

RETHINKING CONDITIONAL FEDERAL GRANTS AND THE INDEPENDENT CONSTITUTIONAL BAR TEST

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I. INTRODUCTION

On a crisp January night, a SWAT team descends on a house in Pullman, Washington. Onlookers can only imagine what type of crime warrants such a response. Was it a hostage situation? Were they trying to subdue a psychotic killer? Maybe there was a violent drug cartel operating out of the house? No. On January 21, 2009, a SWAT team raided a Washington State University fraternity house because some college students may have been drinking alcoholic beverages before their twenty-first birthdays.¹

The National Minimum Drinking Age Act forced states to raise their drinking age to twenty-one, or lose federal highway funds.² The negative side effects of that law—illustrated by the extreme example above—are leading many to call for its abolition.³ The American Recovery and

1. *SWAT Team Called in to Search WSU Fraternity*, MOSCOW-PULLMAN DAILY NEWS, Jan. 22, 2009, available at <http://www.dnews.com/breaking-news/793/>.

2. 23 U.S.C. § 158 (2006). It should be noted that some states voluntarily raised their drinking ages to twenty-one prior to the enactment of the National Minimum Drinking Age Act, but many did not.

3. See, e.g., John M. McCardell, Jr., Op-Ed., *What Your College President Didn't Tell You*, N.Y. TIMES, Sept. 13, 2004, at A23 (arguing that “the 21-year-old drinking age is bad social policy and terrible law”); Glenn Harlan Reynolds, *Hopes for the Obama Presidency: Let's Show Each Other Some Respect*, WALL ST. J., Jan. 21, 2009, at A17 (arguing that Obama should push to “eliminat[e] the federally mandated drinking age of 21”); Will Wilkinson, *Bottoms Up!*, FORBES, Sept. 29, 2008, at 28 (arguing for abolition of the drinking age).

Reinvestment Act of 2009⁴ will dole out \$144 billion to ease fiscal pressures on state and local governments, but instead of allowing them to spend the money based on their best judgments, Congress attached unattractive conditions to the grants.⁵ The No Child Left Behind Act of 2001⁶ grants money to states conditioned upon school districts meeting federally imposed education standards. The result is bad education policy the states cannot afford to abandon, lest they lose much-needed federal aid.⁷ Congress could not enact any of these policies directly. Instead, Congress used its spending power to indirectly regulate these state and local matters via conditional grants.

The Spending Clause has been interpreted to grant extremely broad discretion for Congress to offer conditional grants to the states—most recently in *South Dakota v. Dole*.⁸ Criticism of the deferential *Dole* standard abounds.⁹ Once the Rehnquist Court began reasserting federalism limits,¹⁰ however, most thought it was only a matter of time until the

4. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C.) (colloquially known as the “stimulus bill”).

5. See Ronald D. Rotunda, *Some Strings Attached: Is the Stimulus Law Constitutional?*, CHI. TRIB., Mar. 15, 2009, at C29; Mark Sanford, Op-Ed., *Cross Country: Why South Carolina Doesn’t Want ‘Stimulus’*, WALL ST. J., Mar. 20, 2009, at A9.

6. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

7. See, e.g., Sam Dillon, *Report from States Faults Bush’s Education Initiative*, N.Y. TIMES, Feb. 24, 2005, at A18 (“[A] bipartisan panel of lawmakers . . . pronounced [No Child Left Behind] a flawed, convoluted and unconstitutional education reform initiative that has usurped state and local control of public schools.”); Richard C. Herrera, Note, *Policing State Testing Under No Child Left Behind: Encouraging Students with Disabilities to Blow the Whistle on Unscrupulous Educators*, 80 S. CAL. L. REV. 1433 (2007) (documenting teachers and administrators cheating on student proficiency exams because of the high-stakes testing environment No Child Left Behind creates).

8. *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (holding a grant of federal highway funds conditioned on states raising their drinking age to twenty-one constitutional, even though Congress likely could not directly regulate state drinking-age laws because of the Twenty-first Amendment).

9. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1933 (1995) (arguing the *Dole* test “provided neither a workable definition of these critical standards nor any actual or hypothetical example of their violation”); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 118 (“A close look at [the doctrinal limits of *Dole* shows] that they are verbal constructs devoid of content.”); RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 157 (1993) (“[I]t is clear that with *Dole* . . . any constitutional challenges to [conditional federal grants] are hopeless under current law.”).

10. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding the Violence Against Women Act unconstitutional because it was not within Congress’s commerce power); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Brady Handgun Violence Prevention Act violated the Tenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional because it was not substantially related to interstate commerce); *New York*

spending power was similarly limited.¹¹ Those predictions never came to fruition.

This Note argues that the Spending Clause should be limited by reinterpreting the independent constitutional bar test described in *Dole*. Many have argued for limiting the spending power,¹² but the possibility of using the independent constitutional bar test for this purpose has been almost completely ignored.¹³ The current test tautologically bars only grants with facially unconstitutional conditions.¹⁴ The new interpretation of the independent constitutional bar test proposed in this Note would invalidate any condition that could not be pursued directly by the federal government.

This new interpretation is supported by *United States v. Butler*,¹⁵ the authoritative case on the scope of the spending power according to the *Dole*

v. *United States*, 505 U.S. 144 (1992) (holding the “take title” provision of a federal law unconstitutional because it violated the Tenth Amendment).

11. See Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 346 n.1, 347 nn.2–5, 348 nn.14–15 (2008) (summarizing the voluminous academic literature predicting and arguing for and against limiting the spending power in light of the Rehnquist Court’s New Federalism).

12. See, e.g., Baker, *supra* note 9, at 1966–67 (arguing for a distinction between “reimbursement spending” and “regulatory spending,” allowing the former while holding the latter unconstitutional); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) (arguing for a new interpretation of the coercion test to limit conditional grants); Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002) (arguing that the Court should ideally enforce a categorical ban on federal grants to the states); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1422, 1489–90 (1989) (arguing that strict scrutiny should be applied to federal grants conditioned upon giving up a constitutional right).

13. But see Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 497–99 (1995) (arguing against our current understanding of the “greater includes the lesser” argument and briefly noting that the independent constitutional bar test should have been central to the *Dole* Court’s holding); James V. Corbelli, Note, *Tower of Power: South Dakota v. Dole and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097, 1117–25 (1988) (briefly arguing for a new interpretation of both the independent constitutional bar and coercion tests). These accounts are reasonable but incomplete. This Note examines the legal origins of the independent constitutional bar test, as well as the legal and normative reasons for adopting a stricter standard. It also counters important legal and normative objections to limiting the spending power. Further, this Note offers a substantive replacement for the current test, and illustrates how it would apply to a variety of situations. This Note offers, to date, the most comprehensive approach to a more stringent independent constitutional bar test.

14. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (“[The independent constitutional bar test] stands for the unexceptionable proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”).

15. *United States v. Butler*, 297 U.S. 1 (1936).

Court.¹⁶ It also makes more sense in light of the New Federalism cases that reasserted limits on federal power.¹⁷ Federalism is not adequately protected by the political process,¹⁸ contrary to the claims of some, and this new interpretation of the independent constitutional bar test would help to preserve it. This is worthwhile since federalism tends to increase both individual liberty and overall well-being.¹⁹

This Note will proceed as follows. Part II will briefly summarize the spending power and *Dole*. It will then contrast current Spending Clause doctrine with the unconstitutional conditions doctrine, and argue against the second-class treatment afforded federalism interests. Part III will analyze the legal origins of the independent constitutional bar test, as well as *Dole*'s interpretation of it. Part III will continue by critiquing the Court's current interpretation of the independent constitutional bar test. Part IV will propose a new independent constitutional bar test that is both constitutionally and normatively superior to the current test. Part IV will also explain why political safeguards cannot be relied on to protect federalism interests, and why extremely broad interpretations of the spending power are unconvincing. Part V will conclude the Note.

II. FEDERAL GRANTS, THE SPENDING POWER, *DOLE*, AND UNCONSTITUTIONAL CONDITIONS

This part will briefly describe federal grants and Congress's spending power. Next, it will summarize *Dole*, the Court's most recent holding on the scope of Congress's power to issue conditional grants to the states. Finally, it will explore the "unconstitutional conditions" cases and argue that the Court is mistaken to restrict this rationale to conditional grants that burden only individual rights.

A. FEDERAL GRANTS: DESCRIPTION AND TRENDS

The federal government gives money to state and local governments in the form of grants.²⁰ The use of federal grants has increased dramatically over time in the United States. In 1902, federal grants accounted for less

16. *Dole*, 483 U.S. at 207 ("The breadth of [the spending] power was made clear in *United States v. Butler*.").

17. See *infra* notes 159–71 and accompanying text.

18. See *infra* Part IV.D.

19. See *infra* Part IV.C.

20. These grants are sometimes referred to as "intergovernmental grants." When this Note refers to "federal grants," it means grants from the federal government to state or local governments, unless otherwise indicated.

than 1 percent of state and local revenues; by 1952, 10 percent of state and local revenues came from federal grants; by 2006, the number was 30 percent.²¹ State governments on their own receive nearly 32 percent of their revenue from federal grants.²² In just ten years, total federal grant expenditures went from \$285 billion in fiscal year 2000, to \$653 billion in fiscal year 2010.²³ Nearly all federal grants are conditional, meaning recipients must comply with certain mandates or suffer penalties.²⁴ Congress issues intergovernmental grants, conditional or otherwise, by using its spending power.

B. THE SPENDING POWER

The spending power is derived from the Spending Clause of the Constitution, which allows Congress to “provide for the common Defence and general Welfare of the United States.”²⁵ Any discussion of the spending power should first consider the argument between Alexander Hamilton and James Madison.²⁶

Hamilton, as interpreted by the Court in *United States v. Butler*, thought the Spending Clause “confer[red] a power separate and distinct from those later enumerated,” with the limitation that this power be “exercised . . . for the general welfare of the United States.”²⁷ In Hamilton’s own words:

[T]he power to raise money is plenary and indefinite, and the objects to which it may be appropriated are no less comprehensive The terms “general welfare” were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous

21. JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 258–59 (2d ed. 2007).

22. TAX POLICY CTR., URBAN INST. & BROOKINGS INST., THE TAX POLICY BRIEFING BOOK IV-1-1 (2008), available at http://www.taxpolicycenter.org/briefing-book/TPC_briefingbook_full.pdf. Thirty-two percent of state revenue comes from intergovernmental grants, and nearly all of it comes from federal grants to the states (as opposed to grants to the states from local governments). *Id.*

23. OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES FISCAL YEAR 2011, TABLE 12.1, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/hist12z1.xls>.

24. RONALD L. WATTS, THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY 11, 13 (1999).

25. U.S. CONST. art. I, § 8, cl. 1.

26. For in-depth discussions of this topic see David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5–25 (1994) (discussing and analyzing the Madison-Hamilton debate over the spending power); John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63, 66–71 (2001) (same); and Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 8–19 (2003) (same).

27. *United States v. Butler*, 297 U.S. 1, 65–66 (1936).

exigencies incident to the affairs of a nation would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the “general welfare,” and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.²⁸

Madison thought the spending power could only be exercised within Congress’s enumerated powers.²⁹ His position was explained by the *Butler* Court: “[Since] the United States is a government of limited and enumerated powers,” it follows that “the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress.”³⁰

Madison’s argument has merit. Madison thought the Hamiltonian view of the spending power would undermine any semblance of a federalist system of government.³¹ Almost every President who served between 1800 and 1860 supported Madison’s view of the spending power.³² The Tenth

28. Alexander Hamilton, *Report on the Subject of Manufactures* (Dec. 5, 1791), in 4 THE WORKS OF ALEXANDER HAMILTON 151 (Henry Cabot Lodge ed., 1904). Hamilton qualified this statement though, writing:

The only qualification [of the general welfare clause] is this: That the object to which an appropriation of money is to be made be general, and not local No objection ought to arise from this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. . . . [Congress] would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication.

Id. at 152 (emphasis added).

29. See Eastman, *supra* note 26, at 67.

30. *Butler*, 297 U.S. at 65. In Madison’s own words, the Spending Clause was a “mere introduction to the enumerated powers, and restricted to them.” James Madison, *Supplement to November 27, 1830 Letter to Andrew Stevenson*, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 137 (Phila., J.B. Lippincott & Co. 1867) [hereinafter Madison, *Letter to Stevenson*]; James Madison, *Report on the Resolutions* (Feb. 7, 1799), in 6 THE WRITINGS OF JAMES MADISON 357 (Gallard Hunt ed., 1906) [hereinafter Madison, *Report on the Resolutions*] (noting that the Articles of Confederation had a provision almost identical to the Spending Clause in the Constitution that was interpreted to be limited to the enumerated powers, and arguing a similar restriction applies to the Constitution).

31. See Madison, *Letter to Stevenson*, *supra* note 30, at 137–38 (“[T]he alleged power to appropriate money to the ‘common defence and general welfare’ . . . swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes.”).

32. See Eastman, *supra* note 26, at 66–67, 69. For example, Thomas Jefferson wrote: [Congress is] *not to do anything [it] please[s]* to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States

Amendment lends credence to Madison's interpretation since it confirms the federal government is one of limited, enumerated powers.³³

However convincing Madison's argument was, the Court decided Hamilton's view was the law in *Butler*.³⁴ The *Butler* Court, however, noted "the adoption of the [Hamiltonian] construction leaves the power to spend subject to limitations."³⁵ Later in the opinion, the Court reiterated this point: "Hamilton himself, the leading advocate of broad interpretation of the [spending power], never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states."³⁶ The spending power was interpreted to be more expansive than Madison would have preferred, but it was not unlimited.

