Vanderbilt Law Review

Volume 40
Issue 5 *Issue 5 - October 1987*

Article 4

10-1987

The Coercion Test and Conditional Federal Grants to the States

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Recommended Citation
Donald J. Mizerk, The Coercion Test and Conditional Federal Grants to the States, 40 *Vanderbilt Law Review* 1159 (1987)
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NOTE

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I. INTRODUCTION

In July of 1984 Congress amended the Surface Transportation Assistance Act of 1982[1] to require the states either to raise their minimum drinking age to twenty-one or forfeit a percentage of their federal highway grant.[2] This congressional action forced the states to make an extremely difficult decision. The states either could enact a law that their residents might not support or forego the federal highway funds that the states desperately needed to complete important highway improvements. Many states were displeased with both options and challenged the constitutionality of Congress' conditional spending program.[3]

The states' legal challenge has initiated renewed discussion on the limits of Congress' powers to spend and to attach conditions to the receipt of federal funds. These issues have attracted little at-

1. 23 U.S.C. § 158 (Supp. III 1985).
2. *Id.*
3. *See, e.g.*, South Dakota v. Dole, 791 F.2d 628 (8th Cir. 1986), *aff'd*, 107 S. Ct. 2793 (1987). The states of Colorado, Hawaii, Kansas, Louisiana, Montana, New Mexico, Ohio, South Carolina, Tennessee, Vermont, and Wyoming jointly filed an amicus brief with the United States Supreme Court arguing with South Dakota that the amendment violated the Constitution. Brief for Amicus Curiae for the States of Colorado, Hawaii, Louisiana, Montana, Ohio, South Carolina, Vermont, and Wyoming, South Dakota v. Dole, 107 S. Ct. 2793 (1987) (No. 86-260); Brief for Amicus Curiae of Mountain States Legal Foundation and the State of New Mexico, South Dakota v. Dole, 107 S. Ct. 2793 (1987) (No. 86-260); Brief for Amicus Curiae for the States of Colorado, Hawaii, Kansas, Louisiana, Montana, Ohio, South Carolina, Tennessee, Vermont, and Wyoming, South Dakota v. Dole, 107 S. Ct. 2793 (1987) (No. 86-260) (on petition for writ of certiorari).

tention from constitutional scholars. A three volume treatise on constitutional law published in 1986 devoted only fourteen pages to the entire topic.[4] The most recent debate over the spending power concluded sixty-five years ago when the Supreme Court first articulated its analysis of conditions attached to federal grants to the states. The analysis has remained virtually unchanged since that time.[5] Comprised mainly of what the courts have called the "coercion test," the Court's analysis has not been applied to invalidate a single federal grant program in the last fifty years.[6] Congress, however, has dramatically increased its use of conditional spending schemes to accomplish policy objectives.[7] From this increased use of conditions on federal grants, a new debate over the extent and nature of those conditions has emerged. The debate reexamines the role of conditions in federal grant programs and focuses on whether the Constitution limits the conditions that Congress may attach to federal grants to the states.[8]

The constitutional problems involved in this new debate result from the cumulative impact of three factors. First, the Supreme Court has held that the Constitution allows Congress to spend for very local purposes.[9] Second, the Court has held that the Constitution does not prohibit Congress from attaching whatever conditions Congress wishes to federal grants to the states because state and local governments have the theoretical option to decline participation in the federal grant program.[10] And third, the size of the federal government has increased tremendously. The combination of these three factors has allowed Congress to erode the allocation of powers between the state and federal governments by attaching conditions to local projects with greater frequency and more perva-

4. R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (1986). The three volume treatise contains 2181 pages of substantive text.

5. *Compare, e.g.,* Massachusetts v. Mellon, 262 U.S. 447, 482 (1922) (stating that "[i]f Congress enacted [the spending program] with the ulterior purpose of tempting [the states] to yield [part of their reserved rights], that purpose may be effectively frustrated by the simple expedient of not yielding") *with* South Dakota v. Dole, 107 S. Ct. 2793, 2797 (1987) (stating that "*United States v. Butler* . . . established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly") (citation omitted).

6. Lovell, *Evolving Local Government Dependency,* 41 PUB. ADMIN. REV. 189, 192 (1981).

7. Cappalli, *Mandates Attached to Federal Grants: Sweet and Sour Federalism,* 13 URB. LAW. 143, 143-44 (1981).

8. *See, e.g., Dole,* 107 S. Ct. at 2799 (O'Connor, J., dissenting).

9. *See infra* notes 28-36 and accompanying text.

10. *See infra* notes 74-76 and accompanying text.

sive impact.

This Note discusses the Supreme Court's spending power analysis, most specifically the coercion test, in the context of federal grants to the states. Part II surveys spending power doctrine, explains the rationale behind current spending power analysis, and discusses the origin of the coercion test.[11] Part III analyzes the impact that Congress' use of the spending power and conditional grants has on decisionmaking and the structure of state government under the current coercion test.[12] Part IV analyzes the theoretical weaknesses of the coercion test and why the courts have rejected the test in other areas of constitutional adjudication.[13] Part V proposes the adoption of a new analysis that would identify conditions authorized by the spending power and restrictions authorized by Congress' other enumerated powers. Part V also explains how the courts already have built the foundation for the adoption of such an analysis.[14] Part VI concludes by stressing the urgent need to revise the spending power analysis as applied to conditional grants to the states.[15]

II. Development of Current Spending Power Doctrine

Congress derives its power to spend from Article 1, section 8 of the United States Constitution.[16] In general, Congress may spend to aid the "general Welfare."[17] Congress realized, however, that expenditures alone are not always sufficient to achieve general welfare objectives. Attaching conditions to federal expenditures has allowed Congress to tailor spending programs more closely to these objectives. The debate over the extent of the spending power has centered on what conditions Congress legitimately may attach to spending grants.

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11. *See infra* notes 16-70 and accompanying text.

12. *See infra* notes 71-113 and accompanying text.

13. *See infra* notes 114-51 and accompanying text.

14. *See infra* notes 152-94 and accompanying text.

15. *See infra* notes 195-204 and accompanying text.

16. Article 1, section 8, clause 1 of the United States Constitution provides, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The "common Defence" language has not been fully interpreted by the courts, which have assumed that "general Welfare" includes the "common Defence." *Cf. Dole*, 107 S. Ct. at 2796.

17. *See* Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 65-66 (1936).

A. *The Power to Spend*

1. Historical Development

The first controversy over the spending power concerned the purposes for which the federal government could spend. The Constitution provides that Congress may spend only for the "general Welfare," a phrase which historically has been interpreted at least three different ways.[18] The first interpretation was that the clause authorizes Congress to legislate rather than spend for the general welfare; that interpretation was quickly denounced.[19] Persons opposed to ratification of the Constitution advanced this broad reading of the general welfare clause in order to discredit the Constitution and undermine its public support.[20] The drafters responded by stating that the detractors had interpreted the clause erroneously: if the clause did permit Congress to legislate for the general welfare, then the Constitution did not need to specify the other enumerated powers.[21] Rather, according to the drafters, the general welfare clause modifies only the taxing and spending powers.[22]

The second interpretation limited general welfare objectives to interests delineated by Congress' other enumerated powers.[23] This interpretation would have allowed Congress to use the taxing and spending power only as a means of executing listed governmental powers. The Court rejected this interpretation in *United States v. Butler*[24] and formulated the third, and current, interpretation. In *Butler* the Court addressed the constitutionality of the Agricul-

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18. Cole, *The Federal Spending Power and Unconditional and Block Grants to State and Local Government*, 16 CLEARINGHOUSE REV. 616, 624 (1982).

19. *Id.* at 625.

20. *Id.; see also* Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U.L. REV. 293, 296-97 & n.21 (1975).

21. *Id.*

22. *Butler*, 297 U.S. at 64 (stating that "the view that the clause grants power to provide for the general welfare, independently of the taxing [and spending] power has never been authoritatively accepted").

23. This interpretation of the general welfare clause marks the beginning of the debate between James Madison and Alexander Hamilton. Madison believed that the general welfare clause merely encompassed all of the enumerated powers of Congress. Hamilton, on the other hand, argued that the general welfare clause extended beyond the enumerated powers, but modified only tbe taxing and spending power. *See generally id.* at 65-67; *Helvering*, 301 U.S. at 640; Cole, *supra* note 18, at 625-29. Presidents had used their veto powers very aggressively to thwart many expenditures for local purposes. Therefore, few cases reached the Court before *Butler. Id.*

24. 297 U.S. 1 (1936).

tural Adjustment Act (AAA).[25] The New Deal program used the proceeds of a tax on agricultural processors to subsidize farmers who agreed to take land out of production. Congress and the President designed the program to reduce food production in the hope that a diminished supply would stimulate the prices of agricultural products. The federal government, in defense of the program, conceded that Congress' other enumerated powers did not support the Act, but asserted that Congress' power to tax and spend could.[26] The Court agreed in principle, stating, "[T]he power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[27]

2. Scope of Permissible Spending Objectives

According to *Butler*, Congress' other enumerated powers do not limit the general welfare objectives for which Congress may exercise its spending power. Any restriction on the scope of the spending power originates instead with the Supreme Court's definition of general welfare. The Court's analysis has distinguished expenditures for the "general" welfare from those for a "particular" welfare,[28] equating general welfare with national interests.[29] Thus, Congress may spend for national purposes, but not for local purposes.

The Court has deferred to Congress' determination that a purpose lies within the general welfare and will not intervene "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."[30] One commentator neatly summarized the degree of deference the Court gives Congress in making such

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25. *Id.* at 53.

26. *Id.* at 64.

27. *Id.* at 66.

28. *Helvering*, 301 U.S. at 640; *see also Butler*, 297 U.S. at 65-66.

