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COMMENT

DOES CONGRESS ABUSE ITS SPENDING CLAUSE POWER BY ATTACHING CONDITIONS ON THE RECEIPT OF FEDERAL LAW ENFORCEMENT FUNDS TO A STATE'S COMPLIANCE WITH "MEGAN'S LAW"?

W. PAUL KOENIG

I. INTRODUCTION

In July 1994, young Megan Kanka was violently raped and murdered by her neighbor, thirty-two-year-old Jesse Timmendequas.¹ Timmendequas lured seven-year-old Megan into his home by offering to show her a puppy.² He then tied a belt around her neck and raped her as she was dying.³ Timmendequas dumped Megan's body next to a portable toilet in a weeded area in a neighborhood park and then joined a search party formed to look for the missing girl.⁴ Megan's body was found days later in the same location where Timmendequas had left it.⁵

¹ *Sex Offender Charged in Girl's Strangulation: 7-Year-Old's Body Found After Massive Search*, THE RECORD (NORTHERN N.J.), Aug. 1, 1994, at A3. [hereinafter *Sex Offender Charged*].

² *Thousands Mourn Death, Rally for "Megan's Law,"* THE RECORD (NORTHERN N.J.), Aug. 3, 1994, at A3 [hereinafter *Thousands Mourn*].

³ *Id.*

⁴ Matt Bai, *A Report From the Front in the War on Predators*, NEWSWEEK, May 19, 1997, at 67.

⁵ *Sex Offender Charged*, *supra* note 1, at A3.

Timmendequas had twice been convicted for committing other child sex offenses.⁶ Yet it appears that no one in the community knew about his past.⁷ Rather, the revelation of Timmendequas's history of sex offenses stunned the neighbors, including Megan's parents.⁸ On May 30, 1997, a New Jersey jury found Timmendequas guilty of kidnapping, four counts of aggravated sexual assault, and two counts of felony murder.⁹ On June 20, 1997, he was sentenced to death.¹⁰

No other crime evokes outrage in a community more than sex crimes against children. The story of what happened to Megan Kanka quickly gained national attention and resulted in the recent passage of numerous state and federal laws targeting the perpetrators of these acts. Part I of this Comment will first explore the crimes that led to this national explosion of legislation. This section will then look at some of the state laws and the amended federal version of Megan's Law. Part II looks at the constitutional challenges to state versions of Megan's Law. Part III examines in greater detail a potential Spending Clause challenge to Megan's Law. This Comment questions whether the amended federal statute violates Congress's limited power under the Spending Clause to attach conditions to a grant of federal funds to the states. If the relationship between the condition set upon the receipt of federal funds and the purpose for the federal expenditure is tenuous, the Court should find the condition to be an unconstitutional attempt at federal regulation. Because the relationship is not tenuous, Congress has not violated its powers under the Spending Clause in attaching a

⁶ *Id.*

⁷ *Id.* In addition, both of Timmendequas's roommates were convicted sex offenders. The three men met at a correctional facility for the treatment of compulsive sex offenders. *Thousands Mourn*, *supra* note 2, at A3.

⁸ *Sex Offender Charged*, *supra* note 1, at A3. However, many of the neighbors did know that Timmendequas's roommate, Joseph Cifelli, had spent time in a prison for sex offenders, and that Cifelli had met his roommates in prison. *Megan's Laws: More Menace Than Help?*, DES MOINES REGISTER, May 27, 1997, at 9A.

⁹ *Child-sex Offender Guilty of Murder, "Megan's Law" Figure May Face Death*, CHI. TRIB., May 31, 1997, at 3.

¹⁰ Ralph Siegel, *Megan's Law Upheld; Next Step is Sex-Offender Notification*, SEATTLE TIMES, Aug. 21, 1997, at A4.

condition of state compliance with the amended Megan's Law statute on the state's receipt of federal law enforcement funds.

Part III also addresses whether Congress should involve itself in the regulation of sex offenders. Congress should not always legislate simply because it has the power to do so. This Comment argues that while the problem of how to control crimes against children is an issue of national concern, resolution of this problem is best left to the states. States should be allowed to form their own decisions without risking the loss of their share of federal crime fighting funds.

A. BACKGROUND

Unfortunately, Megan is just one of many children who became the victim of a child predator. For example, in 1990, a seven-year-old boy was lured into the woods of Washington, abducted, raped, stabbed, and mutilated.¹¹ The perpetrator, Earl Shriner, cut off the boy's penis and left him to die.¹² The boy was found cowering the woods, naked, and in a state of shock.¹³ He survived and identified Shriner as his attacker.¹⁴ At the time, Shriner was out on bail pending a rape charge, and had multiple previous convictions for sexual offenses involving children.¹⁵

Similarly, on September 4, 1989, Westley Dodd abducted and killed two young brothers, Cole and William Neer, in a park in Vancouver, Washington.¹⁶ Dodd had packed a lunch that day so that he could stalk children without interruption.¹⁷ After hours of waiting for a suitable target, Dodd spotted the Neer boys riding their bikes.¹⁸ Dodd tied the boys' hands and pro-

¹¹ John Leo, *What Should Society Do With Sexual Predators?*, SEATTLE TIMES, Dec. 17, 1996, at B5.

¹² *Id.*

¹³ See Ann Japenga, *Solace With Strings: Sympathy for a Molested Boy Turns to Resentment of His Mother's Use of a Trust Fund*, L.A. TIMES, Jan. 7, 1990, at E1.

¹⁴ James Popkins et al., *Natural Born Predators: Frightened Communities are Rising up Against Sex Offenders*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 73.

¹⁵ *Id.*

¹⁶ James Wallace, *Dodd: Two People, One a "Monster,"* SEATTLE POST-INTELLIGENCER, Jan. 1, 1993, at A1.

¹⁷ *Id.*

¹⁸ *Id.*

ceeded to sodomize Cole.¹⁹ Dodd then stabbed both boys with a fish fillet knife and left them dead in the park.²⁰

A month later, Dodd preyed again, this time on a four-year-old boy named Lee Joseph Iseli.²¹ Dodd sexually abused the boy for hours and then strangled him.²² The next day when he returned from work, Dodd sexually abused the corpse.²³ Dodd later estimated that he had previously molested around thirty children.²⁴ In a brief to the court, Dodd stated, "[i]f I do escape, I promise you I will kill again and rape again, and I will enjoy every minute of it."²⁵ The State of Washington executed Dodd on January 5, 1993 in the first legal hanging in the United States since 1965.²⁶ Similar tragic stories abound.²⁷

B. THE STATE LAWS

These crimes against children sparked local movements, often led by the parents of the victims, for legislative reform.²⁸ The parents and communities cried out that if they had known the danger posed by their previously convicted neighbors, they may have been able to protect their children.²⁹ The politicians responded.³⁰ Starting in Washington, the site of the seven-year-old boy's kidnapping and mutilation, and continuing in New Jersey, where Megan Kanka was abducted, state after state passed statutes designed to protect their children from sexually violent predators.³¹ Today, all fifty states have statutes requiring

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Leo, *supra* note 11, at B5.

²⁶ See *Today in History*, CINCINNATI ENQUIRER, Jan. 5, 1998, at A12.

²⁷ See, e.g., Ernie Allen, *Missing Children: A Fearful Epidemic*, USA TODAY, July 1, 1994 (Magazine), at 46.

²⁸ See, e.g., Ivette Mendez, "Megan's Laws" Youngster's Murder Prompts Flurry of Sex Crime Legislation, THE STAR-LEDGER, Aug. 4, 1994, available in 1994 WL 7866200.

²⁹ *Id.*

³⁰ *Id.*

³¹ In New Jersey, the legislators rushed the provision, N.J. STAT. ANN. §§ 2c:7-1 to :7-11 (West 1995 & Supp. 1997), to the floor as an emergency measure due to the public outcry over the loss of Megan Kanka. With minimal debate, the legislation was passed

released sex-offenders to register with local law enforcement agencies.³² These statutes differ in the scope of persons who fall within the purview of the registration requirements.³³ The state laws also differ in the information a registrant must give when registering.³⁴ Two states do not apply their law retroactively.³⁵

with no member voting against it. See *Artway v. New Jersey*, 81 F.3d 1235, 1243 (3d Cir. 1996).

³² See ALA. CODE §§ 13A-11-200 to -203 (1994); ALASKA STAT. §§ 12.63.010-100 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3825 (West 1989 & Supp. 1996); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie 1995); CAL. PENAL CODE §§ 290, 291 (West 1989 & Supp. 1997); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1996); CONN. GEN. STAT. ANN. §§ 54-102r to -102s (West Supp. 1997); DEL. CODE ANN. tit. 11, § 4120 (1995 & Supp. 1996); FLA. STAT. ANN. §§ 775.21, 944.606 (West Supp. 1997); GA. CODE ANN. § 42-9-44.1 (Harrison 1994); HAW. REV. STAT. §§ 707-743 (Supp. 1995); IDAHO CODE §§ 18-8301 to -8311 (1997); 730 ILL. COMP. STAT. ANN. 150/1 to /10.9 (Michie 1993 & Supp. 1997); IND. CODE ANN. §§ 5-2-12-1 to -12-13 (West Supp. 1996); IOWA CODE § 692A.1-.15 (Supp. 1997); KAN. STAT. ANN. §§ 22-4901 to -4910 (1995 & Supp. 1996); KY. REV. STAT. ANN. §§ 17.500-.540 (Michie 1996); LA. REV. STAT. ANN. §§ 15:540-.549 (West Supp. 1997); ME. REV. STAT. ANN. tit. 34A, §§ 11101-11105, 11125, 11141-11144 (West Supp. 1996); MD. ANN. CODE art. 27, §792 (1996); MASS. ANN. LAWS ch. 6 §§ 178C-178O (Law. Co-op. Supp. 1997); MICH. COMP. LAWS ANN. §§ 28.721-.732 (West Supp. 1997); MINN. STAT. ANN. § 243.166 (West Supp. 1997); MISS. CODE ANN. §§ 45-33-1 to -19 (Supp. 1997); MO. ANN. STAT. §§ 566.600-.625 (West Supp. 1997); MONT. CODE ANN. §§ 46-23-501 to -508 (1995); NEB. REV. STAT. §§ 29-4001 to -4013 (Supp. 1996); NEV. REV. STAT. §§ 207.151-.157 (1995); N.H. REV. STAT. ANN. §§ 651-B:1 to -B:9 (Supp. 1996); N.J. STAT. ANN. §§ 2c:7-1 to :7-11 (West 1995 & Supp. 1997); N.M. STAT. ANN. §§ 29-11A-1 to -8 (Michie 1997 & Supp. 1996); N.Y. CORRECT. LAW §§ 168-a to -v (McKinney Supp. 1997); N.C. GEN. STAT. §§ 14-208.5-.13 (Supp. 1996); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995); OHIO REV. CODE ANN. §§ 2950.01-.99 (Banks Baldwin 1995 & Supp. 1997); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1991 & Supp. 1997); OR. REV. STAT. §§ 181.585-.602 (1995); 42 PA. CONS. STAT. ANN. §§ 9791-9799.6 (West Supp. 1997); R.I. GEN. LAWS §§ 11-37.1-1 to -19 (Supp. 1996); S.C. CODE ANN. §§ 23-3-400 to -490 (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS §§ 22-22-30 to -41 (Michie Supp. 1997); TENN. CODE ANN. §§ 40-39-101 to -108 (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1997); UTAH CODE ANN. § 77-27-21.5 (1995 & Supp. 1996); VT. STAT. ANN. tit. 13, §§ 5401-5413 (Supp. 1996); VA. CODE ANN. § 19.2-390.1 (Michie 1995 & Supp. 1997); WASH. REV. CODE ANN. §§ 9A.44.130-.140 (West Supp. 1997); W. VA. CODE §§ 61-8F-1 to -10 (Supp. 1997); WIS. STAT. ANN. § 175.45 (West Supp. 1996); WYO. STAT. ANN. §§ 7-19-301 to -306 (Michie 1997).

