency. Another statute purports to make

378. Id. § 1395dd(d)(1)(B). The current statute applies to “any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital.” Id. EMTALA also creates a civil action against the hospital, but not against the physician. Id. § 1395dd(d)(2)(A).

379. See Burditt v. United States Dep’t of Health & Human Servs., 934 F.2d 1362 (5th Cir. 1991). Dr. Burditt argued that he was not “under contract” with the hospital. However, the U.S. Court of Appeals for the Fifth Circuit held whether the physician was under contract with the hospital to be irrelevant as a matter of state law, declaring that “a physician is ‘under contract’ with a hospital [for purposes of EMTALA] when, pursuant to their mutual agreement, the physician examines and treats or transfers people who are covered by EMTALA, regardless of whether the agreement refers to EMTALA.” Id. at 1374. This dispute over whether Dr. Burditt was under contract with the hospital diverted attention from the more important facts that he was not contractually bound by EMTALA and that Congress did not have any power to so bind him other than contractually.

380. 18 U.S.C. § 666(a)(1)(A) (1988). Under this statute, it is not even material whether the property stolen, embezzled, or misapplied had been acquired with federal financial assistance. Of course, even limiting the statute to property so acquired could not
it a felony to "knowingly make[] any false statement ... for the purpose of influencing in any way ... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... upon any application, ... or loan, or any change or extension of any of the same ...". These penal code provisions lack any basis in the Constitution. It cannot be sufficient to give constitutional competence to Congress that the deed sought to be punished is done against one to whom Congress has extended financial aid. Funds recipients are not protectorates of the federal government: Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. Federal dominion over federal property is irrelevant, because once any particular funds have been given to a recipient, those funds are not federal property anymore. The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog. Money cannot infect the recipient with the germ of generalized federal governing control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.

It seems as though if any thought at all has been given to possible constitutional bases for imposing obligations upon non-parties to funding agreements, the question has been pressed no

have made it constitutional; the defect described in the text would remain.

381. 18 U.S.C. § 1014 (Supp. IV 1992); see also United States v. Williams, 112 S. Ct. 1735 (1992) (indicting defendant under 18 U.S.C. § 1014 for supplying banks with overvalued assessments of his assets in loan requests). If it were permissible to invoke the Necessary and Proper Clause of the U.S. Constitution by sheer conjecture, this statute might possibly find support under that Clause in conjunction with the Article IV Property Clause, as follows: having power to "make all needful Rules and Regulations respecting the ... Property belonging to the United States," U.S. CONST. art. IV, § 3, cl. 2, Congress may "make all Laws which shall be necessary and proper for carrying into Execution" that power, id. art. I, § 8, cl. 18. If one conceived a policy of conserving funds as being within the Property Clause, diminishing the probability of claims against the federal government as a deposit guarantor could serve that policy of conservation. One way to diminish the probability of claims under deposit insurance is to increase the likelihood that the depositary institution will remain solvent. One way to help ensure its solvency is to diminish its risk of uncollectible loans, and one way to do that is to prompt candid disclosure from persons seeking such loans by providing for punishment of fraud.

Such telic chains are permitted under the Necessary and Proper Clause, but there are requisites. For example, the means-to-ends connections must seem both rational and "substantial." More to the present point, however, it must appear not merely that the telic connections are conceivable by conjecture, but that they actually were the basis of Congress's action. See generally ENGDAHL, supra note 39, at 20-24, 33-43 (summarizing the limits on Congress's power under the Necessary and Proper Clause).
further than to determine whether imposing the third-party obligation would help effectuate the end at which the particular spending program is aimed. If that end were within the scope of some enumerated federal power, of course—such as military preparedness or interstate commerce policy—this extent of inquiry would be sufficient. With the vast majority of federal spending programs, however, the end is not an enumerated one, but merely an extraneous one, and the fact that some third-party obligation might help effectuate some extraneous end is utterly insufficient constitutionally to support the imposition of that obligation by Congress. Hamilton's spending power view does not posit Congress as competent to do anything toward extraneous (i.e., nonenumerated) ends, except spend.

E. Third-Party Enforcement of Conditions

The federal government has many ways to enforce conditions that accompany federal financial aid. If a prospective recipient fails or refuses to satisfy the conditions, obviously its application for funds may be denied. If a condition is breached after a grant has been made, requests for renewal or extension may be denied, and furthermore, by principles of ordinary contract law, any increments remaining to be paid during the current grant term may be withheld. There should even be a claim for restitution of sums already paid. Alternatively, the United States might obtain a judicial order compelling the recipient to comply with conditions it has accepted, even though the principle of enumerated powers would preclude enforcement of identical requirements if the recipient were not contractually bound. In addition, statutes establishing federal spending programs may assign responsibility to a federal administrative agency for continuing oversight to ensure that contracted funding conditions are fulfilled.

