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# THE CONTRACT THESIS OF THE FEDERAL SPENDING POWER

DAVID E. ENGDAHL<sup>†</sup>

In *South Dakota v. Dole*<sup>1</sup> in 1987, the late Chief Justice Rehnquist listed four “general restrictions” on Congress’ spending power he said were “articulated in our cases.”<sup>2</sup> Only one of these is of great practical significance, and it (or rather, its foundation) is the subject of this article.<sup>3</sup>

Quoting from his own 1981 opinion for the Court in *Pennhurst State School & Hospital v. Halderman*,<sup>4</sup> Rehnquist wrote in *Dole*: “Second, we have required that if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’”<sup>5</sup> This requirement, however, is only one of several corollaries to be drawn from the foundational insight recovered (but stated with unwarranted restraint) in *Pennhurst*: the thesis that “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States [or other recipients] agree to comply with federally imposed conditions.”<sup>6</sup>

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1. 483 U.S. 203 (1987).

2. *Id.* at 207.

3. The restriction on which the majority focused in *Dole* was that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.” *Id.* at 208. Apart from the two dissenters, the Justices took this to mean *not* that Congress is precluded from manipulating its spending to promote “objectives which Congress is not empowered to achieve directly,” but only that spending “may not be used to induce the States to engage in activities that would themselves be unconstitutional.” *Id.* at 210. The Court found nothing offensive to this restriction in *Dole* – or in other cases it has considered since, such as *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), and *United States v. American Library Ass’n*, 539 U.S. 194 (2003). Another of Rehnquist’s “general restrictions” was that conditions must not be “unrelated to” the federal interest or purpose in a grant. This “germaneness” requirement has no substance. It was contrived by amicus counsel in *Dole* from scattered dicta, and Justice O’Connor made it the chief ground of her dissent. She recited it again five years later in the majority opinion in *New York v. United States*, 505 U.S. 144, 172 (1992), but only as a dictum it would have been superfluous for others to disavow. I have already critiqued the germaneness notion elsewhere. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 54-62 (1994). Suffice it here to say that adding any condition(s) to a grant adds *ipso facto* to the purpose(s) of that grant, so that “unrelated” conditions are logically impossible. For example, adding conditions against discrimination on grounds of race, sex, or handicap made the elimination of such discrimination an additional federal purpose, common to numerous spending programs the *other* purposes of which vary widely. Significantly, the Supreme Court has never invalidated a spending condition on the “germaneness” ground; and no Justice has even mentioned it recently, except once in a footnote in a dissent. *Fischer v. United States*, 529 U.S. 667, 689 n.3 (2000) (Thomas, J., dissenting, joined by Scalia, J.). A third restriction listed in *Dole* is actually groundless, albeit frequently recited. Rehnquist said, “the exercise of the spending power must be in pursuit of ‘the general welfare.’” *Dole*, 483 U.S. at 207. But this is tautological, for “[w]hen money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress.” *Helvering v. Davis*, 301 U.S. 619, 645 (1937). The error underlying the conventional focus on this “general welfare” phrase has serious consequences, to be noted in due course below; but the imagined “general welfare restriction” on spending objectives is nothing but empty words: No spending program or condition ever has been (or conceivably will be) held to violate this requirement.

4. 451 U.S. 1, 17 (1981).

5. *Dole*, 483 U.S. at 207.

6. *Pennhurst*, 451 U.S. at 17. Rehnquist continued:

The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.” There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is

Over the past twenty years, acceptance or rejection of this thesis, and admission or denial of its corollaries, has split the Justices into two essentially equal camps, alternating in the majority. The most recent changes in the composition of the Court do not so much change the number, as seemingly enhance the conviction and resolve, of those Justices who acknowledge the “contract thesis” of the spending power.

Certainly Congress can simply give money away, donating with no “strings” attached, and sometimes it has done so. Typically, however, Congress conditions disbursements. In the case of procurements, for example, it can specify what a supplier is expected to provide; in the case of grants or loans or loan guarantees, Congress can specify eligibility criteria and the efforts or accomplishments the largesse is calculated to encourage, facilitate, or reward. For at least sixty years now, funding conditions have also been used to advance policy objectives peripheral or unrelated to the spending programs themselves, such as curtailing partisan political activity by public employees,<sup>7</sup> eliminating discrimination based on race or sex,<sup>8</sup> separating abortion advocacy from funded public health services,<sup>9</sup> and improving the lot of the handicapped.<sup>10</sup> Funds offered on conditions are only vouch-safed so long as the would-be recipient accepts the conditions; and so, except for unconditional donations, federal spending always involves contract.

The contract thesis operated during the nineteenth century regarding conditioned grants of federal land, including (among other examples) homestead and railroad grants to induce settlement and development of the American West.<sup>11</sup> It is enough for present purposes, however, to trace it to the early twentieth century, when federal taxation of incomes was producing a revenue stream greater than the normal costs of defense and federal government operations, and federal spending programs on the modern pattern began to appear and be litigated.

In *Massachusetts v. Mellon*<sup>12</sup> in 1923, the Supreme Court considered the “Maternity Act,”<sup>13</sup> which authorized grants to states that agreed to a congressionally-designed program promoting maternal and infant health. The Justices in *Mellon* unanimously found no justiciable constitutional objection to

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expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

*Id.* (citations omitted).

7. Hatch Act, ch. 410, § 12, 53 Stat. 1147 (codified as amended at 54 Stat. 767).

8. Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (2000) (prohibiting racial discrimination in federally-funded programs); 20 U.S.C. § 1681 (2000) (prohibiting discrimination on the basis of sex in education programs receiving federal assistance).

9. Public Health Service Act of 1970, 42 U.S.C. § 300a-6 (2000). See *Rust v. Sullivan*, 500 U.S. 173 (1991).

10. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000).

11. See generally Engdahl, *supra* note 3, at 31-33.

12. 262 U.S. 447 (1923).

13. Act of Nov. 23, 1921, Pub. L. No. 67-97, 42 Stat. 224 (1921).

Congress manipulating its resources to induce compliance with its wishes regarding matters

outside the powers granted to Congress by the Constitution . . . . Nothing is added by . . . the further incidental allegations that the ulterior purpose of Congress thereby was to induce the States to yield a portion of their sovereign right[s.] . . . If Congress enacted [the Maternity Act] with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.<sup>14</sup>

The Justices in *Mellon* thus unanimously acknowledged:

(1) that Congress may utilize federal funds to *induce* behavior the Constitution gives it *no power to require*; in other words, it can spend to promote objectives *extraneous* to the enumerated powers;

(2) that there is no *justiciable* objection to its so doing; but

(3) that Congress' purpose in so doing can be frustrated simply by disagreement, because no obligation to comply with Congress' extraneous objectives can arise except from voluntary agreement as consideration for the federal funds.<sup>15</sup>

Certainly Congress has *legislative* power only so far as the Constitution endows,<sup>16</sup> and the scope and limits of its *legislative* powers certainly *are justiciable*.<sup>17</sup> Moreover, because of the Supremacy Clause,<sup>18</sup> Congress' *legislative* powers *cannot be avoided* by simply opting out. It therefore appears that the Justices in *Mellon* understood that Congress' power to spend money is *not* a *legislative* power. Our Constitution does contemplate – and in some instances, even specifies – that Congress will have certain *non-legislative*<sup>19</sup>

14. *Mellon*, 262 U.S. at 482.

15. *Id.* at 479-83.

16. U.S. CONST. art. I, § 1. "All legislative Powers *herein granted* shall be vested in a Congress . . ." *Id.* (emphasis added). "Herein" must be taken as referring to the *whole* Constitution, and not only Article I, because power that *is legislative* in character is also conferred elsewhere in the Constitution. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (providing for appointment of "inferior Officers"); U.S. CONST. art. III, § 2, cl. 3 (prescribing venue for crimes not committed within any state); U.S. CONST. art. III, § 3 (declaring punishment for treason); U.S. CONST. art. IV, § 1 (prescribing effect, and manner of proof, of sister-state acts, records, and judicial proceedings); U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2; XIX; XXIII, § 2; XXIV, § 2; XXVI, § 2 (enforcement powers); and certain provisions of amends. XX and XXV. On few and dubious occasions, the Supreme Court has resorted to arguments of "implied" or "inherent" powers to uphold a legislative act of Congress, or its application in a particular case. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (upholding Fugitive Slave Act); *Ex parte Yarbrough*, 110 U.S. 651, 661-62 (1884) (upholding law punishing racial voter intimidation despite absence of state action). See also *Motes v. United States*, 178 U.S. 458, 462-63 (1900); *In re Quarles & Butler*, 158 U.S. 532, 535 (1895); *Logan v. United States*, 144 U.S. 263, 284 (1892); *United States v. Waddell*, 112 U.S. 76, 80 (1884). To the contrary, however, see *Hodges v. United States*, 203 U.S. 1, 18 (1906). As to international affairs, however, the principle of enumerated powers is largely inapplicable to both executive and legislative branch actions. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936); *Burnet v. Brooks*, 288 U.S. 378, 396, 405-06 (1933); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04, 606 (1889). See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 20 n.16 (2d ed. 1996).

17. U.S. CONST. art. III, § 2. "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States . . ." *Id.*

18. U.S. CONST. art. VI, cl. 2. "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

19. Among the powers constitutionally vested in Congress that seem *non-legislative* in character

powers.<sup>20</sup> The power to spend – like the powers to receive and hold property, to make contracts, and to sue for injuries like trespass and waste<sup>21</sup> – inhere in every body politic as an artificial person: “[T]he powers of the United States as a sovereign . . . must not be confounded with their rights as a body politic. . . . The restraints of the Constitution upon their sovereign powers cannot affect [what mid-nineteenth century lawyers referred to as] their civil rights.”<sup>22</sup>

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(even if performed in conventional parliamentary form – *i.e.*, by bill or resolution, and even if with presentment) are those conferred by, *e.g.*, U.S. CONST. art. I, § 10, cl. 3 (consent to state “Agreement[s] or Compact[s],” tonnage duties, or state troops or ships, or state engagement in war); U.S. CONST. art. IV, § 3, cl. 2 (admission of new states and management and disposal of United States property); U.S. CONST. art. V (proposing, or calling conventions for proposing, constitutional amendments); U.S. CONST. amend. XXV (determining presidential inability or ability to discharge duties of office). From time to time, some of these have been mistakenly regarded by courts (even by the Supreme Court, and even within the past few decades) as legislative powers; but the historical mainline of the case law, and the principled common sense of the provisions in context, is to the contrary. Documentation of the previous sentence is far beyond the scope of this article, but for thorough discussion of certain examples see David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965). There also is some narrow room to argue for “implicit” or “inherent” *non*-legislative powers in Congress or in its respective houses, and in the other branches. See, *e.g.*, *Michaelson v. U.S. ex rel. Ry. Co.*, 266 U.S. 42, 65-66 (1924) (discussing judicial contempt power); *In re Neagle*, 135 U.S. 1 (1890) (discussing U.S. Marshall protection of a federal judge); *Anderson v. Dunn*, 19 U.S. 204 (1821) (stating that the House has “the least possible power adequate to the end proposed” to punish for contempt in its presence).

20. The Constitution does give Congress control over spending by providing that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]” See U.S. CONST. art. I, § 9, cl. 7. This procedural safeguard, however, does not make the act of spending any more legislative in character than does the keeping, or the publication “from time to time,” of “a regular Statement and account of the Receipts and Expenditures of all public Money . . .” *Id.*

21. See, *e.g.*, *Cotton v. United States*, 52 U.S. 229 (1850); *United States v. Gear*, 44 U.S. 120 (1845) (holding that the United States is entitled to injunction restraining waste on the public lands). A similar course of reasoning might arguably be sufficient to justify resort to judicial redress to protect the United States’ interests, even in the promotion of policies within its legislative power, without the extreme, unwarrantable, and superfluous rhetoric indulged in *In re Debs*, 158 U.S. 564 (1895).

22. *Cotton*, 52 U.S. at 231. A dozen years ago, I argued at length that the spending power was conferred by the Constitution’s “property clause,” U.S. CONST. art. IV, § 3, cl. 2. David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995). Late in 2002, however, I came to realize – and changed my classroom materials to begin teaching – that the principle of enumerating powers has no application to the ordinary capacities (or “powers”) of legal personhood; the enumeration technique was devised as a way to prevent concentration only of *governance* powers. The traditional, but indefensible, attribution of the spending power to inference from the taxing clause, Article I, Section 8, clause 1, traces all the way back to Hamilton’s time; but its age lends it no merit. No conceivable construction of that *taxing* clause can afford power to spend the hundreds of billions of dollars in budget deficits fattening the accumulated \$8.5 trillion debt borrowed on the credit of the United States under Article I, Section 8, clause 2. Neither can it serve as authority to spend the revenue engendered by permits, licenses, and other regulations under the “commerce clause,” for example; or federal court fees and penal fines; or royalties, rents, and returns on federal investments; or gifts and bequests; or proceeds from the sale or disposal of federal property; or funds from a host of other *non-tax* sources that happen to find their way into the national Treasury. Despite the Articles of Confederation’s even more rigorous foreclosure of national powers not clearly “expressed” – and despite the absence from those Articles of any “taxing clause” – the Continental Congress had spent for a war and a decade of operations and diplomatic efforts, and also made substantial donations to needy native tribes and to disaster victims abroad. Plainly, no one then imagined that a power to *spend* – an ordinary capacity inherent in legal personhood – could not be exercised without a constitutional “grant of power!” In any event, even if one should insist upon hanging the modern Congress’ spending power on the Constitution’s taxing power hook – *i.e.*, if one regards that clause as authority for Congress to spend for whatever Congress considers useful to “provide for the common Defense and general Welfare of the United States” – still nothing more than *spending per se* toward those purposes can be regarded as authorized by the clause. See *infra* note 29 and accompanying text.