³³ Compare ALA. CODE §§ 13A-11-200, 13A-12-131 (1994) (display of an obscene bumper sticker will trigger the registration requirements), with CAL. PENAL CODE §§ 290, 647(d) (West 1989 & Supp. 1997) (conviction of loitering outside a public restroom for a lewd or lascivious purpose will trigger the registration requirements).

³⁴ Compare LA. REV. STAT. ANN. § 15.542(B) (West Supp. 1997), and N.M. STAT. ANN. § 29-11A-4 (Michie 1997 & Supp. 1996) (requiring the offender to provide the government agency with his place of employment), with KY. REV. STAT. ANN. § 17.500(3) (Michie 1996) (requiring the offender to give vehicle registration data).

Most importantly, significant variation exists in the extent to which this information will be made available to the public.³⁶ Only seven states do not allow for public notification.³⁷

The rationales behind these laws are compelling. Because of the appalling nature of child sex crimes, legislative debate often focuses on their horrors. Legislators also have noted that the Government has a duty to protect its citizens, especially the young, who are the least able to protect themselves.³⁸ Furthermore, the problem is widespread. Estimates are that one of every three girls and one of every seven boys will be the victim of sexual abuse before the child reaches the age of eighteen.³⁹

Also, the rate of recidivism for sexual offenders is higher than that for other crimes.⁴⁰ The perpetrators often seem unable to prevent themselves from repeatedly engaging in sexually violent behavior. Congressman Charles Schumer of New York addressed this issue in the congressional debate over Megan's Law, stating that "sexual offenders are different."⁴¹ Congressman Schumer noted that long prison terms often do not deter these men from committing future acts of violence.⁴² Additionally, attempts at rehabilitation frequently fail.⁴³ In the words of

³⁵ CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1997); PA. CONS. STAT. ANN. § 9793 (West Supp. 1997).

³⁶ Compare CAL. PENAL CODE § 290.4(a) (allowing members of the public to find out whether a person is registered as offender if they can give law enforcement agency identifying information about person in question), with TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (permitting local newspapers in Texas to publish identification of any sex offender who moves into the neighborhood).

³⁷ See Bai, *supra* note 4, at 67 (listing Arkansas, Hawaii, Kentucky, Missouri, Nebraska, New Mexico, and Wyoming as lacking a statutory notification provision).

³⁸ See, e.g., 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. McCollum).

³⁹ See Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 789 (1996).

⁴⁰ See Daniel L. Feldman, *The Scarlet Letter Laws of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1125 n.131 (1997).

⁴¹ 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of Rep. Schumer).

⁴² *Id.*

⁴³ *Id.* But cf. Robert J. McGrath, *Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 328, 331 (1995) (arguing that predicting the risk that any individual sex offender will strike again is difficult to determine with any accuracy).

Congressman Schumer, "[n]o matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children . . . to molest, abuse, and in the worst cases, to kill."⁴⁴

Because of the disturbing nature of these crimes and an understandable lack of sympathy for the perpetrators, lawmakers have overwhelmingly supported community notification laws. The laws often pass with little debate and strong bipartisan support.⁴⁵ It appears that no politician wants to vote against such a bill and be left with the unenviable task of explaining to her constituency that she voted for the rapists over the children because she had constitutional concerns.

However, this has not prevented legal commentators, who are immune from the pressures of the popular vote, from raising their own doubts as to the constitutionality of Megan's Law. Additionally, released offenders who were required to register with local law enforcement agencies under the act have also brought constitutional challenges.⁴⁶ Part II will examine the substance of these challenges to the state laws and the treatment the challenges have received in court.

C. THE FEDERALIZATION OF MEGAN'S LAW

In 1989, Jacob Wetterling was abducted near his home in Minnesota.⁴⁷ Jacob has not been found to date, and law enforcement officers have not apprehended the perpetrator.⁴⁸ Jacob's abduction occurred prior to the passage of a Minnesota

⁴⁴ 142 CONG. REC. H4453 (daily ed. May 7, 1996). Fearing that sex offenders will continue to molest children after being released from prison, Texas, Montana, and California have passed laws which allow for the voluntary surgical castration of repeat sex-offenders while they are in prison. Michael T. McSpadden, *Time For Public Debate on Castrating Sex Offenders*, HOUSTON CHRONICLE, June 16, 1997, at 21. California is the only state to *require* recidivist sex offenders released on parole to receive chemical injections that suppress sex drive (but only if the victim is less than 13-years-old). CAL. PENAL CODE § 645 (West Supp. 1997).

⁴⁵ See, e.g., 142 CONG. REC. S4921 (daily ed. May 9, 1996) (statement of Sen. Dole noting the unanimous passage of Megan's Law in the House of Representatives).

⁴⁶ See, e.g., *Artway v. New Jersey*, 81 F.3d 1235 (3d Cir. 1996).

⁴⁷ Dan Oberdorfer, *Wetterling Friends Show Their Support—\$100,000 Reward Yields No Clues*, STAR-TRIBUNE, Oct. 30, 1989, at 1B.

⁴⁸ Richard Meryhew, *Missing Girl Haunts Those Looking for Her*, STAR-TRIBUNE, June 27, 1996, at 1B.

State law requiring sex offenders to register,⁴⁹ and spurred communities nationwide to press for change.⁵⁰ Furthermore, the disappearance of Jacob was the first of these crimes to have an impact at the federal level, leading Minnesota Congressman Jim Ramstad's work on what would eventually become the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Wetterling Act).⁵¹

1. *The Origins of the Federal Law*

Congress passed the Wetterling Act as part of the Violent Crime Control and Law Enforcement Act of 1994.⁵² The bill gave the States an incentive to "implement a system where all persons who commit sexual or kidnapping crimes against children or who commit sexually violent crimes against any person (whether adult or child) are required to register their address with the state upon their release from prison."⁵³ The law also allowed state law enforcement agencies to release "relevant information" about the convict that the agencies believed the public should know for protection.⁵⁴

The 1994 Act did not require the states to comply with its mandates. However, it did provide that "a State's failure to implement such a system by September 1997 will result in that State losing a part of its annual federal crime-fighting funding."⁵⁵ If a state failed to comply, it would lose 10% of its allotted share of federal crime fighting funds.⁵⁶ Thus, a state which elects not to comply with the federal requirements will currently

⁴⁹ See Steve Berg, *Jacob's Mom Backs Proposal in Congress*, STAR-TRIBUNE, Aug. 1, 1991, at 3B.

⁵⁰ Jill Hodges, *New Wetterling Campaign Puts National TV Spotlight on Kid—Safe and Missing*, STAR-TRIBUNE, Sept. 23, 1991, at 1B; Neal Gendler, *Veterans Walk to Raise Money, Concern for Wetterling*, STAR-TRIBUNE, Dec. 26, 1989, at 2B.

⁵¹ 42 U.S.C. § 14071 (1997).

⁵² Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁵³ *Id.*

⁵⁴ 42 U.S.C. § 14071 (1995).

⁵⁵ H.R. REP. NO. 104-555, at 2 (1996).

⁵⁶ 42 U.S.C. § 14071(f) (1997).

lose a part of its portion of over \$100 million in federal funds.⁵⁷ As a result, Congress reserved the ability to exert further pressure on the states to notify the public when sex offenders are released into their communities.

2. Amendment to the 1994 Act

The efficacy of the Wetterling Act proved unsatisfactory to its drafters because some states were apparently reluctant to release the registrant's information to the community.⁵⁸ Thus, in 1996, Congress passed an amendment to the 1994 Act, sponsored by Senator Dick Zimmer of New Jersey, which greatly strengthened its language.⁵⁹ The amendment changed the language of the statute from local law enforcement agencies "may" disclose relevant information as needed to protect the public, to local law enforcement agencies "shall release relevant information that is necessary to protect the public."⁶⁰ The amendment also formally renamed the 1994 Act "Megan's Law."⁶¹ Thus, states now have an affirmative obligation to comply with Megan's Law and release information about convicted sex offenders "sufficient to protect the public" if they wish to continue to receive their full share of federal law enforcement funds.⁶² Failure to meet this obligation will result in a loss of 10% of the

⁵⁷ Earl-Hubbard, *supra* note 39, at 796. Additionally, the Act allows Congress to increase this \$100 million in funding with each subsequent annual budget. *See id.* at 862 n.43.

⁵⁸ 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. McCollum).

⁵⁹ H.R. 2137, 104th Cong. (1996), *reprinted in* 110 Stat. 1345 (1996).

⁶⁰ 142 CONG. REC. H4451 (daily ed. May 7, 1996) (emphasis added).

⁶¹ H.R. 2137, 104th Cong. (1996), *reprinted in* 110 Stat. 1345 (1996). Unless otherwise stated, any references to "Megan's Law" in the remainder of this Comment will refer to the amended federal statute.

⁶² The amended section of the statute now reads:

(d) Release of information

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The designated State law enforcement agency and any local law enforcement agency authorized by the State agency shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

42 U.S.C. § 14071 (1997).

federal law enforcement funds allotted by the federal government to that state.⁶³ The constitutionality of this amendment is the focus of this Comment.

On May 7, 1996, the House of Representatives passed the amendment by a unanimous vote of 418 to 0.⁶⁴ Two days later, the amendment passed in the Senate by a voice vote.⁶⁵ President Clinton signed the amendment into law on May 17, 1996.⁶⁶

The congressional debates (or, more appropriately, conversations) were as one-sided as the votes.⁶⁷ Numerous members of Congress rose to praise and support the bill and its drafters.⁶⁸ Only two Congressmen questioned the bill's legality. Congressman John Conyers (D-Mich.) raised the issue of whether the registration requirement imposes an unconstitutional Ex Post Facto punishment.⁶⁹ Mr. Conyers warned that "this [bill] may be good from this point on, but . . . it could present a problem in the courts in the future."⁷⁰ Congressman Conyers also noted that while the bill is not an unfunded mandate, it does impose a penalty on the states for non-compliance.⁷¹ Despite his doubts about the constitutionality of the bill, Mr. Conyers joined in support of the measure.

