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Getting Spending: How to Replace Clear Statement Rules with Clear Thinking about Conditional Grants of Federal Funds

Brian Galle
Georgetown University Law Center, brian.galle@law.georgetown.edu

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How much federalism is too much? The answer, of course, depends on whom you ask. It is no surprise, then, that in both judicial and academic debates about the proper balance between national and local power, the fiercest arguments have been fought not over "how much?" (perhaps an impossible question in any event) but "who?" Thus, for each key aspect of national power—for example, the scope of the Commerce and Treaty powers, the Tenth and Fourteenth Amendments, and Congress's ability to subject states to suits for damages by private individuals—there is an ac-

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* A.B. Harvard College, J.D. Columbia. Appellate Attorney, U.S. Department of Justice. I am grateful for helpful comments and suggestions from Richard Briffault, John Bronsteen, Jonathan Cedarbaum, Jon Connolly, Michael C. Dorf, Jeff M. Hauser, Aziz Huq, Robert Katzmann, Bernadette Meyler, John C. Nagle, and Mark Tushnet. Unless otherwise noted, the views here are those of the author alone and not those of the United States or any person mentioned in this or any other footnote.


4 See, e.g., Paul Brest, Congress as Constitutional Decisionmaker and Its Power To Counter Judicial Doctrine, 21 GA. L. REV. 57, 68–78, 104–05 (1986); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, Legislative Constitutionalism].

companying literature considering who best to decide where the federalism shadow falls. In recent years the Supreme Court has asserted a strong role for itself in nearly all of these areas.6

A notable exception is the Spending Clause. Although the Court has penciled in a rough set of judicially-enforceable limits on Congress’s power to spend funds “for the general welfare,”7 as a practical matter these guidelines have been purely hortatory.8 The Court has been content to leave to ordinary politics the balance between national conceptions of “general welfare” and state autonomy.9

The Spending Clause thus has come to represent something of a gap in what is otherwise a generally aggressive regime of judicial enforcement of federalism values.10 As a result, constitutional thinkers of all stripes have been drawn to the Spending Clause. Policymakers, rebuffed in direct efforts to legislate, have attempted to re-enact what was formerly direct law-making as a condition on a grant of funds to the regulated entities.11 In the academy, friends of judicially-enforced federalism have with increasing

6 See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress lacks power under Section Five of Fourteenth Amendment to abrogate state sovereign immunity from suit under federal statute outlawing discrimination against disabled employees); United States v. Morrison, 529 U.S. 598 (2000) (curtailing Congress’s powers under the Commerce Clause and Section Five); Printz v. United States, 521 U.S. 898 (1997) (concluding that Tenth Amendment prohibits the federal government from directing state officials to enforce portions of federal handgun control legislation); City of Boerne v. Flores, 521 U.S. 507 (1997) (ruling that the Fourteenth Amendment did not grant Congress power to force states to give wider latitude for religious freedom than the First Amendment required).


9 See Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism’s Trojan Horse, 1988 SUP. CT. REV. 85, 123.


frequency called for the Court to shut the sluice-gate.\textsuperscript{12} And, in some judicial quarters, the gate has begun to creep closed.\textsuperscript{13}

In this article I argue that the gate is not open wide enough. Although the Court does not directly police spending legislation, it does restrict conditional spending by means of an actively enforced "clear statement rule."\textsuperscript{14} In construing the terms of a statute enacted under the authority of the Spending Clause, the Court refuses to recognize any duty burdening a state unless, in the Court's view, the language of the statute clearly requires it.\textsuperscript{15} The result is an extraordinarily rigid statute, with little opportunity left for courts to interpret in light of changed events or novel uses.\textsuperscript{16} Depending on how we understand the clear statement rule, it may also leave little or no room for executive interpretation, a major problem in an era that has come to depend on agencies to provide essential adaptability and to elaborate the detail of Congress's broad designs.\textsuperscript{17} In effect, the Supreme Court has given Congress free reign to legislate under the Spending Clause, but only if Congress legislates badly.

The clear statement rule also constricts the reach of federal constitutional norms. Federal judges often use statutory interpretation as a substitute for constitutional adjudication. For example, by assuming that a statute should be read, if possible, to avoid constitutional doubt, a court in effect weaves constitutional values into the open texture of federal legislation. But federal courts do not have comparable power over state law. To the extent that dependence on their statutory power has left federal courts less willing to expand the limits of the Constitution itself, state law is relatively less constrained by constitutional values. Since the civil rights era,
however, this constitutional gap has been filled by federal legislation and regulation.\textsuperscript{18}

The difficulty with the clear statement rule is that it sharply restricts courts' power to interpret constitutionally-inspired federal lawmaking flexibly so as to fulfill constitutional values. And recent cut-backs in Congress's ability to use its power under Section Five of the Fourteenth Amendment to enact constitutionally-inspired legislation broader than what the Supreme Court has been willing to recognize\textsuperscript{19} place increasing weight on the Spending Clause—the best available avenue for reinvigorating the Constitution in the states. For example, the Supreme Court's decision limiting the liability of states for damages under Title I of the Americans with Disabilities Act\textsuperscript{20} has put much greater importance on the availability of remedies under the Rehabilitation Act, an earlier statute limiting discrimination by states accepting federal funds.\textsuperscript{21}

Despite these dramatic costs, the clear statement rule enjoys virtually unanimous support. In addition to the expected accolades from those who believe federalism is under-enforced, and in need of a rule of statutory interpretation to support it,\textsuperscript{22} Laurence Tribe has praised the clear statement rule;\textsuperscript{23} even the most stubborn critics of judicially-enforced federalism make an exception for it.\textsuperscript{24}

\textsuperscript{18}See infra nn.323-35 and accompanying text.
\textsuperscript{21}See Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1290 n.1 (11th Cir. 2003) (explaining that plaintiffs were proceeding under Rehabilitation Act following Supreme Court's decision that their ADA claims must be dismissed); cf. Ruth Colker & James J. Brudney, Dissing Congress, 100 Mich. L. Rev. 80, 142 n.263 (2001) (making similar point about spending legislation to replace invalidated portions of Age Discrimination in Employment Act).
\textsuperscript{23}See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479–80 (2d ed. 1988).
Yet none of the justifications for the clear statement rule—generally proffered off-handedly, in a sentence or two—withstanding serious scrutiny. The Court has suggested that since Spending Clause legislation is "in the nature of a contract,"25 the clear statement rule is required by contract-law principles. Contract law, to the contrary, rejects formalism and actively facilitates the use of agreements that on their face are incomplete or ambiguous. Liberals who favor the "political safeguards" of federalism over judicial enforcement explain that the clear statement rule ensures that burdens on states arise out of the political process, not judicial decision.26 But an incomplete agreement is itself the product of, not the failure of, the legislative process, and in any event no case could come before a judge without congressional authorization to make the right in question enforceable by federal officials or other parties. And those who claim that a clear statement makes sure that credit or blame for the conditions of federal spending stay with the federal government cannot explain why state officials who elect to receive funds subject to those conditions should not in fact share the public barbs or praise that result.

Probably the strongest argument for the clear statement rule is that, like the doctrine of constitutional avoidance, it reinforces the political protections for the constitutional values of federalism. As I show, however, the political process actually overprotects states against conditional spending. States can engage in strategic behavior—for example, holding out for a payoff that falls just short of the overall value of the proposed legislation to the majority coalition—that may dramatically inflate the costs of conditional spending. These opportunities are especially enticing when the federal government cannot act directly, and the states know that it must obtain their agreement. In this way the Court's aggressive watch over the boundaries of federalism in other areas spills over into spending legislation. Although in theory the Spending Clause may grant Congress the ability to obtain results it could not under its other enumerated powers, as a practical matter transaction costs will usually kill such projects. Thus, unlike in many other areas of legislation, states have a built-in incentive to resist federal expansion, and powerful means for doing so. That leaves the case for further, judicially-invented limits, whether in the form of the clear statement rule or otherwise, to look elsewhere.

This Article develops these themes in the ensuing Parts. Part I fills in background for readers who may not be familiar with the Spending Clause or the clear statement rule. Part II begins the analysis of the merits of the clear statement rule with the justification most often offered by the Supreme Court: that Spending Clause legislation is "in the nature of a contract." Part II argues first that, contrary to one prominent critique, legisla-
tion under the Spending Clause is not actually a contract but is in fact an exercise of Congress's enumerated powers. It then concludes that, whatever the status of spending legislation, contract law flatly contradicts the formalism of the clear statement rule. Part III considers and rejects the alternative rationale that the clear statement rule provides "notice" to states, or that it affords them a necessary opportunity to use the political process to their advantage. Part IV examines two models of the political process, concluding that under either view there is little need for further judicial protection against conditional spending. Part V briefly addresses the claim that conditional spending undermines transparency and confuses voters. In Part VI, this Article shifts gears to consider the benefits of the clear statement rule for preserving federal constitutional norms. Finally, in the Conclusion, this Article discusses the implications of this new understanding of the clear statement rule as it applies to other controversies.

I. DOCTRINE

The Constitution gives Congress "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."27 By implication, then, Congress is authorized to spend its tax revenues for either of the two enumerated purposes.28 Unfortunately, this clause of Article I—the "Spending Clause"—is not especially clear about the limits of the powers it bestows. For example, does the "general welfare" include projects not otherwise included within the scope of Congress's delegated powers? That very question divided Madison from his Federalist Papers co-author, Hamilton.29

Others have related thoroughly the interpretive history of the Spending Clause, from its beginning in the Madison-Hamilton debate down to the modern era.30 The key point is that over time, Congress discovered that it could use the offer of federal funds to entice competing government authorities—the states—to agree to many things they otherwise might not voluntarily have done.31 Innovations in federal income tax collection, which began during the Civil War and gained impressive momentum with

27 U.S. CONST. art. I, § 8, cl. 1.
28 See Engdahl, supra note 22, at 49.
29 See Eastman, supra note 12, at 66–67. Madison believed that "general welfare" did not include projects not otherwise within the scope of Congress's powers, while Hamilton believed that it did. Id.
30 See Baker, supra note 11, at 1924–29; Erwin Chemerinsky, Protecting the Spending Power, 4 CHAP. L. REV. 89, 90–92 (2001); Engdahl, supra note 22, at 4–53; Gibson, supra note 11, at 454–58; Rosenthal, supra note 10, at 1111–13; Zietlow, supra note 10, at 168–70.
the enactment of the Sixteenth Amendment, greatly expanded the pool of federal revenue, so that the spending power became an increasingly important factor in the relationship between the federal government and the states. Today, many major federal programs (excluding national defense) in fact incorporate elements of both federal and state authority, with the terms of the states’ participation defined by way of Congress’s power to dictate the conditions under which its funds may be expended. Indeed, “objectives not thought to be within Article I’s ‘enumerated legislative fields’ . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”

On its surface the modern law of the Spending Clause is fairly stable. The definitive case is South Dakota v. Dole. There is no justiciable limit on the expenditure of funds, with or without conditions, for “the General Welfare.” That is, although there might conceivably be an argument that some spending—for a particular farmer’s hog feed, let’s say—does not advance the general welfare of the nation, the Court defers to Congress’s view of what that welfare might entail. Any “conditions” that Congress attaches to its expenditure, however, must be stated clearly. The conditions must be reasonably related to the purpose of the expenditure. The test of reasonableness, as in most other areas of the Court’s review of congressional decision making, is very forgiving.

Additionally, of course, Congress cannot enact spending legislation that would be barred by any other provision of the Constitution. To take an obvious example, federal procurement decisions cannot be based invidiously on race. Although the Tenth Amendment is generally not an independent bar to spending conditions, the Court has suggested at times that it is conceivable that highly “coercive” spending, the federal offer that states cannot refuse, might be at least a reason to scrutinize attached conditions more closely.

33 See Engdahl, supra note 22, at 33–34; Zietlow, supra note 10, at 170.
34 Zietlow, supra note 10, at 174–75.
37 Id. at 207; Baker & Berman, supra note 8, at 464 n.34; Smith, supra note 11, at 1196–97.
39 Dole, 483 U.S. at 207.
40 New York v. United States, 505 U.S. 144, 167 (1992); see Dole, 483 U.S. at 207.
41 See New York, 505 U.S. at 167; Baker & Berman, supra note 8, at 466.
42 Dole, 483 U.S. at 208.
44 See Dole, 483 U.S. at 211 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). Although many commentators describe coercion as a “fifth” limitation, it is apparent from the early
Other than the "clear statement rule" for spending conditions, none of the constitutional limits peculiar to the Spending Clause has had any real teeth since the end of the *Lochner* era. No modern court of appeals has ever held that an expenditure did not advance the general welfare,\(^45\) or that a state was coerced into accepting the conditions attached to a federal grant.\(^46\) Only very rarely have courts found that a condition was not reasonably related to the spending it accompanied\(^47\)—unsurprisingly, since it would seem that one could often argue that the purpose of the expenditure is precisely to induce the state to accept whatever conditions might apply.\(^48\)

Underneath the surface, though, some of the spending waters are roiled. As Peter Smith has observed, one troubled area becomes visible when we examine closely the basic rationale for the "clear statement rule."\(^49\) Many of the Court’s early decisions applying its clear statement rule for spending conditions—most prominently *Pennhurst State School & Hospital v. Haldeman*\(^50\)—suggest that the rule is a necessary by-product of the fact that state agreements to accept federal funds with some strings attached are "in the nature of a contract."\(^51\) Under this view, a state could not knowingly have accepted the terms of the grant unless they were apparent on the face of Congress’s enactment.\(^52\)

By the beginning of the 1990s, however, it had begun to appear that the *Pennhurst* rationale was obsolete. In a series of cases, the Court repeatedly demanded a clear statement from Congress wherever the federal government sought to displace existing sources of state authority, regardless of

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Spending Clause cases that the Court thought coercive conditions would violate the Tenth Amendment. *See* United States v. Butler, 297 U.S. 1, 70–73 (1936).

\(^{45}\) See Kansas v. United States, 214 F.3d 1196, 1200 (10th Cir. 2000); Baker & Berman, *supra* note 8, at 524.


\(^{47}\) Baker & Berman, *supra* note 8, at 466.


The notable exception involves a federal criminal statute making it unlawful to bribe a person who works in any part of a state or local government, where the relevant segment of that government receives a minimal amount of federal funding. 18 U.S.C. § 666 (2000). Prior to a Supreme Court decision upholding the law, many lower courts had held that there was at least a serious question whether the very broad sweep of the criminal prohibition was reasonably necessary to protect the integrity of the federal funds. *See*, e.g., Sabri v. United States, 124 S. Ct. 1941, 1945 (2004); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 10 (2003).

\(^{49}\) *See* Smith, *supra* note 11, at 1189–90.

\(^{50}\) 451 U.S. 1 (1981).

\(^{51}\) *Id.* at 17.

\(^{52}\) *Id.* The unmentioned assumption here, of course, was that Congress’s conditions were not binding on the state unless the state knowingly accepted them.
whether the federal source of law was the Spending Clause.\textsuperscript{53} Although the Court had invoked this rule a few times before, it had never done so in terms so sweeping, or with so elaborate a justification, as in its 1991 opinion in \textit{Gregory v. Ashcroft}.\textsuperscript{54} In that case, the Court upheld Missouri’s mandatory retirement age for certain state judges, notwithstanding the provisions in the federal Age Discrimination in Employment Act ("ADEA") making such limits by "employers" illegal and explicitly including "states" as covered employers.\textsuperscript{55} The Court explained that given the important constitutional function served by state governmental autonomy—a constellation of values it labeled collectively as "federalism"—Congress would not be permitted to act on or limit that autonomy unless it did so clearly.\textsuperscript{56}

In tying the clear statement rule to the importance of federalism, the Court claimed that its clear statement rule was in fact a variation of its traditional rule of constitutional "avoidance."\textsuperscript{57} Indeed, most commentators have understood \textit{Gregory} as a classic example of the avoidance canon: the Court used statutory interpretation, rather than the Constitution itself, to prop up or expand a rule of constitutional law it was unwilling to enforce directly, simply by making it a bit harder for Congress to enact law in that area.\textsuperscript{58} But the Court rather subtly offered another, more specialized justification for the clear statement rule peculiar to the federalism context. Quoting Professor Tribe’s treatise on constitutional law, the Court remarked at the end of its paragraph on avoidance that "[t]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which \textit{Garcia} relied to protect states’ interests."\textsuperscript{59} Tribe, in turn, explained that the Court had gotten out of the business of enforcing most federalism-derived constitutional limits on federal authority on the assumption that ordinary politics was sufficient to safeguard state autonomy.\textsuperscript{60} He argued that that assumption would prove false if federal judges could use ambiguities in federal statutes to further their own vision of the appropriate federal-state balance, insulated by Article III from the political pressures that the states could otherwise

\begin{itemize}
  \item \textsuperscript{53} \textit{E.g.}, \textit{Gregory v. Ashcroft}, 501 U.S. 452, 461 (1991); \textit{BFP v. Resolution Trust Corp.}, 511 U.S. 531, 544 (1994).
  \item \textsuperscript{54} 501 U.S. 452 (1991).
  \item \textsuperscript{55} \textit{Id.} at 455–56.
  \item \textsuperscript{56} \textit{Id.} at 457–61.
  \item \textsuperscript{57} \textit{Id.} at 464.
  \item \textsuperscript{60} \textit{Gregory}, 501 U.S. at 464 (quoting TRIBE, \textit{supra} note 23, § 6-25, at 480).
  \item \textsuperscript{61} TRIBE, \textit{supra} note 23, § 6-25, at 480.
\end{itemize}
use to protect themselves from federal overreaching. Some lower courts have recognized that this point is a distinct reason, above and beyond the usual avoidance rationale, for applying the clear statement rule in federalism cases.

I explore each of these three distinct explanations for the clear statement rule in much more detail in the ensuing Parts. For now, however, my aim is simply to emphasize the ways in which the uncertainty surrounding the rationale for the clear statement rule could produce different results in otherwise identical cases. Professor Smith, for example, argues that the answer to the question whether federal agencies, rather than Congress, can provide the requisite clear statement depends on whether we think the clear statement requirement comes from Pennhurst's idea of notice or the Gregory notion of constitutional avoidance. This tension came to the fore in the Supreme Court's 1999 opinion holding that state defendants could be liable for damages under Title IX for knowing indifference to student-on-student sexual harassment. The majority opinion, pointing to the contractual nature of Title IX, argued that federal regulations and court rulings gave states ample warning that they would be liable for damages. The dissenters, in contrast, argued that the unclear language of the statute had made it too easy for Congress to impose that obligation, and had deprived states of the opportunity to use their political influence against the Court's rule. Yet neither side acknowledged that the other's position made a fair bit of sense, given the premise for the clear statement rule it started with.

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62 See id. at 479–80; see also Laurence H. Tribe, American Constitutional Law § 6-28, at 1175–76 (3d ed. 2000) (arguing that, because the "congressional political processes" used in "protecting the sovereignty of the states" are absent in court, courts should be reluctant to rely on ambiguous congressional language to displace state regulatory regimes).

63 See, e.g., Va. Dep't of Educ. v. Riley, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) ("To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests.").

64 See Smith, supra note 11, at 1189–90. As I explain a bit later, I largely agree with Professor Smith's analysis of the Pennhurst rationale, see infra Part II.B, but I think his exploration of Gregory is incomplete, see infra text accompanying notes 238–245.


66 Id. at 640–44, 647–48.

67 Id. at 654–55 (Kennedy, J., dissenting).

68 Similarly, the Courts of Appeals are presently split on whether individuals can sue states for damages under the Rehabilitation Act of 1973. Compare Doe v. Nebraska, 345 F.3d 593, 601 (8th Cir. 2003); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1292–93 (11th Cir. 2003) (per curiam); M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark, 344 F.3d 335, 349–51 (3d Cir. 2003); Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 129–30 (1st Cir. 2003); and Douglas v. Cal. Dep't of Youth Auth., 285 F.3d 1226, 1226 (9th Cir. 2002); with Pace v. Bogalusa City Sch. Bd., 325 F.3d 609, 615–18 (5th Cir.), vacated and reh'g en banc granted, 339 F.3d 348 (5th Cir. 2003), and Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98, 113–15 (2d Cir. 2001). The center of the disagreement is whether states that accepted funds subject to the conditions of the Rehabilitation Act "knowingly" waived their sovereign immunity from suit, if at the time they accepted the funds they might reasonably have believed that Congress already had the power to abrogate that immunity directly. E.g.,
The uncertain rationale for the clear statement rule also leaves open just how “clear” a statute must be in order to satisfy the rule. Based on Gregory's reading of the ADEA, which in some senses was very stringent, the popular view is that the clear statement rule demands exceptionally clear language on the face of the statute. Gregory, by reading “employee” not to include state judges, refused to apply a seemingly all-encompassing term to include its more specific applications. But Gregory does not tell us where the clear statement rule ranks relative to other principles of statutory interpretation—most importantly, canons that would import into the statutory text terms that do not appear in the statute at all, but would be obvious to any reader. Thus, for example, does the clear statement rule prohibit judges from employing the traditional assumption that a term of art imports its interpretive history into the statute? How about whether states are bound by a condition that a court imposes because any contrary reading would be absurd? If the clear statement rule is only about making it more difficult for Congress to impose conditions on states, maybe not. But if it rests instead on the need to provide a state with “notice” of what will be required of it, there would seem to be every reason to assume that the states know the obvious. Similarly, the Court suggested prior to Gregory that legislative history is relevant to whether a statute is clear enough to meet the Pennhurst test. That makes perfect sense from a notice perspective, and is quite defensible in Tribe's political-process analysis, but is harder to justify if we want to make the legislative process as difficult as possible.

At present we do not know whether Pennhurst's analysis, based on the knowing acceptance of contract terms, is still good law. Lower courts still regularly invoke that explanation, and the Supreme Court itself, after something of a pause, has now quoted the contract rationale of Pennhurst favorably several times since Gregory. Yet Gregory itself points to

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Doe, 345 F.3d at 601. If the language of the Rehabilitation Act is clear, however, see Nieves-Marquez, 353 F.3d at 129 (observing that “the majority of circuits that have addressed the issue” have found the statute “unambiguous”), this argument is entirely moot if the real basis for the clear statement rule in spending legislation is not Pennhurst's idea of knowing acceptance but rather Gregory's twin theories of political limitations.