It is true that the terms defining eligibility for federal grants,<sup>23</sup> and the conditions that are to accompany federal funds, are specified by Congress in statutory form; but unlike statutory provisions that are grounded in Congress' legislative powers, spending terms and conditions are obligatory and enforceable only if voluntarily accepted – only if agreed to by a recipient as *quid pro quo*. While articulated in statutory form, they are not statutory in their effect: They have no force at all as “law,” but rather are binding, if at all, only by virtue of contract.<sup>24</sup>

This, among other things,<sup>25</sup> is what *Massachusetts v. Mellon* stands for. This is the “contract thesis” of the spending power. The contract thesis is integral to Alexander Hamilton’s classic view of the spending power, which is the indisputably settled rule.<sup>26</sup> Hamilton maintained that Congress has power to spend, not just to fund its enumerated powers (as James Madison famously maintained<sup>27</sup>), but generally for the common good.<sup>28</sup> Hamilton also took care to explain that “[a] power to appropriate money with this latitude . . . would not carry a power to do any other thing, not authorised [sic] in the Constitution[.]”<sup>29</sup> This is a point that Madison, as Hamilton’s critic, seems to have missed.<sup>30</sup> However, Madison’s neighbor, friend, and fellow Jeffersonian (and successor to Madison as President), James Monroe, understood the point,<sup>31</sup> and demonstrated

23. See, e.g., *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 136 (1947).

24. See Engdahl, *supra* note 3, for more complete discussion of the principle of enumerated powers and the nature of the spending power.

25. *Massachusetts v. Mellon*, 262 U.S. 447 (1923), along with the companion case decided with it, *Frothingham v. Mellon*, 288 F. 252 (D.C. Cir. 1923), is well known as a classic case on the issue of “standing” in federal courts.

26. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (stating that “[t]he conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison”).

27. See, e.g., Speech in the First Congress, Third Session (Feb. 2, 1791), reprinted in 6 THE WRITINGS OF JAMES MADISON 19, 28 (Gaillard Hunt ed., 1906); Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON, 411, 418-19 (Gaillard Hunt ed., 1906); James Madison, Veto Message (1817), reprinted in 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 584 (1896). See generally Engdahl, *supra* note 3, at 27-28.

28. Hamilton argued that the power to spend is not confined to objects within the enumerated powers, because

otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision. . . . [I]t was not fit that the constitutional authority of the Union, to appropriate its revenues should have been restricted within narrower limits than the “General Welfare” and . . . this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an appropriation of money is requisite and proper. And there seems no room for a doubt that whatever concerns the general Interests of *learning of Agriculture of Manufactures* and of *Commerce* are within the sphere of the national Councils as far as regards an application of Money. The only qualification of the generality of the Phrase in question, which seems to be admissible, is this – That the object to which an appropriation of money is to be made must be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.

ALEXANDER HAMILTON, REPORT ON THE SUBJECT OF MANUFACTURES (1791), reprinted in 10 THE PAPERS OF ALEXANDER HAMILTON, at 303 (Harold C. Syrett et al. ed., 1966) (emphasis in original).

29. *Id.* at 304.

30. See Supplement to the letter from James Madison to Andrew Stevenson, *supra* note 27, at 418.

31. With regard to Madison’s view, Monroe confessed: “To this construction I was inclined in the

his understanding by vetoing a bill for construction of the Cumberland Road because, beyond paying the cost, it contemplated federal maintenance and protection of the Road, and criminal jurisdiction over it. As Monroe explained:

The right of appropriation is nothing more than a right to apply the public money to this or that purpose. It has no incidental power . . . . All that Congress could do under it in the case of internal improvements would be to appropriate the money necessary to make them. For every act requiring legislative sanction or support the State authority must be relied on. The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent. . . . I think I am authorized to conclude that . . . [Congress has] nothing more than a right to appropriate the public money; . . . that although the right to appropriate the public money to such improvements affords a resource indispensably necessary to such a scheme, it is nevertheless deficient as a power in the great characteristics on which its execution depends.<sup>32</sup>

Hamilton himself, unlike Monroe, might have found Congress competent to build and maintain roads as a means of defense, or to promote its policy for interstate commerce,<sup>33</sup> but so far as concerns the spending power alone, the limitations Monroe perceived were those to which Hamilton himself had referred.

No less than Monroe, President Andrew Jackson perceived the point that Madison had missed. When Congress in 1830 presented the Maysville Road Bill, which resembled the Cumberland Road Bill of Madison's day, Jackson vetoed it on equivalent grounds, explaining:

Assuming the right to appropriate money to aid in the construction of national works to be warranted by the contemporaneous and continued exposition of the Constitution, its insufficiency for the successful prosecution of them must be admitted by all candid minds. . . . [Without] the right to exercise as much jurisdiction as is necessary to preserve the works and to raise funds by the collection of tolls to keep them in repair, nothing extensively useful can be effected.<sup>34</sup>

The Hamiltonian (and historically mainline and orthodox) understanding is that Congress may spend – just as any other entity or person might spend – to induce compliance with its wishes about anything at all. However, its ability to

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more early stage of our Government; but on further reflection and observation my mind has undergone a change . . . ." JAMES MONROE, VIEWS OF THE PRESIDENT OF THE UNITED STATES ON THE SUBJECT OF INTERNAL IMPROVEMENTS (May 4, 1822), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 165 (James D. Richardson, ed., Government Printing Office, 1896).

32. MONROE, *supra* note 31.

33. Certainly moderns would have no difficulty defending federal road-building on these grounds; but although Monroe had come to share Hamilton's understanding of the spending power, as to Congress' power under the "necessary and proper" clause Monroe still clung to Jefferson's erroneous restrictive view.

34. ANDREW JACKSON, VETO OF THE MAYSVILLE ROAD BILL (1830), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 490-92 (James D. Richardson, ed., Government Printing Office 1896) (1896).

control outcomes, to prevent frustration of its chosen objectives – no less than its ability to coerce – is constitutionally confined within the limits of its enumerated lawmaking powers. Outside those limits (in other words, with regard to extraneous objectives) the United States like any other entity or person can use contracts to obligate funding recipients to perform as it desires; but except insofar as some end within an enumerated legislative power<sup>35</sup> is served, it is only by virtue of contract that federal funding can entail federal control.<sup>36</sup>

The contract thesis manifested in *Mellon*, however, was relegated to oblivion thirteen years later when the Supreme Court decided *United States v. Butler*.<sup>37</sup> Although four in *Butler*'s majority and one of those in dissent had participated in deciding *Mellon*, both of the *Butler* opinions were written by newcomers; and neither of them, on that occasion, exhibited a competent grasp of either Hamilton's or *Mellon*'s rationale. Justice Owen J. Roberts for the majority flatly contradicted the Hamiltonian view while purporting to endorse it; he wrote: "Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance."<sup>38</sup>

And to the *Mellon* thesis that a state may frustrate spending objectives "by the simple expedient of not yielding" (which, on the differing facts of *Butler*, would have meant forbidding farmers within the state's jurisdiction to comply with the conditions required), Justice Roberts answered:

The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject-matter of the contract. If this does reach the subject-matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a state. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the states do not dissent.<sup>39</sup>

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35. Remember that Congress' power to "make all Laws which shall be necessary and proper for carrying into Execution" its own (as well as the other branches') other powers, is itself an enumerated power – a fact easily obscured by the unfortunate error of calling Article I, Section 8, clause 18 the source of "implied" legislative powers. However, that clause can only be invoked where the targeted objective is within the scope of another federal power; it does not authorize using otherwise extraneous means to help attain ends which themselves are extraneous, although promoted by the use of some other federal power as a means.

36. In *Wickard v. Filburn*, 317 U.S. 111, 131 (1942), it was observed that "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes." That might be true as to the due process issue; but it begs the question of power. The power exercised in *Wickard* was explained in that opinion as based on the "necessary and proper" clause as a means to interstate commerce policy ends, and the resulting "subsidy" to the farmer (i.e., the production controls' enhancement of the market price of wheat) was not regarded as justifying the production controls at all.

37. 297 U.S. 1 (1936). *Butler* invalidated the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (1933) (providing for payments to farmers agreeing to reduce acreage in production).

38. *Butler*, 297 U.S. at 74.

39. *Id.* Notice the fundamental nature of Roberts' failure: He missed Hamilton's whole point that Congress can fiscally "reach" matters it cannot legislatively control – can spend for objectives that are not within federal legislative "competence" at all.



This is a classic example of the mistaken “dual federalist” distortion of what the principle of enumerated powers means.<sup>40</sup>

But Justice Harlan F. Stone for the *Butler* dissenters made essentially the same mistake, by thinking that spending (or taxing) *objectives* must fall *within* an enumerated power. The difference was that Stone – supposing the spending power to be conferred by the same clause that confers the taxing power<sup>41</sup> – construed its “general welfare” phrase as capacious enough to embrace any disbursement that might be considered to redound to the public good. He therefore thought it material to assert that, because

the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not *within the specifically granted power of Congress* to levy taxes to “provide for the . . . general welfare.”<sup>42</sup>

Whereas the unanimous Court in *Mellon* had countenanced spending to promote goals “*outside* the powers granted to Congress by the Constitution,”<sup>43</sup> Stone in *Butler* reasoned that “the expenditure of funds . . . in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is *within* the specifically granted power.”<sup>44</sup> Thus, even while affirming that “[t]he spending power of Congress is in addition to the legislative power and not subordinate to it,” Stone in *Butler* mistook the “general welfare” phrase as a *limit* (albeit a modest one) to Congress’ spending power.<sup>45</sup>

40. The theory of “dual federalism,” which grew in popularity and dominated judicial thinking for a century following the 1835 death of John Marshall, regards the clauses of the Constitution that enumerate Congress’ “powers” as delimiting the *ends* that Congress may promote, rejecting the use of such “powers” as *tools* to promote “*extraneous*” ends. Having predominated in constitutional jurisprudence since shortly after John Marshall’s death, dual federalism met its deserved demise. See *infra* note 53 and accompanying text.

41. Article I, Section 8, clause 1 provides: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .” U.S. CONST. art. I, § 8, cl. 1. Notice that this clause says absolutely nothing about spending, but even Alexander Hamilton attributed Congress’ spending power to this clause, and the uncritical, plainly mistaken habit of doing so has continued. Justice Roberts in *Butler*, trying to defend the habit, explained it in a way that exposes its incompatibility with the “enumerated powers” doctrine that (wrongly) had made it seem necessary to find a textual basis for it in the first place. Justice Roberts stated:

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation . . . can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. [Therefore the] implication from the terms of the grant is that the public funds may be appropriated “to provide for the general welfare of the United States.”

297 U.S. at 65. To highlight some of the flaws in this explanation, consider: Wouldn’t the same logic make superfluous the specific grants of power to support armies and maintain a navy? By what logic could this clause support ever spending funds derived *other than* from taxes – such as from sale or leasing of public land, from regulatory licenses or penal fines, or (highly significant in modern practice) from exercise of Congress’ borrowing power. The traditional attribution of the spending power to this source simply cannot withstand thoughtful reflection; it is plainly erroneous, and unworthy of continued pretension. See *supra* notes 16-22 and accompanying text for further thoughts on the basis of the spending power.

42. *Butler*, 297 U.S. at 79 (emphasis added).

43. *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (emphasis added).

44. *Butler*, 297 U.S. at 81 (emphasis added).

45. *Id.* at 85.

The following year, when Justice Cardozo (who also was new to the Court since *Mellon*) wrote for the newly emergent majority in the Social Security Act cases, *Steward Machine Co. v. Davis*<sup>46</sup> and *Helvering v. Davis*,<sup>47</sup> he simply repeated Justice Stone's error. The problems of unemployment and old-age indigence had become "national in area and dimensions," Cardozo observed,<sup>48</sup> and the states by themselves had proven unable to deal effectively with them.<sup>49</sup> Evidently Cardozo assumed that, had it been otherwise, federal spending in an effort to alleviate these problems could not have been constitutionally sustained. Hamilton, in contrast, could have approved such expenditures just as easily *whether or not* such matters were among those constitutionally entrusted to the federal government's care.<sup>50</sup>

Failing to understand Hamilton . . . , Cardozo thought it necessary to deny that economic relief of the unemployed and elderly are "fields foreign to [Congress's] function"; he thought it necessary to claim instead that such welfare ends are "fairly within the scope of national policy and power." But of course, they are not. They simply are extraneous ends toward which (among innumerable others) Congress may spend.

Perhaps it was true, as Cardozo eloquently wrote, that there was "need of help from the nation if the people were not to starve"; if so, however, that was true exactly – and only – in the same sense that Hamilton had believed there was need in 1791 for federal subsidy of manufacturing if the young nation's scant economy was not to fail. Federal funds may be spent to meet any such need, but neither the generality and urgency of the need nor any decision to meet it can place such a matter among those enumerated by the Constitution for the federal government's concern. The essence of Hamilton's spending power view is precisely that Congress may spend for matters that the Constitution does not designate for the federal government's concern – that Congress may spend for matters that (in terms of enumerated powers doctrine) are "foreign to [Congress's] function" and are *not* "fairly within the scope of national policy and power."<sup>51</sup>

However, not until *United States v. Darby*<sup>52</sup> four years later, where a prohibition of interstate shipments to induce compliance with Congress' wishes

46. 301 U.S. 548 (1937)

47. 301 U.S. 619 (1937).

48. *Steward Mach. Co.*, 301 U.S. at 586.

49. *Helvering*, 301 U.S. at 644.

50. Hamilton instanced, for example, the "general Interests of *learning*, of *Agriculture*, of *Manufactures* . . ." See HAMILTON, *supra* note 28, at 303. Endorsing Hamilton's view forty-five years later, Justice Joseph Story observed:

There is no doubt that President Washington fully concurred in [Hamilton's] opinion, as his repeated recommendations to Congress of objects of this sort, especially of the encouragement of manufactures, of learning, of a university, of new inventions, of agriculture, of commerce and navigation, of a military academy, abundantly prove.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND THE STATES BEFORE THE ADOPTION OF THE CONSTITUTION 718 n.1 (Melville M. Bigelow, ed., Boston: Little, Brown, and Co. 5th ed. 1905) (1891).

