USING THE SPENDING POWER TO CIRCUMVENT *CITY OF BOERNE V. FLORES*: WHY THE COURT SHOULD REQUIRE CONSTITUTIONAL CONSISTENCY IN ITS UNCONSTITUTIONAL CONDITIONS ANALYSIS

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Congress's broad Spending Clause powers have the potential to circumvent federalism-based limitations on its other enumerated powers by requiring state complicity in federal schemes. When these schemes encroach on individual rights, the states' ability to fulfill their federalist mandate to act as a check on the national government is limited. In this Note, Brett Proctor uses the example of the Religious Liberty Protection Act of 1999, which would rely on the spending power to rehabilitate the Religious Freedom Restoration Act of 1993, to illustrate this danger. Proctor argues that the Supreme Court should prohibit indirect federal encroachments on rights and liberties, but that current spending power doctrine is unable to restrict some of these encroachments in light of judicial deference—deference based on countermajoritarian concerns—to legislative interpretations of the Constitution. Proctor suggests that the countermajoritarian difficulty dissipates in the context of conditional grants to states. He thus proposes a new, supplemental test that would deny Congress the power to compel state behavior via a conditional grant where such state behavior conflicts with an equality- or liberty-bearing provision of the Constitution, even if the state constitutionally could behave as Congress demands were it acting fully of its own volition.

INTRODUCTION

Congress's power to condition its discretionary allocations of funds is remarkably broad: No federal appropriations program has been invalidated by the Supreme Court on federalism-based grounds since 1936.[1] Because of this historical trend, the spending power has

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[1] See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1417 (1989); cf. U.S. Const. art. I, § 8, cl. 1 (constitutional source of spending power); United States v. Butler, 297 U.S. 1 (1936) (last case to strike down conditional grant-in-aid on federalism grounds). Programs that infringe on fundamental liberties, such as First Amendment rights, are treated somewhat differently. See, e.g., FCC v. League of Women Voters, 468 U.S. 364 (1984) (invalidating proscription of "editorializing" by noncommercial

been invoked repeatedly in recent years as the clearest, and perhaps only, tool with which Congress might circumvent the Supreme Court's apparent willingness to enforce federalism-based constitutional norms.[2] President Clinton, for example, suggested that the Gun-Free School Zones Act of 1990[3] might be resurrected by conditioning federal grants to states on their enactment of similar provisions.[4] Justice O'Connor noted that the Brady Act,[5] invalidated in part in *Printz v. United States*,[6] may be saved by conditioning federal grants on state compliance.[7] Speaking for the Court in *New York v. United States*,[8] Justice O'Connor had earlier noted that Congress's power to condition appropriations represents one method, "short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests."[9]

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educational stations that receive grants from Corporation for Public Broadcasting); infra note 32 and accompanying text.

[2] See, e.g., Julian Epstein, Evolving Spheres of Federalism After *U.S. v. Lopez* and Other Cases, 34 Harv. J. on Legis. 525, 553 (1997) ("The Spending Clause is perhaps the clearest method of avoiding constitutional challenges to congressional acts under the Commerce Clause or Tenth Amendment." (footnotes omitted)); Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85, 116 ("[A]ny time that Congress finds itself limited by [its] delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective."). The Supreme Court's recent stance on judicial enforcement of federalism-based constitutional norms represents a stark change of course. Compare Alden v. Maine, 119 S. Ct. 2240 (1999) (holding state not subject to suit by private plaintiff in its own courts under Fair Labor Standards Act), Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not commandeer state officers for federal regulatory purposes), Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that abrogation of states' Eleventh Amendment immunity exceeds Congress's authority under Commerce Clause), United States v. Lopez, 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act of 1990 exceeds Congress's Commerce Clause authority), and New York v. United States, 505 U.S. 144, 188 (1992) (holding that federal government "may not compel the states to enact or administer a federal regulatory program"), with Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550, 552 (1985):

> [T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself . . . . State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

[3] Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (1990) (codified at 18 U.S.C. §§ 921-922, 924 (1994)). The Act was invalidated by the Court in *Lopez*, 514 U.S. 549.

[4] See Todd S. Purdum, Clinton Seeks Way to Retain Gun Ban in School Zones, N.Y. Times, Apr. 30, 1995, at A1.

[5] Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921, 922, 924, 925A (1994).

[6] 521 U.S. 898 (1997).

[7] See id. at 936 (O'Connor, J., concurring) ("Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes . . . .").

[8] 505 U.S. 144 (1992).

[9] Id. at 166.

Similarly, several scholars have advocated that Congress use its spending power to expand the scope of congressional civil rights enforcement power. More specifically, they have suggested that Congress might employ the Spending Clause to achieve the objectives of the Religious Freedom Restoration Act of 1993 (RFRA)[10] that were partly frustrated by the Court in *City of Boerne v. Flores*.[11] Congress

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[10] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). The Religious Freedom Restoration Act (RFRA) provides in part:

> Free exercise of religion protected
>
> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1.

[11] 521 U.S. 507 (1997) (invalidating RFRA as applied to states). See, e.g., Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 81 (1997) [hereinafter House Hearings] (testimony of Thomas C. Berg) ("One trigger for a new version of RFRA would be to rely on the Spending Power and make compliance with the compelling interest test a condition on federal funding of state or local government programs." (footnote omitted)); Daniel O. Conkle, Congressional Alternatives in the Wake of *City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement, 20 U. Ark. Little Rock L.J. 633, 668 (1998) (suggesting that "Congress might be able to impose conditions on the receipt of federal funding by state and local governments, thereby inducing—but not directly requiring—those governments to honor RFRA-like standards in protecting religious conduct even from general laws and practices").

The *Boerne* decision represents but one chapter in a saga. Prior to 1990, the Court interpreted the Free Exercise Clause of the First Amendment presumptively to invalidate, as applied, all state laws that substantially burdened religious exercise, subject to a "compelling state interest" test for approval. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963). This standard may have been a mere rhetorical device, however. See Christopher L. Eisgruber & Lawrence G. Sager, Congressional Power and Religious Liberty After City of Boerne v. Flores, 1997 Sup. Ct. Rev. 79, 79-80 ("*Sherbert*'s fierce invocation of the compelling state interest test was never reflected in practice: in only four cases after *Sherbert* did the Supreme Court find that religious believers were entitled to exemptions, and three of those were minor variations on *Sherbert* itself . . . .").

The Court withdrew even its nominal support for the test in *Employment Division, Department of Human Resources v. Smith* by holding laws of general applicability that do not specifically target burdened religious practices to be constitutionally benign. 494 U.S. 872, 890 (1990). An aghast Congress responded with RFRA, which the Senate passed by a margin of 97-3. See 139 Cong. Rec. S14,471 (1993). President Clinton praised the Act while signing it into law, stating that "[t]he power to reverse . . . by legislation, a decision of the United States Supreme Court" is both "extraordinary" and "called for." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000 (Nov. 16, 1993). But the Court would not be outdone; in *Boerne*, it struck down RFRA as applied to the states: "Broad as the power of Congress is under the Enforcement Clause of the Four-

is considering their proposals as it debates the Religious Liberty Protection Act of 1999 (RLPA),[12] which the House has already passed.[13]

RLPA represents an extraordinary use of the spending power. Assuming state governments[14] will not reject federal assistance in order to avoid its conditions,[15] RLPA functionally reenacts RFRA under a new name.[16] Nonetheless, many scholars deem its spending

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teenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." 521 U.S. at 536.

12 H.R. 1691, 106th Cong. (1999). The Religious Liberty Protection Act (RLPA) provides in part:

> (a) GENERAL RULE.—Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise—
>
> (1) in a program or activity, operated by a government, that receives Federal financial assistance;
>
> . . . .
>
> (b) EXCEPTION.—A government may substantially burden a person's religious exercise if the government demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2(a)-(b). The bill also purports to restrict state burdens on religious exercise using Congress's Commerce Clause powers, see id. § 2(a)(2), presenting issues that have received significant scholarly attention. Compare Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary, 105th Cong. 90 (1998) [hereinafter Senate Hearings] (testimony of Michael W. McConnell) ("The bill['s provision to regulate commerce] is in no wise contrary to *United States v. Lopez* . . . ."), with id. at 83 (testimony of Christopher L. Eisgruber) ("[The provision is] flatly inconsistent with [*Lopez*] . . . ."). Issues implicated in this regard are beyond the scope of this Note, and, accordingly, subsequent references to RLPA refer exclusively to the bill's spending provisions.

RLPA was first considered in 1998. See H.R. 4019, 105th Cong. (1998). While the 1998 version—which was substantially the same as the RLPA currently under consideration—received considerable support, it was not enacted.

13 See 145 Cong. Rec. H5608 (daily ed. July 15, 1999) (roll call vote). The Senate received the bill as reported in the House on July 16, 1999, and referred it to its Committee on the Judiciary on November 19, 1999. It has not taken any further action on the bill to date. See Thomas: Legislative Information on the Internet (visited Feb. 29, 2000) <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HRO1691:@@@L&summ2=M&>.

There is a substantial likelihood that Congress will not enact RLPA this term. However, RLPA's prospects are largely irrelevant to this Note, inasmuch as this Note uses RLPA merely as evidence of the need for the requirement of constitutional consistency proffered in Part III. Whether RLPA will pass or falter does not affect its evidentiary value.

14 The term "state" is used here and henceforth for simplicity, but the argument applies to grants to all nonfederal governments.

15 See infra Part III.B.

16 RLPA's strictures would apply to any program or activity operated by a nonfederal government that receives federal aid. See H.R. 1691 § 2(a)(1). State burdens on religious exercise that are unrelated to a program receiving federal aid would not be subject to RLPA's strictures.

provisions to be constitutionally irreproachable.[17] Their argument is simple: RLPA is modeled precisely after other cross-cutting[18] nondiscrimination conditions that attach to federal appropriations, including Title VI of the Civil Rights Act of 1964.[19] Hence, the argument goes, if RLPA is invalid, so too are many other great landmarks of civil rights legislation.[20]

This Note evaluates the validity of that argument, focusing not on RLPA itself but rather on the Spending Clause issues presented by RLPA. It is true that RLPA shares a common structure with Title VI,[21] but this alone should not place courts between the rock of ac-

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17 See, e.g., Senate Hearings, supra note 12, at 90 (testimony of Michael W. McConnell) ("Section 2(a)(1) of the bill [the condition on appropriations] is an utterly routine exercise of authority under the Spending Power."); id. at 53 (testimony of Douglas Laycock) ("I am confident that § 2(a)(1) is constitutional.").

18 "Cross-cutting" conditions are those that attach broadly to all or almost all federal appropriations to states. See Richard B. Cappalli, Federal Grants and Cooperative Agreements § 8:35, at 138 (1991).

19 See, e.g., 145 Cong. Rec. H5584 (daily ed. July 15, 1999) (statement of Rep. Canady) ("We use the Spending Clause in [RLPA] to protect against the infringement of religious freedom. That same power is used once again in the 1964 Civil Rights Act under title VI of that Act . . . ."); cf. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

There are several statutes that mirror Title VI in this regard. See, e.g., Education Amendments of 1972, tit. IX, 20 U.S.C. § 1681 (1994) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1999) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."); Age Discrimination in Employment Act of 1975, tit. III, 42 U.S.C. § 6102 (1994) ("[N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."). Analogical arguments in this Note typically contrast RLPA with Title VI to promote simplicity, and because this is the comparison that is made most often.

20 See, e.g., Senate Hearings, supra note 12, at 53 (testimony of Douglas Laycock) ("Ensuring that the federal funds not be spent in ways that unnecessarily burden religious exercise is directly analogous to ensuring that federal funds not be spent in ways that discriminate[ ] on the basis of race."); House Hearings, supra note 11, at 82 (testimony of Thomas C. Berg) ("[I]f the Court wanted to strike down a revised RFRA, [similar to RLPA,] it would have to worry about the ramifications for established civil rights laws.").