70 See Bd. of Educ. v. Rowley, 458 U.S. 176, 204 n.26 (1982) (“The Act and its history impose no requirements on the states like those imposed by the District Court and the Court of Appeals. A fortiori Congress has not done so unambiguously, as required in the valid exercise of the spending power.”) (emphasis added); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19–21 (1981) (looking to “the specific language and legislative history” of the statute to discern clear statement).


Pennhurst as an authority for its own version of the clear statement rule.\textsuperscript{73} Does this mean that, when the Court quotes Pennhurst, it really means its re-imagining of the clear statement rule in Gregory? Or, since the two theories could conceivably overlap, perhaps it means to invoke both.

So that is where we stand now. In addition to the Court's own explanations of its doctrine, a number of commentators have attempted to justify or improve on the Court's Spending Clause jurisprudence with theories of their own. The ensuing Parts engage the various rationales I have already mentioned, as well as a few others of scholarly provenance. Ultimately, I find that none of the justifications for the clear statement rule, whether judicially-invented or otherwise, are persuasive.

II. THE PENNHURST RATIONALE

In this section I consider the original explanation for the clear statement rule, as set out by the Court in its opinion in Pennhurst State School & Hospital v. Haldeman.\textsuperscript{74} Noting that conditions attached to grants of federal funds are "in the nature of a contract," the Court declared that any such condition would have to be made clear in advance of the state's acceptance in order to validate the bargain.\textsuperscript{75} Later writers have attempted to make a stronger version of this claim, arguing that Spending Clause legislation is not actually "law," but is simply a contractual agreement between the federal government and the states.\textsuperscript{76} In the first subsection I examine both the strong and weak versions of the contract argument, both rather skeptically. In the second subsection I argue that, even if we accept the proposition that Spending Clause legislation is, or is "in the nature of," a contract, we still would have no reason to impose a clear statement rule.

A. The Contract Analogy

It is difficult to understand what work Pennhurst's contract analogy is supposed to do in changing the way we should interpret Spending Clause legislation. Ordinary law, of course, does not have to be clear. Indeed, if law were always clear, there would be little need for courts. But legislative clarity is both impossible and highly undesirable.\textsuperscript{77} Even in a static world, no legislature could anticipate all of the ways a single piece of legislation will interact with other laws and policies, or the variety of factual circum-

\textsuperscript{73} Gregory, 501 U.S. at 469.
\textsuperscript{74} 451 U.S. 1 (1981).
\textsuperscript{75} Id. at 17.
\textsuperscript{76} See Garnett, supra note 48, at 63.
stances in which it will be applied. And the world turns. Experience may show that what was thought a wise detail will prove to undermine the overall statutory scheme. A central function of judicial statutory interpretation is to make these adjustments—fine-tuning the law, as it were. Thus, a statute that attempts to foresee and provide for every eventuality is actually undesirable, because it would often have the effect of preventing later interpretation from accounting for flaws in the original vision.

The Pennhurst Court never explains why these basic principles should be different in legislation that results from a bargain between states and the federal government. That is unsurprising; nearly every statute could be described as a bargain among various interests. Certainly there are some—textualists, most prominently—who argue that courts have an obligation to preserve each such bargain in haec verba, in the exact words ultimately negotiated by the parties. As I discuss a bit more in the section on contract interpretation, section II.B, the better view is probably that most negotiators prefer recourse to a neutral arbitrator in order to resolve unanticipated difficulties. In other words, flexibility is much to be preferred over near-literalism, both in contract and in legislation generally. That argument seems especially forceful when the bargain affects not only the bargainers but also third parties, either those who were not informed and energized enough to participate in the original round of legislating, or simply those who live under the law’s effects in the future. In any event, my main point for now is that under either view the fact that Spending Clause legislation is “in the nature of a contract” adds little to the arguments for or against a clear statement rule.

Some writers after Pennhurst, though, have tried to make a stronger claim: Spending Clause legislation is not merely like a contract; it is a contract. Obviously, if that argument were right, it would make contract

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78 See Eskridge & Frickey, Law as Equilibrium, supra note 17, at 62; Daniel J. Meltzer, The Supreme Court’s Judicial Passivity, 2002 SUP. CT. REV. 343, 380, 386–87; Kenneth A. Shepsle, Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239, 252 (1992); Smith, supra note 11, at 1208, 1212; Sunstein, supra note 17, at 544.

79 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 87 (1982); T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 MICH. L. REV. 20, 60 (1988); Eskridge & Frickey, Law as Equilibrium, supra note 17, at 56–57; Meltzer, supra note 78, at 396.

80 See Mashaw, supra note 16, at 22; Sunstein, supra note 16, at 420–21. Of course, given infinite legislative energy, the error costs of incomplete or overly rigid statutes could be made fairly low, as the legislature “fixed” problems as they arose. Unfortunately, legislative energy is far from infinite, and after-the-fact fixes are small comfort to the parties affected by the initial error.


84 Engdahl, supra note 22, at 104; Garnett, supra note 48, at 63.
principles important to our understanding of the Spending Clause. The basic rationale is that in many cases, Congress uses the Spending Clause to secure agreement from the states to do what Congress could not directly mandate under any other constitutional provision. That premise has become more plausible recently as the scope of the Commerce Clause power has dwindled slightly. The claim then is that the Constitution authorizes Congress to spend, but not to spend for a particular purpose. While Congress may well select its own purposes, these goals are, according to one commentator, "extraneous ends"—they may well be desired by Congress, but are not themselves part of the spending power. Like a jury's power to nullify, in this view, extraneous ends are a simply structural consequence of power. Therefore, while the appropriation itself is "law," any goals or conditions of the expenditure are said to be binding only to the extent that the recipient agrees to them. Nor, the argument goes, does the Necessary and Proper Clause make Congress's spending goals part of its enumerated powers, because the focus of what is "necessary" must be the expenditure itself, not the purpose for which it is spent.

As I mentioned, all of these arguments ultimately depend on the claim that the purposes for Congress's spending are not themselves enumerated. That claim, though, is based on a strained reading of the Constitution's text, which expressly provides that Congress may spend "for the general welfare." If we take this language at face value, any aim of Spending Clause legislation is itself an enumerated power, so long as it advances "the general welfare." This would make conditions related to that purpose necessary and proper, and therefore, under the logic of the contract argument, would create "law" that was binding and "supreme" irrespective of its status as contract.

85 Engdahl, supra note 22, at 34.
86 Garnett, supra note 48, at 13.
87 See Engdahl, supra note 22, at 49-53.
88 Id. at 16-17.
89 Id. at 22, 64-65, 70-71.
90 Id. at 18, 20, 73, 93.
91 See Chemerinsky, supra note 30, at 93; McCoy & Friedman, supra note 9, at 102 ("[B]y its terms the spending power is 'broader' than the delegated regulatory powers.").
92 Engdahl, supra note 22, at 42; Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. CHI. L. REV. 1484, 1497 (1987). But see McCoy & Friedman, supra note 9, at 87 n.11 (asserting that imposition of condition on spending to further congressional purpose is not within Congress's enumerated powers).
93 See Buckley v. Valeo, 424 U.S. 1, 90 (1976); Engdahl, supra note 22, at 50. Although Professor Engdahl concedes the logic of this syllogism, he claims that its textual premise is weak, primarily because he believes that the text allows only tax revenues, rather than federal funds as a whole, to be spent for the general welfare. See id. at 51-52. That argument hardly helps Engdahl's position, though, since if the power to spend for the general welfare is enumerated, then Congress can use any means that it finds necessary and proper to facilitate that spending. One obvious tool for increasing the usefulness of a revenue stream is borrowing against it.
The Spending-Clause-as-contract proponent avoids this result by arguing that such a broad reading of the Spending Clause is absurd.  “The general welfare” sweeps so broadly that it imposes no meaningful limits on the ends towards which Congress can spend (except, perhaps, grants to particular individuals or entities), and therefore no real limit on what Congress can regulate.  If that is true, this argument goes, then why on earth would Congress have gone to all the trouble of enumerating other powers, and (in the Bill of Rights) reminding the republic that any power not enumerated was reserved to the states?  Therefore, the proponent says, we should select a different meaning, albeit one that is somewhat in tension with the plain language of the Spending Clause.

The difficulty with this argument is that there are major limitations on Congress’s ability to use the Spending Clause to effect its policy goals: the voters’ wallets. The founders understood that the powers both to tax and spend would be subject to serious political limitations.  Thus, so long as federal priorities had to be purchased, the federal government’s license to displace state ordering was subject to the willingness of voters to pay for nationalization.  Moreover, this check is more likely to be exercised than most other forms of political constraint on accumulations of federal power. The founders understood interest-group politics well.  Legislation under, for example, the Commerce Clause, diminishing state control in some relatively ineffable way, which harms (in an opaque manner) a widely-scattered group, but benefits directly and obviously some discrete group, is quite likely to win passage.  Higher tax bills, in contrast, are not difficult

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94 See Baker & Berman, supra note 8, at 485; Eastman, supra note 12, at 66 n.13; Engdahl, supra note 22, at 43; Garnett, supra note 48, at 81–82; McCoy & Friedman, supra note 9, at 115–16, 123; Bradley A. Smith, Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform, 4 CHAP. L. REV. 117, 123 (2001).

95 Engdahl, supra note 22, at 43; Garnett, supra note 48, at 83–84; McCoy & Friedman, supra note 9, at 115–17.

96 See Garnett, supra note 48, at 83–84; Smith, supra note 93, at 123.

97 Maltz, supra note 31, at 114–16.


for the suffering majority to detect, and, while there are free-rider effects, these diminish as the tax bill increases. Rich taxpayers are the quintessential disproportionately powerful minority "faction." It therefore is very difficult to enact a tax increase.

It might be objected that the federal government’s ability to borrow undermines the extent to which tax burdens have a limiting effect on the Spending Clause. But the members of the Constitutional Convention were only too aware of the painful burden of governmental debt, both for the states and the Continental Congress. It is unlikely they would have thought of federal borrowing as less, rather than more, politically damaging than higher taxes.

Thus, as a matter of structural logic, the natural reading of the Spending Clause is entirely consistent with the founders’ constitutional scheme. The taxing and spending powers were very broad but very difficult to use. Other enumerated powers were easier to employ, but limited in scope. There was nothing inconsistent about having both systems in place. Put another way, the need politically to justify federal taxation is perhaps the most significant safeguard of federalism.

To sum up, it is unclear why contract theory should play any role in the interpretation of Spending Clause legislation. The argument that congressional expenditures have no source of authority other than the fact of mutual agreement between parties is based on an improbable reading of the constitutional text, and relies on unfounded structural inferences about the design of the Constitution. Nor is the analogy to contract especially forceful, given that one could draw the same comparison with virtually any piece of lawmaking.

B. Contract Theory

Even if one, for whatever reason, were determined to apply contract law to Spending Clause legislation, the result would still not be a clear

103 See Garrett, supra note 99, at 518–19; Stigler, supra note 100, at 402–03.
105 For example, a court might elect to begin interpretation of an ambiguous provision of a piece of Spending Clause legislation with contract principles, on the assumption that those rules represent a useful and tried set of assumptions about the ways that bargaining partners would want to govern their relations with one another. Unlike the Pennhurst rule, however, that assumption would be defeasible by Congress. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998); Henrietta D. v. Bloomberg, 331 F.3d 261, 285–86 (2d Cir. 2003). The Court’s interpretation of liability under Title IX, which prohibits spending recipients from discriminating based on gender, appears to be based on a similar assumption about congressional intent. See Franklin v. Gwinett County Pub. Schs., 503 U.S. 60, 74–75 (1992).
statement of a rule. Black letter contract law recognizes a wide variety of vague terms, such as "best efforts" or "good faith," that must be interpreted by a court in light of specific circumstances.\textsuperscript{106} What is more, contract law routinely recognizes as binding terms that are either objectively or subjectively unclear in context, such as a commitment to deliver "chickens" when the parties have not specified egg-laying hens or "roasters."\textsuperscript{107} And in some cases, courts hold parties to terms that do not appear in the contract at all.\textsuperscript{108}

All three doctrines are based on pragmatic assumptions about the nature of deal-making. Contract law embraces the use of "good faith" clauses and other vague terms because the costs of precision are too high.\textsuperscript{109} For both sides to sit down and think about the precise behavior for which they want to bargain, and to craft proposed language embodying that standard, would add considerable time and planning (not to mention lawyering) costs to every deal.\textsuperscript{110} More time would be spent in reaching agreement between the two sides about every contingency each envisions. And some deals would never happen if the sides had to reach complete agreement on each point. Unwritten, "off-the-rack" default rules added later by courts can save parties the effort of elaborating their own.\textsuperscript{111}

In addition, complete precision is very difficult to achieve even in the simplest exchanges.\textsuperscript{112} Even if we assume that negotiating contract terms ex ante is costless, it obviously is impossible for parties to foresee all of the circumstances that might affect the contractual relationship in the future. Markets shift, opera singers get the flu, and nations rise and fall.\textsuperscript{113} If the


\textsuperscript{110} See Ayres & Gertner, supra note 109, at 92–93; Posner, supra note 107, at 833; Shepsle, supra note 78, at 251.

\textsuperscript{111} See Easterbrook, supra note 82, at 540.

\textsuperscript{112} See Gillian K. Hadfield, Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, 82 Cal. L. Rev. 541, 547–48 (1994); Posner, supra note 107, at 833 (noting that transaction costs and parties' inability to foresee low probability events make all contracts incomplete).

\textsuperscript{113} See generally Charles J. Goetz & Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms, 73 Cal. L. Rev. 261, 265–66 (1985) (discussing various types of contracting errors that can arise due to occurrence of different contingencies). Some contract theorists have suggested that very sophisticated negotiators might be able to cope somewhat with the perils of uncertainty by designing contracts to stipulate not precise outcomes, but rather carefully calibrated methods of dispute resolution. See, e.g., Sanford J. Grossman & Oliver D. Hart, The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration, 94 J. Pol. Econ. 691, 716 (1986). So far, though, real-world contract writers have not implemented
deal is to go forward, the parties must either be prepared to re-negotiate, or the court to figure out how best to enforce the remaining obligations. In many cases, the court’s intervention is more efficient than re-negotiation, at least from the perspective of the parties, because of both general transaction costs and the opportunity for strategic behavior by either side.\(^\text{114}\)

In short, contract law accepts both implied and uncertain language because deals have value.\(^\text{115}\) It is often better to have incomplete agreement, in which both sides get at least some of what they want, than to throw away the deal altogether.\(^\text{116}\) A duty to bargain for a contract extension in “good faith” may not describe exactly what the parties must do when the present contract runs out, but it at least establishes that a duty of some kind does exist. A similar rationale in part underlies the use of “implied” terms to bind both parties.\(^\text{117}\)

Contract law therefore flatly contradicts the *Pennhurst* rationale for the clear statement rule. Incomplete contracts—contracts that do not clearly instruct the court how they should be applied in all circumstances—are both inevitable and often deliberately drafted by contracting parties. Indeed, because incomplete deals are often more efficient, contract law facilitates them.\(^\text{118}\) At the same time, contract law manages incompleteness, by curtailing transaction costs and ensuring that ambiguities and oversights will not be used as an opportunity for strategic behavior or risk-shifting.\(^\text{119}\)

If contract law teaches us any lessons, it is that businessmen have concluded that the better balance is to embrace ambiguity, fortified with some less restrictive rules that channel, but do not eliminate, the uses of uncer-

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\(^\text{115}\) See Ayres & Gertner, *supra* note 109, at 95–96.

\(^\text{116}\) See CALAMARI & PERILLO, *supra* note 106, at 158–59 (describing conventional court justifications for implied terms); Schwartz & Scott, *supra* note 114, at 573–77 (arguing that average firm is indifferent to variances in interpretation). Schwartz and Scott, it should be noted, use this premise to reach an opposite conclusion from mine; they claim that courts in most cases should use a formalist default rule for interpreting contracts. *Id.* at 577. They argue that, since it is costly to litigate context and purpose, and firms are relatively indifferent to the gains they might realize from the additional precision in capturing their intent that would result, it is more efficient in most cases just to stick with the plain text. *Id.* at 576–77. I find their judgment about the relative preferences of firms for litigation cost-cutting over added precision dubious, especially in light of what the market shows us about demand for the services of contract litigators. Admittedly, however, that is evidence of ex post rather than ex ante preferences.


\(^\text{118}\) See Shepsle, *supra* note 78, at 251.

There are, however, some critics of the predominant approach to con-
tact who urge a more formalist methodology. These critics assert that
courts generally do a bad job interpreting contracts, especially when mea-
ured in terms of economic efficiency. They maintain, therefore, that
courts should in essence apply a clear statement rule to all or most con-
tracts, refusing to invoke default rules, and limiting their search for con-
tractual meaning to the text and structure of the contract document itself.
The critics freely admit that many productive deals would be lost as a re-
sult. They seem to suggest, though, that the possibility of this penalty
would induce parties to draft more complete contracts in the future, so that
overall there would be a net gain in efficiency.

There are two fairly glaring problems with these arguments. First, if
some incomplete contracts are caused by the limited capacity of the draft-
 ers, there is not much point in trying to incentivize them to do a better
job. Relatedly, the claim that the benefits of more complete drafting will
exceed the costs of the penalties is essentially empirical. If courts are
bad at measuring efficiency, how are they supposed to predict whether the
gains of the formalist strategy will outweigh the losses? And how can
the critics make that judgment, without knowing how many contracts are
incomplete by choice, how much effort is saved by that choice, and to what
extent society economizes on ex post litigation cost by forcing the addi-
tional ex ante negotiation? This is not to say (for now) that formalist inter-
pretation of statutes is necessarily wrong, only that the contract analogy
seems to, if anything, weigh against such tools of formalism as the clear

120 See Dent, supra note 119, at 78; McNollgast, supra note 81, at 705.
121 See SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 31:6, at 314–15 (Richard
122 See Scott, supra note 121, at 1021–22.
123 See WILLISTON, supra note 120, § 31:6, at 313–14; Robert E. Scott, The Case for Formalism
124 Id. at 860.
125 See Posner, supra note 107, at 839–40; Scott, supra note 123, at 860; see also Ayres & Gert-
er, supra note 109, at 93.
126 See Posner, supra note 107, at 877; see also Aleinikoff, supra note 79, at 25 (making a similar
critique of formalism in the statutory context); Cass R. Sunstein & Adrian Vermeule, Interpretation
127 See Scott, supra note 123, at 848 (conceding this point).
128 See Mashaw, supra note 16, at 23–25; cf. Hadfield, supra note 112, at 545 (observing that
vague standards may be better response to limited judicial capacity to identify “correct” rule). For a
similar discussion in the statutory context, see Cass R. Sunstein, Foreword: Leaving Things Undecided,
110 Harv. L. Rev. 4, 27 (1996) and Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 75–
77 (2000).
Therefore, far from mandating a clear statement rule, contract law and theory suggests that Spending Clause legislation should have the flexibility to preserve and adapt bargains in the face of time and human failings. Indeed, in one of its most recent Spending Clause opinions, the Supreme Court seems to acknowledge the inadequacy of contract as a rationale. The Court, in holding that punitive damages are not available in private lawsuits brought to enforce obligations arising under Spending Clause statutes, begins with the familiar invocation of contract theory. But a peculiar thing happens nearly at the end of the contract analysis: The Court admits that ambiguous terms in contracts can be interpreted to reflect "fairness." Thus, although buried beneath a lengthy—and, apparently, superfluous—walk through the use of punitive damages in contract actions, the Court's ultimate rationale is actually its own sense of fairness and good government. I follow that lead in the ensuing sections by examining other possible rationales for the clear statement rule.

III. TAKE NOTICE . . . PLEASE!

The need to provide states with "notice" as another rationale for the clear statement rule runs alongside the contract explanation, sometimes serving to provide the real reason for decision in what are nominally contract-rationale cases. In this section I try to make what sense I can out of the notice argument. As the reader may gather, I think "notice" has little or no independent meaning outside some more substantive explanation for why a state should have more notice than any other constitutional actor.

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131 Id. at 187.

132 Id. at 188. It is also worth noting that the Court's analysis was based not on constitutionally-required limitations on the spending power, but rather on its presumptions about what Congress intended by the term "appropriate relief." Id. at 187, 188 n.2. Thus it remains open after Gorman whether Congress can make state recipients liable for punitive damages if it speaks more clearly on that point. More vexing is the question of tremendous interest to many litigants (but well beyond the scope of this Article), whether courts may now presume that a general grant of remedial power includes the ability to impose punitive damages. The Court itself had thought it had such an ability for thirty years or more. See Smith v. Wade, 461 U.S. 30, 36 n.5 (1983); Carlson v. Green, 446 U.S. 14, 47–48 (1981) (Rehnquist, J., dissenting) (assuming that a Bivens remedy includes punitive damages, but stating that the imposition of such damages needs to be considered on the basis of factors, such as the character of the wrong and the amount necessary to "punish" the defendant); Int'l Bhd. of Elec. Workers v. Faust, 442 U.S. 42, 47–52; id. at 53 (Blackmun, J., concurring in result); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); Donahue v. Staunton, 471 F.2d 475, 483 (7th Cir. 1972) (citing Bell v. Hood, 327 U.S. 628 (1946)). However, the majority in Gorman makes no mention of these cases in asserting that it can presume the contrary.

133 I examine the most likely candidates for that substance in the next two sections. See infra Parts IV and V.
Even if we take as a given the claim that the extraordinary degree of notice offered by the clear statement rule is necessary, I argue here that the clear statement rule is redundant, given the states’ ability to alter the effect of ambiguous statutory language through administrative lobbying.