29. *Butler*, 297 U.S. at 67; *see also Helvering*, 301 U.S. at 640. In *Butler*, the Court defined "particular" in the context of the taxing power. Although the Court implied that the limitation would apply to expenditures, "[t]he bald fact stands out that in no case to date has either the Supreme Court or any lower court held any federal grant unconstitutional as heing local rather than for general welfare." Schweppe, *Congress and the "General Welfare,"* 67 A.B.A.J. 1275, 1277 (1981). In *Butler*, the federal government did not deposit the collected tax into the general treasury but instead deposited the funds into the AAA fund for distribution to farmers. The spending provisions were invalidated because Congress "resort[ed] to the taxing power to effectuate an end which [was] not legitimate, not within the scope of the Constitution." *Butler*, 297 U.S. at 69.

30. *Helvering*, 301 U.S. at 640; *see also* Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam).

decisions:

> From *Helvering* and *Steward Machine Co.* through *Buckley*, the Court has approved particular spending programs that were directly responsive to national needs that the Court found were *determined by Congress to exist*, and that were *designed by Congress* to serve the national purposes that it had identified as requiring remedial action.[31]

The Court's definition of "general Welfare," therefore, effectively delegates to Congress the final determination of whether an objective pursues a national interest and, hence, the general welfare.[32]

Because the legislature may determine what expenditures will serve the general welfare, Congress now funds activities that are extremely local in character.[33] In *United States v. Gerlach Live Stock Co.*[34] the Court accepted Congress' determination that a federal expenditure to make land in California available for farming was in the national interest, even though the plan benefitted only California. At the time Congress made this expenditure, an existing surplus of farm land had caused farm prices to decline, making the commission of more farm land detrimental to the nation's well being.[35] The Court's refusal to scrutinize general welfare determinations has allowed Congress to appropriate federal funds for local police forces, fire departments, neighborhood schools, sewer systems, urban renewal projects, and local water projects.[36]

3. The Spending Power Compared to the Other Regulatory Powers

The spending power's utilization of two different tools—the "necessary and proper" clause and the express power to spend—distinguishes it from other grants of congressional power. The spending power allows Congress to spend for the general welfare. The other enumerated powers do not possess this tool but rather rely solely on Congress' ability to enact laws under the "nec-

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31. Cole, *supra* note 18, at 636 (emphasis in original); *see also Buckley*, 424 U.S. at 91.

32. The general/particular distinction has been distorted by the lower courts. The Eighth Circuit recently has said, "Congress's power under the spending clause is not, however, unlimited. First, in exercising that power, Congress must seek to further the well-heing of a particular region or locality." South Dakota v. Dole, 791 F.2d 628, 631 (8th Cir. 1986) (citing *Butler*, 297 U.S. at 64-67 and *Helvering*, 301 U.S. at 640-41), *aff'd*, 107 U.S. 2793 (1987).

33. WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA 30-37 (1986).

34. 339 U.S. 725 (1950).

35. Schweppe, *supra* note 29, at 1276.

36. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 553 & n.15 (1985); *see also* Schweppe, *supra* note 29, at 1276.

essary and "proper" clause. Congress, for example, exercises the commerce and copyright powers exclusively through its lawmaking authority. The conceptually difficult aspect of this structure is that the spending power's general welfare phrase encompasses Congress' other regulatory purposes.[37] Thus, Congress may spend to exercise its commerce or copyright powers, not because the commerce and copyright powers permit these expenditures, but because the general welfare provision includes those regulatory objectives.[38] This distinction makes spending power analysis unique with the bottom line being that Congress may make an expenditure only in the pursuit of an objective within the general welfare. The spending power nevertheless resembles the other regulatory powers by allowing Congress to enact laws to effectuate spending objectives, just as Congress passes laws to effectuate a copyright scheme or a commerce regulating program.

B. *The Power to Condition Federal Grants*

The spending power carries with it the power of Congress to fix the specific terms under which federal money allotments will be disbursed.[39] The "necessary and proper" clause allows Congress to pass laws in order to effectuate what is necessary and proper in the exercise of any of its other enumerated powers.[40] The Supreme Court has concluded that the spending power, when viewed as an independent power, allows Congress, in the pursuit of its spending objectives, to attach conditions to the receipt of federal funds.[41]

1. Types of Conditions

The current definition of condition is relatively unsophisticated, referring to a simple "if-then" notion of a condition. The courts recognize a condition on federal expenditures as any requirement or circumstance that will qualify or disqualify a state from a federal program.[42] Most conditions that apply to the states

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37. Cole, *supra* note 18, at 626.

38. *Cf. id.*

39. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1946).

40. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

41. United States v. Butler, 297 U.S. 1, 83, 85 (1936) (Stone, J., dissenting). Justice Stone dissented in *Butler* stating, "It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to attainment of the end which alone would justify the expenditure." *Id.* at 85. Justice Stone voted with the majority in Steward Machine Co. v. Davis, 301 U.S. 548 (1937). *See also* Cole, *supra* note 18, at 635.

42. *See* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM.

refer either to existing and unchangeable characteristics[43] or to criteria that the state has the option to meet by altering its behavior.[44] Congress has used the spending power to make grants to a state on the condition that the state establish a particular program.[45] The Maternity Act of 1921, for example, provided money to a state on the condition that the recipient establish a program designed "to reduce maternal and infant mortality and [to] protect the health of mothers and infants."[46] If the state has the option of altering its behavior to qualify for a federal program, Congress can gain the state's cooperation by conditioning qualification for desirable federal grants on a particular condition or series of conditions.

Questions then arise over what conduct the federal government may properly seek to manipulate through conditions and the circumstances under which such manipulation is appropriate. More specifically, must the condition be related to the expenditure? The courts have not yet addressed this issue,[47] but rather have generally accepted the use of spending conditions as routine congressional behavior, choosing to evaluate conditional spending programs by other means.[48]

L. REV. 847, 871-81 (1979).

43. *See, e.g.*, 16 U.S.C. § 1704 (1982) (declaring that conservation grants were conditioned upon the requirements that individuals employed under the programs were at least fifteen years old and permanent residents of the United States or its territories or possessions).

44. *See, e.g.*, 23 U.S.C. § 158 (Supp. III 1985) (stating that Secretary of Transportation may withhold highway appropriations unless state raises drinking age to 21); *see also infra* notes 77-79 and accompanying text. Many commentators have dedicated much attention to distinctions between different types of conditions, attempting to distinguish between passive and active conditions, conditions that evaluate, and conditions that require affirmative action. These descriptions are useful to show how Congress has utilized conditions, hut they lack the clarity and certainty necessary to provide a workable analytical framework for evaluating spending conditions. *See, e.g.*, Kaden, *supra* note 42, at 881-82; Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1114-18 (1987).

45. *See* Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

46. Massachusetts v. Mellon, 262 U.S. 447, 479 (1922) (stating that "[the case challenges] the Act of Novemher 23, 1921, 42 Stat. 224, c. 135, commonly called the Maternity Act").

47. *See infra* notes 160-82 and accompanying text.

48. Justice Stone's dissent in *Butler* asserted that Congress had broad powers to condition federal grants. 297 U.S. at 81 (Stone, J., dissenting). The *Steward Machine Co.* Court agreed with Justice Stone's conclusion but differed with his rationale. While Justice Stone thought conditions were limited by the objective of the expenditure, the *Steward Machine Co.* Court stated that the conditioning power was even broader, limited only by the point of coercion. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 586 (1937).

2. Origin of the Coercion/Inducement Test

In 1937 the Supreme Court addressed the constitutionality of the Social Security Act in *Steward Machine Co. v. Davis*.[49] The Act established a national Social Security system funded by a tax on employers with eight or more employees, but allowed employers to deduct ninety percent of their contribution to qualified state unemployment plans.[50] Congress provided for the ninety percent deduction in order to accommodate states that already had responded to the national need for unemployment benefits by establishing social security programs and to encourage other states to establish similar programs.[51] A resident business taxpayer could deduct its contribution to the state unemployment fund if the state social security plan met certain requirements, including the state's consent to deposit immediately all money it received under the plan into the United States Treasury's Unemployment Trust Fund.[52] The federal government, in return, authorized an expenditure to assist the state in administering its unemployment compensation system.

In *Steward Machine Co.* the company paid the tax in accordance with the federal statute and then filed a claim for refund with the Commissioner of Internal Revenue.[53] The Commissioner denied the refund request, and the company sought relief in the courts, asserting that the tax scheme was unconstitutional.[54] The company argued that Congress had invaded the reserved powers of the State of Alabama by structuring a coercive unemployment compensation plan that gave the state no choice but to cooperate.[55] The Supreme Court agreed with the company in theory and stated that Congress may not use the spending power to coerce a state into participating in the federal program.[56] Coercion would make the program the equivalent of a direct federal mandate. Because a direct mandate would violate the tenth amendment, the same

49. 301 U.S. 548 (1937).
50. *Id.* at 574.
51. *Id.* at 587-88.
52. *Id.* at 575 n.1.
53. The facts are not entirely clear, but it appears that Steward Machine Co. paid a tax under Alabama's unemployment compensation act and deducted 90% of the tax from its federal Social Security tax. The company paid $46.14 to the Internal Revenue Service. The company hoped that without the federal statute the state would repeal its act. *See id.* at 588 n.9.
54. *Id.* at 573.
55. *Id.* at 578.
56. *Id.* at 585-86.

mandate effected by coercion must also violate the tenth amendment. With this "coercion test," the Court demonstrated its concern that Congress should be prevented from using the taxing and spending power to "destroy[] or impair[] the autonomy of the states."[57] National government coercion of the states intrudes into the domain of the states by upsetting the separation of powers between state and national governments.[58] Subsequent court decisions have interpreted the *Steward Machine Co.* theory advanced by the company and discussed by the Court to require a demarcation between conditions that coerce and conditions that merely induce.[59]

The Court recognized the company's theory, but declined to invalidate the Act, holding that the incentive plan did not coerce the state.[60] The state, though choosing to participate, had the option to abstain from the federal program. The state simply preferred to administer the program itself rather than allow the federal government to enter the state and administer the program.[61] The Court agreed with dicta in its earlier decision of *Massachusetts v. Mellon*[62] to the effect that the state could avoid federal regulation of state agencies by not succumbing to federal temptation to relinquish some of their reserved rights.[63]

Application of the coercion test has not yet resulted in the invalidation of any conditions attached to a federal grant to the states.[64] Under the coercion test, a court cannot invalidate a spending scheme if the state has the option to abstain from the federal program. Yet any conditional grant, by its very terms, presents the state with the choice of complying or not complying with the conditions. Thus, no conditional grant actually can coerce

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57. *Id.* at 586; *see also* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-43 (1946).