21 The term "common structure" refers here to the fact that both are cross-cutting conditions, see supra note 18, that wave the flag of equal treatment. Generally, this Note's analysis and proposal are intended to apply to all conditional grant programs that functionally impose requirements on states. This set would probably include all cross-cutting conditions. See infra Part III.B.

cepting RLPA's validity[22] and the hard place of endangering historic civil rights legislation. While Title VI serves only to extend constitutional norms to private actors that receive federal aid,[23] RLPA attempts to alter indirectly the substantive scope of the constitutional norms themselves, requiring behavior that conflicts with the normative thrust of the liberty- and equality-bearing provisions of the Constitution.[24] The Spending Clause should not be construed to empower Congress functionally to impose on states conditions that require behavior that encroaches on constitutionally protected liberties.[25]

Unfortunately, while Congress should not be afforded such power, the Court's Spending Clause doctrine is incapable of denying it. RLPA's proponents are correct: Current doctrine cannot distinguish Title VI from structurally similar legislation that should be disallowed.[26] Some tool must be fashioned that will enable the Court to distinguish conditional grants to states that infringe on constitutionally protected rights from those that are constitutionally benign. This Note proposes a two-part test to this end. The Court should invalidate any federal conditional grant program that, first, leaves state-re-

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22 Many scholars have expressed their distaste for RFRA's and, by extension, RLPA's substantive effects. See, e.g., Eisgruber & Sager, supra note 11, at 83 ("RFRA privileged religious believers in a way that was both normatively unattractive and practically unworkable."); Marci A. Hamilton, The Constitutional Rhetoric of Religion, 20 U. Ark. Little Rock L.J. 619, 627 (1998) ("RFRA's standard runs the risk of either marginalizing religion or masking its true power to the detriment of society.").

The compelling state interest test is inapposite to burdens on religious exercise stemming from neutral, generally applicable laws. While such a standard would expand the rights of the religious, it would at the same time contract those of the nonreligious whenever the two conflict. Thus, if a religious adherent wants to discriminate against gays and lesbians, RLPA arguably will permit her to do so. See 145 Cong. Rec. H5595 (daily ed. July 15, 1999) (statement of Rep. Kennedy) ("Let us make no mistake about it, the right wing of the Republican party is against gays and lesbians .... So they feel that if one has in their religion a belief that gays and lesbians would be damned by God, then you should be able to discriminate against them."). Indeed, RLPA would endanger the enforceability of numerous civil rights laws. See Letter from NAACP Legal Defense & Education Fund, Inc. to Congressman John Conyers, Jr., reprinted in 145 Cong. Rec. H5590 (daily ed. July 15, 1999). It would, in brief, create a near-absolute defense that "[m]y religion made me do it." 145 Cong. Rec. H5584 (daily ed. July 15, 1999) (statement of Rep. Conyers). For an elaboration of the argument against RLPA, see infra Part II.B.

23 See infra note 105.

24 See infra Part II.B (discussing RLPA's substance).

25 The conditions that this Note targets do not necessarily require behavior that would be held by the Supreme Court to violate the liberty- and equality-bearing provisions of the Constitution, but they do require behavior that conflicts with the substantive norms that inhere in these provisions, behavior that falls within a penumbral region where governmental activity is constitutional but barely so and only so because of judicial deference to legislative decisionmaking. That is, they require behavior that conflicts with underenforced constitutional norms. See infra Part II.C (explaining underenforcement and its application to conditional grant programs).

26 See infra Part II.A.

cipients functionally unable to resist acceptance of the grant terms and, second, requires the states to encroach on constitutionally protected liberties in ways the federal government could not directly mandate. This test is intended to supplement, not supplant, the Court's current criteria of validity for Spending Clause legislation.

Part I begins by offering a set of theoretical foundations that should motivate spending power theory and then sets forth existing Spending Clause doctrine. Part II applies this doctrine to Title VI and RLPA, highlighting the similar fate each condition faces, argues that the doctrinal requirements are deficient for their inability to distinguish between the various conditions that share Title VI's structure (some of which should be invalidated in light of the theoretical premises advanced in Part I), and discusses the scope of the deficiency. Part III articulates the proposed supplemental test for conditional grants to states, a test that addresses the existing doctrine's deficiency, carving a small but important exception from Congress's vast spending power.

I
FEDERALISM AND SPENDING CLAUSE DOCTRINE

The Spending Clause vests in Congress the power to allocate moneys for the "general Welfare."[27] Normally, Congress is empowered to attach conditions to its allocation of funds as well.[28] The perennial rationale for this practice is that the "greater power" to deny the benefit of federal aid in the first place implies, a fortiori, the "lesser power" to allocate funds conditionally.[29] If the recipient of a proposal does not want to accept the conditions, it may simply reject the funds altogether; it may refuse the terms of the contract.[30]

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[27] U.S. Const. art. I, § 8, cl. 1.

[28] See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (permitting federal government to deny to programs that advocate abortion as method of family planning benefits to which they otherwise would be entitled); South Dakota v. Dole, 483 U.S. 203 (1987) (upholding congressional power to condition federal aid to state transportation authorities on state enactment of specific legislation).

[29] See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999) ("Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts."). Justice Holmes was an early advocate of this argument, and Chief Justice Rehnquist's views, exemplified by his opinion for the majority in *Dole*, stem from those of Justice Holmes. See Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1299 (1984) (noting evolution of greater-implies-lesser argument).

[30] The metaphor of a contractual relationship between grantor and grantee (the federal government and the individual states, in the case of Title VI and RLPA) to which the grantee willingly consents pervades spending power doctrine. See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the

Despite the intuitive appeal of the greater-implies-lesser argument, some conditions may not be imposed regardless of the recipient's "consent"; that is, some conditions are unconstitutional.[31] The doctrine of unconstitutional conditions has two principal categories of application. First, a condition attached to either a federal or state allocation to an individual or firm may be unconstitutional because it directly violates a constitutional right.[32] Second, a federal program of conditional grants-in-aid to states may be unconstitutional, at least in theory, because it disrupts the proper federal balance.[33] This Note addresses only the latter category.

Certain conditional grant programs are not subject to unconstitutional conditions analysis, however, because they are a priori valid: When the requirements of the condition could be directly commanded by Congress, the lesser power to induce cooperation of the states by using the "carrot" of federal funds is included in the greater.[34] Therefore, this Note is concerned only with conditions, such as RLPA, that

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spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

31 Scholars have argued persuasively that the power to condition appropriations does not follow syllogistically from the power categorically to refuse appropriations. See, e.g., Kreimer, supra note 29, at 1310-11 & n.54 ("All that can be deduced logically from the power to deny a benefit absolutely is the power to deny it absolutely."). See generally Brooks R. Fudenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 UCLA L. Rev. 371 (1995).

32 See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that selective exemption of magazines from taxation based on content violates First Amendment); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that denial of unemployment benefits because of unemployed's unwillingness to work on Sabbath violates Free Exercise Clause).

33 See *Dole*, 483 U.S. at 207 (noting that "[t]he spending power is of course not unlimited" while adjudicating condition that required specific state legislation, thereby potentially disrupting federal balance); infra note 38.

34 See *Dole*, 483 U.S. at 206 (suggesting that, if Congress could directly enact national minimum drinking age, "it would follow *a fortiori* that the indirect inducement involved here is" valid); id. at 217 (O'Connor, J., dissenting) (citing conditions that were acceptable because of independent regulatory authority); see also Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1257 (1977) ("[I]n cases where Congress has authority to mandate state initiatives under [for example] its commerce power . . . , *all* federal grants to a state could, in theory, be terminated if the state failed to carry out the federal demands."). But see Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103, 1141 (1987) (arguing that internal constraints on congressional behavior, i.e. state political influences, may serve to limit onerous direct regulations, but "the same process may not work effectively to forestall similar interference through coercive conditions" because states "may not find it politically expedient to dilute their efforts to obtain . . . funds by simultaneously campaigning against the conditions").

may not be imposed directly by Congress via an independent enumerated power.[35]

A. *Federalism-Based Restrictions*

The Court has not invalidated a conditional spending program in service of federalism since the New Deal revolution of 1936 to 1938.[36] At the same time, it has consistently asserted the existence of judicially enforceable limitations on Congress's power to spend.[37] The difficulty that spending power theory faces is to develop doctrinal limitations that can be applied in a principled way to serve the goals of our federal system.[38] Put most generally, this problem instantiates a conspicuous complication presented by our federal system: "[O]ur Constitution only authorizes certain enumerated powers for the national government, but also authorizes some enumerated powers that

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[35] *Boerne* held that Congress's Fourteenth Amendment enforcement power does not include the power to impose RFRA's (and hence RLPA's) strictures on the states. See 521 U.S. 507, 516-29, 536 (1997).

[36] The last case to so invalidate a program was United States v. Butler, 297 U.S. 1 (1936).

[37] See, e.g., *Dole*, 483 U.S. at 207 ("The spending power is of course not unlimited, . . . but is instead subject to several general restrictions . . . ."); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981) ("There are limits on the power of Congress to impose conditions on the States pursuant to its spending power.").

[38] See New York v. United States, 505 U.S. 144, 167 (1992) (noting that conditions in spending programs must comport with certain doctrinal requirements lest "the spending power . . . render academic the Constitution's other grants and limits of federal authority"); Lynn A. Baker, Conditional Federal Spending After *Lopez*, 95 Colum. L. Rev. 1911, 1920 (1995) (stating that:

> The problem, in brief, is to find a principled way to distinguish and invalidate those conditional offers of federal funds to the states that threaten to render meaningless the Tenth Amendment's notion of a federal government of limited powers, while simultaneously affording Congress a power to spend for the "general Welfare" that is greater than its power directly to regulate the states.);

Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 43, 46-47 (1988) ("The doctrine of unconstitutional conditions is the necessary counterweight to the federal government's exercise of its monopoly power . . . . [T]he relevant question is . . . the proper demarcation of the division of powers between separate sovereigns."); Stewart, supra note 34, at 1261 (arguing that expansive spending power "would permit federal control of almost any state or local governmental activity . . . producing a virtually limitless power in a national government of limited powers"); see also Nevada v. Skinner, 884 F.2d 445, 449 (9th Cir. 1989) ("The [coercion] test serves, in theory, as a protection of the federalist system."); infra Part I.B.4 (discussing coercion test). The search for the appropriate division of power in our federal system serves as the driving force behind Spending Clause theory. This Note assumes that this division is not achieved by categorical judicial nonenforcement of federalism-based norms. Today's Court, as well as most scholars, would not object to this assumption. See supra note 2.

are broad enough to allow congressional control over any aspect of human affairs."[39]

Because doctrinal formulations should be motivated by the conceptual objectives underlying the federal system, one must be clear on what these objectives are. Broadly framed, the benefit ideally conferred by the federal structure of government is better service of the people. The federal system may be instrumental in achieving this general objective in several more specific ways:[40] (1) States in a federal system may function as "laboratories," taking risks that eventually may, by duplication, benefit the nation as a whole, and that ought not be tried at the national level in the first instance;[41] (2) decentralization associated with a federal system may maximize utility by allowing for local preferences;[42] and (3) public spiritedness, essential to republicanism, is promoted by small units of government, as is the democratic ideal of public participation.[43]

However, the federal system's ability to protect liberties from governmental infringement is perhaps the most exalted benefit it can

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39 Robert F. Nagel, The Future of Federalism, 46 Case W. Res. L. Rev. 643, 649 (1996); see also Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 815-16 (1998) (highlighting "a basic puzzle of federalism: Given our commitment to having both state governments with certain powers and a national government with limited but supreme powers, where do we draw the line between the two?" (footnote omitted)). Professor Nagel has coined the term "successive validation" to refer to the technique with which the Court handles the difficulty: "[O]ne horn of the dilemma is subordinated in the case at hand but the equivalency of the competing constitutional proposition is reasserted by a stated commitment to enforce that proposition in some future case." Nagel, supra, at 652. On this account, one would expect the Court eventually to revalue the traditionally devalued horn and limit congressional spending power in service of federalism.

40 See generally Erwin Chemerinsky, The Values of Federalism, 47 Fla. L. Rev. 499, 525-30 (1995).

41 See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that federalist structure "allows for more innovation and experimentation in government"); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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."); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1498-1500 (1987) (book review).