A. Notice as a Requirement of Contract

For most courts the core of the notice rationale seems to be to ensure fair bargains. Since Spending Clause legislation resembles a contract, courts have suggested that a state should not be obliged to make a deal when all of the federal government’s cards are not face up. Similarly, since conditional spending sometimes obliges states to give up a portion of their constitutional rights—such as their sovereign immunity from suit—many courts have claimed that the clear statement rule can be justified by analogy to the rule of waiver that applies to individuals who must waive rights, as with the defendant who pleads guilty.

Like most too-easy analogies, these arguments simply beg the question. As we have already seen, the parties to a contract routinely and intentionally make deals in the face of uncertainty. Leaving the terms of a deal incomplete can benefit both sides. Even criminal defendants ordinarily, and constitutionally, plead guilty in order to effectuate deals based on only a sliver of information about their alternatives. Nor is it obvious that the clear statement rule in fact provides states with more information about the burdens of agreement; by definition one cannot plan for the unexpected.

What, then, is special about the states? Is there some reason for why we should be especially reluctant to presume that a state would be harmed by unclear clauses, or that a state should not be entitled to accede to them? If


137 See McMann v. United States, 397 U.S. 759, 769–70 (1970) (“Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court’s judgment might be on given facts.”); Brady v. United States, 397 U.S. 742, 756–57 (1970); John G. Douglass, Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining, 50 EMORY L.J. 437, 447–52 (2001).
so, the notice rationale by itself does not supply one. Furthermore, without better theoretical grounding we cannot know whose notice, whose consent, is relevant—the state legislature, the voters, or perhaps the state officials who will have to comply with the new mandate.

Consider also the problem of the appropriate level of abstraction. That is, the idea of "notice," standing by itself, does little to resolve how detailed the notice given by a particular statute must be. Several courts have made similar observations about Spending Clause legislation containing explicit, open-ended authorization for judicial lawmaking, such as the provisions of the Rehabilitation Act directing courts to pattern remedies after the judge-made (and judicially evolving) remedies of Title VI of the Civil Rights Act of 1964. A state that takes money from the federal government knows that it takes the risk that the common law Rehabilitation Act remedies will be construed by a court in a way that imposes new costs on the state. These cases, although sensible, fail to explain why the same is not true of all legislation. States surely know that (absent the clear statement rule) courts have power to interpret the terms of a statute. Why is not acceptance of an unclear term, subject to that understanding, a "knowing" acceptance of the result?

A recent Rehabilitation Act case in the Second Circuit suggested obliquely that this logic might produce different results in suits for damages or other retroactive relief. Although the court explained that the unwritten remedies of the Rehabilitation Act could satisfy the clear statement rule, it cautioned that there are independent limits that would apply in claims for damages. This may represent an analogy to the law of qualified immunity, which similarly makes individual defendants liable in damages only for obvious or clear violations of the law, and which defines clarity at a rather low level of abstraction. The point, obviously, is to prevent the threat of damages from over-deterring the state officer in carrying out his duties, and to create space for state officers to exercise independent judgment in interpreting the law. In contrast, it is often the case that a private actor must avoid "sailing too close to the wind" in interpreting the meaning of a criminal provision (notwithstanding the occasional resort to leniency). Perhaps the clear statement rule, if it applied only to some kinds of retroactive relief, could be justified by a choice to invest those who must

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139 See id.; see also Smith, supra note 11, at 1216; cf. Posner, supra note 107, at 845 ("[R]ational parties always know that something could happen that makes performance more or less costly.").
140 See Meltzer, supra note 78, at 390–91; Shepsle, supra note 78, at 252.
141 See Henrietta D., 331 F.3d at 285–86 & n.16.
142 Id.
143 See Smith, supra note 11, at 1220–21.
144 See Hadfield, supra note 112, at 549.
145 See id. at 544.
comply with Spending Clause legislation (who are usually, but not always, states) a similar flexibility to read the requirements of the statute aggressively.

These possibilities again push us back against the need for theory that the idea of "notice" itself cannot supply. Perhaps it seems intuitive, in our federalism-saturated legal culture, to assume that we of course would choose the meaning of "notice" that offers state recipients maximum flexibility. But considering the rigidity and heightened bargaining costs of the clear statement rule, it might be wiser to ask first whether the rule is even needed to obtain that flexibility. For instance, public choice theory and some limited empirical data suggest that the states are not actually deterred by the threat of damages. Even if that is wrong, the states might also be able to obtain largely the same benefits that the clear statement rule is supposed to provide through other mechanisms that impose lower overall costs on the lawmaking system.

B. Notice as Deliberation

To be fair, there is at least one significant value of notice that likely holds no matter what our other justifications. As I mentioned, uncertainty in language can be a way for parties to avoid the need to reach agreement on the unsettled terms. Conversely, a condition that appears clearly in the text of an offer of funds is more likely to have been the subject of discussion and debate, not only among the state decision makers who weigh the offer but also the Congress that crafts it, and ultimately between the two bodies. In other words, the notice argument may be a way of describing the familiar point that clear statement rules can be "republican-forcing" (or at least encouraging); they foster conversation and consideration in public bodies prior to the court's interpretation.

In this respect, though, the notice (now the republicanism) rationale simply re-enacts the debate between textualists and other theorists of statutory interpretation. Many textualists justify their views by pointing to the way that limiting the scope of judicial interpretation to the plain semantic meaning of a text helps guarantee that the terms the court can enforce

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148 See Coenen, supra note 24, at 1298–99; Eskridge & Frickey, Clear Statement Rules, supra note 24, at 631; Jackson, supra note 24, at 2234; Sunstein, supra note 147, at 317.

are only those that were reached through actual agreement. One common criticism of textualist methods seems especially trenchant in this context. A number of commentators (including this one) have observed that a decision-making body, and Congress in particular, may reach agreement at different levels of generality. Thus, the "gap" in a statute that to a textualist is a failure of agreement to another interpreter may be evidence of Congress's shared intention to delegate that policy decision to another body. We could similarly say that Congress and the states have agreed that incomplete Spending Clause legislation will be filled out by an interpreting court.

The notice/republicanism rationale proponent now has a dilemma. The textualist, in an ordinary interpretive debate, has a standard counter at this point. The textualist says, "Aha! But the agreement I am talking about is non-delegable. Courts are not legitimate policy-makers in our federal constitutional system; therefore, all agreements must be formed at a very low level of generality, by legitimate (i.e., elected, or diverse and deliberative) policy-makers." But a judicial interpretation of the terms of an unclear condition on federal dollars is a decision about federalism. In taking the textualist's line, the notice-as-deliberation proponent is, in effect, asserting that judges should not be in the business of defining and defending federalism. That, I suspect, is a problem for some of the clear statement rule's expositors and defenders, many of whom have not been shy in asserting the judiciary's federalism-preserving prerogatives and duties.

It thus turns out, in a bit of an O. Henry twist, that we should expect that the strongest proponents of the deliberation rationale for the clear statement rule will be opponents of judicially-enforced federalism. And in fact, these opponents appear overwhelmingly to support the clear statement rule. As I explain in more detail in Part IV, opponents of judicial review

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150 See JEREMY WALDRON, LAW AND DISAGREEMENT 105-18 (1999); John F. Manning, Legal Realism and the Canons' Revival, 5 GREEN BAG 2d 283, 290-92 (2002). Or, if not actual agreement, then at least the decision by some not to read or object to the clear provisions of the statute.

151 See William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 GEO. L.J. 319, 333-43 (1989); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 284-92 (1989); Galle, Federal Agencies, supra note 149, at 179-80, 184; Meltzer, supra note 78, at 386-87.

152 Eskridge, supra note 151, at 323-24.


154 See supra note 22 and accompanying text. I assume here that my hypothetical clear statement rule proponent is not actually a textualist, in which case she has an independent reason for believing that judicial authority is suspect. But the clear statement rule in its deliberation form is largely redundant for the textualist in any event, except to the extent that it may change the weight of some otherwise permissible contextual considerations. For example, the deliberation rationale might limit references to the views of administrative agencies.

155 See Adler, supra note 3, at 1205; Denis Binder, The Spending Clause as a Positive Source of Environmental Protection: A Primer, 4 CHAP. L. REV. 147, 151 (2001); Eskridge & Frickey, Clear
in this context maintain that the states exert enough influence over Congress and the Executive to preserve federalism values. Some of these “political process” proponents assert that statutory clarity increases the likelihood that Congress itself has considered carefully the effects its actions will have on the states. But that is simply a tautology; it offers no explanation for why deliberation cannot be delegated. Other commentators have linked more explicitly the states’ reliance on political safeguards to the clear statement rule, arguing that the clear statement rule helps to ensure that the states have an opportunity to use their political power against any of the burdens of federal legislation. Deliberation, these commentators claim, must be in a branch of the federal government that is open to state influence; otherwise, the political safeguards cannot function.

This argument fails to recognize that an incomplete agreement is itself the end result of a deliberate deal. The fact that a statute is unclear, and

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_See, e.g._, _Adler_, _supra_ note 3, at 1205; _Jackson_, _supra_ note 24, at 2240; _Moulton_, _supra_ note 24, at 911. This theory probably has its roots in Professor Bickel’s suggestion that the Court traditionally had read, and should continue to read, congressional delegations very narrowly when the delegate exercised its power in a way that came close to unconstitutionality. _See_ ALEXANDER BICKEL, _THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS_ 156–169 (1962). He claimed that this helped guarantee that Congress, as the most representative branch, would be held accountable for outcomes that were arguably unconstitutional. _Id._ That claim is only relevant for my argument to the extent we believe conditional spending in general threatens constitutionally-protected federalism values, a possibility I reject in Part IV.


_See_ _TRIBE_, _supra_ note 23, § 6–25, at 480; _Adler_, _supra_ note 3, at 1205; _Marshall & Cowart_, _supra_ note 157, at 1078–79; _Sunstein_, _supra_ note 147, at 339; _cf._ Meltzer, _supra_ note 78, at 381 (arguing that leaving lawmaking power with courts diminishes states’ power, because federal judges are less susceptible to state influence than is Congress). Professor Young makes a similar argument, although he is also in favor of other forms of judicial enforcement of federalism, as well. _See Young, supra_ note 22, at 1359, 1354–55.

_See_ Elhauge, _supra_ note 129, at 2091; Cynthia R. Farina, _Statutory Interpretation and the Balance of Power in the Administrative State_, 89 _COLUM. L. REV._ 452, 468–69 (1989); Harold J. Krent, _Delegation and Its Discontents_, 89 _COLUM. L. REV._ 710, 718 (1994) (reviewing DAVID SCHOENBROD, _POWER WITHOUT RESPONSIBILITY_ (1993)). Professor Easterbrook, too, makes this point. _See_ Easterbrook, _supra_ note 81, at 340, 546–47. However, he claims (contrary, I think, to what we know about deals) that courts should not enforce most implicit or unclear terms. _Id._ at 537; _see also_ Aleinikoff, _supra_ note 79, at 56–57 (explaining that “[b]y leaving issues for subsequent interpreters, the legislature has necessarily recognized that it needs help making the statute work in unprovided-for cases,” but asserting that groups that have bargained for statutory results may be interested in “maintaining their gains irrespective of changes elsewhere in the legal system”). Again, I am not aware of any convincing research demonstrating that parties believe subsequent interpretation is more likely to upset their deal
has been left to the court to interpret, may represent the product of, rather
than the failure of, state political influence. True, some uncertainties may
arise because the parties did not anticipate, or in fact could not have fore-
seen, future events. But just as in the argument for formalist interpretation
of contracts, we cannot know how often the clear statement rule will save a
state, and how often it will frustrate it. What is more, even if we reject the
view that there is no such thing as truly “clear” language (or Dworkin’s
similar claim that clarity exists only after interpretation160), given that the
application of language to the world almost always presents some policy
choices, it is doubtful that “clear” language meaningfully reduces the dis-
cretion of courts.161 On balance, the clear statement rule may well under-
mine, rather than support, the political safeguards.

Nor could we justify selectively invoking the clear statement rule on
those occasions where it was plain that the state could not have expected
the particular contingency before the court to arise. Federal law is pre-
sumed by default to be unenforceable against non-federal defendants; Con-
gress can create a private right of action only by clear statement.162 The
very fact that a dispute is before a court at all thus can only be the result of
an express choice by Congress to authorize suit—a choice that, by hy-
pothesis, the states had an opportunity to alter. There is therefore a strong
argument that every case of unforeseen circumstances that comes before a
court is actually a case of deliberate incompleteness.

Finally, the unforeseen events objection assumes that the states have no
recourse when they are surprised. Given the possibility of new lawmaking,
including retroactive lawmaking, that assumption is obviously wrong.163 At
most, then, the clear statement rule protects states from paying the costs
of overcoming legislative inertia in that uncertain percentage of cases in
which they have not deliberately left a piece of conditional spending legis-
lation incomplete. And we have not yet taken stock of the advantages that

160 RONALD DWORIN, LAW’S EMPIRE 87-88 (1986).
161 See Mashaw, supra note 16, at 26; Nicholas S. Zeppos, Judicial Candor and Statutory Inter-
pretation, 78 GEO. L.J. 353, 388 (1989); cf. Goetz & Scott, supra note 113, at 283–84 (acknowledging
that even express contract terms carry risk of judicial misinterpretation).
Although it is not as clearly established that federal governmental entities cannot sue without express
statutory authorization, the Court was doubtful of such power even during the era when it was quite
open to implied judicial remedies for private parties. See, e.g., New York Times Co. v. United States,
403 U.S. 713, 719 (1971) (Black, J., concurring); id. at 723–24 (Douglas, J., concurring); id. at 730
(Stewart, J., concurring); id. at 731 n.1, 740 (White, J., concurring); id. at 741–47 (Marshall, J., concur-
ring); id. at 753–54 (Burger, C.J., dissenting).
163 States are potent lobbyists. See Lauren Ouziel, Note, Waiving States’ Sovereign Immunity
from Suit in Their Own Courts: Purchased Waiver and the Clear Statement Rule, 99 COLUM. L. REV.
1584, 1601–02 (1999).
states may gain in their dealings with federal administrative agencies.

C. The Role of Agencies

Let us assume for the moment that it is possible to state coherently a test for clarity that can sort "clear" from "unclear" statutes on some principled basis, or to formulate the need for deliberation in a way that would satisfy anyone other than a textualist. Even assuming away these difficulties, both views of notice face another problem. Each largely presumes that agreement has to take place at the very beginning of the deal. In fact, though, states and other parties affected by Spending Clause legislation have an ongoing opportunity to affect the meaning of the terms of unclear requirements, as those requirements are elaborated and enforced by federal (and sometimes both federal and state) administrative agencies. The vast majority of conditional spending is delivered in the form of grant-in-aid programs, each administered by an agency. Many other conditions, such as Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, and the Equal Education Opportunity Act, are not overseen in their entirety on a daily basis by agency personnel, but are nonetheless subject to a federal agency's interpretive authority.

The centrality of federal agencies has two important consequences for the notice argument. The first, which I explore further in the next Part, is that a state or other regulated entity with influence over the regulatory process itself has little need for notice. A state can often control the initial form of the federal norm, and, if surprised by later judicial interpretation, can reverse the court by resorting again to the agency.

Even if federal spending recipients have no direct control over regulations, the regulatory process offers significant informational advantages. Agencies give more elaborate content to relatively general statutory language. Under the so-called "Chevron" doctrine, courts must defer to these

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164 Congressional drafting being what it is, it might be the case that a statute could be so unclear even on a semantic level that no reasonable person or entity could know the obligations a state will bear. A "clear statement rule" that acted only on these dregs of the drafting office would be the functional equivalent of the rule against absurd interpretations, and it is hard to imagine any objection. A rule stated so weakly, obviously, is not the concern of this Article.

165 See DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 182, 189–91 (1995) (discussing the use of grant-in-aid programs to administer conditional spending); see also THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS 100–15 (1990) (discussing grant-in-aid programs as the "principal instrument for the expansion of national power").

170 See Freeman Engstrom, supra note 135, at 1253.
elaborations and interpretations where they are reasonable and issued in a way that Congress has intended as authoritative, such as through notice and comment rulemaking. 171 States can therefore rely on an agency's definition of the general terms of a spending clause statute, which provides them with the "notice" that they might otherwise find lacking in the statute itself. 172

More critically, states can get information from agencies that no statute can provide. For instance, by looking to an agency's published guidance to its field officers, a state could learn how frequently and against whom a particular stricture will likely be enforced. 173 This might tell it far more about the true costs of compliance than any statutory language, no matter how clear. Published records of the agency's deliberations, such as might appear in the Federal Register accompanying a new rule, 174 can give guidance about how the agency will view novel situations. A state can also approach federal officers themselves to pre-clear a proposed course of conduct, negotiate for pilot programs or exemptions, or strike other deals that help the state plan for the future. 175

Largely for the same reasons, agencies also have something to offer those who would demand careful federal consideration before imposing federal norms on state entities. The information that states get from agencies reduces the frequency of unforeseen burdens, and correspondingly weakens the argument that the clear statement rule is needed to shield states from those burdens. Federal agencies also give states another avenue for overturning adverse decisions, one that may be easier to achieve than legislation subject to the requirements of bicameralism and presentment. 176

172 See Eskridge & Frickey, Law as Equilibrium, supra note 17, at 81; Smith, supra note 11, at 1221.
173 See Eskridge & Frickey, Law as Equilibrium, supra note 17, at 81.
176 See Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 Va. L. Rev. 471, 513 (1988); Seidenfeld, supra note 174, at 1565–66. But see Smith, supra note 11, at 1203–06 (claiming that accountability concerns cannot be satisfied when Congress delegates lawmaking power to an agency); Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. 1, 25 ("[T]he abandonment of the nondelegation doctrine and consequent dramatic expansion of federal lawmaking by executive agencies... represent a substantial erosion of process federalism values."). David Freeman Engstrom, in his recent article arguing that agency interpretations may sometimes satisfy the clear statement rule, argues both sides of this issue. See Engstrom, supra note 135, at 1228–29, 1232–33. His arguments for why agencies are relatively closed to state influence, though, focus on the activities of field-level administrators in cooperating state and federal bureaucracies. See id. at 1228–29. That limited analysis neglects the efforts by politically accountable high-ups in both sets of organizations to make the field
Thus, even taking for granted that the need for “notice” is a meaningful concern about Spending Clause legislation, federal agency involvement largely satisfies it.

The notice rationale is the beginning, not the end, of the Spending Clause question. Why do states need a special kind of notice, and what form of notice could satisfy that need? Or, if “notice” is only another way of saying that we should be cautious about letting judges fill in the spaces in a statute left by Congress, what is there about Spending Clause legislation that would differentiate it from any other law? Is this justification sufficient to overcome the shared judgment of Congress and the states about how best to exemplify their agreement? The next two Parts try to answer these riddles.

IV. FEDERALISM

A. The Clear Statement Rule as a Supplement to the Political Safeguards of Federalism

Probably the most important justification for the clear statement rule is as a second-best tool for judicial enforcement of federalism values.\(^7\) In areas outside of the states’ sovereign immunity, the Supreme Court has generally been reluctant to enforce directly limitations on federal power, especially limitations on Congress’s commerce power.\(^8\) That reluctance, to be sure, has diminished in recent years.\(^9\) Nonetheless, in many cases, courts continue to rely on the “political safeguards of federalism” in preference to active judicial intervention.\(^10\) The political safeguards are a set of structural features, such as the disproportionate power of some states in the Senate,\(^11\) or the dependence of national political figures on state and

more responsive, so that it produces outputs they can campaign on, not run away from. While I agree that the question whether those efforts—including frequent rotation of staff, highly transparent benchmarking, and internal or external judicial review—ultimately are successful is an “empirical” one, \textit{id.} at 1230, Engstrom’s summary significantly overstates the political opacity of agency decision making.


\(^8\) See Garnett, \textit{supra} note 48, at 3–5.

\(^9\) See Chemerinsky, \textit{supra} note 30, at 89; Yoo, \textit{supra} note 99, at 1312.

\(^10\) See Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528, 552 (1985); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991); \textit{see also} Larry D. Kramer, \textit{Putting the Politics Back Into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 290 (2000) (stating that “[a]ctive judicial intervention to protect the states from Congress is consistent with neither the original understanding nor with more than two centuries of practice. . . . [s]o far, the Justices have managed to avoid provoking a constitutional crisis by confining their activities to the peripheries of congressional power.”).

\(^11\) Garcia, 469 U.S. at 550–56; Herbert Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 559 (1954) (arguing that disproportionate power of small states in the Senate, as well as fact that
local activists and officials of the same party for their long-term success,\textsuperscript{182} that allow states to look out for their own interests fairly effectively in the course of the political process.

The political safeguards theory acknowledges that the Constitution recognized by the Court is a diminished one, narrower in its protections than might arguably be understood from text, history, and principle.\textsuperscript{183} The diminished Constitution, of course, is hardly unique to federalism; there are many places where constitutional trees might fall, with no court willing to hear them.\textsuperscript{184} The point generally is to minimize the need for the Court, which is thought to be less representative of popular preferences than the political branches, to enter into controversial or difficult areas of policy.\textsuperscript{185} While one might argue that an apolitical, highly expert decision maker might often be desirable, the Court also often does not have enough information to make truly expert decisions.\textsuperscript{186} Thus, the Court would prefer to leave the question of how much federalism is too much to others where possible.\textsuperscript{187}

The Court’s use of the clear statement rule, though, suggests that it considers the political process alone inadequate to protect federalism values.\textsuperscript{188} It may be, for example, that the Court would like to signal that federalism is an important value, and one that legislators and executive officers should take into account when making their decisions.\textsuperscript{189} Because the clear statement rule is defeasible, it can serve this signaling function efficiently, allowing the Court to bar some federal initiatives from time to time without permanently upsetting any popularly-chosen policy.\textsuperscript{190} In addition, as I mentioned earlier, the clear statement rule increases the costs of legislating in an area that affects states, which has the effect of re-inflating the underlying constitutional norm—that is, giving some of the protection of

\textsuperscript{182} See CHOPER, supra note 24, at 179; Kramer, supra note 180, at 279–85.

\textsuperscript{183} See, e.g., Garcia, 469 U.S. at 547–48.