Sometimes, however, enforceability at the instance of the government itself might be deemed insufficient. Today, every federal funding agreement includes conditions designed for the benefit of persons who are not themselves parties to that agreement. As long as they are sufficiently clear to satisfy the Pennhurst standard,382 such third-party beneficiary conditions certainly are valid. Whether third-party beneficiaries themselves may sue to enforce

382. See supra notes 288-91 and accompanying text.
compliance with those conditions, however, is a question of considerable legal complexity.

Federal statutes prescribing conditions to accompany federal funds seldom address the question of third-party enforcement at all. The general rule is—or was, at least, until 1980—that enforceability at the instance of third parties is a question of state law, even though the obligation sought to be enforced arises from a contract with the United States. The 1980 decision in Maine v. Thiboutot\(^{383}\) made a profound change in this general rule, but that change already has been countermanded somewhat and if intelligently considered is unlikely to endure. It seems appropriate, therefore, to examine the pre-1980 situation first.

The Supreme Court confirmed the basic state law character of the question in Miree v. Dekalb County.\(^{384}\) Claimants' Lear jet had crashed after its engines were fouled by birds swarming from a garbage dump maintained by the County adjacent to the County's airport.\(^{385}\) As a condition to federal grants for airport improvement, the County had agreed to restrict the adjacent land to uses compatible with takeoff and landing.\(^{386}\) Claimants argued that federal rather than state law should determine whether they could sue as third-party beneficiaries, but all the Supreme Court Justices thought otherwise.\(^{387}\)

Two years later, the American Law Institute, cognizant of Miree, amended section 313 of its Restatement (Second) of Contracts by adding a subsection saying that the principles evolved through common law judicial processes for application to private third-party beneficiary contracts also apply to contracts with "a government."\(^{388}\) This general proposition is broad enough to include contracts regarding federal financial assistance. Of course, the law generally applicable to private third-party beneficiary contracts is state law, because "[t]here is no federal general common law."\(^{389}\)

\(^{383}\) 448 U.S. 1, 4 (1980).
\(^{385}\) Id. at 27.
\(^{386}\) Id.
\(^{387}\) Id. at 32–33. There was no dissent in Miree: Chief Justice Burger wrote separately, concurring in the judgment. Id. at 34–35 (Burger, C.J., concurring).
\(^{388}\) RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (1981); see also id. ch. 14 introductory note.
\(^{389}\) Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); see discussion infra note 391.
Relevant law varies from state to state. It therefore follows from *Miree* that third-party beneficiaries of a particular funding condition might be able to sue if one state’s law applies but not if another’s does. This variability of result from state to state and from claimant to claimant is acceptable, the Justices reasoned in *Miree*, because a third party’s claim against a federal funds recipient “raises no question regarding the liability of the United States or the responsibilities of the United States under the contracts”\(^3\) and therefore does not implicate such federal interests as might warrant the application of so-called federal common law.\(^3\)

\(^3\) *Miree*, 433 U.S. at 28–29. The Court stated,

The operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude. However, we see no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts.

*Id.* at 30.

\(^3\) *Cf.* *Clearfield Trust Co.* v. United States, 318 U.S. 363, 366 (1943) (holding that the rights and duties of the United States on commercial paper it issues are governed by “federal common law”). The proposition in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), that “[t]here is no federal general common law” does not mean that nonstatutory law in general, or the “general law,” necessarily is state law. To 18th-century, hence prepositivist, legal minds, the general law derived from England’s classic common law and applied (with few variations) in the several states was not “state” law at all; it simply was the general law, which all Americans shared in common. Our earliest generations assumed that the activities of their governments (both state and federal) would be governed by the principles and concepts of that general law, which was neither federal law nor any particular state’s own law, but they never conceived that activities of the federal government should be governed by *state* law. (For an example of the mistaken assumption to the contrary, see *Peter W. Low & John G. Jeffries, Federal Courts and the Law of Federal-State Relations* 317 (3d ed. 1994)).