42 See McConnell, supra note 41, at 1493-94.

43 See David L. Shapiro, Federalism: A Dialogue 91-92 (1995) ("[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized."); McConnell, supra note 41, at 1510-11. But see Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 915-17 (1994) (arguing that public participation is product of decentralization, not federalism).

provide.[44] The diffusion of power among the federal government and the states ameliorates the potential for oppression that might arise out of excessive aggregations of power in a single political unit. Vertical separation of powers between governments thus protects liberties from encroachment by either government. The ability of (idealized) federalism to protect individual rights and liberties from governmental oppression remains a prominent concern today, just as it was for the Framers.[45]

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[44] See Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1426 (1987) ("[T]he Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights."); Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 855 (1979) ("[T]he case for a federal form rests most fundamentally on the capacity of a federal system to enhance and protect individual liberty."). See generally Richard B. Stewart, Federalism and Rights, 19 Ga. L. Rev. 917 (1984).

The modern Court has spoken on this issue in a few cases. See, e.g., Coleman v. Thompson, 501 U.S. 722, 759, 761 (1991) (Blackmun, J., dissenting) ("Federalism . . . has no inherent normative value. . . . Rather, [it] secures to citizens the liberties that derive from the diffusion of sovereign power. . . . The majority has lost sight of the animating principles of federalism."), quoted in part in New York v. United States, 505 U.S. 144, 181 (1992). Justice O'Connor, a strong advocate of judicial enforcement of federalism norms, agrees with Justice Blackmun that "[s]tate sovereignty is not just an end in itself." *New York*, 505 U.S. at 181; see also *Gregory*, 501 U.S. at 458-59 (O'Connor, J.) ("[T]he principal benefit of the federalist system is a check on abuses of governmental power. . . . In the tension between federal and state power lies the promise of liberty.").

[45] Perhaps the single greatest historical motivation for the advent of American federalism was the need to insulate the citizenry against governmental factionalism that might eventuate in tyranny. Both the federalists and the antifederalists prioritized the protection of individual liberties during the framing period. Regarding the antifederalists, "[t]he most important reason offered [in defense] of state sovereignty was that state and local governments are better protectors of liberty." McConnell, supra note 41, at 1500. Madison famously contradicted this position in his treatises on factionalism: "The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States." The Federalist No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

While Madison was concerned primarily with majority factionalism, interest group politics may present an equal danger. Public choice theory suggests that at the national level, "small, cohesive faction[s] intensely interested in a particular outcome can exercise disproportionate influence in the political arena." McConnell, supra note 41, at 1502; see also Stewart, supra note 44, at 921 (explaining that interest group politics in modern bureaucratic state has led to "Madison's Nightmare"). There may be less potential for minority tyranny at the local level. See Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 Sup. Ct. Rev. 341, 386.

The essential point is that, despite their differences, both sides of the debate envisioned a substantial role for the states in the protection of individual liberties. See Amar, supra note 44, at 1495 ("[I]n separating and dividing power, whether horizontally or vertically, the Federalists pursued the same strategy: Vest power in different sets of agents who will have personal incentives to monitor and enforce limitations on each other's powers."); McConnell, supra note 41, at 1502-03; Rapaczynski, supra, at 354:

> The shape ultimately taken by the structure of governmental authority under the United States Constitution was one of compromise . . . . The power represented by the states had to be reckoned with and indeed was welcome insofar

It is with an eye towards this goal—the protection of rights and liberties through vertical separation of powers—that federalism-based doctrinal limitations on congressional spending power should be developed. More precisely, doctrinal requirements that fail to promote the protection of individual liberties via diffusion of governmental authority are inadequate. Spending power doctrine should balance power in our federal system in a way that enables each government involved to secure and insulate the liberty of the people from encroachment by other governments.

B. Existing Spending Clause Doctrine

The criteria by which the Court assesses the constitutionality of a conditional spending program are set forth in *South Dakota v. Dole*.[46] *Dole* established a five-part test for the validity of conditional appropriations to states. First, the terms of the "contract" between the federal government and the recipient must be clear;[47] second, the spending program must be for the general welfare;[48] third, there must be a proper relationship between the condition and the purpose of the corresponding expenditure;[49] fourth, application of the condition must not be prohibited by any independent constitutional bars;[50] and fifth, the program must not be coercive.[51] The first of these is no limit at

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as it could be harnessed into the complex structure of divided authority that was to be the main protection against what the Framers called "tyranny"—a rather amorphous term referring to most forms of governmental oppression.

[46] 483 U.S. 203 (1987). *Dole* is the seminal modern Spending Clause case. Many commentators have expressed discontent with the *Dole* criteria; some have suggested they be replaced. See, e.g., Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 595 (1990) (advocating abandonment of unconstitutional conditions doctrine for approach that directly questions whether "the government has constitutionally sufficient justifications for affecting constitutionally protected interests"). Such a course is unlikely. *Dole* was a 7-2 decision, with Justices O'Connor and Brennan dissenting and no concurring opinions. Justice O'Connor's dissent argued primarily against the majority's characterization and application of the third *Dole* requirement—the germaneness requirement. See *Dole*, 483 U.S. at 212-18 (O'Connor, J., dissenting); infra Part I.B.2. Justice Brennan argued that there was an independent constitutional bar to the spending condition—the Twenty-First Amendment—and that the fourth requirement, properly understood, was not satisfied. See *Dole*, 483 U.S. at 212 (Brennan, J., dissenting); infra Part I.A.4. No justice disagreed with the foundations of the *Dole* analysis. Hence, if doctrinal modifications are to be effected, they will almost certainly consist of recharacterizations and modifications of existing requirements.

[47] See *Dole*, 483 U.S. at 207.

[48] See id.

[49] See id. at 207-08.

[50] See id. at 208.

[51] See id. at 211.

all: It can always be fulfilled by a well-drafted statute.[52] Each of the remaining four criteria is treated below.

1. *General Welfare*

The second *Dole* constraint "derive[s] from the language of the Constitution itself:"[53] Congress may only spend for the "general Welfare of the United States."[54] Despite its explicit textual foundation, this requirement almost certainly does not constitute an external constraint on congressional behavior. The Court has questioned whether it is "judicially enforceable . . . at all,"[55] and has never struck down a spending provision on the grounds that it was not for the general welfare, choosing instead to leave such determinations for Congress.[56]

2. *Germaneness*

The general welfare requirement applies to appropriations per se. The germaneness requirement, *Dole*'s third, targets the relationship between conditions and the appropriations to which they attach. There must be a proper relatedness between a condition and "the purpose of the expenditure"[57] or "'the federal interest in particular national projects or programs'"[58] for a conditional grant program to pass muster. This requirement is commonly viewed as the most important of all the *Dole* criteria.[59]

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[52] The Court insists that conditions attached to grants be perfectly clear because "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (refusing to enforce fund revocation because Congress's intent to make funding conditional on compliance was unclear).

[53] 483 U.S. at 207.

[54] U.S. Const. art. I, § 8, cl. 1.

[55] *Dole*, 483 U.S. at 207 n.2; accord Helvering v. Davis, 301 U.S. 619, 640 (1937):

> The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.

[56] See United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting, joined by Brandeis & Cardozo, JJ.) ("[C]ourts are concerned only with the power to enact statutes, not with their wisdom. . . . For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.").

[57] 483 U.S. at 213 (O'Connor, J., dissenting).

[58] Id. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

[59] See, e.g., New York v. United States, 505 U.S. 144, 167 (1992) ("[C]onditions must (among other requirements) bear some relationship to the purpose of the federal spending . . . ; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority.").

Alternatively described as the germaneness, relatedness, or nexus requirement, this criterion originated with Justice Stone's dissent in *United States v. Butler*[60] and Justice Cardozo's opinion for the Court in *Steward Machine Co. v. Davis*.[61] Its precise content today is unclear.[62] At least three distinct views can be gleaned from the opinions in *Dole*.

All that is required, the Court held, is that conditions be "reasonably calculated" to address a purpose for which funds are expended.[63] In *Dole*, the condition that state legislatures set the minimum drinking age at twenty-one years was germane to one goal sought by Congress when it appropriated highway construction funds: "safe interstate travel."[64] The Court explained that the "lack of uniformity in the States' drinking ages created 'an incentive to drink and drive' because 'young persons commut[e] to border States where the drinking age is lower.'"[65] Having a uniform national drinking age eliminated this incentive. While this causal connection is plausible, it qualifies as tenuous at best. The majority's analysis was a highly deferential one.[66]

There is one anomaly in the Court's opinion. While describing the germaneness requirement, the Court surprisingly cited *Ivanhoe Irrigation District v. McCracken*.[67] In upholding the federal program at issue, the *McCracken* Court asserted: "[B]eyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds .... In any event, the provisions under attack

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60 297 U.S. at 84 (Stone, J., dissenting, joined by Brandeis & Cardozo, JJ.) ("Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated.").

61 301 U.S. 548, 590 (1937):

> 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 adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power.

62 See Sullivan, supra note 1, at 1457 (arguing that theory of germaneness has never been explicated *as a theory* with sufficient clarity to enable one to "distinguish legitimate from illegitimate government proposals"); see also *Dole*, 483 U.S. at 208 n.3 (noting 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").

63 *Dole*, 483 U.S. at 209.

64 Id. at 208. At issue in *Dole* was 23 U.S.C. § 158 (1994), which conditions a percentage of federal highway assistance funds on state enactment of legislation prohibiting the sale of alcohol to those less than 21 years of age.

65 *Dole*, 483 U.S. at 209 (quoting Presidential Commission on Drunk Driving, Final Report 11 (1983)).

66 See McCoy & Friedman, supra note 2, at 123 ("Chief Justice Rehnquist's relatedness or germaneness requirement is a contentless restriction.").

67 357 U.S. 275 (1958), cited in *Dole*, 483 U.S. at 208. *McCracken* involved conditions imposed in a federal contract, which is analogous to the case of conditions imposed in a federal program of assistance to states.

are entirely reasonable . . . ."[68] The two cases are not saying the same thing: While *Dole* speaks of reasonable *relatedness*, *McCracken* speaks of reasonableness per se. *McCracken*'s requirement that conditions be reasonable represents a second possible understanding of *Dole*'s germaneness element.

Justice O'Connor's dissent in *Dole* tracks the language of the majority: "[T]he requirement [is] that the condition imposed be reasonably related to the purpose for which the funds are expended . . . ."[69] Despite the similarity of the language used, however, Justice O'Connor understood the relatedness requirement rather differently than did the majority:

> [T]he line between permissible and impermissible conditions [is determined by] "whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent . . . . Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent."[70]

In suggesting that conditions may do no more than specify how federal funds are to be used lest they be improper "regulations," Justice O'Connor articulated a view sharply divergent from that of the majority, which was willing to tolerate a loose connection between condition and purpose.[71]

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[68] 357 U.S. at 295-96.

[69] 483 U.S. at 213 (O'Connor, J., dissenting). Ironically, two sentences later Justice O'Connor cites *McCracken* for the same proposition as did the majority. See id.

[70] Id. at 215-16 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al. at 19-20).

[71] Precisely what Justice O'Connor had in mind in *Dole* is unclear. She cited Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947), as the exclusive instance of a case implicating a condition "appropriately viewed as . . . relating to how federal moneys were to be expended." 483 U.S. at 217 (O'Connor, J., dissenting). *Oklahoma* involved a challenge to a revocation of funds based on provisions of the Hatch Act:

> No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall . . . take any active part in political management or in political campaigns.

Hatch Act § 12(a), 5 U.S.C. § 118k(a) (1958), repealed by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 201, 90 Stat. 475, 496 (1976).

An injunction against political activity for employees of federally financed programs is *not* a mere condition on the use of federal funds. The statute did far more than proscribe the use of federal funds in political activity; it proscribed all political activity, including that which was privately financed. Cf. Baker, supra note 38, at 1959-62 (arguing that while Justice O'Connor's proposal is "[t]he most promising . . . to date," she failed to explain how she distinguished conditions in *Dole* and *Oklahoma*).

