COMMENTS

South Dakota v. Dole: A Study in Conditional Spending and Missed Opportunity

Over the past fifty years, federal spending has increased in magnitude and influence.[1] Federal grants and subsidies to the states have recently reached the ninety-six billion dollar mark, accounting for approximately one-fifth of all state and local government spending.[2] Yet this staggering escalation in federal beneficence does not come cost-free to the states. Federal appropriations are often conditioned on state compliance with other congressionally imposed provisos.[3]

This "conditional spending" by the federal government creates a tension between two fundamental principles of constitutional federalism: the express power of Congress to spend for "the general welfare,"[4] and the interests of state autonomy. The areas over which Congress possesses legislative authority are enumerated in Article I, section 8 of the Constitution;[5] powers not granted to the federal government are reserved to the states.[6] In 1936, however, the Supreme Court held that the spending

1. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1103-04 (1987).

2. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-53 (1985) (citing authorities).

3. Rosenthal, *supra* note 1, at 1104. Federal appropriations for educational institutions, welfare benefits, and health programs are among those to which conditions are frequently attached. *See* Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 891-96 (1979); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Trezise, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH. & LEE L. REV. 1133 (1977).

4. U.S. CONST. art. I, § 8, cl. 1; *see infra* notes 13-24 and accompanying text.

5. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 298-305 (2nd ed. 1988); Note, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U.L. REV. 293, 297 (1975). Several constitutional amendments also grant Congress legislative power. *See* U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2; amend. XVI, amend. XVIII (concurrently with the states), amend. XIX; amend. XX, § 4; amend. XXIII, § 2; amend. XXIV, § 2.

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

power is not limited by these enumerated boundaries.[7] Since the conditions that Congress attaches to its grants are considered to be incidental to the spending power, these conditions have also been freed from the limitations of Article I, section 8.[8]

Conditional appropriations conflict with the interests of state autonomy when Congress attempts to accomplish through its conditions what it could not enact directly.[9] Although the states are free to reject the conditional grant, the increasing dependence of state and local governments on federal funding frequently makes this option unrealistic.[10] States have argued, with little success, that the conditional spending power effectively allows Congress to circumvent its legislative boundaries and unconstitutionally compel state action.[11]

In *South Dakota v. Dole*,[12] the Supreme Court re-examined Congress' power to condition funds while considering a statute that required recipient states either to raise their minimum drinking age to twenty-one or to suffer partial forfeiture of federal highway funds. The Court upheld Congress' use of the conditional spending power and advanced several criteria for its proper use. This Comment will examine the Court's decision and explore its implications for conditional spending. Part I sets out the historical background of the conditional spending power; Part II discusses the factual and legal background of *South Dakota v. Dole* in the lower courts; Part III details the Supreme Court's treatment of the case; and Part IV analyzes the "general restrictions" on the conditional spending power discussed by the majority. This Comment argues for more restrictive parameters on conditional spending than those imposed by the majority in *Dole*. To that end, Part IV also considers the merits of a standard proposed by the dissent for determining what conditions should be permitted under the federal spending power.

I. Historical Background: The Spending Clause and the Conditional Spending Power

The Spending Clause of the United States Constitution states that "Congress shall have Power to . . . provide for the common Defence and general Welfare of the United States . . . ."[13] The historical interpretation of the Spending Clause centered on two theories.[14] One view, advo-

7. United States v. Butler, 297 U.S. 1 (1936). *See infra* notes 23-24 and accompanying text.

8. *See infra* notes 34-37 and accompanying text.

9. Rosenthal, *supra* note 1, at 1108-09.

10. *Id.* at 1104.

11. *See infra* notes 34-37 and accompanying text.

12. 107 S. Ct. 2793 (1987).

13. U.S. CONST. art. I, § 8, cl. 1.

14. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed.) § 907, 662. *See also* Rosenthal, *supra* note 1, at 1122.

cated by James Madison, construed the clause as authorizing congressional spending only in furtherance of federal powers conferred elsewhere in the Constitution.[15] The other interpretation, espoused by Alexander Hamilton, viewed the clause as conferring a power separate from those otherwise enumerated, subject only to the requirement that the spending be for general, as opposed to particular, purposes.[16]

In *United States v. Butler*,[17] the Supreme Court endorsed the Hamiltonian view while considering, for the first time, a constitutional challenge to a federal appropriation.[18] The statute at issue, the Agricultural Adjustment Act of 1933,[19] sought to stabilize farm prices by offering subsidies to farmers on the condition that they agree to reduce production.[20]

The Court held that the Act was beyond Congress' commerce clause power[21] but that the asserted "general welfare" justification necessitated an interpretation of the Spending Clause.[22] The Court reasoned that because the power to spend is inextricably bound to the taxing power, the former must be as broad in scope as the latter in order to achieve the purposes of the tax.[23] Therefore, the Court found, "the powers of Congress to authorize expenditure of public monies for public purposes is not limited by direct grants of legislative power found in the Constitution."[24]

The *Butler* Court then prescribed two principal restrictions on federal appropriations.[25] First, Congress may not use the independent

15. *The Federalist* No. 41, at 326-28 (J. Madison) (J. Hamilton, ed. 1904); *see also* United States v. Butler, 297 U.S. 1, 65-66 (1936).

16. *See* Hamilton, *Report on Manufactures to the House of Representatives excerpted in* M. WALLACE, THE CONSTITUTION AND THE SUPREME COURT, 155-56 (2nd ed. 1965). *See also Butler*, 297 U.S. at 65-66; L. TRIBE, *supra* note 5, at 322.

17. 297 U.S. 1 (1936).

18. The Court noted, "We are referred to numerous types of federal appropriation which have been made in the past. . . . [S]uch expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts." *Id.* at 73.

19. Act of May 12, 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified as amended at 7 U.S.C. § 601 et seq. (1982)).

20. 7 U.S.C. §§ 608-612 (1982). *See also Butler*, 297 U.S. at 54-59; Rosenthal, *supra* note 1, at 1113.