For generations after state processes of judicial law elaboration had begun to proliferate variations, federal courts in diversity cases continued to work under the outmoded premise that the same “general law” was shared nationwide. Not until *Erie* did the federal judiciary reckon with the new reality that gradually had emerged, at last acknowledging that federal courts are no more competent than Congress to supervene the disseverance of America’s “general law.” *See Erie*, 304 U.S. at 78. *Erie* did not so much overrule the diversity case practice as acknowledge that its conceptual premise had long since ceased to be true.

Five years after reckoning in *Erie* with its import for diversity cases, the Justices considered in *Clearfield Trust* what the displacement of the prior nationwide “general law” by the variant general laws of the respective states must mean with respect to interests and obligations of the United States. *See Clearfield Trust*, 318 U.S. at 367. To regard the peculiar laws of any state as the matrix and measure of federal rights and obligations would render the exercise of enumerated federal powers contingent and dependent upon the laws of a state, and such a result had been recognized since the time of John Marshall as irreconcilable with the Supremacy Clause. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 329–30 (1819) (arguing that instrument employed to effectuate fed-
While third-party enforceability of spending conditions is generally a question controlled by state law, however, state law can be overridden as to spending conditions that promote ends within the scope of an “enumerated” power. Two separate ramifications of the principle of enumerated powers were adumbrated in *Miree*, although the circumstances of that case made it unnecessary for the Court to elaborate them as fully as the circumstances of other cases might require.

The first of these ramifications involves the equivocal character of references to federal “policy.” It was argued in *Miree* that even though the third-party claim alleged no federal liability or obligation, the relevant spending condition did articulate federal “policy,” and that effectuation of that policy was of sufficient “federal interest” that it must not be left to depend upon state law. The Justices simply deflected this suggestion, saying that “even assuming the correctness of this notion, . . . the issue of whether to displace state law on an issue such as this is primarily a decision for Congress. Congress has not chosen to do so in this case.”

While this deflection sufficed for *Miree*, however, for other circumstances the point requires analysis in light of the principle of general powers cannot be left subject to debilitation by states). In *Clearfield Trust*, the Justices therefore concluded that “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.” *Clearfield Trust*, 318 U.S. at 366. There being no federal statutes on point, that law was to be fashioned judicially in the manner which, by the 20th century, had come to be regarded as the “common law” process. See id. at 367.

The *Clearfield Trust* rule cannot be confined to commercial paper; it extends to contracts in general, and beyond. See id. It contemplates “federal common law” displacing the law that otherwise would govern matters within the scope of any enumerated federal power. Two centuries ago, the law that otherwise would govern was the commonly shared American general law; today, it is the variety of bodies of law evolved from that bygone American general law through state-by-state “common law” processes of judicial development.

On the other hand, because “federal supremacy” is the necessity that justifies this rule and the Constitution countenances federal supremacy only within the scope of the enumerated federal powers, *Clearfield Trust* cannot justify displacing the law otherwise governing matters outside the enumerated powers (not even those matters being reached as a means to an enumerated end by virtue of the Necessary and Proper Clause). *Clearfield Trust* does not support displacement of state law merely because a federally contrived uniform rule might better serve some extraneous end toward which the federal government is employing an enumerated power.

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393. *Id.* at 32.
enumerated powers. Federal policy for air travel safety (the relevant federal policy in *Miree*) is policy within the scope of Congress’s plenary commerce power, and any measure to promote—through spending conditions or otherwise—federal policy for matters within an enumerated power is supported by the Necessary and Proper Clause. Consequently, whether to displace state law impacting that federal policy certainly was within Congress’s power.

However, the only federal policies that many spending conditions promote are policies extraneous to the enumerated powers. Such conditions illustrate the principle of extraneous ends, and for reasons fully elaborated earlier, as to such federal policies the appropriate answer to the suggestion of the *Miree* claimants is very different. Congress—and, a fortiori, federal courts—cannot displace state law in order to effectuate federal policy for matters extraneous to the enumerated powers. As to funding conditions that promote federal policy only for such extraneous matters, therefore, not even express statutory language can control the third-party enforcement question. Instead, state law governs, because constitutionally, there can be no federal law.

*Miree* also adumbrated a second ramification of the principle of enumerated powers, one that affects subject-matter jurisdiction. If the federal statute prescribing the funding condition could be held to “imply” a cause of action for beneficiaries of that condition, their claim would raise a federal question. In *Miree*, jurisdiction premised on diversity of citizenship was ample and the possibility of federal-question jurisdiction on this “implied cause of action” theory was raised only at the Supreme Court level, and only as an afterthought, without pleading, briefing, or argument below. The Supreme Court therefore merely noted the possibility and refused to elaborate upon it. Just as with the first ramification, however, what warranted no elaboration in *Miree* itself merits careful examination for the sake of other cases.