Ironically, Justice O'Connor cited Fullilove v. Klutznick, 448 U.S. 448 (1980), as an instance of a case involving a condition that apparently did *not* satisfy her standard. See

Justice O'Connor's rendition of the relatedness requirement is the most stringent one that might be applied by a court. While *McCracken*'s reasonableness per se language was cited by both the majority and dissent in *Dole*, it was ignored by both as well. It is, therefore, unlikely that the germaneness criterion consists of searching judicial inquiry into the reasonableness of legislative determinations. The *Dole* majority's highly deferential interpretation of the requirement is the one most likely to be applied in the future.[72]

3. *Independent Constitutional Bar*

Conditions on spending grants that conflict with independent constitutional prohibitions are disallowed by the Court. This requirement "stands for the unexceptionable proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[73] Perhaps agreeing that this

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Dole, 483 U.S. at 217 (O'Connor, J., dissenting). *Fullilove* involved a condition that required 10% of appropriated funds to be reserved for contracts with "minority business enterprises," which would seem to be a quintessential example of a condition "specif[ying] in some way how the money should be spent." Id. at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al. at 19-20). One is left uncertain how Justice O'Connor would apply the germaneness requirement in the future.

Justice O'Connor's interpretation of the relatedness requirement, whatever its precise content may be, is a normatively unappealing one. The goal of Spending Clause theory—to formulate doctrine that appropriately restricts "'Congress['s power] to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people,'" id. at 217 (O'Connor, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 78 (1936))—is not served by the test proffered by Justice O'Connor. Her test is far too restrictive. See David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 57-58 (1994) (arguing that to employ Justice O'Connor's preferred test would be to "kill the patient to cure the ill"). It would, for example, be inappropriate to disallow the minimum drinking age requirement at issue in *Dole*. Categorical protection of state legislative discretion does not further the important federalist principles discussed supra Part I.A.

At least one commentator has proposed a relatedness test that is actually more restrictive than that proposed by Justice O'Connor, however. Professor Lynn Baker would require first that conditions "specif[y] nothing more than how . . . the offered funds are to be spent" and second that offered moneys not exceed the amount the states would have to spend in order to do the federal government's bidding. Baker, supra note 38, at 1967. Baker's requirement that only "reimbursement" funds be allowed would mark an extreme, unwarranted abrogation of federal authority; it would wreak havoc on the current system of federal appropriations to states.

[72] Aside from its normative merit, this remains true if only because the majority in *Dole* comprised seven justices.

[73] *Dole*, 483 U.S. at 210. Justice O'Connor "assume[d], *arguendo*," that the majority's application of this criterion was correct, id. at 213 (O'Connor, J., dissenting), while Justice Brennan's terse dissent was premised on the existence of an independent constitutional impediment, namely the Twenty-First Amendment, see id. at 212 (Brennan, J., dissenting). Thus, seven or eight members of the *Dole* Court agreed with the characterization of the independent constitutional bar criterion in the text.

Professor William Van Alstyne has argued that, in addition to the Federal Constitution, relevant state constitutions should be taken into account. See William Van Alstyne,

restriction is "unexceptionable"—that the proposition that Congress cannot entice a state to do something the state simply cannot do is unimpeachable—commentators have largely ignored this aspect of spending power doctrine.

This criterion cannot pinpoint the appropriate federal balance for which spending power theorists strive.[74] It represents a mild restriction, invalidating only the most egregious uses of the power to spend. Indeed, exclusively applied, it would treat the spending power as an enumerated grant of unlimited power, subject only to the same limitations placed on all enumerated powers found in the Constitution.[75]

4. Coercion

Dole's fifth requirement is that conditional grants may not be coercive. This criterion directly responds to the most persistent hindrance to attempts to limit the spending power—the "doctrine of consent,"[76] which holds that recipients of aid willingly consent to grant programs, including any conditions contained therein, and hence have no basis for complaint[77]—by allowing courts to find a recipient's con-

"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 Harv. J.L. & Pub. Pol'y 303, 307 (1993) (suggesting that states should not be permitted to accept conditional grants that require state behavior that endangers rights protected by state constitutions). At least one court has implicitly rejected this argument, however. See Hoppock v. Twin Falls Sch. Dist. No. 411, 772 F. Supp. 1160, 1164 (D. Idaho 1991) (holding that Equal Access Act, 20 U.S.C. §§ 4071-4074 (1994), which conditions federal aid to public schools on schools' willingness to provide religious student groups equal access to limited open fora, is enforceable despite apparent conflict with state constitution).

74 See supra note 38 and accompanying text.

75 The examples that Chief Justice Rehnquist provides are illuminating and remarkable: "[A] grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." *Dole*, 483 U.S. at 210-11. If these are the only limitations on Congress's power, to speak of the federal government as one of limited, delegated powers would be, at the least, an overstatement. See McCoy & Friedman, supra note 2, at 102 ("[T]he *Dole* Court invited the complete abrogation of any limits on the delegated powers of Congress.").

Only one modern commentator has suggested that this may be sufficient. Professor David Engdahl has argued that Alexander Hamilton's view of the spending power—purportedly subscribed to by the federal judiciary, see, e.g., United States v. Butler, 297 U.S. 1, 65-67 (1936)—dictates that no "activities or events[ ] are shut off from the federal government's attention." Engdahl, supra note 71, at 12. More generally, Engdahl claims that, in the Hamiltonian view, "the existence of state power *never* precludes federal power even as to the very same matter." Id. Today's Supreme Court is unlikely to concur with Professor Engdahl on this point, and this Note assumes that some limits on federal power are appropriate. See supra note 38 and accompanying text.

76 Cappalli, supra note 18, § 10:11, at 32; see also supra note 30 and accompanying text.

77 See Stewart, supra note 44, at 971 ("[F]ederal courts have uniformly rejected constitutional challenges to conditional grants, reasoning that states are legally free to reject or accept such grants, and hence that no impermissible federal 'dictation' is involved.").

sent infirm because of a coercive proposal.[78] For this reason, many commentators rely heavily on this criterion,[79] arguing that it, unlike the germaneness requirement, is logically justifiable.[80]

Unfortunately, the concept of coercion is riddled with jurisprudential hurdles. Wary of these difficulties, courts have consistently refused to rely on the coercion criterion, and the criterion exists today in nominal form only. The only case to invoke coercion in the process of invalidating a conditional grant statute was *United States v. Butler*.[81] Because "[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy," the *Butler* Court noted that the "regulation is not in fact voluntary."[82] The doctrine was disavowed just one year later in *Steward Machine Co. v. Davis*,[83] in which Justice Cardozo argued that

> to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.[84]

Justice Cardozo's concerns have rendered the noncoercion requirement nearly irrelevant. In *Dole*, only after enumerating the first four criteria of validity did the Court note that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[85] The organization of the opinion suggests that the noncoercion requirement is, at the least, not at the forefront of the Court's analysis.

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78 See Alan Wertheimer, Coercion 21 (1987) ("[V]oluntariness—and, in particular, the absence of coercion—is . . . a necessary condition of obligations grounded in agreement.").

79 See, e.g., Cappalli, supra note 18, § 11:26, at 58 ("If a litigant is not permitted to disprove the supposed freedom underlying a particular decision to apply for aid, it would appear that no constitutional barrier, not even a flimsy one, can be found . . . .").

80 See McCoy & Friedman, supra note 2, at 123:

> [T]here is no independent theoretical basis for the [relatedness] requirement in Chief Justice Rehnquist's analysis . . . . If the Chief Justice is willing to find that spending conditions are not regulations in disguise as long as compliance is 'voluntary' in his sense of the word, there is no purpose to be served by the nexus requirement.

81 297 U.S. 1 (1936). Even *Butler* relied on the notion of coercion only secondarily. Its primary rationale was that the regulation "invade[d] the reserved rights of the states." Id. at 68.

82 Id. at 70-71.

83 301 U.S. 548 (1937).

84 Id. at 589-90.

85 483 U.S. at 211 (quoting *Steward Machine Co.*, 301 U.S. at 590).

The difficulties that accompany the concept of coercion fall into two categories and present themselves in two steps. First, one must determine precisely how much inducement is too much; that is, one must ascertain when a conditional grant becomes so tempting as to deprive a state-recipient of voluntary choice whether to accept it.[86] Even assuming a lack of meaningful choice can be established, a second, more troubling difficulty arises: One must distinguish instances when this lack of choice should invalidate a condition from instances when it should not.[87] A showing that a state lacks functional choice cannot by itself determine the matter, for some spending program conditions that induce state behavior such that no state functionally can resist the federal influence are acceptable as a matter of sound doctrine and policy.[88] In other words, an analysis premised on coercion must be twofold: It must determine, first, whether a conditional grant program deprives a state-recipient of meaningful choice, and second, whether it does so in an *improper* way, where improper is defined with reference to an appropriate baseline.

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[86] Ninth Circuit Judge Stephen Reinhardt has analyzed this aspect of the problem in detail. Noting that "one reason for the federal courts' lack of enthusiasm for the theory [of coercion] is its elusiveness," Judge Reinhardt questioned whether "a sovereign state which is always free to increase its tax revenues [can] ever be coerced by the withholding of federal funds." Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (rejecting challenge to grant program that conditioned 95% of federal highway funds on state compliance with 55 miles per hour speed limit).

Moreover, even if this meta-question were to be answered affirmatively, Reinhardt queried how judges might determine when the hypothesized line between "pressure" and "coercion" was crossed. Is the sheer amount of funds subject to conditions the key, or is it the percentage of the total allocation that is conditioned that matters? How is the size of the state's budget taken into account? See id. To complicate the question further, does the federal tax rate affect the decision? It must; if it were remarkably high, the states might be deprived of their tax base altogether. Does the relative severity of the state-recipient's tax rate in comparison to other states' rates matter? It must; a state would be functionally unable to raise its rates only if doing so would be too costly because of competition from states with lower rates.

Difficulties in measuring inducement are treated in more depth infra Part III.B, in which this Note argues that even if one cannot pinpoint the line dividing temptation and lack of voluntary choice, certain conditional grant programs clearly cross the line.

[87] See Sullivan, supra note 1, at 1443 (noting that finding proposal coercive "necessarily embodies a conclusion about the wrongfulness of a proposal, not merely the degree of constraint it imposes on choice").

[88] See Rosenthal, supra note 34, at 1125-26 ("Congress may presumptively impose regulations reasonably germane to the purpose of a spending program . . . even though they coerce conduct that Congress, even presumptively, could not command."); see also United States v. Butler, 297 U.S. 1, 83 (1936) (Stone, J., dissenting) ("Expenditures would fail of their purpose . . . if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained.").

Title VI epitomizes such a condition. Title VI is eminently inducing, conditioning all federal funds on compliance to its terms. Nonetheless, it is not coercive. See infra Part III.B.

While scholars have generated a mass of literature that attempts to ascertain appropriate baselines (or to disclaim the necessity of any baseline) in the unconstitutional conditions context and in analogous legal and philosophical contexts,[89] they have made little headway. No appropriate baseline has been set forth in our context to date.[90]

Recognition of this collection of difficulties makes it unsurprising that the judiciary has largely deprecated the notion of coercion in unconstitutional conditions analysis.[91] The doctrine of coercion justifia-

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89 The problem of baselines is encountered in many other arenas. See Sullivan, supra note 1, at 1446 (noting that in both criminal and private law settings, "'coercion' constituted more than a lack of choice ('reasonable alternatives') on the part of the offeree"); Wertheimer, supra note 78, at 201 (arguing that two-stage theory "captures the theory of coercion that characterizes virtually the entire corpus of American law"). Several dichotomous pairs of terms are traditionally employed to capture the distinctions one seeks to draw in crafting a baseline; the ones most commonly used in legal analyses are "offers" versus "threats" and "benefits" versus "burdens." For example, the Restatement of Contracts employs the idea of a threat to capture the second stage of its two-stage theory of duress. See Restatement (Second) of Contracts § 175(1) (1981) ("If a party's manifestation of assent is induced by an *improper* threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." (emphasis added)).