Congressman Mel Watt (D-N.C.) raised the same legal issues with greater vigor. Mr. Watt questioned the prudence of not allowing "States to make their own decisions about whether they want a Megan's law or do not want a Megan's law."⁷² Watt criticized what he called "Big Brother Government" for trying to force state compliance with something that is not necessarily a

⁶³ *Id.*

⁶⁴ 142 CONG. REC. S4921 (daily ed. May 9, 1996) (statement of Senator Dole).

⁶⁵ *Id.*

⁶⁶ 142 CONG. REC. D495 (daily ed. May 17, 1996).

⁶⁷ *See, e.g.*, 142 CONG. REC. H4451-H4457 (daily ed. May 7, 1996).

⁶⁸ *See, e.g., id.* (statements of Reps. McCollum, Conyers, Zimmer, Schumer, Smith, Schroeder, Cunningham, Jackson-Lee, and Lofgren) (all rising in strong support of the amendment).

⁶⁹ *Id.* at H4452 (statement of Rep. Conyers).

⁷⁰ *Id.* For a discussion of the potential Ex Post Facto problem, see *infra* notes 76-104 and accompanying text.

⁷¹ 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. Conyers).

⁷² *Id.* at H4456 (statement of Rep. Watt).

federal issue.⁷³ Despite his concerns, Congressman Watt ultimately joined his colleagues, and the bill passed unanimously.

II. CONSTITUTIONAL CHALLENGES TO MEGAN'S LAW

Before beginning an analysis of the constitutionality of "Megan's Law," this Comment will look at some of the other grounds on which the state statutes have been challenged. These constitutional challenges are not the Comment's focus. Nonetheless, it is important to look at the substance of the claims being made, for if the release of information under Megan's Law is found to be unconstitutional, the 1996 Amendment will also be invalid. Congress cannot condition the receipt of federal funds on a state's performance of an unconstitutional act.⁷⁴

A. REGISTRANTS' CONSTITUTIONAL CHALLENGES

Since the inception of the state sex offender notification and registration laws in New Jersey, released offenders have argued that the laws violate their constitutional rights.⁷⁵ This section will consider three of the challenges: (1) that the state laws violate the Ex Post Facto Clause; (2) that the laws violate the Eighth Amendment; and (3) that the laws are unconstitutional under the Fourteenth Amendment.

1. *Ex Post Facto and Double Jeopardy Challenges*

The challenge that has enjoyed the greatest success in court is the claim that the state statutes violate the Ex Post Facto Clause of the Constitution.⁷⁶ This Clause has been interpreted to mean that "the government may not apply a law retroactively that 'inflicts a greater punishment, than the law annexed to the

⁷³ *Id.*

⁷⁴ See *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987).

⁷⁵ Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 91 n.18 (1996).

⁷⁶ U.S. CONST. art. I, § 10 ("[n]o State shall . . . pass any Bill of Attainder, Ex Post Facto law, or law impairing the Obligation of Contracts, or grant any Title of Nobility").

crime, when committed.”⁷⁷ Thus, for instance, if, at the time a crime is committed, the designated punishment for commission of that crime is one year imprisonment, the government cannot decide after the offender has perpetrated the act that the proper sentence for that person’s act should be five years.

Released offenders who have been required to register with law enforcement agencies after being paroled have argued that the dispersal of this information to their community imposes a punishment not allowed for at the time their crime was committed. They therefore claim that the registration and notification requirements are in violation of the Ex Post Facto Clause.⁷⁸ These petitioners argue that the release of their personal information inflicts a retroactive punishment upon them that was not annexed at the time of their sentence.

The New Jersey Supreme Court was not persuaded by this argument and upheld the constitutionality of the New Jersey state “Megan’s Law.”⁷⁹ However, in *Artway v. New Jersey*, the District Court of New Jersey concluded that the public notification requirement of Megan’s Law was an unconstitutional violation of the Ex Post Facto Clause.⁸⁰ Artway, a released sex offender, was required to register with state law enforcement agencies upon his release from prison.⁸¹ Furthermore, depending on the results of a state assessment of Artway’s risk of recidivism (which had not been conducted at the time of trial), New Jersey would also potentially release his registration information to the community.⁸²

On appeal, the Third Circuit distinguished registration with law enforcement agencies from community notification.⁸³ The

⁷⁷ *Artway v. New Jersey*, 81 F.3d 1235, 1253 (3d Cir.), *reh’g denied*, 83 F.3d 594 (3d Cir. 1996) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

⁷⁸ *See id.* at 1242; *Doe v. Pataki*, 919 F. Supp. 691, 698 (S.D.N.Y. 1996); *Rowe v. Burton*, 884 F. Supp. 1372, 1377 (D. Alaska 1994), *appeal dismissed*, *Doe I v. Burton*, 85 F.3d 635 (9th Cir. 1996); *W.P. v. Poritz*, 931 F. Supp. 1199, 1203 (D.N.J. 1996), *rev’d sub nom. E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

⁷⁹ *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995).

⁸⁰ *Artway v. New Jersey*, 876 F. Supp. 666, 669 (D.N.J. 1995), *aff’d in part and vacated in part*, 81 F.3d 1235 (3d Cir.), *reh’g denied*, 83 F.3d 594 (3d Cir. 1996).

⁸¹ *Id.*

⁸² *Artway*, 81 F.3d at 1242.

⁸³ *Id.* at 1265.

court upheld the requirement that released sex offenders register with local law enforcement agencies.⁸⁴ The court concluded that required registration with local law enforcement agencies had a legitimate regulatory purpose and should not be categorized as punitive.⁸⁵ Because the registration requirement alone does not constitute punishment, the court said that it cannot violate the Ex Post Facto Clause.⁸⁶

In contrast, the court found persuasive Artway's argument that the release of this information to the community was an additional punishment.⁸⁷ However, while the court found Artway's argument convincing, it vacated the district court's holding because Artway's challenge to the notification requirements was not ripe for adjudication.⁸⁸ Because the results of the risk assessment were not known at the time of the trial, it was not clear whether his personal registration information would ever be disseminated to the public.⁸⁹ However, dicta strongly implied that once a ripe challenge was brought, the court would hold that the notification provision did indeed violate the Ex Post Facto Clause.⁹⁰

Other federal courts have also concluded that the release of information to the public can be a punitive act.⁹¹ For instance, in *Doe v. Pataki*, the Southern District of New York held that the "public notification provisions of the Act are punitive," and therefore violate the Ex Post Facto Clause.⁹² In finding the Act

⁸⁴ *Id.* at 1265-67.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1267. The court also found that since the registration requirement does not constitute punishment, it does not violate either the Double Jeopardy or Bill of Attainder Clauses.

⁸⁷ *Id.* at 1242 ("Artway's contention that notification constitutes punishment is *prima facie* quite persuasive . . .").

⁸⁸ *Id.* at 1242, 1246-51 ("Article III, as part of its 'case or controversy' mandate, requires parties to suffer injury or come into immediate danger of suffering an injury before challenging a statute"). See also *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

⁸⁹ *Artway*, 81 F.3d at 1248, 1252. The court also vacated the lower court's issuance of a temporary injunction on the notification provision. *Id.* at 1271.

⁹⁰ *Id.* at 1252.

⁹¹ See, e.g., *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Doe v. Pataki*, 919 F. Supp. 691, 700-01 (S.D.N.Y. 1996).

⁹² *Pataki*, 919 F. Supp. at 700-01.

punitive, the court noted that regardless of the legislature's regulatory intent, the release of information has repeatedly resulted in the released offender being ostracized, harassed, threatened, or fired from his job.⁹³

Therefore, before last summer, it was not clear whether the notification provisions violated the Ex Post Facto Clause when applied to individuals who were convicted prior to the passage of the state statutes. However, two recent cases dramatically turn the tide in favor of upholding the statutes against Ex Post Facto challenges.

First, on June 23, 1997, the Supreme Court delivered an opinion that dramatically strengthened the validity of Megan's Law, *Kansas v. Hendricks*.⁹⁴ In a 5 to 4 decision, the Court ruled that a Kansas law requiring the civil confinement of some sexual offenders who had completed their prison sentence did not violate the Ex Post Facto Clause.⁹⁵ The Kansas law at issue established a procedure for the involuntary civil commitment of violent sex offenders found to have a "mental abnormality" or a "personality disorder" at the time of their release from prison that makes them likely to engage in predatory acts of sexual violence.⁹⁶ The Court found the statute constitutional, stating, "[i]t . . . cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty."⁹⁷ The Court ruled that the civil confinement did not violate either the Double Jeopardy prohibition or the Ex Post Facto Clause because the law did not subject the affected individuals to further punishment.⁹⁸ Writing for the majority, Justice Thomas stated that the additional confinement was not punitive because institutionalized mentally-ill persons are confined for civil purposes rather than punishment and are not subject to "punitive conditions."⁹⁹

⁹³ *Id.* at 701.

⁹⁴ 117 S. Ct. 2072 (1997).

⁹⁵ *Id.* at 2076-77.

⁹⁶ KAN. STAT. ANN. § 59-29a01 to a17 (1994 & Supp. 1995).

⁹⁷ *Hendricks*, 117 S. Ct. at 2088 (citing *Addington v. Texas*, 441 U.S. 418, 426 (1979)).

⁹⁸ *Id.* at 2081, 2086.

⁹⁹ *Id.* at 2085-86.

Since the Court's decision in *Hendricks*, the Third Circuit has revisited the constitutionality of the notification provision in state sex offender statutes. In stark contrast to its apparent position in *Artway v. New Jersey*,¹⁰⁰ the Third Circuit reversed course in *E.B. v. Verniero*, where it held that the notification provisions in Megan's Law are not punitive.¹⁰¹ The effect of the *Hendricks* decision on the Third Circuit's apparent change in position is clear. The court stated:

We believe the state's interest in protecting the public here is similar to, and as compelling as, the state interest served by the civil commitment statute in *Hendricks*. Accordingly, based on *Hendricks*, we believe that the state's interest here would suffice to justify the deprivation even if a fundamental right of the registrant's were implicated. Given that something less than a fundamental interest is implicated, the impact of Megan's Law on the registrants' reputational interests is necessarily insufficient alone to constitute "punishment."¹⁰²

Thus, the court ruled that the state law reasonably carries out the legislature's remedial purpose without imposing punitive hardships.¹⁰³ Because the Third Circuit found that notification is not punishment, it held that the state version of Megan's Law does not violate either the Ex Post Facto or the Double Jeopardy prohibition.¹⁰⁴ Based on the Third Circuit's radical change in posture, it appears likely that other federal courts will likewise hold that reasonable limitations of sex offender's liberty interests do not violate their rights under either the Ex Post Facto or Double Jeopardy Clauses.