51. Engdahl, *supra* note 3, at 46-47 (internal citations omitted).

52. 312 U.S. 100 (1941).

regarding wages and hours in local manufacturing was sustained, did a majority of the Justices fully recover the general principle that extraneous objectives are no constitutional obstacle to acts which – considered apart from those objectives – are within Congress’ power.<sup>53</sup> This principle explains – far better than opinions written at the time – why Congress could combat gambling and sexual immorality,<sup>54</sup> for example, or promote livestock health,<sup>55</sup> or protect consumers from impure and misbranded foods and drugs,<sup>56</sup> all by regulating interstate transportation; why it could discourage the issuance of circulating bank notes<sup>57</sup> or the marketing of alternatives to butter,<sup>58</sup> or could encourage the conservation of energy or the private ownership of homes,<sup>59</sup> all by the design of its taxes; and why it could specify to whom electricity should be sold, as a condition of permission to build hydroelectric facilities on federal land.<sup>60</sup> The principle applies as much to Congress’ power to spend, as to any of its legislative powers.

Had this “extraneous ends” principle been so clearly perceived sooner, the irrelevance of whether the Social Security Act’s objectives were “fairly within the scope of national policy and power,”<sup>61</sup> or instead were “foreign to [Congress’] function,”<sup>62</sup> would surely have been evident to Justice Cardozo and the *Helvering* and *Steward* majorities, and Justice Stone dissenting in *Butler* would not have imagined any need to assert that inducing farmers to curtail agricultural production “is within the specifically granted power.”<sup>63</sup>

The misconception that “general welfare” aims are definitive of the spending power<sup>64</sup> has caused serious confusion that still lingers today. Recovering the contract thesis understood and applied in *Mellon* is integral to overcoming this conceptual error, which *Butler*, *Steward*, and *Helvering* all share in common.

Some federal spending conditions advance goals of a particular funding program; but others apply much more broadly – to several programs, or to all. An early example of the latter sort was a section of the 1939 Hatch Political Activity Act that provided:

Sec. 12. (a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed

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53. *Id.* at 112-17 (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)). Steps of transition toward Darby’s rediscovery of this principle had been evident in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940), and *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940).

54. *See, e.g.*, *Caminetti v. United States*, 242 U.S. 470 (1917); *Hoke v. United States*, 227 U.S. 308 (1913); *Champion v. Ames*, 188 U.S. 321 (1903).

55. *See, e.g.*, *Thornton v. United States*, 271 U.S. 414 (1926).

56. *See, e.g.*, *Weeks v. United States*, 245 U.S. 618 (1918); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

57. *See Veazie Bank v. Fenno*, 75 U.S. 533 (1869).

58. *See McCray v. United States*, 195 U.S. 27 (1904).

59. *See, e.g.*, 26 U.S.C. §§ 45L, 45M, 163(h)(3) (2000).

60. *See United States v. San Francisco*, 310 U.S. 16, 29-30 (1940).

61. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

62. *Id.*

63. *United States v. Butler*, 297 U.S. 1, 81 (1936) (Stone, J., dissenting).

64. *See supra* note 40; *see also supra* note 22.

in whole or in part by loans or grants made by the United States or by any Federal agency shall . . . take any active part in political management or in political campaigns.<sup>65</sup>

Reflecting the *Steward* and *Helvering* misconception that any “general welfare” aim of federal spending is *ipso facto* “within the scope of national policy and power,”<sup>66</sup> this Hatch Act provision was drafted as if political activity by state employees was a matter within Congress’ power to control, for on its face the prohibition was a directive not to the grantees, but to their employees. The only consequence, however, of employee noncompliance (or of agency failure to enforce employee compliance) would fall upon the employing grantee agency: Its federal funding might be cut. Recognizing that the provision could have no legal force except as a condition to federal funding, the Supreme Court in the 1947 case of *Oklahoma v. U.S. Civil Service Commission*<sup>67</sup> treated it as a funding condition. The court reasoned that, by choosing to risk a loss of funding by refusing to discipline the employee, “Oklahoma adopted the ‘simple expedient’ of not yielding to what she urges is federal coercion. . . . The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.”<sup>68</sup>

Some more recent, and even more widely applicable, funding conditions have been articulated in similar, prohibitory terms – although in passive instead of active voice, and directed specifically at the funded entity rather than nominally at the employee. Most notably these include the prohibition of race discrimination in federally-funded programs, imposed by Title VI of the Civil Rights Act of 1964;<sup>69</sup> the ban on sex discrimination in federally-funded education programs, imposed by Title IX of the Education Amendments of 1972;<sup>70</sup> and the restrictions on discrimination because of handicap in federally-funded programs, imposed by § 504 of the Rehabilitation Act of 1973.<sup>71</sup> These, too, can have no legal effect whatsoever except by virtue of a recipient’s acceptance of them as among the conditions prerequisite to receiving federal funds. However, the race, sex, and handicap anti-discrimination conditions redound to the benefit of “third persons” – persons who receive no funds from the federal government but whose interests those conditions are intended to advance.

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65. Act of August 2, 1939, 53 Stat. 1147 (codified as amended by Act of July 19, 1940, 54 Stat. 767).

66. See *supra* note 61 and accompanying text.

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

68. *Id.* at 143-44 (referencing *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)). In other respects, however, the Court deciding the *Oklahoma* case remained slave to the *Steward* and *Helvering* misconception, thinking it necessary that “[t]he end sought by Congress through the Hatch Act” be found within Congress’ constitutional power, and supposing that “better public service” resulting from the elimination of “active political partisanship” by state officials administering federal grant proceeds could fulfill that necessity. *Id.* at 143.

69. § 601, 42 U.S.C. § 2000d (2000).

70. § 901, 86 Stat. 373, 20 U.S.C. § 1681 (2000).

71. 29 U.S.C. § 794(a) (2000).

In 1977, in *Miree v. DeKalb County*,<sup>72</sup> the Supreme Court with no dissent rejected an argument that federal rather than state law should govern third-party beneficiaries' claims for violation of a federal funding condition.<sup>73</sup> As a condition of grants for airport improvement, the County had undertaken to limit land adjacent to its airport to uses compatible with takeoff and landing; but a Lear jet carrying the plaintiffs' decedents had crashed when its engines were fouled by birds swarming from a garbage dump maintained by the County.<sup>74</sup> The case was in federal court because of diversity, and the question for the Supreme Court was whether state law or "principles of federal common law were applicable to the resolution of petitioners' breach-of-contract claim."<sup>75</sup>

Applying state law would mean that the law governing third-party claims under federal grant conditions might vary from state to state. The Justices decided, however, that such variations would be unobjectionable since a third-party claim against a grant recipient "raises no question regarding the liability of the United States or the responsibilities of the United States under the contracts[.]" and the relevant operations of the United States would not "be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts."<sup>76</sup>

Prior to *Miree*, the Supreme Court had found causes of action implied by some regulatory statutes, although never for third-party beneficiaries of spending conditions.<sup>77</sup> Some *lower* federal courts, however, had found causes of action for third-party spending beneficiaries to be implicit in Title VI of the 1964 Civil Rights Act,<sup>78</sup> although those cases antedated 1975, the year the Supreme Court articulated more demanding criteria for "determining whether a private remedy

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72. 433 U.S. 25 (1977).

73. *Id.* at 33. While there was no dissent, Chief Justice Burger separately concurred in the judgment. *Id.* at 34.

74. *Id.* at 25 (majority opinion).

75. *Id.* at 26.

76. *Id.* at 28-30. A requirement of compatibility with takeoff and landing might have been sustainable under the necessary and proper clause as advancing Congress' policy for the safety of interstate commerce by air. Congress might therefore have imposed it legislatively, instead of only as a condition to be accepted in voluntary exchange for federal funds. Even if the former would have been valid, however, Congress had elected to do only the latter. The Court of Appeals had nonetheless considered the compatibility policy of such sufficient "federal interest" that the question of its third-party enforceability should not be left to turn on state law. *Id.* at 28. The Supreme Court, however, reversed, declaring that "even assuming the correctness of this notion, . . . the issue of whether to displace state law on an issue such as this is primarily a decision for Congress. Congress has chosen not to do so in this case." *Id.* at 32.

77. *E.g.*, *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (discussing § 10b of Securities Exchange Act); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (discussing 42 U.S.C. §§ 1981 & 1982 (2000)); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (discussing the Voting Rights Act of 1965 found at 42 U.S.C. § 1973 (2000)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (discussing 42 U.S.C. § 1982); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (discussing the Rivers and Harbors Act of 1899); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (discussing § 14(a) of the Securities Exchange Act of 1934).

78. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 nn.20-21 (1979) (citing numerous federal court decisions).

is implicit in a statute not expressly providing one[.]”<sup>79</sup> The Court’s holding in *Miree* – that third-party beneficiaries have only such remedies as relevant state law might provide – had come two years *later*, in 1977.<sup>80</sup> Considering all this, the American Law Institute (ALI) in 1981 added to section 313 of the *Restatement (Second) of Contracts* a subsection observing that the *common law* principles applicable to private third-party beneficiary contracts are applicable also to contracts with a government.<sup>81</sup> The ALI must have contemplated *state* law regarding third-party beneficiaries, for *Miree* had not compromised the premise that “[t]here is no federal general common law.”<sup>82</sup>

It therefore seems remarkable that in 1979, when a splayed Supreme Court barely mustered a majority to dispose of *Cannon v. University of Chicago*,<sup>83</sup> no Justice even mentioned *Miree*.<sup>84</sup>

The plaintiff in *Cannon* complained of being excluded from federally-funded medical education programs of the University because of her sex, contrary to Title IX of the Education Amendments of 1972, which provided: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”<sup>85</sup> Title IX contained no language authorizing private suits for its enforcement, but it was modeled after Title VI of the 1964 Civil Rights Act,<sup>86</sup> which (as earlier noted) had already been held by some lower federal courts to implicitly authorize private suits.<sup>87</sup> The plaintiff in *Cannon* sought a like ruling under Title IX – which is worded just like Title VI except that it applies to discrimination “on the basis of sex” rather than “on the ground of race, color, or national origin,” and is limited to “education” programs or activities.<sup>88</sup>

Invidious discrimination on the basis of race or sex would be unconstitutional if it were state action; and to that extent and for that reason it could be made actionable by Congress as a means of enforcing the Fourteenth Amendment.<sup>89</sup> Indeed, for that reason, it already had been made actionable to that extent by 42 U.S.C. § 1983. In most of the cases in which lower courts had found implied causes of action under Title VI, § 1983 either had been, or could have been, relied upon at least as an alternative ground. Ms. Cannon, however,

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79. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

80. *Miree v. DeKalb County*, 433 U.S. 25, 33 (1977).

81. RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (1981). *See also id.* at ch. 14, introductory note.

82. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

83. 441 U.S. 677 (1979).

84. *See id.* In 1979 the Justices’ recovery of the contract thesis had not yet proceeded very far. Furthermore, some of them might have been jaded enough by zeal for good causes that no application of candid legal analysis could have deterred them from a holding they believed would promote the righteous objectives of Title IX.

85. 20 U.S.C. § 1681 (2000).

86. 42 U.S.C. § 2000d (2000).

87. *See Cannon*, 441 U.S. at 696-98 nn.20-21 (citing numerous federal court decisions).

88. *Id.* at 683-85.

89. *See* U.S. CONST. amend. 14, cl. 5.

could not state a claim under § 1983, because the defendant in her case was a private university whose relevant acts could not be characterized as having been done under color of law.<sup>90</sup>

The lower-court cases under Title VI did include one in which, although state action was absent, federal funding itself was taken as sufficient to entail discrimination restraints that Congress otherwise could not have imposed on private action.<sup>91</sup> However, the district court deciding that case had expressly refused to address the possible constitutional issues raised.<sup>92</sup> Perhaps he imagined that federal funding could serve as a surrogate for state action; but he did not say. More important, although that case was cited along with the other Title VI cases in *Cannon*, the Justices in *Cannon* made no attempt to explain or to justify its holding. Instead, the so-called “opinion of the Court” in *Cannon* simply ignored the crucial difference between restraints accepted as conditions of funding, and restraints imposed by virtue of a legislative power (e.g., the Fourteenth Amendment enforcement power).<sup>93</sup>

The splay of judicial opinion in *Cannon* evidenced a transition of understanding underway. Three Justices dissented on differing grounds, Justice Powell urging that the practice of judicially inferring *any* private causes of action be reconsidered entirely.<sup>94</sup> Justice Rehnquist joined the Court’s opinion, but in a brief concurrence declared that the Court should be “extremely reluctant” to find implied statutory rights of action in the future.<sup>95</sup> Chief Justice Burger in *Cannon* concurred only in the judgment, and wrote no opinion,<sup>96</sup> but his unwillingness to join the “opinion of the Court” is revealing: Eight years earlier he had spoken out when other Justices attributed *statutory* force to spending conditions that he realized were binding only because of *consent*;<sup>97</sup> and no doubt Burger’s insight contributed to Rehnquist’s recall and elaboration of the contract thesis two years later in the *Pennhurst* opinion, which Burger joined.

Thus only three of the Justices – Stevens, the author, Brennan, and Marshall – subscribed without qualification to the “opinion of the Court” in *Cannon*. That opinion ignored the prerequisite of recipient assent, and treated the terms of Title IX – just like the terms of statutory provisions regulating matters within

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90. See *Cannon v. Univ. of Chicago*, 559 F.2d 1063 (7th Cir. 1976).

91. *Hawthorne v. Kenbridge Recreation Ass’n*, 341 F.Supp. 1382 (E.D. Va. 1972).

92. See *id.* at 1384.

93. See *Cannon*, 441 U.S. at 677.

94. *Id.* at 730-49 (Powell, J., dissenting). Justice White, joined by Justice Blackmun, wrote a separate dissent. *Id.* at 718-30 (White, J., dissenting).