The distinction between offers and threats has been elaborated by Robert Nozick, who describes threats as proposals that make recipients worse off and offers as proposals that make recipients better off. See Robert Nozick, Coercion, in Philosophy, Science, and Method 440, 447 (Sidney Morganbesser et al. eds., 1969); see also Sullivan, supra note 1, at 1448-49, 1448 n.142. This, however, only abstracts the problem one notch further, as one then must determine what counts as "better" or "worse." Because these are relative terms, an appropriate baseline against which to assess well-being is still required. See Kreimer, supra note 29, at 1352 (arguing that "the distinction between liberty-expanding offers and liberty-reducing threats turns on the establishment of an acceptable baseline"); Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 Duke L.J. 541, 572 (suggesting that one must "recognize that 'benefit' and 'burden' . . . are relative terms. They all refer to a change in an agent's condition, a change from some stipulated starting point to a new condition that is better or worse . . . .").

Numerous other suggestions for establishing baselines have been made, but these are mostly inapplicable to the context of federal conditional grants to states because traditional analyses involve the coercion of individuals, not governments. See, e.g., Charles Fried, Contract as Promise 95-99 (1981) (suggesting that threat is any proposal that leaves recipient worse off than she *ought* to be); Kreimer, supra note 29, at 1359-74 (proposing three potential baselines: (1) "history," or status quo ante, (2) "equality," and (3) "prediction"); Nozick, supra, at 460-65 (comparing expectations of rational person with proposal's terms); Wertheimer, supra note 78, at 207 (comparing recipient's expectations with proposal's terms); David Zimmerman, Coercive Wage Offers, 10 Phil. & Pub. Aff. 121, 131-32 (1981) (asking whether recipient prefers pre-proposal or post-proposal situation). Perhaps more importantly, none of these proposals has commanded a dominant view even in the contexts in which they were made.

90 Cf. Sullivan, supra note 1, at 1450 (arguing that selection of appropriate baseline is "especially problematic in the context of unconstitutional conditions, which arise against the backdrop of a constitutional jurisprudence in which . . . the government benefits at issue [are] gratuitous in the first place").

91 Perhaps Justice Cardozo was concerned in *Steward Machine Co.* with the greatest danger the doctrine presents: that judicial analyses of coercion might result in ad hoc co-

bly has no significant applicability in unconstitutional conditions analysis today.

II
THE DOCTRINAL DISCONNECT

Dole's criteria of validity, canvassed above, are incapable of serving the theoretical objectives that should motivate Spending Clause theory.[92] Spending Clause doctrine purports to strike an appropriate balance between federal and state spheres of influence in our federal system[93]—a balance that should focus on the protection of rights and liberties. But because the Court has had little occasion to do more than reaffirm the homily of a federal government of limited powers in the process of upholding Spending Clause legislation for over sixty years,[94] its doctrinal exegeses have tended to be factually unspecific. A gross disconnect between theoretical objectives and doctrinal requirements has resulted.[95]

A. Dole *in Action*

The inability of the traditional criteria of validity to distinguish between RLPA[96] and Title VI[97] illustrates this disconnect. Any statute sharing the structure of these provisions with cross-cutting conditions must be upheld under *Dole*'s criteria unless it either is poorly drafted[98] or requires behavior that violates some constitutional provision as interpreted and enforced by the judiciary.[99] The general welfare requirement is almost certainly not judicially enforceable,[100] the noncoercion criterion has fallen into judicial disrepute,[101] and the germaneness or nexus criterion, despite having been touted as *Dole*'s

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opting of baselines in outcome-determinative ways. See supra notes 83-85 and accompanying text.

92 See supra Part I.A.

93 See supra note 38 and accompanying text.

94 See supra note 2 and accompanying text.

95 At least two scholars have been highly piqued by the situation: "[T]he *Dole* holding in effect eviscerates the doctrine that the national government is one of limited delegated powers." McCoy & Friedman, supra note 2, at 115-16; see also Hills, supra note 39, at 922 & n.359 (positing that "Court seems to have come close to" allowing Congress to "attach any conditions to federal funds without depriving state governments of autonomy").

96 See supra note 12 (reproducing RLPA's pertinent provisions).

97 See supra note 19 (reproducing Title VI's relevant provisions).

98 A poorly drafted statute might not satisfy *Dole*'s clarity requirement. See supra note 52 and accompanying text.

99 A condition requiring behavior that violates a specific, judicially enforced constitutional provision would be struck down under the independent constitutional bar criterion. See supra Part I.B.3.

100 See supra Part I.B.1.

101 See supra Part I.B.4.

most formidable worker,[102] is in fact feeble when confronted with cross-cutting civil rights conditions such as Title VI and RLPA.

1. *Title VI and* Dole*'s Criteria of Validity*

The validity of Title VI as Spending Clause legislation is beyond question; the Court has held so and applied the statute several times.[103] Indeed, its validity has never been seriously challenged, despite its remarkable breadth.[104] Its justification is simple and persuasive: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[105]

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[102] See supra note 59.

[103] See, e.g., Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 593 (1983) (opinion of White, J.) ("I note first that Title VI is spending-power legislation . . . ."); Lau v. Nichols, 414 U.S. 563, 568 (1974) ("Respondent . . . contractually agreed to comply with title VI . . . ." (internal quotation marks omitted)).

[104] The author ran a computer search on Westlaw using only the search term "Title VI" and limiting the date field to 1965-1973, the first eight years of the law's existence. The search yielded one hundred and eighty-one cases, in none of which was the validity of Title VI directly challenged. Similarly, a search for the term "Title IX" (seeking cases on Title IX of the Education Amendments Act of 1972, discussed supra note 19) between the years 1971 and 1976 returned no cases directly challenging the statute's validity. One commentator has accordingly reported that "[e]xcept for judicial review of agency Title VI enforcement, it is really a misnomer to talk of 'Title VI' cases." Cappalli, supra note 18, § 19:02, at 6.

[105] *Lau*, 414 U.S. at 569 (internal quotation marks omitted) (quoting 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey) (quoting John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, Pub. Papers 483, 492 (June 19, 1963))); accord *Guardians Ass'n*, 463 U.S. at 599 ("Title VI rests on the principle that 'taxpayers' money . . . shall be spent without discrimination.'" (quoting 110 Cong. Rec. 7064 (1964) (statement of Sen. Ribicoff))).

Some have offered an alternative justification for Title VI: that its provisions could have been directly imposed by Congress under Section 5 of the Fourteenth Amendment. If this were right—if, that is, Title VI would be upheld as a direct congressional regulation—Title VI would not be subject to unconstitutional conditions analysis. See supra note 34 and accompanying text.

This presents a difficult question that the Court has never resolved. Title VI's substantive scope extends no further than does the Equal Protection Clause. See United States v. Fordice, 505 U.S. 717, 732 n.7 (1992) ("[T]he reach of Title VI's protection extends no further than the Fourteenth Amendment."); see also Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J.); id. at 328 (Brennan, White, Marshall, & Blackmun, JJ., dissenting). However, Title VI is applicable to private actors not normally subject to constitutional limitations. The question thus reduces to whether Congress, using its enforcement powers, could extend the strictures of the Equal Protection Clause to private recipients of federal aid.

The author has not discovered any thorough analyses directly on point, but commentators can be found to support either position. Compare Cappalli, supra note 18, § 19:14, at 41, and Engdahl, supra note 71, at 57 (suggesting that Title VI could not be directly regulated), with Senate Hearings, supra note 12, at 82 n.16 (testimony of Christopher L. Eisgruber), 110 Cong. Rec. 1527 (1964) (statement of Rep. Cellar) (The Legality of the Provisions of Title VI), and Rosenthal, supra note 34, at 1129-30 & n.116 (suggesting con-

Title VI clearly satisfies the *Dole* criteria. Its language is sufficiently plain to satisfy *Dole*'s clarity requirement. It does not call for behavior that violates any independent constitutional bar; it actually requires behavior that mirrors constitutional norms.[106] And it has never even been challenged as coercive, perhaps because there is little, if any, precedent that supports an allegation of coercion.[107]

The only plausible limit stems from the germaneness requirement.[108] But under the *Dole* majority's understanding of that requirement, Title VI plainly furthers the federal interest in every federal program by "ensur[ing] that all intended beneficiaries of those programs may participate in them on fair and equal terms."[109] That is, it is reasonably related to one goal behind every congressional expendi-

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trary). Justice O'Connor has subtly intimated that Title VI might be independently supportable. See South Dakota v. Dole, 483 U.S. 203, 217 (1987) (citing *Lau*, which applied Title VI to schools, for indirect support for proposition that spending program conditions that are independently regulable need not satisfy relatedness requirement).

An argument in support of Section 5 authority might analogize to Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). In that case, congressional enforcement power under Section 2 of the Thirteenth Amendment was held to extend to the "badges and the incidents of slavery," as well as to the "relic[s]" of slavery, even though the Amendment itself proscribes only actual slavery. *Jones*, 392 U.S. at 440, 443; see U.S. Const. amend. XIII. Such a theory relies on the idea of a constitutional division of labor; it assumes that many constitutional norms that cannot be judicially enforced can be enforced by Congress. Hence, the argument would assert that even though judges cannot enforce the Equal Protection Clause against private actors, Congress reasonably can extend constitutional norms at least to those private actors that receive federal aid even though receiving such aid does not bring such actors under what the judiciary deems to be "color of law," especially since much of the targeted action is a legacy or "relic" of prior unconstitutional state action. See Lawrence G. Sager, A Letter to the Supreme Court Regarding the Missing Argument in *Brzonkala v. Morrison*, 75 N.Y.U. L. Rev. 150 (2000) (arguing that *Jones* supports Section 5 authority for Violence Against Women Act, 42 U.S.C. § 13,981 (1994), which creates private right of action for victims of gender motivated crimes of violence against private perpetrators of such violence); cf. Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act Is Unconstitutional, 69 N.Y.U. L. Rev. 437, 444 (1994) ("When Congress is acting in the spirit of the adjudicated Constitution to supplement or extend judicially-cognizable violations of the liberty-bearing provisions, it is acting within its authority under section 5 of the fourteenth amendment, even though it adopts an enlarged view of constitutional liberty."); Lawrence G. Sager, Fair Measure: The Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1239-42 (1978) [hereinafter Sager, Fair Measure] (arguing that because Equal Protection Clause is underenforced by judiciary, Congress constitutionally may extend its protections).

We need not conclusively resolve this issue. The validity of Title VI is absolutely clear irrespective of congressional authority to promulgate it under Section 5. That is, even if it is not independently regulable by Congress under the Fourteenth Amendment, it remains valid as Spending Clause legislation. It hence must have a justification under the criteria of validity canvassed in Part I.B.

106 See supra note 105.

107 See supra Part I.B.4.

108 See supra Part I.B.2.

109 Senate Hearings, supra note 12, at 82 (testimony of Christopher L. Eisgruber).

ture: Funds should be distributed fairly. It even satisfies Justice O'Connor's more stringent demands: Title VI, by its terms, "'specifies in some way how the money should be spent'"[110]—it should be spent in a nondiscriminatory fashion.

2. *RLPA and* Dole*'s Criteria of Validity*

Under the current criteria of validity for conditional grant programs, RLPA would fare no differently than Title VI. It, too, modifies the contract between the federal government and the states in a clear way and, on its face, is no more coercive than Title VI and other cross-cutting conditions that remain in force.[111] Only two criteria present plausible obstacles: the independent constitutional bar and the germaneness criteria.

Some commentators and judges argue that RFRA's requirement that every encroachment on free exercise (even ones incidental to generally applicable and nondiscriminatory statutes) satisfies the compelling state interest test violates the Establishment Clause.[112] These analyses, if correct, would likely apply to RLPA as well as RFRA. Courts have not viewed these arguments favorably, however.[113] Moreover, many states have "baby RFRAs" currently in force.[114] Thus, RLPA's substantive requirements probably will not be held to violate the Establishment Clause, and RLPA will not fall prey to the independent constitutional bar criterion.