\textsuperscript{185} See Coenen, supra note 24, at 1397–98; Yoo, supra note 99, at 1319.

\textsuperscript{186} See García, 469 U.S. at 538–47.

\textsuperscript{187} See id. at 556.

\textsuperscript{188} See Eskridge & Frickey, Clear Statement Rules, supra note 24, at 635; Moulton, supra note 24, at 867, 911; Yoo, supra note 99, at 1335, 1338.

\textsuperscript{189} See Adler & Kreimer, supra note 48, at 133–34; Eskridge & Frickey, Clear Statement Rules, supra note 24, at 597; Jackson, supra note 24, at 2226–27; McConville, supra note 12, at 187–88.

the underlying right without active court intervention.\textsuperscript{191}

The key question here is whether the signaling and political-process-reinforcing functions of the clear statement rule the Court employs in enforcing the Tenth Amendment and other limits on the Commerce power are equally necessary in enforcing the terms of the Spending Clause. As with the other forms of federal power, legislation under the Spending Clause is limited not only by the intergovernmental lobby but also by political constraints on the national government's ability to tax and spend to establish and administer its projects.\textsuperscript{192} Spending legislation faces a unique additional cost, however, in that proponents of a relatively uniform nationwide law must buy out each individual dissenting state. The next section explores this extra cost in depth, arguing that (contrary to some recent critics) it is so substantial that it should weigh powerfully against additional judicial limitations on conditional spending.

B. The Safeguards Analyzed

In this section I argue that the political process actually overprotects states from federal overreaching under the Spending Clause. Spending Clause legislation is fairer to political "losers" than traditional lawmaking under, say, the Commerce Clause, and its renewability and administration by federal agencies offer the states ongoing opportunities to influence the actual bargain. Some skeptics, though, claim that conditional federal spending is coercive rather than empowering, or that it lowers overall utility by reducing diversity and tolerance for minority positions at the state level. In responding to these claims I first personify the states, treating their internal workings as a black box producing a single output, the states' preference for a given piece of legislation. I then go inside the box, examining some interest-group models of internal state voter behavior to demonstrate that conditional spending provides superior protection to ordinary politics at that level, as well.

1. The Static Black Box Model

One of the familiar virtues of federal legislation is that it can solve the states' collective action problems.\textsuperscript{193} The states compete against one an-

\textsuperscript{191} See Coenen, supra note 24, at 1288; Eskridge & Frickey, Clear Statement Rules, supra note 24, at 631; Young, supra note 58, at 1606, 1608-09.

\textsuperscript{192} See supra note 97; infra note 207.

other for capital and the loyalty of their citizens. A business that finds Wisconsin too expensive can relocate to Minnesota or Miami. This sometimes can result in the infamous "race to the bottom," as states lower regulatory standards in an attempt to reduce the cost of doing business. Relatedly, each state has an incentive to externalize some of its costs on its neighbors. Lax air emissions standards in Ohio help the state attract business dollars, but it is the citizens downwind who experience most of the ill effects. While in theory (absent the Interstate Compact Clause) states could bargain directly with one another to avoid these costs, the transaction costs of so many individual bargains would make many of them inefficient. National lawmaking dramatically reduces these transaction costs, and allows uniform regulation to prevent capital leaking across borders.

Most federal legislation does not perfectly duplicate the structure of inter-state bargaining. There is, of course, logrolling, and over time the states probably experience about an even distribution of benefits and burdens. For each discrete statute, though, a majority coalition of states need offer nothing to the losing side. There is, therefore, no guarantee that the end result will increase overall national utility. For instance, a small minority of states might very strongly prefer their own position, and, because they are always a minority (or ironically actually agree with a fair portion of the majority coalition on other significant issues), they do not have enough to offer by way of logrolling to sway even the weak preference the majority states have for their position.

Spending Clause legislation, in contrast, is utility-maximizing. Recall that the conditions of a given expenditure are only binding on states that actually accept the funds. By definition, then, if we assume states are rational and act with good information about the costs and benefits of fed-

194 See Baker, supra note 11, at 1947.
196 See McConnell, supra note 92, at 1495; Moulton, supra note 24, at 903; Ulen, supra note 193, at 926.
197 See Baker, supra note 11, at 1971 n.280; Moulton, supra note 24, at 917 n.356; Ulen, supra note 193, at 927.
198 See Baker, supra note 11, at 1951; Baker & Berman, supra note 8, at 477–78; Revesz, supra note 193, at 1216–17.
199 See Mashaw, supra note 16, at 24 ("[B]ecause legislatures represent different constituencies with different interests, all of them will find it useful to make trades with each other (logrolling) so that demands of a wide variety of constituencies can be satisfied."); Carol M. Rose, Takings, Federalism, Norms, 105 YALE L.J. 1121, 1127–29, 1139 (1996) (reviewing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)).
eral legislation, a state that accepts funding is subjectively better off than it would have been if not for the offer of federal money.\textsuperscript{201} Similarly, if the majority is willing to pay the price named by the minority states for uniformity, the majority by definition is subjectively better off (although obviously not as well off as it would be if it did not have to pay the minority states to obtain compliance).\textsuperscript{202}

The federal government overpays for all that happiness. Minority states can reap huge benefits precisely by virtue of their minority status. A state opting out of an expensive regulatory regime might attract significant new capital from its rivals.\textsuperscript{203} The majority coalition will have to pay the rational minority state enough to compensate for this lost opportunity. Other buy-outs will be expensive because the intensity of the state's preference may be in direct proportion to its scarcity. For example, residents of the last state, where it is legal to drive more than fifty-five miles per hour, or the only state where same-sex marriage is lawful, likely value that opportunity more than their neighboring states; they may well live where they do exactly in order to engage in that behavior.\textsuperscript{204} Finally, minority states will recognize that they can obtain holdout costs from the majority.\textsuperscript{205} Over repeated rounds of bargaining, the holdout price is likely to approach the value to the majority of the entire project.\textsuperscript{206}

As a result, Spending Clause legislation is subject to an inherent limit not applicable to any other conventional form of lawmaking. The federal government's capacity to pursue its own policies is, I have argued, subject to political restraint, not only by the need to justify the individual policy on its merits, but also by the corresponding tax burden the policy imposes on the electorate.\textsuperscript{207} Spending Clause legislation, especially on controversial subjects where minority preferences are likely to be strongly held, is disproportionately expensive, and, if voters track the individual costs of par-

\textsuperscript{201} See New York v. United States, 505 U.S. 144, 168 (1992); Baker, supra note 1, at 963; Hills, supra note 175, at 861, 874; Maltz, supra note 31, at 113.

\textsuperscript{202} See Hills, supra note 175, at 872; La Pierre, supra note 97, at 599.

\textsuperscript{203} See Hills, supra note 175, at 884 n.249.

\textsuperscript{204} See Baker, supra note 11, at 1971 & n.279; Baker & Berman, supra note 8, at 471–74.

\textsuperscript{205} See Richard A. Epstein, Exit Rights Under Federalism, 55 LAW & CONTEMP. PROBS. 147, 159 (1992); Hills, supra note 175, at 856; Ilya Somin, Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments, 90 GEO. L.J. 461, 476 (2002); Badawi, supra note 193, at 1373. But see Yoo, supra note 99, at 1401–02 ("[T]he states that are most willing to surrender some of their autonomy will be the ones that acquire federal funds with the greatest ease.").

\textsuperscript{206} Badawi, supra note 193, at 1360–61.

\textsuperscript{207} See Adler & Kreimer, supra note 48, at 107; Hills, supra note 175, at 865, 871; La Pierre, supra note 97, at 633, 644, 647–48; William P. Marshall, Understanding Alden, 31 RUTGERS L.J. 803, 816–17 (2000); cf. Adler, supra note 3, at 1209–10 (claiming that the Sixteenth Amendment was, like the Civil War Amendments, a decision to expand federal power by giving the federal government more money).
ticular legislation, imposes a correspondingly large expenditure of political capital on its proponents. Even if voters do not explicitly tie policy results to costs on a statute-by-statute basis, a Congress that governs largely by use of the Spending Clause will be able to support far fewer policy objectives. Thus, use of the Spending Clause restricts the degree to which state preferences can be displaced by the federal government, whether by drastically increasing the support needed for a given piece of legislation, or simply by diminishing the size of the federal government as a whole.

It might be argued, though, that Congress does not necessarily need to pay full price on the states' holdup charges. Professor Hills, for example, has argued convincingly that the federal government can reduce such costs by threatening to use its power of preemption. Rather than paying a state to capitulate, Congress can simply displace state control and hire federal workers to regulate in those states refusing to take Congress's money. The Clean Air Act, among other regimes, uses just that strategy, directing the Environmental Protection Agency to oversee emissions in states that fail to submit satisfactory plans of their own. As a result, the amount of money a state can demand for surrendering its position may sometimes be limited by the risk that the state's intransigence risks losing both the policy fight and the payout.

There are, however, several important qualifications to Professor Hills's argument. First, it is almost always the case that Spending Clause legislation will give states some, albeit limited, opportunity for holdouts. Consider why Congress would resort to the Spending Clause at all. One possibility is that delegation to the states is cheaper perhaps because it saves start-up costs, or because states can better distribute overhead expenses. Delegation may also produce better results, especially if Congress's program works better when other local policies are coordinated together with it. Another likely reason Congress pays off the states is to obtain political support for what would otherwise be a losing initiative. In each of these situations, the states will be able to charge, if not the full value of the program to the states who favor it, at least a cost close to the savings or efficiency gains of delegation.

Next, and crucially, the preemption alternative does not work at all when the object of the spending legislation is beyond any of the federal government's other enumerated powers. In that situation, a state, knowing Congress has no "do it yourself" alternative, is free to hold out for all it can

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208 Hills, supra note 175, at 865; see also La Pierre, supra note 97, at 644–46.
209 Hills, supra note 175, at 880–82.
210 Id. at 880; see also McCoy & Friedman, supra note 9, at 111.
If several states take this route, and uniformity is important to the success of the program, it will probably fail unless the holdouts somehow coordinate their demands to split the available pie. As a result, the political checks on federal legislation are strongest exactly where the textual sources of federal authority are thinnest. This outcome dovetails nicely with my earlier claim that the founders could reasonably have written the Spending Clause with the understanding that, despite its fairly unlimited language, it would not dramatically expand the power of the national government.

For similar reasons, the fears of some commentators that the Spending Clause provides an effective end-run around limits on judicial limits on the Commerce Clause and other sources of congressional power would appear to be rather overblown. The more likely it seems that the Court would strike down direct legislation, the more likely it is that a state will hold out for the full value of the enactment. In effect, judicially enforced federalism in other doctrinal areas spills over into conditional spending, so that as judicial safeguards emerge elsewhere, the need for a supplementary clear statement rule for spending legislation diminishes.

Another potential objection to the effectiveness of political limits on the spending power, suggested by Professor Baker, is that the political cost of raising funds is overstated. Professor Baker’s argument, at least as I understand it, has two parts. First, she claims, because taxes might be imposed either by states or by the federal government, the money Congress uses to buy off recalcitrant states is not really federal money at all, but rather money that Congress has prevented the states from raising on their own. Furthermore, assuming that the public’s tolerance for an overall level of taxation is limited, federal taxation crowds out state taxes, so that states are left in a situation where their own cash flow is subject to federal

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There may also be some spending legislation in which the objects of the law are constitutionally permissible but it would be highly impractical for Congress to displace state regulation. In some situations, federal administration would be more expensive than the value of the federal program to its proponents, so that the threat of preemption is hollow. Consider, for example, the Individuals with Disabilities Education Act (“IDEA”), which provides states and localities with funds for the educational of children with disabilities. 20 U.S.C. § 1411 (2000). Even assuming the federal government would have authority to take over local school districts, the sheer expense of administering whole districts, or even just an independent parallel educational system for students with disabilities, is daunting. See also Binder, supra note 155, at 158; Hills, supra note 175, at 862–63.

213 Epstein, supra note 205, at 159, 161; see also Hills, supra note 175, at 885.


216 Baker, supra note 11, at 1936–38.
tax decisions. This is "coercive," according to Baker, because Congress has itself created the situation where its offers of funds are needed by the states, and thereby reduced the amount of money that would otherwise be required to change state preferences.

This claim fails on its premises. Because states compete fiercely with one another for capital, there are significant collective action barriers to any individual state raising its tax rates. Federal taxation, by avoiding this difficulty, is able to tap a large base of revenue unavailable to the states. Professor Baker offers no evidence that federal tax levels, either now or at any time in history, have been so high that they have exceeded this base. For example, suppose that because of interstate competition all of the states together could collect $100 billion, but popular sentiment nationwide will support tax levels high enough to generate $1 trillion in revenue. If the federal government collects $900 billion, it has not crowded out a dime of state funds. In addition, as Professor Hills points out, even if there were an overlap between federal and state pools of money, it is unclear why federal taxes will occupy the states' tax "space," rather than the other way around.

The second part of the argument is that states in favor of a particular piece of spending legislation are not spending their own money. Rhode Island, for example, is writing checks not from the Rhode Island treasury to get what it wants, but rather Congress's, probably in disproportionate share to Rhode Island's own contributions. Evidently the difficulty with this is that we cannot then be sure whether Rhode Island would have paid the same amount of its own funds, leaving open the possibility that we have achieved a very weak preference of Rhode Island's at the expense of, say, a

217 See Adler & Kreimer, supra note 48, at 107; Baker, supra note 11, at 1937; Baker, The Spending Power, supra note 214, at 214; McCoy & Friedman, supra note 9, at 86.

218 See Baker, supra note 11, at 1938; Baker, The Spending Power, supra note 214, at 223; McCoy & Friedman, supra note 9, at 86.

219 See Richard Briffault, "What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism, 47 VAND. L. REV. 1303, 1314, 1321 (1994); Epstein, supra note 205, at 155; La Pierre, supra note 97, at 594; Moulton, supra note 24, at 906; Revesz, supra note 193, at 1239–40; Ulen, supra note 193, at 933–34.

220 See Ulen, supra note 193, at 948.

221 Indeed, the conventional wisdom is that state and federal tax levels rise and fall together. See, e.g., Alysson McLaughlin, National Conference of State Legislatures, The Impact of Federal Tax Policy Decisions on States' Budgets (2003) ("As a rule, when federal taxes go up or down, so do state taxes."); at http://www.ncsl.org/statefed/taxprimer.htm (last visited Oct. 3, 2004) (on file with the Connecticut Law Review). That dynamic is very hard to explain if, as Professor Baker claims, higher federal tax collections put political pressure on states to lower their own tax rates.

222 See Hills, supra note 175, at 865. Furthermore, the federal government could always give tax credits to federal taxpayers for any state income tax they paid, so that Baker's feared "displacement" of state taxing authority is politically contingent.

strong preference of Connecticut. More to the point, it may be that Rhode Island’s congressional delegation will feel like they are playing with house money, since the money that is used to obtain their objectives does not impose the political costs that would come with higher taxes in Rhode Island.

The problem with this argument is that spending legislation is not exempt from Article I and Article II. It still takes a majority of both houses plus the President, or a supermajority of both houses, to enact a conditional spending measure. Although of course the House, Senate, and Electoral College do give advantages to small states, it should be relatively rare for a majority to represent a disproportionately small share of federal revenue. Moreover, the rational wealthy-state minority will demand extra compensation in that situation, exactly because it recognizes that its own funds are being used for purposes it opposes, rather than more generally beneficial purposes. In any event, even for the Rhode Islands of the nation, interstate bribery via the Spending Clause is not costless. Spending Clause legislation either displaces other desirable, cheaper legislation that could be enacted through other means, or requires an increase in the overall level of federal revenues, including taxes levied on the Rhode Islands and Montanas.

2. The Black Box Model with Post-Enactment Modifications

To this point I have focused on the political dynamics of legislation at

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224 See Baker, supra note 11, at 1972; McConnell, supra note 92, at 1496.

225 Baker, The Spending Power, supra note 214, at 200-02; see also McCoy & Friedman, supra note 9, at 124. Note that this same structural feature also potentially increases the cost of Spending Clause legislation. We might expect to see false-negative states, states whose actual preference is for the majority position, but who pretend to be opposed in order to exact payment. Although the game theory analysis is complicated by the risk that unnecessary holdouts can jeopardize the entire deal, the false negative would often be a rational strategy where the costs of buyouts are largely born by other majority states.

Ilya Somin offers a variation of Baker’s argument, claiming that the cost of refusing grants is exacerbated by the fact that the state has already subsidized its competitors with its tax money. Somin, supra note 205, at 466. But that is just a sunk cost. Rational decision makers ignore sunk costs and analyze only marginal gains or losses; a corporation does not keep manufacturing widgets at a loss just because it spent a lot to build its widget factory.

226 Mashaw, supra note 16, at 24. In addition, the President represents a national constituency, and has some incentive to resist unfair redistributions among states. See Elhauge, supra note 128, at 2149–50; Mashaw, supra note 16, at 25; John O. McGinnis, Presidential Review as Constitutional Restoration, 51 DUKE L.J. 901, 903-04, 926, 928–29 (2001). Professor Baker claims, though, that prospective grantees will be more effective in courting the President’s favor, because the benefits of a veto are widespread and thin, whereas the gains of the spending legislation are more concentrated. Baker, The Spending Power, supra note 214, at 202–03. But Baker’s argument about spending generally actually undercut her opposition to conditional spending. A rational state will seek a veto when the benefits of federal grants plus or minus the effects of the accompanying condition are a net negative. If minority states are more effective in that effort, then that represents an additional protection against conditions that might result in some loss of utility for the minority position. See infra text accompanying notes 242–46.
the time of enactment. But time is the destroyer of all things, including political consensus. What seems a fair bargain during debate on the Senate floor can in five years look like a raw deal. In the intervening period, though, the state may well have made significant investments in the national scheme, so that declining further federal funds may involve substantial expense above and beyond the foregone dollars. Taking these "lock-in" costs into account, it may be that compliance is only the better of two bad options.

It could be argued that the clear statement rule offers states some protection against this problem. As I discussed briefly in the last Part, the clear statement rule creates a sort of qualified immunity for states. That is, by reducing the risk that a court would be able to reject the state's interpretation, the rule allows the state to deviate somewhat from the terms of its bargain. For example, suppose federal spending legislation requires states to reduce "automobile" emissions, but exempts pollutants emitted by "trucks." Years later, the increased popularity of sport utility vehicles (which did not even exist when the statute was written) makes compliance with the federal legislation prohibitively expensive. The state might decide that SUVs are not "automobiles," but rather "light trucks," and avoid having to give up federal funds. If private citizens or downwind states sue, a court would likely be compelled to agree that the original legislation did not clearly designate SUVs as "automobiles" and not "trucks."

Again, though, this benefit turns on the relative effectiveness of the political process in safeguarding the states' interests. If states can use politics, not only at the time of the writing of the statute, but also subsequently to ratify their own interpretations, then there is little need to protect them from judicial oversight.

An efficacious alternative would be especially welcome in light of the destructive consequences of the clear statement rule. Consider the SUV example. There, the rule allows some states to unravel what is probably the key objective of the federal legislation, reducing non-commercial vehicle emissions. Other states, observing (or anticipating) this behavior, may reasonably wonder why they should themselves invest in a cooperative venture that will not, ultimately, be truly cooperative. Once more, there is a parallel in contract law. The common law is reluctant to allow a party to escape the obligations of a contract simply because the plain terms of the contract apply with some degree of uncertainty to subsequently aris-
ing conditions, unless the later event would completely destroy the fundamental purpose of the contract itself.\footnote{See JAMES P. NEHF, 14 CORBIN ON CONTRACTS § 74.1, at 2–11 (Joseph M. Perillo ed., rev’d ed. 2001).} The reason, as with our SUV example, is that to do otherwise would seriously curtail the incentives for both sides to invest in the deal.\footnote{See Ayres & Gertner, supra note 109, at 98; see also Dent, supra note 119, at 68–70, 72 & n.110; Richard A. Posner & Andrew M. Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. LEGAL STUD. 83 (1977).}

We do not have to look far for an ongoing political alternative to the clear statement rule. As I have already mentioned, modern governance uses administrative agencies to solve the problem of changing conditions over time.\footnote{See United States v. Southwestern Cable Co., 392 U.S. 157, 172–73 (1968); Aleinikoff, supra note 79, at 43–45; Elhauge, supra note 129, at 2127–28; Shepsle, supra note 78, at 252; Smith, supra note 11, at 1196.} States have influence over the administrative process through a variety of channels: electoral sway with the chief executive, and through him, the political leadership of each agency;\footnote{See Galle, Federal Agencies, supra note 149, at 210–11; Hills, Bureaucratic Power, supra note 212, at 1252.} intergovernmental lobbying;\footnote{See Choper, supra note 24, at 180–81; Hills, supra note 175, at 861, 866–67; Marshall, supra note 207, at 816–17.} federal dependence on the knowledge and resources of cooperating state regulators;\footnote{See Galle, Federal Agencies, supra note 149, at 210–11; Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1686 (1975).} and the now-familiar mechanisms, described by public choice theory, by which any interest group can sway government decision making.\footnote{See Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 CHI.-KENT L. REV. 1039, 1050–51 (1997); Richard A. Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MGMT. SCI. 335, 335 (1974); David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 GEO. L. J. 97, 114 (2000).}

A state utilizing this influence can protect itself from extra costs of compliance that appear subsequent to enactment of spending legislation. Indeed, in one sense the protection afforded by administrative involvement is broader than the clear statement rule. An agency’s power to interpret the terms of a federal statute it administers is limited by the clear meaning of the statute.\footnote{The Fourth Circuit has also suggested that the Pennewest clear statement rule is incompatible with judicial deference to otherwise authoritative agency interpretations. Va. Dep’t of Educ. v. Riley, 106 F.3d 559, 567 (4th Cir. 1997) (en banc). The reasoning, evidently, is that rulemaking subsequent to the time the “contract” was made undermines the state’s ability to assess the costs of the deal. See id. at 567; see also McConville, supra note 12, at 186 (arguing that a state should not be bound by a condition to which it did not agree). As I argue in the main text, this logic presumes wrongly that the state has no involvement in the subsequent rulemaking. In any event, the Fourth Circuit’s argument would prove far too much. All laws are deals. A state’s decision to lobby against a bill, or the state delegation’s decision to vote for or against it, would be no less undermined by later administrative action than the state’s decision to accept funds. Why then would not the clear statement rule of Greg-}
tance of a federal agency) cannot by interpretation alone avoid obligations plainly demanded by federal law. A state could, however, win agreement by the agency not to enforce even plainly applicable federal requirements, perhaps by promising to deliver other, more achievable goals. Thus, an agency can often relieve a state from burdens that would not be affected at all by the clear statement rule.