21. Because the purpose of the Act—regulation of agriculture—was deemed to be "a purely local activity," the Court found it could not be justified under the Commerce Clause. *Butler*, 297 U.S. at 63-64. Subsequent expansion of the commerce power might well produce a different conclusion today. *See* South Dakota v. Dole, 107 S. Ct. at 2801 (O'Connor, J. dissenting); Rosenthal, *supra* note 1, at 1126 n.105; L. TRIBE, *supra* note 5, at 310-18.

22. 297 U.S. at 62.

23. *Id.* at 65.

24. *Id.* at 66.

25. The Agricultural Adjustment Act worked through individual contracts rather than an express condition on funds for the entire program; the *Butler* court thus stated it was "not here concerned with the conditional appropriation of money nor with a provision that if certain conditions are not complied with, the appropriation shall no longer be available." *Id.* at 73. The distinction, however, between funds subject to explicit conditions and those contingent

spending power to accomplish objectives that could not be achieved through its regulatory powers.[26] The plan to stabilize farming concerned "a matter beyond the powers delegated to the federal government."[27] The Act was therefore invalid as an intrusion upon "the reserved rights of the states"[28] as secured under the Tenth Amendment.[29] Second, the Court condemned federal grants that take advantage of a recipient's economic condition. The Act granted benefits to cooperative farmers while withholding benefits from farmers who refused to contract with the government. In the Court's view this plan constituted an attempt "to purchase a compliance which the Congress is powerless to command."[30] The farmers' apparent cooperation was thus a product of "coercion by economic pressure,"[31] an inappropriate use of the spending power.[32]

Butler is the only case in which the Supreme Court has invalidated a conditional grant on the grounds that it exceeds Congress' spending power.[33] Subsequent challenges to conditional federal grants frequently centered on allegations of unconstitutional congressional intrusion into states' rights[34] and de facto coercion of fund recipients.[35] Succeeding

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upon the assumption of a contractual obligation does not appear relevant to the limits imposed on the spending power. *See infra* notes 26-33 and accompanying text.

26. The Court stated unequivocally:

> It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted . . . . Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.

Id. at 68, 74.

27. *Id.* at 68; *see supra* note 21 and accompanying text.

28. 297 U.S. at 68.

29. The Court noted that the federal government is limited to its enumerated powers and that the Tenth Amendment was adopted "[t]o forestall any suggestion to the contrary." *Id.*

30. *Id.* at 70.

31. *Id.* at 71.

32. *Id.* at 70-72. "At best," the majority concluded, "[this statute] is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." *Id.* at 72.

33. Rosenthal, *supra* note 1, at 1126.

34. *See e.g.*, State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947). *Oklahoma* concerned a challenge to the Hatch Political Activity Act, which imposed a partial forfeiture of federal funding on any recipient state program that did not terminate its politically active employees or officers. Oklahoma asserted that a federal act requiring forfeiture of funding or state office intruded upon state sovereignty in violation of the Tenth Amendment. *Id.* at 142.

35. *See e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548 (1937). In *Steward Machine*, the plaintiff challenged a provision of the Social Security Act in which Congress levied a tax to fund a national unemployment program but allowed up to a 90% tax credit for payments by employers into a federally approved state unemployment program. The Court noted, "The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." *Id.* at 587.

decisions effectively loosened the *Butler* restrictions by rejecting the tenth amendment challenge[36] and disparaging charges of federal economic pressure.[37]

Although questions of state autonomy and economic coercion have frequently dominated Supreme Court decisions on conditional spending,[38] the Court has also recognized the importance of finding a reasonable relationship between the attached conditions and the purposes of the spending program. Both *State of Oklahoma v. United States Civil Service Commission*[39] and *Steward Machine Co. v. Davis*[40] acknowledged a reasonable relationship criterion, but neither of these decisions turned on this issue or sought to elaborate on its parameters.[41]

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36. The *Oklahoma* Court summarily disposed of the *Butler* protection against conditions designed to achieve objectives beyond Congress' regulatory power: "While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." 330 U.S. at 143. *Accord* Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256, 269-70 (1985) (utilizing conditional spending rationale to overrule state law on federal money distribution); Lau v. Nichols, 414 U.S. 563, 565-69 (1974) (relying on conditional spending provision to compel English language instruction); Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. at 528, 552-54 (analyzing conditions attendant on federal funds and questions of state sovereignty with respect to the Commerce Clause).

37. The Court in *Steward Machine* found nothing in the statute there at issue, *see supra* note 35, to suggest "a power akin to undue influence," 301 U.S. at 590. The Court recognized a congressional intent to induce state unemployment programs through the tax rebate but refused to go further: "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Id.* at 589-90. *See also* Helvering v. Davis, 301 U.S. 619 (1937) (companion case) (upholding Titles II and VIII of the same act, which imposed taxes to support old age pensions). Although *Steward Machine* concerned the power to tax rather than the correlative power to spend, the decision has been accepted as authority on the issue of coercive federal conditions generally. *See e.g.*, South Dakota v. Dole, 107 S. Ct. at 2798. *See also* Note, *supra* note 5, at 302.

38. *See supra* notes 35-37.

39. 330 U.S. at 143. The Court cited United States v. Darby 312 U.S. 100 (1940), to the effect that the Tenth Amendment cannot limit conditions "appropriate and plainly adapted to the permitted end" of the spending program. *Id.* at 124.

40. 301 U.S. 548 (1937). The Court distinguished conditional taxes where "the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax, or any other end legitimately national." *Id.* at 591.

41. In *Oklahoma* the employee termination condition of the Hatch Act, *see supra* note 34, was deemed to be reasonable in order to ensure that federal funds would not be misused by politically partisan state employees. 330 U.S. at 143. Congress' criteria for a tax credit in *Steward Machine* had a similar purpose: "to give assurance to the federal government that the moneys granted . . . will be used in the administration of genuine unemployment compensation laws." 301 U.S. at 578. *See also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958). In *Ivanhoe* the Court stated that "the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof." *Id.* at 295. *Ivanhoe* concerned federal funding for an agricultural water project that imposed the condition that farmers limit the land receiving project water to 160 acres. The Court found both the condition and the objective to be in harmony within a measure "designed to benefit people, not land." *Id.* at 297.