The relatedness requirement as applied to RLPA is no more robust an obstacle. Like Title VI, a justification for RLPA can be of-

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[110] *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al. at 19-20).

[111] Other conditions that, like Title VI, are arguably coercive but defy judicial characterization as such are reproduced supra note 19.

[112] See, e.g., City of Boerne v. Flores, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring) (arguing that RFRA violates Establishment Clause); Eisgruber & Sager, supra note 105, at 452-60 (arguing that RFRA violates Establishment Clause because RFRA is overprotective of religion); Jed Rubenfeld, Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional, 95 Mich. L. Rev. 2347, 2349-50, 2358-72 (1997) (arguing that RFRA violated Establishment Clause because RFRA was "seeking to dictate church-state relations").

[113] See, e.g., Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997) (holding that RFRA does not violate Establishment Clause); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996) (same); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), rev'd on other grounds, 521 U.S. 507 (1997); Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge), 220 B.R. 386, 395-401 (Bankr. D. Idaho 1998) (holding that RFRA remains valid post-*Boerne* as applied to federal government).

[114] See, e.g., Alabama Religious Freedom Amendment, Ala. Const., amend. 622; Religious Freedom Restoration Act of 1988, Fla. Stat. Ann. §§ 761.01-761.05 (West Supp. 2000); Religious Freedom Restoration Act, 775 Ill. Comp. Stat. Ann. 35/1-99 (West Supp. 1999).

fered that would satisfy not only the majority's but even Justice O'Connor's understanding of the criterion: It ensures that all intended beneficiaries of federal programs may participate in them on what Congress deems to be "fair and equal terms." That is, its defenders can argue that RLPA, like Title VI, assures that federal funds are distributed fairly and, accordingly, that it is reasonably related, even integral, to a legitimate purpose of every federal program—the same purpose that uncontroversially justifies Title VI. Moreover, it does no more than restrict the uses to which federal funds may be put: It mandates that funds not be used to burden the free exercise of religion.[115]

The only way to counter this argument is to assert that the purpose that RLPA admittedly furthers, that is, Congress's understanding of what constitutes fair and equal terms or, more broadly, fairness, is illegitimate—not unconstitutional,[116] but mistaken all the same. But this is tantamount to asserting that Congress's understanding of what furthers the general welfare—Congress's understanding of what is a fair distribution of federal funds—is mistaken. As we have seen, the Court has expressed great reluctance to interfere with Congress's assessment of the general welfare.[117] Therefore, RLPA will survive

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115 See House Hearings, supra note 11, at 81 (testimony of Thomas C. Berg) ("The condition [in a revised RFRA, such as RLPA] is in fact a restriction on the use of funds, as Justice O'Connor demands."). But see Kristian D. Whitten, Conditional Federal Spending and the States "Free Exercise" of the Tenth Amendment, 21 Campbell L. Rev. 5, 28 (1998) (asserting without explanation that "RLPA goes well beyond specifying how the federal money should be spent").

116 If the purpose furthered by a condition were an unconstitutional one, such as the promotion of racial discrimination, the Court would not hesitate to strike down the condition. In such an instance, the independent constitutional bar criterion would be violated as well. However, the purposes furthered by RLPA are probably not unconstitutional ones.

117 See supra Part I.B.1. To give teeth to the general welfare criterion would require intense judicial scrutiny of the wisdom of legislative ends. This would hearken back to the Court's much-maligned pre-New Deal substantive due process jurisprudence, epitomized by Lochner v. New York, 198 U.S. 45 (1905), which invalidated a labor regulation because it was not "a fair, reasonable and appropriate exercise of the police power of the State." Id. at 56; see Laurence H. Tribe, American Constitutional Law § 8-4, at 1348 (3d ed. 2000) ("Perhaps more striking than [the] close scrutiny of means-ends relationships during the *Lochner* era was the strict judicial assessment of legislative ends."). Such intense judicial scrutiny was considered explicitly during the framing period when the establishment of a "Council of Revision" was proposed. See Frank B. Cross, Shattering the Fragile Case for Judicial Review of Rulemaking, 85 Va. L. Rev. 1243, 1332 (1999) ("The Framers considered the possibility of judicial involvement in discretionary political matters as courts reviewing government action for fairness and policy wisdom. James Madison supported, and the convention debated, the creation of a 'council of revision,' combining the executive and judiciary to review legislative enactments."). The Council would, Madison argued, "discourage the passage of unjust or ill-conceived laws, and in doing so, . . . protect private rights and the public good against legislative impulse." Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1057 (1997). However, the Framers soundly rejected the Council for reasons that included "the judicial lack of

scrutiny under the germaneness requirement, just as it will under the other *Dole* criteria.

3. *The Source of* Dole*'s Feebleness*

The deficiency in the *Dole* criteria is that the one requirement that is supposed to have the most teeth, the germaneness requirement, is toothless as applied to conditions that can be justified as promoting fairness (or some other equally abstract concept) in federal programs. The Court requires only that conditions further one purpose of the federal spending program to which they are attached, but, at the same time, the Court is unwilling to scrutinize purposes closely.[118] Unless the Court strays from its doctrinal traditions,[119] unless the Court becomes willing to declare that Congress's conception of fair and equal terms is simply askew, the nexus requirement cannot differentiate Title VI from RLPA and other structurally similar legislative acts.

*B. The Federalism-*Dole *Disconnect*

The inability of the *Dole* criteria to distinguish Title VI and RLPA is problematic in light of the principles of federalism that should motivate spending power doctrine. Federalism demands that power be diffused between the federal government and the states so that individual liberties are protected from governmental encroachment.[120] RLPA offends this demand, for it represents an indirect encroachment on liberty against which the states cannot protect their

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expertise in policy matters" and "faith in the accountability of elected officials." Cross, supra, at 1332.

Since the late 1930s, the Court has recognized consistently that it does not and should not sit as a modern day Council of Revision, reviewing the wisdom of legislative determinations. See, e.g., United States v. Rutherford, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy."); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) ("[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."). The fact that the Constitution explicitly requires that federal spending in particular be for the general welfare does not affect the question of which institution is best suited for the determination. See United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting, joined by Brandeis & Cardozo, JJ.) (arguing that spending program should not be invalidated because "courts are concerned only with the power to enact statutes, not with their wisdom" and that for "removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government").

118 See Baker, supra note 38, at 1966 ("[T]he Court's notion of a permissible 'federal interest' is seemingly boundless . . . ."); McCoy & Friedman, supra note 2, at 123.

119 See supra note 117.

120 See supra Part I.A (advancing certain principles of federalism).

citizens. As RLPA conflicts with constitutional norms, it should not be upheld as Spending Clause legislation.[121]

At first glance, RLPA appears to be a "noble" congressional attempt to protect religious freedom.[122] However, RLPA requires a compelling interest to justify all state-imposed burdens on religious exercise—a standard that, if seriously applied, would be remarkably difficult to satisfy.[123] Unfortunately, "[t]his is a zero-sum game: by granting religion expansive new power against generally applicable, neutral laws, Congress inevitably subtracts from the liberty accorded other societal interests."[124] That is, RLPA's effect is to privilege reli-

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121 Even if one disagrees with this rather dismal view of RLPA, everyone can probably conceive of legislation that shares RLPA's structure, and thus that would have to be upheld under *Dole*, but that encroaches on protected liberties. In other words, this Note regards RLPA as evidence of a deficiency in the Court's spending power doctrine. If the reader does not consider RLPA to be such evidence, it does not follow that there is no deficiency.

122 Daniel O. Conkle, The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute, 56 Mont. L. Rev. 39, 40 (1995) ("Although its cause is noble, RFRA exceeds the power of Congress . . . .").

123 Professor Gunther's description of the compelling state interest test as "'strict' in theory and fatal in fact" is well known. Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). However, in the context of free exercise exemptions, the compelling state interest test as applied prior to Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990), when it was still in force, was "strict in theory but *feeble* in fact." Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994) (emphasis added). How the courts would apply this standard of review in response to RLPA is unclear, especially in light of the *Smith* Court's explicit disdain for the task. See *Smith*, 494 U.S. at 889 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."); see also Ira C. Lupu, The Lingering Death of Separationism, 62 Geo. Wash. L. Rev. 230, 276 (1994) ("Congress in the RFRA purports to require courts to do precisely what *Smith* proclaims them as incompetent to do. . . . [N]o one should be surprised if under these circumstances the Supreme Court searches for constructions of the RFRA that minimize the extent of interest-balancing reimposed upon the judiciary.").

124 Senate Hearings, supra note 12, at 75 (testimony of Marci A. Hamilton); see also Thomas D. Farrell, The Religious Freedom Restoration Act: Why RFRA Is Unconstitutional, Haw. B.J., June 1995, at 6, 12 ("RFRA is a double-edged sword with the potential to enhance the civil rights of religious practitioners while diluting the rights of other citizens."). The parade of potential horribles is long. RLPA, like RFRA, could require exemptions from "health and safety regulation[s] such as manslaughter and child neglect laws, . . . social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races." *Smith*, 494 U.S. at 889 (citations omitted). Most of these interests would not be "compelling" as that term has traditionally been employed by the Court. See 145 Cong. Rec. H5584 (daily ed. July 15, 1999) (statement of Rep. Conyers) ("'[A]lthough we believe that courts should find civil rights laws compelling and uniform enforcement of these laws the least restrictive means, we know that at least several courts have already rejected that position.'" (quoting letter from American Civil Liberties Union)). Nor are these "horribles" mere possibilities. See, e.g., Powell v. Stafford, 859 F. Supp. 1343 (D.

gious observance, not just protect it.[125] And to privilege religious observance in the way and to the extent that RLPA does is properly viewed as a contraction, not an expansion, of liberty.[126]

Because it significantly privileges religious observance, RLPA conflicts with norms inherent in the Constitution. The Establishment Clause, like the Equal Protection Clause, embodies norms of equality. More specifically, the Establishment Clause requires that religious and secular citizens be treated with "equal regard" under the law.[127]

Colo. 1994) (holding that RFRA bars Age Discrimination in Employment Act claim by teacher in Catholic school).

125 See Eisgruber & Sager, supra note 105, at 453-54 ("RFRA's compelling state interest test privileges religious believers by giving them an ill-defined and potentially sweeping right to claim exemption from generally applicable laws, while comparably serious secular commitments . . . receive no such legal solicitude."); William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 319 (1991) ("Granting exemptions only to religious claimants promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems.").

126 See Eisgruber & Sager, supra note 105, at 445-52.

127 See, e.g., Eisgruber & Sager, supra note 123, passim (advocating that Establishment Clause and Free Exercise Clause, together, ensure that religious and secular citizens are treated with equal regard). Under this theory, religious adherents should be treated as full and equal members of our polity and should be neither privileged nor underprotected. If religious adherents are privileged by, for example, granting them exemptions from *all* laws that impinge on their religious practices, there will necessarily be costs imposed on other segments of society. See supra note 124 (setting forth *Smith*'s parade of potential horribles arising from application of compelling state interest test). These costs may impinge on nonadherents' "free exercise" of "non-religion." See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 197 (1992) ("The right to free exercise of religion implies the right to free exercise of non-religion.").

This basic notion of equality may best justify and explain the Court's "endorsement" theory of the Establishment Clause, whereby the Court attempts to "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations," in order to ascertain whether the "'government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.'" Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring)); see also Lupu, supra note 123, at 240-41 ("The nonendorsement principle is concerned with the individual alienation, or feelings of exclusion, that an observer of a government-sponsored religious symbol might experience . . . .").

As its name suggests, equal regard also demands that "government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally." Eisgruber & Sager, supra note 123, at 1283 (emphasis omitted). Equal regard would require, for example, that the exemption for religious use of peyote sought in *Smith* be granted, especially in light of the fact that exemptions for sacramental use of wine were consistently granted during the Prohibition. See Rubenfeld, supra note 112, at 2367 n.90. On the other hand, equal regard would not require that an exemption for sacramental narcotic use be provided if the failure to exempt does not stem from discriminatory animus, which is typically directed against minority religious observers.