Of course, it could be objected that the "minority" states, those that must be bribed to comply with a spending initiative, are not the only states with influence over the administrative process. Indeed, one commentator has argued that the rationale of the clear statement rule should prevent courts from deferring to federal administrative interpretations of federal law, because such interpretations (perhaps under the influence of the majority states) might add unfairly to the burdens of the state that has already accepted funds.

I would first say in response that there are several reasons to expect that the minority state will fare relatively well in a system in which states use federal agencies to exert influence over one another. Most significantly, the minority state has ongoing opportunities for exacting holdout costs from the majority states. Once a national regulatory scheme is in place, other states will act and invest based on the assumption that rival states will also comply. A federal regulatory apparatus will be put into place, in part designed on the assumption of cooperation with (and perhaps even field-level contribution by) the minority state. By threatening to decline federal funds, a holdout state now has an additional set of costs it can impose: waste of these investments of time and resources.

...equally preclude Chevron deference to any interpretation affecting a state's interests? And such a rule would be far less flexible, since the federal government could not argue that the state had capitulated to administrative interpretations by accepting later grants of funds. See Smith, supra note 11, at 1220–21.

It is also unclear whether the Fourth Circuit's logic would apply to interpretations that lower the state's costs. If so, one then must wonder how a court is supposed to discern when non-monetary obligations would make a deal more or less attractive to the accepting state.


238 Marshall, supra note 207, at 816–17. This quasi-prosecutorial discretion also supplements the agency's interpretive power over less-than-clear provisions of federal law. The agency's own enforcement choices are particularly important for such provisions because vague federal laws cannot be enforced privately by suits under § 1983. Blessing v. Freestone, 520 U.S. 329, 340 (1997).

239 See Baker, supra note 1, at 966.

240 Smith, supra note 11, at 1189–90.


To be sure, these costs are likely to be much smaller than the lost value of the program as a whole. A holdout state is therefore unlikely to win concessions that radically undermine the value of the project to the majority. But the state could expect to gain smaller concessions, approximating the lesser of either the cost of replacing the sunk investment or the benefits that would accrue to the majority in the remaining term of the project. See Epstein, supra note 205, at 158.
In addition, standard public choice analysis suggests that the minority state will often be able to succeed in its administrative lobbying efforts. Put very simply, public choice theory claims that, because of free rider effects, a group that receives a relatively small benefit spread widely among the members of the group is unlikely to act aggressively in protecting that benefit through lobbying and the like.\footnote{See OLSON, supra note 102, at 21-22, 31, 35; Rose, supra note 199, at 1137; Stigler, supra note 100, at 401.} In contrast, a small, well-defined group that receives a relatively larger benefit or burden is more likely to overcome its collective action problems and push hard to preserve or alter government policy.\footnote{See OLSON, supra note 102, at 21-22, 31, 35; Garrett, supra note 99, at 523; Rose, supra note 199, at 1037; Stigler, supra note 100, at 401.} Pollution, again, is a good example, since the benefits of clean air and water inure extremely broadly, but the costs of regulation fall narrowly and heavily on polluters. Spending Clause legislation has something of this flavor. The benefits fall to a class larger than the group that bears the burdens. Since the majority would likely comply voluntarily with the regulation, while the minority must be bribed, it is also likely that the minority will feel more acutely the sting of the regulation. As a result, the general tendency will be for the minority states to be more vigorous, and therefore more effective, in lobbying an agency to soften its regulatory stance towards the minority state. While agency supervision of spending legislation offers some risk that the "costs" of a program will increase, the greater likelihood is that agency involvement makes costs both more manageable and (as I discussed in Part III) more predictable.\footnote{David Freeman Engstrom has recently argued that, although the clear statement rule should be subordinate to agency policy making in most instances, states should not be bound by agency decisions enacted after the state has elected to begin receiving funds. \textit{See} Freeman Engstrom, supra note 135, at 1217. My disagreement with him turns in part on the fact that he (in my view) incorrectly claims that states do not have significant bargaining power after the initial spending agreement is reached. \textit{See id.} at 1241-46. Freeman Engstrom's most forceful point is that states cannot credibly threaten to hold out against future participation, because once a program is up and running it creates an in-state constituency that will likely be attentive to efforts to cut back their services. \textit{Id.} at 1243-44. The federal government will therefore know that the state is bluffing and refuse to pay holdout costs, whether in cash or in altered program details. \textit{Id.} at 1244. But, as he later seems to acknowledge, this problem is unlikely to arise when the federal government has a do-it-yourself alternative. \textit{Id.} at 1270-71. By assumption, the federal program proponents want uniformity (otherwise they would not be paying for it). Therefore, the state can assume that, even if it pulls out, the federal government will step in. It can thus make the threat of withdrawal without having to pay the political price to the entrenched beneficiaries. The federal entity, recognizing its bind, will have to take the threat seriously, and pay at least the additional cost it would incur in order to take over itself. Even where there is no preemptive federal alternative, the state retains significant holdout power, by virtue of the fact that its threat, even if not hugely credible, is to the value of the entire program, not just the costs of replacing the single state's participation. The fact that the state may face some internal political pressure may cause the federal negotiators to discount somewhat its demands, but even at a discount they will still likely command a substantial price.}
More critically, though, the objection presumes that the relationship among competing states will be adversarial rather than cooperative. It is not inevitable, however, that the structural competition among states will necessarily be reflected in a bureaucratic system that permits the states to impose costs on one another. With good institutional design, these competitive forces can be channeled into a system where they make internal improvements in state and local administration more attractive than gaming the federal system. Rather than undermining national diversity, as Professor Baker fears, such a system could incentivize and reward difference, while considerably expanding each locality's capacity for innovation by providing them with comparative data and basic building blocks, such as extensive libraries of "best practices." The clear statement rule thus can actually impede diversity; as Professor Mashaw has pointed out, demands for exceptionally clear statutory directives tend to undermine, not strengthen, the regional diversity prized by federalism.

3. Inside the Box

Now let us suppose that each state does not behave as a single composite of its overall interests. Assume instead that a state's decision to accept or refuse federal funds is the product of an accumulation of the preferences of individual state voters, either through a state legislature composed of representatives responsive (to a greater or lesser degree) to diverse constituencies, or through plebiscite. Roughly speaking, voters within each state break down into three groups: those who agree with the national majority position, those who are in the national minority but whose view could be changed with a bribe the majority can afford, and those in the minority who cannot be swayed by the money the majority can offer. Although we are now sketching our picture in a finer grade, the overall image should be the same.

Our voter-level analysis suggests that there may be somewhat weaker possibility by demanding more up front. His response to the counter-argument is simply that state legislators might not be rational, preferring short-term benefits to long-term flexibility, given that it may be hard to connect the legislator's earlier vote to the later costs. Putting aside questions about whether that claim is right ("Jane Legislator has voted to accept IDEA funds eight times ... her votes now cost us $100 million a year"), I do not understand why we would want to design a quasi-constitutional rule that rewards such self-serving behavior. States can design institutions that are more interested in long-term planning, and assign the power to make choices at least in part to those institutions. For example, state agencies are more likely to be interested in preserving their long-term budgets; if they had principal authority to accept or receive funds, then Freeman Engstrom's lock-in arguments would be much weaker.

246 See Baker, supra note 11, at 1950–51.
247 See Dorf & Sabel, supra note 245, at 322, 347, 444.
248 See Mashaw, supra note 16, at 26–27.
constraints on conditional spending in some circumstances. Suppose, for example, that within a state the three groups are split evenly one-third each. Obviously, the national-majority and unswayable-national-minority voters combined represent a majority. Both groups may be uninterested in holding up other states for funds—the majority because it does not want to risk its coalition, the minority perhaps because they would realize little benefit from additional funds, or view their position as inalienable. We now have a majority in favor of accepting funds, but also a majority against holding out for additional funds.

Individual voters may also be less likely to act strategically than states as a whole. Staging a successful hold-up takes several fairly sophisticated steps. The voter has to recognize her opportunity, which means distinguishing legislation in which national uniformity is important. She must then be prepared to follow the course of the legislation through several rounds of negotiation, voting against it at times when the overall package is less than ideal, and then in favor of it when the offer improves. These burdens magnify the familiar collective-action problem that deters voters from participating vigorously in political decisions.

Professor Baker points to somewhat similar features as justification for her claim that there should be judicially-enforced constraints on conditional spending. She claims that in some situations a conditional offer of federal funds may not improve overall utility for a state that elects to accept, as when the unbribable minority’s position is strongly held, but the majority’s preference for federal funds is relatively weak. To the extent that the argument for an unconstrained Spending Clause depends on the claim that conditional spending is utility maximizing, Baker’s point does superficially undermine the argument.

Baker’s proposed solution of aggressive judicial enforcement of limits on the Spending Clause, however, is out of tune with her underlying justification. She assumes that judges will be able to identify and invalidate conditional grants in which utility declines. Yet the error costs of her

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249 See Jackson, supra note 24, at 2216 (“Individual rights, unlike the interests of states, do not have the same ‘political safeguards’ and thus require more judicial protection.”); Yoo, supra note 99, at 1400.


251 See Baker, supra note 11, at 1949.

252 See Baker, supra note 11, at 1949–50.

253 See Baker, supra note 11, at 1969–72. Not the least of the problems a judge would face is that the values on either side of an equation are likely to be incommensurable, especially if one group views the right or benefit it is foregoing as beyond price. Cf. Hills, supra note 175, at 936 (arguing that judges are incapable of determining when states have been adequately compensated for burdens imposed on them by federal legislation); Ulen, supra note 193, at 938 (recognizing difficulty of distinguishing “circumstances in which interstate competition is good from those in which it is bad”).
approach—the familiar perils of an unelected judiciary rejecting duly enacted legislation based on its own theory of what the Constitution demands—are substantial.

The clear statement rule might be thought an appealing resolution of these problems. Occasional judicial intervention to block the invocation of unclear spending conditions might send signals to voters to pay attention during subsequent attempts to reauthorize the condition more expressly. Clearer terms could reduce slightly the information costs to voters of following the course of federal legislation. And the added "cost" of enacting sufficiently clear legislation, in terms of legislative time and effort, may serve to replace in some measure the hold-up costs that otherwise constrain conditional spending. That the majority is willing to undergo these costs allays to some extent Baker's concerns, because it demonstrates that the majority's preference for its position is relatively strong.

Again, though, these benefits are redundant. Voters on the less popular side of a federal spending initiative, or those who could stand to benefit substantially from additional federal money, are a relatively discrete and well motivated group. They will already be more attentive to the legislative process, and more dedicated to achieving the outcome they desire. The scenario Professor Baker describes in which conditional spending might result in an overall loss of utility also describes exactly the situation in which a political minority is at its most active and most powerful: the minority has a strong, well defined preference, while the majority has a weak preference, and the benefit of the majority's preference (here, federal dollars) is distributed widely and thinly among the majority.

The minority's influence is further magnified by the involvement of administrative agencies. Administrative decisions, especially individual enforcement decisions, are less visible to the general public, and therefore require more attention and effort by the majority to monitor. In contrast, the small sector of the public directly subject to regulation is more likely to be aware of what an agency is doing, and faces lower transaction costs in assembling needed information. That gives the smaller, regulated group an advantage in influencing the decision makers who direct administrative

254 See Kramer, supra note 180, at 288–89; La Pierre, supra note 128, at 600, 621.
255 See Smith, supra note 11, at 1202; Young, supra note 22, at 1359.
256 See Eskridge & Frickey, Clear Statement Rules, supra note 24, at 631.
257 See Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 HARV. L. REV. 553, 571–72 (2001); cf. Hills, supra note 175, at 887 (noting that localities might turn down federal subsidies for low income housing because middle class homeowners who oppose them are more vocal and better organized than the beneficiaries).
258 See Krent, supra note 159, at 717; Jonathan R. Macey, Public Choice and the Legal Academy, 86 GEO. L.J. 1075, 1081 (1998) (reviewing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)).
259 See Stewart, supra note 234, at 1686.
And, as I have mentioned, there are other factors, such as an agency's dependence on state regulators for information and political support, its history of cooperation and shared personnel with state agencies, and its need to cultivate outside lobbyists to support its goals, that enhance the power of groups most directly affected by regulation.\textsuperscript{261} All of these factors are generally portrayed as undesirable features of the administrative process, largely because they are thought to reduce public accountability.\textsuperscript{262} The same might be said, though, of the Great Compromise. Both significantly enhance the power of minorities to block policy that would otherwise command a popular majority.\textsuperscript{263} Both also help to produce a more even distribution of benefits and burdens, thereby encouraging compromise and strengthening the commitment of both sides to the system as a whole.\textsuperscript{264} In that sense, then, they may actually be more "democratic" than their critics generally appreciate.

In any event, whatever the "democratic" credentials of the administrative process, it is likely here to stay. And in a system of conditional federal spending that employs agencies to superintend the day-to-day compliance of grantees with federal law, agencies offer a significant opportunity for political influence by those who have "lost" at the national level. Perhaps ironically, the pervasive role of federal agencies (and of joint federal and state regulatory enterprises) is the most powerful check on the power of Congress to utilize the Spending Clause to expand the influence of federal policy decisions.

To sum up, it appears that whether considered at the scale of states or individual voters, the political limits on congressional spending authority need little supplement. At those points where spending conditions would be most troubling—in extending Congress's reach beyond other enumerated powers, and in extracting agreement against the will of a minority that places a high value on its contrary view—the structural barriers to federal authority are most imposing. As judicial enforcement of federalism in other areas increases, the need for a clear statement rule affecting conditions of spending decreases. And even in routine uses conditional spending faces unusually high costs, both literally and politically. Of course it is probably impossible to state in a meaningful way the point at which exercise of the spending power is "difficult enough," or sufficiently con-

\textsuperscript{260} See Garrett, supra note 99, at 522; Hills, supra note 175, at 887; Krent, supra note 159, at 717; Stewart, supra note 234, at 1686.

\textsuperscript{261} See supra text accompanying notes 232–35; see also Hills, Bureaucratic Power, supra note 212, at 1255.

\textsuperscript{262} See Krent, supra note 159, at 710 n.2 (collecting critics of delegation).

\textsuperscript{263} See Baker, supra note 11, at 211; David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 GEO. L.J. 97, 124 (2000).

\textsuperscript{264} See Spence & Cross, supra note 263, at 124.
strained, so as to need no further limitations. Nonetheless, given the substantial, unique political limitations on the spending power, it seems implausible to claim that it is so “under-enforced” that it must be buttressed by a clear statement rule.

V. CLEARING UP TRANSPARENCY

In the last Part I noted that one of the underlying assumptions in my analysis of the political process at the level of the individual voter is that state elected officials respond to voter preferences about policy choices. The last of the major critiques of conditional spending speaks to the heart of this assumption, claiming that Spending Clause legislation blurs the lines of accountability for both federal and state legislators. According to some commentators, Spending Clause legislation has the potential to confuse voters about which legislative body or other governmental unit is responsible for the policies that result from a state’s decision to accept conditional funding. If that is right, then it may be difficult for voters to hold state officials accountable for their choices, which in turn might weaken my claim that the political process adequately limits federal spending power. Alternatively, the critique might establish that political checks on conditional federal spending come at the cost of transparency, and therefore democratic accountability, and for that reason alone merit closer judicial scrutiny.

The transparency critique, however, rests on several shaky assumptions itself. The critique’s proponents maintain that the boundary-spanning structure of conditional spending confuses voters. Under this argument, federal officials might force each state to enact and enforce unpopular policies, so that state voters blame state officials, rather than their congressional representatives or the President, for the distasteful results. At the same time, state officials can take cover in federal mandates, claiming that bad results—either in particular, or in more general form, such as high state taxes or poor economic performance—are the fault of the feds, not their

265 See Briffault, supra note 219, at 1304.
266 See Mashaw, supra note 16, at 24; cf. Coenen, supra note 24, at 1297 n.86, 1398–99 (arguing that there is not much point in clear statement rule for congressional abrogation of state sovereign immunity now that there are more direct, strongly enforced judicial limits on that power); Levin, supra note 58, at 1363, 1366 (arguing similarly that direct enforcement of federalism values makes the Gregory clear statement rule cumulative); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1965 (1997) (arguing that courts should eschew avoidance unless protecting rights that are particularly fragile and important).
267 See McCoy & Friedman, supra note 9, at 124; Young, supra note 22, at 1360; Note, supra note 12, at 1420.
268 See McCoy & Friedman, supra note 9, at 124; Zietlow, supra note 10, at 203; Note, supra note 12, at 1420.
269 See McCoy & Friedman, supra note 9, at 125; Note, supra note 12, at 1420, 1429.
own bad judgment.270

The first problem with these arguments is that it is not clear why the supposedly confused voters in each hypothetical are wrong. A state official who chose to accept federal funds should be called to account for the choices he makes, and the federal official should be held to answer for the hard choices he puts to the states. The ultimate policy decision could not come into effect without affirmative decisions by both sides, and, as joint venturers, they are both entitled to credit or blame. One set of commentators asserts that the federal government should not be able to shift blame for its choices onto the state officials who choose to accept.271 But that argument depends on the assumption that the state’s acceptance is coerced. I have already shown that it is not. Indeed, most recent commentary has contrasted conditional spending with what some call “commandeering,” where the federal government directs the states or their officers to act with no opportunity to decline.272 Even if the latter is illegitimate, these commentators generally acknowledge, the former is not.273

Nor is there any particular reason to believe that voters will fail to understand that both ends of the conditional spending transaction are accountable for the outcome.274 Voters who are interested enough to follow an issue are likely to know from whence the object of their displeasure emerged. Unjustly accused officials can point fingers back, and have a strong incentive to lobby for change.275 To the extent that candidates do not have the resources to make voters understand their message, and voters

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270 See McCoy & Friedman, supra note 9, at 125; Young, supra note 22, at 1360–61; Note, supra note 12, at 1420.

271 See Neal Katyal Kumar, Judges as Advicegivers, 50 STAN. L. REV. 1709, 1718 (1998); Note, supra note 12, at 1434.

272 See Jackson, supra note 24, at 2211 & n.141; La Pierre, supra note 128, at 643–44 n.366; Zietlow, supra note 10, at 190; cf. La Pierre, supra note 128, at 658–60 (arguing that, while federal statutes imposing uncompensated duties on state officers are unconstitutional, threats to preempt if the state fails to comply with the federal demand are not because the federal government would have to pay if its bluff is called).

273 See Chemerinsky, supra note 30, at 97, 101; Jackson, supra note 24, at 2211; Weiser, supra note 241, at 702–03; Zietlow, supra note 10, at 190. But see Adler & Kreimer, supra note 48, at 110 (arguing that both commandeering and cooperation undermine accountability); Hills, supra note 175, at 826. I should note that I am unpersuaded by these efforts to distinguish commandeering from conditional spending; in my view, both are constitutionally unremarkable. State voters rely on state elected officials not only to govern directly but also to serve as their agents in relation to the federal government. It is perfectly reasonable to hold our agents accountable for failing in their intergovernmental lobbying efforts to prevent “commandeering” legislation. Thus, in both cases voters are properly distributing blame to both sets of elected representatives.

274 See Adler, supra note 3, at 1240–41; Chemerinsky, supra note 30, at 100; Hills, supra note 175, at 910; Moulton, supra note 24, at 877.

275 See Chemerinsky, supra note 30, at 100; Hills, supra note 175, at 910. Indeed, as I mentioned in an earlier footnote, a state official who fails to lobby against unpopular federal legislation is not doing her job, and deserves the anger of her constituency. See supra note 273. Blaming these unsuccessful lobbyists is accountability, not confusion.
do not have time to search out the truth, that is as much an argument for campaign finance reform as it is for limiting the power of the federal government.

It might be argued, however, that a clear statement rule could again be something of a second best solution. Clearly worded legislation might conceivably make it more difficult for federal officials to shift blame for their own policy decisions entirely onto state officials, perhaps by making it more likely that voters will notice the federal enactment, or making it more evident that the state's obligation was imposed, rather than freely chosen. That clarity, however, is a double-edged sword. To the extent that it gives spending legislation the appearance of a federal mandate, clear language also makes it easier for state officials to pretend that the outcome is solely a federal decision, rather than one that was bargained for and agreed to by the state.

In any event, this debate overlooks the more fundamental point that transparency is contingent on institutional design. A well-built cooperative federal-state enterprise can activate and inform citizens, by incorporating them in planning, implementation, and evaluation at all levels. Centralized benchmarking of parallel enterprises might give local voters a way of comparing the performance of their state representatives to those elsewhere, making the state officials more accountable for their choices than they would be in a purely local system. Obviously, not every conditional expenditure will be so well designed. It is implausible, though, to read the Constitution based on an assumption that none of them could be.