II. The Minimum Drinking Age Condition: *South Dakota v. Dole*

A. The Road to the Supreme Court

South Dakota v. Dole[42] concerned a controversial condition on the receipt of federal highway funds. In 1958 Congress passed the first comprehensive plan for federal assistance in the "construction, reconstruction, or improvement" of the nation's highway system.[43] Pursuant to this plan, the Highway Improvement Act of 1982 authorized federal highway expenditures of more than fifteen billion dollars over four years.[44]

In July, 1984, Congress amended the statute to condition five per cent of any state's highway fund apportionment on its establishing a minimum drinking age of twenty-one by October 1, 1986.[45] The percentage withheld doubled to ten percent for any state that did not comply before October 1, 1987.[46] The amendment, entitled "National Minimum Drinking Age," (NMDA)[47] was passed in response to a growing concern over teenage drunk driving. Congress had found that young people, underage in their own states, would cross the border to drink in less restrictive neighboring states and would then drive back, sometimes while

42. 107 S. Ct. 2793 (1987).

43. Pub. L. No. 85-767, § 1, 72 Stat. 885 (codified at 23 U.S.C. § 101 et. seq. (1958)). Title 23 established a cooperative scheme in which the federal government matches state funds expended for highways at roughly a three-to-one ratio. DOLE & BARNHART, HIGHWAY STATISTICS SUMMARY TO 1985, 54 (1986). Congress authorizes funds to be expended for highways, and the states make actual expenditures to contractors. The government then reimburses each state for the federal share of a project's cost. *Id.* at 55. Funds expended in this program comprise a substantial portion of all federal grants to states. In 1985, for example, the federal funds expended in this manner totalled over twelve-and-a-half billion dollars. *Id.* at 118, Table FA-206.

44. Pub. L. No. 97-424, 96 Stat. 2099-2113 (1983). The Highway Improvement Act encompasses the first title of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097-2200 (codified as amended in scattered sections of 23 U.S.C.) Section 105 of the Highway Improvement Act appropriates fifteen billion seven hundred fifty million dollars ($15,750,000,000) for expenditure from 1983 through 1988.

45. National Minimum Drinking Age, Pub L. No. 98-363, § 6(a), 98 Stat. 437 (codified as amended at 23 U.S.C. § 158 (1986)). Although the National Minimum Drinking Age statute was enacted as an amendment to the Surface Transportation Assistance Act of 1982, *see supra* note 44, the withholding provision affects any funds apportioned to the states for expenditure on the Federal-aid primary system, Federal-aid secondary system, Interstate system, and Federal-aid to urban system. *See infra* note 119; *see also* 23 U.S.C. §§ 104(b)(1), 104(b)(2), 104(b)(5), 104(b)(6)(1982). Three billion nine hundred million dollars ($3,900,000,000) of the funds appropriated in the Highway Improvement Act were subject to National Minimum Drinking Age withholding.

46. 23 U.S.C. § 158(a)(2). *See infra* note 119.

47. *Id.*

intoxicated.[48] Congress concluded that a uniform drinking age of twenty-one would eliminate this temptation for teenagers to drink and drive.[49] Since direct federal control over the sale of alcohol within a state's borders appears to be precluded by the Twenty-first Amendment,[50] Congress relied on the conditional spending power to further this objective.

At the time NMDA was passed, South Dakota allowed persons aged nineteen or older to purchase beer containing 3.2 percent alcohol.[51] The federal penalty for the state's failure to rescind this privilege as to persons under twenty-one was projected at four million dollars in 1987 and eight million dollars in 1988.[52] The district court dismissed South Dakota's complaint,[53] however, and the state failed on appeal to the Eighth Circuit.[54]

South Dakota had raised two principal contentions. First, the state argued that the Twenty-first Amendment gives the states exclusive control over "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors"[55] through an express grant of authority.[56] This constitutional authority, the state asserted, prevents Congress from enacting a national minimum drinking age statute or, alternatively, makes the state drinking age statute pre-emptive.[57] Second, South Dakota argued that the Tenth Amendment prohibits Congress from using its spending power to intrude in this area of state

48. *See, e.g.*, 130 CONG. REC. 58228 (daily ed. June 26, 1984) (statement of Sen. Mitchell); *id.* at 58239 (statements of Sens. Bradley and Biden), *id.* at 58241 (statements of Sens. Huddleston and Hollings); 130 CONG. REC. H5395 (daily ed. June 1, 1984) (statement of Rep. Anderson); *id.* at H5398 (statement of Rep. Barnes); *id.* at H5402 (statements of Reps. Coats and Porter).

49. *Id.*

50. U.S. CONST. amend. XXI, § 2, states, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *See also* California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system."). *See* South Dakota v. Dole, 791 F.2d 628, 634 (1986), *cert. granted*, 107 S. Ct. 567 (1986) ("In fact, the [drinking age amendment] necessarily recognizes the state's power to reject Congress' judgment and adopt and legally maintain any drinking age it chooses.").

51. S. D. CODIFIED LAWS ANN., § 35-6-27 (1986).

52. *Dole*, 791 F.2d at 630.

53. The United States District Court for South Dakota granted Secretary Dole's motion to dismiss for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12 (b)(6). The court found that the Tenth Amendment did not prevent indirect use of the spending power and that NMDA did not conflict with the state's rights under the Twenty-First Amendment. South Dakota v. Dole, No. Civ. 84-5137 (D.S.D. May 3, 1985).

54. *Dole*, 791 F.2d at 634.

55. U.S. CONST. amend. XXI, § 2. *See supra* note 50.

56. *Dole*, 791 F.2d at 632.