C. *DOLE* AND THE LIMITS ON FEDERAL CONDITIONAL GRANTS TO THE STATES

The constitutionality of the National Minimum Drinking Age Act ("NMDA")³⁷ was challenged in *Dole*. The NMDA required states to set their drinking age to at least twenty-one,³⁸ or lose 5 percent of their federal highway funds that year, and 10 percent every year thereafter.³⁹ South Dakota argued the NMDA violated the Twenty-first Amendment.

The Court did not opine on the scope of the Twenty-first

and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect.

Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON 277 (Julian P. Boyd ed., 1974).

33. 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.")

34. *Butler*, 297 U.S. at 66. See also *Helvering v. Davis*, 301 U.S. 619, 640 (1937) ("The conception of the spending power advocated by Hamilton and strongly reinforced by [Justice] Story has prevailed over that of Madison, which has not been lacking in adherents."). But see Engdahl, *supra* note 26, at 35-36 (arguing that the *Butler* and *Helvering* Courts misinterpreted the Hamiltonian argument and actually applied a Madisonian standard).

35. *Butler*, 297 U.S. at 66.

36. *Id.* at 77. See also *supra* note 28 and accompanying text.

37. 23 U.S.C. § 158 (1988) (amended 1998).

38. Actually, the NMDA only sets the age at which individuals are allowed to purchase and possess alcohol. Laws regarding consumption of alcoholic beverages vary by state. Of course, disallowing purchase and possession, in practice, dictates the age at which individuals are allowed to imbibe, so this Note will continue to use the phrase "drinking-age laws."

39. 23 U.S.C. § 158. South Dakota allowed persons aged nineteen years or older to purchase beer that was 3.2 percent alcohol by volume or less. See *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

Amendment.⁴⁰ Instead, it held that the NMDA was a legitimate use of the spending power, regardless of the Twenty-first Amendment.⁴¹ The Court relied on *Butler*, which delineates the scope of the spending power.⁴² The majority opinion held that “objectives not thought to be within Article I’s ‘enumerated legislative fields,’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”⁴³

Recognizing that the spending power is not unlimited, the Court created a four-part test to gauge the constitutionality of particular conditional federal grants.⁴⁴ First, the condition must further general welfare, but courts should “defer substantially to the judgment of Congress.”⁴⁵ Second, the condition must be clearly and unambiguously stated.⁴⁶ Third, the condition must be germane to the conditioned spending.⁴⁷ Fourth, there must be no “independent constitutional bar” to the condition;⁴⁸ that is, “the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”⁴⁹

Chief Justice Rehnquist, writing for the majority, applied this test to the NMDA and concluded the first three prongs were not seriously implicated.⁵⁰ He claimed the NMDA was an exercise of the spending power to further the nation’s general welfare, and that the conditions in the NMDA “could not be more clearly stated by Congress.”⁵¹ The Court dismissed the idea that the condition in the NMDA was not germane to the purpose of the federal highway funds because it was “directly related

40. *See Dole*, 483 U.S. at 206 (“[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.”).

41. *See id.* (“Here, Congress has acted indirectly under its spending power to encourage uniformity in the States’ drinking ages. . . . [W]e find [the NMDA] within constitutional bounds even if Congress may not regulate drinking ages directly.”).

42. *Id.* at 207.

43. *Id.* (citation omitted).

44. *See id.* (“The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases.” (citation omitted)).

45. *Id.*

46. *See id.*

47. *See id.* at 207–08 (“[C]onditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion))).

48. *Id.* at 208.

49. *Id.* at 210.

50. *See id.* at 208 (“South Dakota does not seriously claim that [the NMDA] is inconsistent with any of the first three [prongs of the *Dole* test].”).

51. *Id.*

to . . . safe interstate travel.”⁵² The NMDA was not independently constitutionally barred either, since states may regulate their drinking-age laws with impunity.

The Court, however, noted one more limitation on conditional federal grants: the condition cannot coerce states into compliance.⁵³ Citing *Steward Machine Co. v. Davis*,⁵⁴ the Court explained that a grant becomes coercive when it “pass[es] the point at which ‘pressure turns into compulsion.’”⁵⁵ Since South Dakota could have turned down the federal highway money and kept their lower drinking age, pressure had not turned into compulsion and the NMDA was not coercive.⁵⁶

There were two dissenting opinions in *Dole*. First, Justice Brennan argued the Twenty-first Amendment granted plenary power to the states to set their drinking ages, making the NMDA unconstitutional.⁵⁷ Justice O’Connor argued the test used by the majority was correct, but their application of the test was flawed.⁵⁸ Primarily, she thought the NMDA failed the germaneness prong.⁵⁹ She distinguished between a “germane” relationship and a “tangential or attenuated” relationship, arguing the stricter standard must be used for the test to have any meaning.⁶⁰ O’Connor also criticized the majority’s reading of *Butler*, arguing the scope of the spending power articulated in *Butler* was much more restricted than the

52. *Id.*

53. *See id.* at 211.

54. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

55. *Dole*, 483 U.S. at 211 (citing *Steward Machine*, 301 U.S. at 590).

56. *See id.* at 211–12. *See also id.* at 211 (“We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.”).

57. *See id.* at 212 (Brennan, J., dissenting) (“I agree with Justice O’Connor that regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment. . . . Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority.”).

58. *See id.* (O’Connor, J., dissenting) (“My disagreement with the Court is relatively narrow on the spending power issue; it is a disagreement about the application of a principle rather than a disagreement on the principle itself.”).

59. *See id.* at 213 (“[T]he Court’s application of the [germaneness] requirement . . . is cursory and unconvincing.”).

60. *Id.* at 215. O’Connor argued the relationship between allocating funds for the construction of highways and the age at which persons are allowed to possess or purchase alcohol was too tangential to pass scrutiny. *Id.* at 218. She also noted the NMDA was both under- and overinclusive; underinclusive since it did nothing to stop drunk drivers over the age of twenty-one, and overinclusive because it denied rights to the majority of young adults that do not drive drunk. *Id.* at 214–15.

majority claimed.⁶¹

The *Dole* test has garnered much criticism. Some argue the Court misinterpreted both precedent and the Constitution.⁶² Others criticize the germaneness prong as being too vague and requiring normative judgments for application.⁶³ The coercion test has been similarly criticized,⁶⁴ and lower courts struggle to apply it.⁶⁵ The first two prongs of the *Dole* test have also been denounced.⁶⁶ Nonetheless, *Dole* remains good law.

D. CONDITIONAL GRANTS TO INDIVIDUALS VERSUS CONDITIONAL GRANTS TO THE STATES

The *Dole* Court implicitly distinguished between conditional grants that burden individual rights—called “unconstitutional conditions”—and those that burden states’ rights.⁶⁷ An unconstitutional condition occurs when the “government offers a benefit on condition that the recipient

61. *Id.* at 216–17.

62. See McCoy & Friedman, *supra* note 9, at 105–17.

63. See, e.g., Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 466 (2003) (“[T]he court[s] [have] done little more than assert, without analysis or elaboration, that the challenged condition is ‘reasonably related to the federal interest in the national program.’” (quoting *Kansas v. United States*, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998))); Sullivan, *supra* note 12, at 1474–76 (“[G]ermaneness theories founder on the extreme malleability of the concept of germaneness itself. . . . [Germaneness has more to do with] disciplining governmental activity according to some independent norm of appropriate legislative process than it does with protecting constitutional rights.”).

64. See Baker & Berman, *supra* note 63, at 517–21; Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 102–03 (2001); Donald J. Mizerk, Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159, 1179–85 (1987).

65. For example, in dicta, the court in *Nevada v. Skinner* stated: Nevada, while baldly stating that withholding 95% of highway funds constitutes “coercion,” has not given us any principled definition of the word Moreover, we would seriously question the vitality of the coercion test in light of the Supreme Court’s holding in *Garcia v. San Antonio Metropolitan Transit Authority* The purpose of the coercion test is to protect state sovereignty from federal incursions. If this sovereignty is adequately protected by the national political process, we do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise. *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989). See also *West Virginia v. U.S. Dep’t of Health and Human Servs.*, 289 F.3d 281, 288–89 (4th Cir. 2002) (“[T]he coercion theory is somewhat amorphous and . . . [the] ‘endless difficulties’ in applying the coercion theory have led some courts to conclude . . . that the theory raises political questions that cannot be resolved by the courts.”).

66. See, e.g., Eastman, *supra* note 26, at 72–87 (arguing against the extremely deferential standard for the general welfare prong); Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 878–82 (2008) (arguing, inter alia, against the clear statement prong of the *Dole* test).

67. See Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 764 (2003) (noting that judicial review of the constitutionality of conditional grants is “addressed almost exclusively to the protection of individual rights . . . not states’ rights”); McCoy & Friedman, *supra* note 9, at 103–04.

perform or forego an activity that a preferred constitutional right normally protects from government interference. The ‘exchange’ thus has two components: the conditioned government *benefit* on the one hand and the affected constitutional *right* on the other.”⁶⁸ Unconstitutional conditions pose an interesting problem because conditional grants are usually allowed under the Spending Clause, but burdens on the relevant individual rights are usually subject to strict scrutiny.⁶⁹

Prior to *Dole*, the Court used the unconstitutional conditions doctrine to invalidate conditional grants that required recipients to give up individual liberties.⁷⁰ An illustrative case is *Sherbert v. Verner*,⁷¹ which held that it is unconstitutional for the government to offer benefits with conditions that burden religious freedom. At issue were federal unemployment benefits conditioned on the beneficiary being available to work on Saturdays, which went against the beneficiary’s religion.⁷² The Court viewed the condition as akin to a fine on the beneficiary’s free exercise of religion.⁷³

There is not a principled difference between *Sherbert* and *Dole*. The NMDA is akin to a fine on states’ exercising their Twenty-first

68. Sullivan, *supra* note 12, at 1421–22. See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 980–81 (3d ed. 2006) (describing unconstitutional conditions); EPSTEIN, *supra* note 9, at 5–12 (same). Sullivan argues that “rights” in this sense are not limited to individual rights, but also include “corporate rights to do interstate business or invoke federal diversity jurisdiction, [and] state rights to self-government.” Sullivan, *supra* note 12, at 1426. The Court, however, has offered more strident protection for individual rights burdened by conditional grants than states’ rights.

69. Sullivan, *supra* note 12, at 1422.

70. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (holding a federal conditional grant invalid because it abridged freedom of press); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that the government may not withhold employment from a person for exercising First Amendment rights); *Speiser v. Randall*, 357 U.S. 513 (1958) (holding a property tax exemption that required recipients to forgo certain speech unconstitutional). This doctrine was not always applied consistently, however. See Sullivan, *supra* note 12, at 1428–42, 1458–68.

71. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). See also *id.* at 405 n.6 (listing “examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity”).

72. See *id.* at 399–401.

73. The Court wrote:

The [conditional grant] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404. *But cf.* *United States v. Am. Library Ass’n*, 539 U.S. 194, 212 (2003) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.” (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980))).

Amendment right to determine appropriate drinking-age laws.⁷⁴ The *Sherbert* Court noted the “unmistakable” pressure on the grant recipient to go against her religion to receive federal benefits.⁷⁵ The grant “threatened to ‘produce a result which the State could not command directly.’”⁷⁶ The *Dole* Court took a much different approach but never explained this departure.

One explanation for the different approaches in *Sherbert* and *Dole* is that the former implicated individual rights, which deserve protection, while the latter concerned states’ rights, which do not.⁷⁷ It is not obvious that “individual rights” need more protection than “states’ rights,”⁷⁸ and the Court offered no hints as to why this might be. Besides, at bottom the NMDA abridges the rights of individuals to live in a state that has a locally deliberated drinking age.⁷⁹ Second, “there is no explicit exception of federalism cases from the Court’s jurisdiction, nor is there any other clear indication that such issues are to receive second-class status before the courts.”⁸⁰ Maybe the First Amendment’s protections are more important than the Twenty-first Amendment’s in the overall scheme of ordered liberty, but no such ranking is found in or implied by the Constitution.

Post-*Dole*, the Court’s unconstitutional conditions doctrine has been inconsistent.⁸¹ Conditions the Court finds impermissible are labeled

74. Cf. EPSTEIN, *supra* note 9, at 152 (“The situation in *Dole* is scarcely distinguishable from one in which Congress says that it will impose a tax of x percent on a state that does not comply with its alcohol regulations”); McCoy & Friedman, *supra* note 9, at 104 (“Withholding of a state-created benefit to obtain compliance, is, in effect, identical to [a fine].”).

75. *Sherbert*, 374 U.S. at 404. *But cf.* *South Dakota v. Dole*, 483 U.S. 203, 210–11 (1987) (describing the NMDA as “mild encouragement,” referring to the “prerogative of the States,” and noting that South Dakota may exercise the “‘simple expedient’ of not yielding” (citations omitted)).

76. *Sherbert*, 374 U.S. at 405 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). *But cf.* *Dole*, 483 U.S. at 207 (“[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.” (citations omitted)).

77. McCoy & Friedman, *supra* note 9, at 104 n.95.

78. See, e.g., Lynn A. Baker & Ernest A. Young, Essay, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112–28 (2001) (arguing that “federalism provisions” deserve respect equal to “individual rights provisions”).