95. *Id.* at 717-18 (Rehnquist, J., concurring). As to Title VI, and thus its virtual carbon copy in Title IX, Rehnquist was persuaded to concur because “at least during the period of the enactment of the several Titles of the Civil Rights Act” the judiciary had induced Congress “to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself.” *Id.* at 718. Two years later, in the *Pennhurst* case, discussed below, Rehnquist would write for a majority reasserting the forgotten fact that spending conditions are not even obligatory *as statutes*, but only by virtue of recipient consent. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

96. *Cannon*, 441 U.S. at 717.

97. *Townsend v. Swank*, 404 U.S. 282, 292 (1971) (Burger, C.J., concurring).

Congress' legislative powers – as creating “statutory rights”.<sup>98</sup>

When Congress intends private litigants to have a cause of action to support *their statutory rights*, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited *by its legislation*.<sup>99</sup>

For yet another year, a majority of the Justices failed to distinguish between obligations *voluntarily incurred* and rights *statutorily conferred*. Thus, in *Maine v. Thiboutot*<sup>100</sup> not only Justices White and Blackmun, but also Justice Stewart, joined with Justices Brennan, Marshall, and Stevens to comprise a majority holding that § 1983 – which they newly construed to reach deprivations of non-constitutional “rights, privileges, or immunities secured by the . . . laws” – conferred a private cause of action for miscalculation and the resulting underpayment of benefits a state was obligated to pay only because it had agreed to participate in the federally-funded program of Aid to Families with Dependent Children, authorized by the Social Security Act.<sup>101</sup> Although the obligation arose solely from the state's agreement, the *Thiboutot* majority opinion referred to the underpayments as “deprivations of *statutory rights*.”<sup>102</sup>

At last, however, in 1981, writing for the Court in *Pennhurst*, Justice Rehnquist resuscitated the contract thesis that had lapsed into obscurity after *Massachusetts v. Mellon*.<sup>103</sup> The thesis also occasionally surfaced again in the decade following *Pennhurst*. In 1984, for example, Justice White for the Court cited *Pennhurst* in holding that “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept[,]” and that a college “may terminate its participation in the . . . program and thus avoid the requirements” of Title IX.<sup>104</sup>

98. See, e.g., *Cannon*, 441 U.S. at 689-90, 698, 717. Private civil rights claims might be sustained under the “enforcement clause” of the Fourteenth Amendment (if state action is involved), or insofar as deemed “necessary and proper for carrying into execution” Congress’ will for interstate commerce (regardless of state action). In *Cannon*, however, neither Justices Rehnquist and Stewart, concurring, nor Justices White, Blackmun and Powell, dissenting, made anything of the crucial fact that the University of Chicago – a *private* institution – could not be reached by Title IX on *either* of these grounds.

99. *Id.* at 717 (emphasis added).

100. 448 U.S. 1 (1980).

101. *Id.* at 4.

102. *Id.* at 10 (emphasis added).

103. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Even Justice White in *Pennhurst*, dissenting in part with Justices Brennan and Marshall – although he characterized the third-party benefits as “statutory rights,” *id.* at 52, and regarded jurisdiction over Halderman’s claim as “properly invoked . . . under *Thiboutot*,” *id.* at 53 – did acknowledge that a remedy which would be appropriate

where state officials fail to observe the limits of their power under the United States Constitution or fail to perform an ongoing statutory duty imposed by a federal statute enacted under the commerce power or the Fourteenth Amendment is not necessarily the measure of a federal court’s authority where it is found that a State has failed to perform its obligations undertaken pursuant to a statute enacted under the spending power. . . . [T]he courts in such cases must take account of the State’s privilege to withdraw and terminate its duties under the federal law.

*Id.* at 53 (White, J., dissenting).

104. *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984).



In another case decided the same day, Justice Powell for the Court observed about § 504 of the 1973 Rehabilitation Act<sup>105</sup> that Congress “determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.”<sup>106</sup> Two years later, Justice Powell for the Court invoked the contract thesis again, this time to explain why the requirements of § 504 bind no one but the funds’ recipients themselves.

Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient’s acceptance of the funds triggers coverage under the nondiscrimination provision. . . . Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to “receive” federal funds.<sup>107</sup>

By 1992, Chief Justice Burger and Justices Stewart, Brennan, Marshall, and Powell all were gone from the Supreme Court, replaced by Justices O’Connor, Scalia, Kennedy, Souter, and Thomas. Thus, only Rehnquist, Stevens, White, and Blackmun remained from when *Pennhurst* was decided. The future course of the struggle for complete recovery of the contract thesis was therefore uncertain.

When the Court in that year held in *Franklin v. Gwinnett County Public Schools*<sup>108</sup> that damages were available to a third-party beneficiary student to remedy a teacher’s intentional sexual abuse and harassment contravening Title IX (which was known to, and not deterred by, supervising authorities), the Court’s opinion written by Justice White failed to endorse the contract thesis,<sup>109</sup> and spoke instead of “Spending Clause statutes”<sup>110</sup> and of causes of action brought “pursuant to a federal statute.”<sup>111</sup> The opinion also relied upon *non-spending* cases<sup>112</sup> for what White described as the “normal presumption in favor of all appropriate remedies.”<sup>113</sup>

While there was no dissent in *Franklin*, Chief Justice Rehnquist and Justices Scalia and Thomas concurred only in the Judgment, and they explained themselves in another case pending at the same time and decided just a month later. In *Suter v. Artist M.*,<sup>114</sup> Chief Justice Rehnquist wrote for the Court holding that the Adoption Assistance and Child Welfare Act of 1980<sup>115</sup> was *not*

105. 29 U.S.C. § 794 (2000). This section addresses handicap discrimination in terms substantially equivalent to those of Title VI regarding race and Title IX regarding sex.

106. *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 633 n.13 (1984).

107. *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-06 (1986).

108. 503 U.S. 60 (1992).

109. It was argued, citing *Pennhurst*, that a damages remedy was not foreseeable and thus, for lack of notice, should not be available to enforce a spending condition; but the Court bluntly responded that “[t]his notice problem does not arise . . . [where] intentional discrimination is alleged.” *Id.* at 74-75.

110. *Id.* at 75 (emphasis added).

111. *Id.* at 71 (emphasis added).

112. *See e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Bell v. Hood*, 327 U.S. 678 (1946).

113. *Franklin*, 503 U.S. at 74.

114. 503 U.S. 347 (1992).

115. 42 U.S.C. § 620 (2000). This Act conditionally authorized reimbursements to states for a

enforceable by a private action, either implicitly under the Adoption Act itself or even under 42 U.S.C. § 1983. In so holding, Rehnquist for the majority relied heavily upon his *Pennhurst* opinion; its emphasis upon voluntary and knowing acceptance of “the terms of the ‘contract;’” its holding that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously;”<sup>116</sup> and the fact that the condition at issue in *Suter* was unspecific and “does not unambiguously confer an enforceable right upon the Act’s beneficiaries.”<sup>117</sup>

Justice Blackmun, joined by Justice Stevens in dissent, accused the *Suter* majority of contradicting the decision in *Wilder v. Virginia Hospital Ass’n*,<sup>118</sup> just two years before, which had held enforceable under § 1983 what the *Suter* dissenters described as a “functionally identical provision” of the Medicaid Act.<sup>119</sup> The *Suter* majority proffered some distinctions, but the essential difference was that the *Suter* dissenters (like the majority opinion in *Franklin*) ignored the contract thesis, and instead relied primarily on *non-spending* cases.<sup>120</sup>

Speaking of *Franklin* again, there is another point to be noted regarding Justice Scalia’s concurring opinion there. It asserted that the Court no longer engages in “the expansive rights-creating approach exemplified by *Cannon*,” and that it “perhaps ought to abandon the notion of implied causes of action entirely.”<sup>121</sup> However, while thus insisting that *Cannon* was no reliable guide for the future, Scalia did not propose its abrogation, for he said:

I nonetheless agree with the Court’s disposition of this case. Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. The Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a)(2), must be read, in my view, not only “as a validation of *Cannon*’s holding,” . . . but also as an implicit acknowledgment that damages are available.<sup>122</sup>

Remember, though, that 1992 was still relatively early in the process of recovering the contract thesis, and Scalia did not discuss – and no one seems to have raised – the underlying *constitutional* question of whence (if at all)

portion of foster care and adoption assistance payments.

116. *Suter*, 503 U.S. at 356 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

117. *Id.* at 363.

118. 496 U.S. 498 (1990).

119. *Suter*, 503 U.S. at 365 (Blackmun, J., dissenting).

120. *E.g.*, *Dennis v. Higgins*, 498 U.S. 439 (1991); *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989).

121. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring in judgment). Scalia had played this theme before. *See Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in judgment). “If a change is to be made, we should get out of the business of implied private rights of action altogether.” *Id.* at 192. At least, the concurring Justices maintained, “when rights of action are judicially ‘implied,’ categorical limitations upon their remedial scope may be judicially implied as well.” *Franklin*, 503 U.S. at 77. This distinguished them from the majority’s anomalous view that there can be no *limitations* on an *implied* cause of action unless they are *expressed*.

122. *Franklin*, 503 U.S. at 78.

Congress might derive *power* to create causes of action in third parties against the recipients of federal funds (even if it were to do so *explicitly*). Even now, indeed, no one seems to have noticed this question in any litigation; but we will address it here before we are done.<sup>123</sup>

During the ensuing two years, Justices White and Blackmun retired and were replaced by Ruth Bader Ginsburg and Stephen G. Breyer respectively. That left only two *Pennhurst* veterans on the Court. Although both of these had been in the *Pennhurst* majority, Chief Justice Rehnquist and Justice Stevens were to lead in opposite directions regarding the contract thesis while the Court's personnel remained unchanged for the next eleven years. Among the Justices of this period, in addition to Justice Stevens, Justices Souter, Breyer, and Ginsburg afforded the contract thesis no support. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, on the other hand, were its most constant proponents. Justice O'Connor also applied the thesis, sometimes with seeming vigor and conviction, but in time, she proved to be less stalwart.

In the 1997 case of *Blessing v. Freestone*,<sup>124</sup> the Court in an opinion by Justice O'Connor unanimously reaffirmed<sup>125</sup> that in order to succeed under 42 U.S.C. § 1983 as a third-party spending beneficiary, a claimant must show not merely that a funding condition accepted by the recipient had been violated, but also that the violated condition had been clearly and unambiguously designed by Congress to create a specific obligation in the recipient for the benefit of the claimant. In other words, as had been held before, the violated condition must be shown to bestow upon the claimant a federal "right" to receive the benefit which the funds-recipient had withheld.<sup>126</sup> The Court also reiterated that redress under § 1983 would not be available if it were statutorily foreclosed, either expressly or by inference from a perceived inconsistency between § 1983 actions and the overall enforcement scheme provided for the funding program involved. None of this was new, nor was it necessarily dependent upon accepting or rejecting the contract thesis.

However, while Justice Scalia joined the unanimous *Blessing* opinion, he added some additional paragraphs which Justice Kennedy joined. These two could join the Court's opinion, Scalia explained, only because it left open "the possibility that third-party-beneficiary suits simply do not lie."<sup>127</sup> Scalia had played this theme before<sup>128</sup> (and, as we shall see, he later would play it again). Invoking *Pennhurst*'s emphasis on the contractual character of federal funding agreements, Scalia in *Blessing* observed that third-party beneficiaries seem not to

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123. See *infra* note 229 and accompanying text.

124. 520 U.S. 329 (1997).

125. The Justices were asked to overrule the *Thiboutot* case; but as that point had been neither litigated below nor raised in the certiorari petition, the Justices declined to consider it.

126. See, e.g., *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (citing *Wilder v. Va. Hosp. Auth.*, 496 U.S. 498, 509 (1990) and *Wright v. Roanoke*, 479 U.S. 418, 423 (1987)).

127. *Blessing*, 520 U.S. at 350.

128. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., joined by Chief Justice Rehnquist and Justice Thomas, concurring); *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring).

have been able to sue for contract enforcement in the period when what is now 42 U.S.C. § 1983 was enacted, so that “[a]llowing third-party beneficiaries of commitments to the Federal Government to sue is certainly a vast expansion” of what Congress could have intended when it enacted § 1983.<sup>129</sup>

In 1998, in *Gebser v. Lago Vista Independent School District*,<sup>130</sup> the Supreme Court considered a claim against a school district under Title IX.<sup>131</sup> At issue was whether the school district could be held liable for sexual harassment of a female eighth-grade student by a teacher in its employ. Justices Stevens, Souter, Ginsburg, and Breyer urged in dissent that the agency principle of *respondeat superior* should be used to establish such liability, as it is under Title VII of the Civil Rights Act of 1964.<sup>132</sup> In an opinion by Justice O’Connor, however, the majority pointed out that Title IX was patterned *not* after Title VII, but rather after Title VI<sup>133</sup> of that 1964 Act,

conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. . . . Title IX’s contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring that “the receiving entity of federal funds [has] notice that it will be liable for a monetary award.”<sup>134</sup>

“Consequently,” said the *Gebser* majority,

in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.

We think, moreover, that the response must amount to deliberate indifference to discrimination. . . . Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions.<sup>135</sup>

Three cases decided at the next term, however, illustrate that such strong and clear expressions of the contract thesis were not always forthcoming. The last of these argued, but the first decided, was *National Collegiate Athletic Ass’n*

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129. *Blessing*, 520 U.S. at 350.

130. 524 U.S. 274 (1998).

131. 20 U.S.C. § 1681 (2000).

132. 42 U.S.C. § 2000e (2000).

133. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

134. *Id.* at 286-87 (quoting *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60, 73 (1992)).

135. *Id.* at 290-91.

*v. Smith*,<sup>136</sup> where the Justices unanimously agreed that “[d]ues payments from recipients of federal funds . . . do not suffice to render the dues recipient subject to Title IX.”<sup>137</sup> Had it seemed necessary to fully explain their reasons, the proponents of the contract thesis surely would have repeated that only a recipient could have had the opportunity to accept or reject the funding condition. However, the same result in the case could as easily be reached by construction of Title IX itself – which by its terms reaches only educational programs and activities “receiving Federal financial assistance,”<sup>138</sup> and not organizations that receive money from those who receive the federal funds. Justice Ginsburg’s opinion for the Court followed the latter track, which *all* of the Justices – whether accepting the contract thesis or not – could comfortably ride.