Before *Miree*, the Supreme Court had considered whether private causes of action could be found by implication from feder-

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394. See supra notes 68–70 and accompanying text.
395. See the *a fortiori* rationale in *Erie*, 304 U.S. at 78.
396. Cf. id. at 78–80 (stating that Congress does not have power to declare common law applicable to states).
al statutes articulating policy with respect to certain matters within Congress's enumerated powers, such as the use of interstate commerce or the mails to solicit shareholder proxies and activities in connection with the election of Presidents, senators, and members of Congress. Before *Miree*, however, the Court had not considered whether causes of action could be implied by provisions aimed only at extraneous ends.

The distinction is of crucial importance. When Congress creates private rights and obligations within the scope of its enumerated powers, inferring a private cause of action to enforce them does not require positing federal competence beyond the enumerated powers. Insofar as such private suits would tend to effectuate Congress's policy for an enumerated matter, authorizing them is plainly within Congress's power under the Necessary and Proper Clause, regardless of whether the intent to authorize them is explicit. Many spending conditions, however, pertain to matters outside the scope of any enumerated power. As to such extraneous matters, Congress constitutionally has no competence to legislate. It can generate rights and liabilities as to them, but only by contract, and "cause of action" is a conception of law, not of contract.

The particular spending condition relied upon in *Miree* could easily have been linked through the Necessary and Proper Clause to the enumerated Commerce Clause policy end of air-traffic safety. Finding a third-party cause of action implicit in that particular spending condition, therefore, would not have surpassed federal power, because the enumerated policy of interstate commerce safety would have been served. But creating causes of action to enforce extraneous conditions is not within the power given to Congress by the Necessary and Proper Clause. To find an "implied" cause of action to enforce any extraneous spending condition, therefore, would require positing legislative competence for Congress beyond the scope of the enumerated powers.

It is conceivable that recipients might be required as a condition of funding to agree to respond on the merits to claims of

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third parties under extraneous conditions. The Pennhurst rule discussed earlier, however, would require that this condition and its impact be made unmistakably clear and if they were made so clear, no occasion for discussing “implied” causes of action should arise. Moreover, even then the impediment to federal court jurisdiction would remain insofar as the third-party claims arose from provisions binding only by force of contract and not by virtue of the funding statute as law in itself.

Because it declined in Miree to discuss the federal-question issue at all, the Court had no occasion even to mention the distinction between enumerated and extraneous ends.

In 1979, the Supreme Court returned to this second issue adumbrated in Miree. In Cannon v. University of Chicago the Court held that the statute conditioning federal aid to educational institutions on their abstinence from sex discrimination implies a federal cause of action for beneficiaries of that condition. In Cannon once again, there was no mention of the distinction between conditions promoting enumerated ends and those promoting only extraneous ones. Even as to private institutions, such as the University of Chicago, however, the particular condition considered in Cannon is supported by the “enforcement power” enumerated in Section 5 of the Fourteenth Amendment. Although private discrimination on the basis of sex, unlike state action discriminating on that ground, does not implicate the Equal Protection Clause, if the restriction against private discrimination serves as a means to discourage or prevent forbidden discrimination by the state, then, by analogy, the prophylactic statutory prohibition of such private discrimination is within the power enumerated for Congress in the Fourteenth Amendment’s Enforcement Clause.

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401. See supra notes 288-92 and accompanying text.
402. By contrast, where, as in Miree, an enumerated rather than merely extraneous end was served, consent or even knowledge on the part of a grant recipient should not be a prerequisite to third-party enforceability, for not only giving those particular rights but also giving the cause of action to enforce them would be assertions of Congress’s legislative power under the Necessary and Proper Clause.
405. Cannon, 441 U.S. at 688-89.
As to conditions aimed only at extraneous ends, therefore, Cannon in no way disputes the proposition that third-party enforceability is, as Miree held, a question of state, not federal law.

Indeed, Cannon does not support a federal cause of action for every spending condition that promotes an enumerated end. In Cannon, the Justices elaborated, and applied in the spending context, a strategy of statutory construction they had employed in a nonspending context four years earlier in Cort v. Ash. In any context, this strategy requires examination of the specific terms and circumstances of each particular statutory provision under which the question of a federal cause of action is put. Under this approach, therefore, even among spending conditions promoting objects within the scope of enumerated powers, the third-party beneficiaries of some conditions might have a federal cause of action while the beneficiaries of many others might not. As to

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requirement as means to prevent unconstitutional disenfranchisement of citizens unable to read and write English, even though English literacy requirement itself does not violate Constitution). In the Fifteenth Amendment context, see Rome v. United States, 446 U.S. 156, 177 (1980) (holding that the enforcement power under the Fifteenth Amendment supports statute against electoral changes discriminatory in effect, even though the Amendment itself forbids only intentional discrimination in voting).