79. This right is guaranteed by the Twenty-first Amendment, as argued in the Appendix.

80. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313 (1997).

81. Compare *United States v. Am. Library Ass’n*, 539 U.S. 194, 212 (2003) (upholding a grant to libraries conditioned upon installing Internet filters that burden individuals’ First Amendment rights, and noting that the grant “simply reflects Congress’ decision not to subsidize [libraries who do not install Internet filters]” and that “[to] the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance”), and *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding a federal regulation that prevented recipients of federal funds for family planning services from providing abortion-related counseling, and noting that “[a] legislature’s decision not to subsidize the exercise of a

unconstitutional; conditions the Court wishes to uphold are labeled as decisions not to subsidize a right.⁸² So long as *Dole* is law, states will be accorded second-class treatment under the Spending Clause. Conditional grants that burden rights, whether individual or states' rights, should receive exacting judicial scrutiny.

III. THE INDEPENDENT CONSTITUTIONAL BAR TEST: ANALYSIS AND CRITIQUE

The independent constitutional bar test has received very little attention from academic commentators.⁸³ This is a mistake. This part will first examine the legal origins and meaning of *Dole*'s independent constitutional bar test. An analysis of post-*Dole* applications of the test will follow. The final section will argue against the *Dole* Court's interpretation of the independent constitutional bar test.

A. ORIGINS OF THE INDEPENDENT CONSTITUTIONAL BAR TEST

Dole held that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."⁸⁴ In support of this proposition, the Court cited *Lawrence County v. Lead-Deadwood School District No. 40-1*,⁸⁵ *Buckley v. Valeo*,⁸⁶ and *King v. Smith*.⁸⁷ These cases offer little, if any, support for *Dole*'s independent constitutional bar test.

Lawrence County concerned the Payment in Lieu of Taxes Act,⁸⁸ which "compensates local governments for the loss of tax revenues resulting from the tax-immune status of federal lands . . . located in their jurisdictions, and for the cost of providing services related to these

fundamental right does not infringe the right" (citations omitted)), *with* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating restrictions on lawyers receiving funds from the Legal Services Corporation), *and* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (invalidating a government grant that refused funds to a university group because it was religious).

82. CHEMERINSKY, *supra* note 68, at 984. As one scholar quipped, studying the Court's unconstitutional conditions doctrine is enough "to make a legal realist of almost any reader." Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984). Presumably *Dole* converted any remaining nonrealists.

83. For exceptions, see Fudenberg, *supra* note 13, at 497-99; and Corbelli, *supra* note 13, at 1117-21.

84. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

85. *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985).

86. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

87. *King v. Smith*, 392 U.S. 309 (1968).

88. 31 U.S.C. § 6902 (2006).

lands.”⁸⁹ The local government is allowed to use this money for “any governmental purpose.”⁹⁰ South Dakota enacted a statute requiring local governments to distribute federal largesse in the same manner as general tax revenues.⁹¹ Lawrence County chose not to spend their payment in lieu of taxes in the same manner as general tax revenues, so South Dakota sued to force it into compliance.⁹² The Court held that the Supremacy Clause overrules South Dakota’s statute and the federal in-lieu-of-tax funds may be spent for any governmental purpose.⁹³

The Payment in Lieu of Taxes Act was enacted under Congress’s spending power, and the *Lawrence County* Court asserted that absent an independent constitutional bar, Congress could impose conditions on federal grants.⁹⁴ The Court cited *King* as precedent for this proposition.⁹⁵ The Court, however, did not elaborate on the precise meaning or scope of this test; it merely asserted it. Moreover, the statute at issue in *Lawrence County* did not condition receipt of federal funds on some specific action by a state or local government. Nor did it threaten to withhold funds from a state that did not comply with Congress’s specific demands. Its relevance to *Dole* is thus limited.

King concerned an Alabama statute that disallowed federal funds disbursed under the Social Security Act from going to the families of children in which “substitute fathers” were present.⁹⁶ The Court held that the Alabama statute was invalid because it undercut the purpose of the federal statute—helping poor children—since it could result in the loss of welfare benefits when the mother cohabits with a man who has no obligation to give financial support to the dependent children.⁹⁷

The *King* Court, in dicta, wrote that the federal government may place conditions on federal grants absent “some controlling constitutional

89. *Lawrence County*, 469 U.S. at 258.

90. 31 U.S.C. § 6902(a)(1).

91. *See Lawrence County*, 469 U.S. at 259.

92. *See id.* at 259–60.

93. *Id.* at 270.

94. *See id.* at 269–70 (“It is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipts of federal funds, absent some independent constitutional bar.”).

95. *Id.* at 270 n.24.

96. *King v. Smith*, 392 U.S. 309, 313–14 (1968). More specifically, the Alabama statute did not allow a family that consisted of a woman, dependent children, and a cohabitating nonmarried man to receive federal welfare benefits for which they would otherwise be eligible absent that statute. *Id.*

97. *Id.* at 313, 333.

prohibition.”⁹⁸ The Court cited *Ivanhoe Irrigation District v. McCracken*⁹⁹ and *Oklahoma v. United States Civil Service Commission*¹⁰⁰ in defense of this standard, but neither case mentions an independent constitutional bar test.¹⁰¹ This is the extent of *King*’s analysis on the issue. *King*, like *Lawrence County*, tells us there is an independent constitutional bar test, but does not explain how the test works.

Buckley v. Valeo announced an intelligible independent constitutional bar test. The relevant part of *Buckley* involved a statutory scheme for public financing of election campaigns.¹⁰² Petitioners argued this scheme violated the “general welfare” provision of the Spending Clause, and the First and Fifth Amendments.¹⁰³ The *Buckley* Court disagreed with the general welfare argument, writing that “[a]ny limitations upon the exercise of [the spending power] must be found elsewhere in the Constitution,” that is, outside of the Spending Clause.¹⁰⁴ This is a version of the independent constitutional bar test, and the Court, without making the test as explicit as the *Dole* Court, applied it to determine whether the statute at issue was “inconsistent” with the First Amendment, the Fifth Amendment, or both.¹⁰⁵ After analyzing the scope of both Amendments, the Court found the statutory scheme did not violate either one.¹⁰⁶

On this narrow issue *Buckley* is on point with *Dole*, since it concerned a conditional federal grant that might be inconsistent with parts of the Constitution outside of the Spending Clause. The only major difference is

98. *Id.* at 333 n.34 (“There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose [conditions on federal grants] and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.”).

99. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958).

100. *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127 (1947).

101. The only statement in *Ivanhoe* that comes close to conveying an independent constitutional bar test is the following: “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.” *Ivanhoe*, 357 U.S. at 295. *Oklahoma* said nothing about an independent constitutional bar test. Rather, it applied a coercion analysis: “[T]he United States . . . has no power to regulate local political activities as such of state officials, [but] it does have the power to fix the terms upon which its money allotments to states shall be disbursed.” *Oklahoma*, 330 U.S. at 143. So even though the regulation at issue would be unconstitutional under the Tenth Amendment if enacted directly, there was “[no] violation of the State’s sovereignty . . . Oklahoma adopted the ‘simple expedient’ of not yielding to what she urges is federal coercion.” *Id.* at 143–44.

102. *See Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (per curiam).

103. *Id.*

104. *Id.* at 91.

105. *Id.* at 90–97.

106. *See id.* at 90 (“We find no merit in these contentions [that the statute is conditioned upon action that is independently barred by another part of the Constitution].”)

that *Buckley* concerned federal largesse to individuals and political parties, whereas in *Dole* the states were receiving funds. The *Dole* Court's refusal to consider the scope of the Twenty-first Amendment is a departure from *Buckley*'s approach.

B. THE INDEPENDENT CONSTITUTIONAL BAR TEST AS APPLIED IN *DOLE*

In *Dole*, South Dakota argued the Twenty-first Amendment was an independent constitutional bar to the NMDA.¹⁰⁷ The Court dismissed this argument, writing that the independent constitutional bar test is “not of the kind petitioner suggests” and that *Butler* allowed for a “less exacting” limitation on Congress’s spending power.¹⁰⁸ The Court noted that conditional federal grants are “not unusual.”¹⁰⁹ It then analogized *Dole* to *Oklahoma*, in which the Hatch Act was held to be constitutional because the state could have adopted “the simple expedient” of forgoing the federal funds.¹¹⁰

After that brief analysis, the *Dole* Court announced that *Oklahoma*, *Steward Machine*,¹¹¹ and *Massachusetts v. Mellon*¹¹² established that the independent constitutional bar test prevents only grants that are conditioned on unconstitutional activity.¹¹³ Grants conditioned on “invidiously discriminatory state action” or the “infliction of cruel and unusual punishment” are examples of conditions disallowed by the Court’s interpretation of the test.¹¹⁴ Since accepting the terms of the NMDA “violate[s] the constitutional rights of [no] one,” the argument that it was independently barred by the Twenty-first Amendment failed.¹¹⁵

Notice the Court cited *Lawrence County, King*, and *Buckley* for the

107. *South Dakota v. Dole*, 483 U.S. 203, 209 (1987) (“[Petitioner argued that] ‘Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment.’”).

108. *Id.*

109. *Id.* at 210.

110. *Id.* (quoting *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 143 (1947)). The Hatch Act conditioned states’ receipt of federal funds on the “requir[ement that] those who administer funds for national needs . . . abstain from active political partisanship.” *Oklahoma*, 330 U.S. at 143. The Hatch Act would have violated the Tenth Amendment if enacted directly by Congress.

111. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

112. *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (dismissing plaintiffs’ claims for lack of jurisdiction but in dicta claiming the Court would not invalidate the conditional federal grant at issue because “[i]f Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding”).

113. *See Dole*, 483 U.S. at 210.

114. *Id.* at 210–11.

115. *Id.* at 211.

proposition of an independent constitutional bar test, but then cited *Steward Machine, Oklahoma, and Mellon* in applying the independent constitutional bar test. The latter three cases employed a coercion analysis, basically holding that, because the states could theoretically refuse the conditional grants at issue, the grants were not constitutionally problematic.¹¹⁶ Conflation of the coercion and independent constitutional bar tests is unwarranted. Application of the coercion test requires consideration of empirical facts and how they relate to the recipient of the conditional grant in question, given some normative baseline. In contrast, application of the independent constitutional bar test involves comparing the text of the conditional grant with that of the Constitution. The *Dole* Court's conflation of the independent constitutional bar test with the coercion test is puzzling.

C. THE INDEPENDENT CONSTITUTIONAL BAR TEST AS APPLIED POST-
DOLE: UNITED STATES V. AMERICAN LIBRARY ASSOCIATION

To date, no conditional federal grant has been invalidated under *Dole*'s independent constitutional bar test.¹¹⁷ The Court has only seriously considered application of the test once since *Dole*—in *United States v. American Library Association*.¹¹⁸ Unsurprisingly, the legislation was upheld.

At issue in *American Library* was the Children's Internet Protection Act ("CIPA"), a conditional grant program that required public libraries to filter Internet content that might be harmful to minors. CIPA mandated that libraries install filters on all computers, even those that are not open to the public and would be used only by the library's staff. The filters could be turned off to "enable access for bona fide research or other lawful purpose."¹¹⁹ The district court enjoined CIPA because it induced libraries

116. *Id.* at 210. See *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143–44 (1947); *Steward Machine*, 301 U.S. at 589–91; *Mellon*, 262 U.S. at 482.

117. Baker & Berman, *supra* note 63, at 465 ("As one might expect, the 'independent constitutional bar' prong of the *Dole* test has rarely come into play."); Tonnis H. Venhuizen, Note, *United States v. American Library Association: The Supreme Court Fails to Make the South Dakota v. Dole Standard a Meaningful Limitation on the Congressional Spending Power*, 52 S.D. L. REV. 565, 604 (2007) ("[In *American Library*] the Court continued its patterns of upholding exercises of the congressional spending power and avoiding use of the independent constitutional bar prong to invalidate an act of Congress.").

118. *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003). That is, *American Library* is the only case since *Dole* in which the Court thought the independent constitutional bar test prong was seriously implicated.

119. 47 U.S.C. § 254(h)(6)(D) (2006).

to violate individuals' First Amendment rights.¹²⁰

On appeal, the Supreme Court reversed the district court's enjoinder of CIPA in a plurality opinion.¹²¹ The plurality held that CIPA does not "induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power."¹²² The plurality cited *Dole* for the proposition that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives."¹²³ The plurality found CIPA's only potential violation of the First Amendment was the erroneous blocking of innocuous material by the library's filter, and dismissed it noting that patrons may ask a librarian to disable the filter.¹²⁴ Since CIPA did not violate the First Amendment, it was not independently barred.

The plurality also dismissed what it considered a separate unconstitutional conditions argument.¹²⁵ Petitioner argued that CIPA wrongly requires libraries to give up funds or sacrifice First Amendment rights, while the government argued that libraries have no First Amendment rights.¹²⁶ The plurality decided in favor of the government, because Congress can "appropriate[] public funds to establish a program [and] is entitled to define the limits of that program."¹²⁷ Moreover, the libraries theoretically had a choice in accepting the federal funds, erasing any constitutional problem.¹²⁸ The Court did not think it was important that Congress could not enact CIPA directly.¹²⁹

120. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194.

121. *Am. Library*, 539 U.S. at 214.