In the second relevant case at the 1988 Term – *Cedar Rapids Community School District v. Garret F.*,<sup>139</sup> – the opinion of the Court was written by Justice Stevens; but all of the others except Justices Thomas and Kennedy joined. Like Justice Ginsburg’s opinion in *N.C.A.A.*, Justice Stevens’ opinion in *Cedar Rapids* treated the question as one of ordinary statutory construction,<sup>140</sup> and made no reference at all to *Pennhurst* or to concepts of contract. Nonetheless, only Justices Thomas and Kennedy thought it necessary to point out that, because the Individuals with Disabilities Education Act (IDEA)<sup>141</sup> was an exertion of Congress’ spending power, the analysis

is governed by special rules of construction. We have repeatedly emphasized that, when Congress places conditions on the receipt of federal funds, “it must do so unambiguously” [quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)]. This is because a law that “condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds” [quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 186 (1998)]. As such, “[t]he legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it” [quoting *Pennhurst*]. . . . It follows that we must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate.<sup>142</sup>

The majority opinion, instead of applying the contract thesis, said the recipient school district was obligated by a quite unspecific “related services”

136. 525 U.S. 459 (1999).

137. *Id.* at 462.

138. 20 U.S.C. § 1681(a) (2000).

139. 526 U.S. 66 (1999).

140. See *id.* at 77. “[O]ur role in this dispute is to interpret existing law.” *Id.* at 79 (emphasis added). “Under the statute, our precedent, and the purposes of the IDEA, the District must fund such ‘related services’ in order to help guarantee that students like Garret are integrated into the public schools.” *Id.* (emphasis added).

141. 20 U.S.C. § 1400 (2000).

142. *Cedar Rapids*, 526 U.S. at 83-84 (Thomas, J., dissenting).

requirement attached to the funds it had accepted, to provide continuous, one-on-one specialized health care and services throughout the school day for a child whose spinal cord injury would otherwise have prevented him from remaining in school. But three of those otherwise identifiable as proponents of the contract thesis – Chief Justice Rehnquist and Justices Scalia and O'Connor – silently joined in Stevens' opinion. Yet that does not mean they abandoned the contract thesis.<sup>143</sup> They might simply have found the "related services" condition sufficiently specific under the circumstances to satisfy the *Pennhurst* standard.

Less than three months later, however, in the third of the 1988 Term cases, Chief Justice Rehnquist and Justice Scalia were driven to join Kennedy and Thomas in dissent, while Justice O'Connor not only switched company but wrote the majority opinion. In *Davis v. Monroe County Board of Education*,<sup>144</sup> the Court upheld school-board liability under Title IX for peer (*i.e.*, student-on-student) sexual harassment – although only with what Justice O'Connor considered strict and effective limitations.<sup>145</sup> Presumably Justices Stevens, Souter, Ginsburg, and Breyer would have voted the same way even without those limitations; but without O'Connor they were not a majority, so they put up with the limitations – and with her argument that they ensured consistency with *Pennhurst* and *Gebser*, for example.<sup>146</sup>

Joining Justice Kennedy in dissent, however, the other proponents of the contract thesis rigorously<sup>147</sup> and even ruthlessly declaimed O'Connor's opinion

143. After all, even the dissent by Justice Thomas contained statements appropriate to statutory construction rather than contract interpretation. See, e.g., *Cedar Rapids*, 526 U.S. at 79 (stating "the constitutionally mandated rules of construction applicable to legislation enacted pursuant to Congress' spending power") (emphasis added). *Id.* at 83 (declaring that "our analysis of the statute in this case is governed by special rules of construction") (emphasis added). *Id.* at 84 (noting that "we must interpret Spending Clause legislation narrowly") (emphasis added).

144. 526 U.S. 629 (1999).

145. *Id.* at 650. O'Connor said that

funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

*Id.* And, she protested, "The dissent fails to appreciate these very real limitations on a funding recipient's liability under Title IX." *Id.* at 652.

146. See *id.* at 639–40.

147. Justice Kennedy wrote:

Congress can use its Spending Clause power to pursue objectives outside of "Article I's 'enumerated legislative fields'" by attaching conditions to the grant of federal funds. So understood, the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.

A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it "must do so unambiguously" [citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)]. As the majority acknowledges, "legislation enacted pursuant to the spending power is much in the nature of a contract," and the legitimacy of Congress' exercise of its power to condition funding on state compliance with congressional conditions "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" "There can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it."

Our insistence that "Congress speak with a clear voice" to "enable the States to exercise their

for the Court, insisting that while it purported to defend contract thesis principles, “it eviscerates the clear-notice safeguard of our Spending Clause jurisprudence.”<sup>148</sup> Indeed, O’Connor’s opinion now drove Kennedy to repeat a proposition in which he, as well as Justices Scalia and Thomas and Chief Justice Rehnquist, had joined before: that “[w]hether the Court ever should have embarked on [the endeavor of defining implied causes of action] under a Spending Clause statute is open to question.”<sup>149</sup>

Three years later, O’Connor’s compromise of her commitment to the contract thesis was manifested again in *Barnes v. Gorman*.<sup>150</sup> A jury had awarded a paraplegic not only \$1 million in compensatory damages, but also \$1.2 million in punitives, for injuries resulting from treatment in violation of both § 202 of the Americans with Disabilities Act of 1990 (ADA)<sup>151</sup> and § 504 of the Rehabilitation Act of 1973.<sup>152</sup> With no dissent, the Court reversed the punitive award; but their agreement on outcome did not conceal the Justices’ disagreement over rationale.

Writing for the Court, Justice Scalia found no need in *Gorman* either to question or to reaffirm the concept of “implied” third-party-beneficiary claims under spending conditions. The text of both the ADA (which did not condition spending) and the Rehabilitation Act (which did) expressly authorized enforcement by remedies coextensive with those available in private causes of action under Title VI of the 1964 Civil Rights Act; and while beneficiary suits under the latter initially had been judicially inferred, Congress later had ratified that inference.<sup>153</sup> Consequently, the third-party cause of action claimed in *Gorman* could be treated as one expressly conferred. (Again, however, as in

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choice knowingly, cognizant of the consequences of their participation,” is not based upon some abstract notion of contractual fairness. Rather, it is a concrete safeguard in the federal system. Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power. Cf. [*South Dakota v. Dole*, 483 U.S. 203,] at 217 (O’Connor, J., dissenting) (“If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives ‘power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed” [quoting *United States v. Butler*, 297 U.S. 1, 78, (1936)]. While the majority purports to give effect to these principles, it eviscerates the clear-notice safeguard of our Spending Clause jurisprudence.

*Id.* at 654-55 (Kennedy, J., dissenting) (citations omitted).

148. *Id.* at 655.

The majority’s opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion. The potential costs to our schools of today’s decision are difficult to estimate, but they are so great that it is most unlikely Congress intended to inflict them.

*Id.* at 657. “Its multifaceted balancing test is a far cry from the clarity we demand of Spending Clause legislation.” *Id.* at 675. “[T]he majority’s watered-down version of the Spending Clause clear-statement rule is no substitute for the real protections of state and local autonomy that our constitutional system requires.” *Id.* at 686.

149. *Id.* at 685.

150. 536 U.S. 181 (2002).

151. 42 U.S.C. § 12134 (2000).

152. 29 U.S.C. § 794(a) (2000).

153. See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

*Franklin*,<sup>154</sup> the underlying constitutional question of Congress' power to create such third-party claims seems to have been overlooked by all.)

The Justices agreed, however, that the appropriate scope of relief in such actions – and in particular, whether punitive damages should be allowed – had not yet been determined; and on this question, Justice Scalia (and Chief Justice Rehnquist and Justices Kennedy and Thomas, all of whom joined his opinion without separate comment) found the contract thesis decisive. Arguing from *Pennhurst*, Scalia noted that “punitive damages . . . are not generally available for breach of contract,”<sup>155</sup> and that recipients therefore could not have clearly foreseen (and consented) that liability for punitive damages could be a consequence of accepting the federal funds involved.

Justice Stevens, joined by Justices Ginsburg and Breyer, concurred only in the judgment, and on a ground the majority specifically declined to reach: That the police and police commissioner defendants in *Gorman*, as government entities, “are clearly not subject to punitive damages pursuant to our holding in” a 1981 case they cited.<sup>156</sup> Further, Stevens protested that “[t]he Court’s reliance on, and extension of,” the contract thesis of “*Pennhurst* – a case that was not even cited in petitioners’ briefs in the Court of Appeals – is particularly inappropriate.”<sup>157</sup> “Moreover,” Stevens added, “the Court’s novel reliance on what has been, at most, a useful analogy to contract law has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case.”<sup>158</sup>

The characterization of the contract thesis as only an “analogy,” at most, was no doubt a calculated rhetorical diminution, apparently originating with those who always had opposed the thesis. The fourth of them, Justice Souter, joined Scalia’s opinion of the Court in *Gorman* rather than concurring only in the judgment, like Stevens, Ginsburg, and Breyer; but he did so, he explained, only because “I agree that analogy to the common law of contract is appropriate *in this instance*,” and he took pains to declare that “the contract-law analogy may fail to give such helpfully clear answers to other questions that may be raised by actions for private recovery under Spending Clause legislation.”<sup>159</sup>

Most notable of all, however, is that Justice O’Connor, having already distanced herself from the other proponents of the thesis, now opted to join Justice Souter in his very guarded concurrence. Justice Scalia’s almost obsequious acceptance of the “analogy” characterization,<sup>160</sup> his disavowal of such potentially far-reaching consequences as Justice Stevens decried,<sup>161</sup> and his

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154. See *supra* notes 122-23 and accompanying text.

155. *Barnes*, 536 U.S. at 187.

156. *Id.* at 193 (Stevens, J., concurring). The 1981 case was *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). See also *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000).

157. *Barnes*, 536 U.S. at 192 (Stevens, J., concurring).

158. *Id.* at 192.

159. *Id.* at 190-91 (Souter, J., concurring) (emphasis added).

160. See, e.g., *id.* at 181, 186-87 (plurality opinion).

161. *Id.* at 188 n.2. “We do not imply, for example, that suits under Spending Clause legislation are



exaggerated ascription of significance to a 1985 opinion by O'Connor,<sup>162</sup> seem like concessions indulged to secure a majority by deferring peripheral disputes. The very fact, however, that Scalia and the three who unqualifiedly joined him went this far to achieve their majority – rather than acquiescing in the alternate, neutral ground preferred by Stevens, Ginsburg, and Breyer – seems to show how firmly committed those four Justices are to the contract thesis.

Simultaneously with *Gorman*, the Court was considering *Gonzaga University v. Doe*.<sup>163</sup> In *Gonzaga*, a former student brought a § 1983 suit for damages he attributed to the university's breach of a federal grant condition prescribed by the Family Educational Rights and Privacy Act of 1974 (FERPA) regarding nondisclosure of student records.<sup>164</sup> The Washington Supreme Court in *Gorman* had held that, while "FERPA itself does not give rise to a private cause of action," the nondisclosure provision *did* confer a federal right which was enforceable under § 1983.<sup>165</sup>

The Supreme Court reversed.<sup>166</sup> The majority opinion admitted that some language in prior opinions could be taken to allow private enforcement actions under § 1983 so long as the plaintiff falls within the general zone of interest that the statute [or spending condition] is intended to protect: something less than what is required for a statute [or spending condition] to create rights enforceable directly from the statute [or condition] itself under an implied private right of action.<sup>167</sup>

Fostering that view, said the Court, "is the notion that our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983."<sup>168</sup> After observing that "[o]ur more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes[.]"<sup>169</sup> the *Gonzaga* majority said, "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. . . . [I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section."<sup>170</sup> Moreover, "[t]his being so, we further reject the

suits in contract, or that contract-law principles apply to all issues that they raise." *Id.* The plurality was responding to Justice Stevens' suggestion that they were "fearless crusaders[.]" *See id.* at 193 n.2 (Stevens, J., concurring). The plurality characterized this intended aspersion as undeserved "praise." *See id.* at 188 n.2 (plurality opinion).

162. Scalia wrote, "[W]e have been careful not to imply that all contract-law rules apply to Spending Clause legislation," 536 U.S. at 186, citing *Bennett v. Ky. Dept. of Ed.*, 470 U.S. 656, 669 (1985) (O'Connor, J., writing for the majority), which had simply declined to apply a principle appropriate to bilateral contracts regarding discrete transactions (*i.e.*, that they should be construed most strongly against the drafter) to a spending statute creating a complex program of grants to induce cooperative effort by several levels of government.

163. 536 U.S. 273 (2002). *Gorman* and *Gonzaga* were argued on April 23 and 24, 2002, respectively, and decided on June 17 and 20, 2002, respectively.

164. 88 Stat. 571, 20 U.S.C. § 1232g (2000).

165. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 400 (Wash. 2001).

166. *Id.* at 404.

167. *Gonzaga*, 536 U.S. at 283.

168. *Id.*

169. *Id.* at 281.

170. *Id.* at 283 (emphasis in original).

notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”<sup>171</sup> In either case, the Court said, “we must first determine whether Congress *intended to create a federal right*[.]”<sup>172</sup> using language “phrased in terms of the persons benefited” and “with an *unmistakable focus* on the benefited class.”<sup>173</sup> “Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.”<sup>174</sup> “In sum,” the opinion continued, “if Congress wishes to create new rights enforceable under § 1983, it must do so in *clear and unambiguous terms* – no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”<sup>175</sup> This requirement of *clear and unambiguous terms*, of course, is bottomed on *Pennhurst* and the contract thesis of the spending power.<sup>176</sup>

The majority opinion in *Gonzaga* was written by Chief Justice Rehnquist and joined not only by Justices Scalia, Kennedy, and Thomas, but also by the less stalwart O’Connor. Unsurprisingly, the four Justices generally opposed to the contract thesis declined to join the Court’s opinion in *Gonzaga*. Justice Stevens, joined by Justice Ginsburg, pointed out that the majority’s conclusion was contrary to that reached by “all of the Federal Courts of Appeals expressly deciding the question” with regard to claims under FERPA.<sup>177</sup> While admitting the language in the particular statutory subsection involved “is not as explicit as it is in other parts of the statute, it is clear that, in substance, [it] formulate[d] an individual right.”<sup>178</sup> Indeed, Stevens asserted, “the right at issue is more specific and clear than rights previously found enforceable under § 1983” in two other cases he cited – notwithstanding it took more than a couple of dozen words for plaintiff’s counsel to articulate the “individual right” being claimed.<sup>179</sup>

Justice Breyer, with whom Justice Souter joined, did not dissent; but he concurred in the judgment only. Breyer declared that

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171. *Id.*

172. *Id.* (emphasis in original).

