

THE BOUNDS OF CONGRESS’S SPENDING POWER

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The Spending Clause of the Constitution, unlike all the other enumerated powers granted to Congress, allows its exercise to provide for the general welfare. This Article addresses the extent to which that aspect of the Spending Clause permits the federal government to circumvent limits inherent in the other enumerated powers. It considers why the Spending Clause alone would permit pursuit of the general welfare and posits that spending is different from the other enumerated powers in that it necessarily involves a voluntary transaction: if the federal government spends money to buy a good or service, there must be a willing seller. This Article uses this insight to reanalyze some old-chestnut spending-power cases, from which it derives the principle that the spending power is limited to spending subject to budget constraints. This in turn means that the government may not exercise the spending power for purchases induced by a threat that is unrelated to the interest of the federal government in ensuring that it obtains the quality of the goods or services it purchases and does not spend more than necessary to obtain them. The focus on spending as involving the exercise of noncoercive powers of government leads to the further conclusion that the federal government should not have the power to purchase coercive exercises of governmental power from the states. This Article applies these two limitations to the Trump Administration’s threats to withhold grant funding from sanctuary cities and concludes that certain requirements the Administration seeks to impose on local and state governments as a condition on receipt of grant money is beyond the federal government’s spending power.

TABLE OF CONTENTS

| | |
|---|---|
| INTRODUCTION | 2 |
| I. LESSONS FROM TWO OLD CHESTNUTS | 5 |
| A. <i>United States v. Butler</i> : It’s All About Spending | 5 |
| B. <i>Steward Machine</i> : Extortion Is Not Spending | 7 |

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| II. LESSONS UNLEARNED: TWO MORE RECENT CASES | 10 |
| A. <i>South Dakota v. Dole</i> : A Wrong Turn in the Badlands | 10 |
| B. <i>National Federation of Independent Business v. Sebelius</i> : Coercion Unmoored | 14 |
| III. GETTING BACK TO SPENDING | 18 |
| IV. COOPERATIVE FEDERALISM: LIMITS ON BUYING STATE REGULATION | 23 |
| V. FEDERAL GRANTS AND SANCTUARY CITIES: A TIMELY SPENDING-POWER CONTROVERSY..... | 27 |
| CONCLUSION | 30 |

INTRODUCTION

The Constitution’s authorization of the powers of Congress—the so-called enumerated powers—is known for limiting the powers of the federal government to specified ends.¹ Thus, common wisdom asserts that these powers exclude general police powers,² which are powers to pursue the amorphous end of the “general welfare.”³ If that exclusion is the design of the enumerated powers, however, the taxing and spending power sticks out. It is the very first power listed in the enumeration, and it explicitly states that Congress “shall have the Power To lay and collect Taxes . . . to pay the Debts and provide for the Common Defence and *general Welfare* of the United States”⁴ It is tempting to think, therefore, that the common wisdom about the enumerated powers is mistaken. But, if the enumerated powers were meant to allow the federal government to pursue the general welfare, that raises the question: what need does the Constitution have for specifying the remaining 17 powers in Article I?

1. See *Bond v. United States*, 572 U.S. 844, 854 (2014) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder . . . [t]he Federal Government . . . has no such authority and ‘can exercise only the power granted to it.’”) (quoting *McCulloch v. Maryland*, 4 Wheat 316, 405 (1819)); see also Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014).

2. *Bond*, 572 U.S. at 854 (“The States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’”) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

3. For a definition of “police power” see, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 392–93 (1926) (stating that an ordinance must be justified under the police power that serves the public welfare including health, morals, safety, and general welfare of the community); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (stating that States may exercise their police powers, which are defined as “an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of people” even if it impacts contractual obligations of citizens); Randy Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 485 (2004) (stating that the police power has been construed to empower States to protect health, safety, and morals of the general public, but ultimately arguing that individual rights should be the emphasis of the state police power).

4. U.S. CONST. art I, § 8, cl. 1 (emphasis added).

By no means am I the first to consider the potential for the spending power to allow Congress to circumvent limits on its other enumerated powers. In fact, that very issue was debated by Alexander Hamilton and James Madison shortly after the Constitution was ratified.⁵ More recently, scholars addressed that issue in light of the Supreme Court having limited Congress's power under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. These scholars addressed whether the Supreme Court's reluctance to impose similar limits on the spending power "gives Congress a 'back door' through which [Congress can] accomplish policy goals that otherwise are unattainable pursuant to its enumerated powers."⁶ But scholarship on the Spending Clause, to date, has failed to focus on what it is about spending that might have prompted the framers to allow Congress to address broader ends under the Spending Clause than pursuant to Congress's other enumerated powers.⁷

In this Article, I answer the question of the ability of Congress to circumvent limits on the other enumerated powers by focusing on some classic spending-power cases from the era when the Court switched from actively policing the powers of government, federal and state alike, to deferring to political decisions that implemented the New Deal. One of those cases, *United States v. Butler*,⁸ is not considered good law today; the other, *Steward Machine Co. v. Davis*,⁹ while never overruled, has been massaged by subsequent Supreme Court cases into a different limiting principle than the Court drew regarding Congress's spending power. But, despite the Court's deviation from the limitations on congressional power recognized by these cases, an enlightened reading of them makes clear that the key to limiting the spending power is that it must be an exercise of budget-constrained

5. THE FEDERALIST NOS. 30, 34 (Alexander Hamilton); THE FEDERALIST NO. 41 (James Madison); *see also* *United States v. Butler*, 297 U.S. 1, 65–68 (1936) (discussing the disagreement between Hamilton and Madison on the "true interpretation" of Congress's power to tax and appropriate for the general welfare).

6. Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 189 (2002); *see also* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987).

7. *See, e.g.*, Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 187 (2004) (arguing that the fact that states have to agree to conditions on spending overprotects state interests in resisting federal encroachment on state sovereignty); Zietlow, *supra* note 6, at 199 (utilizing a functional analysis not tied to constitutional text or a theory of why the Spending Clause is different to conclude that "upholding Congress's power to solicit waiver of sovereign immunity is necessary to protect the supremacy of federal law and enable Congress to define and protect civil rights"); Lynn Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935–48, 1962–63 (1995) (contending that states are politically vulnerable to federal spending to coerce them to regulate matters that the federal government cannot directly regulate, and proposing that such spending be presumed invalid unless the spending merely reimburses the state for its cost of regulating to further the purposes of the spending program).

8. 297 U.S. 1, 77 (1936).

9. 301 U.S. 548 (1937).

spending rather than an exercise of regulatory power.¹⁰ Furthermore, I argue that the reason for that distinction, and for why Congress can exercise only the spending power to pursue the general welfare, is because spending is not an exercise of the coercive powers of a sovereign.¹¹ Rather, when the government spends to achieve an end it must engage in a voluntary transaction with a willing buyer, just as any private entity would have to do.¹² From this recognition, I draw some detailed limitations on how Congress may exercise the spending power, even accepting that it may do so to achieve the broad ends of the general welfare.¹³

Part I of this Article proceeds by analyzing the structure of spending established by *Butler* and *Steward Machine* and explains how those cases support the argument that it is not dangerous to allow spending for broad ends because spending is not an exercise of coercive sovereign power. Part II addresses the two relatively recent Supreme Court cases and describes how the Court lost sight of the distinction between noncoercive spending and coercive regulation as the basic limit on the spending power. It analyzes how that oversight has caused current Spending Clause doctrine to be incoherent and necessarily unprincipled. Part III lays out what limits on Spending Clause power should look like if one focused on the distinction between coercive regulation and voluntary selling of a good or service to the federal government. It does so by relying on some recent scholarship about the doctrine of duress in contract law, which gives meaning to the notion of coercion under the Spending Clause and explains how that notion prevents the federal government from spending essentially without meaningful budgetary constraints. Part IV describes how the coercive/voluntary distinction between regulation and spending could allow courts to distinguish legitimate cooperative federalism from illegitimate coercive use of state sovereign powers by the federal government. Finally, Part V illustrates the importance of defining coherent bounds on Congress's spending power by considering the extent to which the Trump Administration's threats to withhold grants to sanctuary cities fall within the federal government's Spending Clause power.¹⁴

10. See *infra* Part I.

11. See *infra* Parts I and IV.

12. *Id.*

13. See *infra* Part III.

14. See Martin Kaste, *Trump Threatens 'Sanctuary' Cities with Loss of Federal Funds*, NPR (Jan. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds>; see also Eli Rosenberg, *Federal Judge Blocks Trump's Executive Order on Denying Funding to Sanctuary Cities*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities/?utm_term=.4dc36f1e4dfb. By "sanctuary cities," I mean cities that have vowed not to cooperate with Federal Immigration Officials to enforce immigration laws against undocumented immigrants. See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1067 (2018) (using "sanctuary cities" to refer to cities "that refused to assist federal officials in enforcing immigration laws"); Jack M. Beermann, *Barack Obama's Emancipation Proclamation: An Essay in Memory of Judge Richard D. Cudahy*, 67 DEPAUL L. REV. 613, 619 (2018) (defining

I. LESSONS FROM TWO OLD CHESTNUTS

A. *United States v. Butler: It's All About Spending*

Butler laid out the conundrum of the spending power.¹⁵ The Constitution states that Congress may spend for the general welfare.¹⁶ But, the Constitution is structured to limit federal powers to those enumerated powers in Article I, Section 8, and a few other specific powers mentioned in the other articles of the Constitution.¹⁷ If one takes the ordinary view of the general welfare, the Spending Clause would essentially allow Congress to exercise its spending power broadly to carry out any desired legislative end. Such an understanding of the general welfare is not limited in scope—the general welfare is as broad as the ends allowed states under their police powers. Hence, if Congress can spend on anything it desires, the spending power threatens to include within it virtually all the other enumerated powers.