58. *Steward Machine Co.*, 301 U.S. at 586.

59. *See, e.g.*, South Dakota v. Dole, 107 S. Ct. 2793, 2798 (1987); *Oklahoma*, 330 U.S. at 143-44.

60. *Steward Machine Co.*, 301 U.S. at 589.

61. *Id.* at 590.

62. 262 U.S. 447 (1922).

63. *Steward Machine Co.*, 301 U.S. at 590. In *Massachusetts*, the Court stated, "If Congress enacted [the spending program] with the ulterior purpose of tempting [the states] to yield [part of their reserved rights], that purpose may be effectively frustrated by the simple expedient of not yielding." *Massachusetts*, 262 U.S. at 482.

64. *See* Schweppe, *supra* note 29, at 1277. The Court intended that *Steward*'s holding be rather limited. *Steward Machine Co.*, 301 U.S. at 590. Subsequent decisions, however, have interpreted the decision more broadly.

a state under the so-called coercion test.[65]

Some courts have implied that a condition would be invalid if the potential financial loss were "catastrophic" or "coercive."[66] It appears unlikely, however, that any court would conclude that a purely financial threshold constitutes coercion. Any holding that a set of spending conditions constitutes "financial duress" would be a considerable departure from previous court opinions.[67] Even *North Carolina ex rel. Morrow*, the decision that established the financial impact approach, found coercion not to exist when federal funding for over forty state health care programs was contingent on the state establishing a separate "health planning and development agency" to administer those programs.[68] This decision may constitute merely an admission that the coercion test fails to consider whether, in a practical sense, a state is being coerced by even the most heavy-handed Congressional conditions.

The Supreme Court to date has not restrained Congress' use of the spending power to entice state participation in federal programs. The Court has not invalidated, for any reason, any conditional spending program offered to the states since *Butler*. Because these spending schemes are effective and currently unimpeachable in the courts,[69] Congress has increased its reliance on these condi-

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65. *Oklahoma*, 330 U.S. at 143-44. The *Oklahoma* Court stressed that these conditional spending programs impose no penalty on the state. *Accord Steward Machine Co.*, 301 U.S. at 589-90; South Dakota v. Dole, 791 F.2d 628 (8th Cir. 1986), *aff'd*, 107 S. Ct. 2793 (1987); South Dakota v. Adams, 506 F. Supp. 50 (D.S.D. 1980); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied sub nom.* 444 U.S. 927 (1979). In *Dole* the Eighth Circuit stated that, "In *Oklahoma v. Civil Service Commission*, . . . the Supreme Court made clear that the tenth amendment is not violated when Congress conditions the receipt of federal funds on compliance with certain terms and conditions." 791 F.2d at 634 (citation omitted).

66. *Steward*, 301 U.S. at 590, *cited in* North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978).

67. *See, e.g.*, *North Carolina*, 445 F. Supp. at 535.

68. *Id.*

69. The law is only one reason among many for the states' failure in challenging these conditional grant schemes. *See* Baker & Asperger, *Foreword: Toward a Center for State and Local Legal Advocacy*, 31 CATH. L. REV. 367, 368 (1982). Baker and Asperger, both legal practitioners, note that the states have been uncoordinated and ineffective in their Supreme Court representation. In contrast, the opposition to state interests generally has been well represented. "There is a wide-spread consensus among Court-watchers—including law professors, veteran Supreme Court advocates, Supreme Court clerks, and even Supreme Court Justices—that state and local governments frequently fail to represent their cases in the most effective manner." *Id.*

Perhaps more importantly, the states have had little incentive to challenge these programs and risk the loss of revenue. In the few cases in which parties did question the constitutionality of these programs, lack of standing usually prevented a substantive determination by the Court. *See* Massachusetts v. Mellon, 262 U.S. 447 (1922); Frothingham v.

tional grants in order to implement federal policy.[70]

III. The Impact of Conditional Grants on State Governments and the Political Process

Congress' increased reliance on conditional grants to implement federal policy has had a correspondingly heightened impact on state governments and the political process as a whole. The Office of Management and Budget has compiled a list of fifty-nine policy objectives that attach to every federal grant to the states.[71] These policy objectives include antidiscrimination requirements regarding race, religion, handicaps, and gender; sixteen rules protecting the United States' cultural and physical environment; rules concerning the use of American ships, planes, and companies in the implementation of grant activities; employment rules; accounting and management rules; freedom of information rules; and "right of privacy" rules.[72] These conditions generally have little to do with any spending program, but rather "are part of the fabric of an overriding national policy."[73] A state, by accepting one grant, opens the flood gates for federal restrictions on the state's general activities.

A. *The Impact on State Policy Initiatives*

Congress, through the use of conditional grants, has significantly influenced the activities undertaken by state governments.[74] Sometimes a state may be quite willing to yield to this influence. In *Steward Machine Co.*, which established the coercion test, the state was an enthusiastic participant in the federal program, supporting Congress' policy objectives and the state's role in the national plan.[75] Coercion, then, was not actually at issue in the case that created the coercion test, though the Court chose to evaluate

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Mellon, 262 U.S. 447 (1922) (consolidated case). *See generally* Soloman & Benjamin, *Foreword: Federalism—Making the Case for State and Local Governments*, 18 Urb. Law. 483 (1986).

70. Cappalli, *supra* note 7, at 143-45.

71. *Id.* at 143-44.

72. *Id.*

73. *Id.* at 144.

74. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1254 (1977).

75. Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1937). As the Court noted, the state appeared "satisfied with her choice, and would be sorely disappointed if it were now to be annulled." *Id.*

the program in those terms.[76] Lower courts did not have the opportunity to judge the coercion test until less willing participants sought relief from the courts. Recent examples of challenges to conditional grants indicate that, unlike Alabama in *Steward Machine Co.*, some states are not enthusiastic about participating in federal programs.

Some states have enacted laws that automatically revert to the favored state policy when a condition is invalidated by a court or not enforced by the federal government. In 1984 Congress attached the "National Minimum Drinking Age Amendment" to the Surface Transportation Assistance Act of 1982,[77] which directs the Secretary of Transportation to withhold five percent of a state's federal highway funds if the state has not raised its minimum drinking age to twenty-one years of age.[78] If the state refuses to comply within one year, the Secretary must withhold ten percent of the state's federal highway funds until the state raises its minimum drinking age to twenty-one.[79] South Carolina reluctantly complied by raising its drinking age, but included a provision that would lower the drinking age in the event that the condition is enjoined or declared unconstitutional by a court of competent jurisdiction.[80] South Carolina's method of complying with the federal condition indicates reluctance to participate in the federal plan.

In a similar example, Nevada enacted a law that raised the state's maximum speed limit on its highways to seventy miles per hour. The state, however, changed the speed limit back to fifty-five when the Department of Transportation declared that, pursuant to the Emergency Highway Energy Conservation Act,[81] the Secretary of Transportation would eliminate the state's federal highway

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76. *Id.* at 586.

77. 23 U.S.C. § 158 (Supp. III 1985).

78. *Id.* § 158(a)(1).

79. *Id.* § 185(a)(2).

80. Section 4 of South Carolina 1985 Act No. 117 states:

> [If] Public Law 98-363 [the National Minimum Drinking Age Amendment] is enjoined by a court of competent jurisdiction or declared by a court to be contrary to the United States Constitution, the provisions of sections 61-9-40, 61-9-455, and 20-7-370 of the 1976 Code shall be effective under the terms and conditions as existed prior to the amendments contained in Sections 1, 2, and 3.

1985 S.C. Acts 117, § 4; *see also* S.C. CODE ANN. § 61-9-40 editor's note (Law. Co-op. Supp. 1986).

81. *See* 23 U.S.C. § 154 (1982), *as modified by* 23 U.S.C.A. § 154 (Supp. 1987) (see *infra* note 95 for the text of the 1987 version of the statute); 1974 U.S. CODE CONG. & ADMIN. NEWS 8011, 8019.

grant.[82] These and other conditional grants have influenced the legislative agendas of the states, which, unlike Alabama in *Steward Machine Co.*, generally have been displeased with the policy alternatives that Congress has offered.

B. The Impact on the Structure of State Governments

Congress' use of conditions also has altered the internal structure of state governments.[83] Many conditions on federal grants have required the states to create new agencies to implement the co-sponsored social programs.[84] In one instance, compliance with a condition necessitated amendment of North Carolina's constitution in order to permit the establishment of a separate health department to administer certain health programs.[85] Moreover, spending conditions can upset separation of powers within a state government by assigning control over the federal grants to state executive agencies.[86] Such assignments may circumvent the state's appropriation process and deprive the legislature of control over the state's income.[87] These conditional programs also have dictated the choice of persons to administer the programs.[88]

Congress' use of spending conditions has disrupted the relations between some state and local governments. In *Lawrence County v. Lead-Deadwood School District*[89] the Supreme Court invalidated a South Dakota law that required localities to distribute certain federal funds in proportion to the distribution of local tax proceeds. South Dakota received funds under a federal statute that compensated localities for tax revenues lost because of federal ownership of land in the community and allowed recipients

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82. NEV. REV. STAT. § 484.361 (1986) (editor's note under second version of section with delayed effective date).