173. *Id.* at 284 (emphasis in original) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13, 691 (1979)).

174. *Id.* at 286.

175. *Id.* at 290 (emphasis added). The Court then continued: “FERPA’s nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education’s distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983.” *Id.*

176. Notice that, by equating the requisites for “rights” enforceable under § 1983 with those for rights enforceable under an implied private cause of action, the *Gonzaga* majority avulsed the foundation of the spurious ruling under § 1983 in *Maine v. Thiboutot*, 448 U.S. 1 (1980): the notion that third-party “rights” under spending conditions are “secured by the . . . laws,” as distinguished from being secured by a recipient’s voluntary agreement. *Gonzaga*, 536 U.S. at 288-89.

177. *Gonzaga*, 536 U.S. at 299. See, e.g., *Brown v. City of Oneonta, N.Y., Police Dept.*, 106 F.3d 1125 (2d Cir. 1997); *Turka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990).

178. *Gonzaga*, 536 U.S. at 294.

179. *Id.* at 294-95.

the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance. I would not, in effect, predetermine an outcome through the use of a presumption – such as the majority’s presumption that a right is conferred only if set forth “unambiguously” in the statute’s “text and structure.”<sup>180</sup>

Of course the *Gonzaga* majority was not really treating the “clear and unambiguous” criterion as a “presumption”; it was in fact a *requirement*, one that the contract thesis logically entails. In any event, however, Justice Breyer reasoned that “[t]he ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute, through 42 U.S.C. § 1983 or otherwise, is a question of congressional intent[.]” and he and Justice Souter simply were not convinced “that Congress intended private judicial enforcement of this statute’s ‘school record privacy’ provisions.”<sup>181</sup>

Justice O’Connor had joined with the other contract thesis proponents in the *Gonzaga* majority; but her divergence from them became evident again in 2005, in *Jackson v. Birmingham Board of Education*.<sup>182</sup> As she had in the *Gebser* case seven years earlier, O’Connor wrote for the Court in *Jackson*. But this time – as in the 1999 *Davis* case – it was the *Gebser* dissenters (Stevens, Souter, Ginsburg, and Breyer) who joined her, and the others who had been with her in the *Gebser* majority (Rehnquist, Scalia, Kennedy, and Thomas) now were left to dissent. Justice Thomas wrote the dissenting opinion.

The question in *Jackson* was “whether the private right of action implied by Title IX encompasses claims of retaliation”;<sup>183</sup> the majority held that it does, “where the funding recipient retaliates against an individual because he has complained about sex discrimination.”<sup>184</sup> Nodding toward *Pennhurst* and *Gebser* and her own contract-based caveats in *Davis*, Justice O’Connor affirmed that third-party actions to enforce spending conditions are available only if a recipient had notice sufficient for it to have knowingly accepted the risk of liability.<sup>185</sup> But that was no problem in this case, she said, asserting that “*Pennhurst* does not preclude private suits for intentional acts that clearly violate Title IX.”<sup>186</sup> “[T]he [defendant] Board should have been put on notice,” she said, “by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX’s private cause of action broadly to encompass diverse forms of intentional sex discrimination.”<sup>187</sup> In fact, however, while the Court had indicated in those cases that “deliberate indifference” to sex discrimination could make out a Title IX claim, the Court had never addressed

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180. *Id.* at 291 (citation omitted).

181. *Id.*

182. 544 U.S. 167 (2005).

183. *Id.* at 171.

184. *Id.*

185. *Id.* at 181-82.

186. *Id.* at 182.

187. *Id.* at 183.

retaliation (and neither had Congress).<sup>188</sup> Undeterred, however, by that troublesome truth – and speaking in terms of “statute” (and regulations) instead of knowing acceptance – O’Connor further weakened the notice requirement by demanding of recipients a sufficiently “realistic” imagination, saying:

retaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient, and it is always – by definition – intentional. We therefore conclude that retaliation against individuals because they complain of sex discrimination [indeed, even of sex discrimination against others than themselves!] is “intentional conduct that violates the clear terms of the statute,” and that Title IX itself therefore supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls’ basketball team. . . . The Board could not have realistically supposed that . . . it remained free to retaliate against those who reported sex discrimination.<sup>189</sup>

Probably the four Justices who joined her opinion would willingly have dispensed with O’Connor’s curtsy to contract; but once again, without her they would have lacked a majority. Besides, her gesture was empty enough that it presented no obstacle to their shared conclusion. Writing in dissent on behalf of the more earnest proponents of the contract thesis, however, Justice Thomas was compelling:

For their acceptance to be voluntary and knowing, funding recipients must “have notice of their potential liability.” Thus, “[i]n interpreting language in spending legislation, we . . . ‘insis[t] that Congress speak with a clear voice,’” and a condition must be imposed “unambiguously.” . . . The question is not whether Congress clearly excluded retaliation claims under Title IX, but whether it clearly included them. . . . [A]mbiguity is resolved in favor of the [recipient] States, which must be aware when they accept federal funds of the obligations they thereby agree to assume. . . . [Gebser and Davis] hardly gave notice to the Board here that retaliation liability loomed.<sup>190</sup>

Indeed, Thomas explained, “[a] claim of retaliation is not a claim of discrimination on the basis of sex”<sup>191</sup> at all:

At bottom, . . . retaliation is a claim that aids in enforcing another separate and distinct right. . . . [P]rotection from retaliation is separate from direct protection of the primary right and serves as a prophylactic measure to guard the primary right. . . . To describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself[.]<sup>192</sup>

Thus, he concluded, “[r]ather than requiring clarity from Congress, the majority requires clairvoyance from funding recipients.”<sup>193</sup>

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188. *Id.*

189. *Id.* at 183-84 (internal citation omitted).

190. *Id.* at 191-92 (Thomas, J., dissenting) (internal citations omitted).

191. *Id.* at 185.

192. *Id.* at 189.

193. *Id.* at 192.

What really explains the majority's holding in *Jackson* is not O'Connor's genuflect to *Pennhurst* and its progeny, but rather her determination (and that of those joining her) to provide what seemed to them to be helpful toward achieving what they saw as Congress' purpose in specifying the spending condition involved. It was as bold a display of "I'm-going-to-help-you-whether-you-ask-for-it-or-not" hubris as the 1964 judicial invention of stockholder suits under § 14(a) of the Securities Exchange Act<sup>194</sup> had been – although one might have thought that kind of judicial wildcatting had been curtailed thirty years ago by *Cort v. Ash*.<sup>195</sup> As O'Connor wrote,

Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also "to provide individual citizens effective protection against those practices" [quoting from *Cannon*]. . . . [T]his objective "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation."<sup>196</sup>

As Justice Thomas pointed out, such zeal to "help" Congress do better than it did cannot be squared with the approach taken in the other recent implied cause of action cases.<sup>197</sup>

By crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy.<sup>198</sup>

Thus, by the end of the 2004 term in mid-2005, the contract thesis of the spending power seemed in significant trouble. Four Justices seemed firmly against it, except that one of them had been willing to use a contract "analogy" when he considered it useful. Four others seemed firmly committed to it (although, as we shall see, that does not necessarily mean they understood, or endorsed, all of its corollaries). The ninth – Justice O'Connor – had become pretty wobbly: She used the right phrases, but when it came to the point of decision, she could tip either way.

Chief Justice Rehnquist died September 3, 2005, and was succeeded by John G. Roberts, Jr., who took his seat on September 29 the same year. It happened that Roberts was already proficient with spending power issues. As Principal Deputy Solicitor General he had briefed and argued the 1992 *Suter* case for the United States as Amicus Curiae (supporting petitioner, who

194. J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964).

195. 422 U.S. 66, 80-85 (1975) (articulating restrictive criteria for holding private remedies implicit in statutes not expressly providing for them).

196. *Jackson*, 544 U.S. at 180 (majority opinion) (quoting from the Amicus Curiae Brief of the United States).

197. See *id.* at 192-93 (Thomas, J., dissenting).

198. *Id.* at 195.

prevailed);<sup>199</sup> and later, while in private practice, he had briefed and argued the 1998 *N.C.A.A.* case on behalf of that association (which prevailed),<sup>200</sup> and also the 2002 *Gonzaga* case on behalf of the University (which prevailed).<sup>201</sup> Although to be effective as an advocate one must often be less bold than academics (and Justices) can afford to be, it is notable that in each of the latter two cases Roberts' briefs not only relied unabashedly and confidently upon the contract thesis<sup>202</sup> – declaring, for example, that “[t]he Title IX contract is the thread that holds this Court’s Title IX jurisprudence together” – but also asserted that “given its origin” (*i.e.*, not in a regulatory power, but as a condition of federal spending) “Title IX could extend no further” than to reach actual recipients of the funds.<sup>203</sup> “Lack of notice is a basic constitutional impediment,” he observed, and “[e]xtending federal coverage to entities that merely indirectly benefit from the federal aid received by others [as the court below had done in that case] would obliterate this fundamental notice requirement because such indirect beneficiaries have no reason to know they are covered . . . .”<sup>204</sup>

Five months later, on January 31, 2006, Justice O'Connor's resignation became effective on the seating of her successor, Samuel A. Alito, Jr. Alito had sat on the Third Circuit Court of Appeals for some fifteen years, and in 2002 had written an opinion for a 6-5 majority of that court that departed from most other Circuits in disallowing Medicaid *providers* (as distinguished from recipients) to pursue § 1983 claims to enforce Social Security Act conditions. Alito's opinion held that a federal right, based on Congress' intent to benefit the beneficiary claimant, is as crucial to a § 1983 claim as it would be to an implied cause of action.<sup>205</sup> That decision preceded by fourteen weeks the Supreme Court's like holding in the *Gonzaga* case, discussed earlier. Thus Alito, too, came to the Supreme Court already a strong proponent of the contract thesis.

Alito would be the first of the two new Justices to address spending issues in his new role. At the end of the term in June, 2006, he wrote the opinion in *Arlington Central School District Board of Education v. Murphy*.<sup>206</sup> Alito's opinion was joined by the new Chief Justice, as well as by the three continuing, already-proven proponents of the contract thesis – Scalia, Kennedy, and Thomas. Justice Ginsburg concurred in the judgment, but not in the majority's contract

199. See *supra* note 114-15 and accompanying text.

200. See *supra* note 136-37 and accompanying text.

201. See *supra* note 163 and 166 and accompanying text.

202. See, e.g., Brief of Petitioner at 12, 17, *N.C.A.A. v. Smith*, 119 S. Ct. 924 (Nov. 10, 1998) (No. 98-84), 1998 WL 784591; Brief of Petitioner at 12-13, 39-43, *Gonzaga University v. Doe*, 122 S. Ct. 2268 (Feb. 25, 2002) (No. 01-679), 2002 WL 332055.

203. Brief for Petitioner, *N.C.A.A.*, *supra* note 202, at 12.

204. *Id.* at 17-18. Moreover, Roberts argued, “conditions on federal funding implicate not only contractual concerns but issues of federalism as well,” and also “profound separation of powers concerns.” Brief for Petitioner, *Gonzaga*, *supra* note 202, at 18. Chief Justice Rehnquist was gone, but at least on spending power issues, the indications were that Chief Justice Roberts would fit comfortably in his shoes.

205. *Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531 (3rd Cir. 2002), *cert. denied*, 537 U.S. 821 (2002).

206. 126 S. Ct. 2455 (2006).

rationale. Justices Breyer, Stevens, and Souter dissented.

The question in *Murphy* was whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA)<sup>207</sup> enables those who prevail in third-party beneficiary litigation enforcing IDEA provisions to recover the cost of expert consultants retained in connection with IDEA administrative proceedings.<sup>208</sup> The case turned on the meaning of the word “costs” for purposes of the IDEA.<sup>209</sup>

The dissenting opinion of Justice Breyer, which Justices Stevens and Souter joined, adduced strong indications from the legislative history that Congress had intended that recovery of expert fees be allowed; and the dissenters urged construing the statute’s language to accomplish that intent.<sup>210</sup> They urged also that “[t]he Act’s basic purpose further supports interpreting the provision’s language to include expert costs.”<sup>211</sup>

[T]he Act’s statutory right to a “free” and “appropriate” education may mean little to those who must pay hundreds of dollars to obtain it. . . . To read the word “costs” as requiring successful parents to bear their own expenses for experts . . . will leave many parents and guardians “without an expert with the firepower to match the opposition,” a far cry from the level playing field that Congress envisioned.<sup>212</sup>

These considerations might have carried considerable weight if the question were actually one of *statutory* interpretation; but Justice Alito for the majority set them aside, explaining:

Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause. . . .

Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State’s acceptance of federal funds, the conditions must be set out “unambiguously.” [citing *Pennhurst*] “[L]egislation enacted pursuant to the spending power is much in the nature of a contract,” and therefore, to be bound by “federally imposed conditions,” recipients of federal funds must accept them “voluntarily and knowingly” [quoting *Pennhurst*]. States cannot knowingly accept conditions of which they are “unaware” or which they are “unable to ascertain.” Thus, in the present case, we must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.<sup>213</sup>

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207. 20 U.S.C. § 1415(i)(3)(B) (2000).

208. *Murphy*, 126 S. Ct. at 2457.