As *Butler* made clear, this conundrum was recognized by the Framers.¹⁸ Madison and Hamilton debated whether the ends to which Congress can spend are limited to those included in its other enumerated powers.¹⁹ Madison argued that the spending power must be so limited to prevent the federal government from essentially exercising general police powers.²⁰ Hamilton argued that the Constitution did not so limit the spending power.²¹ In terms of the structure of the enumerated-powers clauses, Hamilton would seem to have the better argument, given that Congress already had the power “necessary and proper” to effectuate its enumerated power. This term of art was understood to convey that Congress had at its disposal all appropriate means to effectuate its powers.²² Such means presumably would include spending federal dollars to effectuate those other powers. If we accept Madison’s interpretation as correct, the Spending Clause becomes redundant. Thus, *Butler* explicitly held that Hamilton’s reading better accounted for the meaning of “general welfare” within the spending power.²³

That, of course, leaves the question about what limit, if any, there is on congressional spending to prevent it from rendering the enumeration of other powers unnecessary. *Butler* asserted that the federal government could not spend as a means of regulating matters that were left to the states.²⁴ Finding that regulation of agricultural production was left to the states, the *Butler* Court struck down the

“sanctuary cities” as “cities in which officials have vowed not to enforce federal immigration laws against illegal immigrants”).

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

16. U.S. CONST. art. I, § 8, cl. 1.

17. *Butler*, 297 U.S. at 63–64.

18. *Id.* at 77; *see also id.* at 88 (Stone, J., dissenting).

19. *Id.* at 65–67 (majority opinion).

20. *Id.* at 65.

21. *Id.* at 65–66.

22. *See* U.S. CONST. art. 1, § 8; *see also* THE FEDERALIST NO. 33 (Alexander Hamilton).

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

24. *Id.* at 68.

Agricultural Adjustment Act, characterizing it as regulation of the amount of cotton that farmers would produce.²⁵ Essentially, the Court held that the Act regulated conduct rather than spending on something that Congress wished to buy.²⁶ Further, the conduct it regulated was outside of Congress's regulatory power.²⁷

Butler was insightful in focusing on the nature of spending as the limitation imposed by the Spending Clause. Certain actions by Congress are not spending; they are regulatory. But, if one looks closely at the plan of the Agricultural Adjustment Act, those actions look like an exercise of the taxing and spending power.²⁸ Congress essentially offered producers money to not plant cotton.²⁹ Admittedly, Congress thereby purchased conduct rather than a good. But being a purchase of conduct does not render the action regulatory. Anytime the federal government employs a person to perform some service, it is paying for conduct. What seems to have stuck in the craw of the *Butler* majority was that Congress was paying for cotton farmers to *refrain* from a certain activity, and funding that restriction through a tax on cotton essentially effectuated a limit on the production of cotton.³⁰ Limiting conduct intuitively seems more regulatory than transactional. But, the Court failed to explain why paying a person to refrain from conduct is necessarily regulatory and hence not an exercise of the spending power.

In fact, drawing the spending/regulatory line based on payment to refrain from action is inherently problematic. One can think of the distinction between spending and regulation as a distinction between an exercise of influence that is not inherently governmental and one that is. Private individuals can purchase goods and services by spending money. Perhaps that is why the Spending Clause is written so broadly so as to include spending to further the general welfare. The lack of limitation on the power may reflect that spending is not an exercise of coercive sovereign power. Exercising spending power depends on the availability of a willing "seller." But private individuals can and sometimes do pay others to refrain from conduct. For example, noncompete clauses, which often are part of the sale of a business, prohibit the seller from setting up a new shop and directly competing with the buyer.³¹ Similarly, one who purchases a covenant is essentially paying the owner of land to refrain from asserting his or her property right to act in a manner

25. *Id.*

26. *Id.* ("The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.").

27. *Id.*

28. *See id.* at 53–57; *see also* Agricultural Adjustment Act of 1933 § 9, 7 U.S.C.A. § 609 (West, Westlaw through Pub. L. No. 115-281).

29. *Butler*, 297 U.S. at 70–71.

30. *Id.* at 71–78.

31. *See, e.g.*, J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 371 (2016); John Dwight Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49, 49–52 (2002).

inconsistent with the covenant.³² Such a purchase is directly analogous to the government paying farmers not to grow cotton: presumably, individuals who dislike cotton plants might pay their neighbors to refrain from growing the crop. In short, although *Butler* was undoubtedly on the right track in identifying the limitation on the spending power as one that distinguished between exercises of propriety versus sovereign authority, it went astray in concluding that paying an individual to refrain from conduct falls into the latter category.

The *Butler* majority still had to address the issue of whether, as regulation, the use of taxing and spending to control the production of cotton was beyond Congress's powers.³³ That the Congress had not asserted regulatory authority under any other enumerated power in Article I posed a problem for the Court. In essence, the Court could not rely on doctrine or reasoning regarding the bounds of the other enumerated powers. Essentially, it was faced with the United States's argument that the regulation was implemented via the taxing and spending power, and therefore the appropriate standard is whether the program "provide[d] for the General Welfare."³⁴ The Court elided that issue by simply asserting that the regulation of production was a matter left to the states.³⁵ Essentially, the Court relied on the still-controversial understanding that the enumeration of some powers implies the existence of something not enumerated.³⁶ This understanding might lead one to read *Butler* as asserting that Congress cannot buy conduct that it could not impose by regulation. But, if the crucial fact was that Congress did not have the power to prescribe the conduct by regulation, that would be inconsistent with *Butler*'s conclusion that Hamilton was correct that the goal of the spending power was not limited by the other enumerated powers. Hence, a better reading of the *Butler* holding is simply that buying conduct is regulation and not a valid exercise of the taxing and spending power—a reading that is problematic for the reasons just presented.

B. Steward Machine: Extortion Is Not Spending

Steward Machine involved a statute providing a discount in the rate employers had to pay into a federal unemployment-compensation program if the

32. See, e.g., George A. Patterson, *Real Property—Covenants Running with the Land: Their Desirability and Utility*, 32 NOTRE DAME L. REV. 502, 502–08 (1957); Dennis A. Kerbel, *Zoning and Complicated Reliance on Restrictive Covenants*, 12 FLA. INT'L U. L. REV. 264, 263–66 (2017).

33. *Butler*, 297 U.S. at 64–68.

34. *Id.* at 64–66.

35. *Id.* at 68.

36. See, e.g., Primus, *supra* note 1, at 596–604 (arguing that enumeration imposes no meaningful constraints on Congress); see also Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 4 (2016) (stating that "the enumerated-powers idea [is] not [] an actionable rule for legislative behavior but as an aspect of the identity, professional and national, of American constitutional lawyers"). *But see* Kurt T. Lash, *The Sum of All Delegated Powers: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J.F. 180, 180–81 (2014).

employer's state had established its own qualified program.³⁷ The *Steward Machine* Court advanced spending-power jurisprudence in two regards. First, although it addressed a federal insurance program for private employees, the structure of the program clearly evidences an intent to induce state governments to create their own unemployment-compensation plans.³⁸ *Steward Machine* did not draw a line between money spent to buy private conduct, such as the spending at issue in *Butler*, and that ultimately aimed at encouraging state regulation. Instead, *Steward Machine* suggested that the line delineating the constitutional exercise of the spending power depends on whether the use of that power is coercive.³⁹

The legitimacy of federal spending to buy state regulation, which *Steward Machine* condoned, is not obvious. Allowing the federal government simply to purchase regulation by state governments when it cannot regulate under its other enumerated powers would authorize an expansion of Congress's ability to marshal coercive sovereign power that it otherwise would not have. There is nothing Congress could not regulate so long as Congress was willing to pay the states enough money. But, limiting Congress's power to buy state regulation was never on strong footing when applied to state cooperation in a program that the federal government has the power to implement on its own. In such situations, the use of the spending power may allow Congress to avoid some political heat for enacting regulatory programs but would not expand the scope of permissible federal regulatory power. And, it would be perverse to disallow the federal government from funding state cooperation in federal programs where both the state and federal governments prefer such cooperation to having the federal government regulate without state input. This has been the basis for numerous programs of cooperative federalism, which have not raised any constitutional red flags.⁴⁰ Essentially, if the federal government could establish a program directly, but it is more efficient or politically expedient to involve the states, there is no barrier to the federal government inducing state cooperation—either by paying for the program or granting states valuable

37. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 573–78 (1937); The Social Security Act of 1935 § 620, 42 U.S.C.A. §§ 30-1305 (West, Westlaw through Pub. L. No. 115-281).

38. *Steward Mach. Co.*, 301 U.S. at 585–87.

39. *Id.* at 578, 585.

40. See Rosenthal, *supra* note 6, at 1136–40 (stating that the actions of courts and commentators have regularly assumed the constitutionality of cooperative-federalism programs); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (observing that most government-benefit decisions, including conditional-spending programs, are subject to minimal scrutiny by courts); John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183, 1183–90 (1995) (noting the number of cooperative-federalism programs that began emerging in 1965 and have withstood constitutional challenges, ultimately arguing that the delegation of implementation authority to states protects federalism).

implementation discretion—to help implement the federal program.⁴¹ Thus, *Steward Machine* is the progenitor of cooperative-federalism programs.