57. *Id.* at 632-33.

sovereignty.[58]

The Eighth Circuit rejected South Dakota's contentions by distinguishing Congress' authority to regulate from its authority to impose conditions on the disbursal of federal funds. The court interpreted the Twenty-first Amendment very narrowly, stressing that congressional power under the Spending Clause "without question includes the authority to attach conditions to the receipt and further expenditure of federal funds."[59] Thus, a conditional appropriation such as NMDA does not exceed federal constitutional authority, the court reasoned, because the statute "falls within the scope of Congress's spending power."[60] The court also noted that "to the extent a state finds the conditions attached by Congress distasteful, the state has available to it the simple expedient of refusing to yield."[61]

The United States Supreme Court granted South Dakota's petition for a writ of certiorari,[62] prompting one scholar to hope that "[t]he Court [would] avoid expressing any sweeping generalities as to [Congress'] power, or lack of it, to regulate by spending what could not be regulated directly."[63]

B. General Limits and Broad Pronouncements: The View of the Supreme Court Majority

Six justices joined Chief Justice Rehnquist in affirming the decision of the lower court.[64] After rejecting the argument that NMDA exceeds congressional authority, the majority assembled four "general restrictions" that limit federal conditional spending.[65]

Chief Justice Rehnquist first disposed of South Dakota's contention that NMDA constituted an intrusion into the reserved power of the state to set its own minimum drinking age. The Court distinguished indirect action under the spending power from the direct federal regulation ar-

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58. *Id.* at 634.

59. *Id.* at 631. The court stated, "Specifically, the primary intent of the twenty-first amendment was to authorize the state (where it would otherwise be prohibited from doing so) to regulate directly the transportation or importation of liquor into the state, . . . in effect, to create 'an exception to the normal operation of the Commerce Clause.' " (citations omitted). *Id.* at 633.

60. *Id.* at 634.

61. *Id. See also* Oklahoma v. United States Civil Service Comm'n., 330 U.S. 127, 143-44 (1947).

62. Petition for Writ of certiorari to U.S. Supreme Court filed August 18, 1986 (No. 86-260), *cert. granted,* 107 S. Ct. 567 (1986).

63. Rosenthal, *supra* note 1, at 1137 n.148.

64. South Dakota v. Dole, 107 S. Ct. 2795. Joining the Chief Justice were Justices White, Powell, Marshall, Blackmun, Stevens, and Scalia.

65. The majority consolidated "several general restrictions articulated in [previous] cases." *Id.* at 2796.

guably precluded by the Twenty-first Amendment:[66]

> [W]e need not decide in this case whether [the Twenty-first] Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.[67]

This distinction between permissible indirect action under the spending power and impermissible congressional regulation in an area reserved to the states was applied to South Dakota's tenth amendment argument as well. The Court noted later in its discussion "that a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."[68] The Court made it clear that South Dakota's challenge to the "relatively mild encouragement"[69] proffered by Congress cannot succeed on the theory that NMDA represents unconstitutional federal regulation.

The Court did, however, present four "general restrictions" that limit federal conditional spending.[70] The first limitation arises from the language of the Spending Clause itself: any federal expenditure must be for "the general welfare."[71] Second, when Congress conditions an appropriation, it "must do so unambiguously" so that the state can exercise its choice to comply or refuse with full knowledge of the consequences.[72]

Third, the Court declared that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[73] Citations in support of this principle refer to dicta in three decisions,[74] none of which defines the principle.[75] Nevertheless, by endorsing this

66. *See supra* note 50 and accompanying text.

67. *Dole*, 107 S. Ct. at 2795-96.

68. *Id.* at 2797. The Court specifically considers the Tenth Amendment in the context of its discussion of the "independent constitutional bar" limitation. *See infra* notes 73-79 and accompanying text.

69. *Id.* at 2798.

70. *Id.* at 2796. *See supra* note 65.

71. *Id.*, quoting U.S. CONST. art. I, § 8, cl. 1.

72. *Id.*, quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1980).

73. *Id.* at 2796-97.

74. The Court cites Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256 (1985); Buckley v. Valeo, 424 U.S. 1 (1976); and King v. Smith, 392 U.S. 309 (1968).

75. *Lawrence County* involved a condition requiring local control over federal funds; the Court there mentioned the independent bar and cited *King v. Smith* but did not discuss or apply the principle. 469 U.S. at 269-70. *King* addressed a state regulation conditioning an individual's receipt of federal funds and provided no further elaboration on what constitutes a "controlling constitutional prohibition." 392 U.S at 333 n.34. In *Buckley v. Valeo* the Court considered an attack on a federal campaign finance act based on the General Welfare Clause.

restriction, the Court appeared to sustain South Dakota's contention that the Twenty-first Amendment bars the NMDA.[76]

The majority, however, rejected South Dakota's argument. The Court concluded that the "constitutional bar" restriction does not refer to other articles or amendments that may appear to prohibit directly the conditional use of the spending power.[77] "Instead," the Court explained, "we think that the language in our earlier opinions stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[78] The NMDA does not require such misconduct by the states; state compliance with the drinking age condition "would not violate the constitutional rights of anyone."[79]

The fourth limitation requires that the condition have a "relatedness" or "germaneness" to the program to which it is attached.[80] The Court's language does not so much define this restriction as imply it by referring to earlier cases that "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' "[81]

This "relatedness" requirement received only scant attention from the majority. The Court concluded that by admitting NMDA addressed a problem of national concern, South Dakota had conceded the "germaneness" or "relatedness" issue.[82] Despite the assertion that "the

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The Court acknowledged that limits on the Spending Power must be found "elsewhere in the Constitution," but neither found one nor discussed what restrictions might exist. 424 U.S. at 91.

76. The state argued that although Congress may have imposed conditions beyond its legislative power in the past, "[i]n this case, Congress seeks to impose a condition when the power to legislate has been *withdrawn* from it by the Constitution." *See* Petition for Writ of Certiorari, *supra* note 65, at 22 (emphasis added). Thus, the Twenty-first Amendment's explicit grant of power to the states bars any congressional action in the area of state drinking age. *Id.; see also supra* notes 55-57 and accompanying text.