209. *Id.* at 2459-60.

210. *Id.* at 2466-68.

211. *Id.* at 2468.

212. *Id.* at 2469-70 (internal citation omitted).

213. *Id.* at 2458-59 (internal citations omitted).

Considering the term “costs,” as commonly used with regard to litigation, a term of art that excludes expert fees, Alito wrote that “[c]ertainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State’s receipt of IDEA funds.”<sup>214</sup> Noting that the Court in other cases had applied this same construction to “virtually identical” statutory language, he concluded that it “does not unambiguously authorize prevailing parents to recover expert fees.”<sup>215</sup>

Justice Ginsburg concurred in the judgment, but she concurred in the majority opinion only insofar as it relied on the terms of the IDEA and the support of other cases.<sup>216</sup> As to the majority’s reliance on the contract thesis, Ginsburg objected that “no ‘clear notice’ prop is needed in this case given the twin pillars” on which she chose to rely, and “on which the Court’s judgment securely rests.”<sup>217</sup> Her continued opposition to the contract thesis is evident from her insistence that “*Pennhurst*’s ‘clear notice’ requirement should not be unmoored from its context” – a context she conceived narrowly as “an unexpected condition for compliance – a new [programmatic] obligation for participating States.”<sup>218</sup>

For their part, the three other opponents of the contract thesis vigorously insisted in the *Murphy* dissent<sup>219</sup> that the obligatory force of spending conditions derives not at all from contract, but rather from Congress’ legislative power. Conceiving the task as one simply of statutory construction, Justice Breyer wrote:

I am perfectly willing to assume that the majority is correct about the traditional scope of the word “costs.” . . . But Congress is free to redefine terms of art. . . .

. . . If that is so, the claims of tradition, of the interpretation this Court has given other statutes, cannot be so strong as to prevent us from examining the legislative history.

. . . That history makes Congress’ purpose clear. And our ultimate judicial goal is to interpret language in light of the statute’s purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will.

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214. *Id.* at 2461.

215. *Id.* at 2462-63.

216. “[A]lthough I disagree with the Court’s rationale to the extent that it invokes a ‘clear notice’ requirement tied to the Spending Clause,” she said, “I agree with the Court’s discussion of IDEA’s terms, and of our decisions . . . .” *Id.* at 2465 (Ginsburg, J., concurring in judgment) (internal citation omitted).

217. *Id.* at 2464. Ginsburg agreed with the dissenters that reimbursing expert fees “would make good sense in light of IDEA’s overarching goal,” but departed from them in her conclusion that “Congress did not compose § 1415(i)(3)(B)’s text . . . to alter the common import of the terms ‘attorney’s fees’ and ‘costs’ in the context of expense-allocation legislation. . . . The ball, I conclude, is properly left in Congress’ court . . . .” *Id.* at 2465.

218. *Id.* at 2464.

219. Justice Souter wrote a very brief separate dissent just to emphasize his agreement with Breyer’s distinction in the principal dissent between the minor “detail” at issue in *Murphy* and the “indeterminate” but potentially large risk of punitive damages in *Gorman* – a risk so large that it apparently was the reason that Souter had indulged a “contract-law analogy” in that one case. *Id.* at 2466 (Souter, J., dissenting). See *id.* at 2470-71 (Breyer, J., dissenting); *supra* note 159 and accompanying text.



In my view, to keep faith with that interpretive goal, we must retain all traditional interpretive tools – text, structure, history, and purpose. And, because faithful interpretation is art as well as science, we cannot, through rule or canon, rule out the use of any of these tools, automatically and in advance.

. . . By disregarding a clear statement in a legislative report adopted without opposition in both Houses of Congress, the majority has reached a result no Member of Congress expected or overtly desired. It has adopted an interpretation that undercuts, rather than furthers, the statute's purpose

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. . . .

To the dissenters' *statutory* construction argument, however, Alito and the majority had this succinct and particularly powerful reply: "In a Spending Clause case, *the key is not what a majority of the Members of both Houses intend* but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."<sup>221</sup>

It seems safe now to say that adherents of the contract thesis of the spending power currently comprise a thin, but relatively young and vigorous, majority of the Supreme Court. So long as this remains true, there is good reason to expect important additional developments, at least with regard to third-party beneficiary actions.

Justices Scalia,<sup>222</sup> Kennedy,<sup>223</sup> and Thomas are already on record as very skeptical of "implied" rights of action under spending conditions. Moreover Justice Scalia, joined by Justice Kennedy, has argued against third-party beneficiary claims even under 42 U.S.C. § 1983, on the basis of what Congress realistically could have conceived in the historic jurisprudential context of that provision.<sup>224</sup> And the new Chief Justice Roberts, as a private advocate, not only endorsed that argument<sup>225</sup> but went even further, saying:

Nor is it clear that the conditions in Spending Clause legislation qualify as "laws" under § 1983. Such conditions only become operative when the contract is accepted by a recipient; it is the resulting contract, not the federal legislation itself, that gives rise to obligations and allegedly enforceable rights. Section 1983, however, does not cover contracts.<sup>226</sup>

220. *Murphy*, 126 S. Ct. at 2472-75 (Breyer, J., dissenting) (citations omitted). This, of course, would leave recipients subject to surprise by whatever unnoticed "details" might remain hidden in the darkness of statutory prose until teased out by "artful" judicial "interpretation" – an "art" whose only masters are Justices "faithful" to designs which some in Congress might have entertained, but which they failed to make evident enough for prospective recipients (or their lawyers) to perceive.

221. *Id.* at 2463 (majority opinion) (emphasis added).

222. *E.g.*, *Blessing v. Freestone*, 520 U.S. 329, 350 (1997) (Scalia, J., concurring) (noting that the majority opinion leaves open "the possibility that third-party beneficiary suits simply do not lie."). "[W]e . . . perhaps ought to abandon the notion of implied causes of action entirely . . ." *Franklin v. Winnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring).

223. "Whether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 685 (1999) (Kennedy, J., dissenting).

224. *Blessing*, 520 U.S. at 349-50 (Scalia, J., joined by Kennedy, J., concurring).

225. Brief for Petitioner, *Gonzaga*, *supra* note 202, at 40-41.

226. *Id.* at 42 n.14. For this proposition, Roberts' only citation was: "*Cf. United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Congress may indirectly regulate state conduct by attaching strings to grants of money given to state and local governments, but those strings aren't *laws*.)" (Bye, J.,

The mistreatment of spending conditions as “laws,” of course, was the critical error that set up the hijacking of 42 U.S.C. § 1983 for spending beneficiary claims in the *Thiboutot* case.<sup>227</sup>

Apart from § 1983, certain other statutes have been read as intending to confer (or to confirm) third-party claims under spending conditions;<sup>228</sup> but the Supreme Court has yet to address the serious constitutional question of Congress’ power (or lack of power) to prescribe rights and obligations as between recipients of its largesse and third persons. It seems all but inevitable that this question will be forced to decision before long.

To create *legal* rights or obligations requires power to make *law* – and to make law governing the activity or relationship to which the legal rights or obligations pertain. Without lawmaking power, one might oblige another by contract to perform for the benefit of a third; but to make that performance – owed to a contracting party – a performance *legally owed to the third party* (a stranger to the contract), so that *the third party* has a *legal right* to that performance, requires more than a power to contract. A number of states have created third-party rights on this model, which they can do by virtue of their *general* lawmaking competence; but our *national* government has lawmaking competence only within such limits as the Constitution ordains, and not even the “necessary and proper” clause gives it *lawmaking* power to effectuate *extraneous* ends.<sup>229</sup>

Congress might well have power to create third-party rights against “state actors” to help enforce those spending conditions that are designed, for example, to effectuate the Fourteenth Amendment. However, as to private actors (like the University of Chicago in the *Cannon* case), and even as to state actors where *constitutional* rights are not involved, no viable rationale has yet emerged. If none can be found in candor, it would not mean the end of third-party spending beneficiary claims; it would only mean leaving them to the laws of the various states – where the Supreme Court in the *Miree* case unanimously had said they belong.<sup>230</sup> If it be said that “federal rights” should not be abandoned to state remedies, the ample answer is that any rights that federal spending beneficiaries might have against federal spending recipients *are not “federal rights”* where Congress has no *power* to confer them; and not even the fact that Congress propounds them with unmistakable clarity, specificity, and rigor can overcome a deficiency of power.

With the Supreme Court’s present membership, it seems reasonable to

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concurring) (emphasis in original; citation omitted), *cert. denied* 534 U.S. 825 (2001).”

227. See *supra* notes 100-02 and accompanying text.

228. E.g., the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a) (2000), which Justice Scalia (with Rehnquist and Thomas), concurring in the judgment in *Franklin v. Gwinnett County Public Schools*, 504 U.S. 60, 78 (1992), viewed as validating the Title IX cause of action inferred in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). See *supra* note 122 and accompanying text. See also Title VI of the 1964 Civil Rights Act § 601, 42 U.S.C. § 2000d (2000); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

229. See Engdahl, *supra* note 3, at 13-26.

230. See *supra* notes 72-76 and accompanying text.

anticipate new developments *beyond* third-party beneficiary issues, too. This is not a certainty, of course: It was Justice Scalia, after all, joined by his fellow contract thesis proponents, who said “we have been careful not to imply that *all* contract-law rules apply to Spending Clause legislation,”<sup>231</sup> and “[w]e do not imply . . . that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.”<sup>232</sup> Those statements in *Barnes v. Gorman* might have been tactical concessions only for the purposes of that case,<sup>233</sup> but they might also reflect hesitation on the part of some proponents themselves. It is true, however, that apart from contract Congress has no power at all to impose many of the most prominent conditions accompanying federal funds. As reflection pressures judicial minds toward consistency, this ought to lead to applying the contract thesis to other issues as well.

It nonetheless must be observed that some occasions for application of the contract thesis have been missed during the past few years, and perhaps not even noticed by its proponents on the Court.

One example is the 2004 case of *Sabri v. United States*.<sup>234</sup> There, the Court rejected a facial attack on the federal bribery and embezzlement statute – 18 U.S.C. § 666 – which (among other things) outlaws bribes of organizations (or their agents) that receive at least a threshold amount of “grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.”<sup>235</sup> The opinion of the Court was written by Justice Souter, a known *opponent* of the contract thesis; but none of the thesis’ four *proponents* then sitting (five, if Justice O’Connor is included) called out the glaring error.

Justice Souter wrote in *Sabri*:

Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars. . . . Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity.<sup>236</sup>

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231. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (emphasis in original).

232. *Id.* at 188 n.2.

233. *See supra* notes 150-62 and accompanying text.

234. 541 U.S. 600 (2004).

235. *Id.* at 603 (quoting 18 U.S.C. § 666(b) (2000)). *See generally* R.W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003).

236. *Sabri*, 541 U.S. at 605. The “necessary and proper” clause has recently begun to receive long-overdue attention from the Justices, most notably in connection with the “commerce clause.” This renaissance began in 1985, when a minority realized for the first time since the 1940s that the later New Deal holdings, which over time had degenerated into the so-called “affectation” or “affecting commerce” doctrine, were actually not expansions of the “commerce clause” but conscious and careful applications of classic “necessary and proper” clause analysis in commerce contexts. The most prominent display so far was in *Gonzales v. Raich*, 545 U.S. 1 (2005), especially Justice Scalia’s concurring opinion therein. *See* L. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 5-3, at 802-04 and n.12 (3rd. ed., 2000); Engdahl,

He added that, in enacting § 666, Congress was “within its prerogative to protect spending objects from the menace of local administrators on the take.”<sup>237</sup>

The crucial error<sup>238</sup> in this was Souter’s failure to observe that the necessary and proper clause can only apply where the *end* to be carried into execution is – to use Chief Justice Marshall’s classic phrases – “legitimate, . . . within the scope of the Constitution,”<sup>239</sup> so as to justify laws “really calculated to effect”<sup>240</sup> that *enumerated* end. The federal grant programs involved in the *Sabri* case had only objectives which, while worthy, were *not* “objects intrusted [sic] to the [federal] government” by the Constitution;<sup>241</sup> they were, instead, ends *extraneous* to the federal government’s constitutionally contemplated role. Federal spending may certainly be used to promote extraneous ends; that is the essence of Hamilton’s view. In Hamilton’s own words, however, “A power to *appropriate money* with this latitude . . . would not carry a power to do any other thing not authorized in the Constitution.”<sup>242</sup> That was the point made by Presidents Monroe<sup>243</sup> and Jackson,<sup>244</sup> and it was the understanding that prevailed until the obfuscating confusion of *United States v. Butler* (repeated in the *Steward Machine* and *Helvering* cases), which confounded this branch of constitutional jurisprudence until the contract thesis began to re-emerge just about thirty years ago. Congress is free to secure its extraneous spending objectives as well as it might *by means of contract*; but contract is the *only* means it has to ensure the accomplishment of its *extraneous* spending ends. This – as much as anything about ambiguity, clarity, knowing consent, and informed choice – is corollary to the contract thesis.

A case very different from *Sabri* was *Salinas v. United States*,<sup>245</sup> decided under a different subsection of the same bribery statute just seven years before. The United States uses imprisonment of violators as one means to enforce compliance with its criminal laws – which themselves are means of enforcing its

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*The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL’Y 107 (1998). The judicial recovery had commenced in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 587 (1985) (O’Connor, J., dissenting) (citing Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENT 93 (1985)). The best judicial explication so far is Justice Scalia’s concurring opinion in *Gonzales v. Raich*.

Several Justices still have far to go, however, toward recovering the classic “necessary and proper” clause analysis. See, for example, the opinions of Justices Souter and Breyer in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), mistakenly applying the “rational basis” test appropriate under the Fourteenth Amendment for review of legislation that is presumptively valid, rather than the very different “rational basis” test derived out of *McCulloch v. Maryland*, 17 U.S. 316 (1819), and its progeny, for use where validity cannot be presumed but instead must be established under the necessary and proper clause.

237. *Sabri*, 541 U.S. at 608.