408. 422 U.S. 66, 78 (1975).

409. In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (citations omitted).

410. Where the recipient of federal funds is a state entity (as in Cannon), rather than a private one or a municipality or county, enforceability of conditions at the instance of third-party beneficiaries is complicated further by considerations of state immunity from suit by virtue of the Eleventh Amendment, and the rule of Hans v. Louisiana, 134 U.S. 1, 20 (1890). There is no Eleventh Amendment immunity for counties, cities, or school boards. See Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 280-81 (1977) (school boards); Workman v. New York, 179 U.S. 552, 565 (1900) (cities); Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (counties).

Under Ex parte Young, 209 U.S. 123, 125 (1908), officials could sometimes be sued personally in federal courts even if their state was immune. However, Young contemplated only claims for prospective relief from alleged constitutional violations. Id. Young therefore was irrelevant to claimed violations of spending conditions, except where some constitutional violation also was claimed and the claims were so intertwined that the spending condition claim could be deemed "pendent" for purposes of jurisdiction.
the latter, state law would continue to determine whether third-party beneficiary claims could be heard, for while Congress could have addressed such claims, it has not. And similarly—although for the different reason that by virtue of the principle of enumerated powers, Congress could not have governed the point even if it had tried—third-party enforceability of conditions promoting only extraneous objectives also would remain a question of state law.

In 1980, the majority ruling in *Maine v. Thiboutot*[^1] worked a profound change, exponentially increasing the prospect of third-party beneficiary suits to enforce spending conditions. The *Thiboutot* majority found a federal cause of action for spending condition beneficiaries under 42 U.S.C. § 1983, the statute countenancing private claims for state action depriving persons of rights "secured by the Constitution and laws."[^2]

Before *Thiboutot*, whether a third-party beneficiary of a violated funding condition could sue the recipient to enforce it was a question of state law, unless the particular condition promoted some enumerated end and a federal cause of action could be inferred under the rule of *Cort v. Ash*[^3] and *Cannon*.[^4] *Ash* and *Cannon* required separate analysis of the statutory provisions regarding each particular funding condition as to which a question of jurisdictional reason, the earlier third-party spending condition cases pursued in federal courts always had advanced some purported constitutional claim to which the spending condition claim was made pendent. See *Rosado v. Wyman*, 397 U.S. 397, 399 (1970); see also, e.g., *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 411 (1973); *Carleson v. Remillard*, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 283 (1971); *California Dep't of Human Resources v. Java*, 402 U.S. 121, 124 (1971); *Dandridge v. Williams*, 397 U.S. 471, 483 (1970); *King v. Smith*, 392 U.S. 309, 311 (1968).

There was a rush of such cases in the late 1960s and early 1970s, but it quickly abated once the Court began to curtail extravagant applications of the Equal Protection Clause. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18–23 (1973), and extended the *Hans v. Louisiana* bar to suits for monetary relief (even if prospective in form) against officials when it seemed the money "must be paid from public funds in the state treasury." See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

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[^1]: 411. 448 U.S. 1 (1980).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

third-party enforcement was raised.\textsuperscript{415} Under Thiboutot, by contrast, state law is superfluous, and no analysis of any particular condition is necessary because 42 U.S.C. § 1983 is taken to cover them all.\textsuperscript{416}

Thus, Thiboutot alters everything heretofore said about third-party enforcement. For that and other more important reasons, the Thiboutot rule merits critical scrutiny. The Thiboutot majority now is gone from the Court, and its rationale was gravely flawed. Subsequent decisions have significantly, and (it seems) deliberately, diminished the impact of its rule. Indeed, I venture to predict that the Thiboutot rule will not long endure once its fundamental fallacy is perceived.