83. *See generally* La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1696 (1981); Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power*, 128 U. PA. L. REV. 402 (1979).

84. *See, e.g.*, 42 U.S.C. § 300k (1982).

85. North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978); *see infra* notes 101-07 and accompanying text; *see also* Kaden, *supra* note 42, at 877.

86. *See generally* Comment, *Federal Funds and Separation of Powers: Who Controls the Purse?*, 53 U. CIN. L. REV. 611 (1984).

87. *See generally id.* at 612-13.

88. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 144-45 (1946).

89. 469 U.S. 256 (1985).

to use the payment "for any governmental purpose."[90] The Court held that the directives of the federal statute preempted state law and that the locality could use the money for whatever purpose it desired.[91]

C. *Consequences of Forfeiture*

1. Disruption in Planning and Loss of Investment Resulting from State Reliance on Federal Programs

The pressure on states to cooperate with grant conditions is even more apparent when Congress attaches conditions to existing federal benefits.[92] Having accepted the federal benefit with the original set of limited conditions, a state often comes to rely on the presence of the benefit. The state may have restructured its services and budget to accommodate the program and the original conditions[93] or may have planned future projects and expansion around the federal incentives.[94] Because of the state's reliance on the program, rejecting the federal grant would place the state in a worse position than before Congress imposed the new condition.

The National Highway Safety Act[95] is a telling example of this

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90. *Id.* at 259 n.4.

91. *Id.* at 270 (stating that "Congress intended the affected units of local government . . . to be the managers of these funds, not merely the State's cashiers"). A spending directive that allows a local unit of government to spend the federal grant for any purpose the locality wishes may be contrary to the general welfare clause of the Constitution. An expenditure to a local government with no direction cannot pursue an objective for the general welfare. *See generally* Cole, *supra* note 18; *see also* Schweppe, *supra* note 29, at 1276-77.

92. For an example of a condition attached to an existing benefit, see 23 U.S.C. § 154 (1982), *as modified by* 23 U.S.C.A. § 154 (Supp. 1987) (establishing the 55 m.p.h. speed limit). *See also infra* note 95 for the text of the 1987 version of the statute.

93. Kaden, *supra* note 42, at 882.

94. For example, when planning its highway programs, the State of Illinois Department of Transportation projects the amount of grants that it will receive from the federal government. Illinois expects to receive $504 million in fiscal year (FY) 1987, which begins July 1, 1987, $489 million in FY 1988, $461 million in FY 1989, $450 million in FY 1990, $450 million in FY 1991, and $450 million in FY 1992. Letter from Randy Vereen, Illinois Department of Transportation, to Author (May 20, 1987) (on file with Author).

95. 23 U.S.C. § 154 (1982), *as modified by* 23 U.S.C.A. § 154 (Supp. 1987). Congress recently repealed the 55 m.p.h. maximum speed limit, but may reenact this restriction. In addition, Congress has only repealed tbe restriction on interstate highways, replacing it with a 65 m.p.h. maximum speed limit; all other highways still have a federally imposed 55 m.p.h. maximum speed limit. The new statute states:

> § 154. National maximum speed limit
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> (a) The Secretary of Transportation shall not approve any project under section 106 in any State which has (1) a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour other than a highway on the Inter-

dilemma. Enacted in 1978, this act conditions the receipt of federal highway funds on a state's reduction of its maximum speed limit to fifty-five miles per hour on all highways. Suppose, hypothetically, that in 1976 a state chose to undertake a major highway rebuilding program, but could not afford to proceed with the project without federal financial assistance. Congress had determined that providing funds to the states would encourage them to maintain and rebuild their highways, which would further an interest within the general welfare. Because of the federal incentive, the state added its own funds to the available federal money and, as Congress had hoped, embarked on a ten-year plan to renovate its entire highway system. Two years into the rebuilding plan, the new condition became effective, forcing the state to comply with the new condition in order to receive federal assistance during the plan's final years. The federal government had initially encouraged the state to rebuild roads with the federal aid, and now, presented with the new condition, the state must choose between complying with the condition or abandoning or altering its plan for major infrastructure improvements. Congress has the power to enact a national speed limit based on its commerce powers, but initial participation in a federal program can limit a state's ability to decline offers from the federal government.[96] The state still has the option to decline the benefit and escape federal manipulation, but exercising that option becomes quite costly.[97]

The states often match federal funds with funds from the

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state System located outside of an urbanized area of 50,000 population or more, (2) a maximum speed limit on any highway within its jurisdiction on the Interstate System located outside of an urbanized area of 50,000 population or more in excess of 65 miles per hour, or (3) a speed limit on any other portion of a public highway within its jurisdiction which is not uniformly applicable to all types of motor vehicles using such portion of highway, if on November 1, 1973, such portion of highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. A lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any loan thereon. Clause (3) of this subsection shall not apply to any portion of a highway during such time that the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of a highway.

23 U.S.C.A. § 154 (Supp. 1987). This modification illustrates the breadth of the regulation. If the state raises the speed limit to 65 m.p.h. on a state highway, the state risks losing funding of all of its federally subsidized highway projects.

96. *See* Rosenthal, *supra* note 44, at 1134-35.

97. *See* Leach v. Carlisle, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting) (commenting that "when habit and law combine to exclude every other [option] it seems to me that the First Amendment in terms forbids such control").

state treasury as a condition to federal grants.[98] A state would lose the public funds it had already invested if Congress encouraged the state into a venture and then attempted to extort new concessions after the state had structured and planned around the initial federal program.[99] Some commentators have suggested that the courts should be sensitive to the possibility that the retraction of a current benefit may have an unconstitutional impact.[100] The threatened withdrawal of a federal benefit has essentially the same ability as a financial incentive to influence the states' behavior.

2. Breadth of Grants Attached to a Single Condition

In addition to placing new conditions on existing programs, Congress has pressured the states by broadening the base of federal benefits to which Congress attached a particular condition.[101] For example, the National Health Planning and Resources Development Act of 1974[102] required the states to establish a "Health Planning and Development Agency," which would assume various regulatory and certification functions, in order to qualify for federal funding.[103] A state that failed to comply with the new regula-

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98. Madden, *Terms and Conditions of Federal Grants*, 18 URB. LAW. 551, 553-54, 565-66 (1986).

99. Kaden, *supra* note 42, at 882 (stating that "[i]f this aid proves temporary, its withdrawal creates added pressures on subnational governments that have accommodated their service plans to the new source of revenue"); Lamm, *The Fiscal Squeeze on Local Government*, 13 CURRENT MUN. PROBS. 17, 19 (1986) (noting that "the federal government is withdrawing its financial support for a number of local activities and facilities. These activities, never sought out by local units of government in the first place, are very difficult to abandon once started and institutionalized").

100. *See, e.g.*, Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1362 (1984). Professor Kreimer stated:

> So, too, a citizen may reasonably come to rely on past practice and justifiably regard a change as a deprivation, different in kind from a mere failure to provide a benefit. Once the government decides upon a course of action, it should be held to account for the impact of its decision on constitutional rights.

Id.

101. Rosenthal, *supra* note 44, at 1134 (noting that "recent Congresses have contrived [Draconian sanctions] to inflict on states that refuse to abide by the conditions imposed"). This wider applicability of particular conditions creates the impression, in some cases, that Congress thinks of the condition first and then finds a series of spending programs to which it can attach the condition. *See, e.g.*, 29 U.S.C. § 794 (1982) (loss of federal post office subsidy for failure to hire handicapped individuals); 31 U.S.C. § 1241(a)(1) (1982) (prohibiting recipient of federal grants from discriminating in hiring on basis of religion); 42 U.S.C. § 2000(d) (1982) (prohibiting any institution receiving federal funds from denying benefits or discriminating on the basis of race, color, or national origin). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 4, § 5.7(b) (1986).

102. 42 U.S.C. §§ 300k-300u (1982).

103. North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 533 (E.D.N.C. 1977),

tions would forfeit federal support for an array of health programs. North Carolina did not wish to comply with the new conditions, but the possibility of losing aid to over forty financial assistance health programs forced the state to amend its constitution in order to comply with the conditions.[104]

In some instances, one state agency's failure to comply with a federal condition results in the loss of a similar benefit in a separate innocent agency. The Family Educational Rights and Privacy Act of 1974,[105] for example, provided for the termination of an educational institution's federal funding if the institution did not give parents access to their children's school records. This termination would apply to all separately funded divisions of an educational institution even if only one of the divisions did not comply with the disclosure requirements and the noncomplying division did not receive any federal funding.[106] Thus, failure to adopt a single condition could start a chain reaction of federal grant forfeitures between unrelated and independent state and private entities.[107]

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aff'd mem., 435 U.S. 962 (1978).

104. *See North Carolina*, 445 F. Supp. at 535; *see also In re* Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973). The circumstances in the *North Carolina* case were unusual in that the state constitution prevented the state from complying with the consolidation required by the Act. North Carolina could qualify only by passing an amendment to its constitution allowing it to establish such an agency. Failure to establish the agency potentially would cost North Carolina federal aid for forty-two federal health assistance programs. The court nevertheless held that the conditions were valid:

> We perceive nothing unconstitutional either in the purposes of the Act or in the condition thereby attached to health grants made to the States under federal health programs. Without question Congress in making grants for health care to the States, should be vitally concerned with the efficient use of the funds it appropriates for that purpose. It had a perfect right to see that such funds did not cause unnecessary inflation in health costs to the individual patient. It certainly had the power to attach to its grants conditions designed to accomplish that end.