77. The Court observed that "the 'independent constitutional bar' limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." 107 S. Ct. at 2798.

78. *Id.*

79. *Id.*

80. *Id.* at 2797 n.3.

81. *Id.* at 2796, quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978). The "relatedness" limitation was also the only restriction not mentioned in the Court of Appeals summary of precedent. *See Dole*, 791 F.2d at 631.

The majority's observation that this factor lacked "significant elaboration" in the earlier cases suggests that the Court might prefer that the relationship between a condition on the receipt of funds and the federal interest served by the program meet an articulable standard. Such a limitation could significantly reduce the scope of Congress' conditional spending power. *See infra* notes 135-38 and accompanying text.

82. The Court noted that "the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it 'has never contended that the congressional action

[drinking age] condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel,"[83] the Court disclaimed any authoritative ruling on the scope of the "relatedness" restriction.[84]

Thus the Court clarified three restrictions on federal conditional spending and left one additional restriction undefined. Congressional spending conditions must first serve the "general welfare," second, be unambiguously expressed, and third, not induce the recipient state to violate the Constitution. Although the majority offered a fourth limitation concerning the relationship between the condition and the "federal interest" in the spending program, South Dakota's apparent waiver of the "relatedness" issue obviated further elaboration.

C. Problem and Proposal: The Dissent's Objection

In her dissent Justice O'Connor agreed that Congress can constitutionally condition its appropriations and deferred to the Court's three named restrictions on these conditions. She objected, however, to the Court's "cursory and unconvincing" application of the "relatedness" restriction.[85] A drinking age condition might relate to highway funding if the objective of the highway program were, as the majority stated, simply

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was . . . unrelated to a national concern in the absence of the Twenty-first Amendment.' " 107 S. Ct. at 2797, quoting Brief for Petitioner at 52, South Dakota v. Dole, 107 S. Ct. 2793 (1987) (No. 86-260).

The passage in question clearly expresses South Dakota's understanding that variable state drinking ages contribute to teenage drunk driving and comprise a problem which is "bigger than the individual states." Brief for Respondent at 6, South Dakota v. Dole, 107 S. Ct. 2793 (1987) (No.86-260) (quoting President Reagan, 20 WEEKLY COMP. PRES. DOC. 1036 (July 17, 1984)). The states' admission of a national concern, however, does not appear necessarily to waive the issue of whether a remedial funding condition *bears a reasonable relationship to the underlying spending program.*

Justice O'Connor regarded the majority's view of South Dakota's "concession" to be a misreading of counsel's brief and argument as well as poor support for the majority's holding. 107 S. Ct. at 2800 (O'Connor, J., dissenting). She observed, "The fact that the Twenty-first Amendment is crucial to the State's argument does not, therefore, amount to a concession that the condition imposed by [NMDA] is reasonably related to highway construction." *Id.*

83. 107 S. Ct. at 2797.

84. The Court stated:

> Because the petitioner has not sought such a restriction . . . and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power. *Id.* at 2797, n.3 (citation omitted).

85. *Id.* at 2799 (O'Connor, J., dissenting). The dissent acknowledged that the first two restrictions, "general welfare" and clear choice, were "wholly unobjectionable" in the instant case. *Id.* Justice O'Connor also stated she was "willing to assume *arguendo* that the Twenty-first Amendment does not constitute an 'independent constitutional bar' to a spending condition." *Id.* (emphasis in original).

Justice Brennan also dissented, arguing that the Twenty-first Amendment precludes congressional conditions based on a state drinking age. *Id.* (Brennan, J. dissenting).

"safe interstate travel."[86] Justice O'Connor, however, perceived the majority's characterization of this objective as overly broad, allowing Congress virtually unrestricted power to condition highway funds:

> When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of the highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.[87]

To illustrate, Justice O'Connor hypothesized highway grants conditioned on a state's moving its capital, a condition justified by the safety interest in reducing traffic congestion.[88] Under a "safe interstate travel" rationale, the dissent found this scenario "hardly more attenuated than the one which the Court [found] supports [NMDA]."[89]

Justice O'Connor then offered a new standard that could "draw the line between permissible and impermissible conditions on federal grants" by limiting the spending power to its literal constitutional meaning.[90] Because Article I, section 8 empowers Congress to spend, the concomitant power to condition funds should be restricted to provisos on how the money should be spent.[91] This standard, Justice O'Connor noted, would hark back to the *Butler* decision by eliminating those congressional conditions that are truly regulatory in nature.[92] The NMDA would be invalid under this standard because the condition did not concern the expenditure of the appropriated funds.[93]

III. The *Dole* Restrictions Applied and Analyzed

A. The Majority's Restrictions in Practice

The majority decision in *South Dakota v. Dole* both reiterated precedent and purported to clarify the limits of the federal conditional spending power. However, the three restrictions the Court defined, "general welfare," clarity, and constitutional bar,[94] do little to check Congress'

86. *Id.* at 2797.

87. *Id.* at 2800 (O'Connor, J., dissenting).

88. *Id.* at 2800-01 (O'Connor, J., dissenting).

89. *Id.* at 2801 (O'Connor, J., dissenting).

90. *Id.* Justice O'Connor's standard was proposed by the National Conference of State Legislatures in their brief as *amici curiae*.

91. "Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes. . . . Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent." Brief of the National Conference of State Legislatures as *amici curiae* at 19-20, South Dakota v. Dole, 107 S. Ct. 2793 (1987) (No. 86-260) (emphasis in original).

92. 107 S. Ct. at 2801 (O'Connor, J., dissenting).

93. *Id.* at 2801-02 (O'Connor, J., dissenting).

94. *See supra* notes 71-79 and accompanying text.

power to condition funds. The decision's simultaneous approval and avoidance of the "relatedness" criterion suggests a deference to congressional judgment whenever a spending condition represents a federal response to a national problem.