Additionally, *Steward Machine* recognized that what characterizes sovereign power is its coercive nature.⁴² Thus, *Steward Machine* suggested that, if the goals allowed by the spending power are to be unlimited because that power is not sovereign in nature, then the power must not be wielded in a coercive manner.⁴³ Precisely how congressional spending could become coercive may not always be intuitive. When a consumer buys anything, including behavior, the recipient of the purchase price must agree to the bargain, which would seem to make the exercise of the power dependent on voluntary participation by both parties. Implicit in the *Steward Machine* Court's focus on potential coercion, therefore, is recognition that the government is capable of leveraging its spending power beyond that which characterizes a voluntary purchase. In essence, reliance on federal spending enables Congress to use the threat of cutting off spending to extort conduct from the recipient of the funds. *Steward Machine* defined the line between such extortion and legitimate buying power by focusing on the relationship of the condition on spending and the spending itself.⁴⁴

Steward Machine's understanding of coercion depends on whether the government is buying something rather than leveraging funds it has already committed. In the latter scenario, a government's conditional threat to withhold spending might not be related to the actual good or service that spending is used to buy. Thus, the government gets some extra influence out of spending that seems unrelated to the spending program. In such a situation, it is likely that the government really has no interest in carrying out the threat to cut off funding; the threat is made only to extract further concessions from a recipient (or the state in which the recipient resides in the *Steward Machine* context) over and above those to which the recipient of federal funds (or the state) originally agreed. The Court thus focuses on whether the condition that would trigger the threat to withhold spending is related to what the spending bought in the first place.⁴⁵ The *Steward Machine* Court essentially held that the condition (the state adopting an unemployment-compensation program) triggering the discount of federal unemployment-compensation fees paid by employers (the spending) is related to the product on which federal funds are spent (federal unemployment-compensation benefits) because a state administering its own program reduces the need for the federal government to pay out benefits.⁴⁶

A key point of *Steward Machine* for today's Spending Clause jurisprudence—one the current Court seems to have failed to comprehend fully—is

41. See Zietlow, *supra* note 6, at 158; Baker, *supra* note 7, at 1918–20; see also Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J.L. & PUB. POL'Y 93, 98–99 (2014).

42. See *Steward Mach. Co.*, 301 U.S. at 578, 585–87.

43. *Id.* at 585.

44. *Id.* at 586–89.

45. *Id.* at 590–91.

46. *Id.* at 589–91.

that coercion depends on the relationship between the condition imposed and the efficacy of federal spending.⁴⁷ A valid condition should protect the amount the federal government needs to spend to achieve its desired outcome. The strength of this relationship should determine whether the condition is coercive. There is no suggestion in *Steward Machine* that if the amount of conditional spending is simply too great then the condition is coercive. *Steward Machine* also does not consider any abstract relationship between the condition and the spending program. It is the condition's relation to the actual incurrence of federal costs that matters.

II. LESSONS UNLEARNED: TWO MORE RECENT CASES

A. *South Dakota v. Dole: A Wrong Turn in the Badlands*

For 60 years after the Supreme Court's acceptance of the New Deal, the Court systematically expanded its understanding of Commerce Clause regulatory power and generally disfavored judicial prescription of limits imposed by federalism.⁴⁸ Under this expanded understanding, there is very little that Congress cannot do under its Commerce Clause powers.⁴⁹ Combined with the reluctance of the courts to interfere with cooperative-federalism programs that Congress could, in the abstract, have implemented on its own, few cases addressed the question of the boundary of Congress's power to purchase state regulation.⁵⁰

Because of the history of prohibition, regulation of sales of alcoholic beverages is one area in which the bounds of Congress's power remain uncertain.⁵¹ Thus, it not surprising that after a hiatus of half a century, the Supreme Court issued its first significant opinion on the spending power in a case involving Congress's

47. See Samuel Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372–80 (arguing that the proposals of courts and scholars regarding coercion and attempts to define it have failed to adequately consider the nexus between the purpose of the spending and conditions put on the funds).

48. See, e.g., Primus, *supra* note 36, at 2; Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 42–43 (2012); David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 1–2 (2012) (“Between 1937 and 1995, the Court upheld every statute that was challenged as exceeding Congress’s power under the Commerce Clause.”); Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001) (“In *United States v. Lopez*, for the first time in sixty years, the Supreme Court of the United States held a statute to be unconstitutional because it exceeded the powers of Congress under the Commerce Clause.”). *United States v. Lopez* was decided in 1995. 514 U.S. 549.

49. See Strauss, *supra* note 48, at 1; see also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1455 (1987) (arguing that congressional power should be narrow in scope, but recognizing in practice how broad it is).

50. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–66 (2001); see also Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1692–93 (2001).

51. See generally Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1 (2004) (discussing the intersection and uncertainty of the Commerce Clause, Dormant Commerce Clause, and the Twenty-first Amendment).

effort to establish a national minimum drinking age—a mandate that was probably beyond Congress’s power under the Twenty-first Amendment to the Constitution.⁵² Congress, therefore, sought to implement a uniform limit on possession and sales of alcoholic beverages by conditioning 5% of federal highway funding provided to a state on that state enacting the 21-year-old minimum drinking age.⁵³

The Court addressed a challenge to this conditional provision of funding in *South Dakota v. Dole*.⁵⁴ After summarizing prior cases, *Dole* set out a list of factors with which a statute must comply to impose a legitimate condition on federal funding.⁵⁵ Those factors were: (1) the funding itself must further the general welfare; (2) Congress must make the condition on funding clear so that states would be on notice that failure to comply with the condition would forfeit federal dollars; (3) the condition cannot violate any provision of the Constitution independent of the powers granted to Congress under Article I, Section 8; and (4) the condition must be related to a federal program—presumably the program for which the money that is at stake is provided.⁵⁶ After stating these conditions, the Court offhandedly mentioned that the condition on spending cannot be coercive.⁵⁷

The *Dole* Court merely mentioned the concern that was key to *Steward Machine*’s analysis of the bounds of the spending power: the potential to exercise such power in a coercive manner.⁵⁸ It thereby downplayed the significance of that concern and, in doing so, changed the nature of the judicial coercion inquiry. In addressing coercion, *Dole* simply considered the amount of funding at issue if states failed to enact a 21-year-old minimum age for possession of alcohol.⁵⁹ It noted that 5% of federal highway dollars amounted to too small a percentage of the state budget to make the threat coercive.⁶⁰

The *Dole* Court downplayed the threat of coercion by excluding it from the factors defining the scope of legitimate spending and relegating coercion to an afterthought. Even more importantly, the Court changed the coercion inquiry by separating it from the inquiry into the relation of the condition on spending to the spending program. Shorn of that relation, the inquiry by necessity focuses only on the extent of the inconvenience that the condition imposes on the state. This seems to misunderstand *Steward Machine*’s use of the coercion inquiry as a means of determining whether the statute at issue really involved congressional concern for the federal fisc. Without focusing on the relation of the desired condition *to the use of federal funds*, *Dole* provides no criteria for determining when the threat of termination of federal funds is great enough to constitute coercion, let alone how that threshold might relate to the federal interest in assuring federal dollars are spent

52. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

53. *Id.* at 205–06, 211.

54. *Id.* at 205.

55. *Id.* at 207–08.

56. *Id.*

57. *Id.* at 211.

58. *Id.*

59. *Id.* at 211–12.

60. *Id.* at 211.

efficiently and wisely. Separating the concept of coercion from the federal interest in spending invites courts to reach unprincipled decisions based on how much of a deprivation of funding the judge deems to be, in some abstract sense, too much.

Dole's deviation from *Steward Machine*'s focus on spending is illustrated by the relationship between the 21-year-old drinking age and highway safety that *Dole* found sufficient to justify Congress's conditioning of highway funds on state adoption of that age. The *Dole* Court noted that a differential in state drinking ages would encourage those who are not old enough to drink in their state of residence to drive to neighboring states where they could purchase alcohol legally.⁶¹ Invariably, this would increase the number of teens who had been drinking on the highways.⁶² The Court reasoned that this would affect highway safety, and because federal highway funds were meant in part to keep highways safe, the condition on spending was related to the spending program.⁶³ But, the Court could not find that reducing the number of such drivers would have any appreciable impact on the need to spend federal construction dollars, or the value the federal government would derive from such spending, because building more highways or maintaining those already built does not substantially reduce the danger posed by inebriated teen drivers.⁶⁴ And certainly, whatever marginal effects additional teen driving might have on highway wear and tear would not amount to anything that would warrant any reduction in federal highway funding, let alone the 5% penalty that the statute authorized.⁶⁵ Hence, under the *Steward Machine* rationale, the Court should have found an insufficient connection between the drinking age and the need for highway dollars or the benefit provided by such dollars; the condition, therefore, should have been deemed coercive.⁶⁶

Dole was also significant for allowing Congress to purchase regulation from the states that Congress could not have imposed under its other enumerated powers.⁶⁷ The legitimacy of such a purchase is not simply an implication of *Butler*'s holding that the spending power was not limited to the bounds of the other enumerated powers because in *Dole* Congress was not buying private conduct. That is, Congress was not using its purchasing power to induce the private conduct it could not directly order. Instead, it purchased the use of the states' coercive regulatory power. Thus, the argument that spending is analogous to private conduct is more problematic because private parties generally cannot legally bribe the government to use its coercive power on their behalf. The *Dole* Court simply elided this issue.

Perhaps there are reasons to extend the purchasing power of Congress to state coercive regulation. First, it is arguable that private parties can buy state law. Today a state often will offer special tax breaks to incentivize businesses to relocate

61. *Id.* at 208–09.

62. *Id.*

63. *Id.*

64. *Id.* at 214–16 (O'Connor, J., dissenting).

65. *Id.*

66. *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 590–91 (1937).