North Carolina, 445 F. Supp. at 534. The special circumstances in North Carolina that caused the unusual impact of the federal condition were irrelevant to the evaluation of the program's constitutionality. "Were this not so," the court stated, "any Stato, dissatisfied with some valid federal condition on a federal grant could thwart the congressional purpose by the expedient of amending its Constitution or by securing a decision of its own Supreme Court." *Id.* at 535. Therefore, the fact that a condition *may* force the state to pass a law would not invalidate a condition, though a requirement that a state enact legislation may be invalid. *See infra* note 204.

105. 20 U.S.C. § 1232g (1982).

106. Comment, *supra* note 20, at 295.

107. *See, e.g.*, Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1026-28 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied sub nom.* 444 U.S. 927 (1979).

3. Political Consequences of Forfeiture

A state that abstains from a federal program risks adverse political consequences. The funds that Congress offers the states are essentially a return of tax dollars collected from the state's residents. Allocation formulas for federal programs often parallel population and contribution,[108] and the funds often go toward such local services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.[109] If the state chooses to exercise its option to abstain, then its residents are forced to pay twice for the provision of ordinary municipal services.[110] The perception that the state's residents have a proprietary interest in the funds makes rejection of the federal benefit extremely difficult.

Congress' use of conditional grants to the states also diffuses the electorate's efforts to hold elected officials accountable for their political decisions.[111] For example, rather than having the federal government directly administer a program, Congress sometimes offers the states a handsome reward for implementing program under federal guidelines. These incentives can be extremely effective because they diffuse potential voter retribution. The federal government shifts the ultimate decision to the states, which can claim that there was no option but to do as Congress requested in order to avoid forfeiture of badly needed federal funds. Thus, local voters have difficulty identifying the responsible governmental

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108. *See, e.g.*, 42 U.S.C. § 5306 (1982 & Supp. III 1985) (detailing allocation formula for community development grants).

109. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 553 (1985); *see also* Schweppe, *supra* note 29, at 1276.

110. *See* Williams, *Liberty & Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 24 (1983); *cf.* Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1937). In defending the tax credit provisions of the Social Security Act, the *Steward Machine Co.* Court said that states with their own Social Security program should get a tax break. Otherwise the states would be forced to pay twice for the program. *Id.*

Because the courts have allowed Congress to spend federal money for local projects, the federal government taxes community residents with the intention of returning the funds in the form of local projects. One commentator expressed the states' predicament this way:

> The Court in *Steward Machine Co.* stressed that the states had welcomed the establishment of the federal program. Realistically, however, they had no choice but to go along with it, since the alternative would have made their citizens pay the entire federal tax but with no reassurance that they would receive an unemployment insurance program in return.

Rosenthal, *supra* note 44, at 1127; *see also* Schweppe, *supra* note 29, at 1276-77.

111. *See* Texas v. United States, 730 F.2d 339, 354-55 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984).

entity.[112]

D. *The Cumulative Impact of Conditions*

Congress' manipulation of conditions attached to federal grants has compromised the states' ability to control their governing structure and policy agenda. The states' ability to avoid the federal conditions is limited because the states have structured their governments and policies around the federal programs. From the states' perspective, each federal condition appears innocuous when compared to the consequences of noncompliance. Although apparently harmless, the cumulative impact of such conditions has caused some states to give priority to complying with federal conditions over the pursuit of state initiatives. The Supreme Court noted in *Garcia* that in the past twenty-five years federal grants to states and localities have grown from seven billion dollars to ninety-six billion dollars, accounting for about one-fifth of state and local government expenditures.[113] Congress' increased reliance on conditions to implement federal policy has reduced proportionately the amount of time, effort, and money the state can devote to state initiatives. With Congress having unlimited taxing power, the courts should be careful to determine whether the Constitution allows Congress to influence the whole gamut of state activities through conditional federal grants. Although their identical impacts on state behavior indicate that conditions on federal grants are essentially the same as direct federal regulations, the Court has analyzed the two restrictions quite differently.

IV. THE INADEQUACIES OF THE COERCION/INDUCEMENT TEST

A. *Identifying Coercion*

Subsequent cases have cited *Steward Machine Co.* as the origin of the coercion test[114] and assumed that the test can identify unconstitutional exercises of the spending power. The *Steward Machine Co.* Court itself, however, recognized the difficulty of determining whether a statutory scheme coerces a state. The Court

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112. Stewart, *supra* note 74, at 1255. Professor Stewart objected to conditions similar to the 55 m.p.h. speed limit because "[s]uch a condition, accompanying funds which the state cannot afford to forgo, intensifies federal interference with local mechanisms of political accountability by compelling states to enforce against their constituencies restrictions that the constituencies oppose." *Id.*

113. *Garcia*, 469 U.S. at 552-53.

114. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

questioned whether the concept of coercion can ever be applied validly to the relations between a state and nation.[115] One commentator expressed the difficulties of this analysis and concluded that debating whether conditions on federal grants in these circumstances "coerce" the states is a futile pursuit: "The question . . . is not whether federal requirements overbear on a hypostatized state 'free will,' but whether they unduly compromise normative political conception of state autonomy."[116] In short, a state's decisionmaking process is not readily characterized in terms of coercion or inducement.[117]

Theoretical problems accompany the practical difficulties of applying the coercion test. According to current spending power analysis, Congress can remain within the limits of the spending power simply by conditioning the receipt of federal grants on the state's compliance with federal mandates. A condition on a spending grant cannot actually coerce a state, which always has the opportunity to decline the benefit and avoid the accompanying federal regulation.[118] The courts have rejected the coercion test in other areas of constitutional adjudication because the withholding of a benefit that merely induces nevertheless allows a government to penalize indirectly behavior that the government cannot penalize directly.

B. *Distinguishing Coercive From Inducive Grant Schemes*

If the state does not comply with a federal grant condition, the state violates no law; the federal government simply withholds the connected grant.[119] The coercion test attempts to distinguish between circumstances in which the withholding of a benefit coerces from circumstances in which the withholding of a benefit merely induces. The test operates on the principle that the Constitution permits a withholding scheme that induces but forbids one that coerces.

The courts have discarded this coercion/inducement dichotomy in other areas of constitutional adjudication because no distinction exists in practical terms between withholding a benefit

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115. *Steward Machine Co.*, 301 U.S. at 590.

116. Stewart, *supra* note 74, at 1254; *see also* Kreimer, *supra* note 100, at 1391 (stating that "[i]f federalism dictates that certain decisions be withheld from the federal government and entrusted to the states, a state waiver should be irrelevant").

117. Note, *supra* note 83, at 1698. *But cf.* Rosenthal, *supra* note 44, at 1140-42.

118. *See supra* notes 60-65 and accompanying text.

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

and assessing a penalty.[120] Distinguishing a withholding scheme that induces from one that coerces is the equivalent of distinguishing a penalty that provides a strong deterrent from one that provides a weak deterrent.[121] The courts generally do not evaluate penalties by their force but rather by examining the conduct that results in a penalty.[122] Therefore, the courts have chosen to evaluate certain conditional spending schemes not by their effectiveness in altering behavior, but by the conduct that disqualifies a party from a benefit.

The Supreme Court has held that a condition which inhibits the exercise of constitutionally protected behavior is the equivalent of penalizing the exercise of constitutionally protected behavior. In *Sherbert v. Verner*[123] the Court invalidated a South Carolina statute that disqualified a person from receiving unemployment benefits if he or she failed to accept work without good cause.[124] Mrs. Sherbert, because of her religious beliefs, refused to accept a job that required her to work on Saturdays.[125] The Court stated that governmental imposition of such a choice places the same kind of burden upon free exercise of religion as a fine imposed for Saturday worship.[126] The Court also stated that the resemblance between fines or penalties and conditions on benefits has led the courts to analyze both in the same manner.[127]

Courts that equate the withholding of a benefit with a penalty are not interested in whether the government is withholding a major benefit or a minor one. In *Sherbert*, for example, the Court stated that the condition placed a "burden" on Mrs. Sherbert's religious practices[128] and concluded that the condition was invalid if it imposed "*any* burden on the free exercise of appellant's religion."[129] A court's analysis of a state law that assessed a one dollar fine for going to a particular church would be the same as the anal-

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120. *See infra* notes 123-30 and accompanying text.

121. *See infra* notes 128-30 and accompanying text.

122. *But see* U.S. CONST. amend. VIII.

123. 374 U.S. 398 (1963).

124. *Id.* at 400 n.3.

125. *Id.* at 403.

126. *Id.* at 404. The Court further stated: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

127. *Id.* at 404 & n.6, 405.

128. *Id.* at 404.

129. *Id.* at 403 (emphasis added). The state can overcome the presumption of invalidity by showing, as required by standard first amendment analysis, a compelling state interest for the restriction.

ysis of a law that assessed a one hundred dollar fine. In this context, a court does not distinguish inducement in the form of a condition attached to an insignificant benefit from coercion in the form of a condition attached to a necessary benefit.[130] The condition is either valid or invalid under both schemes.