122. *Id.*

123. *Id.* at 203. Rehnquist, writing for the plurality, continued: "But Congress may not 'induce' the recipient 'to engage in activities that would themselves be unconstitutional,'" reiterating his tautological interpretation of the independent constitutional bar test. *Id.*

124. *See id.* at 209 ("Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled.").

125. *Id.* at 214. According to the plurality, the unconstitutional conditions doctrine holds that "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Id.* at 210 (alteration in original) (citation omitted).

126. *See id.*

127. *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). *See also id.* at 212 ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." (citations omitted)).

128. *See id.*

129. The Court had earlier invalidated direct regulation by Congress similar to CIPA. *See Venhuizen*, *supra* note 117, at 580–81.

D. PROBLEMS WITH THE COURT'S CURRENT INTERPRETATION OF THE INDEPENDENT CONSTITUTIONAL BAR TEST

The Court's current interpretation of the independent constitutional bar test is logically redundant and implausible. The test would only invalidate a conditional grant when the condition itself is facially unconstitutional. But this goes without saying; a grant that conditions funds on unconstitutional activity merely shifts the wrongdoing from Congress to the grant's recipient. If a federal grant conditioned upon unconstitutional action were enacted, it would not be necessary for the wronged party to sue the federal government under an "improper use of the spending power" argument. The wronged party could directly sue the wrongdoer. There is no reason to believe that the *King*, *Buckley*, and *Lawrence County Courts* all thought it would be important to note that paying people, states, or other entities to perform unconstitutional deeds is unconstitutional.

A more reasonable interpretation is that the test was invented to prevent conditional grants that indirectly upset the constitutional balance of powers between the federal government and state governments. This understanding flows naturally from the "inconsistent with the Constitution" language the *Buckley* Court used in applying the independent constitutional bar test. It is problematic when Congress pressures people, states, or entities into doing things that are not facially unconstitutional, but corrosive of the constitutional balance of powers.¹³⁰ The independent constitutional bar test is a way to prevent conditional federal grants that expand Congress's powers beyond those conferred by the Constitution.

IV. A NEW INDEPENDENT CONSTITUTIONAL BAR TEST

This part will propose a new understanding of the independent constitutional bar test, and will explain why it is preferable to the current test. This part will also explain why federalism needs judicial review.

A. THE NEW TEST

When considering the constitutionality of a conditional federal grant, the main question should be whether the condition is independently barred

130. This understanding of the independent constitutional bar test requires subjecting grants that burden federalism to the same scrutiny as those that burden individual rights. Cf. Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 460 (1995) ("[T]he Supreme Court's rationale for the distinction between individual rights and states' rights is seriously flawed."). See *supra* Part II.D for criticism of this disparate treatment.

by the Constitution. This Note submits the following interpretation of the independent constitutional bar test:

Compare the conditional grant at issue with the Constitution; if the condition would be unconstitutional when undertaken directly by the federal government, then it is independently barred by the Constitution.¹³¹

Some explanation of the meaning and ramifications of the New Test follows.

Application of the New Test would lead to the same result as the current independent constitutional bar test in some instances. For example, a grant to a state conditioned on its outlawing abortion would be disallowed under the New Test.¹³² The federal government cannot directly outlaw abortion,¹³³ and under the New Test, it would not be allowed to condition receipt of federal grants on such action.

The New Test would not require violation of any individual right to give it effect. Take for example, a conditional grant that threatens to withhold funds unless a state requires a general election be used to fill vacant Senate seats.¹³⁴ The Seventeenth Amendment gives state legislatures the right to allow their executive to appoint new senators.¹³⁵ Since the federal government cannot interfere with this process directly, it

131. This Note will refer to this new interpretation of the independent constitutional bar test as the “New Test” to avoid confusion with the current test. This Note’s analysis of the pros and cons of the New Test will focus on federalism issues. The New Test, however, would protect purely individual rights as well. The New Test is similar to some other suggested limits on the spending power. *See, e.g.*, Choper, *supra* note 130, at 464 (“The Court could hold that Congress has an independent spending power, but does not have authority to condition its spending on conduct it could not directly require using one of its regulatory powers.”); Sullivan, *supra* note 12 (arguing the Court should apply a strict scrutiny analysis to conditional grants that burden individual rights, corporate rights, and state sovereignty); Corbelli, *supra* note 13, at 1117–21 (arguing the independent constitutional bar test should be used to disallow Congress to indirectly regulate through the spending power). I hope this Note (1) ties together some disparate areas of concern; (2) clearly details the problems of the current test and describes the benefits of adopting the New Test; and (3) by carefully probing precedent and situating the New Test within *Dole*, shows that a more constrained spending power is not as radical as it at first might seem.

132. This would not be allowed under the current independent constitutional bar test either.

133. *See Roe v. Wade*, 410 U.S. 113, 152–56 (1973).

134. In the wake of the Rod Blagojevich scandal, such a grant is not unrealistic. For a description of the Blagojevich scandal, see Monica Davey, *Governor Accused in Scheme to Sell Obama’s Senate Seat*, N.Y. TIMES, Dec. 10, 2008, at A1.

135. U.S. CONST. amend. XVII (“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”).

would not be able to do so indirectly via conditional grants under the New Test.

There are more difficult cases where it will be unclear whether the New Test bars a conditional grant; namely, grants conditioned on a constitutional issue that has not been settled by the Court. For example, the Court has not yet ruled on what constitutional rights, if any, cryogenically frozen individuals possess. This is a difficult question because such individuals are legally dead but expect to be brought back to life in the future.¹³⁶ Imagine a conditional grant to the states that withheld federal funds unless they outlawed reanimation of cryogenically frozen individuals. Assume further that succumbing to this condition would force cryogenic labs to renege on their contracts to reanimate the frozen individuals when technologically feasible. Would direct regulation in this vein be a violation of the Contracts Clause? Does it violate frozen individuals' due process rights? The answer is not obvious and the Court has not ruled on the issue. Such a ruling would be necessary for the New Test's application.

Grants to the states that do not interfere with the boundaries of federal, state, and individual autonomy delineated by the Constitution would not be barred by the New Test. For instance, grants that have no conditions attached or that merely match funds spent by the state would not be unconstitutional. An example of a conditional grant that would be valid under the New Test is one conditioned on a state's illicit drug laws falling in line with the Federal Controlled Substances Act. For instance, Congress could withhold federal funds from California for allowing medical marijuana prescriptions, because after *Gonzalez v. Raich*,¹³⁷ Congress can regulate medical marijuana under its commerce power. Thus, the New Test does not make the spending power impotent, but merely prevents the federal government from indirectly regulating in areas where it may not directly regulate.¹³⁸

136. Odd as it sounds, technology is advancing such that this feat might one day be possible, and if it happens legal systems will have to adapt to this new reality. See DAVID D. FRIEDMAN, *FUTURE IMPERFECT* 249–59 (2008).

137. *Gonzales v. Raich*, 545 U.S. 1 (2005).

138. For a further look at how the New Test would work in practice, see the Appendix, which applies the New Test to the NMDA.

B. THE NEW TEST IS BETTER THAN THE COURT'S CURRENT SPENDING
CLAUSE DOCTRINE

1. The New Test Comports Better with *Butler* than the Current Test

Dole relied heavily on *Butler*, asserting it “resolv[ed the] longstanding debate over the scope of the Spending Clause.”¹³⁹ The *Butler* Court espoused the Hamiltonian position on the spending power, but was careful to note that the power was nonetheless a limited one.¹⁴⁰ The *Butler* Court was very skeptical of conditional federal grants:

[C]onstitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. . . . In reality, the [recipient of the conditional grant] is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.¹⁴¹

The *Butler* Court would invalidate any conditional federal grant in which the recipient surrendered rights or sovereignty, even if it was possible to prove the acceptance of the condition was entirely voluntary in a meaningful sense of the term.¹⁴² Coercion and notions of free will are a non sequitur for the real issue concerning conditional grants: Does the Constitution allow a particular conditional grant? The New Test is an attempt to provide a workable answer that fits with *Butler*.

Additionally, the *Butler* Court never countenanced the differential treatment of unconstitutional conditions and conditional grants to the states. To the contrary, that Court's approach is much the same as the New Test's:

139. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

140. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 835 (3d ed. 2000) (noting that the *Butler* Court held that “[t]he General Welfare Clause thus confers only the power to tax and spend . . . ; it confers, however, no independent power to regulate”); *supra* Part II.B.

141. *United States v. Butler*, 297 U.S. 1, 72 (1936) (quoting *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926)). See also *id.* at 70–71 (“The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy.”); *id.* at 71 (“It is clear that the [Agricultural Adjustment Act is] properly described [as a plan] to keep a noncooperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory.”).

142. See *id.* at 72–73 (“But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. . . . The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.”).

The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.¹⁴³

The classification of unconstitutional conditions as a separate issue from conditional federal grants, recently reaffirmed in *American Library*, is unwarranted.¹⁴⁴

The New Test also fits well with the Court's interpretation of the spending power in *Buckley* and *Sherbert*. The *Buckley* Court would not recognize conditional federal grants that are inconsistent with the Constitution.¹⁴⁵ *Sherbert* held that a government benefit cannot be conditioned on an individual giving up a constitutional right.¹⁴⁶ The New Test is consistent with both cases and is animated by the same concern—maintaining the constitutional balance of powers.

Some argue that the Constitution does not greatly limit the spending power, so judicial review more probing than *Dole* should not be adopted.¹⁴⁷ These scholars conceive of the spending power as “plenary”¹⁴⁸ and find that “no limit on the scope of the spending power can be reasonably inferred from the text of the Constitution.”¹⁴⁹ Finding limits on the spending power outside of the Spending Clause, like the Tenth Amendment, is not warranted because the spending power is enumerated.¹⁵⁰ Defenders of the broad spending power also point to *Butler*'s adoption of a broad, Hamiltonian spending power.

Arguments for an unlimited spending power, based on interpretation of the Constitution, are unconvincing. Given the Tenth Amendment, it is implausible that the Spending Clause grants Congress the power to regulate

143. *Id.* at 62.

144. *See supra* Part II.D.

145. *See supra* notes 102–06 and accompanying text.

146. *See supra* notes 71–76 and accompanying text.

147. *See, e.g.,* Chemerinsky, *supra* note 64, at 93 (“[T]he spending power authorizes Congress to tax and spend to ‘provide for the common Defence and general Welfare of the United States.’ It is hard to imagine a broader statement of the scope of Congress’s power.”).

148. Earl M. Maltz, *Sovereignty, Autonomy and Conditional Spending*, 4 CHAP. L. REV. 107 (2001).

149. Chemerinsky, *supra* note 64, at 93.

150. *See id.* at 97.

virtually anything indirectly via conditional grants.¹⁵¹ Justice O'Connor recognized this point:

If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."¹⁵²

Also, since it would be necessary to tax and spend to effectuate Congress's enumerated powers in Article I, Section 8, it is not clear that the Spending Clause is a separate enumerated power rather than a Madisonian-style enabling clause.¹⁵³

Interpreting *Butler*'s declaration of a Hamiltonian spending power to mean it is unlimited is also wrong, because it ignores the large limitations placed on the spending power by the *Butler* Court's interpretation. Some have noted that the *Butler* Court misunderstood Hamilton's position and really adopted a Madisonian spending power.¹⁵⁴ One may reasonably object that neither Madison's nor Hamilton's interpretation of the spending power matters. The *Dole* Court, however, explicitly relies on *Butler*, and the *Butler* Court explicitly claimed to adopt the Hamiltonian view of the spending power. So, it matters what both the *Butler* Court and Hamilton thought about the spending power. Despite lip service paid to *Butler*, *Dole* extends the spending power to "virtually any secular activity,"¹⁵⁵ a result that neither *Butler* nor Hamilton would find agreeable. If *Butler* really is the seminal spending power case, we have a constrained Madisonian-like spending power that is Hamiltonian only in name; whatever the label, it is more restrained than the *Dole* majority held.¹⁵⁶

151. See McCoy & Friedman, *supra* note 9, at 91.

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

153. See Natelson, *supra* note 26, at 47 ("Anti-Federalist suggestions that [the Spending Clause] might grant independent power were firmly rebutted by Federalists. The Federalists' agreement to the Tenth Amendment was their seal on the bargain.")

154. See TRIBE, *supra* note 140, at 836 n.14 ("[D]espite the [*Butler*] Court's protestations to the contrary, [its holding] most certainly *does* ascertain the scope of the spending power (and . . . ironically, adopts the *Madisonian* position that the spending power applies only to authority granted elsewhere in the Constitution."); Engdahl, *supra* note 26, at 35–37.

155. TRIBE, *supra* note 140, at 839 ("[I]nternal limits on congressional spending power are difficult to discern. [Post-*Dole*] [i]t is not clear that any form of spending is beyond the positive scope of the spending power.")