RLPA conflicts with this principle.[128]

C. *The Scope of the Disconnect*

RLPA does not require behavior that will be held by the judiciary to be unconstitutional; thus, RLPA does not violate the independent constitutional bar criterion.[129] However, RLPA does conflict with the constitutional norms that inhere in the Establishment Clause.[130] There is no contradiction here, for not all constitutional norms are fully enforced by the judiciary.[131]

As Lawrence Sager has explained, the Supreme Court does not always enforce constitutional provisions to their fullest. Rather, the Court develops workable analytical doctrines and structures that reflect its understanding of these provisions.[132] These workable structures, or, in Sager's terms, "constructs," may fail to exhaust parent provisions, or "concepts," for several reasons. The most potent of these reasons are institutional capacity and institutional setting.

Institutional capacity limits the kinds of determinations that federal judges can make. For example, given their limited resources, many consider it inappropriate for judges to set social policy.[133] More

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[128] RLPA arguably also conflicts with the Equal Protection Clause's normative thrust. However, the Supreme Court, in holding that laws "affording a uniform benefit to *all* religions" should be analyzed under the Establishment Clause and not the Equal Protection Clause, see Larson v. Valente, 456 U.S. 228, 252 (1982), has probably foreclosed this possibility.

[129] See supra notes 112-14 and accompanying text.

[130] See supra Part II.B.

[131] See Sager, Fair Measure, supra note 105, passim (setting forth theory of underenforcement of constitutional norms).

[132] See id. at 1213-14.

[133] See, e.g., Dandridge v. Williams, 397 U.S. 471, 487 (1970) (stating that:

> [w]e do not decide today that the Maryland regulation [capping benefits under an Aid to Families with Dependent Children program at $250 per month regardless of actual need] is wise [or] that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, . . . [because] the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.);

Frank I. Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U. L.Q. 659, 684-85 (noting that governmental duty to satisfy citizens' subsistence requirements "seems to be one that courts acting alone cannot or ought not undertake to define, impose, and enforce"); Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 Nw. U. L. Rev. 410, 420 (1993) (suggesting that notion of minimum entitlement that economic justice demands involves "immensely complex questions of social strategy and social responsibility, questions that are linked to an intricate web of extant social services, taxes, and economic circumstances . . . [and] that seem far better addressed by the legislative and executive branches [than by the judiciary]"). But see Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1175-83 (1999) (arguing that institutional incompetence is surmountable obstacle in context of state court enforcement of positive economic rights).

prominently, the federal judiciary's institutional setting may curtail its ability to enforce constitutional norms fully. Norms of federalism and separation of powers, and concomitant fears of countermajoritarian judicial review, have induced a litany of commentators to recommend that federal courts defer to some legislative constitutional determinations with which they disagree.[134] Courts often heed this advice, though explicit recognition of this fact is more unusual.[135]

Because constitutional norms may be underenforced by the judiciary, there is no contradiction in saying that a given law conflicts with constitutional concepts but would not be held unconstitutional by the federal judiciary. Indeed, the test offered in this Note[136] would invalidate only those conditions that, like RLPA, require state behavior that conflicts with constitutional concepts but would not be held unconstitutional were a state to take the actions in question fully of its own volition.[137] The test thus supplements *Dole*'s independent constitutional bar criterion, which already invalidates conditions that require state behavior that violates a constitutional provision as enforced by the Supreme Court.

RLPA encroaches on constitutionally protected liberties under the Court's substantive interpretation of the Constitution. It thus flies directly in the face of the theoretical concerns for individual rights and liberties that should motivate the development of spending power doctrine. The Court's almost exclusive reliance on the nexus requirement to police the line demarcating the appropriate federal balance is

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134 See, e.g., Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 155 (1997) (suggesting that, particularly in close cases, "the independent judgment of Congress on a constitutional question should make a difference" and that "[a] responsible court necessarily takes into consideration not only the meaning of the constitutional provision at issue, but also the institutional implications of the doctrine [at issue] for the allocation of power between the courts and the representative branches"); Sager, Fair Measure, supra note 105, at 1224 (arguing that "some judicial decisions reflect the tradition of judicial restraint and should not be understood to be exhaustive statements of the meaning of the implicated constitutional norms"); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 140 (1893) ("'[A]n Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.'" (quoting Commonwealth ex rel. O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811))).

135 See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) ("It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system."); Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").

136 See infra Part III.

137 The conclusion that RLPA fits this description assumes that the Establishment Clause is an underenforced constitutional norm. This point is advanced infra note 173.

misplaced. A new test is needed to prevent Congress from using its spending power to impinge indirectly on protected liberties.

III
THE REQUIREMENT OF CONSTITUTIONAL CONSISTENCY

Courts should require that federal conditional grants-in-aid not disrupt constitutional consistency. This notion will assist in fulfilling the role of mediation in our federal system by enabling courts to cordon off those conditions that share Title VI's structure but that, like RLPA, should be declared invalid.

The requirement of constitutional consistency posits that when a state has no real choice but to accept federal assistance that is conditionally granted, courts should fully enforce constitutional norms relating to the state behavior compelled by the condition. Because the states are functionally unable to reject all federal assistance today,[138] all cross-cutting conditions, which by definition condition all or almost all federal assistance on state compliance,[139] should be subject to the heightened scrutiny called for by this requirement. If the state behavior compelled by a cross-cutting condition conflicts with the norms inherent in the liberty- or equality-bearing provisions of the Constitution as interpreted by the Supreme Court,[140] the condition should be invalidated even if the state could engage in the same behavior were it acting fully of its own volition.

A. The Requirement's Justification and Motivation

Federalism demands that a state be accorded a role in the preservation of its citizens' liberties. Therefore, federalism is offended when a state is conscripted in a federal scheme of rights impingement. At the same time, theories of separation of powers and judicial restraint that induce the Supreme Court to underenforce some constitutional norms are inapposite in the conditional grant context. The judiciary should therefore cease to restrain itself when confronted with appropriate conditions, invalidating them in service of liberal constitutional values and federalism.

In our federal system, states should not be effectively required by the federal government to impinge on their people's liberties, even if the states could constitutionally do so of their own volition. Congress

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138 See infra Part III.B.

139 See supra note 18.

140 For a defense of the primacy of judicial interpretations of the Constitution, see Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359 (1997).

may not compel states to act in ways that cut against the grain of the liberty- and equality-bearing provisions of the Constitution without running afoul of federalist principles, according to which the most noble purpose a state can serve is to safeguard the liberties of its people.[141] The moment that Congress attempts to require such behavior is the moment to rein in federal power—the precise task modern spending power theory attempts to do.[142]

In addition, when Congress does compel such behavior from states, the institutional concerns that have led the Court to underenforce constitutional norms will often be lacking. For example, the most potent justification for the doctrine of judicial restraint—the perceived "need to protect the discretionary judgments of representative institutions from uncabined judicial interference"[143]—dissipates significantly in the context of state action taken pursuant to federal conditional grant programs.[144] The judiciary's duty of deference to legislative determinations is premised on a "theory of democratic primacy . . . [whereby] [f]ederal judicial review of government action . . . presents a fundamental tension, because it allows unelected Article III judges to override the policy preferences of the people's elected representatives."[145] Implicit in this "democratic" attack on judicial review is the notion that the elected branches are just that, elected, and therefore accountable to the people, while judges lack this virtue of accountability.[146] But in the context of conditional grant programs, the countermajoritarian difficulty disappears because the supposed accountability of the elected branches is itself lacking: State legislatures

141 See supra Part I.A (arguing that telos of federal system is protection of individual liberties from governmental encroachment).

142 See supra note 38 and accompanying text.

143 McConnell, supra note 134, at 156; see also Sager, Fair Measure, supra note 105, at 1223 (suggesting that thesis of judicial restraint is premised on "the idea that only manifestly abusive legislative enactments . . . entitle[ ] a court to displace the prior constitutional ruling of the enacting legislature").

144 Note, however, that institutional capacity (as opposed to institutional setting) difficulties that at times induce the Court to underenforce constitutional norms, see supra notes 133-35 and accompanying text, may remain.

145 Hershkoff, supra note 133, at 1157; see also Erwin Chemerinsky, The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 61 (1989) (describing countermajoritarian difficulty as "the dominant paradigm of constitutional law and scholarship, a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy").

146 See Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. Rev. 333, 335 (1998) ("The problem is this: to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?").

point their fingers at Congress and Congress points right back.[147] This deficiency in accountability, this failure of process, has led several commentators to call for significantly heightened judicial review of conditional grant schemes.[148] In contrast, this Note's claim that the Court should fully enforce relevant constitutional provisions is relatively modest.[149]

The proposed standard furthers that which is at once the quintessential justification and objective of the federal system, and the heightened judicial review it calls for does not exacerbate the countermajoritarian difficulty. Therefore, the federal judiciary should implement it when an appropriate occasion arises.

B. The Requirement In Action: Title VI and RLPA Revisited

The states have no real choice but to accept Title VI's terms, and they will have no choice but to accept those of RLPA if it passes. Both Title VI and RLPA condition every dollar given to the states on compliance with federal demands.[150] This constitutes far more than a

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147 See Note, Federalism, Political Accountability, and the Spending Clause, 107 Harv. L. Rev. 1419, 1420 (1994) (arguing that:

> [w]hen Congress conditions the receipt of federal money on legislative action by the states, federal legislators can point to the state's voluntary decision to accept the funds as the decisive act. State legislators, on the other hand, have a persuasive claim that Congress never intended to offer the states a choice because the state could not, in practical terms, decline the much-needed federal funding. This potential for evasion of accountability undermines both the government's responsiveness to voter preferences and federalism's effectiveness as a check on the abuse of political power. (footnote omitted));

see also Ann Althouse, Variations on a Theory of Normative Federalism: A Supreme Court Dialogue, 42 Duke L.J. 979, 1017-18 (1993) ("Cooperative federalism [i.e., the system of conditional federal grants to states,] can become a tempting device for insulating officeholders at both the state and the federal levels.").

148 See, e.g., McCoy & Friedman, supra note 2, at 118-20 (arguing that Congress should be permitted to impose only those conditions that it could regulate directly under an independent source of power); Note, supra note 147, at 1420 (arguing that Court should "review more carefully Congress's conditional grants . . . to ensure that the Constitution's procedures and structural design are not being undermined by the evasion of political accountability").

These arguments find support in recent decisions such as New York v. United States, 505 U.S. 144 (1992), which held that Congress must enact regulatory programs itself rather than compel states to do so. They also accord nicely with one prominent strain of constitutional thought that holds that judicial review is justifiable only insofar as it corrects political process failures. See, e.g., John Hart Ely, Democracy and Distrust 73-104 (1980).

149 Cf. Stewart, supra note 34, at 1270 (noting that "[t]he hazards in judicial enforcement of federalism limitations on national power would be ameliorated" if courts were limited to their "characteristic role in reviewing the constitutionality of congressional legislation to protect individual rights").

150 Note that funding revocations are limited to specific programs or activities that violate conditions. Thus, a minor infraction will not result in the revocation of all federal assistance, but a state that wishes never to comply will lose all such aid.

"temptation"[151] or "mild encouragement";[152] indeed, it is hard to conceive of a program that would impose a greater penalty on noncompliance than these do.[153] Thus, while it is by no means easy to determine at precisely which point a state loses its ability to "just say no,"[154] it is clear that cross-cutting conditions like Title VI and RLPA go well past this point.

In 1965, federal expenditures for grants to state and local governments totaled $10.9 billion, or $48.2 billion in 1992 dollars.[155] This sum is paltry in comparison to today's total outlay: over $234 billion in 1997, or $205.8 billion in 1992 dollars.[156] Yet the comparison with 1940 figures, which barely post-date Justice Cardozo's opinion in *Steward Machine Co. v. Davis*,[157] is the most glaring: Just $872 million were then granted to states, or $9.9 billion in 1992 dollars.[158] While states may have been able to forego the "temptation"[159] of federal aid in 1940, they cannot realistically do so today. Changes in total outlays and correlative state dependence have induced several commentators to call for a reappraisal of the doctrine of consent in recent years.[160]

But while these figures are striking, they alone prove little. As Judge Stephen Reinhardt noted, "a sovereign state . . . is always free

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

152 South Dakota v. Dole, 483 U.S. 203, 211 (1987).

153 Only a condition that would revoke all state assistance to remedy a violation limited to a single program would be more severe. It is no wonder Title VI was pejoratively described as "The Hundred-Billion-Dollar-Blackjack" in the South in the 1960s. See Cappalli, supra note 18, § 19:16, at 46.