67. *See Dole*, 483 U.S. 203 (1987); *see also supra* note 52 and accompanying text.

within the state and thereby provide economic benefits to the state.⁶⁸ Although such transactions are not framed as direct monetary payment for beneficial treatment under state law, they effectuate the same result. And, as long as the legislators who vote for the specialized treatment do not directly benefit personally, deals that provide special tax benefits are not illegal bribes.⁶⁹ But, special tax treatment is not the same as regulation. Instead, it is more like a refund that the local government provides an entity that agrees to invest in the locality and thereby increases local-government tax revenues.

Second, even with respect to buying state regulation that Congress could not itself implement, there are pragmatic political limits on Congress's expansion of its regulatory prerogatives. Taxation is one of the most politically objectionable acts that a government can take.⁷⁰ Historically, the U.S. populous has been wary of taxation,⁷¹ and today popular distaste for federal taxation is especially great.⁷² Political opposition to federal taxation creates a significant barrier to Congress

68. See, e.g., Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 378 (1996); Kathleen E. McDavid, *Giving State Tax Incentives to Corporations: How Much is Too Much?*, 7 S.C. J. INT'L L. & BUS. 257, 257–58 (2011); Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), <http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?pagewanted=all>; Emily Badger, *Should We Ban States and Cities from Offering Big Tax Breaks for Jobs?* WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/15/should-we-ban-states-and-cities-from-offering-big-tax-breaks-for-jobs/?utm_term=.292ee66c9b3e.

69. See Badger, *supra* note 68; see also Edward A. Zelinsky, *Tax Incentives for Economic Development: Personal (and Pessimistic) Reflections*, 58 CASE W. RES. L. REV. 1145, 1145–47 (2008).

70. See, e.g., Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. L. REV. 171, 172–75 (2006) (arguing that the income tax dominates the national political agenda and is a contentious issue because “[n]obody likes to pay taxes”); Jonathan Mann, *Why Americans Hate Paying Taxes*, CNN (Dec. 17, 2010), <http://www.cnn.com/2010/US/12/17/jonathan.mann.us.taxes/index.html> (“Nobody likes paying taxes, but American culture seems to increasingly treat taxation as something close to a crime committed by the ruling class.”). See generally DAVID F. BURG, A WORLD HISTORY OF TAX REBELLIONS (2004) (reviewing nearly 4,300 years of riots, rebellions, protests, and wars all triggered by tax policies and systems).

71. See Galle, *supra* note 7, at 169–70 (noting framers’ understanding of special-interest influence and explaining why taxation would be especially susceptible to political checks); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 505 (1998) (reporting James Madison’s anticipation that factionalism would attend “the apportionment of taxes”).

72. John Sides, *Here’s the Incredibly Unpopular GOP Tax Reform Plan—in One Graph*, WASH. POST (Nov. 18, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/18/heres-the-incredibly-unpopular-gop-tax-reform-plan-in-one-graph/>; Christopher M. Federico, *Why is the GOP Tax Bill So Unpopular? Maybe It’s All Relative.*, POLITICO (Dec. 21, 2017), <https://www.politico.com/magazine/story/2017/12/21/unpopular-gop-tax-bill-relative-deprivation-216158>; Hannah Lang, *Quinnipiac: Only 29% of Americans Approve of GOP Tax Plan*, CNN (Dec. 5, 2017), <https://www.cnn.com/2017/12/05/politics/tax-plan-approval-quinnipiac-poll/index.html>.

simply taxing to accrue sufficient revenue to purchase regulation that states are loath to provide.⁷³

In addition, the enumeration of powers is seen today primarily as a safeguard against federal erosion of state authority. If Congress is willing and able to pay states enough to induce their support and implementation of a federal regulatory program that the federal government could not otherwise implement, then it has effectively induced cooperation by the institutions that are meant to be protected by Congress's limited powers.⁷⁴ Moreover, states retain some control over the program because, at any time, a state can exit the cooperative scheme so long as it is willing to forfeit the federal money Congress offers. Once a state does so, it is free to repeal the regulations that it supplied to the federal government that were otherwise beyond Congress's power. Nonetheless, blatant purchasing of use of states' regulatory authority to pursue ends that are beyond Congress's other enumerated powers seems to exceed both the influence that private entities could exert by the purchase of conduct and the coercive power given directly to the federal government. Hence, such purchases do not fit comfortably within the understanding of spending power as involving a voluntary transaction, as established by *Butler* and *Steward Machine*.

B. National Federation of Independent Business v. Sebelius: Coercion Unmoored

The *National Federation of Independent Business v. Sebelius* (NFIB) Court addressed Congress's spending power with respect to the Medicaid program—a context in which the federal government could have directly exercised the necessary regulatory power, but where it had engaged in a cooperative federal scheme for almost a half a century.⁷⁵ Moreover, that scheme had grown to the point where federal dollars accounted for, on average, over 10% of the entire budgets of the states.⁷⁶ The Court held that conditioning the continuation of preexisting Medicaid funding solely on state expansion of Medicaid, as set out in the Affordable Care Act

73. Eric M. Zolt, *Politics and Taxation: An Introduction*, 67 TAX. L. REV. 453, 453–60 (2014) (discussing the importance of the relationship between taxation and politics, observing that tax policies often become the focus for voters in political elections, and noting that voter preferences often limit the government's ability to dictate levels of taxes and make spending decisions); Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 TAX. L. REV. 557, 557 (discussing the disagreements between the Republican and Democratic political parties that often lead to gridlock on tax policy); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process As Illustrated by the Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 7–9 (1990) (discussing the complex motivations that contribute to tax policy, including the individual legislator's future interest in collecting campaign contributions and securing institutional power, the general aim to enact "good" tax policy and to satisfy constituents).

74. Mitchell Berman would characterize such inducement as "compulsion" rather than coercion. Mitchell Berman, *Coercion, Compulsion, and the Medicaid Expansion*, A Study in the Doctrine of Unconstitutional Conditions, 91 TEX. L. REV. 1283, 1286 (2013).

75. NFIB v. Sebelius, 567 U.S. 519, 530–31, 541 (2012).

76. *Id.* at 542, 583.

(ACA), was beyond Congress's spending power.⁷⁷ The Court reasoned that such an extreme potential impact on state budgets was simply too great.⁷⁸

Justice Roberts wrote the opinion that represented the holding of the case on the Spending Clause issue.⁷⁹ Roberts began by noting that the federal government could condition the actual use of funds it provides to states because it has an interest in ensuring that federal funds are used in the manner that Congress intends.⁸⁰ This is consistent with virtually all the preceding case law, including *Butler's* rejection of the use of federal funds to induce farmers to not grow cotton. Roberts, however, correctly noted that the conditions in *NFIB* were not direct restrictions on the use of funds and hence were subject to the *Dole* test.⁸¹

The spending provisions in *NFIB* seem to fit comfortably within the four factors *Dole* set out to determine the constitutionality of federal conditioning of funds on state regulation.⁸² Expanding Medicaid to provide health care for more poor Americans seems to be within the general bounds of the ACA's program that Congress could reasonably conclude enhanced the general welfare of those in the United States.⁸³ The ACA clearly put states on notice that if a state did not expand its Medicaid program as required by the Act, then it could lose funding for its preexisting Medicaid program.⁸⁴ Based on *Dole's* liberal construction of the relationship between the condition on spending and the program on which the spending occurs, the Medicaid expansion would seem clearly related to the preexisting program in that both addressed provision of health services to the

77. *Id.* at 585.

78. *Id.* at 580–583.

79. Based on the *Marks* rule,

[w]hen a fragmented Court decided a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred on the narrowest grounds Three Justices joined in the controlling opinion.

Marks v. United States, 430 U.S. 188, 193 (1977) (citation omitted). In *NFIB*, three Justices signed on to Roberts's opinion, four Justices would have restricted Congress from enacting a program that gave it so much leverage over the states that the threat of ending the program would be coercive, and two Justices would have affirmed Congress's power to condition existing Medicaid payments on state enactment of the ACA's Medicaid expansion. *See NFIB*, 567 U.S. at 529; *id.* at 589 (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part); *id.* at 646 (Scalia, J., dissenting).

80. *Id.* at 588 (majority opinion).

81. *Id.* at 580–83.

82. For the four factors in *Dole*, see *supra* Section II.A; see also *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

83. *See NFIB*, 567 U.S. at 625, 633 (Ginsburg, J., concurring in part and dissenting in part).

84. *Id.* at 626, 637–42 (Ginsburg, J., concurring in part and dissenting in part).

needy.⁸⁵ Further, no one contended in *NFIB* that the Medicaid expansion provisions of the ACA contravened any independent provisions of the Constitution.⁸⁶

The controlling *NFIB* opinion, however, found that the Medicaid expansion provision ran afoul of *Dole*'s seeming afterthought—that at some point the magnitude of the funds conditioned makes the spending coercive.⁸⁷ Justice Roberts noted that existing Medicaid funding comprised about 10% of the average overall state budget, amounting to hundreds of billions of dollars provided by the federal government to the states annually.⁸⁸ Hence, the threat of loss of these funds was much greater than that in *Dole*.⁸⁹ The Court, therefore, found the threat of loss of existing Medicaid funding was unconstitutional.⁹⁰ Contrary to Justice Scalia's opinion, which provided four of the seven votes rejecting the Medicaid expansion, Justice Roberts' opinion held that the coercive threat was severable from the remainder of the statute and simply excised the condition on existing Medicaid spending from the ACA.⁹¹

Justice Roberts' rationale, however, places significant pressure on courts to determine the bounds of statutory spending programs without the aid of seemingly legally cognizable standards. There is no objective basis by which courts can draw a line beyond which withdrawal of federal funding is too great in magnitude to constitute coercion. Relatedly, Roberts struggles to distinguish prior amendments to Medicaid that had expanded the reach of the program backed by the threat of loss of funds for the entire program if a state failed to accede to the amendments.⁹² In finding the ACA Medicaid expansion conditions coercive, Justice Roberts felt obligated to find that the expansion was a separate program from preexisting Medicaid—a finding that was strongly contested by the dissent.⁹³ If the two are mere parts of the same program, apparently Justice Roberts believed Congress could have conditioned receipt of funds for one part of the program on implementation of the second part. It is not clear why Justice Roberts held that belief. Perhaps if the expansion were part of the same program as preexisting Medicaid, he would have concluded that the condition was an example of Congress simply conditioning how the federal funds are to be used.