The Court's quick dismissal of South Dakota's state autonomy argument[95] continues the Court's tendency since *Butler* to accord Congress a broad conditional spending power. As the Court noted earlier in *Oklahoma*, a congressional condition on the disbursement of funds is not an exercise of federal regulatory power.[96] Consequently, federal spending conditions are not subject to the constitutional limitations imposed by Article I, section 8[97] or by the Tenth[98] and Twenty-first Amendments.[99] Thus, a state's constitutional right to control its minimum drinking age has no bearing, in the Court's view, on Congress' power to condition its highway funding on state compliance with the NMDA.[100] Despite the condition's practical effect of inducing state compliance,[101] Congress did not directly regulate the state's minimum drinking age by imposing it.

The first of the Court's list of limitations simply applies the language of the Constitution itself. Every congressional appropriation, including the conditions attached, must serve "the general welfare."[102] Once the *Butler* court determined that this language does not impose legislative boundaries on Congress' power to spend,[103] however, little was left in the way of a "general welfare" restriction. Since *Butler*, no case has held that a federal spending measure failed to meet this requirement.[104] The majority in *South Dakota v. Dole* continued this tradition, further noting that "the concept of welfare or [its] opposite is shaped by Congress."[105]

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95. *See supra* notes 66-69 and accompanying text.

96. 330 U.S. at 143. *See supra* note 36.

97. *See supra* note 5 and accompanying text.

98. *See supra* note 6 and accompanying text.

99. *See supra* note 50 and accompanying text.

100. *See supra* notes 68-69 and accompanying text.

101. South Dakota's repeal of the chapter authorizing the sale of low-point beer to minors effectively raised the state's minimum drinking age to twenty-one. S.D. CODIFIED LAWS ANN. ch. 35-6 (repealed by SL 1971, ch. 211, § 121; 1987, ch. 261, § 10, effective April 1, 1988) (1988 Supp.) The reluctance of the state lawmakers to raise the drinking age is specifically (and vociferously) codified. South Dakota's legislature voiced its strong objection "to being forced to choose between loss of highway construction funds . . . and loss of its right to set its own drinking age." S.D. CODIFIED LAWS ANN., 35-9-4.1 (1988 Supp.) The section concludes with an automatic revival of the low-point beer chapter should "the provisions of 23 U.S.C. 158 [be] repealed, expired, or declared invalid by the United States Supreme Court . . . ." *Id.*

102. *Dole*, 107 S. Ct. at 2796, quoting U.S. CONST. art. I, § 8, cl. 1.

103. *See supra* notes 23-24 and accompanying text.

104. Rosenthal, *supra* note 1, at 1113.

105. 107 S. Ct. at 2797, quoting *Helvering v. Davis*, 301 U.S. at 645. In her dissent, Justice O'Connor noted:

The requirement that conditions attached to expenditures be unambiguous limits the legislative form of the conditional spending power rather than its substance. Any proviso that clearly defines the character and consequences of noncompliance would satisfy this restriction regardless of the condition imposed.[106] As a result, this clarity requirement has little practical effect in limiting congressional exercise of the conditional spending power.

Finally, the "independent constitutional bar" restriction invalidates only those appropriations that require the recipient state to perform some unconstitutional act.[107] In practice this limitation merely encourages Congress to uphold the Constitution by striking down spending conditions that require its violation. Ironically, South Dakota's argument that the Twenty-first Amendment bars the NMDA failed the majority's test because the Amendment itself grants to the states the power to regulate drinking age. As Justice Rehnquist noted, Congress cannot be constitutionally barred from conditioning funds on a state's raising its drinking age because state control in this area is explicitly constitutional.[108]

B. The *Dole* Majority and the "Reasonably Related" Condition

The majority recognized that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' "[109] Thus, the fact that conditions in spending bills are not limited by restrictions on Congress' regulatory powers "does not mean that [such conditions] need not be reasonably related to the purposes of the spending program itself."[110] A condition must bear some reasonable relationship to the federal interest in the underlying appropriation.

Within the realm of what constitutes a "reasonably related" spending condition lies the boundary between valid federal control over the objectives of appropriation and arbitrary federal intrusion into matters of independent state control. Although Congress' spending power is sepa-

> If the Spending Power is to be limited only by Congress' notion of the general welfare, . . . the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.

Id. at 2801 (O'Connor, J., dissenting), quoting *Butler*, 297 U.S. at 78.

106. *Cf.* Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

107. *See supra* notes 77-79 and accompanying text.

108. *See supra* note 79 and accompanying text.

109. 107 S. Ct. at 2796, quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978). *See supra* notes 80-81 and accompanying text.

110. Note, *supra* note 5, at 303.

rate from its power to legislate,[111] the magnitude and prevalence of federal funding inevitably pressures the states to subordinate the autonomous exercise of their reserved powers to the federal policy objectives furthered by congressional spending conditions.[112] Congress' interest in conditioning its grants in order to achieve the purposes of the appropriation must be balanced against the states' right not to have independent policy decisions unreasonably burdened by federal funding contingencies. This balancing of federal and state interests requires a constitutional standard for defining when a congressional condition and the federal interest in the appropriation are reasonably related.

South Dakota v. Dole presented an ideal test case for defining the "reasonably related" condition. The facts manifest an interesting dichotomy. On one hand, federal funds helped to create the highways by which teenagers cross into neighboring states where the drinking age is lower. The federal interest in maintaining highway safety is threatened when these teenagers drive back while under the influence of alcohol.[113] On the other hand, every local concern that could conceivably affect the "safe highways" objective should not represent an opportunity for Congress to condition highway funds.[114] As Justice O'Connor hypothesized, an unchecked conditional spending power could lead to manifestly intrusive results.[115] Defining a "reasonable relationship" between a program and a spending condition and clarifying the breadth of a "federal interest" in this context would have helped to establish the boundaries of appropriate congressional conduct in this area.[116]

The majority's analysis centered on the goal of "safe interstate travel" and the related benefits to be gained from a higher drinking age.[117] This discussion, however, did not take note of the actual appropriation to which the drinking age condition was attached. The amendment was not added to funding for state safety or alcoholism programs that are designed to combat drunk driving directly; it affected general

111. *See supra* notes 23-24 and accompanying text.