156. A thought experiment might illustrate this point. Imagine a confused American tourist dines at a restaurant in the Middle East. The tourist tells the waiter: "I'd like a shish kebab, you know, fried

The Constitution does not give a clear description of the limits of the spending power, and it is probably true that the Framers did not consider the problems posed by conditional spending.¹⁵⁷ An interpretation that gives Congress powers that are in drastic contravention to the constitutional framework otherwise provided, however, is not warranted.¹⁵⁸

2. The New Test Makes More Sense in Light of the New Federalism

In 1987, a scholar wrote: “[N]ot much is left that is so local that Congress cannot regulate it in some fashion. If the front door of the commerce power is opened, it may not be worth worrying whether to keep the back door of the spending power tightly closed.”¹⁵⁹ Then came the New Federalism cases that purported to limit Congress’s power by “tightening” the Tenth Amendment and Commerce Clause.¹⁶⁰ Suddenly the “back door” was worth worrying about for the first time since the 1930s.¹⁶¹ If Congress can no longer regulate virtually anything under the Commerce Clause, then it is troubling to allow indirect regulation of almost anything via the Spending Clause.¹⁶²

The Court disallowed federal government “commandeering” of state

chickpeas formed into balls and stuffed into a pita.” The tourist obviously desires falafel, but has called it by the wrong name. Should the waiter bring out skewers of meat and vegetables (shish kebabs) or falafel? The waiter should correct the patron and serve falafel. Analogously, if the *Butler* Court called its interpretation of the spending power “Hamiltonian” but described a constrained Madisonian position, we should infer that the Court was actually advocating a constrained Madisonian spending power.

157. Maltz, *supra* note 148, at 109.

158. Choper makes much the same point:

The Court has been hesitant to impose marked limits on the Congressional spending power because it has adopted the Hamiltonian view that the spending power is an independent power. There is a feeling that if the spending power is an independent power, then Congress must be able to engage in conditioned spending. However, that does not logically follow. The Court could hold that Congress has an independent spending power, but does not have authority to condition its spending on conduct it could not directly require using one of its regulatory powers.

Choper, *supra* note 130, at 464.

159. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987).

160. See cases cited *supra* note 10.

161. See, e.g., Baker, *supra* note 9, at 1916 (“[T]he *Lopez* majority should reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause.”); Angel D. Mitchell, Note, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161, 195 (1999) (“The federal government should not be allowed to dispense benefits to produce results it may not command directly [in light of New Federalism decisions].”).

162. See Choper, *supra* note 67, at 765 (“It seems plain that truly imposing substantive limits on Congress’s regulatory reach, which the rhetoric of *Lopez* and *Morrison* describe, . . . will require the Court to address the Spending Clause.”).

legislatures and executives in its Tenth Amendment cases.¹⁶³ Conditional grants from Congress have an effect analogous to federal commandeering, because “the whole point of attaching conditions to . . . grants is to give state governments incentive to implement policies they would not adopt of their own independent volition.”¹⁶⁴ The Court is also concerned with states’ accountability to their populaces, and sees commandeering as diminishing this accountability.¹⁶⁵ Conditional grants diminish states’ accountability because they effectively pay states not to respond to the preferences of their local population.¹⁶⁶

The Commerce Clause cases were concerned with maintaining a “dual system of government,”¹⁶⁷ which means limiting the scope of the national government’s power to allow a sovereign sphere for state governments.¹⁶⁸ Conditional grants erode state sovereignty and are thus inimical to the dual sovereignty required by the Constitution as interpreted by the Court.¹⁶⁹

The Court’s approach to the Tenth Amendment and the Commerce Clause is not very important if these limits on Congressional power may be avoided via conditional grants. If it is true that “[s]tate officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution,”¹⁷⁰ then logical coherence would seem to require the Court to somewhat restrict Congress’s spending power, or else the New Federalism is a moot point.¹⁷¹

163. *Printz v. United States*, 521 U.S. 898, 928 (1997) (“[States should not be] ‘reduc[ed] to puppets of a ventriloquist Congress.’ It is . . . essential [that states] remain independent and autonomous within their proper sphere of authority.” (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975))).

164. *Somin*, *supra* note 12, at 482.

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

166. *Somin*, *supra* note 12, at 484. *See also* Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 177 (2001) (“Where the state retains the ability to determine whether to participate in a federal program . . . [it] retains the ability to respond to and implement the will of the local electorate.”).

167. *United States v. Lopez*, 514 U.S. 549, 557 (1995) (“[I]n the light of our dual system of government [the commerce power] may not be extended so as to embrace effects upon interstate commerce so indirect and remote that . . . would effectually . . . create a completely centralized government.” (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))).

168. *See id.* at 566–68 (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation [under the Commerce Clause]. . . . [We are unwilling to recognize that there is not] a distinction between what is truly national and what is truly local.”).

169. *See Baker*, *supra* note 9, at 1988.

170. *New York*, 505 U.S. at 182.

171. *Raich* might suggest that *Lopez* and *Morrison* were anomalies. *See Gonzales v. Raich*, 545

3. Article V is the Only Legitimate Method of Changing the Constitutional Balance of Powers

Conditional grants can be used to change the constitutional balance of powers without the supermajority consensus required by Article V. Allowing Congress to use the spending power to ignore parts of the Constitution it finds inconvenient is akin to allowing Congress to amend the Constitution by non–Article V means.¹⁷² Article V details the procedures for amending the Constitution; it is not optional. The Constitution is by no means perfect, but the extremely high democratic bar it and subsequent Amendments had to clear should give us confidence in its dictates.¹⁷³ Alternatively, the many well-known problems inherent in the Congressional legislative process should leave us somewhat skeptical of the legislation it begets.¹⁷⁴ The New Test prevents federal conditional grants from undoing hard-fought victories of constitutional deliberation.

C. THE BENEFITS OF FEDERALISM

1. The New Test and Federalism

A major benefit of the New Test is that it will better ensure some measure of the interstate diversity provided by federalism, from which

U.S. 1 (2005) (relying on *Wickard v. Filburn*, 317 U.S. 111 (1942), to hold that the federal government may, through the Commerce Clause, regulate marijuana grown for wholly intrastate use). At the very least, it suggests the Court will use *Wickard*-style reasoning when convenient. But the Court has not backed down from its new Tenth Amendment jurisprudence, and it did not explicitly overrule *Lopez* and *Morrison* in *Raich*. Federalism is still alive as a doctrine in U.S. constitutional law, and locating the spending power within our federalist system of government is still relevant.

172. See Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1469 (2001) (“Article V sets out a detailed, and difficult, process for amending the Constitution The absence of judicial review would allow Congress to circumvent Article V and arguably ‘amend’ the Constitution by simple legislation”).

173. See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1170–81 (2007) (arguing that supermajority voting rules for constitutional provisions increase the likelihood that such provisions will accurately reflect the public interest and better satisfy the general public’s preferences over the long term).

174. Congressional legislation suffers from incoherency, logrolling, organized lobbying that can lead to policies favoring special interest groups at the expense of the general public, and other problems. Two classic works in this area are JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962), and MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). Good summaries of some of these problems include DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 17–62 (1991) (offering a critical summary of rent-seeking and social choice theory problems of the democratic process); and William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 377–401 (1988) (summarizing problems inherent in majority rule legislative processes). The supermajority voting requirements in Article V lessen these negative effects.

everyone can benefit.¹⁷⁵ The principled argument for federalism—apart from the fact that it is mandated by the Constitution—does not deem “states’ rights” valuable insofar as those rights empower state governments.¹⁷⁶ Rather, the value of states’ rights “derives entirely from their utility in enhancing the freedom and welfare of individuals.”¹⁷⁷ The separation of “individual rights” and “states’ rights” is a false dichotomy; the latter is often a means of securing a greater measure of the former.

Conditional grants undermine federalism. As one scholar wrote, “[B]oth state and federal legislators have strong incentives to support grant programs. Like Pandora’s box, the pork barrel trough of federal subsidies is enormously tempting, highly destructive of important values, and difficult to close once opened.”¹⁷⁸ Conditional grants from the federal government make society as a whole worse off by reducing states’ responsiveness to the preferences of their inhabitants and reducing competition between states to become more attractive to inhabitants (“horizontal competition”).¹⁷⁹

In a large, heterogeneous society like the United States, a federal government that imposes “one-size-fits-all” solutions on its populace is bound to decrease aggregate utility.¹⁸⁰ This is because the populations of the various states tend to have diverse preferences, and federal legislation only satisfies one set of preferences.¹⁸¹ State and local governments are in a better position to recognize and respond to their population’s preferences, and therefore decentralized government is likely to increase aggregate social welfare.¹⁸²

175. See generally Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002) (arguing that liberals (and everyone else) should favor judicial enforcement of federalism); John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 127 (2004) (“Judicial intervention on behalf of federalism benefits the citizens of the whole nation, not state governments . . .”).

176. See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”); McGinnis & Somin, *supra* note 175, at 106–12.

177. Baker, *supra* note 175, at 444. See also CHEMERINSKY, *supra* note 68, at 313–16 (noting three often-mentioned non-states’-rights benefits of federalism: “[D]ecreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to be laboratories for new ideas”).

178. Somin, *supra* note 12, at 463.

179. *Id.* at 464–71.

180. See Baker, *supra* note 9, at 1947–54; Somin, *supra* note 12, at 464–68; Michael W. McConnell, *Federalism: Evaluating the Founder’s Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (book review).

181. See McConnell, *supra* note 180, at 1493–94; Somin, *supra* note 12, at 464–68.

182. Baker, *supra* note 175, at 450 (“In the absence of consensus, imposition of a uniform national

An example may help illustrate this point.¹⁸³ Imagine a nation comprised of two states, *A* and *B*, each with populations of exactly 100 voters. Assume 70 percent of *A*'s voters want to outlaw same-sex marriage and 40 percent of *B*'s voters wish the same. The rest of both states' voters are in favor of legalized same-sex marriage. If the decision is made at the national level, same-sex marriage is outlawed. One-hundred-ten people are content with that outcome and 90 are upset. If the decision is made at the state level, however, *A* outlaws same-sex marriage and 70 people are happy, and *B* legalizes it and 60 people are happy, leaving a total of 130 people satisfied and 70 dissatisfied. Under the decentralized scenario, aggregate utility is increased.

Federalism will also tend to satisfy a greater number of individual preferences due in large part to the ability to “vote with one’s feet.”¹⁸⁴ As long as there is interstate mobility and diverse preferences,¹⁸⁵ governments will have to respond to local preferences or (1) lose population—and tax revenue—as residents vote with their feet, or (2) risk being voted out of office.¹⁸⁶ Notice in the hypothetical above, the decentralized scenario would allow individuals that care deeply about same-sex marriage to move to the other state if their current state does not satisfy their preferences. National legislation on the issue allows no such recourse.

Conditional federal grants centralize decisionmaking, since the grants often require states to submit to Congress’s preferred public policy.¹⁸⁷

solution will almost always satisfy fewer people, and may therefore result in decreased aggregate social welfare, than allowing for state-by-state variation.”). This Note uses “decentralized” to describe state and local governments, as in contrast to the “centralized” federal government.

183. This hypothetical is a slightly modified version of Michael W. McConnell’s example in McConnell, *supra* note 180, at 1494. All credit for this hypothetical should go to him.

184. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (the classic article on the topic); GRUBER, *supra* note 21, at 262–64 (summarizing the Tiebout model).

185. The Tiebout model is undermined if mobility is limited, but at least in the United States, where 20 percent of the population moves every year, this is not much of a concern. See Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 3, 12 n.8 (John Ferejohn & Barry R. Weingast eds., 1997).

186. Somin, *supra* note 12, at 465. During the early part of the Soviet Union’s reign, East Germany saw many of its inhabitants vote with their feet in response to communism. The Soviet Union reacted by erecting the Berlin Wall, which allowed the government to keep its subjects without responding to their preferences. GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, GOVERNMENT FAILURE 75 (2002).

187. James Madison wrote presciently on this topic:

Whether [a lax interpretation of the Spending Clause] would not by degrees consolidate the States into one sovereignty, is a question [where there is] little room for difference of opinion. . . . [B]y extending the sovereignty of the United States to all cases of the “general welfare” [the Spending Power is extended] *to all cases whatever*.

Conditional grants are rarely refused,¹⁸⁸ which stifles interstate diversity in public policy.¹⁸⁹ State governments will often accept conditional grants even when the condition mandates a policy choice that a majority of the state's citizens oppose, because federal grants are a great bargain. Most of any federal grant will be paid for by tax revenue from other states, which skews the cost-benefit analysis in favor of accepting the grant.¹⁹⁰ Refusal of federal funds can put states at a competitive disadvantage, because it has the effect of subsidizing the other states.¹⁹¹ Finally, there are potentially adverse political consequences for state politicians who refuse "free money" from the federal government.¹⁹² Therefore, we should expect conditional grants from Congress to homogenize state-level public policy and decrease aggregate utility.

Federalism also fosters horizontal competition, which occurs when state and local governments compete with each other to offer the most attractive package of benefits at the lowest cost.¹⁹³ This is related to, but different from, the aggregate utility-enhancing effects of federalism. That argument assumes decentralized governments merely respond to local preferences. Horizontal competition occurs when state governments intentionally attempt to lure new inhabitants by offering an attractive package of goods and services at a reasonable cost.¹⁹⁴ Without this pressure from competing governments, there would be less incentive for state governments to give citizens a "good deal." Absent competition, governments often act like monopolists, extracting rents at the expense of their citizens.¹⁹⁵

Madison, *Report on the Resolutions*, *supra* note 30, at 357.

188. See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1140 (1997) ("[F]iscal and political realities make it difficult for states and local governments to turn down any offers of federal aid.").

189. Somin, *supra* note 12, at 465–67.

190. McConnell, *supra* note 180, at 1496 ("Where the benefits of government action are predominantly local but financing is national, each community can be expected to pursue projects even where total cost exceeds the actual benefit. Local decisionmakers will take into account only the local portion of the cost, since the national portion will be effectively 'free.'").