VI. RECONSTITUTING THE CONSTITUTION IN THE COURTS

Until now I have concentrated most of my efforts on debunking many of the supposed dangers of the Spending Clause. In this Part I want to turn to a major benefit of conditional spending so far neglected in the current literature. As other commentators—and Congress itself—have recognized, the Spending Clause offers an opportunity to make constitutional norms not enforceable by federal courts binding on the states. It has not previously been observed, though, that the Spending Clause is actually a necessary structural component in seeing that the Constitution's promises are fully realized. Modern constitutional interpretation uses statutory interpretation as its primary tool of constitutional enforcement, and leaves the core of each constitutional right, which cannot be superseded by ordinary politics, somewhat "under-enforced." But the federal courts have no lasting power over state law. Thus, in federal court, the Constitution's power over

276 See Dorf & Sabel, supra note 245, at 313.
277 See id. at 314, 321.
278 See supra note 11.
state law is weaker than its influence over federal legislation. Subpart VI.A explores the contours of this limited Constitution. Subpart VI.B moves on to address the ways in which federal legislation and administration can serve to supplement the rights the Court has been willing and able to defend. The clear statement rule, however, has thus far kept us from realizing the extent of these advantages, by constricting the open texture available for federal courts to interpret in giving meaning to federal constitutional norms, and by casting a cloud over whether there is any role at all for agency interpretation. My claim therefore is that the clear statement rule cannot be squared with contemporary constitutional thinking.

Of course, in recent years the Court has also repeatedly rejected congressional efforts to “enforce” the Fourteenth Amendment against the states. Subpart VI.C attempts a sort of internal critique of these cases. After outlining sympathetic accounts of three possible justifications for the Court’s decisions, I argue that building redefined rights into conditional grants of federal funds largely eliminates each of the three concerns. Administrative involvement gives the Court greater assurance of an ongoing, considered political commitment to the chosen policy, and a governmental partner to take responsibility over time. And the political constraints on conditional spending I have already described help to keep federal rights and state policy making in equipoise.

A. The Limited Constitution


As Alexander Bickel described, and later authors like Lawrence Sager have analyzed in greater depth, the Supreme Court recognizes an abbreviated version of the Constitution. In many areas, ranging from the Constitution’s guarantee of a republican form of government to the application of the Equal Protection Clause to public school funding, the Court has concluded that it is not institutionally capable of defining or enforcing what arguably are the full expanses of the rights protected by the Constitution.

And yet, as Sager and others have argued, the Constitution surely does

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281 See Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 252–53, 329 (2002); Brest, supra note 4, at 104–05; Hershkoff, supra note 193, at 1862–63; Sager, supra note 184, at 1217. To the catalogue offered by Bickel one might also add more recent innovations such as constitutional limits on standing, which arguably rest on the Court’s fear of being dragged by individual litigants into political debates that will undermine its credibility and authority, or forced to decide difficult issues without sufficiently comprehensive understanding of the relevant facts.
not shrink to fit the scope of what an assembly of nine unelected officials can understand and enforce.\textsuperscript{282} For example, when the Court chose not to recognize a judicially-enforceable right not to have one's vote diluted, it rejected not the notion that the Constitution values meaningful participation in the democratic process, but rather the possibility that a court could do more good than harm in trying to identify when that value had been offended by state action.\textsuperscript{283} The constitutional norm remained intact; it was only the judiciary's power to vindicate it that had been thrown into question. Similarly, a constitutional violation is no less a violation because a given plaintiff lacks standing to assert it.

Of course, one could make the positivist claim that the Constitution is meaningful only to the extent that it can be enforced in a court. But that argument is implausible and probably not one that would be advanced by a responsible judiciary. Other governmental actors sometimes behave as though they are constrained by constitutional provisions the Court has decided are non-justiciable.\textsuperscript{284} At the least, it would be undesirable for the Court to suggest otherwise. Besides the obvious impact such a rule would have on the likelihood of self-compliance, it would also diminish the Court's potential as an expositor of meaning and value for society at large.\textsuperscript{285}

Indeed, as I discussed in Part IV, the idea that the Constitution is "under-enforced" is the central premise of modern principles of constitutional avoidance.\textsuperscript{286} Federal courts now interpret federal statutes and regulations with the strong presumption that, absent very clearly contrary semantic evidence, the statute or regulation does not require or regulate conduct in a way that would raise "serious" constitutional questions.\textsuperscript{287} By avoiding the need actually to decide the constitutional question, the court in effect ex-


\textsuperscript{283} See Colegrove v. Green, 328 U.S. 549, 554–56 (1946); Sager, supra note 184, at 1224.

\textsuperscript{284} See Brest, supra note 4, at 83–93, 99; McConnell, supra note 282, at 171 & n.123; Mark Tushnet, Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies, 50 DUKE L.J. 1395, 1417–18, 1424 (2001).


\textsuperscript{286} See WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 348 (2000).

\textsuperscript{287} See Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71, 82–83; Vermeule, supra note 266, at 1949.
pands the scope of the underlying right, in some cases displacing the most natural or obvious reading of the text even where, if push came to doctrinal shove, the textual command would be constitutional.

This method has a number of benefits. By leaving open the possibility that the Court's decision could be overturned legislatively, avoidance helps to alleviate the Court's concern about displacing the policy decisions of the more representative branches. At the same time, the avoidance decision may encourage constitutional reasoning during the subsequent legislative debate, both by signaling to legislators themselves and also potentially activating otherwise inattentive voters. Furthermore, avoidance partners the Court with Congress and/or the Executive in the elaboration and enforcement of the Constitution. A Congress that chooses not to overturn an avoidance decision because it is convinced by the Court's constitutional reasoning takes much of the political "heat" of a potentially controversial decision off the Court itself. And, to the extent that the Court's constitutional judgment might depend on unresolved facts or policy judgments, its avoidance decision could be something like a jurisprudential flow chart: "If A is true, then we would reach result one. If A is false, then we would reach result two. We remand to Congress for determination of whether A is true or false." In this way, avoidance allows the Court to make at least partial constitutional decisions in the face of what it perceives as its limited expertise and accountability.

The avoidance method is so attractive that it actually exerts doctrinal pressure on the scope of what we have traditionally labeled constitutional "rights." That is, the Court takes a narrower view of rights that cannot be displaced by the other branches exactly because it prefers to define rights

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290 See JOHN HART ELY, DEMOCRACY AND DISTRUST 4-5 (1980); Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 563 (1990); Schauer, supra note 287, at 71; Young, supra note 58, at 1606-07; see also Eskridge & Frickey, Clear Statement Rules, supra note 24, at 630-31 (arguing that the same is true of clear statement rules generally).

291 See Young, supra note 58, at 1608; see also Jackson, supra note 24, at 2234 (making same observations about clear statement rules generally).

292 See Paul W. Kahn, Community in Contemporary Constitutional Theory, 99 YALE L.J. 1, 7-16 (1989); Klein, supra note 177, at 602; Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. REV. 1003, 1005 (1994) [hereinafter Kloppenberg, Avoiding Constitutional Questions]; Krent, supra note 159, at 750-51; cf. Sunstein, supra note 128, at 88 (offering this same justification in favor of variety of "minimalist" judicial techniques).

293 See Coenen, supra note 190, at 1591.
in a way that permits congressional and executive involvement. Even under this view it may still be useful to make a semantic distinction between constitutional "rights" and "mere" statutory interpretation. But, whatever our language, it is evident that each is defined in relation to the other. The Court's very conception of a constitutional "right" now includes two parts, one politically contingent (i.e., defeasible by statute) and the other not.

As a result, a constitutional regime in which avoidance is sometimes prohibited is inherently deficient. When avoidance is impossible, the court's interpretive regime not only omits the politically contingent portion of a given right, but also recognizes only core apolitical rights which have been defined narrowly on the assumption that they will be complemented by their political partners.

One significant downside to the avoidance scheme of constitutional enforcement is that federal courts cannot authoritatively interpret state law. Thus, a federal court that refuses to reach the core constitutionality of a state law on the assumption that the statute does not actually authorize the constitutionally dubious conduct runs the risk that a month or a year later a

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294 See Eskridge & Frickey, Law as Equilibrium, supra note 17, at 44; Post & Siegel, Equal Protection, supra note 282, at 517; Tracy A. Thomas, Congress' Section 5 Power and Remedial Rights, 34 U.C. Davis L. Rev. 673, 722–23 (2001). For an extensive discussion of this tension in the development of immigration law, see Motomura, supra note 290, at 564, 568–74, 610–11.

295 See Coenen, supra note 190, at 1862–66; Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 885 (1999); Thomas, supra note 294, at 694–95; Young, supra note 58, at 1551–52, 1594–99.

296 Of course, given that the avoidance doctrine has a number of detractors, it might be argued that a scheme in which it plays a lesser role is much to be desired. Although the details of these critiques are beyond the scope of this Article, in broad outline they are not especially persuasive. Critics generally claim that avoidance hypocritically claims to elevate legislative supremacy but, in fact, usually displaces what Congress would want. See, e.g., Lisa A. Kloppenberg, Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns, 30 U.C. Davis L. Rev. 1, 76 (1996) [hereinafter Kloppenberg, Serious Doubts]; Schauer, supra note 287, at 88–89, 94–95. That criticism has little force if we understand avoidance as simply another form of judicial review, with no pretensions of exalting legislative supremacy over all other values. Avoidance is more deferential than outright invalidation, but sometimes not much more. See Galle, Federal Agencies, supra note 149, at 220. Critics also worry that avoidance is confusing, because it leaves underlying constitutional doctrine unsettled. See Kloppenberg, supra, at 55–56, 73–74. But that is precisely the point; avoidance allows the court to deter undesirable conduct without paying the full cost of invalidation. Cf. Adler & Kreimer, supra note 48, at 137 (making this point about virtues of Court's confusing federalism doctrines). Finally, some authors worry that avoidance duplicates many of the features of judicial review without the careful thought and rhetorical justification that ordinarily goes with core constitutional adjudication. The "serious" constitutional question prerequisite, however, imposes virtually the same demands. NLRB v. Catholic Bishop, 440 U.S. 490, 500–01 (1979); see Rust v. Sullivan, 500 U.S. 173, 190–91 (1991) (analyzing in detail constitutionality of regulation to determine whether it presents a "doubtful" constitutional question).

state court will reach the opposite statutory ruling.\textsuperscript{298} While in theory the federal court might then reopen its door to the party it erroneously turned away, the federal courts generally have found that the more economic approach is not to make such predictions at all.\textsuperscript{299} Further, in many cases the federal court will be able to provide a remedy only if there is a federal constitutional violation—for example, if the suit was brought under 42 U.S.C. § 1983, or any time the defendant is the state itself.\textsuperscript{300} Avoidance in those situations would leave the plaintiff with nothing but a favorable, but not binding, precedent to present to a state court in a subsequent suit (and even that assumes one is available, that further delay would not be the same as an outright loss, and so on).

This, then, is the dilemma of federal judicial review of state law. Federal courts depend on the avoidance canon to make up for their own institutional shortcomings, and to give more complete meaning to recognized constitutional norms. In many cases, the core "right" defining the scope of immovable judicial protection for the norm itself may have been defined narrowly on the assumption that avoidance would be available where application of the norm was difficult or contingent on determinations the court could not easily make for itself. Yet federal courts cannot meaningfully use tools of statutory interpretation to shape state law. As a result, the vigor of judicially-enforced constitutional norms is considerably diminished against the states.

2. Some Objections Considered

I do not want to suggest that my claim that in court the Constitution binds the states rather less strongly than it constrains the federal government is open-and-shut. Federal courts do have some other methods for recreating the avoidance canon when they are confronting state law. And certainly there is always state-court review of federal constitutional claims. In this subpart I consider both objections.

The first objection, again, is that federal courts already do account in a


\textsuperscript{299} See Nicholson, 344 F.3d at 170. Several opinions seem to go even farther, suggesting that this rule of economy is constitutionally mandated by Article III's case or controversy requirement. See id. (citing Sims, 442 U.S. at 428; Rescue Army v. Mun. Court, 331 U.S. 549, 577–78 (1947)); cf. Michigan v. Long, 463 U.S. 1032, 1042 (1983) ("The jurisdictional concern is that we not ‘render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.’") (quoting Herb v. Pitcairn, 324 U.S. 117, 126 (1945)).

\textsuperscript{300} Extant sovereign-immunity constraints on supplemental jurisdiction also mean that federal plaintiffs will never be able to raise state administrative law challenges in federal court. See Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 539–42 (2002); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117–21 (1984). I am assuming for the moment that the plaintiff has no independent federal statutory claim.
variety of ways for their bounded authority over state law. However, none of these solutions is especially powerful. Federal courts can, however, also attempt to avoid constitutional adjudication by shifting state-law decisions to state courts. *Pullman* abstention is the most significant tool for this kind of dodge, although it has now been replaced in most courts by certification, which avoids some of the delay and unfairness that comes with obliging plaintiffs to commence their state litigation from scratch. *Younger* abstention, in which federal courts decline equity jurisdiction where they might be obliged to enjoin certain forms of ongoing or imminent state proceeding, can serve a similar function, although in the case of *Younger* often both the state- and federal-law claims end up being heard in state court. But the effectiveness of any of these measures depends on whether the state court is adequately equipped to carry out the task of avoidance.

Thus, the better objection is that state courts are also capable of interpreting their own statutes to avoid potential constitutional questions. Indeed, some state courts possess the broad law-making authority that federal courts deny themselves, so that a state court might be able to defy even the plain text of a state law to prevent confrontation with a serious constitu-

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301 For example, the vagueness and overbreadth doctrines both seem to allow federal courts some latitude to interpret state law. *See Coenen, supra note 24, at 1307–08.* Both allow a federal court to declare a state law unconstitutional based on the claim that it fails to give the public adequate notice about what conduct is prohibited under the statute, notwithstanding the fact that a state court could conceivably either find the statute perfectly clear or issue a subsequent clarifying or narrowing interpretation. Although the federal court is supposed to take account of the possibility that there exists an unambiguous reading of the statute, see *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988), it is possible that the federal court will insist on using an approach to interpretation that admits of more ambiguity than the state court would choose. But both doctrines are applied only in narrow circumstances, and inconsistently even there. *See Stuart Buck & Mark L. Rienzi, Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes, 2002 UTAH L. REV. 381, 381–82; Vermeule, supra note 266, at 1966–68* (arguing that overbreadth serves as complement to, not replacement for, avoidance).

Professor Kloppenberg argues, somewhat unaccountably, that the Supreme Court can interpret state law in order to avoid constitutional questions. *Kloppenberg, Avoiding Constitutional Questions, supra note 292, at 1056.* Her authority for this claim, however, is *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175 (1909), a product of the pre-*Erie* era in which federal courts in fact had interpretive power over state law. Yet, as I discuss in the text, the entire premise of *Pullman* abstention is that *Erie* prevents federal courts from using avoidance techniques directly on state law. *Siler* is also difficult to reconcile with modern limitations on pendent jurisdiction, which often will mean that a federal court cannot even hear state-law claims. *See Pennhurst, 465 U.S. at 104–21* (rejecting plaintiffs' claim that *Siler* authorized their pendent state-law suit against state officers).


303 *See Arizonans for Official English v. Arizona, 520 U.S. 43, 75–76 (1997).*


State courts also have much more authority over state administrative agencies, since federal courts do not have jurisdiction (absent state waiver) to hear state-law challenges to the actions of state agencies or their officers sued in their official capacity.

The trouble with this objection is that federal norms are often contrary to the interest of individual states. Many federal constitutional provisions serve to prevent destructive collective-action problems that arise when states compete with and affect each other. The Court's Dormant Commerce Clause jurisprudence obviously is strongly influenced by these considerations, as is its interpretation of the Article III grant of diversity jurisdiction. Perhaps less obviously, the Constitution also prohibits states from discriminating against migrants from other states; helps assure that states cannot compete for employers by weakening labor rights, such as the right to organize and picket; draws lower bounds on the extent to which the state can cut taxes by economizing on government services that contribute to the due process of law; and removes exit-driven political pressure to restrict core unpopular individual rights, including the rights of criminal defendants and political and religious dissenters. In short, we could well conceive of all of the incorporated provisions of the Bill of Rights as resting, at least with one foot, on the ground that they represent public goods that can only be protected effectively if protected by a central authority.

Furthermore, as other commentators have observed, the Court's constitutional decisions can often best be explained as efforts by a national popular majority to prevent contrary behavior by a local mi-


307 See Galle, Federal Agencies, supra note 149, at 206 n.202, 213–14 (explaining that combined effect of limits on supplemental jurisdiction and federal deference to state definitions of what constitutes a sovereign entity is that state agency cannot be sued in federal court unless state consents).

308 See TRIBE, supra note 23, § 6-5, at 1051; Eskridge & Frickey, Law as Equilibrium, supra note 17, at 52.


313 See CHOPER, supra note 24, at 185; cf. Adler & Kreimer, supra note 48, at 127–30 (arguing that diversity and experimentation arguments for federalism limits on national power are unpersuasive when applied to the Fourteenth Amendment, which is supposed to protect rights that should be universal or are essential to a fair political process).
It would be surprising if the local minority enforced the Court's majoritarian view of a constitutional provision against itself as effectively as the majority's courts would.

The objector now might respond that the weaknesses in her argument are only apparent if state judicial decisions reflect the political interests of their states, rather than a principled nationalist reading of the Constitution.\textsuperscript{315} The first problem with this counter-argument is that state courts, in the abstract, are subject to political pressure.\textsuperscript{316} States have substantial freedom to define the structure of their judiciary, and in fact many state judges are elected.\textsuperscript{317} Even if the manner of state judicial selection were constrained by federal law, state legislatures might well still have plenary power to set the rules of interpretation and precedent for their courts. While the state courts must generally be open to federal claims,\textsuperscript{318} it is not clear at present whether states could by legislation dramatically reduce the force of state judicial interpretation of constitutional law, for example, by outlawing the avoidance canon.\textsuperscript{319} Thus, whatever the skill and principle of

\textsuperscript{314}See Mark Tushnet, Taking the Constitution Away from the Courts 129–53 (1999); Eskridge & Frickey, Law as Equilibrium, supra note 17, at 88; Hershkoff, supra note 193, at 1903–04; cf. La Pierre, supra note 128, at 641–42 (arguing that courts should recognize national political choices over those of state or local government).

\textsuperscript{315}See, e.g., Fallon et al., supra note 305, at 1225 ("[B]y 1971 there was no reason to think state courts generally untrustworthy in cases involving claimed federal rights . . . .").


In other contexts the Constitution appears to place some limits on state power to define state jurisprudential and interpretive theory. In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that it had power under Article III to review ultimate state court decisions unless the state decision was clearly based on an adequate and independent state ground. \textit{Id.} at 1039–42. Interestingly, the Court stated that where a state-law doctrine was intended to incorporate or adopt federal law concepts, any decision based on that doctrine would be a reviewable federal-law decision, not state law. See \textit{id.} at 1042 n.8. Why that should be so is, obviously, rather beyond my scope here. The point is that the \textit{Long} interpretive rule is contrary to some potential jurisprudential views of what makes law. For example, under a strong positivist view, any law issued by a state court, interpreting state law or the state constitution, might be state law, regardless of the provenance of its reasoning. \textit{Long} therefore suggests, as I said, that the Constitution may exclude some potential state definitions of the meaning of state law.
state judges, state courts may not be a welcoming place for some federal rights.

But even supposing that state courts are perfectly insulated from the pressures of state competition, and can vigorously apply avoidance principles, they can still be overruled by their own political branches. That, after all, is the nature of avoidance. The same is true even if state courts rely on state constitutional grounds, rather than statutory interpretation, for their decisions; the political cost of overruling is just higher for the former.

Could we make a similar argument that states cannot forbid the avoidance canon, or at least that Congress or the Supreme Court may have the power to prohibit them from doing so? I think so, although probably not under existing case law. But cf. Bush v. Gore, 531 U.S. 98, 111–15 (2000) (Rehnquist, C.J., concurring) (reviewing and arguing for overturning the Florida State Supreme Court’s decision on state election law grounds by finding that Article II constrains such state laws); Henry Paul Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 COLUM. L. REV. 1919, 1925 (2003) (arguing that the Supreme Court has “ancillary” jurisdiction to review a state court’s decision involving a “federal constitutional provision [that] directly constrains or incorporates state law”). The basic premise of the argument would be that a state court adjudicating a federal claim is acting as one of the “inferior courts” Congress may establish under Article I. The power to establish those courts, we have been told, includes the power to make rules of decision in those courts. And the Supreme Court has inherent supervisory power over its inferior courts. See James E. Pfander, Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers, 101 COLUM. L. REV. 1515, 1518–19 (2001).

See Sager, supra note 184, at 1247–49 (discussing debate over whether state judges are as good as federal judges at adjudicating federal rights).

On the other hand, it is true that the Madisonian Compromise assumed that there might not be any inferior federal courts, see FALLON ET AL., supra note 305, at 8, and for a long time even plaintiffs with federal claims for damages could not get into federal court unless their claim was worth a substantial amount of money. Id. at 1473. Both of these structural features imply an assumption that state courts are adequate to preserve federal rights, presumably including those that would implicate interstate competition. Quite possibly that assumption is mistaken; for example, the Madisonian Compromise antedated the Bill of Rights and the idea of the Dormant Commerce Clause, and it was arguably exactly the pressure of incorporation that killed the minimum-value restriction on federal claims. See id. (noting widespread exceptions to amount in controversy requirement in cases that seemed to implicate national interests). But perhaps Madison’s Compromise obliges us to find a way to harmonize later developments in constitutional law with the premise of state court exclusivity. One such harmony might be to accept that the state courts are at least adequate to protect what I have called “core” constitutional rights—rights that cannot be altered by the political process. And, to make up for the tools of statutory interpretation needed to protect the full scope of the federal right, state judges might draw on federal legislation (including federal spending legislation) instantiating federal constitutional values, which through the Supremacy Clause also must prevail over contrary state law. In Subparts VI.B and C, I explain why conditional federal spending legislation is especially useful for that purpose.

Another harmonization, as I suggested in an earlier footnote, would be to permit Congress or the Supreme Court to place some limits on state political control over state jurisprudence, perhaps by using their power over “inferior” federal courts. See supra note 319. Proposals to limit the election of state judges offer a similar appeal.