112. *See supra* notes 9-11 and accompanying text.

113. *See supra* notes 48-49 and accompanying text.

114. *See* Brief of *amici curiae, supra* note 91, at 23-24.

115. *See supra* notes 88-89 and accompanying text.

116. In reviewing the Court's pre-*Dole* remarks on this issue, one commentator has suggested a dual standard for determining what constitutes a "reasonably related" condition. Those provisos are proper that either directly further the "substantive goals" of the program or control how the appropriated funds are to be administered. Note, *supra* note 5, at 308. Unfortunately, this construct does little to clarify the relationship between condition and program, since it permits conditions that are as general as a federal program's "substantive goals." It does, however, implicitly ask whether "conditions [may be upheld] if they are intended merely to carry out a 'policy' of Congress or of the federal government at large, but [are] not sustainable as an implementation either of the spending or of any of the other powers of Congress." Rosenthal, *supra* note 1, at 1129.

117. *Dole*, 107 S. Ct. at 2797.

highway construction funds,[118] allocated for the "construction, reconstruction, or improvement" of the nation's roads.[119] The NMDA does not purport to serve any of these functions.[120]

Nonetheless, the *Dole* majority inferred a general congressional commitment to "safe interstate travel" from the highway fund appropriation,[121] and the justices viewed NMDA to be "directly related" to this purpose.[122] Because a lower incidence of drunk drivers increases highway safety, the majority's reasoning would appear to approve any congressional spending condition that decreases the number of drunk drivers. Such conditions would be "reasonably related" to the "safe interstate travel" goal of highway funding.[123] This "relatedness" rationale could logically extend to any condition that affects highway congestion, pollution, or even destination[124] if a safety objective were advanced. By ruling that NMDA and this spending program are reasonably related under a "safe interstate travel" theory, the *Dole* majority allows Congress a potentially limitless power to condition grants within a broad definition of highway safety.

Despite its "directly related" language, the Court explicitly declined to consider the potential scope of the relatedness requirement.[125] Thus, evaluating the impact of *Dole* on future conditional spending cases is necessarily a speculative endeavor. The decision's flat endorsement of the statute, however, suggests a practical interpretation of the majority's position. For problems of national scope the reasonable relationship question considers not the *condition* (higher drinking age) and the *spending program* (highway funds), but rather the *policy* (safer highways) and the

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118. Brief of *amici curiae, supra* note 91, at 23 n.39.

119. *See* 23 U.S.C. § 101(b) (1982) (Declaration of Policy); *see also* H.R. Rep. No. 555 97th Cong., 2nd Sess, 1-4 (1982), *reprinted in* 1982 U.S. CODE CONG. ADMIN. NEWS 3639, 3639-42.

120. Section 158 provides in pertinent part:

> (a) Withholding of funds for noncompliance.—
>
> (1) First year.— The Secretary [of Transportation] shall withhold 5 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of this title on the first day of the fiscal year succeeding the first fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.
>
> (2) After the first year.— The Secretary [of Transportation] shall withhold 10 per centum of the amount required to be apportioned to any State under [the surface Transportation Assistance Act] . . . on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful. . . .

23 U.S.C. § 158 (1986).

121. 107 S. Ct. at 2797.

122. *Id.*

123. *See supra* note 83 and accompanying text.

124. *See, e.g., supra* notes 88-89 and accompanying text.

125. *See supra* note 84 and accompanying text.

problem (drunk driving).[126] The extent to which the Court is willing to interpret expansively a program's "broad policy objectives"[127] in order to justify a given condition will most likely depend on the particular problem that condition is designed to remedy.[128] In any event, the problem of teenage drunk driving led the court to conclude that the "encouragement to state action found in [NMDA] is a valid use of the spending power."[129]

C. The Dissent's "Reasonable Relationship" Standard

In her dissent Justice O'Connor endorsed a bright line standard for determining whether a spending condition is "reasonably related" to the underlying federal appropriation. The Constitution grants Congress the power to spend, so the conditions Congress attaches to its appropriations should relate only to how the money should be spent.[130] This proposal would achieve several beneficial results. First, it would clarify the constitutional rationale for conditional spending by rectifying the *Butler* Court's contradictory interpretation of Congress' power under the Spending Clause. Second, Justice O'Connor's "reasonable relationship" test would assist Congress and the courts by providing a clear standard for determining constitutionally acceptable spending conditions. Finally, this definition of a "reasonably related" condition would promote the interests of federalism by protecting state autonomy while preserving Congress' power to spend for the "general welfare."

1. *Reconciling the* Butler *Limitation on Conditional Spending*

After deciding that the spending power is not subject to federal regulatory boundaries,[131] the *Butler* majority held that Congress could not use the spending power to accomplish objectives outside its regulatory power.[132] Both the *Butler* dissent and subsequent scholars pointed out the inherent inconsistency in these conclusions. By ruling that the spending power cannot be used to achieve objectives beyond Congress'

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126. The dissent argues against the validity of the latter association in the case of NMDA:

> It hardly needs saying . . . that if the purpose of [NMDA] is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation.

107 S. Ct. at 2800 (O'Connor, J., dissenting).

127. *Id.* at 2796, quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980). *But see infra* note 136 and accompanying text.

128. *Cf.* Helvering v. Davis, 301 U.S. 619, 641-44 (1937) (describing plight of the aged and unemployed to support the validity of the Social Security Act).

129. 107 S. Ct. at 2799.

130. *See supra* notes 90-93 and accompanying text.

131. *See supra* notes 23-24 and accompanying text.