2. Eighth Amendment Challenges

Registrants could also attack Megan's Law on the grounds that the release of information to the community constitutes cruel and unusual punishment under the Eight Amendment.¹⁰⁵

¹⁰⁰ The Third Circuit first addressed the issue in *Artway v. New Jersey*, 81 F.3d 1235 (3d Cir.), *reh'g denied*, 83 F.3d 594 (3d Cir. 1996), and found the issue not ripe for review. See *supra* notes 88-90 and accompanying text.

¹⁰¹ *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir. 1997).

¹⁰² *Id.* at 1104.

¹⁰³ *Id.* at 1096.

¹⁰⁴ *Id.* at 1105.

¹⁰⁵ U.S. CONST. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

To determine whether the release of information regarding sex offenders violates the Eighth Amendment, a court must first assess whether the release of this information constitutes punishment.¹⁰⁶ If the release of information is considered punitive, the court must then determine whether the punishment is cruel and unusual.¹⁰⁷

Whether the release of information is punitive is addressed above in the discussion of the Ex Post Facto inquiry.¹⁰⁸ If the act is punitive, the court must then consider whether the punishment is cruel and unusual. Whether a punishment is cruel and unusual is determined by "the evolving standards of decency that mark the progress of a maturing society," and so [it] admits of few absolute limitations."¹⁰⁹ Even if a sentence is not itself considered cruel and unusual by these evolving standards, it can rise to the level of cruel and unusual if the punishment causes third parties to behave in a manner that imposes cruel and unusual conditions on the convicted individual.¹¹⁰ However, this can only occur if the government was aware of the danger of vigilante violence and did not take remedial measures to prevent it.¹¹¹

Critics have asserted that state versions of Megan's Law can be considered cruel and unusual because of vigilante attacks visited on sex offenders following the release of information about them to the community.¹¹² Indeed, the threat of vigilante violence against offenders required to register is real. On numerous occasions, released offenders have been attacked or driven away.¹¹³ The Eighth Amendment challenge to notification laws

¹⁰⁶ For a detailed discussion as to whether this release of information is punitive or regulatory, see *Artway v. New Jersey*, 81 F.3d 1235, 1253-64 (3d Cir.), *reh'g denied*, 83 F.3d 594 (3d Cir. 1996).

¹⁰⁷ *See id.*

¹⁰⁸ *See supra* notes 76-104 and accompanying text.

¹⁰⁹ *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).

¹¹⁰ *Farmer v. Brennan*, 511 U.S. 825, 848 (1994).

¹¹¹ *Id.*

¹¹² *See, e.g., Earl-Hubbard, supra* note 39, at 823-25.

¹¹³ For example, in Texas, a released offender could not begin counseling because vigilante activity forced him to move repeatedly. Christy Hoppe & Diane Jennings, *Ex-inmates Pose Quandary for Many States; Convicts Seen as Threat Even After Their Release*,

contends that, when releasing information to the public about convicted sex offenders, the government is aware of the threat vigilante neighbors present to the convicted sex offender and has nevertheless failed to take measures to protect the registrant from the inherent physical and psychological harm.¹¹⁴ Furthermore, this argument asserts that allowing (and perhaps encouraging) this neighborhood vigilantism is cruel and unusual.¹¹⁵

This theory has not been ruled upon in any of the cases that have challenged Megan's Law because the courts that have the release of information to be punitive have not gone on to consider whether the punishment is cruel and unusual. Thus, it is also not clear whether the amended version of the federal Megan's Law statute is an unconstitutional violation of the Eighth Amendment. However, based on the recent decisions in *Hendricks*¹¹⁶ and *Verniero*,¹¹⁷ it is unlikely that the Court will find community notification punitive. Therefore, the odds of the Court even reaching the second prong of the inquiry in future cases are slim.

3. Fourteenth Amendment Challenges

Finally, the courts and legal critics have considered whether state registration and notification statutes violate any of the substantive due process rights protected by the Fourteenth

DALLAS MORNING NEWS, Aug. 29, 1993, at A1. In Washington, vigilantes burned down a child sex-offender's house shortly before his sentence was to end. Rick Hampson, *What's Gone Wrong with Megan's Law?; Notification: Reason for Law is its Biggest Problem*, USA TODAY, May, 14, 1997, at A1.

Attacks have not been limited to sex-offenders. On more than one occasion, vigilantes harassed or beat an innocent person whom they mistakenly believed to be the released offender. For instance, in Phillipsburg, New Jersey, a man broke into the house that the police reported as being the residence of a sex offender and beat up the person he found sleeping on the sofa. The person on the sofa was not the sex-offender. *Id.* Likewise, in Manhattan, Kansas, state officials mistakenly identified a trailer inhabited by a family with two daughters as the residence of a sex offender. The children were harassed and rocks were thrown at the trailer until the mistake was corrected. *Man Mistakenly Branded as Sex Offender by Officials*, DES MOINES REGISTER, May 4, 1997, at A4.

¹¹⁴ Earl-Hubbard, *supra* note 39, at 823-25.

¹¹⁵ *Id.*

¹¹⁶ *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

¹¹⁷ *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

Amendment.¹¹⁸ The requirement of substantive due process prohibits a state from arbitrarily depriving an individual of a due process right.¹¹⁹ Professor Lewis argues that the registration and notification requirements effectively brand a person who has paid his debt to society with a scarlet letter.¹²⁰ She asserts that this state-imposed scarlet letter arbitrarily deprives the person of the right to privacy, personal safety, employment, and travel—all of which should be protected by the Fourteenth Amendment.¹²¹ Additionally, Professor Lewis argues that the released offenders are deprived of these rights without due process because the registration statutes impose additional punishment on released sex offenders as a group rather than adjudicating each case individually.¹²²

In addressing a Fourteenth Amendment challenge, the Third Circuit said that requiring the released offender to register with a state agency does not violate any due process rights.¹²³ However, the court did not express an opinion as to whether a registrant could successfully challenge the release of this information to the community under the Fourteenth Amendment.¹²⁴

The *Doe v. Pataki* court did not reach the Fourteenth Amendment question.¹²⁵ The court decided that the release of information under Megan's Law was an unconstitutional violation of the Ex Post Facto Clause, and therefore found it unnecessary to rule on whether the statute was also violative of the Fourteenth Amendment.¹²⁶ Thus, there is not yet dispositive authority regarding whether the release of information violates an individual's substantive due process rights.

¹¹⁸ U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

¹¹⁹ See *Youngberg v. Romeo*, 457 U.S. 307, 314-15 (1982).

¹²⁰ Lewis, *supra* note 75, at 102-03.

¹²¹ *Id.* at 102-15.

¹²² *Id.* at 103.

¹²³ *Artway v. New Jersey*, 81 F.3d 1235 (3d Cir.), *reh'g denied*, 83 F.3d 594 (3d Cir. 1996).

¹²⁴ *Id.* at 1251-52.

¹²⁵ *Doe v. Pataki*, 919 F. Supp. 691, 702 (S.D.N.Y. 1996).

¹²⁶ *Id.*

These and other constitutional challenges¹²⁷ are not the focus of this Comment. However, if the release of information under Megan's Law is found to be unconstitutional, the 1996 Amendment will also be invalid because Congress cannot condition the receipt of federal funds on the states agreeing to perform an illegal act.¹²⁸ For the purpose of investigating whether the conditions which the 1996 Amendment adds to Megan's Law are a legitimate exercise of the federal government's spending power, it will be assumed in this Comment that the underlying law is constitutional.

B. FEDERALISM CONCERNS REGARDING THE CONSTITUTIONALITY OF THE 1996 AMENDMENT

The amended version of Megan's Law faces a new potential adversary—the states themselves. The 1996 Amendment to the Jacob Wetterling Act conditions state receipt of certain federal law enforcement funds on the state agreeing to implement a specified regulatory scheme.¹²⁹ This provision potentially violates the limits on federal power enumerated in the Constitution. To determine the constitutionality of the amendment, this Comment will first ascertain whether it is within Congress's enumerated powers to compel the states to enact and enforce a program designed to regulate convicted sex offenders. Second, assuming Congress cannot require the states to implement a regulatory plan, this Comment will consider whether the congressional use of monetary incentives to encourage the states to enact laws regulating released offenders is a legitimate exercise of the federal Spending Clause power.¹³⁰

¹²⁷ For instance, Megan's Law has also been challenged on the grounds that it violates the bill of attainder and double jeopardy clauses. *See Artway*, 81 F.3d at 1242.

¹²⁸ *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987).

¹²⁹ 42 U.S.C. § 14071(f)(2) (1996). *See supra* text accompanying notes 58-73.

¹³⁰ U.S. CONST. art. I, § 8, cl. 1 ("[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for common Defence and general welfare of the United States . . .").

1. *The Federal Government's Enumerated Limitations*

Congress's powers are limited to those enumerated in the Constitution.¹³¹ Those powers that are not given to the federal government are reserved to the states by the Tenth Amendment.¹³² The Supreme Court has repeatedly ruled that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."¹³³ Thus, "[t]he States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."¹³⁴

In determining whether a federal regulation is a legitimate exercise of congressional power, one of the factors on which the Court focuses is whether the questioned statute governs private individuals or the states themselves.¹³⁵ As the Court stated in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, when Congress attempts to regulate the states *qua* states,

the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."¹³⁶

Law enforcement historically has been considered one of these attributes of state sovereignty upon which the federal gov-

¹³¹ *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

¹³² U.S. CONST. amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

¹³³ *United States v. Darby*, 312 U.S. 100, 124 (1941).

¹³⁴ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (internal quotation omitted). For a thorough analysis of Tenth Amendment case law history, see John R. Vile, *Truism, Tautology, or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445 (1996-97).

¹³⁵ *National League of Cities v. Usury*, 426 U.S. 833, 845 (1976) (holding federal extension of minimum wage and maximum hour laws to state employees constitutional under Commerce Clause).