See Hershkoff, supra note 193, at 1887; Schapiro, Misconceptions, supra note 319, at 679–80. Of course, a state court can label what it does as federal constitutional law, and its interpretation of the federal constitution is basically irreversible by the state’s own population. But that very fact may well be why the Supreme Court is so aggressive in identifying state interpretations of federal law for its own review. As a result, it is not always easy for a state court to treat a federal constitutional provision differently than federal courts have. And remember that in defining a federal constitutional right one
There is therefore little guarantee that in the end the state will be fully constrained by the federal norm. Of course, it might be argued that political defeasibility is exactly the point of non-core constitutional rights. But political decisions at the state level, as I have said, raise problems of collective action between states as well as of local intransigence. In contrast, legislative or executive decisions at the federal level will internalize (albeit sometimes imperfectly) the competitive forces that the constitutional rights are in part aimed at preventing. And, obviously, a statute is by definition a majoritarian act.

The bottom line, therefore, is that absent some supplement, the full panoply of federal rights available in federal court is not effective against state actors.


How, then, does this deficiency relate to the clear statement rule? Begin with this question: If, as I have just claimed, there is a large imbalance in the judicial enforcement of federal constitutional rights, why has it gone unnoticed? The answer (probably obviously) is that most important constitutional rights running against state and local governments are now supplemented by federal statute or regulation. Some of these enactments have claimed expressly to be vindicating what Congress and the President understand to be the obligations of the Constitution. Others, although nominally an exercise of some other congressional power, such as the Commerce Clause, are widely acknowledged to be in the service of constitutional norms of fairness or equality.

In addition to filling the jurisprudential space that would otherwise be left in federal judicial review of state law, federal legislation restores the collaborative framework that is the heart of the avoidance method. Recall that avoidance allows courts to draw on the superior political insight and fact-finding capabilities of Congress and the Executive Branch in crafting not only the defeasible aspects of a constitutional right but also the content of its inalterable core. As Professors Post and Siegel have pointed

factor the Court considers (outside what I have called the indefeasible "core" of that right) is the fact that the elaboration of the right will include elected officials. Thus, we should be very reluctant to encourage state supreme courts to re-designate the cooperative elements of federal rights as exclusively judge-made, unless we are confident that in doing so we are not compromising the premise of the right itself.

323 See Eskridge & Frickey, Law as Equilibrium, supra note 17, at 27-28; Neuman, supra note 2, at 1635–36; Zietlow, supra note 10, at 144.
326 See Kloppenberg, Serious Doubts, supra note 295, at 38.
327 See Coenen, supra note 190, at 1588; Kloppenberg, Avoiding Constitutional Questions, supra note 292, at 1005; Post & Siegel, Equal Protection, supra note 282, at 467–68; Sager, supra note 184, at 1239.
out, federal civil rights legislation has had a similar impact, so that Con-
gress and the President have had significant roles both in shaping how ex-
istig core constitutional rights will be enforced and also in the evolution
of those core rights over time.\textsuperscript{328}

The clear statement rule interferes with both these benefits. Effective
constitutional adjudication depends on our willingness to accept a rela-
tively open-textured source of authoritative law. The grand, unspecified
language we see in key portions of the Constitution is intentionally vague.
One cannot write in advance a meaningful code to distinguish the process
that is due, to choose two of innumerable examples, when a state removes
a child from the custody of a mother with an abusive spouse from the proc-
cess that is due when the state bars the visitation rights of mentally ill
grandparents. We have instead to trust in the ability of judges to discern
the underlying values that are embodied by the broad terms and to apply
those values wisely in difficult new situations. In demanding absolutely
clear language of statutes imposing constitutionally-inspired limitations on
state or local governments, the clear statement rule strips from courts this
most central of constitutional tasks, and leaves the Constitution in the states
threadbare by comparison to its federal instantiation. That demand is espe-
cially hard to justify when, unlike "core" constitutional interpretation, judi-
cial interpretation of the requirements of constitutional legislation is rela-
tively easy to revise through a political process quite open to state influ-
ence.

The clear statement rule also undermines the partnership between
courts and the political branches. For one thing, if Congress or an agency
knows that the courts will be limited to carrying out the more-or-less literal
terms of what they enact, they will have considerably less incentive to pre-
serve for public inspection the record of their reasoning, the constitutional
deliberation and analysis that produced the statutory or regulatory outcome.
And perhaps there is a lesser incentive to carry out such deliberation at all.
When a court announces, "your deliberations don’t matter," it seems a fair
possibility that the natural response is not to bother. Even if as a practical
matter not much legislation is produced by real "republican" processes, the
premise of avoidance is that courts should encourage, not undermine, con-
stitutional thinking by political actors.\textsuperscript{329}

Another way that the clear statement rule interferes with collaborative
constitutionalism is that it silences courts. A good partnership needs feed-
back from both sides. But if courts are limited simply to finding the clear

\textsuperscript{328} See Post & Siegel, \textit{Equal Protection}, supra note 282, at 519; Robert C. Post & Reva B. Siegel,
\textit{Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power}, 78 IND.
L.J. 1, 23–24, 31–33 (2003) [hereinafter Post & Siegel, \textit{Juricentric Restrictions}]; see also Caminker,
\textit{supra} note 279, at 1171–73.

\textsuperscript{329} See Kloppenberg, \textit{Avoiding Constitutional Questions}, supra note 292, at 1040; Sunstein, \textit{supra} note 128, at 88.
semantic meaning of a text, and then stopping, they will never engage their partners on the meaning and wisdom of the principles that animate the words. 330

Furthermore, to the extent that the clear statement rule requires judges to look exclusively to the terms of a statute, rather than a regulation, for the necessary clear statement, the rule cuts out a major potential source not only of expertise but also of political accountability. As I mentioned earlier, this reading of the clear statement rule is doctrinally plausible, at least for now. 331 I have shown, however, that it is also illogical. Agencies offer better “notice” to states than does Congress; they are at least as deliberative and are probably more accessible to state political influence. 332 Additionally, elevating the clear statement rule above Chevron and related deference doctrines is highly undesirable from the standpoint of effective and collaborative constitutional interpretation. Agency involvement means that judicial interpretations would not only be subject to occasional congressional alteration, but also would have the advantage of the expertise and political judgment of the federal and state agencies who are administering the grant-in-aid program. 333

Thus the fundamental problem with the clear statement rule is that it is inconsistent with our modern Constitution. As applied to the federal government, the judicially-enforced Constitution is deeply collaborative, and its politically indefeasible reaches are curtailed accordingly. Yet, thanks to the clear statement rule, the Constitution in the United States is simply “under-enforced.”

C. . . . And the Limits are Unjustified

Our picture of constitutional legislation is not yet complete, however. In response to congressional and other efforts to supplement the Constitution, the Supreme Court has devised new limits on both legislative and executive power to impose constitutionally-inspired burdens on state government. The puzzle for this subpart is: Why? Do these concerns justify the clear statement rule or other stronger constraints?

The search for an answer to those questions, I claim, has three leading

331 See supra notes 64, 236.
333 See Dorf & Sabel, supra note 245, at 363 (analyzing both informational and accountability advantages for reviewing courts in allowing agencies to develop policy in a real-world setting before courts consider the validity of the policy).
candidates. Each is at least plausible within its own realm. Some may even extend to include efforts to enforce constitutional norms through the Commerce Clause or other national powers not directly tied to the meaning of the Constitution. None, however, seem to have much force as applied to conditional spending. This subpart thus has something of the flavor of an internal critique; even accepting the best justifications for limiting direct constitutional legislation, the Spending Clause offers a relatively unimpeachable alternative for rendering both state and federal law equally subject to constitutional scrutiny.

1. The Restrictions: Boerne & Sandoval

One principal source of Congress’s power to enact constitutionally-inspired legislation is Section Five of the Fourteenth Amendment, which authorizes Congress to enforce the Amendment’s other substantive provisions. As I suspect most readers will know, the Supreme Court has now curtailed Congress’s power to legislate under Section Five, beginning with the Court’s opinion in City of Boerne v. Flores. Congress, displeased with the Supreme Court’s penurious view of the Free Exercise Clause in Employment Div., Dep’t of Human Res. v. Smith, enacted the Religious Freedom Restoration Act ("RFRA"). RFRA sought to require all courts, state and federal, to give strict scrutiny to state action burdening religious conduct. The Court responded by holding that application of RFRA as to state law exceeded congressional power under Section Five. Under Boerne and its progeny, Congress may only use Section Five power to “remedy or prevent” conduct that the Court itself would conclude violates the Constitution.

What perhaps is less familiar is the additional role played by Alexander

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334 See U.S. CONST. amend. XIV, § 5.
337 See City of Boerne, 521 U.S. at 512–16.
338 Id.
339 Id. at 536.
340 Id. at 519.
341 Id. at 519–20.
342 Id. at 530; see also Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (stating that Section Five legislation reaching beyond the scope of Section One must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80–83 (2000).
v. Sandoval, a case in which the Court held that agency regulations enforcing the anti-discrimination provisions of Title VI cannot be privately enforced. Title VI itself prohibits only intentional discrimination; nevertheless, the regulations in question also disallow facially neutral policies having a "disparate impact" on protected groups. Although the Court did not actually declare the regulations themselves invalid, it ruled that they could not be the basis for a private suit because "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." As I have explained elsewhere, that claim is inexplicable (and probably inaccurate) as a matter of administrative law. Taken in the specific context of Sandoval, however, it might be understood as an aspect of the Boerne rule. If agencies can expand (within reasonable limits) upon the guidelines of the underlying statute, then administrative elaborations of Section Five legislation might prove broader than what the Court is willing to uphold as "appropriate" legislation if enacted directly by Congress. Sandoval thus can be understood in the tradition of other cases in which the Court has interpreted Congress's grant of power to an agency strictly in order to avoid possible constitutional problems.

Thus, Boerne places a straitjacket on federal efforts to legislate constitutional rights and, by implication, on similar administrative efforts. Does this tell us that the Constitution should not bind state law as tightly as it does federal law, or only that some of the ways that Congress might seek that goal are themselves constitutionally suspect? The next three subparts argue the latter view.

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344 Id.
345 Id. at 280-81.
346 Id. at 291.
347 See Galle, Federal Agencies, supra note 149, at 174-75 n.60. Others have seized on this problem to suggest that Sandoval must in fact mean that the Court believes that the regulations are invalid, perhaps because a prohibition on disparate impact is a substantive redefinition of, rather than simply a prophylactic remedy for, unconstitutional discrimination. See John Arthur Laufer, Note, Alexander v. Sandoval and its Implications for Disparate Impact Regimes, 102 COLUM. L. REV. 1613, 1614 (2002); cf. Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 HARV. L. REV. 493, 520-23 (2003) (doubting that the disparate impact standard can be defended on the ground that it is predictive of intentional violations). That view, however, assumes a sub silentio overruling of South Carolina v. Katzenbach, which upheld parts of the Voting Rights Act under a similar theory. 383 U.S. 301, 308, 325-26, 333-36 (1966) (upholding congressional suspension of existing state limits on voting, and preclearance requirement for new state restrictions, despite the fact that the Court had previously upheld similar ballot restrictions). Since, as I explain in the text, there is a third explanation, so that the conclusion of the syllogism does not necessarily follow, I think the better view is that the validity of the regulations is not in question.
348 See BICKEL, supra note 156, at 156-169; Krent, supra note 159, at 748-50.
2. The Rhetoric of Separation of Powers

Probably the most popular explanation for *Boerne*, at least in the first few years after the opinion, was that it was a demonstration of the Court's commitment to a formalist understanding of the separation of powers between the three branches. That is, in rejecting Congress's power to craft supplemental meanings of the Fourteenth Amendment, the Court preserved for itself the exclusive power to interpret the Constitution. Similarly, the stringent test for what can constitute proper prophylactic rules for enforcing existing judge-made rights might be seen as a way of assuring that Congress is not covertly remaking a right under the guise of revising the remedy. That understanding of *Boerne* finds obvious textual support in the opinion's invocation of the *Marbury* power to "say what the law is," as well as contextual support in legislative history indicating that Congress's intention was to overturn *Smith*. But as several writers have pointed out, this result is puzzling when taken in combination with the notion of under-enforced constitutional norms. In many areas the Court has as much as admitted that the Constitution comprises rights that the Court has not chosen to recognize. Why, then, should the Court treat its under-enforced norms as what constitutional "law is," rather than more forthrightly labeling them "judicially enforceable rights," or something similar, thus permitting congressional recognition of the rest?

The closest answer sympathetic to *Boerne* is probably that the rights/enforceable rights distinction threatens to undermine one of the Court's important rhetorical tools. Against the political power of its fellow branches essentially all the Court has to offer in opposition is its claim to a

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350 See Caminker, supra note 279, at 1166. Or, if we see the distinction between rights and remedies as basically semantic, then the remedial limitations in *Boerne* are not simply a test for covert redefinition of rights, but a direct bar on redefinitions of the right/remedy complex.


352 See Caminker, supra note 279, at 1182–83.

353 See Estreicher & Lemos, supra note 349, at 113; Post & Siegel, Equal Protection, supra note 282, at 462; Post & Siegel, Legislative Constitutionalism, supra note 4, at 2044.

superior source of authority.355 “Yes,” it can say, “flag burning is loathsome, but the Constitution, the founders, and the definition of what it means to be American tell us that we must tolerate it.” These appeals to deeper commitments—to the hostile audience’s sense of Lockean obligation, to their national selfhood, or to their more pragmatic need for a system with the potential for ultimate, uncontestable decisions that end further wasteful political wrangling—may in large measure be what ensures that the Court’s opinions will be respected and enforced rather than ignored.356

Boerne, then, may reflect a calculation that to arm Congress with the argument that it, too, is interpreting the Constitution might in the long run destroy the Court’s authority to resist Congress’s will. That, I believe, is the import of the otherwise cryptic comment in Boerne that a contrary rule would make everyday law the stuff of the Constitution.357 Once the Court concedes that Congress can interpret constitutional provisions it has not recognized, where does it find the power to oppose Congress’s claim that any given piece of legislation is required by the Constitution?

Perhaps it is an answer to say that this loss is costless since Congress will simply be supplementing the constitutional rights already built by the Court—what some call the “ratchet” theory.358 That presumes, however, that we can always tell constitutional up from down. More problematically, it assumes that constitutional rights do not come into conflict.359 Yet nearly all of the interesting and difficult constitutional questions of this era are about rights in conflict: consider free exercise against establishment; continued fetal support against parental autonomy; and state political sovereignty against individual liberties, to name but a few. Resolution of these conflicts calls not just for rights definition, but also rights balancing. Once the Court has acknowledged that Congress, too, is a source of authoritative constitutional meaning, how shall the Court call the people to its side when Congress claims to find a different balance?

These difficulties are compounded by the possibility that the distinction between rights and enforceable rights may be either illusory or too subtle for the electorate to understand. As Daryl Levinson and I have both

355 See Post & Siegel, Juricentric Restrictions, supra note 328, at 25–26; cf. BICKEL, supra note 156, at 128–31 (claiming that Congress values stamp of legitimacy that judicial approval gives to its actions).

356 See TUSHNET, supra note 314, at 24–25 (arguing that the Court’s interpretive authority depends on the public’s perceived need for an institution with such authority); Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359, 1369–70 (1997).


358 See Gregory P. Magarian, How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution, 99 Mich. L. Rev. 1903, 1932–44 (2001) (arguing that RFRA did not usurp the Court’s power to interpret or decide constitutional matters but rather was a precommitment to enforce rights); Post & Siegel, Juricentric Restrictions, supra note 328, at 39.

359 See Brest, supra note 4, at 72–73; Caminker, supra note 279, at 1177–78; Post & Siegel, Juricentric Restrictions, supra note 328, at 39.
argued, although in slightly different senses, the distinction between a core constitutional "right" and the extent to which that right is enforced in court may well be at most semantic.\(^{360}\) If Congress can claim plausibly that its choice of remedy is a form of constitutional interpretation, it again has a source of rhetoric with which to oppose a judicial determination that Congress's remedy distorts the balance between two core constitutional rights that were previously in equipoise.\(^{361}\)

Whatever the persuasiveness of this rhetorical model of the Separation of Powers argument, it seems to have little force outside the special context of Section Five legislation. Statutes enacted exclusively under Section Five, and the parallel clauses of the other Reconstruction Amendments, impose a unique obligation on reviewing courts to determine and declare whether Congress was in fact interpreting and enforcing the Constitution. Commerce legislation, in contrast, may well purport to serve constitutional ends, but there is no need for a court to decide whether or not that congressional judgment is correct. There is, therefore, no risk that the Court will be forced to acknowledge the interpretive powers of another branch.\(^{362}\)

And indeed, there was no implication in \textit{Boerne} that its rationale called into question cases in which various civil rights statutes were within Congress's commerce power.\(^{363}\) Furthermore, statutes enacted under other sources of authority often will not claim explicitly to be interpreting the Constitution. There is a world of difference, rhetorically, between the statement that a particular law enforces the Constitution and the statement that it fulfills constitutional values. The first is an assertion of authoritative interpretation of the Constitution; the second acknowledges (if implicitly) that it is based on Congress's subjective understanding of what the Constitution intends.

3. \textit{Federalism}

Another common explanation for the \textit{Boerne} rule is that it protects fed-
eralism values.\textsuperscript{364} Although that explanation is not on the face of \textit{Boerne} itself, it emerges forcefully in the Court's later application of the \textit{Boerne} Section Five analysis in \textit{Morrison} and \textit{Garrett}.\textsuperscript{365} The federalist account is in some sense rather simple: Without meaningful restrictions on Congress's ability to invoke Section Five, its "ultimate trump card" in its relations with the states, Congress would be free to circumvent any other restrictions the Court might find on federal legislative power.\textsuperscript{366}

Our theory so far, though, explains why we must have limits, but not necessarily why the limits are so dramatic. The Court's scrutiny of Section Five legislation is far more demanding than the highly deferential view it takes of Congress's decisions about what further enactments are "necessary and proper" to carry out its enumerated powers.\textsuperscript{367} Yet the Necessary and Proper Clause seems just as likely to threaten the existence of states as meaningful policymaking institutions, and similarly raises questions, not of the proper ends towards which Congress might legislate, but only of the means it chooses to employ to reach those ends.\textsuperscript{368} Why, in short, are the political safeguards of federalism adequate to prevent federal overreaching under Article I but not Section Five?

The answer appears to be a story of ongoing political accountability. As several other authors have pointed out, the Court's recent federalism-inspired restrictions on federal activity share a common concern with the electoral accountability of state and federal officials.\textsuperscript{369} In the absence of state sovereign immunity from damages, the Court's theory goes, state voters may have difficulty ascertaining whether their state representatives


\textsuperscript{365} See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001); id. at 375–76 (Kennedy, J., concurring); Caminker, \textit{supra} note 279, at 1187.

\textsuperscript{366} See United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (noting that the federal power balance is so tenuous that the Court cannot admit inability to intervene); Post & Siegel, \textit{Equal Protection}, \textit{supra} note 282, at 511–12 (describing but not agreeing with the view that Section Five may create a broad federal police power).


\textsuperscript{368} See Katzenbach v. Morgan, 384 U.S. 650–656 (1966) (explaining basis of Court's view that "[b]y including [Section Five] the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause," and examining whether Congress's choice of means to effect its goal of eliminating discrimination is consistent with Constitution); Caminker, \textit{supra} note 279, at 1166–67, 1188–89; Estreicher & Lemos, \textit{supra} note 349, at 117–18; see also McConnell, \textit{supra} note 282, at 192–93 (arguing that even if federalism might justify some limits on congressional power, federalism concerns should not limit Section Five authority, since the whole purpose of the Fourteenth Amendment was to nationalize constitutional rights).

\textsuperscript{369} See Post & Siegel, \textit{Equal Protection}, \textit{supra} note 282, at 512 (discussing Court's concern with direct congressional control of state political processes); Mark D. Falkoff, Note, \textit{Abrogating State Sovereign Immunity in Legislative Courts}, 101 Colum. L. Rev. 853, 855, 865–67 (2001).
are responsible for using scarce treasury dollars to satisfy the grievances of individual voters. Further, many funding decisions would be made by unaccountable federal judges. Similarly, the Court justifies its new rules more clearly prohibiting the "commandeering" of state non-judicial officials largely on the basis of concerns about political transparency and the danger that a federal government that could shift its costs onto the states would not be constrained by the political demands of moderating its policy goals to meet its budget.

These concerns arise not at the enactment of the federal legislation but only afterwards. If the political safeguards are functional, then states should be able to prevent initial passage of a statute abrogating their sovereign immunity or compelling them to carry out federal directives. There is no obvious reason why the state would be less effective at blocking this kind of legislation than anything else that Congress finds "necessary and proper" but that diminishes a state's prerogatives. Even the exceptions the Court identifies, as when the Executive Branch is willing to accept the expense and blame for litigating directly against a state, provide assurances of political accountability only after the liability-generating statute has been passed. Evidently though, the future of continuing state political accountability is a core constitutional right, like freedom of speech, that cannot be left to the perils of everyday politics. Maybe the Guarantee Clause is justiciable after all.

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371 Id. at 750-52.
372 See Moulton, supra note 24, at 876.
373 See Alden, 527 U.S. at 756.
374 Professors Adler and Kreimer rely on a similar notion in proposing their own variant of the Boerne principles. According to Adler and Kreimer, legitimate Section Five legislation poses no threat to federalism values, because it is intended to elaborate core political rights and fundamental norms that should not be subjected to the pressures of politics and state competition. See Adler & Kreimer, supra note 48, at 127-31. They imply that a Boerne-type inquiry could be defended as an effort to distinguish Section Five legislation that in fact advances this type of right from ordinary, commerce-type lawmaking dressed up in Fourteenth Amendment clothes. Id. at 130-33. This theory, if anything, would tend to support conditional spending aimed at furthering constitutional values.