132. *See supra* notes 26-29 and accompanying text.

legislative power, the Court imposed limitations on conditional spending that its interpretation of the Spending Clause necessarily released.[133] If the power to condition funds comes from the independent power to spend, the conditions imposed should be similarly unaffected by Congress' regulatory boundaries. Justice Stone's dissent in *Butler* emphasized that "the Court's limitation [was] contradictory and . . . incapable of practical application. The spending power of Congress is in addition to the legislative power and not subordinate to it."[134]

The power to condition funds has no separate constitutional mandate, but rather must derive from the Spending Clause. The purpose of the *Butler* limitation was to identify those spending conditions that are regulatory in nature and exclude them from Congress' spending power. The genesis of the *Butler* contradiction, however, was in the court's attempt to limit the scope of the conditional spending power instead of the scope of the conditions themselves. Justice O'Connor's proposal avoids this problem by requiring that a federal condition pertain to actual expenditure in order to be justified under the Spending Clause. Conditions that relate to the expenditure of federal funds are ancillary to Congress' power to appropriate them effectively. Any condition that does not pertain to actual expenditure exceeds the independent spending power and could only be valid as an exercise of federal regulatory power, attached to but constitutionally distinct from, the spending measure. This rationale does not expressly limit Congress' power to condition funds, but it does effectively restrict conditions designed to achieve objectives beyond congressional regulatory power.

2. *Providing a Clear and Effective Standard*

Justice O'Connor's proposal would provide a clear and effective standard to aid congressional drafting and judicial consideration of federal spending conditions. As the magnitude and prevalence of federal funding increases,[135] so too does the importance of establishing definite parameters on the funding conditions Congress may impose. The dissent's suggestion is clear and simple: provisions that direct how federal money is to be spent are reasonably related to the underlying appropriation, and those that step over this bright line are not. Judicial analysis of challenged spending provisos would center on the statutory language itself, avoiding the speculative task of attempting to fathom the nature and extent of a spending program's "objective."

133. Note, *supra* note 5, at 299-300.

134. United States v. Butler, 297 U.S. 1, 85 (1936) (Stone, J., dissenting).

135. *See supra* notes 1-2 and accompanying text.

3. *Promoting Balanced Federalism*

Most importantly, Justice O'Connor's proposal would preserve state autonomy without curtailing Congress' authority under the Spending Clause. Tying conditions to actual spending would allow Congress full control over the agencies and methods of expenditure while restricting the extent to which federal provisos interfere with state policy decisions.[136] Under this standard the conduct required by a proper spending condition would concern state management of federal property.[137] States would have no right to spend or administer federal funds in ways contrary to congressional intent. Conversely, state activities unrelated to federal funding or federal regulatory authority would not be subject to congressional conditions.

Moreover, this limitation would not reduce the scope of congressional spending because it would not foreclose any area previously eligible for federal funding. Although Congress would lose the considerable power it derives from attaching loosely related conditions to its appropriations, the leverage inherent within the power to spend would remain undiminished. Congress alone would continue to decide what portion of the ninety-six billion dollars goes where.[138]

The dissent's proposal would significantly and beneficially affect interactions between Congress and the states. Instead of imposing conditions beyond its regulatory authority, Congress would have to cooperate with state policy-makers to achieve its "general welfare" objectives. Ideally, such dialogue itself might further the nation's "general welfare."

Conclusion

Although the Constitution provides for a balance of power between the federal and state governments, the states have become increasingly dependent on the massive financial resources allocated by Congress. The Constitution allows Congress to spend for "the general welfare," and the

136. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448 (1980). Congress appropriated funds for local public works projects but stipulated that ten per cent of the appropriation had to be spent to procure the services of minority contractors. The use of a condition on expenditures did not hamper congressional control over the program, while it did serve to further the congressional objective of ensuring public works jobs for minority business enterprises.

137. Appropriations that carry conditions concerning state administrative staff arguably fall within the dissent's proposed standard. Conditions designed to ensure that federal funds are not misused or misadministered by state employers certainly pertain to how those funds are spent. *See, e.g.,* Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143 (1947) (funding condition requiring abstention from partisan political activity); *see also* Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant in Aid Programs: Suggestions for Beneficiary Involvement,* 58 VA. L. REV. 600, 608-9 (1972) (discussing merit system requirement for state programs administering federal Aid to Families with Dependent Children); Note, *supra* note 5, at 308.

138. *See supra* note 2 and accompanying text.

Supreme Court has held this spending power to be unfettered by the constitutional limits on federal regulatory authority. Congressional practice and Supreme Court interpretation have added the power to attach conditions to these appropriations. The Court has held that these provisos are also unaffected by enumerated regulatory boundaries.

As state spending has increasingly become a function of available federal funding, the expedient option of refusing these conditioned federal funds has become increasingly unrealistic. Because important federal grants may be subject to state compliance in areas that Congress is not empowered to regulate directly, conditional federal spending has enabled Congress effectively to circumvent constitutional limitations on its power by purchasing what it could not command.

While the need to limit the conditional spending power has been recognized in several Supreme Court decisions, only *United States v. Butler* evinces an attempt to do so. Subsequent Supreme Court decisions eroded the restrictions imposed in *Butler* and accorded Congress broad power to accomplish its objectives through conditioned appropriations.

In *South Dakota v. Dole,* the Court advanced four "general restrictions" on the conditional spending power. Congressional conditions must serve the "general welfare," present the states with an unambiguous choice, and must not induce the states to violate the Constitution. The fourth limitation requires that the condition be related to the federal interest in the spending program. The Court does, however, leave a critical issue unexplored: the standard by which a condition and a program can be deemed reasonably related. A proposal endorsed by Justice O'Connor in her dissent would require that congressional spending conditions pertain directly to the expenditure of federal funds. Justice O'Connor's standard would provide a constitutional rationale for limiting regulatory spending conditions and would promote the reconciliation of federal prerogative and state autonomy. Despite the dissent's valuable proposal, however, the decision in *South Dakota v. Dole* represents a continuation of the Court's previous approach and a lesson in missed opportunity.

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