154 See supra note 86 and accompanying text.

155 See Office of Management & Budget, Historical Tables: Budget of the United States Government 203 tbl.12.1 (1999) [hereinafter Historical Tables].

156 See id. It is not surprising that modern states have been described as "federal aid junkies." See Cappalli, supra note 18, § 10:07, at 17 (citation omitted).

157 301 U.S. 548 (1937).

158 See Historical Tables, supra note 155, tbl.12.1.

159 *Steward Machine Co.*, 301 U.S. at 590.

160 See, e.g., Rosenthal, supra note 34, at 1104 ("There may once have been an easy answer [to the issue of coercion]: If you don't like the conditions, don't take the money. But this answer has become increasingly unsatisfactory in light of the growing dependence of recipients . . . upon federal money.").

The passage of the Sixteenth Amendment may also be a relevant factor. One commentator, speculating on the motivations of the state in arguing that it was coerced in Massachusetts v. Mellon, 262 U.S. 447 (1923), suggests that:

> If the grant-in-aid technique went unchallenged, and if it became popular in Congress, and if Congress went increasingly to the Sixteenth Amendment "well," the states would be eventually stripped of their tax bases, would become increasingly dependent upon federal financial aid, and would thereby lose their sovereign status.

Cappalli, supra note 18, § 10:04, at 8; accord Baker, supra note 38, at 1936-37 ("Since the adoption in 1913 of the Sixteenth Amendment, . . . the states implicitly have been able to tax only the income and property remaining to their residents and property owners after the federal government has taken its yearly share." (footnotes omitted)).

to increase its tax revenues."[161] Hence, the argument goes, whatever funds are forsaken by state legislatures in lieu of submitting to federal demands can simply be recovered via a tax hike. While this argument is appealing, it is flawed.

A state would have to increase its tax rates dramatically to compensate for federal revenues lost due to unwillingness to comply with RLPA or Title VI. New York State, for example, would have to increase its total tax revenues over sixty percent to compensate for lost assistance.[162] Such an action might be practicable, but only if New York existed in a vacuum.

A cross-cutting condition divides states into two groups: those that do not object to the condition and those that do.[163] Those states that do not object will of course comply with the federal government's requirements. They will, accordingly, be able to maintain their pre-condition rate of taxation, benefiting from continued federal support. States that do object, on the other hand, will prefer not to comply. If they so choose, they will have to raise their taxes significantly to maintain the level of services they provided prior to the imposition of the condition.[164]

This would place those states at a gross disadvantage, vitiating their ability to compete with their neighbors that accept the conditional grant.[165] Corporate and individual taxpayers might react to extreme disparities in rates of taxation by "taking their business elsewhere,"[166] thus making it politically improvident for legislatures to refuse federal assistance even if that requires compliance with conditions they abhor. It is, accordingly, unsurprising that states very rarely refuse federal aid.[167] If RLPA passes, state legislatures will find it

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161 Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989).

162 See New York State Executive Budget, 1998-99, app. II, at 71 (1998). The figure was calculated by dividing total federal grants to New York ($23.065 billion) by New York's total tax revenues ($38.247 billion). This assumes New York would not comply with the condition(s) in any of its federally funded programs.

163 See Baker, supra note 38, at 1935-36.

164 See supra note 162 and accompanying text.

165 See Stewart, supra note 44, at 958 ("Refusal to accept federal funds may also require tax increases that will result in competitive disadvantages compared to other jurisdictions that accept [the] grants. Accordingly, state or local refusal to participate in grant programs is exceedingly rare.").

166 Uncertainty regarding the effects of tax rates on firm choices whether to relocate "may create a plausible *fear* of triggering a flight of capital that can significantly restrain state and local officials from raising taxes." Id. at 926 n.19.

167 See Cappalli, supra note 18, § 10:07, at 17 ("While examples of refusals of federal grants could be unearthed, they were a mere handful compared to the gleeful acceptance of thousands upon thousands of pecuniary inducements by state agencies, local governments, and nonprofits." (footnote omitted)); supra note 165.

functionally impossible to refuse to comply with its strictures, just as no state has flouted Title VI's demands.[168]

The question thus arises whether the behavior compelled by these conditions conflicts with constitutional norms. In this respect, the two conditions diverge.

Title VI does no more than extend constitutional norms, norms of equality derived from the Equal Protection Clause, to "private" actors who are not normally subject to constitutional mandates.[169] Thus, while Title VI functionally imposes its strictures on the states, its strictures are constitutionally unobjectionable as a substantive matter; they are, in fact, identical to constitutional norms. Therefore, Title VI passes the test with flying colors. Not only does it not undermine constitutional consistency, it promotes it.

RLPA, on the other hand, does not benignly extend constitutional norms to nonstate actors. Rather, it imposes norms of behavior that are quite different from those that inhere in the Constitution as interpreted by the judiciary.[170] Because RLPA's requirements in effect privilege religious observance over other matters of importance to society,[171] RLPA fails to maintain constitutional consistency. Even if (as is likely the case) states may act in accordance with RLPA's substantive provisions of their own volition,[172] Congress may not functionally command them to do so because these provisions conflict with Establishment Clause norms.[173] To grant Congress the power to com-

168 Cf. Chemerinsky, supra note 40, at 524 ("The reality, of course, is that strings on grants can be as coercive as any direct requirement.").

169 See supra note 105 (discussing whether Title VI could be directly regulated by Congress in light of fact that Title VI serves only to extend Equal Protection Clause norms to private actors).

170 See Eisgruber & Sager, supra note 105, at 444 ("RFRA is at direct odds with the best understanding of religious freedom."); supra Part II.B.

171 See supra notes 122-26 and accompanying text.

172 See supra notes 112-14 and accompanying text.

173 The conclusion that RLPA conflicts with constitutional norms assumes that the Establishment Clause is at times underenforced by the judiciary. However, as notions of underenforcement are not often associated with the Establishment Clause, see, e.g., Sager, Fair Measure, supra note 105, at 1218-20 (listing "likely candidates for characterization as underenforced [as] the fifth amendment's prohibition against takings of property without just compensation, the privileges or immunities clause of the fourteenth amendment, and the due process [and equal protection] clause[s] of the fourteenth amendment" (footnotes omitted)), it is necessary to justify this assumption.

The Establishment Clause is violated when religion is privileged. See supra note 127; see also Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing three-pronged test, which demands that statutes (1) have secular legislative purposes; (2) not have primary effect of advancing or inhibiting religion; and (3) not excessively entangle government with religion); Gillette v. United States, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organ-

ization."); Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (suggesting that federal government may not pass laws that "aid one religion, aid all religions, or prefer one religion over another"). However, in its recent religious liberty jurisprudence, the Court's eagerness to enforce this requirement robustly has waned. See, e.g., Agostini v. Felton, 521 U.S. 203 (1997) (5-4 decision) (overruling Aguilar v. Felton, 473 U.S. 402 (1985), and portion of School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), by holding that state-sponsored remedial education may be provided to disadvantaged children on grounds of religious schools); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 337-39 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence .... [L]imiting governmental interference with the exercise of religion ... [is a permissible legislative purpose]."); Lupu, supra note 123, at 237 ("[D]evelopment of the Religion Clauses during the Reagan-Bush years ... constituted an assault on separationism [i.e., the strong view of the Establishment Clause that advocates for a strict separation of church and state,] in every respect ...."). The Supreme Court's change of course has not been inconsequential. Cf. Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge), 220 B.R. 386, 400 (Bankr. D. Idaho 1998) (upholding RFRA against Establishment Clause challenge, remarking that if "one applies the *Lemon* test literally, it seems clear that RFRA fails to satisfy the first two prongs of that test .... However, the *Lemon* test must be applied with the judicial gloss which has been placed upon it by subsequent decisions ....").

While this change could reflect either a substantive reinterpretation of constitutional provisions or a refusal to enforce provisions to their full extent, underenforcement must represent at least part of the explanation.

Constitutional theorists' "obsession" with the countermajoritarian difficulty was at its apex in the 1970s and 1980s. See Friedman, supra note 146, at 339. Supreme Court justices started taking notions of judicial restraint seriously in turn; the contrast between the Burger and Rehnquist Courts and the Warren Court is well known. These notions of judicial restraint applied in the Establishment Clause context. See Lupu, supra note 123, at 237 (arguing that Court's retreat from separationism from 1980 to 1992 "was part of the overall program of putting an end to 'judicial activism'"); id. at 255 ("[P]ermissive accommodations [of religious interests] are at the crossroads of two competing themes of this period—deference to political branches as an institutional matter, and the presumptive equality of religion and nonreligion as a substantive matter.").

In addition to requiring that judges not strike every law they might, judicial restraint also requires that judges permit legislatures to participate in the process of constitutional interpretation and enforcement. Thus, both scholars and judges have been at pains to ensure that a "gap" between the Establishment and Free Exercise Clauses exists. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (Brennan, J.) ("Contrary to the dissent's claims, ... we in no way suggest that *all* benefits conferred exclusively upon religious groups ... are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); id. at 28 (Blackmun, J., concurring) ("We in the judiciary must be wary of interpreting these ... constitutional Clauses in a manner that negates the legislative role altogether."); Marshall, supra note 125, at 323 ("[T]here should be some space for permissible legislative action between the two constitutional commands."); Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 3 (same). A failure to enforce judicially a constitutional provision so that legislatures may have room to work is an instance of judicial restraint—an instance that makes clear that the Establishment Clause is underenforced.

At the same time, one must recognize that notions of judicial restraint may carry weight in the Court's interpretation of the Free Exercise Clause as well. See Gerald L. Neuman, The Nationalization of Civil Liberties, Revisited, 99 Colum. L. Rev. 1630, 1643 (1999) (suggesting that *Smith* may be in part product of judicial underenforcement). But see Harold J. Krent, The Supreme Court as an Enforcement Agency, 55 Wash. & Lee L. Rev. 1149, 1180 (1998) ("[I]n *City of Boerne*, the Court invalidated the legislation only

pel the states to encroach on constitutionally protected liberties would be to eviscerate the most important protections that can be afforded by our federal system—protections of individual rights.

CONCLUSION

Congressional authority under the Spending Clause is broad, and rightly so; contrary to some assertions,[174] it should not be significantly abridged. However, judges should scrutinize schemes of conditional grants and disallow indirect federal encroachments on individual rights. While the protection of these rights is normally assigned to the legislative branches, the judiciary should fully enforce norms of liberty and equality inherent in the Constitution when a state is effectively forced to impinge on its people's liberties. Federalism and separation of powers do not require judicial deference in these circumstances; in fact, federalism demands the opposite: It demands that the federal judiciary help preserve the role of the states in the protection of liberty. Ingeniously crafted federal schemes that indirectly target constitutionally protected rights should not be permitted.

Unfortunately, the current criteria by which the Court assesses conditional grant programs are formalistic and incapable of rising to the task. Supplementing these criteria with a conceptually motivated test that seeks to promote constitutional consistency better preserves individual rights, as federalism demands.

Over two decades ago, Justice Brennan wrote that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[175] Likewise, to eviscerate the role of state governments in the protection of these rights would be a mistake.

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after determining—despite possible arguments to the contrary—that its prior construction of the Free Exercise Clause was not based on institutional or federalism factors." (footnote omitted)). Thus, whether RLPA is constitutionally consistent may turn on whether it is required by the Free Exercise Clause, fully enforced, or is proscribed by the Establishment Clause, fully enforced, and this question ultimately turns on a more general concept of religious liberty.

174 See, e.g., Baker, supra note 38, passim.

175 William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977).