191. See Baker, *supra* note 9, at 1948–49; Somin, *supra* note 12, at 466.

192. See Somin, *supra* note 12, at 466.

193. See Baker, *supra* note 9, at 1947.

194. See GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX* 171–86 (1980); McConnell, *supra* note 180, at 1498 ("[S]maller units of government have an incentive, beyond the mere political process, to adopt popular policies."); Somin, *supra* note 12, at 468 n.34 (citing many horizontal competition sources from the "vast" literature on the subject).

195. McConnell, *supra* note 180, at 1498 ("A consolidated national government has all the drawbacks of a monopoly . . ."). McConnell was writing about "vertical competition," which is competition between the federal government and state governments. The point applies to horizontal

Conditional federal grants undermine horizontal competition.¹⁹⁶ Federal largesse serves as a replacement for the revenue received from taxpayers. If governments wish to increase their revenue, then absent federal grants, horizontal competition will proceed to capture as much tax revenue as possible. Grants from the federal government, which comprise 32 percent of all revenue to state governments,¹⁹⁷ lessen state governments' incentives to provide an attractive bundle of services because they replace tax revenue.¹⁹⁸ This is further aggravated by the fact that it is usually cheaper for a state to lobby for federal grants than to compete with other states to offer better policies and governance.¹⁹⁹

States with policies that conform to the national majority's preferences can also use federal conditional grants to "cartelize" and force noncooperative minority states into line.²⁰⁰ This tactic prevents potentially beneficial horizontal competition. For instance, if a majority of states are in favor of outlawing medical marijuana, but a minority of states want to legalize it, the Congressional representatives from the majority states can pass a grant conditioned on states outlawing medical marijuana.²⁰¹ This cartel-like activity has two negative effects. First, it prevents horizontal competition by impeding minority states from enacting their preferred legislation. This leads to more instances in which no state's policies satisfy individuals' preferences.²⁰² Second, it puts the cartel members—the majority states—in a better position at the expense of the minority states.²⁰³ The minority states must choose between succumbing to the condition and giving up a horizontally competitive advantage (and presumably the policy preferred by its populace), or refusing the money and putting itself at a financial disadvantage.²⁰⁴ Empirical evidence suggests that "collusive

competition as well. Without horizontal competition, state governments can act like monopolists in much the same way as a consolidated national government.

196. See BRENNAN & BUCHANAN, *supra* note 194, at 183 ("[Grants from the federal government to the states] subvert[] the primary purpose of federalism, which is to create competition between jurisdictions."); Baker, *supra* note 9, at 1950–51.

197. See *supra* note 22.

198. See Somin, *supra* note 12, at 469–70.

199. See *id.* at 470.

200. See *id.* at 470–71; Baker, *supra* note 9, at 1947–54; McKinnon & Nechyba, *supra* note 185, at 29 ("[W]hen nonbenign lower-tier governments find themselves under healthy competitive pressures [owing to horizontal competition] they can seek to reduce these pressures by agreeing to collude and having the central government act as an enforcer of their collusive agreements.").

201. See Baker, *supra* note 9, at 1948.

202. Baker, *supra* note 175, at 438.

203. Baker, *supra* note 9, at 1949.

204. Baker, *supra* note 175, at 437 ("[We should] expect such conditional funding legislation to

political behavior” has caused federal grant policy to deviate from optimal public finance theory.²⁰⁵

Federalism is usually associated with political conservatism, but as explained above, individuals of all political persuasions should favor some measure of federalism, and be wary of conditional federal grants that subvert it.²⁰⁶ Even progressive critics of the New Federalism²⁰⁷ recognize that federalism can advance liberal as well as conservative goals.²⁰⁸ But federalism is not always good. There are notable examples in which federalism has been used for nefarious purposes, such as slavery and Jim Crow laws.²⁰⁹

These examples merely illustrate the importance of setting a “constitutional floor” below which individual liberty may not fall, however; and in fact, with the Reconstruction-era Amendments to the

be enacted only if a (substantial) majority of states . . . already willingly comply with, or favor, the stated condition, and the conditional offer of funds is therefore no less attractive to them than a similar unconditional offer. For the states in the majority (and their congressional representatives), a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other [minority] states.”)

205. McKinnon & Nechyba, *supra* note 185, at 30. Some argue that conditional grants expand the choices available to states and actually enhance state autonomy. See Maltz, *supra* note 148, at 113–16. This is not plausible. Most conditional grants can be understood as the federal government “offering to return the states’ money to them, often with unattractive conditions attached.” Baker, *supra* note 9, at 1937. Earl M. Maltz argues further: “[I]f state autonomy is really an important concern, we should be concerned less about elaborating new, judicially-created doctrines and more concerned about using the political process to insist that Congress respect local prerogatives in its legislative actions.” Maltz, *supra* note 148, at 116. As explained in *infra* Part IV.D, there is little hope for the political process to protect state autonomy. Reconciling this with Maltz’s statement that “there can be little doubt that . . . the Constitution is premised on the view that states will retain [autonomy]” is difficult. Maltz, *supra* note 148, at 112. If not judges, who will protect state interests?

206. For example, (nonconservative) Justice Brennan wrote on the topic of federalism and how it can safeguard individual liberty. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

207. See, e.g., Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 396 (2002) (“The new federalism [is] a radical attempt to undermine [the] constitutional commitment to fairness and basic dignity, [and] is disturbing as a matter of principle and doctrine.”).

208. See *id.* at 408–21 (arguing the New Federalism decisions should be used to prevent federal criminalization of partial-birth abortions, and to allow physician-assisted suicide and the use of medical marijuana).

209. But see David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Migration by African-Americans*, 76 TEX. L. REV. 781, 840 (1998) (arguing that federalism “protected African-Americans to some degree [by allowing them to migrate to the less racist Northern states] when the various branches of the federal government evinced little interest in civil rights, and sometimes were affirmatively hostile to equal protection of the laws”).

Constitution, the incorporation of the Bill of Rights to the states via the Fourteenth Amendment, and the constitutional guarantees in the various state constitutions, there is already a fairly robust floor in place.²¹⁰ In a perfect world, federalism would be unnecessary. Federalism is a solution for the real world. It is the best way to simultaneously satisfy diverse preferences while maintaining robust protections for individual liberty.²¹¹ The New Test, by somewhat limiting the spending power, will protect federalism better than *Dole*.

2. When Federalism is Problematic

Federalism does not always bring good outcomes.²¹² It could be argued that federal conditional grants often mitigate problems associated with federalism, and thus a more constrained spending power will be harmful. Some arguments along these lines are extreme: “[A] virtually *infinite* range of social needs and problems *require* federal spending.”²¹³ A more tenable version of this argument is that conditional federal grants are needed to solve some national problems, like “races to the bottom” or interstate externalities.²¹⁴ The New Test is not a ban on conditional federal grants, merely a more intellectually defensible doctrine for deciding the constitutionality of such grants.

The case of transfer payments to the poor raises the classic race to the bottom concern. If welfare payments were done strictly at the state level, each state might “attempt[] to export the problem of poverty by setting welfare benefits so low that the poor will migrate to high-benefit states.”²¹⁵ The result could be no state offering adequate transfer payments, lest it become a “welfare magnet” that attracts poor residents and imperils the fiscal well-being of the state.²¹⁶ The New Test would not prevent the

210. See Baker, *supra* note 175, at 441, 449. Of course we could have more constitutionally guaranteed liberties, but federalism is just as likely to be used as a force for expanding liberty (for example Massachusetts legalizing same-sex marriage) as it is for curtailing it.

211. See *id.* at 439–42.

212. See, e.g., FARBER & FRICKEY, *supra* note 174, at 76–77 (noting that “[i]nterstate competition hampers inefficient regulation, but it can also hamper efficient regulation as well” and also describing “race to the bottom” concerns and the likelihood of decreased wealth redistribution when there is horizontal competition between states); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 666 (6th ed. 2003) (noting that externalities can occur in federalist systems and that “[t]he central government must make sure that states do not . . . interfere with maximization of aggregate *national* wealth”).

213. Chemerinsky, *supra* note 64, at 92 (emphasis added).

214. See *id.*

215. McKinnon & Nechyba, *supra* note 185, at 8.

216. See Baker, *supra* note 175, at 439 n.22; Somin, *supra* note 12, at 477–78. *But see* Craig Volden, *Entrusting the States with Welfare Reform*, in *THE NEW FEDERALISM: CAN THE STATES BE*

federal government from making transfer payments to individuals.²¹⁷ If there were strings attached to the grants, then the unconstitutional conditions doctrine would apply. The New Test might prevent the federal government from using conditional grants to shape *state-level* welfare policy, depending on how far the Court extends its recent Tenth Amendment revival.

Interstate externalities pose another problem for federalism, but do not always require federal conditional grants.²¹⁸ The same self-interest that prevents state governments from solving externality problems afflicts the federal government as well, and the states and industries that cause the most interstate externalities usually have more lobbying power than the parties attempting to prevent the externality.²¹⁹ Also, interstate externalities are often overstated for reasons of political expediency, and the likely efficacy of the grants in solving the problem is often exaggerated.²²⁰ Coasean bargaining should also be possible, leading to more efficient outcomes, since most interstate problems occur between only a few states (and often just two), and transaction costs should be relatively low.²²¹ The use of conditional grants to solve interstate externalities is not hopeless, but we should be cautious in judging their efficacy. Regardless of arguments on this issue, the New Test would not completely shut out the federal government from policing interstate externalities.

We would be better off with more federalism, though an entirely decentralized system is unwise. The New Test would restore some of the

TRUSTED?, *supra* note 185, at 65, 73 (“[T]he evidence is that welfare magnets seem only weakly attractive.”).

217. Nothing in the Constitution prevents the federal government from making direct transfer payments to individuals.

218. See Somin, *supra* note 12, at 473–74.

219. *Id.* at 475. Since both political parties at the federal level are “currently dominated by national interests [that are] largely beholden to corporate and other wealthy interest groups,” assuming federal beneficence is misguided. Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 1025 (2002).

220. Take the case of the NMDA, where it was claimed that nonuniform drinking ages caused severe interstate externalities. Careful studies show that the conditional grant program enacted by the NMDA has not saved lives, calling into question the extent of the interstate externality in the first place. See Mike A. Males, *The Minimum Purchase Age for Alcohol and Young-Driver Fatal Crashes: A Long-Term View*, 15 J. LEGAL STUD. 181, 182 (1986) (“[Researchers and policy makers] drastically overestimated the life-saving potential of a national [drinking age] of twenty-one.”); Jeffrey A. Miron & Elina Tetelbaum, *Does the Minimum Legal Drinking Age Save Lives?*, 47 J. ECON. INQUIRY 317, 332 (2009) (“[T]he [national minimum legal drinking age] fails to have the fatality-reducing effects that previous articles have reported.”).

221. Somin, *supra* note 12, at 475–77. *But see* POSNER, *supra* note 212, at 666 (noting some obstacles to Coasean bargaining in the context of interstate externalities).

interstate diversity lost to the increasing use of conditional federal grants. This is a nice side-effect, but regardless of how the New Test would affect federalism, it should be adopted because it is a more plausible reading of both precedent and the Constitution.

D. WHY JUDICIAL REVIEW OF FEDERALISM IS NECESSARY

Courts have abandoned judicial review of the federalism aspect of conditional spending. Since the New Test essentially advocates for judicial review of federalism, it is necessary to explain why, as a general matter, such review is important. Some prominent commentators have argued that the democratic process provides sufficient protection for federalism interests, making judicial review unnecessary.²²² Federalism, however, is not adequately protected by these “political safeguards.” For this reason, courts should apply judicial review to federalism issues because they are the only institution that can realistically safeguard federalism.

One political safeguards of federalism theory holds that judicial review for federalism issues is unnecessary since Congress is composed of representatives and senators elected to represent the people of the various states, and the states—through the Electoral College—elect the President. Both Congress and the President are beholden to state interests and so state interests should be well represented in the national government.²²³ A newer theory contends that “the decentralized American party systems . . . protect[] the states by making national officials politically dependent upon state and local party organizations,” thereby obviating the need for judicial review.²²⁴

Even if we assume there are robust political safeguards of federalism, it does not follow that judicial review is unwarranted. Political safeguards arguments assume that states’ interests are adequately represented in the

222. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) (“[T]he national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions . . . on the domain of the states.”); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176 (1980) (“Judicial review of federalism issues cannot be . . . justified [in contrast to judicial review for individual rights]. Numerous structural aspects of the national political system serve to assure that states’ rights will not be trampled”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 233–87 (2000) (arguing that Wechsler was correct about political safeguards of federalism, but that political parties, and not the Congress and President, are what provides this protection).

223. See Wechsler, *supra* note 222, at 544.

224. Kramer, *supra* note 222, at 278.

political process. This line of reasoning leads to absurd results. Individuals directly elect their congressional representatives and vote for presidential electors, so under a political safeguards theory judicial review of individual rights is unnecessary.²²⁵ This result is absurd because most realize that democratic representation does not guarantee constitutionally sound results.

Without judicial review, majorities can take away individual rights from disfavored minorities; judicial review can safeguard individual liberty. The same is true of states' rights: "A majority of states . . . could consistently use the political process to exclude the interests of a minority of states."²²⁶ Since one of the major benefits of federalism is that it secures greater individual liberty, the political safeguards theories fail at a conceptual level.