238. We may overlook Souter’s conventional attribution of the spending power to the taxing clause. See *supra* note 22.

239. *McCulloch*, 17 U.S. at 421.

240. *Id.* at 423.

241. *Id.*

242. HAMILTON, *supra* note 28. See *supra* note 28 and accompanying text.

243. See *supra* text accompanying notes 31-32.

244. See *supra* text accompanying note 34.

245. 522 U.S. 52 (1997).

will on various matters within its enumerated powers. The United States arranged for some federal prisoners to be housed in a Texas county jail in exchange for a grant to fund jail improvements and a per diem payment for each prisoner so housed. One prisoner bribed Sheriff Salinas to allow him “contact visits,” sometimes with his wife and sometimes with his girlfriend. The Sheriff was convicted under 18 U.S.C. § 666, and the Supreme Court affirmed. The explanation given in Justice Kennedy’s opinion for the *Salinas* Court, however, differed very much from that which Justice Souter would later give in *Sabri*. Kennedy wrote:

[T]here is no serious doubt about the constitutionality of § 666(a)(1)(B) *as applied to the facts of this case*. Beltran was without question a prisoner held in a jail managed pursuant to a series of agreements with the Federal Government. The preferential treatment accorded to him was a threat to the integrity and proper operation of the federal program. Whatever might be said about § 666(a)(1)(B)’s application in other cases, *the application of § 666(a)(1)(B) to Salinas* did not extend federal power beyond its proper bounds. *See Westfall v. United States*, 274 U.S. 256, 259 (1927). . . .

We simply decide that, as a matter of statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds and that under this construction the statute is constitutional *as applied in this case*.<sup>246</sup>

The *Westfall* case cited by Justice Kennedy clearly makes the constitutional point. There, a federal statute punishing misapplication of funds belonging to member-banks of the Federal Reserve System was held valid as applied to the misapplication of the funds of a state bank which had opted to become part of the system – and thus to become *a federal instrumentality for the federal fiscal ends of the Federal Reserve*.<sup>247</sup> “[T]he United States may punish acts injurious to the System,” said the Court, “although done to a corporation that the State also is entitled to protect.”<sup>248</sup> At the specific page that Justice Kennedy cited in *Salinas*, the *Westfall* Court had explained: “Congress may employ state corporations with their consent as instrumentalities of the United States, and may make frauds that impair their efficiency [as such federal instrumentalities federal] crimes.”<sup>249</sup> Like the member-bank in *Westfall*, the Texas jail in *Salinas* was being used (pursuant, of course, to the necessary and proper clause) as an instrumentality toward ends that are within the federal Government’s enumerated powers; it was *that* – *not* the bare fact of federal funding – that justified the holding in *Salinas*.

The same could *not* be said as to *Sabri*, where the object being promoted by the federal spending program was *extraneous* to the enumerated powers. As to *extraneous* “objects behind federal spending,”<sup>250</sup> by definition the only “federal

246. *Id.* at 60, 61 (emphasis added).

247. *Westfall v. United States*, 274 U.S. 256, 257-58 (1927).

248. *Id.* at 258.

249. *Id.* at 259.

250. *Sabri v. United States*, 541 U.S. 600, 606 (2004).

interest”<sup>251</sup> involved is a *constitutionally immaterial* one. Therefore, except insofar as it brigades such extraneous federal interests with sufficient, enforceable *contract* terms, Congress might indeed “have to sit by and accept the risk of operations thwarted by local and state improbity”;<sup>252</sup> the necessary and proper clause authorizes “Laws” only “for carrying into Execution” the *governance* powers of Congress and the other branches.

Another case illustrating the same point as *Salinas* (in contrast to *Sabri*), although it did not involve the bribery statute, was the 2000 case of *Norfolk Southern Railway Co. v. Shanklin*.<sup>253</sup> The Highway Safety Act of 1973 created the “Federal Railway-Highway Crossings Program,” which offers federal funds to states for projects including the installation of warning devices “adequate” to diminish rail crossing hazards.<sup>254</sup> The Secretary of Transportation issued a regulation establishing a “standard of adequacy” for such devices; and in *Shanklin* the Supreme Court construed that standard of adequacy as “*mandatory* for all warning devices installed with federal funds.”<sup>255</sup> Further, the *Shanklin* Court held that state law tort actions alleging deficiencies in devices that comply with the mandatory federal standard of adequacy are preempted, barred by the Supremacy Clause.<sup>256</sup>

This might seem on its face to indicate that federal requirements accompanying federal funds can displace otherwise applicable state laws, *because of* the federal funding. This might be taken to mean that Congress’ will can preempt state law by inducing compliance with its will by spending. That, however, would be to grossly misread *Shanklin*.

Interstate rail transportation is wholly within Congress’ commerce power. For well over a century it has been understood that – by virtue of its necessary and proper clause power in conjunction with its commerce power – Congress can regulate even local activities as a means to effectuate its will for interstate transport, including its safety. At the beginning of her opinion for the Court in *Shanklin*, Justice O’Connor pointed out that Congress had exercised this “necessary and proper” clause power *three years earlier* by enacting the Federal Railroad Safety Act of 1970 “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”<sup>257</sup> That 1970 Act had directed the Secretary of Transportation to “maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem.” As O’Connor also pointed out, it was that 1970 Act that specified that

[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety *until the Secretary of*

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251. *Id.* at 601.

252. *Id.* at 605.

253. 529 U.S. 344 (2000).

254. 23 U.S.C. § 130 (2000).

255. *Shanklin*, 529 U.S. at 353 (emphasis in original).

256. *Id.* at 358-59.

257. *Id.* at 347 (citing 49 U.S.C. § 20101 (2000)).

*Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.*<sup>258</sup>

The subsequent 1973 Act, including its “Federal Railway-Highway Crossings Program” involved in the *Shanklin* case, made federal funds available to advance the earlier statute’s grade crossing safety policy. Because the Secretary of Transportation’s “standard of adequacy” regulation was written specifically for that particular funding program, it can hardly be surprising that it was limited by its terms to *federally-funded* warning devices. What entailed supremacy for the standard-of-adequacy regulation, however, was *not* that it happened to be associated with federal funding, but rather that (like the funding itself) it was designed to serve as a means to help “develop and carry out [nationally uniform] solutions to the railroad grade crossing problem,”<sup>259</sup> as contemplated by the 1970 Act. Consequently, the standard-of-adequacy regulation could easily pass muster under the necessary and proper clause as a means to effectuate Congress’ will for safety in interstate commerce.

While both *Shanklin* and *Salinas*, in contrast to *Sabri*, are consistent with the contract thesis, there still is reason to wonder how alert the Justices will consistently be to its ramifications. Consider, for example, what happened in *Fischer v. United States*,<sup>260</sup> another case under the bribery statute that was being considered by the Court at the same time as *Shanklin* (the railroad crossings case). *Fischer* was decided just four weeks after *Shanklin*, and the Court’s opinion in *Fischer* was written by Justice Kennedy, who had written the *Salinas* opinion just three years before. Unfortunately, Kennedy’s opinion in *Fischer* was less well-considered, and quite unsound.

*Fischer* upheld the conviction under 18 U.S.C. § 666 of a consultant who had defrauded a municipal hospital authority that operated two hospitals receiving federal funds under the Medicare program.<sup>261</sup> The Court rejected a statutory construction argument made in the consultant’s defense, but Kennedy’s rationale in so doing exhibited the same error that Justice Souter was to make later in *Sabri*.<sup>262</sup> The underlying constitutional point had not been identified or briefed by counsel in *Fischer*, nor did it draw any comment from even a single Justice. No one, it seems, saw the elephant in the room!<sup>263</sup>

In the course of responding to the consultant’s *statutory* argument, Justice Kennedy wrote for the Court:

Medicare is designed to the end that the Government receives . . . long-term advantages from the existence of a sound and effective health care system for the elderly and disabled. The Government enacted specific statutes and regulations to secure its own interests in promoting the well being and advantage of the health care provider, in addition to the patient

258. *Id.* at 347-48 (citing 49 U.S.C. §20106 (2000) (emphasis added)).

259. *Id.* at 347 (citing 49 U.S.C. § 20134 (2000)).

260. 529 U.S. 667 (2000).

261. *Id.* at 681-82.

262. *Id.* at 677.

263. Justice Thomas, joined by Justice Scalia, dissented in *Fischer*, but only on statutory grounds.

who receives care. . . .

The Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery being perpetuated upon Medicare providers. Fraudulent acts threaten the program's integrity. They raise the risk participating organizations will lack the resources requisite to provide the level and quality of care envisioned by the program. *Cf. Salinas*, 522 U.S., at 61 (stating that acceptance of bribes by an official of a jail housing federal prisoners pursuant to an agreement with the Government "was a threat to the integrity and proper operation of the federal program").<sup>264</sup>

But the federal government's "interest" in Medicare – unlike its interest in the penal confinement of criminal violators of federal laws – is no different in constitutional significance from the "interest" in maternal and infant health that led Congress to enact the Maternity Act in 1921.<sup>265</sup> *Neither* is within Congress' enumerated powers; maternal health and Medicare both are "extraneous." We can be grateful that Congress shows "interest" in them, and politically we might insist that it provide for them suitably; but they are not among the matters with regard to which the federal branches are constituted as our government, with competence – backed by the "supremacy clause" – to control.<sup>266</sup>

The law distinguishes between one's *legal* interests (for example, in property) and one's interest in good government – or, indeed, one's interest in sports; and it likewise distinguishes between the federal government's interest in interstate trade, national security, or the postal system, for example, and its interest in the health, nutrition, and well-being of people. When Congress acts "for carrying into Execution" its interstate commerce policy, for example, the supremacy clause prevents interference with its will; but when Congress acts to advance maternal and child health, for example, "that purpose may be effectively frustrated by the simple expedient of not yielding."<sup>267</sup>

Justice Kennedy in *Fischer* described the Government's interest in Medicare as "legitimate and significant"; and so it is, but only in the same sense that one might have a legitimate and significant interest in the well-being of an unrelated friend. Regardless of how permissible, important, motivating, or compelled by humanitarian considerations, such interests have no *legal*, including *constitutional*, relevance. Unless an enumerated-power objective is a target (and apart from contractual considerations), the Government's "interest" in Medicare is no more than that of a donor. A donor may curtail his largesse if displeased with what ensues, and so may the United States; but a donor's

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264. *Fischer*, 529 U.S. at 680, 680-82.

265. 42 U.S.C. § 161 (2000).

266. *Westside Mothers v. Havemen*, 133 F. Supp. 2d 549, 561-89 (E.D. Mich. 2001) (Judge Cleland endorsed the contract thesis and realized that it precludes application of the supremacy clause to extraneous spending programs). To the relief of Justices Stevens, Ginsberg, and Breyer, concurring in the judgment of *Barnes v. Gorman*, 536 U.S. 181, 192 n.2 (2002), the Sixth Circuit rejected Judge Cleland's rationale, in *Westside Mothers v. Haveman*, 289 F.3d 852, 859-60 (6th Cir. 2002). Now, however, the position of Justices Stevens, Ginsberg, and Breyer is more distinctly the minority view. See generally *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006).

267. *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).



contribution *per se* gives him no legal right (apart from contract) to control the use or abuse of his gift. Moreover, neither donation *nor contract* can empower a donor to punish fraud, bribery, embezzlement, or theft detrimental to the objectives toward which he had aimed his largesse.

## CONCLUSION

Congress today probably directs more human behavior by conditions accompanying federal funding than by any exercise of its legislative powers. Roughly two-thirds of the federal budget in recent years has been spent on social security, social and economic assistance, education, and other aid and development programs – few of which had any counterpart in practice before the New Deal. Virtually all of these (as well as procurements and other federal activities involving expenditures) involve eligibility conditions to which aspirants, to succeed, must conform, as well as conditions that must be agreed to as consideration for receiving federal funds. Many of these conditions, including the several anti-discrimination mandates sweepingly employed today, are peripheral or unrelated to the basic purposes of most such expenditures. And, at least with regard to private recipients, most are unrelated to any objective the federal government has legislative power to attain.

The thesis that allows for such adaptation to society's perceived modern needs, while at the same time preserving the decentralizing and democratizing virtues of the principle of enumerated federal powers, seems now to be attaining clear dominance with regard to claims of third-party beneficiaries. Other corollaries to the contract thesis of Congress' spending power, however, have not been worked through by the Justices. Predictably, however, they will be – and sooner, no doubt, if well-prepared advocates lead the way – simply because where intellects are free, sounder ideas tend, over time, to prevail.

It has been popular now for two or three generations to parrot the “realist” claim that constitutional law is politics and Justices can (and should, if they share enlightened policy predilections) reshape and embellish the Constitution as their wisdom leads. Fiat premises,<sup>268</sup> leaps of logic,<sup>269</sup> and plain contradictions<sup>270</sup> have been indulged when the immediate results have seemed desirable; it therefore should be no surprise that subtler errors – like the confusion that Cardozo's Social Security opinions shared with *Butler*, and the mistaken characterization of spending as a “legislative” power – endured so long. It has been my observation, however, over more than forty-five years as a

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268. Over the past twenty years, the Supreme Court has gradually been rediscovering the role of the necessary and proper clause outside the spending power area – for example, in the commerce power realm. The most recent evidence is *Gonzales v. Raich*, 545 U.S. 1 (2005), and especially the concurring opinion of Justice Scalia therein. This rediscovery on the part of most of the Justices, however, is still quite imperfect. *TRIBE*, *supra* note 236, at §§ 5-3, 5-4. See generally Engdahl, *supra* note 236.

269. E.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948). See generally Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; A Time for Throwing Away?"* 47 KAN. L. REV. 61 (1998).

270. E.g., *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

practitioner and a scholar of constitutional law and constitutional history, that careful, critical, and perceptive application of principled legal analysis, so far from being “formalistic,” can more persuasively (and thus more effectively and enduringly) not just maintain, but refine, adapt, and improve established conceptions and institutions to promote greater freedom, opportunity, fairness, and well-being. This essay is offered as an illustration of the kind of scholarship still needing to be done.