The Thiboutots had suffered a reduction of benefits under Maine’s program of AFDC, funded largely by federal grants under the Social Security Act.\textsuperscript{417} As a condition to that federal assistance, Maine had undertaken to conform its AFDC program to provisions of the Social Security Act and implementing federal regulations.\textsuperscript{418} The Thiboutots sued in state court for judicial review of the administrative action reducing their benefits and joined a claim under section 1983.\textsuperscript{419} For purposes of administrative review, it would have been sufficient for them to show that the reduction resulted from a benefits-calculation method different from the one the state had contracted to use by accepting the conditioned funds. The premise of the section 1983 claim, however, was that AFDC recipients have a right secured by the Social Security Act to have the state agency administering AFDC use a conforming method of calculating benefits.\textsuperscript{420}

This premise made Thiboutot fundamentally different from every prior case in which a spending condition claim had been heard. In those, the principal claims had been constitutional and the spending condition claims merely pendent.\textsuperscript{421} They were not even federal law claims at all, much less claims under section 1983—although with jurisdiction otherwise established and no other issue in those cases affected by whether the spending condi-

\textsuperscript{415} Id. at 689–709; Ash, 422 U.S. at 80–85.
\textsuperscript{416} See Maine v. Thiboutot, 448 U.S. 1, 4 (1980).
\textsuperscript{417} Id. at 2–3.
\textsuperscript{418} See id. at 3.
\textsuperscript{419} Id.
\textsuperscript{420} Id. at 4–5.
\textsuperscript{421} See supra note 410.
tion claim arose under state or federal law, there had been no occasion in those cases to focus on that point.\textsuperscript{422} The state law character of such claims never had been material until \textit{Miree} in 1977,\textsuperscript{423} in which jurisdiction rested on diversity but the state law character of the claims determined the outcome. \textit{Miree} was the only case before \textit{Thiboutot} in which that point had been materi-
al.\textsuperscript{424}

Yet the unanimous and recent holding in \textit{Miree} was completely overlooked in \textit{Thiboutot}. Maine's highest court agreed that the calculation method used by the state agency did violate the funding conditions prescribed by the Act, and moreover, that section 1983 applied.\textsuperscript{425} Reaching only the latter point,\textsuperscript{426} the U.S. Supreme Court affirmed by a 6-3 vote.

The construction given in \textit{Thiboutot} to section 1983 is applicable to a wide spectrum of federal statutes, not merely those that prescribe funding conditions, and some of its faults are equally evident in any application. For example, in rejecting the long-settled view that the phrase "and laws" contemplates only laws protecting civil rights and equal protection, Justice Brennan's majority opinion purported to rely on the "plain language" of section 1983.\textsuperscript{427} A more candid application of the "plain meaning" rule, however, would instead have taken the word "and" to import the

\textsuperscript{422} Justice Brennan argumentatively asserted for the \textit{Thiboutot} majority that § 1983 had been "the exclusive statutory cause of action" in several of those cases. See \textit{Thiboutot}, 448 U.S. at 5-6. There is nothing in those cases themselves, however, to support Brennan's retrospective mischaracterization. It would not have served Brennan's purpose to acknowledge that they might have been considered state law claims (as the Justices in \textit{Miree} unanimously had held).

\textsuperscript{423} See supra note 384.

\textsuperscript{424} In \textit{Thiboutot}, which arose in a state court, the state or federal law character of such claims was made relevant by a request for attorney's fees under 42 U.S.C. § 1988 (1988), which could apply only if the Thiboutots' spending condition claim were indeed based on § 1983. \textit{Thiboutot}, 448 U.S. at 8-10.

\textsuperscript{425} Thiboutot v. State, 405 A.2d 230, 236 (Me. 1979), aff'd, 448 U.S. 1 (1980).

\textsuperscript{426} The state court also held that an attorney's fees award under § 1988 might be appropriate and had remanded the case. \textit{Id.} at 240. Proceedings on remand were stayed when \textit{certiorari} was granted by the U.S. Supreme Court, 444 U.S. 1042 (1980), but in the interim, the state agency complied with the state court's ruling both by changing the method of calculating benefits and also by paying the additional AFDC benefits to the Thiboutots retrospectively. \textit{Thiboutot}, 405 A.2d at 232. When the case actually reached the Supreme Court, therefore, the only relief at issue was the request for attorney's fees. That depended on whether § 1988 applied, which in turn depended on whether § 1983 applied. \textit{Thiboutot}, 448 U.S. at 3.

\textsuperscript{427} \textit{Id.} at 4.
conjunctive rather than disjunctive, so that the rights, privileges, or
immunities referred to would be only those secured both by the
Constitution and by federal laws and not any secured by either the
Constitution or a statute alone. On this ground (as well as on
several other grounds elaborated by dissenting Justices)\textsuperscript{428} Thiboutot's view of section 1983 remains vulnerable to attack.