C. *Coercion Test Allows Circumvention of Existing Regulatory Restrictions*

Because conditional grant programs regulate behavior indirectly,[131] the courts have struggled with the possibility that such programs might avoid the scrutiny of direct regulation. In *Federal Communications Commission v. League of Women Voters*[132] the Supreme Court invalidated a 1981 amendment to the Public Broadcasting Act of 1967. The 1967 Act established a nonprofit corporation that distributed federal funds to noncommercial radio and television stations.[133] The 1981 amendment disqualified from federal funding any station that "engage[d] in editorializing."[134] The majority opinion did not evaluate the restriction as a condition on a federal expenditure, but rather applied the same analysis that the Court would apply to direct regulation. The Court ignored the coercion test and invalidated the condition simply because it abridged the freedom of the press in violation of the first amendment of the Constitution.[135]

Justice Rehnquist's dissent, on the other hand, did analyze the amendment as a spending condition,[136] noting that the owners of the noncommercial broadcasting stations knew of the conditions when they accepted the grants. Justice Rehnquist concluded that the condition was valid because it served the objective of the expenditure.[137] Although both the dissent and the majority addressed the first amendment concerns, the traditional coercion analysis

130. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (holding that a state cannot condition a state job on reduced due process protection); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that a state cannot condition unemployment benefits on compromising personal religious practices); Shapiro v. Thompson, 394 U.S. 618, 638-41 (1969) (noting that Congress may not induce the states to impose conditions on recipients of Aid to Families with Dependent Children).

131. *See supra* notes 71-113 and accompanying text.

132. 468 U.S. 364 (1984).

133. *Id.* at 366.

134. 47 U.S.C. § 399 (1982).

135. 468 U.S. at 398.

136. *Id.* at 402 (Rehnquist, J., dissenting).

137. *Id.* at 408.

would have ignored first amendment implications of a conditional grant program like the 1981 Amendment. *Steward Machine Co.* held that any condition attached to a federal grant to a state is permitted because the state can always decline the benefit, escape the condition, and preserve whatever state sovereignty the Court believes that the tenth amendment protects. If *League of Women Voters* had followed *Steward Machine Co.*, the Court would have held that the stations simply could decline the federal benefit, escape the "no editorializing" requirement, and continue to broadcast whatever they wanted.[138]

A comparison of Chief Justice Rehnquist's dissent in *League of Women Voters* with his majority opinion in *South Dakota v. Dole* further illustrates the Court's confusion over the role of the coercion test in spending clause analysis. In the earlier of the two cases, *League of Women Voters*, then-Associate Justice Rehnquist stated that Congress had a legitimate purpose in placing conditions on grants to the Corporation for Public Broadcasting.[139] Likewise, in *Dole* Chief Justice Rehnquist stated that Congress also had a valid purpose in attaching conditions to highway grants.[140] Because both the stations and the states had the power to reject the grants, the content of the conditions was of little concern.[141] What was perhaps a remarkably consistent approach for Justice Rehnquist, however, was a complete turnabout for the Court.[142] Justices Mar-

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138. *See* Arnett v. Kennedy, 416 U.S. 134 (1974), *overruled by* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

139. FCC v. League of Women Voters, 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting).

140. South Dakota v. Dole, 107 S. Ct. 2793, 2797 (1987).

141. Justice Rehnquist covered his tracks in *League of Women Voters* by claiming that the restrictions were neutral in content and therefore did not violate the first amendment. His analysis does not depend greatly on discussion of the content of conditions. Displaying his lack of concern for the substance of these amendments, the Justice summarized his dissent by stating:

> Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles; Pacifica, well aware of § 399's condition on the receipt of public money, nonetheless accepted the public money and now seeks to avoid the conditions which Congress legitimately has attached to receipt of that funding.

League of Women Voters, 468 U.S. at 403 (Rehnquist, J., dissenting).

In *Dole* Chief Justice Rehnquist appeared to be even more nonchalant towards the impact of the conditions on the states that he concluded his majority opinion by declaring: "Even if Congress might lack tbe power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power." *Dole*, 107 S. Ct. at 2799.

142. Justice Brennan, who wrote the majority opinion in *League of Women Voters*, did not agree with Chief Justice Rehnquist's majority opinion in *Dole* and wrote a short

shall, Powell, and Blackmun joined in *Dole* with the same reasoning that they earlier had rejected in *League of Women Voters*.[143] The impression that emerges from the Justices' ambivalence is that the Court will either agree or disagree with the contested condition depending on the individual Justices' subjective inclinations. With that, the analysis has plunged into a Lochnerian abyss with the coercion test being selectively reintroduced when the Court wishes to uphold the condition or forgotten when the Court wishes to strike it down.

The Supreme Court has avoided distinguishing between coercing and inducing schemes when evaluating federal conditions on nongrant benefits to the states. In *Coyle v. Smith*[144] the Court held that Congress could not condition Oklahoma's admission to the United States on the location of its capital.[145] The Court could have applied the coercion test and held that the condition was valid because Oklahoma had the option to reject Congress' offer for statehood.[146] Instead, the Court stated that to allow this conditioning would permit Congress to enlarge its powers by the conditions imposed upon new states by Congress' own legislation admitting new states into the Union.[147] The Court here foresaw the dilemma created by conditional benefits: the imposition of conditions could allow Congress to frustrate the Constitution's allocation of powers.[148]

The Court in *Sherbert*, *Coyle*, and *League of Women Voters*

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separate dissent, stating that Congress has no power to condition a federal grant in a manner that abridges the states' twenty-first amendment right to regulate tbe minimum age for purchasing liquor. *See id.* at 2799 (Brennan, J., dissenting).

143. *Compare Dole*, 107 S. Ct. 2793 *with League of Women Voters*, 468 U.S. 364.

144. 221 U.S. 559 (1910).

145. *Id.* at 564-65.

146. *Cf. id.* at 565-66 (stating that "Congress may, in the exercise of such power, impose terms and conditions upon the admission of tbe proposed new state, whicb, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess").

147. *Id.* at 567.

148. *See also* United States v. Butler, 297 U.S. 1, 72 (1936). For another example of the Court's refusal to allow Congress to condition nonfinancial federal benefits on relinquishing rights, see United States v. Jackson, 390 U.S. 570 (1968) (invalidating portions of Federal Kidnapping Act because it presents suspects with choice between waiving right to jury trial in exchange for no death penalty upon conviction).

Congress' unlimited taxing power further exacerbates Congress' ability to circumvent the constitutional restrictions on its power. Congress can continue to increase taxes to raise the funds necessary to "buy" the states' independence. *See* Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347; Kreimer, *supra* note 100, at 1391-93.

has stated implicitly that Congress and the states should not be able to use government benefits as a means of circumventing constitutional restrictions on the exercise of their regulatory powers. Chief Justice Rehnquist, however, apparently disagrees. In *Dole* the Chief Justice stated that limitations on Congress' spending power are "less exacting than those on its authority to regulate directly"[149] and do not prohibit "indirect achievement of objectives which Congress is not empowered to achieve directly."[150] Restrictions on Congress' power arguably should not be less restrictive when Congress uses its spending power. Admittedly, the spending power authorizes conditions that may not have any support independent of the spending power.[151] The courts, however, should not ignore the applicability of constitutional restrictions on congressional power whenever Congress' authority to impose conditions is at issue. As the Chief Justice's analysis admits, application of the coercion test allows Congress to evade restrictions on its powers.

V. Determining the Validity of Grant Conditions

After abandoning the coercion test in spending power cases, the Court next must construct an analysis that focuses on the substance of the condition. In cases such as *Sherbert* and *League of Women Voters* in which the Court ignored the coercion test, the conditions were analyzed in the same manner as regulations. The Court viewed the conditions as restrictions on first amendment interests and simply applied a traditional first amendment analysis,[152] inquiring into whether the conditions at issue placed a burden on the respective first amendment interests and then whether the government had a compelling interest for restricting the activity. With some refinement, such an analysis could be equally well suited for cases involving federal grants to the states.

Coyle, Sherbert, and *League of Women Voters* demonstrate that conditions, as currently treated by the Court, are merely simple regulations attached to benefits. The Court has abandoned the condition analysis when more appears to be at stake than a federal benefit.[153] In the context of individuals, the first eight amendments provide an analytical alternative to the coercion test. In the context of the states, however, the prevention of encroachment

149. South Dakota v. Dole, 107 S. Ct. 2793, 2797 (1987).
150. *Id.* at 2797, 2798.
151. See *infra* notes 180-82 and accompanying text.
152. *League of Women Voters*, 468 U.S. at 374-75.
153. United States v. Darby, 312 U.S. 100 (1941).

originates in the governmental structure intended to limit the federal government to its delegated powers.[154] Thus, an analysis that distinguishes precisely between permissible and impermissible congressional action is extremely important.[155]

When assessing the validity of conditions on federal grants to the states, the Court arguably should adopt a test that more closely parallels the lawmaking mechanism described in the Constitution.[156] Instead of using the coercion test, the Court might determine whether an enumerated power of Congress supports a particular condition. The spending power supports some conditions on federal grants to the states if the condition is necessary to implement the objective of Congress' expenditure.[157] An unnecessary condition may still be valid if the Constitution allows Congress to enact the condition, unconnected to the expenditure, as a law supported by another regulatory power.[158] The courts have enunciated this analysis in dicta, but no court has consciously applied a like analysis that traces the lawmaking mechanism.[159]

A. *Determining What Conditions the Spending Power Authorizes*

Most courts have not scrutinized the content of conditions placed on federal grants to the states.[160] The courts that have commented on the content of conditions have concluded simply that

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154. *See* Rosenthal, *supra* note 44, at 1126 n.105.

155. *Id.*

156. The tenth amendment traditionally was the primary restraint on Congress' ability to regulate the states. In United States v. Darby, 312 U.S. 100 (1941), the Court, however, rejected the view that the tenth amendment itself represented an exclusive reservation of power for the states. The Court instead insisted that the tenth amendment represented an observation. By stating that the tenth amendment was only a "truism," the Court removed any limitation generated by the tenth amendment itself that would restrict Congress' ability to regulate what had been established previously as exclusive state regulatory territory. *Id.* at 124. Although the Court retreated from this interpretation of the tenth amendment in National League of Cities v. Usery, 426 U.S. 833 (1975), the Court reinstated *Darby's* passive interpretation in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). The *Darby* court's analysis presumes that Congress will exercise only its delegated powers. *Darby*, 312 U.S. at 124.