85. See *infra* notes 111–14 and accompanying text (describing the relationship of the condition that states expand Medicaid to the federal government's spending under preexisting traditional Medicaid).

86. See *NFIB*, 567 U.S. at 575–85 (discussing the challenge of Medicaid expansion as an exercise of the Congress's spending power without any mention of possible violation of independent provisions of the Constitution).

87. *Id.* at 580–82.

88. *Id.* at 581–82.

89. *Id.* at 582.

90. *Id.* at 588.

91. *Id.* at 587–88.

92. *Id.* at 582–85.

93. *Id.* at 584; *id.* at 625–26 (Ginsburg, J., concurring in part and dissenting in part) (“Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it.”).

Whatever the reason for this inquiry, Justice Roberts found that the expansion was a different program than preexisting Medicaid because it would provide payment for medical care of individuals whose incomes fell below 133% of the poverty level and was part of the ACA, the goal of which was to provide universal coverage for medical care.⁹⁴ Preexisting Medicaid, in contrast, had only required states to cover those families that would have been eligible for welfare had welfare not been eliminated and those individuals whose income fell below 133% of the poverty level if those individuals were blind or disabled, pregnant, or single caretakers of children.⁹⁵ Thus, Roberts characterized preexisting Medicaid as a program to provide health care to the deserving poor, while the expansion of Medicaid was part of a program to achieve universal health care.⁹⁶ In other words, by Roberts' reasoning, an identical expansion of Medicaid would have been constitutional if Congress had enacted it on its own, but it was unconstitutional because Congress enacted the identical expansion as part of a larger program aimed at universal health insurance.⁹⁷ This is the first and only time, to my knowledge, that the Court hinged the bounds of Congress's powers on whether the challenged provision was enacted in isolation rather than alongside other provisions.

Moreover, one can disagree with Justice Roberts's conclusion that preexisting Medicaid was meant to provide medical care only to the "deserving poor."⁹⁸ One could just as easily characterize it as a first step in trying to provide medical care for all who cannot afford it, which in turn addresses the weakest link in the armor of universal health-care insurance. For example, Medicaid for those who would have qualified for Welfare essentially covers individuals making less than 63% of the poverty level, which would seem aimed at funding health care for the poorest individuals in society.⁹⁹ Moreover, preexisting Medicaid could be said to encompass several different programs. For example, medical care for single parents seems to aim at ensuring continued care for the general welfare of children rather than merely for health care for those who cannot be blamed for being unable to afford it. A program to cover health care only for the deserving poor would seem not to cover health care for children's providers in addition to that of the children themselves. Yet, Roberts seemed to generally concede that prior amendments of Medicaid to add coverage for single parents and pregnant women, backed by threats of states potentially losing all preexisting Medicaid coverage, had been within Congress's spending power.

Justice Roberts's opinion also creates tension regarding the authority of Congress to achieve by more circuitous means essentially the same outcome as the

94. *Id.* at 575–77, 583.

95. *Id.* at 575–76.

96. For a description of how the ACA altered Medicaid's original goal of covering health care for the deserving poor, see Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C.L. REV. 1, 12–14 (2016). See also *NFIB*, 567 U.S. at 575, 583 ("The current Medicaid program requires States to cover only *certain discrete categories of needy individuals . . .*") (emphasis added).

97. *NFIB*, 567 U.S. at 583.

98. *Id.*

99. *Id.* at 575.

ACA. He seems to concede the point made by the dissent on this issue—that Congress could have repealed Medicaid in its entirety and then enacted a new Medicaid program that included the precise mandates of the preexisting Medicaid program together with the ACA’s expansion.¹⁰⁰ In that instance, Justice Roberts’s opinion suggests that the new statute could have conditioned all state funding under the new program on compliance with any provision of that program.¹⁰¹ The notion that a statute is unconstitutional because of the order in which Congress enacted its provisions is unprecedented, and yet Justice Roberts provides no defense for such an implicit holding.

III. GETTING BACK TO SPENDING

My analysis of the cases suggests that current Spending Clause doctrine is incoherent due to its departure from the rationale for the Clause’s broad grant of power—that spending is not an exercise of sovereign power. The doctrinal focus on coercion stems from the fact that the government can coerce compliance with conditions without actually buying such compliance. Once we recognize that the spending power is not about defining the bounds of sovereign power, but rather about concerns regarding the use of private spending power to coerce outcomes, the bounds of the spending power are best analyzed by analogies to private law, such as the definition of “duress” in contract law. Einer Elhauge was wise to suggest that the tests for coercion in the spending context and in areas of law concerned with constraining private abuses should track each other.¹⁰² My analysis suggests why this is so.

The key to identifying coercion in the private setting is a threat to do something against the threat-maker’s interest as a means of inducing the victim to take action desired by the threat-maker.¹⁰³ For purposes of the analogy between the coercive use of the spending power and private coercion, the crucial aspect is that the coercive threat allows the threat-maker to achieve ends it desires free from budget constraints. In essence, voluntary transactions depend on each party providing something of benefit to the other party in return for the desired conduct by the other party.¹⁰⁴ Providing benefits to the other party is costly. Coercive transactions occur without any exchange by the threat-maker in return for the desired conduct. When a mugger puts a gun to the victim’s head and says, “your money or your life,” he does not have any interest in actually killing the victim, but rather seeks to obtain the money without having to provide the victim any reciprocal

100. *Id.* at 583 n.14.

101. *See id.*

102. Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 503–09 (2016); *see also* Mitchell Berman, *supra* note 74, at 1286–89.

103. Mark Seidenfeld & Murat C. Mungan, *Duress and Rent-Seeking*, 99 MINN. L. REV. 1423, 1424 (2015); *see also* Elhauge, *supra* note 102 at 507–09; Berman, *supra* note 74, at 1292.

104. Elhauge, *supra* note 102, at 507.

benefit.¹⁰⁵ Were the government free to coerce conduct via conditional spending, it would essentially be able to achieve the desired conduct without paying any monetary price for that conduct.

One might object that sovereigns—unlike private entities—can use their governmental power to coerce those subject to their jurisdiction to act as dictated by statute. But, the point of the enumerated powers in the Constitution is to limit the conduct that the federal sovereign can dictate.¹⁰⁶ One can understand the Spending Clause’s broader allowance of the pursuit of the general welfare as different from limits on the other powers precisely because it does not authorize an exercise of coercive government power.

Another possible objection to borrowing the notion of coercion from private law stems from the fact that the government does not have to “earn” the money it spends. The government has coercive taxing power, which also extends to allow the government to provide for the general welfare.¹⁰⁷ Hence, one might contend that budgets are not a meaningful constraint on government. The exercise of the power to tax, however, is among the least popular coercive government actions. Much of the impetus for the American Revolution stemmed from the British abuse of its taxing power over the colonies.¹⁰⁸ Politically today, “tax” is *the* dirty three-letter word.¹⁰⁹ Thus, there is a strong political aversion to the use of the taxing power that translates into the federal budget being a constraint on the government’s ability to achieve the behavior it desires from its citizens.¹¹⁰ Allowing unfettered conditional spending would compromise that budgetary constraint.

In the context of government spending, we can identify threats that are against the government’s interest with relative precision. The key to identifying such threats in the spending context is to recognize that courts should tie limits on spending power to federal interest in having federal money spent as Congress sees

105. See Berman, *supra* note 74, at 1293 (discussing the “your money or your life” paradigm and noting that the coercer understands that success in achieving the money is a function of the pressure of the coercion, not necessarily the actual consequence threatened).

106. See Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354, 358–59 (2003); see also THE FEDERALIST NO. 14 (James Madison) (“[The federal government’s] jurisdiction is limited to certain enumerated objects, which concern all the members of the republic The [states] which can extend their care to all those other objects . . . will retain their due authority and activity.”); THE FEDERALIST NO. 78 (Alexander Hamilton) (“[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”).

107. See U.S. Const., art. I, §. 8, ¶ 1 (Congress “shall have the Power *To lay and collect Taxes* . . . to pay the Debts and provide for the Common Defence and general Welfare of the United States.”) (emphasis added).

108. DAVID RAMSEY, THE HISTORY OF THE AMERICAN REVOLUTION 87–98 (1811); see also Sebastian Galiani & Gustavo Torrens, *Why Not Taxation and Representation? British Politics and The American Revolution* 9–11 (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846776.

109. See Guy Peters, *Understanding Tax Policy*, in PAUL PERETZ, THE POLITICS OF AMERICAN ECONOMIC POLICY MAKING § 3B.1 (1987).