Even if these theories were conceptually sound, they ignore the reality that the political safeguards of federalism are in fact remarkably weak. There are three groups that can ensure the federal government will not encroach upon state autonomy: individual voters, state officials, or federal officials. Any theory that contends there are political safeguards in place to protect federalism ultimately claims one or more of these groups will monitor the national government and intervene if federalism boundaries are crossed.²²⁷ Neither individual voters nor federal officials have sufficient incentive to perform this monitoring task,²²⁸ however, and state officials lack the power to enforce federalism limits.²²⁹

225. See Baker & Young, *supra* note 78, at 128–33; Prakash & Yoo, *supra* note 172, at 1472.

226. Prakash & Yoo, *supra* note 172, at 1472 n.52.

227. Larry D. Kramer claims that political parties safeguard federalism. Political parties are merely an amalgam of individual voters, state officials, and federal officials, so this Note does not analyze them as a separate entity. In any case, political parties cater more to national special-interest groups than state governments. See, e.g., Frymer & Yoon, *supra* note 219, at 1025.

228. For a useful framing of constitutional federalism as a principal-agent problem, see McGinnis & Somin, *supra* note 175, at 93–105; and David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009) (arguing that democratic government presents a principal-agent problem and judges, via judicial review, can better execute important monitoring and coordination functions than a dispersed lay populace).

229. *But see* Galle, *supra* note 66, at 882 (arguing that "no convincing evidence presently exists to demonstrate that the reasonably rational decisions of self-serving [state] officials in fact undermine federalism. . . . [T]he burden is on proponents of judicial intervention to explain why judges should set aside the freely-made decisions of uncoerced public officials"). State governments, however, now receive 32 percent of their revenue from federal grants, most of them conditional. Assume arguing that half of the money has strings attached that are undesirable from the state's point of view. How many state governments could really afford a 16 percent decrease in revenue? Moreover, state government officials, for a variety of reasons, will not always represent states' long-term interests in preserving federalism and state sovereignty. See Garrett, *supra* note 188, at 1127–31.

Individual voter ignorance prevents voters from curbing federal aggrandizement.²³⁰ Almost one-third of American adults are “political ‘know nothings’ who possess little or no useful knowledge of politics.”²³¹ Less than 40 percent of American adults can name both senators from their state, and even smaller percentages know their senators’ political parties.²³² Only a minority of Americans know the basic functions of the three branches of government and which agencies and officials are involved in various issues.²³³ Knowledge of politicians’ voting records and stances on various policy issues is “close to nil.”²³⁴ Levels of political knowledge are not improving.²³⁵ Widespread ignorance, however, does not prevent people from voting.

Many social scientists think voter ignorance is a consequence of the incentives faced by individual voters, and thus classify it as “rational ignorance.” In short, “it is irrational to be politically well-informed because the low returns from data simply do not justify their cost in time and other resources.”²³⁶ The chances of influencing a presidential election in the United States are about one in 70 million, so there is little incentive to become well informed because any individual vote has almost no chance of influencing the election.²³⁷

Another theory about voter behavior is the rational irrationality theory,

230. See McGinnis & Somin, *supra* note 175, at 94–97 (summarizing evidence of and reasons for voter ignorance).

231. *Id.* at 95. See also Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. (forthcoming Dec. 2010) (“Surveys consistently confirm that the vast majority of the public does not regularly ‘follow what’s going on in government and public affairs,’ and that people are largely unaware of congressional actions.”).

232. BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* 95 (2007). Furthermore, only half of all adults know that each state has two senators, and only 25 percent know the length of a senator’s term in office. *Id.*

233. McGinnis & Somin, *supra* note 175, at 95.

234. CAPLAN, *supra* note 232, at 95–96. See also Bar-Siman-Tov, *supra* note 231 (“[P]eople [are] rarely aware of even a single policy position taken by their district representatives . . .”).

235. See McGinnis & Somin, *supra* note 175, at 95.

236. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 259 (1957). Given the low expected returns from voting “most voters are unlikely to spend as much time ‘shopping’ for a congressperson as for a television set.” JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 15 (1997).

237. TULLOCK, SELDON & BRADY, *supra* note 186, at 7. Voting can be contrasted with private transactions, where participants are sufficiently incentivized to become well informed, at least for important decisions. For instance, few people decide where to live, or purchase an automobile, without investing in knowledge relevant to those transactions. See *id.* at 6–8; Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 271–72 (2006).

which holds that many voters will maximize their well-being by possessing irrational political beliefs, and voting accordingly.²³⁸ A rationally ignorant voter simply would not know about federal conditional grants or politicians' views on particular grants. A rationally irrational voter might support conditional grants because he or she will feel good for doing so, not due to a defensible political philosophy or a careful study of the likely consequences of the grants.²³⁹

Neither rational ignorance nor rational irrationality theories bode well for the idea of citizen-guardians of constitutional federalism. Federalism is a complicated and nonobvious method to distribute power between governments. Given the paucity of political knowledge possessed by most individuals, it is implausible to assume that most understand the concept of federalism or why conditional grants might be harmful, let alone that voters will act as watchdogs for these issues.²⁴⁰ Instead, many vote for politicians who enact conditional grants that go against their and the general public's best interests.²⁴¹ And given rational irrationality, many voters will maximize their utility by supporting politicians who favor such policies.²⁴²

238. See generally CAPLAN, *supra* note 232, at 114–204 (advancing a theory of rational irrationality to explain why democratic processes lead to suboptimal public policy). Observations of the general public's irrationality are not new. See THUCYDIDES, THE PELOPONNESIAN WAR § 1.20 (Richard Crawley trans., 1874), reprinted in THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 15 (Robert B. Strassler ed., The Free Press 1996) (“There are many other unfounded ideas current among the rest of the Hellenes, even on matters of contemporary history which have not been obscured by time. . . . So little pains do the vulgar take in the investigation of truth, accepting readily the first story that comes to hand.”).

239. See CAPLAN, *supra* note 232, at 19 (“Voters typically favor the policies they perceive to be in the general interest of their nation. . . . Voters almost never take the next step by critically asking themselves: ‘Are my favorite policies effective means to promote the general interest?’ In politics as in religion, faith is a shortcut to belief.”).

240. McGinnis & Somin, *supra* note 175, at 96. But see generally ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 205–27 (1998) (arguing that “voting cues” help uninformed voters vote as if they were informed, minimizing the negative effects of voter ignorance). For counterarguments, see CAPLAN, *supra* note 232, at 106–08; Somin, *supra* note 237, at 262–68; and Eric Crampton, Political Ignorance and Policy Preferences (March 3, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352661.

241. See TULLOCK, SELDON & BRADY, *supra* note 186, at 7 (“[V]oters are . . . likely to be badly informed and may favor a politician or policies that are directly contrary to their interest.”); Somin, *supra* note 237, at 273 (“If most citizens have little or no knowledge of politics and public policy, it is likely that many legislative actions are not actually products of the popular will in any meaningful way.”).

242. This is because any one vote has “only an infinitesimal influence” and so voters have no incentive to vote rationally; in fact, their incentives are to vote irrationally, for reasons that maximize their utility rather than optimize public policy. CAPLAN, *supra* note 232, at 140–41.

Rational ignorance or irrationality is just one symptom of a larger problem faced by individual voters: a collective action problem that undermines any incentive to monitor the national government to sufficiently protect federalism interests. The large number of voters in federal elections leads to a “free-rider” problem.²⁴³ Monitoring the federal government’s actions is a public good, but the costs of doing so are high, encouraging individuals to “free ride” on the monitoring of others, drastically lowering the amount of monitoring.²⁴⁴ Even well-informed voters may be tempted to free ride. Additionally, with so many voters, transaction costs are high and thus coordinated bargaining to solve the collective action problem will be very difficult.²⁴⁵ Relying on individual voters to protect against conditional grants that undermine federalism is nearly hopeless.

Expecting federal officials to ensure that states’ interests will not be subservient to federal interests is the least plausible of the political safeguards arguments.²⁴⁶ Federal politicians compete with state politicians for power.²⁴⁷ Respecting federalism is antithetical to this quest for power.²⁴⁸ Further, given that both Congress and the President are elected by

243. McGinnis & Somin, *supra* note 175, at 98.

244. *Id.*

245. *Id.* Judicial review can help solve these monitoring and coordination problems. See Law, *supra* note 228, at 730 (“Constitutional courts with the power of judicial review perform monitoring, signaling, and coordination functions that facilitate the exercise of popular control over the government.”).

246. Madison’s famous warning is pertinent:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

247. Cf. Kramer, *supra* note 222, at 223–24 (“Federal politicians will want to earn the support and gratitude of local constituents by providing desired services themselves—through the federal government—rather than giving or sharing credit with state officials. State officials are rivals [of federal officials], not allies . . .”).

248. The realist or public choice account of politicians’ motivations is often derided as being too simplistic. Some commentators note that politicians often pursue multiple goals, like “reelection; power and prestige in Washington; and ideology and desire to make good public policy.” Bar-Siman-Tov, *supra* note 231 (describing the viewpoint advanced in RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973)). Even assuming this is correct, it still does not follow that federal officials will ensure federalism interests are protected. Federal officials increase their power and prestige by expanding federal jurisdiction over state and local matters. Moreover, it is probably true that many in the federal government are ideologically opposed to federalism, or at least do not believe it is good public policy (without regard to whether the nonfederalist policies are allowed by a reasonable reading of the constitution).

individual voters, with their attendant lack of monitoring, federal officials will often be free to ignore federalism, especially with conditional grants that are nontransparent and difficult to understand.²⁴⁹ Federal officials have both the ability and the incentives to ignore federalism limits on national government.²⁵⁰

There is another structural limitation on the likelihood of federal officials policing themselves—“the lack of a credible commitment to enforcing federalism.”²⁵¹ Federal legislators could theoretically protect federalism by favoring legislation that advances their substantive policy goals while not encroaching upon state sovereignty. But even if we assume noble legislative intentions, the lack of real-life enforcement of federalism disincentivizes federal officials from respecting those constraints. This is especially true in the context of conditional grants, since the lax *Dole* standard allows virtually any such grant without regard to its effect on the balance of federal and state power. This leads to a “tragedy of the commons” situation, in which no individual legislator has sufficient incentive to protect federalism limits without enforcement of those limits.²⁵² If federal officials “hold back on pursuing their preferred [substantive] policies for the sake of federalism, they take a risk that their forbearance will result in neither a coherent federalism *nor* their preferred substantive policies.”²⁵³ We should not expect federal officials to protect federalism, even if we assume good intentions on their part.

State governments both have incentive to care about limiting conditional federal grants and largely lack the ignorance and collective action problems that plague individual voters, making them a natural choice to police the national government on federalism issues.²⁵⁴ The Seventeenth Amendment, which mandates that senators be elected by popular vote in each state, eviscerated the power of state governments to check their federal counterparts. Additionally, there are some incentives that push state officials to voluntarily support, or at least acquiesce, in the abdication of federalism.

State interests were afforded reasonable protection in the Senate prior

249. See Somin, *supra* note 12, at 484–87.

250. See McGinnis & Somin, *supra* note 175, at 103–05.

251. *Id.* at 99.

252. *Id.* at 100.

253. *Id.* (emphasis added).

254. Yoo, *supra* note 80, at 1400 (“State legislatures, as opposed to the people of a state, were perhaps the only institutions that had a consistent, long-term interest in protecting state sovereignty.”).

to the Seventeenth Amendment. During this period, state legislatures elected senators for their state and told them how to vote.²⁵⁵ Senators that disobeyed their state legislature were often forced to resign, regardless of whether their term was up.²⁵⁶ Special-interest groups could easily lobby individual House representatives to support legislation that helped their constituency while ignoring federalism, but lobbying senators to do the same was much more difficult, since it required “the acquiescence of majorities in the state legislatures that senators represented.”²⁵⁷

Ratification of the Seventeenth Amendment made senators beholden to the voters in their state instead of state legislators, which ended the most effective political safeguard of federalism. State officials can efficaciously monitor senators, but dispersed voters cannot.²⁵⁸ Evidence that political safeguards no longer protect states’ interests can be found in the form of the “state governmental entities, such as legislators, attorney generals, and governors, [that have] organize[d] into national interest groups to make their interests known in the political process.”²⁵⁹ True political safeguards for federalism would not depend on state governments lobbying Congress to consider their interests.²⁶⁰

Other factors contribute to state officials’ passive attitude toward federalism as well.²⁶¹ Politicians often consider only the short-term effects of legislation, which can lead state officials to support legislation that undermines their autonomy in the long run.²⁶² For example, “[A]bsen[t] judicial review, *some states* will harness the federal lawmaking power to impose their policy preferences on *other states* to the former states’ own advantage.”²⁶³ States have a myriad of short-term reasons for seeking these

255. See Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1036 (1994).

256. *Id.*

257. *Id.* at 1038.

258. *Id.* at 1041 (“One legislator in a body of forty legislators can have some practical control over a senator’s behavior; one voter in a constituency of several million cannot. Moreover, because they elected and instructed senators, legislators had an incentive to monitor their behavior . . .”). This is straightforward given the rational ignorance or irrationality theories, and collective action problems that plague individual voters.

259. Yoo, *supra* note 80, at 1400.

260. *Id.* (“The very presence of these groups and outside mechanisms indicate that the political safeguards have failed. States should not have to organize into national lobbying groups if, as the political safeguards theory holds, they could pursue their interests directly through their elected representatives in Congress.”).