Whether or not it convinces the credulous in other contexts,
however, the Thiboutot rationale is utterly fallacious when applied
(as it was in Thiboutot itself) to statutory provisions that do, and
constitutionally can do, no more than establish conditions to feder-
al funding.\textsuperscript{429} Section 1983 contemplates rights “secured by” fed-
eral “laws”; the lawmaking or “legislative” competence of Con-
gress, however, extends no further than the enumerated powers.
Certainly Congress may condition federal assistance on a prospec-
tive recipient’s agreement to terms that will benefit third persons
(just as any donor or testator may), and if that condition is not
lawfully countermanded, it might as a practical matter “secure”
certain gains to those third persons. But unless the terms thus
prescribed as conditions are also independently valid by virtue of
some enumerated power, they are obligatory only by virtue of
such agreement and not by force of law. They may freely be coun-
termanded by state law (except insofar as the state itself is con-
strained by its own contracted obligations). Beyond the scope of
its enumerated powers, Congress has no more competence to
make “law” than any private donor or testator has.

True, it is a statute that prescribes the funding condition and
requires denial of federal assistance if the funding condition is not
agreed to; however, only the agreement—and not the stat-
te—makes the terms obligatory on the funds recipient and thus
“secures” the contemplated third-party rights. Thus, third-party
rights like those of the Thiboutots are “secured” (if at all) not by
any “law,” but only by the contract between the recipient and the
United States, and section 1983 does not even remotely contem-
plate causes of action for contract violations. No feasible contor-

\textsuperscript{428} See id. at 11–34 (Powell, J., dissenting).
\textsuperscript{429} Justice Powell's appendix to his dissent in Thiboutot also listed numerous
nonspending measures for which Thiboutot's construction of § 1983 would be significant.
Id. at 34–37 (Powell, J., dissenting) (Appendix). Our particular concern here, however, is
with conditional spending.
tion of its terms can bring rights “secured” only by contract within its ambit.

Because prior to *Thiboutot*, few had seriously imagined that section 1983 might comprehend such claims, *Thiboutot* and its portent came as a great shock. Thus it is fair to say that in *Thiboutot* the Supreme Court itself “surpris[ed] participating States with postacceptance or ‘retroactive’ conditions,”430 exactly what the Court the next year in *Pennhurst State School v. Halderman*431 would declare that Congress may not do.

*Thiboutot* precipitated a surge of section 1983 claims in the lower courts. Some of those claims were asserted under regulatory statutes within the scope of various enumerated powers, but many were third-party claims asserted under federal funding conditions.432 The particular concern in this Article is only with the latter, but judicial reaction to the deluge came in both varieties and therefore both must be noted.

The litigation flood was diked the year after *Thiboutot* by two decisions. One of these was *Pennhurst*.433 In *Pennhurst*, a different majority (including the three *Thiboutot* dissenters) held that certain language in the Developmentally Disabled Assistance and Bill of Rights Act is merely precatory.434 That holding was controversial, because the statutory language seemed adequate on its face to create beneficiary rights and that probably was Congress’s intent. However, this very fact makes *Pennhurst* more forceful in emphasizing that third-party claims cannot succeed without persuasive demonstration that the statutory language relied on actually gives the complaining third parties legal rights.

If the language relied on does not actually create “rights,” and unless the right claimed is derivable from some independent source, the beneficiaries of the funding to which the condition applies have no “right” upon which 42 U.S.C. § 1983 could operate. Consequently, the Court’s refusal to find that the statutory language involved in *Pennhurst* actually created rights, its insis-

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431. *Id.* ("Though Congress’ power to legislate under the spending power is broad, it does not include surprising States with postacceptance or ‘retroactive’ conditions.")
433. *See supra* notes 288–92.
tence that the language was merely precatory, is best explained as expressing the new majority's opposition to Thiboutot's section 1983 thesis itself.

The other 1981 decision was Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.435 Seizing the occasion to address this point even though no party had raised it, the Sea Clammers majority said that even where actual third-party rights are established, section 1983 cannot avail if the legislation creating those rights provides other remedial devices "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983."436 Whether or not Sea Clammers, like Pennhurst, bespeaks dissatisfaction with Thiboutot's section 1983 thesis itself, it does diminish Thiboutot's significance for spending condition claims in particular, because spending conditions always are enforceable through a variety of remedial devices at the federal government's instance (and discretion), and where no basis for private claims other than section 1983 can be shown, an inference that Congress considered this remedial array sufficient is likely to be persuasive.