110. *Id.*

fit and in avoiding unnecessary spending. When the federal government spends money on a state-run program, it has a legitimate interest in ensuring that states spend allocated dollars on the activities that Congress specifies.¹¹¹ Hence, it would be in the interest of the federal government to deny money spent on activities outside those allowed by the federal authorizing statute. It would also be in the interest of the federal government to withhold money that a state wastes because it administered its program inefficiently. Finally, over and above efficiency, it would be in the federal interest to have states administer federally funded programs in a manner that will not increase the overall cost to the federal government.

The crucial question, in applying the coercion principle to government spending, is how courts are to distinguish between conditions that reflect coercion rather than protection of the government interests in obtaining the precise program for which it paid and in avoiding unnecessary expenditures. One might be tempted to suggest that courts should evaluate the harm to the spending program that would be caused by violation of the condition and compare that to the benefit the program would lose from the rescission of spending. That, however, would be problematic from both a theoretical and practical perspective.

Theoretically, one can again borrow from private contract law to understand the problem of coercive conditions on spending. Analogous to a party to a contract, the federal government is entitled to the full benefit of the bargain Congress strikes with funding recipients when they accept conditional federal dollars. Thus, just as courts do not scrutinize the value of consideration when determining whether parties have formed a contract, courts should not question how Congress values compliance with conditions it imposes on spending. The courts should merely ask whether the conditions relate to the quality of the goods or services provided or obviate the need for unnecessary federal expenditures to secure those goods or services. If they do relate to such quality or protect against unnecessary spending, then the conditions are a valid exercise of securing the value and efficiency of the program; if they do not relate, they are almost certainly a veiled attempt to coerce something extraneous from the recipients of federal funds.

Pragmatically, allowing courts to evaluate the likely benefits and detriments of conditions on a federal spending program would confer enormous judicial discretion over how such programs operate. The fact that the government feels compelled to create a spending program usually reflects the belief that the private market will not adequately provide the goods or services the program obtains.¹¹² As is often the case with contracts, without a well-functioning market

111. See, e.g., Baker, *supra* note 7, at 1918; David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1206 (2004).

112. For example, many social-welfare programs aim to fill what would be market gaps. In a message to Congress, before the passage of the Social Security Act, President Roosevelt stated “[a]mong our objectives I place the security . . . of the Nation first. [Security includes] decent homes to live in; [located] where [people] can engage in product work; and [people] want some safeguard against misfortunes” John E. Hansan, *Origins of the State and Federal Public Welfare Programs (1932-1935)*, VCU LIBRARIES: SOCIAL WELFARE

there is no way to provide an objective value on contract performance. With respect to cost savings, the operation of spending programs is usually sufficiently complex that counterfactual estimates of how much a program would have saved had a recipient who violated conditions on spending complied with those conditions is essentially unreliable.¹¹³ Thus, imposing any sort of proportionality inquiry would empower courts great reign to import their own policy preferences and subjective beliefs regarding the benefit of conditions into consideration of the constitutionality of such programs.

I can best illustrate how my criteria would operate by considering the Spending Clause issue raised in *NFIB v. Sebelius*. That issue focused on ACA provisions subjecting states to the potential loss of all federal funding for their existing Medicaid programs if they did not expand Medicaid to cover a larger percentage of the poor.¹¹⁴ Specifically, pre-ACA Medicaid covered all individuals earning below two-thirds of the national poverty-level income, as well as the disabled, pregnant women, and adults who directly cared for children if those individuals earned less than four-thirds of the poverty-level income.¹¹⁵ The ACA would have expanded Medicaid to require states to cover all individuals whose income fell below four-thirds of the national poverty level.¹¹⁶ The Medicaid expansion condition clearly did not address the use of Medicaid money for purposes outside those specified by statute. Nor did it involve any attempt to increase the efficiency of services provided under the preexisting Medicaid program. There is a good argument, however, that the condition would save some amount of money that the federal government was spending on the original Medicaid program.

The argument is as follows: individuals who earn between two-thirds and four-thirds of the national poverty-level income—the marginal poor—live precarious economic lives. For example, consider a hypothetical individual in that group working as an unskilled laborer. Under preexisting Medicaid, if that person was ill, for instance, with an ailment like bronchitis, she might avoid going to the doctor because she would be unable to afford it. Failing to seek medical treatment would increase the risk that the ailment would progress to a more serious illness such as pneumonia. If the ailment did progress, the individual could end up in emergency care at a hospital and would almost certainly need to take time off from work to recuperate. Given the nature of the individual's job, there is a great risk that

HISTORY PROJECT, <https://socialwelfare.library.vcu.edu/public-welfare/origins-of-the-state-federal-public-welfare-programs/> (last visited Feb. 24, 2018). After months of Congressional hearings and negotiations, the Social Security Act was signed into law and introduced various programs designed to provide “economic protections to different populations” that the market would have failed to provide. *Id.*

113. The difficulty of evaluating costs and benefits of complex counterfactual scenarios has been noted in other contexts. *See, e.g.*, Benjamin Eidelson, *Note: The Majoritarian Filibuster*, 122 *YALE L.J.* 980, 1018 (2013) (noting that it would be both unreliable and uninformative to make particular judgments about a counterfactual past in the context of evaluating how likely Senate filibusters are to reflect the preferences of a majority of voters); Mauritz Dolmans, *Standards for Standards*, 26 *FORDHAM INT'L L.J.* 163, 201 n.114 (2002) (in the context of intellectual-property rights under European Competition Law).

114. *See NFIB v. Sebelius*, 567 U.S. 519, 585–86 (2012).

115. *Id.* at 583–84.

116. *Id.*

her employer would terminate her employment and hire a replacement worker. Once that occurred, the individual's income would fall below the two-thirds threshold for the preexisting Medicaid program, and the federal government would be obligated to support health care for that individual. Moreover, the fact that the individual sought care through the emergency room rather than from a doctor before pneumonia developed means that the ultimate expense for care would likely be much greater than the costs would have been otherwise. The implication of this hypothetical is that Congress could legitimately threaten to withhold funding for the preexisting Medicaid program because implementing Medicaid expansion would lower costs of the preexisting program.

Although the argument is more speculative, it is also possible that expanding Medicaid could affect the efficiency and quality of the preexisting Medicaid program. Presumably, the process of filing claims and seeking reimbursement for care would be the same for patients eligible under the expanded program as those eligible under the original program. Thus, expanding the program according to the ACA's conditions could result in returns to scale, so that the per-patient administrative cost of preexisting Medicaid might decrease.¹¹⁷

Notice that my formulation of coercive use of conditional funding eliminates the need for the courts to inquire whether Congress could have adopted the ultimate program by some different order, or even whether the money provided to the states comprises one program versus multiple ones. The only inquiry would be whether the violation of the condition on spending commits the federal government either to spending more dollars to obtain the benefits of the program or to getting less benefit for the dollars it spends. If it does, the condition is a constitutional exercise of the federal spending power. If it does not, then the condition is unconstitutional coercion. It would not matter whether the condition is included in the statute from the time it is originally enacted, or instead whether the condition is added later to an existing spending program. And it would not matter whether the condition was added by a statute that implemented a different program with different goals from the spending program. All that would matter is whether the condition relates to the spending or operation of the initial program.

117. To the extent one is concerned that the federal government could implement the penalty for violating the condition on spending in a manner that is out of proportion to the harm caused by the violation, it is possible that subconstitutional judicial review of the agency action could discourage such punitive action. If the imposition of the penalty is subject to review under the statute authorizing the penalty or the Administrative Procedure Act (APA), a court might find that imposition of a disproportionate penalty in a particular case is arbitrary and capricious. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *id.* at §706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious an abuse of discretion or otherwise not in accordance with law."). The use of case-by-case statutory or APA review would have the advantage of allowing the court to evaluate the benefit and harm from the condition violation in an actual, rather than counterfactual, context and could also allow more nuanced consideration of particular circumstances surrounding federal imposition of such a penalty.

IV. COOPERATIVE FEDERALISM: LIMITS ON BUYING STATE REGULATION

Since the expanded the reach of federal regulatory power through acceptance of the New Deal, courts have expressed little concern for the use of the spending power to induce states to cooperate with federal regulatory programs.¹¹⁸ In fact, the use of such inducement has prompted an entirely new perspective on federalism—cooperative federalism—that focuses on the role of states in implementing federal-government programs and the interaction of states and the federal government in such programs.¹¹⁹ The analogy of coercion in the federalism context to that of duress in contract law can help clarify the constitutional limits on cooperative federalism. The federal government enticing cooperation by threatening action that is “credible” is not coercion and hence is valid inducement of state cooperation.

It is worth noting at the outset that federal inducement of state cooperation is not uniquely dependent on federal spending. The threat of federal exercise of its Commerce Clause power without state involvement can also induce states to accept a cooperative role in federal regulatory programs. For example, under the Clean Air Act, the federal government sets standards for ambient levels of pollution and technologically based pollution control.¹²⁰ But, it allows states to develop implementation plans limiting the pollutions emissions of particular sources and to exercise primary enforcement responsibility to implement the achievement of those standards.¹²¹

States cooperate with such schemes because the alternative is to have the federal government implement them without state involvement.¹²² Implementation often involves choices about the optimal pollution reduction by each particular pollution source, as well as about how strictly those standards will be enforced when violations occur despite good-faith efforts by polluters to comply.¹²³ States have an interest in setting actual reduction levels in a manner that is least disruptive to their local economies.¹²⁴ State regulators will often grant greater pollution allowances to

118. See *supra* notes 48–50 and accompanying text.

119. See Engstrom, *supra* note 111, at 1242–43, 1257; see also Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 815–16 (1998); Rosenthal, *supra* note 6, at 1104–07.

120. See Clean Air Act, 42 U.S.C. § 7401 (2012).

121. *Id.* at §§ 7402(a), 7410.