261. See, e.g., Garrett, *supra* note 188, at 1127–31; Somin, *supra* note 12, at 464–73.

262. See Prakash & Yoo, *supra* note 172, at 1478.

263. Baker & Young, *supra* note 78, at 117.

impositions.²⁶⁴ Whatever the reason, in the long run, federalism is undermined by these incentives.²⁶⁵

Political safeguards of federalism arguments fail at both a conceptual and practical level. Conceptually, political safeguards say nothing about the need for judicial review. Practically, neither individual voters, state officials, federal officials, nor any political party (which is merely a collection of these groups) has sufficient incentive or power to enforce federalism. If judges do not protect federalism, no one will.

V. CONCLUSION

The Court's current spending power doctrine is untenable. The authoritative spending power case, *Butler*, argued for a limited spending power that would prevent many conditional federal grants allowed today under *Dole*. The Court should adopt a new interpretation of the independent constitutional bar test set forth in *Dole*. This New Test would find conditions on grants to the states unconstitutional if the condition could not be undertaken directly by the federal government. The New Test is more faithful to (non-*Dole*) precedent and the Constitution. It would better ensure some measure of federalism, which tends to advance individual liberty and overall well-being. The New Test is important because without judicial review, federalism will not be adequately safeguarded.

264. *Id.* at 118–21.

265. Baker, *supra* note 175, at 437 (“The ability to impose conditions on offers of federal funds to the states . . . undermine[s] the autonomy of *all* states[—even those in the majority—]in the long run.”).

VI. APPENDIX: APPLYING THE NEW INDEPENDENT CONSTITUTIONAL BAR TEST TO THE NMDA

This Appendix considers whether the NMDA would be constitutional if the Court applied the New Test. The Twenty-first Amendment is the only other part of the Constitution that is relevant for application of the New Test. The Court would have to determine whether Congress could directly regulate state drinking ages. Though the Court has never directly ruled on the issue, it would very likely find that Congress cannot directly regulate state drinking ages. If the Court reached this conclusion, the NMDA would be unconstitutional under the New Test.

The *Dole* Court remarked that the scope of the Twenty-first Amendment “escaped precise definition”²⁶⁶ and did not opine on whether Congress can regulate state drinking ages.²⁶⁷ An examination of the Twenty-first Amendment shows that states have the exclusive police power to impose regulations on alcoholic beverages within their borders, however, including setting their drinking-age laws.²⁶⁸

Prior to the ratification of the Eighteenth Amendment in 1919, states had the exclusive police power to regulate alcohol within their borders. In 1847, the Court held that this police power rested solely with the states.²⁶⁹ This view was reaffirmed in *Mugler v. Kansas*, decided in 1887.²⁷⁰ The

266. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). This is in part because of poor drafting. See Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons From the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 217–20 (1995) (noting the second clause of the Twenty-first Amendment is poorly drafted).

267. See Corbelli, *supra* note 13, at 1117–21 for an earlier consideration of whether Congress can directly regulate state drinking-age laws.

268. The contemporary Court’s general interpretation of the Twenty-first Amendment also supports this assertion. See, e.g., Berman, *supra* note 12, at 30 n.117 (“Although the Twenty-First Amendment does not on its face extend [the] plenary power [to regulate drinking-age laws], previous decisions of the Court had strongly suggested that the Amendment should be construed to repose absolute control of the liquor trade in the states.”).

269. *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. 504, 632 (1847) (“The police power, which is exclusively in the States, is alone competent to the correction of these great evils [associated with alcohol abuse] . . .”). Moreover:

A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government.

Id. at 588.

270. See *Mugler v. Kansas*, 123 U.S. 623, 659 (1887) (“[States have the right] to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate

pre-Eighteenth Amendment situation is best summarized as follows:

[B]efore the 18th Amendment, the state and federal governments had reached a general accommodation on the balance of authority between the state police power and national commerce power. The states had the authority to regulate purely local affairs, such as rules governing the manufacture and consumption of alcohol, especially with respect to bars and saloons where alcohol was sold and consumed on premises. The federal government retained complete control over matters involving interstate commerce.²⁷¹

States' drinking-age laws were regulated solely by the states before national Prohibition.

The Eighteenth Amendment eviscerated the states' police power to regulate alcohol. Section 1 banned the manufacture, sale, or transportation of intoxicating alcoholic beverages into the United States and territories subject to its jurisdiction.²⁷² Section 2 read: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."²⁷³ Both Congress and the states had the police power to enforce Prohibition. In reality, because of the Supremacy Clause, this section gave the federal government dominion over the regulation of alcoholic beverages.²⁷⁴ Section 2 was integral to the Eighteenth Amendment since the regulations it sought to impose in Section 1 could not be countenanced otherwise. Most complaints about the Eighteenth Amendment were really complaints about the abolition of a localized system of alcohol regulation.²⁷⁵

Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment.²⁷⁶ Section 2 of the Twenty-first Amendment restored the balance of power that existed before ratification of the Twenty-first

rights secured by the Constitution of the United States. The power to establish such regulations . . . reaches everything within the territory of a state not surrendered to the national government." (citation omitted).

271. Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & LIBERTY 609, 620 (2005).

272. U.S. CONST. amend. XVIII, § 1.

273. *Id.* § 2.

274. Zywicki & Agarwal, *supra* note 271, at 621 (noting that the Volstead Act allowed states to impose stricter regulations but not different or weaker ones).

275. 76 CONG. REC. 4144 (1933) (statement of Sen. Wagner) ("[Most objections were] not at all concerned with liquor. It was a question of government: how to restore the constitutional balance of power and authority in our Federal system which had been upset by national prohibition.").

276. U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

Amendment.²⁷⁷ States retained their police powers to regulate alcoholic beverages, and Congress could regulate the interstate liquor trade.²⁷⁸ This much could be implied from Section 1; Section 2 was added to ensure that states did not discriminate in favor of in-state alcohol interests in violation of the dormant Commerce Clause, and to allow voluntarily dry states to exercise their police powers to remain dry.²⁷⁹ The hypothetical Section 3, which Congress considered but deliberately left out of the Twenty-first Amendment, cements this interpretation.²⁸⁰

Section 3 would have held: “Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.”²⁸¹ This section would have given Congress, along with the states, concurrent police power to regulate wholly intrastate alcohol matters, much like Section 2 of the Eighteenth Amendment.²⁸² Section 3 was ultimately omitted from the Twenty-first Amendment because including it would have meant ignoring the major failing of the Eighteenth Amendment: granting federal control over purely local matters.²⁸³ Returning police power to the states to regulate liquor was the best remedy for the problems caused by national Prohibition.²⁸⁴

277. Zywicki & Agarwal, *supra* note 271, at 627 (“Section 2 [restores] the traditional constitutional balance between the state and federal governments”); Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1633 (2000) (“[S]ection two merely returned the authority that the Eighteenth Amendment had taken from the states—the use of their police powers to enact alcoholic beverage regulations subject to the . . . Commerce Clause.”).

278. Douglass, *supra* note 277, at 1633.

279. This was to remedy a problem that existed pre-Eighteenth Amendment, namely that dry states could not effectively exercise their police powers to prevent liquor that originated in a wet state from being shipped to it. The Wilson and Webb-Kenyon Acts were enacted prior to the Eighteenth Amendment to solve this problem. Section 2 of the Twenty-first Amendment can be seen as incorporating the protections of the Wilson and Webb-Kenyon Acts into the Constitution. See Zywicki & Agarwal, *supra* note 271, at 613–20, 622–25.

280. See *id.* at 628 (“The key to understanding the rejection of Section 3 is to remember that Section 1 embodies the real purpose of the 21st Amendment—to repeal the 18th Amendment and thereby prevent the federal government from regulating alcohol.”).

281. 76 CONG. REC. 4141 (1933).

282. Zywicki & Agarwal, *supra* note 271, at 625.

283. See 76 CONG. REC. 4146 (statement of Sen. Wagner) (“The real cause of the failure of the eighteenth amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits. Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure and futility. No law can live unless it finds lodgment in the public conscience and is nourished by public support.”).

284. See 76 CONG. REC. 4226 (statement of Sen. Tydings) (“[Regulation of alcoholic beverages] is a local question, and it can be solved best in the communities that have to deal with it. This Government never was conceived with the idea that we would reach out into every community and

Legislative history from the Twenty-first Amendment's ratification process lends credence to this interpretation. Senator Robert Wagner stated that Section 3 would let the federal government regulate the "age of [alcoholic beverage] purchasers."²⁸⁵ Senator Joseph Robinson affirmed that it should be "left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported."²⁸⁶ Section 3 would have been antithetical to this purpose. Senator John Blaine argued that federal control over local affairs, like the regulation of alcoholic beverages, went against the Constitution, and so opposed Section 3.²⁸⁷ Representative Clarence Lea noted it would be absurd to include Section 3, since it allowed the federal government to force (voluntarily) dry states to sell liquor within their borders.²⁸⁸ Since Section 3 was struck from the Twenty-first Amendment, we can infer that only states have the power to control their respective drinking-age laws.

The Court's general approach to the Twenty-first Amendment is supportive of an interpretation that states have plenary power to regulate their drinking ages.²⁸⁹ The most recent case defining the scope of the

govern the habits and the morals . . . of people in those communities. . . . The sooner we give [the power to regulate liquor] back to the States the sooner we shall establish law and order and decency and some respect for government.").

285. 76 CONG. REC. 4147 (statement of Sen. Wagner) ("If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are sold. . . . If that is to be the history of the proposed amendment—and there is every reason to expect it—then obviously we have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of section 3.").

286. 76 CONG. REC. 4225 (statement of Sen. Swanson and response of Sen. Robinson). Thus, Senator Robinson successfully moved the Senate to a vote to strike Section 3 from the Twenty-first Amendment. *Id.* at 4171, 4179. *See also* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 356 (1987) (O'Connor, J., dissenting).

287. 76 CONG. REC. 4143 (statement of Sen. Blaine) ("Surely, Mr. President, it was never designed that our [federal] Constitution would be compilation of local ordinances regulating the lives, the customs, and the habits of our people. But that is exactly the character of the eighteenth amendment. It has no place in the Constitution."). For further evidence, see this statement from Blaine:

[S]ection 3 is . . . contrary to section 2 of the [proposed Twenty-first Amendment]. . . . The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the states are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment.

Id.

288. 76 CONG. REC. 2776 (1933) (statement of Rep. Lea) ("The fact that such a power [as the proposed Section Three] is seriously proposed to be placed in the Constitution should excite the opposition of all.").

289. In *Dole*, both dissenting Justices Brennan, *see* South Dakota v. Dole, 483 U.S. 203, 212 (1987) (Brennan, J., dissenting), and O'Connor explicitly argued that the Twenty-first Amendment

Twenty-first Amendment is *Granholm v. Heald*.²⁹⁰ The issue was whether states may ban direct shipment of wine from out-of-state wineries, while allowing it from in-state wineries.²⁹¹ The Court held that the Twenty-first Amendment gives states wide latitude to regulate liquor,²⁹² but does not exempt Congress from regulating the *interstate* liquor trade through the Commerce Clause.²⁹³ Thus, states are not allowed to adopt regulations on alcoholic beverages that discriminate in favor of in-state interests.²⁹⁴

Given *Granholm*, the Court would only allow Congress to interfere with drinking-age laws if it found them within the ambit of the Commerce Clause. After *Raich*, some caution is warranted in pronouncing that states unequivocally have the sole power to regulate their drinking-age laws.²⁹⁵ Even so, it is likely the Court would rule that the Twenty-first Amendment guarantees the states the right to choose their drinking age.

If the Twenty-first Amendment prevents the federal government from directly regulating state drinking-age laws, then the New Test would prevent Congress from indirectly regulating in this area via conditional grants. If Congress can directly regulate state drinking-age laws, then under the New Test it can offer grants conditioned on states conforming to Congress's drinking-age law preferences. Given the likelihood of Congress lacking the power to directly regulate state drinking-age laws, the NMDA would probably be ruled unconstitutional under the New Test.

granted states the unilateral power to determine their drinking ages, *see id.* at 218 (O'Connor, J., dissenting) (“[T]he regulation of the age of the purchasers of liquor, just as the regulation of the price at which liquor may be sold, falls squarely within the scope of those powers reserved to the States by the Twenty-first Amendment.”).

290. *Granholm v. Heald*, 544 U.S. 460 (2005).

291. *Id.* at 465–72.

292. *Id.* at 489 (“State [liquor] policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.”). *See also id.* at 488 (“The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”).

293. *Id.* at 484 (“[There is] strong support for the view that § 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts[,] . . . ‘[c]onstitutionalizing the Commerce Clause framework established under those statutes.’” (quoting *Craig v. Boren*, 429 U.S. 190, 205–06 (1976))).

294. *Id.* at 476 (“Section 2 [of the Twenty-first Amendment] does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.”).

295. *See Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (holding that the Commerce Clause allows Congress to regulate the wholly intrastate, noncommercial cultivation and possession of marijuana for medicinal purposes in accordance with California state law). Since *Wickard v. Filburn*, 317 U.S. 111 (1942), the case that supplied the *Raich* rationale, and *Raich* itself, both dealt with cultivation (of wheat and marijuana, respectively) it is hard to see how either could apply to drinking-age laws. Rather, drinking-age laws are social regulations more akin to the issues raised in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). *See supra* note 10.