¹³⁶ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-87 (1981) (quoting *National League of Cities*, 426 U.S. at 845).

ernment cannot easily infringe.¹³⁷ Thus, Congress is greatly restricted in the degree to which it can regulate a state's administration of its local law enforcement agencies.¹³⁸

Because of this limited power over the states, particularly in areas such as law enforcement, Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹³⁹ Furthermore, even if Congress has the authority to regulate or prohibit certain acts if it chooses to do so, it cannot force the states "to require or prohibit those acts."¹⁴⁰

This was recently reaffirmed by the Supreme Court in *Printz v. United States*.¹⁴¹ In *Printz*, the Court held that sections of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922, which compelled state agents to temporarily administer a federal regulatory program were unconstitutional.¹⁴² The provisions in question required state law enforcement officials to conduct background checks on prospective handgun purchasers.¹⁴³ The Petitioners, law enforcement officers from Montana and Arizona, argued that the Brady Act forced them into federal service by requiring them to perform the background checks and related functions necessary to implement the federal program.¹⁴⁴ Petitioners claimed that this federal coercion of state officials was unconstitutional.¹⁴⁵ The Court agreed, saying that the federal government cannot compel states to administer a federal program.¹⁴⁶ Justice Scalia, writing for the majority, stated, "[i]t is

¹³⁷ *United States v. Lopez*, 514 U.S. 549, 564 (1995) (stating that law enforcement is an area where states historically are sovereign).

¹³⁸ *Id.*

¹³⁹ *Hodel*, 452 U.S. at 288.

¹⁴⁰ *New York v. United States*, 505 U.S. 144, 166 (1992). For a criticism of *New York*, see Martin H. Redish, *Doing It With Mirrors*: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation, 21 HASTINGS CONST. L.Q. 593 (1994) (arguing that the "Court imposed constitutional limits on congressional power that derive from nowhere in the text of the Constitution").

¹⁴¹ 117 S. Ct. 2365 (1997).

¹⁴² *Id.* at 2368.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2369.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2383.

the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."¹⁴⁷

To find otherwise would violate the doctrine of accountability.¹⁴⁸ This doctrine states that the government official who elects to enact a certain statute should be held accountable to the public for that decision.¹⁴⁹ Only then can the constituency elect the candidate who enacts legislation which comports with the majority's interest.¹⁵⁰ In contrast, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."¹⁵¹

This limited power over the states applies equally to the federal Megan's Law statute. As repugnant as child sex crimes are, Congress is still without the power to force state legislatures against their will to pass laws regulating the crime.¹⁵² However, *Printz* is not directly controlling to the question raised by this Comment because with Megan's Law, the federal government is not compelling states to release sex offender information. At least in theory, states can choose to refuse to release this information and forego the federal funds. Thus, Megan's Law is unlike the provisions of the Brady Act struck down in *Printz* because it does not compel the states to do anything.

However, this distinction becomes less clear if the enticement of federal funds becomes so strong that it presents the states with no realistic choice. If the states are sufficiently dependant on the federal funds, it may not matter that they have

¹⁴⁷ *Id.*

¹⁴⁸ *New York v. United States*, 505 U.S. 144, 169 (1992).

¹⁴⁹ *Id.* at 168-69; see also Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending*, 4 CORNELL J.L. & PUB. POL'Y 482 (1995).

¹⁵⁰ *New York*, 505 U.S. at 168.

¹⁵¹ *Id.* at 169; see also *Printz*, 117 S. Ct. at 2382:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

¹⁵² See, e.g., *Printz*, 117 S. Ct. at 2365.

choice in theory.¹⁵³ In reality, the "enticement" in Megan's Law may leave the states with as little choice as the federal coercion in *Printz*. This would occur if the states were so reliant on the federal funds that they felt compelled to adhere to whatever terms the federal government included in its conditions. The next section will address whether Congress can use federal law enforcement funds not to compel, but to entice, the states to enforce a program consistent with the federal guidelines.

2. *The Congressional Spending Power*

The use of federal funds to influence the manner in which the states' law enforcement agencies are run questions the boundaries of constitutional federalism. While Congress cannot directly commandeer state law enforcement agencies,¹⁵⁴ the federal government can use monetary incentives to "urge a state to adopt a legislative program consistent with federal interests."¹⁵⁵ Congress is able to hold out these incentives as part of its power to tax and spend under the Spending Clause.¹⁵⁶ Congress is not restricted in its power to give federal money to the individual states. Additionally, Congress can tie conditions on the way that money is spent to further its legislative purpose.¹⁵⁷ For instance, if Congress gives the states federal money for the construction of highways, it can require that the construction meets certain quality standards.¹⁵⁸ These conditions are permissible incident to the spending power to ensure that the money is spent in a manner consistent with the federal objective for the expenditure.

What is not clear is whether Congress can tie conditions to the receipt of federal funds which are not directly related to the use of those funds. If this is within Congress's power, it could be used as a tool to regulate in areas that would otherwise lie

¹⁵³ See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

¹⁵⁴ *Printz*, 117 S. Ct. at 2365.

¹⁵⁵ *New York*, 505 U.S. at 166.

¹⁵⁶ U.S. CONST. art. I, § 8, cl. 1. See *supra* note 130 for the text of the Spending Clause.

¹⁵⁷ See *Dole*, 483 U.S. at 206.

¹⁵⁸ *Id.* at 215 (O'Connor, J., dissenting).

beyond its enumerated powers. This could in turn conflict with the rights reserved to the states under the Tenth Amendment.¹⁵⁹ Therefore, the issue in judging the constitutionality of Megan's Law is whether there is a sufficient connection between the condition that a state collect and release the specified information and the receipt of federal law enforcement funds. The Supreme Court addressed the scope of the federal spending power in *South Dakota v. Dole*.¹⁶⁰

a. *South Dakota v. Dole*

In 1984, Congress passed 23 U.S.C. § 158, which "induced" states to raise their minimum drinking age to twenty-one.¹⁶¹ Section 158 required the Secretary of Transportation to withhold a percentage of federal highway funds from states "in which the purchase or public possession . . . of any alcoholic beverages by a person who is less than twenty-one years of age is lawful."¹⁶² At the time Congress adopted § 158, South Dakota allowed persons nineteen-years-old or older to purchase and possess beer containing up to 3.2% alcohol.¹⁶³ South Dakota brought suit against then-Secretary of Transportation, Elizabeth Dole, claiming that § 158 violated constitutionally protected states rights.¹⁶⁴ South Dakota argued that the withholding of highway funds violated rights reserved to the states by the language of the Twenty-first Amendment¹⁶⁵ and the constitutional limits on Congress's exercise of its spending power.¹⁶⁶

The Supreme Court did not reach the issue of whether Congress had the power to directly impose a national minimum

¹⁵⁹ U.S. CONST. amend. X. See *supra* note 132 for the text of the Tenth Amendment.

¹⁶⁰ 483 U.S. 203 (1987).

¹⁶¹ 23 U.S.C. § 158 (1986).

¹⁶² *Id.*

¹⁶³ S.D. CODIFIED LAWS § 35-6-27 (Michie 1986).

¹⁶⁴ *Dole*, 483 U.S. at 205.

¹⁶⁵ U.S. CONST. amend. XXI, § 2 ("[T]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.") (emphasis added).

¹⁶⁶ *Dole*, 483 U.S. at 205.

drinking age in light of the Twenty-first Amendment.¹⁶⁷ Instead, the Court based its decision on its finding that Congress's use of a financial incentive to indirectly obtain a uniform drinking age was a valid use of its spending power, even if Congress did not have the power to regulate the drinking age directly.¹⁶⁸ Thus, as McCoy and Friedman explain, "although Congress lacks regulatory authority to achieve a legislative end on its own, the Congress may 'purchase' state compliance through the use of conditions attached to spending grants."¹⁶⁹

The majority opinion, authored by Chief Justice Rehnquist, claimed that incident to the spending power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"¹⁷⁰ Furthermore, Congress's powers under the Spending Clause are broader than its enumerated powers to regulate directly.¹⁷¹ Specifically, "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."¹⁷² Thus, according to the majority, Congress may legitimately influence state regulation indirectly through conditional appropriations in areas where the federal government is not empowered to regulate directly.¹⁷³

However, the Chief Justice also stated that this power is not unlimited.¹⁷⁴ The Court listed four limitations upon Congress's spending power: (1) the spending power must only be exercised in pursuit of the general welfare; (2) the conditions upon the states' receipt of federal funds must be unambiguous; (3) the conditions must be reasonably related to the purpose of the ex-

¹⁶⁷ *Id.* at 206.

¹⁶⁸ *Id.*

¹⁶⁹ Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 SUP. CT. REV. 85, 100-01.

¹⁷⁰ *Dole*, 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

¹⁷¹ *Id.* at 209.

¹⁷² *Id.* at 210.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 207.

penditure; and (4) the condition must not violate an independent constitutional prohibition.¹⁷⁵ The Court split over the proper scope of the limitation that conditions be reasonably related to the purpose of the program or grant.¹⁷⁶

This limitation actually includes two embedded requirements to the conditional use of federal funds. First, the condition must be related, or have a nexus, to the purpose of the appropriation.¹⁷⁷ The Court addressed this issue indirectly, saying that “[o]ur cases have not required that we define the outer bounds of the ‘germaneness’ or ‘relatedness’ limitation on the imposition of conditions under the spending power.”¹⁷⁸ This implies that there is an outer bound or nexus requirement. If the condition does not have a reasonable relationship to the purpose of the grant, the condition may be beyond the scope of Congress’s spending power.

The Court found that the condition upon the receipt of highway funds was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”¹⁷⁹ Thus, without defining the outer bound of the germaneness requirement, the Court concluded that the drinking age was sufficiently related to interstate travel to be within the congressional spending power.¹⁸⁰

Even if one accepts the Court’s “germaneness” analysis in *Dole*, there is a second limitation on Congress’s ability to set conditions on the receipt of federal grants. Namely, the purpose of the appropriation must be something in which there is a federal interest in imposing a national project or program.¹⁸¹ In *Dole*, the Court found that a legitimate federal interest did exist in encouraging a uniform minimum drinking age because the varying drinking ages gave teens an incentive to drive long distances to neighboring states to drink.¹⁸² The Court found that

¹⁷⁵ *Id.* at 207-08.

¹⁷⁶ *Id.* at 207.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 208 n.3.

¹⁷⁹ *Id.* at 208.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 207.

¹⁸² *Id.* at 209.

these teens often drove home after a night of drinking, which had an adverse impact on highway safety.¹⁸³ Thus, the Court concluded that Congress had a legitimate interest in encouraging a uniform minimum drinking age.¹⁸⁴

The majority concluded that the conditional grant authorized by § 158 was nothing more than a "mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose."¹⁸⁵ Thus, the Court held that even if Congress could not impose a national drinking age directly (an issue which was not decided), the inducement of a uniform drinking age was a legitimate use of Congress's spending power.¹⁸⁶

b. Criticism of the *Dole* Decision

Justices O'Connor and Brennan dissented from the majority opinion in *Dole*.¹⁸⁷ Justice O'Connor authored the more detailed criticism of the majority's decision. In her dissent, she argued that there is not a reasonable relationship between the condition that the states impose a minimum drinking age of twenty-one and the expenditure of federal funds for highway construction.¹⁸⁸ Instead, the condition was an attempt to regulate the sale and consumption of alcoholic beverages.¹⁸⁹ Justice O'Connor argued that this attempt to regulate was beyond the federal government's power because it was reserved to the states under the Twenty-first Amendment.¹⁹⁰

Justice O'Connor agreed with the majority that Congress could tie conditions on the receipt and use of federal funds "to further 'the federal interest in particular national projects or programs.'"¹⁹¹ Justice O'Connor also concurred in finding that

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 211.