122. See, e.g., Dwyer, *supra* note 40, at 1190–99 (arguing that in regard to the Clean Air Act, states having autonomy and some independence in implanting the Act allows states to make important decisions and also works to preserve federalism); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1201–02 (1977) (noting that state officials have strong incentives to “assume the administrative and political burdens of carrying out environmental policies dictated by federal agencies” and arguing that one of them is to keep federal leadership out of the implementation of such policies within the state).

123. See Clean Air Act, 42 U.S.C. §§ 7402, 7410 (2012).

124. See Stewart, *supra* note 122, at 1126; Dwyer, *supra* note 40, at 1198.

sources that are crucial to a state's economic well-being.¹²⁵ And because local economies depend on continued operation of such sources, they are likely to enjoy more forgiving enforcement that focuses on encouraging future compliance rather than punishment for past violations. Forfeiting the ability to exercise implementation discretion thus threatens the welfare of the state. The threat of federal implementation if states choose not to cooperate, however, is not coercive because it is credible.¹²⁶ If the state does not implement the program, the federal government has an interest in doing so.¹²⁷ The fact that federal implementation will decrease the welfare of the state below what would result from state implementation is not the motivation for the threat. Hence, the threat really represents allowing the state an opportunity to avoid the harm that would result from the federal government pursuing its regulatory interest.¹²⁸

Cooperative federalism with respect to pending spending programs is well exemplified by Medicaid. The federal government sets standards about whom Medicaid is to cover and a minimum of services that the program will provide.¹²⁹ It leaves the choice of whether to implement the program to the states. If states do not implement the program, they risk losing all Medicaid funding for health care for the poor.¹³⁰ Presumably, the states cooperate because they desire the federal dollars. But, it is also relevant that the federal government could set up a Medicaid program that left no role for the states. Almost certainly, this would be worse for both the states and the federal government because the federal government does not have detailed knowledge of the specific populations it would have to serve, and unlike states, the federal government does not have an extensive system in place to provide social services to the poor, and hence would have to invest in creating such a system. Thus, the federal government essentially purchases the regulatory power of the states in order to implement its program in a manner that not only respects local preferences, but also takes advantage of state institutions already established to deliver social-welfare programs, which allow the states to deliver medical care to

125. See Dwyer, *supra* note 40, at 1198; see also Tom Dart, *Lawsuit Aims to Force EPA to Crack Down on Air Polluters in Texas*, *GUARDIAN* (July 20, 2017), <https://www.theguardian.com/environment/2017/jul/20/epa-lawsuit-texas-industrial-air-pollution> (discussing a recent lawsuit where an environmental group accused Texas of allowing gas and oil companies an excessive ability to pollute and damage the air quality).

126. See Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 *J. LEG. STUD.* 391, 428 (2004) (concluding that threats to breach a contract if the other party will not agree to modification should not be considered unenforceable due to coercion if the threat of breach is credible).

127. The assumption here is that the federal government desires implementation of the program but believes that states can implement it more cheaply. If the state does not implement the program, the federal government has an interest in doing so itself to achieve implementation, not to punish the state.

128. See Mark Seidenfeld & Murat C. Mungan, *Duress as Rent-Seeking*, 99 *MINN. L. REV.* 1423, 1438 (2015) (when a threat is credible, “[t]he threat-maker essentially is informing the target of how he intends to act, and providing the target an opportunity to pay not to have him act as threatened”).

129. See Social Security Act, 42 U.S.C. § 1396.

130. See *id.* at § 1396(b).

the poor more efficiently and effectively. Such efficiency enhancing the use of federal spending should not be deemed coercive.

Courts have regularly accepted such cooperative programs as legitimate exercises of Congress's spending power.¹³¹ With respect to programs that require state regulations as part of the implementation, the federal purchase becomes more controversial when the Congress does not have the regulatory authority to implement the program by itself. In that situation, Congress would be using the spending power to purchase the use of sovereign power that the Constitution does not grant to Congress itself.¹³²

If the reason that Congress is allowed to pursue a broader set of ends under the Spending Clause than under other enumerated powers reflects the voluntary nature of purchases in contrast to the coercive nature of regulation, it is problematic for Congress to purchase the coercive powers of the states. One might see this as an end run around limits on non-Spending Clause enumerated powers in Article I. Viewed from another perspective, to say that the spending power is not sovereign in nature means that it only allows the government to act as a private entity that had enough money to induce the desired conduct. As noted above, outside the ambit of special tax treatment, private persons cannot directly purchase state regulation that they desire. Private entities may lobby for regulation they desire, and they may financially support candidates whom they think will vote for regulation that they desire. But, quid pro quo purchases of state regulation usually run afoul of laws prohibiting bribery. Thus, *Butler's* distinction between regulation and spending suggests that it should be beyond the spending power for the federal government to purchase state implementation that depends on regulation that would fall outside the federal government's other enumerated powers.

To illustrate my dual criteria that spending must be neither coercive nor a purchase of state regulation beyond that within the other powers of the federal government, it is instructive to consider how *Dole* should have come out had the highway spending program provided funds for policing of public roads to prevent

131. Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 883 ("For the most part, courts have not directly limited the scope of Congress' power to enact legislation in the form of conditional spending."); see also *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) ("Although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition."); *Kansas v. United States*, 214 F.3d 1196, 1200 (10th Cir. 2000) ("There are no recent relevant instances in which the Supreme Court has invalidated a funding condition.").

132. See Zietlow, *supra* note 6, at 137, 149 (noting that the inquiry in *Dole* was complicated because it was not clear, and the Court avoided deciding whether Congress could directly legislate a national drinking age; but later observing that in *New York* the court appeared to condone Congress's use of the spending power to indirectly accomplish what it was not constitutionally allowed to do directly); see also Baker, *supra* note 7, at 1928–30; Lynn A. Baker & Mitchell 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, 459–61 (2003) (discussing proposals by commentators to use the spending power to maneuver around the limits that Rehnquist places on other congressional powers).

dangerous driving. Then, the drinking-age effects on highway safety would have had a direct impact on the level and efficacy of policing needed to keep roads in a noncooperating state safe. In essence, the federal expenditure of funds would be “wasted” by a state failing to enact the 21-year-old drinking age because that failure would encourage drunk driving, which would place an extra burden on policing of highways. Hence, conditioning spending for such a program on state adoption of the 21-year-old drinking age would not have been coercive. By my account, however, it would still have fallen outside of Congress’s spending power because Congress would be purchasing the use of the coercive powers of the sovereign states that the federal government could not have exercised itself. As this example makes clear, invalidity of a federal statute that secures a regulatory outcome unavailable to Congress directly is theoretically distinct from invalidity of a federal statute due to coercion.

My approach to cabining Congress’s spending power fits within the genre of recent scholarship that views “federalism” as the structuring of processes by which the federal and state sovereigns interact.¹³³ This literature addresses how to structure such processes to allow each level of government in our system of dual sovereignty to protect its interests while still permitting cooperation to achieve coherent and efficient governance.¹³⁴ My approach, however, also harkens back to more traditional federalism scholarship that describes the constitutional bounds of federal power and areas where states should be free from federal interference.¹³⁵ But, unlike traditional scholarship, my theory of the Spending Clause does not attempt to define or even defend such bounds. Rather, it posits that federal and state governments cannot structure their processes of interaction to allow them, either independently or by collusion, to use the spending power’s authorization of pursuit of the general welfare to circumvent any such bounds that might exist.

Note that my proposed prohibition on the federal purchase of state exercises of sovereign power beyond the nonspending powers of the federal government would prohibit even the straight offer of federal money in return for the desired state regulation, without any threat of rescinding money at all. It would bar the state from selling its regulation even if the state preferred the money and the concomitant obligation to regulate as Congress dictated. Hence, any justification of such a limitation must depend on some goal for federalism beyond protecting states from federal coercive abuses. Although I have not fully worked out the details of

133. See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 5–11 (2011); Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1697, 1719–22 (2017); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922–23, 1953–57 (2014).

134. Ryan, *supra* note 133, at 24–28, 67, 90–91; Gerken, *supra* note 133, at 1714–23; Bulman-Pozen, *supra* note 133 at 1922–24, 1953–57.

135. See, e.g., Bulman-Pozen, *supra* note 133, at 1921 (discussing the shift away from separate-spheres federalism but noting that some commentators call for a revival of this type of federalism); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313–15 (1997); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 754–56 (1995); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

such a goal, I suggest that it is desirable to allow the people to choose whether they trust states to regulate more than they trust the federal government. In other words, the structure of “Our Federalism” would reflect the need to maintain independent—and in some sense competing—political systems, with the people choosing the bounds of each system’s regulatory power.¹³⁶ Again, I have not comprehensively thought through all the possible benefits and detriments of federalism as political competition for regulatory power between the federal and state governments. But, one benefit would be to mollify government’s monopoly over coercive powers of the state, even to the point of prohibiting collusion between the state and federal governments to divide up the use of that coercive power.¹³⁷ For example, if people got to the point where they distrusted the federal government and wished to sheer it of regulatory power, the result would not be an absence of government, but rather a reliance on the state to substitute its regulatory choices for those of the federal government. The people have much greater liberty to disempower one level of government if they know that the other level would be able to fill the regulatory vacuum and avoid the chaos of anarchy.

V. FEDERAL GRANTS AND SANCTUARY CITIES: A TIMELY SPENDING-POWER CONTROVERSY

Given the breadth of federal regulatory power, it is not surprising that the purchase of state exercises of sovereign power that the federal government could not exercise in its own right has only arisen in one case thus far—*Dole*. But, given some of the controversial executive orders issued by President Trump, the issue is currently one of great significance.