157. United States v. Butler, 297 U.S. 1, 85-86 (1936) (Stone, J., dissenting); *see also* Comment, *supra* note 20, at 300-01, 305.

158. Stewart, *supra* note 74, at 1257-61.

159. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819) (stating that "[t]he only security against the abuse of [the taxing] power, is found in the structure of the government itself"). Justice O'Connor advocated an approach in her *Dole* dissent that attempts this same goal. *See* 107 S. Ct. at 2799 (O'Connor, J., dissenting).

160. *See infra* note 182.

the Constitution authorizes any condition that pursues a national interest.[161] This result reveals that many grant conditions may not constitute spending conditions at all. The spending power does not authorize conditions, only *expenditures*, that pursue the "general Welfare."[162] To implement the general welfare objective of an expenditure, Congress may find it necessary to attach conditions to the expenditure. The necessary and proper gloss on the spending power authorizes only those conditions necessary to implement the objectives of the expenditure.[163]

1. Current Confusion Over the Scope of Permissible Conditions

Much of the confusion over permissible conditions dates back to language in *Steward Machine Co.* in which the Court stated that the conditions included in the federal unemployment program were not unrelated to a "legitimately national" objective.[164] The Court was not endorsing the notion that the Constitution permits all spending conditions related to any national objectives.[165] Some lower courts, however, have stated that a condition on a federal grant is valid if reasonably related to a "legitimately national" concern.[166] In *Vermont v. Brinegar*,[167] for example, a federal district court responded to Vermont's challenge of the federal Highway Beautification Act of 1965.[168] The Act required the states to remove billboards along public highways or accept a ten percent reduction in the state's share of federal highway appropriations.[169] The Act directed the states to compensate the owners of the prohibited billboards[170] for which the states would be reimbursed seventy-five percent of the sign owner's compensation.[171] The question before the court was whether the combination of conditions contained in the federal legislation violated the tenth amendment.[172] The district court, citing *Steward Machine Co.*, wrote that

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161. *See id.*
162. *See infra* notes 174-76 and accompanying text.
163. *See id.*
164. *Steward Machine Co.*, 301 U.S. at 591.
165. *Id.* at 590.
166. *See, e.g.*, Vermont v. Brinegar, 379 F. Supp. 606, 616 (D. Vt. 1974). Although the courts generally have not cited *Brinegar* for this test, *Brinegar*'s language tends to appear in many lower court opinions. *See* Note, *supra* note 83, at 1697 n.25.
167. 379 F. Supp. 606 (D. Vt. 1974).
168. 23 U.S.C. § 131 (1982).
169. 23 U.S.C. § 131(b) (1982).
170. 23 U.S.C. § 131(g) (1982).
171. *Id.*
172. *Brinegar*, 379 F. Supp. at 615.

the applicable issues were, first, whether the measure under attack coerced the state and, second, whether the legislation was reasonably related to a legitimate national end.[173]

By posing the second question, the district court erroneously added another requirement to the already derailed spending condition analysis. According to *Brinegar*, both the expenditure and the condition must pursue objectives within the general welfare. This analysis reveals a fatal misunderstanding of *Steward Machine Co.* Under *Brinegar*'s articulation of the test, the condition takes on a life of its own, quite apart from that of the expenditure, in its separate pursuit of the general welfare. Thus, *Brinegar* states that the national objectives pursued by the expenditure and the condition do not have to be the same.[174] In effect, Congress is conditioning for the general welfare, an action the Constitution clearly prohibits.[175] Congress has the power to condition only because it has the power to spend. Congress' power to spend for the general welfare,

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173. *Id.* at 616, *citing Steward Machine Co.*, 301 U.S. at 591. The *Brinegar* court resolved the coercion prong of the test with the reasoning of *Massachusetts* that "[i]f Congress enacted [the statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." Massachusetts v. Mellon, 262 U.S. 447, 482 (1922); *see Brinegar*, 379 F. Supp. at 617.

174. *Brinegar*, 379 F. Supp. at 616.

175. The Constitution clearly prohibits this result. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court stated: "[The Constitution] made no grant of authority to Congress to legislate substantively for the general welfare, . . . and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted [in the Constitution]." *Id.* at 292. The framers noted that such an interpretation of the general welfare provision was incorrect because if the Congress can attach conditions on grants whenever the conditions pursue the general welfare, then the other enumerated powers would have been unnecessary. Cole, *supra* note 18, at 624-27.

Parties that have supported laws that might not have found support in any of Congress' enumerated powers have argued that a problem that is national in scope and that the states cannot handle adequately must fall within the scope of Congress's power. The *Carter* court faced a similar argument and replied:

> [N]othing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.
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> . . . .
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> The proposition . . . that the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.

Carter, 298 U.S. at 291; Cole, *supra* note 18, at 633. Only Congress' power to enact laws, not the quality of its laws, concern the Constitution. Helvering v. Davis, 301 U.S. 619, 644-45 (1937) (stating that "[the Court's] concern . . . is with power, not with wisdom"); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam). Although *Carter's* commerce clause interpretation has been overruled in subsequent cases, the Court's statements regarding the Constitution's limitation of Congress to its delegated powers have not been criticized.

though accompanied by the ability to place related conditions, surely does not allow the legislature to impose conditions that pursue separate, unrelated national objectives. By upholding general welfare conditions, the courts appear to have adopted the interpretation of the general welfare clause that was advanced by those who sought to discredit the Constitution.[176] Thus, the dual focus on the objectives of both the condition and the expenditure is based on a misguided interpretation of the "general Welfare" clause of the Constitution.

2. Reevaluating *Steward Machine Co.*

In attempting to define what conditions the spending power authorizes, the *Steward Machine Co.* Court may not have intended to establish the coercion test as the standard of constitutionality. The Court acknowledged that "what is basic and essential may be assured by suitable conditions"[177] and expressly stated that its decision did not address the validity of a condition requiring the state to adopt a "statute unrelated in subject matter to activities fairly within the scope of national policy or power."[178] The propriety of requiring the state to adopt an acceptable Social Security Program before allowing a taxpayer to deduct paid state unemployment taxes was not at issue because the condition clearly related to the federal tax objective.[179] Questions regarding the rela-

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176. *See supra* notes 18-22 and accompanying text. Even the Supreme Court has tripped on this language at times. In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Court upheld the new public campaign financing statute and stated: "In this case, Congress was legislating for the 'general Welfare'—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. It is well established that Congress cannot legislate for the general welfare. *See supra* note 21 and accompanying text.

The Court recognized that Congress' power to condition grants concerned the necessary and proper clause. Buckley, 424 U.S. at 91. The Court's understanding of the clause, however, permitted the conditions because, "Congress has concluded that the means are 'necessary and proper' to promote the general welfare," and therefore the conditions are valid. *Id.* The Court actually meant that the expenditure was for an objective well within the scope of the general welfare and that the conditions related to Congress' purpose for making the expenditure. Because the conditions were necessary to implement the objective of the expenditure, the conditions constituted valid conditions supported by the necessary and proper gloss on the spending power.

177. Steward Machine Co. v. Davis, 301 U.S. 548, 593 (1937).

178. *Id.* at 590.

179. *Id.* at 593. The Court stated: "A credit to taxpayers for payments made to a State under a state unemployment law will be manifestly futile in the absence of some assurance tbat the law leading to the credit is in truth what it professes to be." *Id.*

tionship of the condition to the tax were to be determined at another time. The *Steward Machine Co.* Court did not intend "national policy and power" or "legitimately national" ends to be self-defining. Instead, the scope of national power and policy should be defined by the congressional action permissible under Congress' regulatory powers, subject to all constitutional limitations on the powers of the legislative branch.

3. Permissible Spending Power Conditions

The Supreme Court in *Steward Machine Co.* implied that the power to make an expenditure for a specific purpose would justify "suitable conditions" that are "basic and essential" to the expenditure.[180] While the Constitution does not expressly allow Congress to attach conditions to federal grants, the necessary and proper clause does permit Congress to enact the "laws" that are necessary to implement objectives pursued through Congress' enumerated powers.[181] For example, a law may intend to assist in the regulation of interstate commerce. When exercising its spending power, Congress has the power to attach conditions only to the extent necessary to effectuate spending objectives. The power to attach conditions is a supplemental power to each separate congressional exercise of the spending power. Thus, the combined force of the spending and necessary and proper clauses allows Congress to attach conditions that assist in pursuing the objectives of the expenditure, and not of objectives unrelated to that expenditure.[182]

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180. *Id.*

181. U.S. CONST. art. 1, § 8.

182. The Court purports to apply this relatedness requirement in spending cases. *See* South Dakota v. Dole, 107 S. Ct. 2793, 2797 (1987). Justice O'Connor, however, sensed inadequacy in the Court's current relatedness analysis, causing her to dissent in *Dole*. Justice O'Connor argued that "the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended, is cursory and unconvincing." *Id.* at 2799 (O'Connor, J., dissenting). She then proceeded to outline the proper method of delineating conditions supported by the spending power and regulations which must be supported by another of Congress' powers in order to be valid. *Id.* at 2801-02.