¹⁸⁶ *Id.* at 212.

¹⁸⁷ *Id.* (O'Connor, J., dissenting); *id.* (Brennan, J., dissenting).

¹⁸⁸ *Id.* (O'Connor, J., dissenting).

¹⁸⁹ *Id.* (O'Connor, J., dissenting).

¹⁹⁰ *Id.* (O'Connor, J., dissenting).

¹⁹¹ *Id.* (O'Connor, J., dissenting) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

the federal government's power to tax and spend is broader than its delegated regulatory powers.¹⁹² The spending power is broader in scope because it is "limited only by the qualification that the expenditure be for the 'general welfare.'"¹⁹³ This means that Congress can freely contribute money when the purpose of the contribution is thought to be in the general welfare—assuming that the expenditure is free from conditions imposed upon the states.

However, Justice O'Connor in dissent disagreed with the majority's application of the requirement that the policy objectives of conditions tied to the state's receipt of federal funds be reasonably related to the purpose of the federal expenditure.¹⁹⁴ While Congress is able to give money freely to states in the pursuit of the general welfare, it cannot tie a condition to the receipt of these funds unrelated to the purpose of the contribution.¹⁹⁵ The fact that Congress's spending power is broader than its enumerated regulatory powers does not mean that "because Congress may spend for the general welfare, it may use the spending power to circumvent all limitations on its regulatory powers."¹⁹⁶

Justice O'Connor found that the relationship between a uniform minimum drinking age and interstate highway construction was insufficient "to justify so conditioning funds appropriated for that purpose."¹⁹⁷ As she explained:

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the the-

¹⁹² *Id.* at 212-13 (O'Connor, J., dissenting).

¹⁹³ McCoy & Friedman, *supra* note 169, at 103.

¹⁹⁴ *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting).

¹⁹⁵ *Id.* (O'Connor, J., dissenting). For a criticism of Justice O'Connor's Spending Clause analysis, see David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 57 (1994) (arguing that her dissent is overly restrictive).

¹⁹⁶ McCoy & Friedman, *supra* note 169, at 103.

¹⁹⁷ *Dole*, 483 U.S. at 213-14 (O'Connor, J., dissenting).

ory that use of the interstate transportation system is somehow enhanced.¹⁹⁸

Therefore, when the constitutionality of a condition is at issue, the correct inquiry should be whether the condition specifies how the money is to be spent or attempts to regulate an unrelated (or tenuously related) area of law.¹⁹⁹ In Justice O'Connor's opinion, "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent."²⁰⁰ The enumeration of powers given to Congress implies that there is something not enumerated. If Congress can use its extensive financial resources to influence any area of state law, it has a *de facto* ability "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."²⁰¹

The *Dole* decision has also come under attack from academics.²⁰² Scholars have argued that the states often do not have a realistic choice other than to accept the federal government's condition upon the receipt of funds.²⁰³ This lack of real choice occurs because the federal government has become richer in relation to the states; the federal tax burden has steadily increased over the last several decades.²⁰⁴ This heightened federal burden makes it more difficult for the states to raise local taxes because their constituents have less after-federal-tax income than in the

¹⁹⁸ *Id.* at 215 (O'Connor, J., dissenting).

¹⁹⁹ *Id.* (O'Connor, J., dissenting).

²⁰⁰ *Id.* at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al. at 19-20, *South Dakota v. Dole*, 483 U.S. 203 (1987) (No. 86-260)).

²⁰¹ *Id.* at 217 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

²⁰² See, e.g., McCoy & Friedman, *supra* note 169; H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 657 (1995); James V. Corbelli, Note, *Tower of Power: South Dakota v. Dole and the Strength of Spending*, 49 U. PITT. L. REV. 1097 (1988); Donald J. Mizerk, Note, *The Coercion Test and Conditional Grants to the States*, 40 VAND. L. REV. 1159, 1193-95 (1987). See generally Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72-77 (1990) (arguing that there are numerous federal attempts to coerce states with incentives which are unconstitutional).

²⁰³ McCoy & Friedman, *supra* note 169, at 86.

²⁰⁴ *Id.*

past.²⁰⁵ Therefore, the increased federal income tax in relation to the states has resulted in the states being put in a position of greater dependence on federal funds.²⁰⁶ This increasing reliance on federal moneys "invites Congress to extract concessions from the states, to require that the states accept certain 'conditions'"²⁰⁷ Because the Court in *Dole* failed to limit Congress's ability to impose conditions on states that are beyond the scope of its enumerated powers, Congress can now require that "the state impose on itself or its citizens some regulation that Congress constitutionally could not have imposed itself."²⁰⁸ This is an evisceration of the efficacy of the Tenth Amendment. Because *Dole* allows Congress to regulate whenever it can creatively adduce some tenuous relationship between the "regulation" and a grant of federal funds, the federal government is no longer effectively limited to its enumerated powers.

Moreover, the *Dole* Court failed to recognize the doctrine of "unconstitutional conditions." This doctrine has been repeatedly addressed by the Court in First Amendment cases.²⁰⁹ In these cases, the Court recognized that a congressional threat to withhold a benefit based on a person's willingness to surrender an individual right is no different than imposing a fine when the individual engages in a protected activity.²¹⁰ A person who chooses to violate a regulation and pay a fine is in the same position as a person who decides not to adhere to a condition knowing that she will have to forego the attached benefit.²¹¹ Therefore, under the doctrine of "unconstitutional conditions,"

²⁰⁵ *Id.*

²⁰⁶ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-53 (1985).

²⁰⁷ *McCoy & Friedman*, *supra* note 169, at 86.

²⁰⁸ *Id.* at 87.

²⁰⁹ See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (holding a conditional grant of federal funds to media entities which complied with statute an unconstitutional restriction on freedom of the press); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (holding conditions on unemployment compensation were a violation of First Amendment religious freedoms); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding the condition on receipt of unemployment compensation that worker be able to work Saturdays was an unconstitutional violation of Saturday Sabbatarians' freedom of religion).

²¹⁰ See *League of Women Voters*, 468 U.S. at 400; *Thomas*, 450 U.S. at 717-18; *Sherbert*, 374 U.S. at 404.

²¹¹ See *Sherbert*, 374 U.S. at 404.

Congress could not tie the receipt of welfare to the recipient's agreeing not to criticize the President, just as Congress could not fine a welfare recipient for her criticism.²¹²

Likewise, in dealing with the states, "where Congress . . . cannot impose a fine to regulate certain conduct [because the right of regulation is reserved to the states], it cannot withhold a . . . benefit for engaging in that same conduct."²¹³ The conditions placed on federal appropriations to states are "unconstitutional conditions" when the withholding of funds for failure to comply would have the same effect as fining a state if it does not agree to relinquish one of its constitutionally reserved rights. In this situation, there is no realistic difference between a federal grant, which is dependent on state compliance, and a federal fine on the state. Both present "the same governmental interference with the individual's [or state's] constitutionally protected liberty to engage in the conduct."²¹⁴

In *Dole*, Chief Justice Rehnquist tried to circumvent this argument by attempting to distinguish between conditional grants which are incentives and grants which are "so coercive as to pass the point at which 'pressure turns into compulsion.'"²¹⁵ However, this argument ignores the states' increased reliance on all funds received from the federal government discussed above.²¹⁶ Also, if the condition on the grant is an unconstitutional exercise of congressional regulation, the degree of the conditional expenditure's unconstitutionality should be irrelevant.

Prior to *Dole*, the Court addressed the Spending Clause in the context of federalism and consistently found that any difference between a conditional grant and a fine was illusory.²¹⁷ *United States v. Butler* involved a dispute over whether Congress could tax agricultural processors and use the funds as an incen-

²¹² McCoy & Friedman, *supra* note 169, at 87.

²¹³ *Id.*

²¹⁴ *Id.* at 103.

²¹⁵ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

²¹⁶ See *supra* notes 203-08.

²¹⁷ See *United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co.*, 301 U.S. at 548.

tive to producers to leave their land fallow.²¹⁸ The federal government claimed that even if this regulation was beyond its delegated regulatory powers, it was a valid exercise of Congress's power to tax and spend for the general welfare.²¹⁹ The Court disagreed, finding that the scheme went beyond Congress's power to spend.²²⁰ The Court found that instead of simply spending funds, Congress was attempting to coerce state submission to a federal program that Congress did not have the authority to impose.²²¹ The Court went on to hold that while Congress can impose restrictions on the way federal money is spent, it cannot use conditional grants to regulate.²²² Thus, *Butler* stood for the proposition that Congress cannot use a condition on a federal appropriation to achieve a regulatory goal outside its delegated powers.²²³

In the *Dole* decision, Chief Justice Rehnquist attacked the proposition in *Butler* that no conceptual difference exists between conditional grants and direct regulation.²²⁴ The majority relied heavily on *Steward Machine Co. v. Davis*²²⁵ in support of its proposition that a condition is different than a regulation as long as adherence to the condition is voluntary.²²⁶ In *Steward*, a taxpayer challenged a federal unemployment compensation statutory scheme under which taxpayers could credit payments made into the state's unemployment compensation program against their federal tax liability.²²⁷ The plaintiff paid the federal tax under protest and then sued for a refund, claiming the compensation program was an unconstitutional regulation of

²¹⁸ *Butler*, 297 U.S. at 58-59.

²¹⁹ *Id.* at 62.

²²⁰ *Id.* at 72.

²²¹ *Id.*

²²² *Id.* at 73.

²²³ *Id.* at 78. For an analysis of the limits of the precedential reliance of *Butler* unrelated to its ruling on the scope of the Spending Clause, see McCoy & Friedman, *supra* note 169, at 107-08.

²²⁴ *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). See *supra* notes 161-86 (discussing *Dole*).

²²⁵ 301 U.S. 548 (1937).

²²⁶ *Dole*, 483 U.S. at 210.