This theory raises the question if state governments should not cloud their accountability for the future with a single political decision, as the decision not to oppose federal legislation abrogating their immunity, then why can states waive sovereign immunity entirely? The short answer is that the decision to accept damages liability may be a choice about which theory of representative democracy an individual state prefers. See Bowers v. NCAA, 171 F. Supp. 2d 389, 400-02 (D.N.J. 2001), rev'd on other grounds, 346 F.3d 402 (3d Cir. 2003). If the national rule were no immunity, then it would be very difficult for individual states to choose a different rule—for example, by lobbying each time a new federal liability arises for individualized opt-out provisions. In contrast, where the national rule is immunity, it is basically costless for the state to choose liability instead. The national immunity rule
To bring this discussion back to the Spending Clause, it is apparent that the ongoing accountability theory of Section Five does not demand any similar limits on conditional spending. As I have argued, the administration of cooperative federal and state programs under the Spending Clause, like direct federal enforcement against states under other federal enactments, is subject to ongoing supervision by the Executive Branch.376 Both the need to provide further appropriations every year and the danger of escalating costs when states hold out also create a continuing and powerful fiscal check on Congress's reliance on conditional spending.377 And, as I have also discussed, conditional spending does not mislead voters about who is responsible for the resulting policy choices and their consequences: both federal and state officials share blame.378 Finally, to the extent that the Boerne limits on Section Five prove to be no more than the simple claim that there must be meaningful limits on federal power, the powerful political constraints on spending legislation easily satisfy this concern.

4. The Boomerang Effect

The last explanation for Boerne rests on notions of institutional competence. Recall that the "under-enforced norms" critique of Boerne argues that the Court should permit Congress to craft remedies for constitutional violations that the Court believes it is not itself well-suited to recognize or adjudicate.379 The Court may well be unconvinced, however, that it will prove any better equipped to resolve disputes authorized in this way by Congress.380 Thus, we might chalk Boerne up to the Court's leeriness to therefore maximizes state choice. Of course, one might doubt, as I do, that this is a choice we ought to facilitate, but that is a different debate.

Whether or not this story, or the one I relate in the text, gives a satisfying explanation for Section Five sovereign immunity cases like Kimel and Garrett is questionable. It admittedly does not do much to justify Boerne itself or the Court's opinion striking down parts of the Violence Against Women Act ("VAWA") in United States v. Morrison. What defect in the political process, either present or future, explains why the states could not resist Congress's use of Section Five to enact parts of VAWA, or to modify the standard of review in federal free exercise cases? In fact, in the aftermath of Smith, many states actually changed their own free exercise law to parallel RFRA. See Galle, Capital Jurors, supra note 336, at 584–85 n.68. This does not necessarily mean that the ongoing accountability theory is wrong. Again, I think that there are several distinct theories underlying Boerne, not all of which will be applicable in all cases.376 See supra notes 165–169 and accompanying text; see also Falkoff, supra note 369, at 874–76 (arguing that political accountability of federal agencies should mitigate accountability concerns of making states defendants in agency proceedings).

376 See supra notes 165–169 and accompanying text; see also Falkoff, supra note 369, at 874–76 (arguing that political accountability of federal agencies should mitigate accountability concerns of making states defendants in agency proceedings).


378 See supra text accompanying notes 270–271.

379 Colker & Brudney, supra note 21, at 120 (finding that the Court views its own role under Section One as antidemocratic and, therefore, is hesitant to act under that grant of authority); Post & Siegel, Equal Protection, supra note 282, at 463.

380 See Eskridge & Frickey, Clear Statement Rules, supra note 24, at 633–34; cf. Caminker, supra note 279, at 1169 (noting that Court's view of its power to say what the law is may include supervision of how the Constitution is operationalized in practice). But see Magarian, supra note 358, at 1907;
plunge back into the difficulties of balancing burdens on free exercise against the legitimacy of the state’s asserted interest, regardless of whether Congress thought the Court was up to it. In other words, Boerne gives a kind of constitutional status to the "passive virtues."381

We can tease out two somewhat distinct components of the institutional argument. The first is the difficulty that the other branches may force the Court into making controversial choices between competing value judgments. The facts of Sandoval are a good example of this phenomenon.382 Prior to Sandoval, the Court had repeatedly refused to recognize the possibility that unintentional racism, as in facially neutral policies having a "disparate impact" on certain racial minorities, could violate the Fourteenth Amendment.383 The Court's opinions suggest strongly that its hesitation was based on the fact that to decide otherwise would require it to strike down too much, generate too much controversy, and undermine its long-term authority.384 Relatedly, it seemed as though the Court feared that it would have to make many difficult balancing decisions between the merits of each challenged program or practice and the incremental injury to equality—judgments that would require the Court to take controversial and uncertain stands on how important the challenged activity was, and how vital equality ought to be.385 The disparate impact regulations promulgated under § 602 of the Civil Rights Act, if enforceable in private suits to enforce Title VI would have required courts to decide many cases raising exactly the same issues—for example, whether using as a qualification for employment an entrance exam on which black applicants as a group scored

381 McConnell, supra note 282, at 191–92 (rejecting argument that Boerne can be justified by claim that RFRA forced judges to conduct the sort of analysis the Smith Court had concluded courts could not carry out). Magarian and McConnell's main contention is that the balancing imposed by RFRA is just another version of strict scrutiny, which in their view courts have demonstrated that they are fully capable of executing. McConnell, supra note 281, at 191–92; see Magarian, supra note 358, at 1947. Professor McConnell also asserts, without explanation, that a court's limited capacity is at most a reason for the court's refusal to take responsibility on itself, rather than rejecting authority granted to it. McConnell, supra note 282, at 192. It is unclear what in his view justifies that distinction. For a discussion of Professor Magarian's related claims, see infra note 402.

382 BICKEL, supra note 156, at 111–98.


386 See McClesky, 481 U.S. at 297; Davis, 426 U.S. at 247–48; see also Motomura, supra note 290, at 574; Post & Siegel, Equal Protection, supra note 282, at 468–69. The Court did not mention that it carries out a similar balancing act in free speech cases. Cf. McConnell, supra note 281, at 291–92.
very poorly was unlawful discrimination.\textsuperscript{386}

In short, rules for judicial decision crafted by the other two branches may lack, in the Court's view, sufficient appreciation for the political delicacy of the Court's operation. Congressional or executive constitutional interpretations that are forced on the Court may subject it to more political heat than it thinks it can handle. The Court's opinions in \textit{Kimel}\textsuperscript{387} and \textit{Garrett}\textsuperscript{388} have something of this quality; the Court seems to have determined that it does not want to involve itself in political decisions that affect the aged or those with disabilities, and it resists being pushed into them.\textsuperscript{389}

It might be argued, though, that the very fact that it was one of the other branches that established a new rule or right would give the Court political cover, and satisfy its concern that its choice between competing alternatives has some democratic legitimacy.\textsuperscript{390} Whether or not that is so might well depend on how broadly Congress has framed the right. What seems like a swell idea in the abstract may be much less appealing when applied to particular cases, especially unforeseen cases. How many people who supported the Religious Freedom Restoration Act wanted to legalize polygamy? Over time, it is likely to be the courts, not Congress, that take the heat for individual applications of even moderately broadly phrased rights. Later Congresses are unlikely to be eager to shift blame for unpopular decisions back to themselves.

Another problem with the objection is that statutes by their nature create problems of inter-temporal legitimacy. Laws sometimes stay on the books well after they could no longer win a majority to enact them. This may be because of, among other factors, legislative inertia, or (more interestingly for my present purpose), because a subject is just too hot to

\textsuperscript{386} See Davis, 426 U.S. at 248–52 (conducting parallel evaluation of same exam under both Titles VI and VII).

\textsuperscript{387} Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act exceeded Congress's authority under Section Five).

\textsuperscript{388} Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that a provision in the Americans with Disabilities Act allowing individuals to sue the states for failure to comply with the Act violated the Eleventh Amendment).

\textsuperscript{389} The Court's recent decision to uphold portions of the ADA under Section Five, Tennessee v. Lane, 124 S. Ct. 1978 (2004), actually supports this analysis as well. The \textit{Lane} opinion, in demonstrating the history of arguable constitutional violations that might have been targeted by Title II of the ADA, relies in significant part on judicial decisions resolving constitutional claims that would also have been actionable under the ADA. See \textit{id.} at 1989–90 & nn.10–14. One might think that as evidence of historical practice a few scattered cases would be at best no better than a collection of anecdotes. As evidence of courts' institutional capacity to resolve the problems the ADA raises, however, they are considerably more powerful. And, indeed, the \textit{Lane} opinion returns to that theme later, arguing that its task in enforcing the challenged aspects of Title II is no more burdensome than what it has already done in the past. See \textit{id.} at 1994.

Judge Calabresi’s well-known suggestion for this problem is to allow courts to modify statutes that have fallen into desuetude. Another, though, is to make it more difficult for Congress to pass laws that are especially likely to leave the courts in the business of enforcing highly controversial value judgments that may no longer command a majority of the population. That, arguably, is one thing that Boerne accomplishes.

The other component of the institutional argument is the difficulty of judicial fact-finding. In several doctrinal areas the Court explains its reluctance to act as a consequence of the problem that the “right” answer to the constitutional question depends on empirical evidence that is not readily available to the court. Often this is evidence that changes over time, or relates in complex ways with other facts. Courts, especially lower courts bound by Supreme Court precedent, are likely to have trouble keeping up with significant changes in facts that would alter doctrinal outcomes. Additionally, among other difficulties, the courts (at least in their present design) have difficulty acquiring information, other than what is brought to their attention by litigants. Absent a new suit, and attendant discovery, a court’s existing (and now perhaps outdated) rules may continue to influence how people and institutions behave. Thus, rather than attempting

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391 See Eskridge, supra note 330, at 1524–27; Eskridge & Frickey, Law as Equilibrium, supra note 17, at 62.
392 See CALABRESI, supra note 79, at 154–61 (providing judicial strategies for encouraging legislative action on outdated statutory schemes).
393 I should say once more that I personally do not think these arguments are adequate to sustain Boerne, and are certainly inadequate to sustain Kimel or Garrett. But my disagreement is not so much with the internal logic of the institutional capacity rationale, which I have defended in the text, as it is with the Court’s substantive standard of review. I do not think the Court is right that, for reasons of institutional capacity, it should leave the treatment of the elderly or people with disabilities to ordinary politics. Many elderly or disabled persons are isolated, if not always politically then socially. Those who cannot partake fully in the daily interactions that shape society and its views will be long-term losers in our political games, whether their isolation is the result of hatred and distrust or just neglect. Even if not, it would seem that sins of neglect (rather than commission) are better candidates for judicial action, not worse. By focusing public attention, and leading public opinion, the Court can cure neglect far more easily than it can cure hatred. I think Sandoval and Washington v. Davis are probably wrongly decided for the same reason. But, again, those are separate debates.
398 See CHOPER, supra note 24, at 199.
continually to revisit such questions as, "Can the federal government regulate the national economy as effectively without a national bank as it could with it?" or "What is the collective impact of wheat subsidies on the interstate wheat market?" the Court has elected to leave the constitutional dilemmas that might be implicated by those queries relatively unaddressed.\footnote{See M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 421–23 (1819); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942); Choper, supra note 24, at 202–03; Christopher L. Eisgruber, The Most Competent Branches: A Response to Professor Paulsen, 83 Geo. L.J. 347, 355–62 (1994). Professor Magarian claims that these types of cases are justifiable, if at all, by a theory of political accountability. See Magarian, supra note 358, at 1948–49. Maybe so, but that does not really dispense with the question of expertise; for example, a rational voter unable to monitor every issue might well decide where to delegate decision making responsibility based on the competence of the decision maker.}

This temporal dilemma would probably be the core of any fact-finding institutional theory implied by \textit{Boerne}. I say "probably" because \textit{Boerne} and the federalism cases have not really raised any problems of empirical evidence; they were, as I just mentioned, mostly dilemmas of reconciling conflicting values. Still, we would not expect the Court to worry much about facts existing in the world at the time of Congress’s enactment. To the extent that the Court is not confident about its capacity to analyze technical or multivalent information, Congress’s own (superior) determination that the state of the facts merits the chosen response should allay the Court’s worry\footnote{See Barkow, supra note 281, at 252–53.}—although the Court may well choose to review at least the process Congress used in reaching its decision to further assure itself that the conclusion is accurate. What guarantee does the Court have, though, that this initial finding will prove accurate over time? Legislative inertia is pandemic.\footnote{See Calabresi, supra note 79, at 4–6, 93.} Once the attention of the coalition that passed a piece of legislation has moved on, Congress may lose interest in tracking the relevant facts.\footnote{See Eskridge, supra note 330, at 1524–25. This is the main basis for my disagreement with Professor Magarian’s dismissal of the institutional competence theory of \textit{Boerne}. Professor Magarian claims that congressional oversight, and the possibility of congressional modification of the Court’s jurisdiction, ought to remove any worries that a court will bungle administration of difficult constitutional issues. See Magarian, supra note 358, at 1950–51. The trouble, as I have also argued elsewhere, see Galle, Federal Agencies, supra note 149, at 219–20, is that it is doubtful that Congress in fact does, or realistically can, keep such close tabs on judicial performance, especially in the lower courts. I also do not think Congress should have the wide-ranging jurisdiction-stripping power that undergirds Magarian’s argument.}

Unlike the “rhetoric” argument, both of these institutional concerns have potential applications outside the special context of Section Five legislation. What, for example, will be the ultimate fate of RFRA as applied to federal law? Is it clear that the Court will agree that Congress has the
power to dictate, in effect, a special rule of interpretation that federal statutes must be read to provide some latitude for religious exercise? Or would the Court reject that as a violation of its power to say what the law is, and, as a practical rationale, cite the accountability dilemma that would result? On the expertise end, consider the Court’s recent decision interpreting the Sherman Act to exclude a cause of action for the failure of local phone carriers to provide access to their competitors. The Court’s ultimate justification was exactly that it (and the lower courts) would be unable to make the demanding factual judgments that would be dispositive of those claims. Quite possibly the Court would be just as reluctant to interpret Commerce Clause legislation in a way that forced it to work beyond what it views as its core competencies.

It will also be hard to escape this reading of Boerne by the expedient of labeling a particular piece of legislation “remedial” or “prophylactic.” That approach makes some sense when our worry is whether the public will confuse congressional lawmaking with the Court’s authoritative elaboration of the Constitution. But disparate impact cases, for example, are no less difficult for courts to resolve because they are only a remedy for unconstitutional discrimination. Quite possibly this is why the evidentiary standard needed to justify “appropriate” enforcement powers under Section Five in Garrett seemed so exasperatingly impossible to satisfy—because it was. But it should still be possible to enact “appropriate” Section Five legislation based on expansive readings of the Constitution, as long as the enforcement alternatives do not place competency demands on federal courts—for example, if enforcement were entirely by federal agencies or state courts.

Most conditional spending legislation will similarly mitigate any of the Court’s institutional concerns. The day-to-day involvement of federal agencies in overseeing the administration of federal funds gives courts the benefit of the agency’s technical expertise, and assures that the courts will have a politically accountable partner in elaborating the meaning of statutes that further constitutional values. In an earlier Article, I built on the

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403 See Magarian, supra note 358, at 1916–17 & nn.59–60 (summarizing circuit split). See also Madison v. Riter, 355 F.3d 310, 322 (4th Cir. 2003) (noting unresolved Tenth and Eleventh Amendment challenges to RLUIPA, the spending power reincarnation of RFRA). These cases generally put aside the question of congressional regulation of federal property, which is directly authorized under Article IV. See U.S. CONST. art. IV, § 3, cl. 2.


405 Id. at 879, 883. That, of course, is not a constitutional holding, but there is not much difference between the way that the Court elaborates common law under the Sherman Act as opposed to under the Constitution.

406 See Elhauge, supra note 128, at 2127–28, 2137; Sunstein & Vermeule, supra note 126, at 928; see also Erik Andersen, Note, Constitutionalizing Chevron: Filling Up on Interpretive Equality, 42
work of Michael Dorf and Charles Sabel to show how federal agencies could, in authorizing suits under 28 U.S.C. § 1983, make judicial resolution of those claims uniquely accountable and well-informed. Even where a right of action is not expressly approved by an agency, various doctrines of deference to agency decisions (which are especially strong where the agency is administering a technical or highly complex web of policy) help to make courts interpretive partners with agencies. Indeed, one premise of Chevron is that ambiguities in statutory language are presumed to reflect Congress’s desire that the agency continually update the statute to reflect its best current understanding, as read in the light of the agency’s political allegiances and technical knowledge. Although courts may sometimes refuse to defer, as when the court finds the language of the statute clearly contrary to the agency’s view, in these cases the court will have still placed the burden of accountability squarely on someone else’s shoulders: Congress. In many situations, too, the fact of ongoing agency involvement will provide a record of experience and expert analysis to educate the court, regardless of whether it ultimately rejects the agency’s findings.

Alexander v. Sandoval, admittedly, may be a doctrinal barrier for my argument. The Sandoval holding, again, was that agencies cannot expand a right beyond what is delineated by statute. As I have suggested, the most comprehensible explanation for that rule (since it is inexplicable by administrative law principles) is that its absence would weaken the edges of Boerne, as agencies would be able to adopt interpretations of statutes that would accomplish what Boerne prohibits to Congress itself. Perhaps, then, the Court implicitly rejected the possibility that agencies can resolve better than Congress the Court’s inter-temporal problems of expertise and legitimacy. If so, then the Court failed to see that it was missing an opportunity to do justice without incurring insurmountable political costs. But the better reading of Sandoval, I think, is that its rule ought to apply only when the court is invoking the rhetorical justification for Boerne: that is, the argument that agencies, no more than Congress, should not be allowed to “say what the law is.”

Finally, agencies aside, the fact that federal spending must continually


411 Id. at 291.
be re-authorized, and its terms regularly accepted by states, reduces inter-temporal problems. If the federal government is still willing to pay for a provision, even in the face of the ongoing potential for state holdouts, then there is little doubt that the measure enjoys continuing popular support. And, similarly, Congress would be unlikely to keep paying unless it concluded that judicial application of the statute to date had not done a fair job of applying the facts of individual cases in a way that furthered the purposes of the statute.

The bottom line on the clear statement rule, therefore, is that it unjustifiably truncates efforts to give full effect to the Constitution as applied to state law. At least one aspect of the Boerne rationale, its concern for institutional competence, makes some sense as applied to Section Five or ordinary commerce legislation. But none of the reasoning behind Boerne and its kindred can explain why we would impose similar limits, whether through the clear statement rule or otherwise, on conditional federal spending.

VII. CONCLUSION

Despite its widespread acceptance, the clear statement rule for conditions on federal spending is hard to defend. It interferes with one of the central functions of courts as interpreters of law, and obstructs efforts by the political branches of the federal government to extend the protections of the Constitution more fully to those whose rights might be threatened by state or local government activity. This, despite the fact that the states are willing—and through holdouts, lobbying, and related efforts more than able—to protect themselves against potential judicial impositions, whether before the underlying statute or regulation is enacted or afterwards. And even if conditional spending is "in the nature of a contract," contract law, like the law of statutory interpretation, recognizes that complete clarity in the terms of a bargain is inefficient and likely impossible, and so demands nothing like the "clarity" of the clear statement rule.

Given the now-vast field of conditional federal spending, this improved understanding of the rules for interpreting the field is an important recognition for its own sake. But my analysis has implications for several other significant controversies, as well.

For one thing, we should now be able to lay to rest two significant challenges to the legitimacy of conditional federal spending itself. One is David Engdahl's claim that because the purposes of federal spending are not enumerated in the Constitution, Congress cannot invoke the Necessary and Proper Clause to authorize conditions aimed at guaranteeing that

granted funds serve congressional purposes. Engdahl’s textual arguments, I have shown, are weak—the Constitution does grant the power to tax and spend “for the general welfare,” after all—and his fallback suggestion (following Madison) that a contrary reading gives absurdly broad powers to Congress fails to apprehend the force of political constraints on conditional spending. It is exactly where Congress does not have the ability to legislate other than through the Spending Clause that the states’ power is greatest, because they know that Congress has no alternative but to pay for their cooperation.

Another is Lynn Baker’s argument that conditional spending threatens the diversity of state law, and the important values, such as individual autonomy, that draw sustenance from the array of choices that such diversity provides. This danger, she has said repeatedly, justifies strong judicial intervention to curtail use of the Spending Clause. But buying uniformity with federal funds, I have shown, is prohibitively expensive, in part exactly because Congress must pay more to those who rue their lost choices. There is little need for additional judicial checks, and no meaningful criteria on which judges could sort necessary national solidarity from pernicious conformity. Even if uniformity were costless, if diversity is really a value, we would expect a rational Congress to build the opportunity for local variation into its national programs. And, sure enough, we observe just such flexibility in a wide array of federal spending programs, ranging from Medicare to the Clean Air Act.

My examination here of the clear statement rule also is significant for my earlier work on the enforceability of federal agency regulations under 28 U.S.C. § 1983. The Supreme Court has repeatedly invoked Pennhurst’s clear statement rule for conditional spending as justification for refusing to find a particular provision of a federal spending statute unenforceable. This Article demonstrates that whatever the basis for the clarity demanded by Pennhurst—whether it be notice to a state, the opportunity to exert the state’s political influence to resist creation of a private right of action, or just general concerns about the expansiveness of federal

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413 See Engdahl, supra note 22, at 22, 64–65.
414 See Baker, supra note 11, at 1970–77, 1989; see also McConnell, supra note 92, at 1493–94 (discussing benefits of decentralization); Somin, supra note 205, at 466; Badawi, supra note 193, at 1352–53.
415 See Baker, supra note 11, at 1916; Baker & Berman, supra note 8, at 470.
417 See Galle, Federal Agencies, supra note 149.
GETTING SPENDING

law—that demand can be met equally well by language authored by a federal agency. Agencies give better notice to states than does Congress, and they are at least as open to political influence. Indeed, I have argued that agency involvement mitigates any concerns we might have about use of the Spending Clause to restrict state autonomy. Thus, Pennhurst offers no independent justification for a court’s reluctance to look to agency regulations in determining the enforceability of federal norms.

Finally, my revised understanding of the Spending Clause speeds our efforts to re-imagine constitutional law through the lens of institutional design. Already commentators have suggested that the Court expand its tentative efforts at sharing the process of constitutional interpretation and enforcement with Congress.419 With the barrier of the clear statement rule removed, we now can consider also integrating federal agencies, state government, and state courts—more sources of data for courts to draw upon, and more political support upon which the federal courts can rely.