The majority's analysis is unconvincing because the Court does not actually address the question of the condition's relation to the expenditure. Chief Justice Rehnquist admits that this requirement was created by the Court "without significant elaboration." *Id.* at 2796 (majority opinion). Nevertheless, the Chief Justice still claims to apply the relatedness test even though the Court has not attempted to define it. *Id.* at 2797. As long as the Court adheres to the coercion test, Congress is free to use the federal purse to "encourage" states to implement congressional objectives regardless of their nature. Justice O'Connor has formulated the correct approach, but has failed to persuade her colleagues to abandon the coercion test. Until the Court does reject the coercion test, Justice O'Connor's proposal is, for all practical purposes, irrelevant. *See supra* notes 164-76 and accompanying text; *see*

Suppose that Congress, for example, establishes a national fund to provide grants to municipalities for the purpose of establishing paramedic emergency services. Congress may conclude that helping communities improve their emergency health services would promote the general welfare. To assure that the services are effective, Congress can require that each community, in order to qualify for the funds, submit a study to a federal agency demonstrating the need for the improvements. Congress may not, however, rely on the spending power to support an additional condition requiring community high schools to teach first aid and cardiopulmonary resuscitation (CPR). The condition relates to the national interest in providing emergency health services, but does not relate to the specific purpose of the expenditure—the establishment of paramedic services. The requirement, therefore, is not authorized under the spending clause, but may be valid as a regulation under another of Congress' regulatory powers.

B. Unauthorized Conditions Permissible as Regulations

A condition that does not assist the objective of the expenditure nevertheless may be valid if supported by another regulatory power.[183] The Supreme Court has not expressly articulated this analysis, but has implied that the approach is valid. Because of the problems associated with a coercion analysis, the Court at times has avoided determining what conditions the spending power itself supports, choosing instead to find support for conditions in Congress' other powers.[184]

The Court implicitly adopted this approach in *Fullilove v. Klutznick*.[185] *Fullilove* examined the validity of the Public Works Employment Act of 1977, which appropriated to state and local governments four billion dollars for use in local public works

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also Dole, 107 S. Ct. at 2799 (O'Connor, J., dissenting).

183. *Cf.* Steward Machine Co. v. Davis, 301 U.S. 548, 591 (1937). It is well established that legislation invalidly enacted under one of Congress' powers, but valid under another, will be upheld. *See* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); United States v. Butler, 297 U.S. 1, 61 (1936).

184. *Steward Machine Co.*, 301 U.S. at 590. In *Steward Machine Co.* the Court chose to evaluate conditions according to whether they were "fairly within tbe scope of national policy and power," *id.*, suggesting that the conditions would be valid if they could stand unattached to an expenditure. *Id.* at 586 (holding that, in order to be deemed unlawful, "[t]here must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing hy themselves").

185. 448 U.S. 448, 475 (1980) (stating that "[i]f, pursuant to its regulatory powers, Congress could have achieved the objectives of the [Minority Business Enterprise] program, then it may do so under the Spending Power").

projects. Congress attached to each grant the condition that a locality must assign to minority business enterprises ten percent of the proceeds from any grant for local public works projects.[186] The Court's analysis did not address whether the spending power authorized the condition, but instead found authorization in the commerce power and the fourteenth amendment.[187]

Allowing Congress' other enumerated powers to support conditions unauthorized by the spending power provides the deference typically granted to Congress by the Court. In *McCulloch v. Maryland*[188] the Court held that the necessary and proper clause allows Congress to choose the means by which it pursues a constitutionally permissible national objective.[189] Thus, if Congress chooses to connect a legitimate interstate commerce restriction to a legitimate spending objective, the Court probably will not object.[190]

C. *Effect of the Proposed Analysis*

The requirement that the conditions relate to the objective of the expenditure does not contradict the Court's holding that the spending power creates a power independent of Congress' other enumerated powers. The spending power authorizes a set of conditions that relate to the objective of each expenditure. The other enumerated powers simply authorize another set of conditions.

Finally, the Court should ask whether the condition offends any other restriction on Congress' regulatory powers.[191] The Court has alluded to this inquiry in several cases, stating in one instance that Congress may impose conditions on the receipt of federal funds "absent some independent constitutional bar."[192] Beyond paying nominal recognition to this concept, however, the Court has not ventured to explain what "independent constitutional bar" actually means.[193] By defining this restriction precisely, the Court

186. 42 U.S.C. § 6705(f)(2) (1982).

187. *Fullilove*, 448 U.S. at 475.

188. 17 U.S. (4 Wheat.) 316 (1819).

189. *Id.* at 323-34; *see also* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 4, § 5.8(a).

190. It is not necessary that Congress identify the power that it is using to enact a legislative package. "Today the test for validity of a federal act is whether the Congress might reasonably find that the act relates to one of the federal powers." R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 4, § 3.3.

191. Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 269-70 (1985).

192. *Id.*

193. The Court, most recently, referred to the requirement in South Dakota v. Dole, 107 S. Ct. 2793, 2796 (1987) (stating that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds"). For support the court cited *Lawrence County, Buckley,* and *King v. Smith. Id.* at 2796-97. *Lawrence County* states

could prevent Congress from using spending conditions to circumvent restrictions on direct regulation.[194]

This new test would not have changed the outcome of most prior Supreme Court decisions, but would provide the courts with a clearer and more appropriate test to apply in the wake of Congress' current aggressive use of conditional grants. The adoption of this test would allow courts, when evaluating new conditional grant programs, to consult already widely accepted analyses of Congress' enumerated powers.

V. Conclusion

The Court has not completely defined the extent to which Congress may place conditions on spending grants,[195] relying instead on the coercion test to curb the conditioning power. The coercion test, however, is not capable of invalidating any condition to a spending provision.[196] Thus, use of the coercion test has allowed Congress to employ grant schemes as a means of avoiding the constitutional restrictions on the use of its powers.[197] The Constitution does not permit Congress to legislate for the general welfare,[198] though the current spending power analysis and the coercion test

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simply that "Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." *Lawrence County*, 469 U.S. at 269-70. For support, *Lawrence County* cites *King*. *See id.*; *see also King*, 329 U.S. 309, 333 n.34 (1968). *Buckley* makes no direct reference to the "independent constitutional bar" but states in passing with no elaboration or support that "[a]ny limitations upon the exercise of that granted power must be found elsewhere in the Constitution." *Buckley*, 424 U.S. 1, 91 (1976) (per curiam). *Lawrence County* and *Dole* cite a footnote in *King* for support. That note states simply that "[t]here is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall he disbursed." *King*, 392 U.S. at 333 n.34. The footnote also provides no explanation but cites generally to Ivanhoe Irrigation District v. McCraken, 357 U.S. 275, 295 (1958), and Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143 (1947). *Ivanhoe* and *Oklahoma* merely restate Congress' power to place conditions on federal grants. *Ivanhoe*, 357 U.S. at 295 (indicating that "also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges"); *Oklahoma*, 330 U.S. at 143 (stating that Congress "does have power to fix the terms upon which its money allotments to states shall he disbursed").

The *King* footnote was apparently the beginning of a restriction that never was. *See* Austin, *Footnotes as Product Differentiation*, 40 Vand. L. Rev. 1131, 1135 n.17 (1987).

194. *See supra* notes 131-51 and accompanying text.

195. Fullilove v. Klutznick, 448 U.S. 448, 475 (1980); Lau v. Nichols, 414 U.S. 563, 596 (1974).

196. *See supra* notes 60-70 and accompanying text.

197. *See supra* notes 131-51 and accompanying text.

198. *See supra* notes 18-24 and accompanying text.

essentially give Congress this ability.[199] The courts[200] can resolve this inconsistency by limiting the strings on federal spending programs to conditions that are directly related to the objective of each expenditure and regulations allowed by the other regulatory powers.[201] Both the conditions and the regulations also must be subject to the restrictions of the various constitutional limitations and amendments.[202] This approach will further the framers' promise of a federal government of limited powers.[203]

Congress' use of the spending power, with its accompanying authority to impose conditions on grants, has created an underground network of additional federal regulation affecting political accountability, the tenth and twenty-first amendments, and the balance of power between state and federal governments. The result has been an alteration of the fundamental federal structure established by the Constitution. When examining the constitutionality of restrictions on federal grants to the states, the Court should not simply conclude that the states have the option to refuse the benefit and thereby escape any accompanying restrictions. Rather, the Court should determine whether Congress has the power, presumably under the spending or the commerce powers, to place the restriction on the states in the first place. If any power supports the restriction, then the Court must determine whether the condition violates an independent constitutional bar.[204] Only

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199. *See supra* notes 131-59 and accompanying text.

200. *See* Texas v. United States, 730 F.2d 339, 355 (5th Cir. 1984) (stating that "[r]egardless of whether Congress acts in a politically accountable manner, the courts must be prepared to intervene to protect the essential role of the states in the federal system"), *cert. denied*, 469 U.S. 892 (1984).

201. *See supra* notes 180-82 and accompanying text.

202. Kreimer, *supra* note 100, at 1396. Professor Kreimer concluded "that courts seeking to protect constitutional liberties run severe risks if they exempt allocational sanctions from constitutional scrutiny." *Id.*

203. Schweppe, *supra* note 29, at 1276. Dean Schweppe expressed a similar frustration with the spending power doctrine: "The political result is the spending of lavish sums by Congress for purposes that would have made the Founding Fathers scrap the Constitution could they have envisioned that perversion of their image of a limited federal government." *Id.*

This Note does not attempt to reevaluate the Court's deference to Congress in making determinations regarding whether a spending objective pursues the general welfare. Deference should not be given to Congress in determining whether a condition is related to the spending objective, which would undermine any conclusion that the coercion test is inadequate.

204. Congress, for example, may not affirmatively require a state to enact legislation. *See* EPA v. Brown, 431 U.S. 99, 103 (1977) (per curiam) (suggesting that the federal government could not require the states to enact legislation); *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761-62 (1982) (noting that the Court has never explic-

after applying this analysis will the Court have squarely evaluated Congress' conduct within the limitations of the Constitution.

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itly sanctioned federal directives requiring states to promulgate laws and regulations).

* The Author would like to thank Barry Friedman, Assistant Professor of Law at Vanderhilt School of Law, for his comments on an earlier draft of this Note.