²²⁷ *Steward Machine Co.*, 301 U.S. at 574.

the states' unemployment programs.²²⁸ The *Steward* Court upheld the scheme in ruling against the taxpayer finding, *inter alia*, that the tax scheme did not result in a coercion of the states by the federal government.²²⁹ Chief Justice Rehnquist quoted from *Steward* in *Dole* in concluding that a conditional federal expenditure did not violate states' rights as long as the incentive was only a temptation and not federal coercion.²³⁰

Professors McCoy and Friedman assert that the Chief Justice's reliance on *Steward* was misguided.²³¹ Unlike *Butler* and *Dole*, the issue in *Steward* was not whether Congress could use its spending power to achieve a regulatory goal that would otherwise be beyond the ambit of its delegated powers.²³² Instead, *Steward* involved a challenge of Congress's taxing power.²³³ The taxpayer protested the payment of a federal income tax to pay for an unemployment compensation program, not a conditional tax exemption.²³⁴ Thus, the plaintiff's clearly erroneous contention was that Congress could not tax to spend money on an unemployment compensation program.²³⁵

Accordingly, Chief Justice Rehnquist misapplied dicta from *Steward* that addresses the difference between temptation and coercion to the factual situation faced in *Dole*. Additionally, and more importantly, as Professors McCoy and Friedman point out, the Court in *Steward* explicitly rejected the anticipated interpretation of its holding that the *Dole* Court reached when it stated that:

We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the

²²⁸ *Id.* at 578.

²²⁹ *Id.* at 585-91, 598.

²³⁰ *Dole*, 483 U.S. at 211 ("[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.") (quoting *Steward Machine Co.*, 301 U.S. at 589-90).

²³¹ McCoy & Friedman, *supra* note 169, at 108-09.

²³² *Id.* at 109-10.

²³³ *Id.* at 109.

²³⁴ *Id.*

²³⁵ *Id.* at 110.

adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us.²³⁶ Thus, the *Steward* decision does not stand for the proposition for which the *Dole* majority opinion cites it.²³⁷

Hence, where Congress cannot regulate directly, it should also be unable to use its purse strings to do so indirectly. The *Dole* Court "was willing to assume that Congress could not impose a minimum drinking age through the exercise of its regulatory powers, but permitted Congress to withhold benefits (highway funds) to obtain the same end."²³⁸ The *Dole* Court failed to correctly apply the settled Spending Clause precedent. Prior cases such as *Butler* and *Steward* hold that Congress cannot use a conditional grant to encourage a state to impose a regulation on itself which Congress would otherwise be powerless to invoke, regardless of whether the encouragement is seen as a temptation or coercion.²³⁹ There is no practical difference between the conditional withholding of benefits and the imposition of a fine to regulate an area of law which is beyond the scope of Congress's regulatory power. *Dole* diminishes the efficacy of the ideal that the national government is limited to its enumerated powers.

c. *Fullilove v. Klutznick*

This Comment does not suggest that all conditions placed on the receipt of federal funds go beyond the scope of the Spending Power. For instance, *Fullilove v. Klutznick* involved a challenge to a provision of the Public Works Employment Act of 1977, which made state receipt of federal public works grants conditional on an agreement by the state government to allocate at least 10% of the federal money to contracts with minority businesses.²⁴⁰ The Court ruled that the condition fell within Congress's regulatory powers under the Commerce Clause and

²³⁶ *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

²³⁷ *McCoy & Friedman*, *supra* note 169, at 112.

²³⁸ *Id.* at 104.

²³⁹ See *United States v. Butler*, 297 U.S. 1, 73 (1936); *Steward Machine Co.*, 301 U.S. at 590.

²⁴⁰ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

the Fourteenth Amendment.²⁴¹ Additionally, the Court found that the condition was legitimate under the Spending Clause because the federal government's spending powers are at least as broad as its delegated regulatory powers.²⁴²

In contrast to *Dole*, even if the provision was beyond Congress's regulatory capabilities, the conditional expenditure was constitutional. The condition in *Fullilove* did nothing more than enumerate the specifications and purposes of the expenditure.²⁴³ The provision simply ensured that the federal money would be spent for its intended purpose. Unlike *Dole*, *Fullilove* did not involve a provision attached to a grant to achieve an unrelated regulatory objective. Thus, even if the condition in *Fullilove* had not fallen within any of the federal government's enumerated powers, the provision would not have presented the Court with the unconstitutional exercise of Spending Power faced in *Dole*.

III. THE SPENDING POWER APPLIED TO MEGAN'S LAW

With the passage of Megan's Law in 1996, Congress conditioned the receipt of certain law enforcement funds on states agreeing to administer programs that would have the purpose of releasing specified information to the public.²⁴⁴ Therefore, Megan's Law falls squarely within the scope of the *Dole* analysis because, as in *Dole*, Congress is attempting to coerce state compliance with a regulatory scheme by threatening to withhold federal funds for noncompliance. Accordingly, the issue in judging the legality of Megan's Law is whether there is a sufficient connection between the condition that a state release the specified information and effective law enforcement.²⁴⁵ If the relationship is too tenuous—as the Court should have found in *Dole*—Megan's Law is not a valid exercise of congressional spending power. Instead, the condition is an unconstitutional attempt at regulation beyond Congress's delegated regulatory

²⁴¹ *Id.* at 475-78.

²⁴² *Id.* at 475.

²⁴³ See McCoy & Friedman, *supra* note 169, at 114.

²⁴⁴ 42 U.S.C. § 14071(d) (1996). See *supra* notes 58-73 and accompanying text.

²⁴⁵ *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

powers. On the other hand, if Megan's Law merely specifies the object of the federal expenditure, then the condition is incidental to Congress's spending power.

The condition on the receipt of law enforcement funds included in Megan's Law falls in between the condition that should have been found unconstitutional in *Dole* and the legitimate expenditure specifications in *Fullilove*. The condition Congress imposed on the states with the passage of Megan's Law specifies how some of the federal money is to be spent by local law enforcement agencies—to release information pertaining to sex offenders necessary to protect the public.²⁴⁶ If this is all the amendment does, then the condition is clearly within the congressional spending power.

However, if the release of this type of information is not a task which is traditionally performed by law enforcement, then the requirement may be too tenuously related to the purpose of a law enforcement grant. This is especially true since the amendment coerces a state agency to perform a certain function. Because the government requires the state agency to take action, it is a regulation of the states *qua* states.²⁴⁷ This is in contrast to *Dole*, which was a regulation of the states' citizens, not the states themselves.²⁴⁸ When the state itself is being regulated, the nexus between the condition and the grant must be closer or the condition will constitute an impermissible federal regulation.²⁴⁹

For instance, if Congress required local police agencies to clear paths in federal forests for the state to receive federal law enforcement funds, the Court would almost certainly find the condition to be an unconstitutional federal regulation. This is true even though the statute appears to do nothing more than specify how the funds are to be used. Otherwise, Congress could regulate the administration of state agencies with federal

²⁴⁶ 42 U.S.C. § 14071 (1996).

²⁴⁷ See *supra* notes 136, 139, 148-51 and accompanying text, for an analysis of *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-87 (1981) and *New York v. United States*, 505 U.S. 144 (1992) (addressing difference between federal regulation of individuals and federal regulation of states).

²⁴⁸ *Dole*, 483 U.S. at 203.

²⁴⁹ *New York*, 505 U.S. at 167.

enticements wholly unrelated to the purpose of the expenditure.

Hence, the issue here becomes whether the release of information is sufficiently related to the functions of law enforcement to justify the condition imposed on the federal funds. The release of information to the public pertaining to sex offenders is not something that law enforcement agencies traditionally have done. On the contrary, this is a very new concept, beginning only recently with the passage of the state version of Megan's Law in Washington and New Jersey.²⁵⁰

State agencies, though, do frequently compile and retain information pertaining to convicted offenders.²⁵¹ Additionally, police often make information available to the public when doing so would aid in the apprehension of a suspect.²⁵² Common examples include the use of wanted posters and television shows such as *America's Most Wanted* to track suspected criminals.²⁵³

However, these actions all relate to police activities that take place after a crime already has occurred. They relate to the traditional law enforcement goal of apprehension of the criminal suspect. In contrast, Megan's Law is ostensibly the first attempt at releasing information about persons who might commit a criminal act in the future.

Nevertheless, the fact that Megan's Law coerces the police to do something that they have not done before does not mean that the release of this information is unrelated to traditional police functions. Deterrence is as traditional a function of law enforcement as apprehension of criminal suspects.²⁵⁴ Additionally, even if this type of deterrence has not been a method tradi-

²⁵⁰ See *supra* text accompanying note 31.

²⁵¹ See *United States v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 759 n.10 (1989) (Attorney General has duty to compile information regarding convicted criminals for use by state and federal agencies); Feldman, *supra* note 40, at 1112 (government agencies such as Office of Court Administration retain criminal record information).

²⁵² See Brief on Behalf of the Public Defender, *Amicus Curiae*, *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), reprinted in 6 B.U. PUB. INT. L.J. 75, 96 (1996).

²⁵³ See Feldman, *supra* note 40, at 1096.

²⁵⁴ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1008 (1991) (Kennedy, J., concurring); *Vera Cruz v. Escondido*, 126 F.3d 1214, 1216 (9th Cir. 1997) (stating that deterrence is one of the primary purposes of criminal law).

tionally utilized by the police, law enforcement agencies must have the flexibility necessary to be effective. Police agencies must be allowed to modernize with advances in technology, criminology, forensic science, and police techniques to adapt to changes in societal behavior.

The apparent goal in releasing the disputed information to the community is the prevention of crime. Crimes can be prevented by deterring potential criminals or by educating potential victims on how to protect themselves. Thus, the 1996 Amendment to Megan's Law falls within this function of law enforcement. There is a reasonable relationship between the release of information condition in Megan's Law and the statutory purpose of law enforcement. Therefore, the federal government had jurisdiction under the Spending Clause to enact the 1996 version of Megan's Law.

However, even if Congress *can* pass legislation such as Megan's Law, this does not necessarily mean that it *should*. In contrast to the inquiry regarding whether Congress has jurisdiction to enact certain legislation, federal interest analysis asks whether Congress should involve itself in certain matters.²⁵⁵ Thus, demonstrating this nexus should not conclude our analysis because establishing jurisdiction does not necessarily indicate a federal interest. Without a federal interest, Congress should not promulgate federal criminal legislation simply because it can. Accordingly, we must ask what the federal government's interest is in involving itself in criminal law matters traditionally handled by the states.

Congress certainly has a general interest in preventing crime, especially crimes against children. However, the states also have a strong incentive to prevent repeat sex crimes. Because the states have an incentive to regulate child sex offenders, there is no reason to believe that the states will fail to responsibly address the problem in the absence of congressional action.

²⁵⁵ See Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1130 (1997).

Furthermore, in many ways, the states are best suited to develop the solution that is locally most appropriate.²⁵⁶ The Supreme Court repeatedly has noted that primary responsibility for defining and enforcing criminal law lies with the states.²⁵⁷ Since most crimes, including sex offenses, directly threaten the neighborhood in which the crime occurs, local government has a more immediate and significant interest in regulating conduct it finds to be criminal than the federal government's general interest in preventing crime.²⁵⁸

In addition, state laws are drafted by legislators who are in closer contact with the local community than members of Congress. Hence, it is more likely in most situations that state laws which are not distorted by the influence of the federal bank-roll will more accurately reflect goals and values of the community. Federal funding invariably alters the standards states may have otherwise set for themselves in determining how to address the problem of repeat sex offenders.