For example, Trump issued an Executive Order threatening the eligibility of cities that provide sanctuary for undocumented immigrants to receive federal-grant funding.¹³⁸ As part of the implementation of this Order, then-Attorney General Jeff Sessions issued a statement providing that cities would not receive funding

136. Cf. Marianno-Florentino Cuéllar, *Adaptation Nation: Three Pivotal Transitions in American Law & Society since 1886*, 70 OKLA. L. REV. 321, 328 (2017) (stating, in the context of enforcement of governmental corruption, that “[i]mplicit in robust federalism is sufficient institutional independence to make possible a degree of competition between sovereigns”).

137. An analogy to the Sherman Act might help clarify the rationale for my approach. By prohibiting monopolization, Section Two of the Sherman Act clearly protects competitors against injuries from dominant firms’ anticompetitive behavior. Sherman Antitrust Act, 15 U.S.C. § 2 (2012). But, Section One also protects the consumer from collusion between potential competitors by prohibiting all agreements in restraint of trade. *Id.* at § 1. Analogously, my proposal protects states against coercive conditional spending by the dominant federal government, but also protects the people from potential collusion by state and federal governments to divide the exercise of coercive state powers among themselves.

138. EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES, WHITE HOUSE § 9 (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/> [hereinafter EXECUTIVE ORDER]. Before the Executive Order, Donald Trump announced to a crowd in Youngstown, Ohio that he was going to “crackdown” on sanctuary cities. See Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C.L. REV. 1703, 1705 (2018).

under the Edward Byrne Memorial Justice Assistance Grant (JAG) program unless they agree to notify U.S. Immigration and Customs Enforcement (ICE) about any undocumented foreign nationals who are in the city's custody 48 hours before a city releases an individual and provide ICE access to city jails and police stations to take custody of any deportable immigrants.¹³⁹ The City of Chicago has sued to enjoin the AG from imposing these new conditions on the Byrne JAG grants, alleging among other things that the conditions are beyond the spending power of the United States.¹⁴⁰

Byrne JAG grants provide:

critical funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.¹⁴¹

The Bureau of Justice Assistance (BJA) awards its grants as follows: each state receives a minimum award plus an amount based on its share of violent crime and population; local governments receive 40% of their state's allocation, based on "a jurisdiction's proportion of the state's 3-year violent crime average."¹⁴² In short, the grants are formula-based and are not discretionary. In 2016, the BJA provided a total of \$86.4 million to local governments; Chicago received \$2.33 million of that money.¹⁴³

Given the flexibility that Byrne JAG grants provide to local government regarding the use of grant funds, it is difficult to formulate any precise calculation of how undocumented immigrants in a jurisdiction receiving a grant will affect the need for grant money or the value the federal government derives from the grant

139. *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, U.S. DEP'T. OF JUST. (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [hereinafter SESSIONS STATEMENT].

140. *See* Complaint, *City of Chicago v. Sessions*, 264 F.Supp.3d 933 (2017) (No. 1:17-cv-5720), 2017 WL 3386388; *see also* Sandhya Somashekhar, *Chicago sues Justice Department over new police grant rules targeting sanctuary cities*, WASH. POST (Aug. 7, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/07/chicago-to-sue-justice-department-over-new-police-grant-rules-targeting-sanctuary-cities/?utm_term=.1977904d3c3f.

141. *See* *Welcome to BJA's Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, OFFICE OF JUSTICE PROGRAM, <https://www.bja.gov/jag/> (last visited Feb. 12, 2018).

142. *See* *Technical Report, Justice Assistance Grant Program, 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE (BJA) 2 (Sept. 2016), <https://www.bja.gov/jag/pdfs/JAG-Technical-Report.pdf>.

143. *Id.* at 1.

awards. Trump's Executive Order implies that the federal government desires that the money it provides not go to the benefit of undocumented immigrants.¹⁴⁴ This desire is legitimate under my Spending Clause analysis because, within the bounds of independent constitutional constraints such as the First Amendment or Equal Protection Clause, the federal government has unfettered discretion over the recipients of its grant programs.¹⁴⁵ One can reasonably assume that a sanctuary city will attract undocumented immigrants so that the number of such immigrants in the city would be greater than if the city had not chosen to limit its cooperation with federal immigration-enforcement efforts in order to protect its residents from deportation.¹⁴⁶ Thus, under my coercion criteria for Spending Clause violations, the federal government has a legitimate basis for withholding Byrne JAG grant awards to a city if that city does not otherwise ensure that the money will not go to undocumented immigrants.

There is, however, an independent argument that the threat of cutting off grants to cities that fail to meet the conditions specified in Sessions' statement is beyond the United States' spending power. ICE has the authority to detain individuals whom it determines in the first instance are deportable, pending a determination by INS that they truly are subject to deportation.¹⁴⁷ But, ICE cannot stop any person who looks like he or she might be an immigrant to verify his or her immigration status.¹⁴⁸ ICE must have reasonable articulable suspicion to believe that the individual is an undocumented immigrant.¹⁴⁹

It appears that ICE is seeking to have local governments check the immigration status of anyone who is detained for the commission of a state or local crime, or even anyone who is arrested on suspicion of committing such a crime. ICE has further asked local and state police to detain such individuals for 48 hours after notifying ICE of their detention, so that ICE may determine whether the individual is undocumented and hence subject to deportation.¹⁵⁰ In some cases, this request would require local police to hold a criminal suspect beyond the time the state would

144. See EXECUTIVE ORDER, *supra* note 138, at § 9.

145. The statute authorizing Byrne JAG grants may limit the authority of the President to condition the award of Byrne JAG grants. See 34 U.S.C. §§ 10152(a)(1), 10154, 10156 (specifying the formula and procedures for awarding Byrne JAG grants). Such limitations, however, do not reflect any constraint on the federal government under the Spending Clause to specify the recipients of federal grants.

146. For an overview of how designated sanctuary cities have protected undocumented immigrants see Lasch et al., *supra* note 138, at 1736–51.

147. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> (last visited Feb. 12, 2018); see also 8 U.S.C. § 1225.

148. This would be an unconstitutional seizure of a person. See U.S. CONST. amend IV; see also *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

149. See *Terry*, 392 U.S. at 19–22.

150. SESSIONS STATEMENT, *supra* note 139.

otherwise detain him, solely for the purpose of determining his immigration status.¹⁵¹

In seeking to have the state detain individuals under local or state law while it determines their immigration status, ICE is essentially using the state's sovereign power to detain individuals it could not detain alone as part of its immigration-enforcement responsibility. Moreover, it is fairly well agreed, even if there is no consensus, that absent agreement by the local government, Congress would not have the authority to enforce purely local and state laws.¹⁵² Thus, the federal government has no constitutional authority to enforce local laws by detaining those for whom probable cause exists that they violated state or local law. By threatening to cut off grant money unrelated to federal immigration policy, ICE is "buying" the use of state law-enforcement power to obtain custody over deportable individuals whom the federal government would be unable to identify and detain on its own.

It is true that state or local government could authorize federal law-enforcement personnel to aid the state or local government in its enforcement efforts, in which case the Department of Justice might be given authority to detain individuals who it has probable cause to believe committed state or local crimes while ICE checks on their immigration status. But, if the state grants that authority because of the threat of loss of unrelated federal dollars, that would implicate the federal spending power. And recall my proposed ban on the federal purchase of regulatory power beyond that the federal government enjoys under the nonspending enumerated power. This ban considers whether the federal government would have the power it is buying from the state or local government *without the purchase*—i.e., without voluntary invitation or consent by state or local government to have the federal government exercise essentially local law-enforcement authority. Hence, Attorney General Sessions' statement seems to violate the prohibition of coercive federal spending to derive a benefit from the exercise of state powers that the federal government does not have on its own.

CONCLUSION

The Spending Clause of the Constitution, unlike all the other enumerated powers granted to Congress, allows its exercise to provide for the general welfare. This Article addresses the extent to which that aspect of the Spending Clause permits the federal government to circumvent limits inherent in the other enumerated powers. It considers why the Spending Clause alone might permit pursuit of the general welfare and posits that spending is different from the other enumerated

151. Chicago's complaint in *Chicago v. Sessions* alleges that many of the detainees are released shortly after being booked and hence are not detained for 48 hours. Compliance with the condition on a Byrne JAG grant to cooperate with ICE would then require the state or local police to increase its detention time of apprehended suspects. Complaint at 21–22 ¶¶ 62–63, *City of Chicago v. Sessions*, 264 F.Supp.3d 933 (2017) (No. 1:17-cv-5720), 2017 WL 3386388.

152. See, e.g., Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1375–78 (2006) (noting that in the immigration arena, the federal government can likely preempt local and state laws, but the federal government cannot enforce local or state laws that these governments have chosen not to enforce).

powers in that it necessarily involves a voluntary transaction: if the federal government spends money to buy a good or service, there must be a willing seller. From this insight, this Article concludes that the spending power is limited to spending subject to budget constraints. This, in turn, means that the government may not exercise the spending power for purchases induced by a threat that is unrelated to the interest of the federal government in ensuring that it obtains the quality of the goods or services it purchases and does not spend more than necessary to obtain them. The focus on spending as involving the exercise of noncoercive powers of government leads to the further conclusion that the federal government should not have the power to purchase coercive exercises of governmental power from the states. It applies these two limitations to the Trump Administration's threats to withhold grant funding from sanctuary cities and concludes that certain requirements the Administration seeks to impose on local and state governments as conditions on the receipt of grant money are beyond the federal government's spending power.