In 1989, a sharply divided Supreme Court repudiated the tacit premise of numerous prior decisions by holding that section 1983 gives no cause of action either against "a state [or] its officials acting in their official capacities."437 It might be that this holding, too, is explicable as a reaction against Thiboutot's forced expansion of section 1983, since it is difficult to rationalize persuasively otherwise.

Pennhurst and Sea Clammers were sandbags hastily thrown against the flood of section 1983 cases precipitated by Thiboutot. Those sandbags still hold. For example, in 1992, a seven-Justice majority applying Pennhurst concluded that the Adoption Assistance and Child Welfare Act of 1980438 (a conditioned spending measure) does not actually create third-party beneficiary rights.439

435. 453 U.S. 1 (1981). Sea Clammers was not a spending condition case; the claims for which § 1983 was invoked were asserted under regulatory statutes resting on Congress's commerce power and foreign affairs powers coupled with its Necessary and Proper Clause power. See id. at 19.
436. Id. at 20. Cf. Smith v. Robinson, 468 U.S. 992, 1011-12 (1984) (holding that relief granted under the Education of the Handicapped Act does not include attorney's fees). This case made into a limitation on § 1983's reach the flip side of a factor that, before Thiboutot, had been used to identify causes of action "implied" by federal statutes.
On the other hand, the sandbags have not proved impregnable: 5-4 majorities not only construed spending conditions to confer third-party rights, but also applied section 1983 to them, in 1987 under the National Housing Act and in 1990 under the Boren Amendment to the Medicaid Act.

The majorities in those 1987 and 1990 cases, however, included Justices Brennan, Marshall, White, and Blackmun, all of whom have since retired. All four of those Justices had been among the majority in *Thiboutot* itself and had resisted when *Pennhurst* fought to dike the resulting flood. In contrast, the 1992 majority included Chief Justice Rehnquist (who had dissented in *Thiboutot*); all three of the 1980s appointees—Justices O'Connor, Scalia, and Kennedy (who likewise appear determined to contain *Thiboutot*, if not overrule it); and the 1990s appointees to that date—Justices Souter and Thomas.

This simplistic head count should be enough to induce doubt that *Thiboutot*'s novel construction of section 1983 can long survive. But to argue from head counts alone would be to deprecate the role of the intellectual element in constitutional law. *Thiboutot* has produced confusion in the lower courts, and while commentators have offered varied advice they have not succeeded


443. See *Brown*, supra 433, at 33.

in dispelling the confusion and doubt. The reason, I think, is that notwithstanding the roles of politics, predilection, and pragmatic considerations, constitutional law fundamentally is an intellectual enterprise, and shortfalls of logic, consistency, and coherence inevitably produce confusion and disagreement in the short run and, in the longer run, powerfully impel rethinking and change. Cogency, on the other hand, breeds constancy.

Once exposed as unsoundly reasoned, faulty propositions tend not to endure. Sometimes individuals become attached beyond reason to favored but flawed propositions and adhere stubbornly to them until overcome by the inexorable march of time. Whenever good minds consider a point anew, however, there is opportunity again for reason to subjugate will, and for intellect's intolerance of inconsistency, incongruity, and illogic to prevail. Thiboutot simply is nonsense, no matter how well it serves anyone's social or political objectives. One can be confident, therefore, that the prospect for its survival in the face of a candid reassessment is very poor.

CONCLUSION

Even if one agrees that theoretical purity should not be expected (and may not even be desirable) in a discipline so relentlessly practical as law, there surely is a surfeit of contradictions and anomalies in modern constitutional thought about federal spending. The more one studies recent cases, the more it becomes evident that often neither the Justices nor those who have argued before them have quite understood what they were doing. Say what one may about law thriving on experience rather than logic, there is vast room for greater conceptual coherence and systematic analysis in this realm of jurisprudence before any risk of doctrinaire theory need be feared. Alexander Hamilton's was a pragmatic and practical mind, and it was precisely for that reason that he valued and strove to maintain consistency and coherence in his constitutional thought.

Years ago it fell out of fashion among law teachers, scholars, practitioners, and judges to invest any serious analytical effort toward understanding the principle of enumerated powers and

other rudimentary, if now sorely misunderstood, fundaments of the constitutional law of American federalism. The anomalies and contradictions now prevalent regarding the spending power are among the sad results. It now is long past the due time to reconsider.

The one constant with regard to federal spending, from the First Congress in the time of George Washington through both historic practice and judicial theory right down to the latest cases, is the conviction that Hamilton had it right. The shortfall has been as to diligence in understanding what Hamilton said. This Article is intended to help its readers in that important, illuminating, and quite reorienting task.