Additionally, federal enticement of states is inefficient because it pushes the states toward uniformity. Without this influence, states are more readily able to implement a variety of regulatory schemes which provides citizens with a choice. If we think of citizens as "consumers" of government services, then variety among the states increases the value of government to citizens by providing them with a choice of which state government's bundle of "products" to consume (by choosing that state as the state in which to reside). Citizens can "shop around" and choose the state in which the state government's use of limited resources closely matches the citizen's priorities.²⁵⁹

²⁵⁶ See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In *Defense of* *United States v. Lopez*, 94 MICH. L. REV. 752, 775-79 (1995).

²⁵⁷ See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993))); *United States v. Rewis*, 401 U.S. 808, 812 (1971).

²⁵⁸ *Lopez*, 514 U.S. at 581-83 (Kennedy, J., concurring).

²⁵⁹ See Calabresi, *supra* note 256. Professor Calabresi refers to this argument as the Tiebout Model and states: "[s]ocial welfare can be maximized by allowing citizens to choose from among a number of jurisdictions, each of which provides a different bundle of public goods." *Id.* at 775 (quoting Jacques LaBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 560

An additional disadvantage to federal commandeering of state law-making decisions is that the benefits of decentralization are allayed. When states are left to their own accord in deciding how best to handle a legal problem, they serve a valuable function of acting as legislative laboratories.²⁶⁰ The different states can experiment with various solutions to a national problem at the local level. If one solution proves especially effective, it can be copied by other jurisdictions. Federal funding mitigates this advantage by forcing uniformity.

Finally, considerations of efficiency favor granting the power to oversee the bulk of criminal law to the states.²⁶¹ States have the greatest knowledge of what local resources are available and how they should best be utilized. For instance, a state could agree that notification is beneficial, but that the benefit is outweighed by the cost of administering a notification program. The state could accordingly conclude that its law enforcement funds would be better spent in some other manner.²⁶²

For all the above reasons, the states' interest in deterring future repeat sex offenders is stronger than Congress's general interest in preventing crime. Therefore, if Congress is to invoke its powers under the Spending Clause to influence the manner in which states administer their criminal justice system, it should have an interest sufficiently compelling to override the benefits of leaving Megan's Law-type statutes to the states. Otherwise, it should not legislate simply because it can.

(1994)). This argument makes the dual assumptions that individuals have perfect information regarding the differences between the states, and that individuals are able to freely move to the most desirable state. However, even if these assumptions are not applicable to all people, efficiency will still be increased if the assumptions apply at least to some people. While the entire population may not benefit from the choice, at least some citizens probably will. These citizens will go to the state best suited for them and overall efficiency will be greater than if no citizens have this choice.

²⁶⁰ See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"); *United States v. Virginia*, 116 S. Ct. 2264, 2307 (1996) (Scalia, J., dissenting).

²⁶¹ See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 994 (1995) (factors such as knowledge of local police and state interests in local prisons allow state agencies to enforce criminal law more efficiently).

²⁶² For a more thorough treatment of this argument, see *infra* Part IV.

For instance, Congress could potentially have a federal interest in promoting uniform administration and enforcement of the notification provisions.²⁶³ If notification provisions are not uniform, released sex offenders are more likely to move to jurisdictions that are more "offender-friendly."²⁶⁴ When offenders move, they are more difficult to track and the benefits of registration are lessened.²⁶⁵

While uniformity seems like a legitimate justification, it lacks a foundation in reality. It is extremely unlikely that any state will willingly choose to be known as the national safe haven for child sex offenders. This is not the kind of situation where there will be a "race to the bottom."²⁶⁶ Additionally, in the unlikely event that a state should choose to forego community notification, Congress should not deter it from enacting its own solution to local problems. As Justice Brandeis said in an oft-quoted dissent, it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."²⁶⁷ Thus, fears that a lack of uniformity will substantially hinder national law enforcement efforts are largely vacuous, and are certainly outweighed by the state's interests in regulating crime.

An alternative justification for federal involvement in Megan's Law is that some states who want to implement a system of

²⁶³ See Tom Stony & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 302 (1997) (advocating uniformity as a justification for federal involvement).

²⁶⁴ Hampson, *supra* note 113, at A2.

²⁶⁵ Offender compliance with registration requirements goes down when offenders move to another state for two reasons. First, offenders may either not know they have a duty to re-register or may not know how to register in their new state. Second, prosecution for failure to register becomes more difficult when offenders move around because prosecutors are often unable to confirm whether the person still resides within the state. See Earl-Hubbard, *supra* note 39, at 791, 853.

²⁶⁶ The race to the bottom theory says that, in certain situations, states will have an incentive to regulate less than other states, often to minimize governmental costs for its citizens. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 408 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

²⁶⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

registration and notification may lack sufficient resources to do so. In those cases, federal funding that allows the states to protect their interests would be appropriate. However, the states' potential need for federal assistance does not justify the attachment of conditions on the receipt of those funds. If Congress's goal is simply to assist, it should not dabble in legislation by imposing conditions on its willingness to help.

Because the federal government's concern in preventing sex crimes against juveniles is considerably less substantial than the states, Congress should not continue to burden the states with restrictions on the use of available law enforcement funds. The obvious retort to this argument is that the very purpose of the Spending Power is to allow Congress to spend funds as it sees fit.²⁶⁸ This is true where a federal interest is implicated. For instance, when Congress is giving the states federal funds to build federal interstate highways, it should be allowed to set guidelines regarding construction standards.²⁶⁹ In contrast, where the federal government's interest is indirect, it should not throw its financial muscle into the realm of criminal laws historically defined and administered by the states simply because the *Dole* precedent says that it can. To do so distorts the states' right in our federalist system to determine what is "criminal" and how to deal with criminality according to local morals and customs.²⁷⁰

IV. PRACTICAL APPLICATION

On a final note, as a practical matter, it is worth considering whether the states have any real reason not to comply with Megan's Law, even if it infringes upon their reserved rights. If not,

²⁶⁸ See *supra* notes 154-57, 170-73.

²⁶⁹ See *supra* note 158.

²⁷⁰ For an argument that federal involvement in this area of law is justifiable, see Stony & Dayton, *supra* note 263, at 300-02. Professors Stony and Dayton argue that the negative impact federal involvement has on state diversity and experimentation is overblown because of the apparent nationwide support for anti-sex offender laws. *Id.* at 301. This argument misses the point. While everyone likely agrees that these crimes present a problem that must be addressed, states potentially disagree on the best way to address it. The federal law coerces states to all go down the same path, thereby lessening the benefits that normally inhere in leaving such decisions to the states.

a constitutional dispute may never arise, and this Comment may be nothing more than a purely academic inquiry. After all, by the time Congress passed the 1996 Amendment, nearly all of the states had already enacted some version of Megan's Law into their state ordinances.²⁷¹ If the federal law is simply redundant, then the 1996 Amendment could be viewed as nothing more than the condition-free appropriation of federal funds.

However, it is not a foregone conclusion that every state is in agreement regarding community notification. Seven states which presently require sex offenders to register with law enforcement agencies do not allow for the release of this information to the public.²⁷² The reasons these states may have elected not to release this information are understandable. First, as hard as it is to be sympathetic to sex offenders, their rights cannot be wantonly violated because of the distasteful nature of their crimes. A state legislature might therefore decide that once persons have served their time for the commission of a crime, their debt to society must end. While the mandatory registration may be purely regulatory, a state government could decide that the release of the information is excessively punitive.²⁷³

Second, the release of information can be expensive to administer. States must be allowed to prioritize their objectives and plan a state budget accordingly. Since a crime has its greatest impact on the state in which it is committed, a state should be able to conclude that the release of information pertaining to sex offenders is not worth the opportunity cost of foregoing other law enforcement efforts without forfeiting a part of its share of federal funds. For instance, a state should be able to decide that, while community notification is important, it has a more pressing need for new patrol cars or new officers to fight narcotics distribution. Narcotics may simply be a greater problem locally than repeat sex offenses. A state that did not want to use a portion of its federal money to set up a notification

²⁷¹ See 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statements of Rep. McCollum). For a list of current state statutes, see *supra* note 32.

²⁷² See *supra* note 37.

²⁷³ See *supra* notes 83-86 (analysis of unconstitutionality of release of information provisions).

scheme could argue that a federal expenditure on a uniform sex offender program is not an exercise of the spending power "in pursuit of 'the general welfare.'"²⁷⁴

While this claim is colorable, its chances of success in court are slim. First, courts "defer substantially to the judgment of Congress" in determining whether an expenditure is for the general welfare.²⁷⁵ Second, the statutory language of Megan's Law is ambiguous and leaves the states with substantial discretion in determining how to administer their local notification program. The amended Megan's Law statute says that state police agencies shall release information "necessary to protect the public."²⁷⁶ Thus, the statute arguably gives the states broad discretion in determining what information they must release to protect the public, if any. On the other hand, since the phraseology is ambiguous, a state and the federal government could disagree on whether the state is complying with the mandate that it release a sufficient amount of information. If the federal government decides to withhold federal funds for lack of compliance, the state would almost certainly bring a constitutional challenge to the 1996 Amendment. Thus, the inquiry into whether the federal version of Megan's Law is constitutional is not just an academic exercise.

V. CONCLUSION

Although the Court erred in finding a sufficient connection between a minimum drinking age and highway money in *South Dakota v. Dole*, the requisite nexus is present in the 1996 Amendment to Megan's Law. Police agencies frequently compile and retain information pertaining to convicted offenders. Additionally, police often make information available to the public when doing so would aid in the apprehension of a suspect. Perhaps most common is the use of wanted posters to track suspected criminals. The 1996 Amendment does little more than specify how the federal government wants states to use a small portion of federal law enforcement funds in the pur-

²⁷⁴ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

²⁷⁵ *Id.*

²⁷⁶ 42 U.S.C. § 14071(d) (1996).

suit of law enforcement. Since conditions which specify the intended use of the federal money are incident to Congress's spending power,²⁷⁷ the 1996 Amendment falls within the federal government's rights under the Spending Clause.

Nevertheless, Congress has invaded the province of the states without considering whether it should have done so. Although the federal government understandably shares an interest with the states in combating the problem of sex offenses against children, it should leave the resolution of this problem to the states. The federal government's concern is neither as immediate or direct as the interest of local communities in protecting their children. If Congress wants to help in the fight against sex crimes against juveniles, it should contribute funds without conditions that distort the states' ability to decide for themselves how to create the best solution. By attaching conditions that are not related to a direct federal interest, Congress has warped the balance found in our federal system and lessened the benefits that inhere in having states determine how to administer their criminal justice systems.

²⁷⁷ *Dole*, 483 U.S. at 206.