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Can Congress Buy RLUIPA's Way to Constitutional Salvation

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COMMENTS

CAN CONGRESS BUY RLUIPA’S WAY TO CONSTITUTIONAL SALVATION?

INTRODUCTION

What do prison administration and land use policy have in common? On the surface, these topics appear to have little to do with each other, yet they are both subjects of a federal law designed to protect religious freedom in areas where Congress believes religious discrimination runs rampant.

Congress enacted the Religious Land Use and Institutionalized Persons Act of 20001 ("RLUIPA"), barring any government from imposing a "substantial burden" upon a prisoner2 or propagating a land use regulation that imposes a "substantial burden" upon religious assembly.3 Congress enacted RLUIPA using its authority under the Commerce Clause,4 Section Five of the Fourteenth Amendment,5 and one additional justification: the spending power.6 Congress tied the statute to its spending power out of fear that its first two foundations would not be sufficient to sustain the statute's constitutionality. But is the spending power really the answer to Congress's prayers, or just another golden calf waiting to be struck down by an angry Court?7

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7 C.f. Exodus 32:8-10. ("They have turned aside quickly out of the way I commanded them. They have made for themselves a golden calf and have worshipped it and sacrificed to it

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The spending power is the one major area of Congressional authority that has not yet been restrained by the Rehnquist Court’s “federalism revolution.”\(^8\) The Court has strongly limited the scope of the Commerce Clause\(^9\) and the Fourteenth Amendment’s Enforcement Clause\(^10\) while simultaneously expanding the breadth of state sovereignty.\(^11\) Congress currently uses the spending power as a plenary grant of authority whose scope is just as boundless as the Commerce Clause’s used to be.\(^12\) The plain language of the Commerce Clause limits it to regulation of commercial activities that are “among the several states” or with Indian tribes or foreign nations, whereas the Spending Clause contains no such limitation. The sole textual limitation on the spending power restricts Congress to spending for the “general welfare,” a description that the Court admits is nonjusticiable.\(^13\)

and said, ‘these are your gods o Israel who brought you up out of Egypt!’ . . . Now therefore let me alone now, that my wrath may burn hot against them . . . .”) (ESV).

\(^8\) See Lynn A. Baker & Mitchell N. Berman, Getting off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So, 78 Ind. L.J. 459, 460 (2003) [hereinafter Baker & Berman] (describing the spending power as the “notable exception” to the Rehnquist Court’s reigning in of Congressional authority); John C. Eastman, Restoring the “General” to the General Welfare Clause, 4 Chap. L. Rev. 63, 63 (2003) (claiming that over the last decade the Court has restored the founders’ “vision of a national government that was strong within the sphere of power assigned to it but limited by the extent of that sphere.”).


\(^10\) See City of Boerne v. Flores, 521 U.S. 507 (1997) (stating that Congress cannot use Section Five of the Fourteenth Amendment to expand constitutional liberties beyond the boundaries recognized by the courts).


\(^12\) Jonathan H. Adler, Judicial Federalism and the Future of Federal Environmental Regulation, 90 Iowa L. Rev. 377, 447 (2005) (“Under existing precedent, it nonetheless appears Congress has ample authority to circumvent the Court’s federalism holdings through the use of conditional spending.”); Lynn A. Baker, The Spending Power and the Federalist Revival, 4 Chap. L. Rev. 195, 195-96 (2001) (“No matter how narrowly the Court might read Congress’s powers under the Commerce Clause . . . . the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.”).

\(^13\) Helvering v. Davis, 301 U.S. 619, 640 (1937) (“The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”). See also Eastman, supra note 8, at 66 (“the contemporary view is that Congress’s power to provide for the ‘general welfare’ is a power to spend for virtually anything that Congress itself views as helpful.”).
Professor Erwin Chemerinsky observed that "[t]he next frontier of litigation is sure to be the Spending Clause."\(^{14}\) RLUIPA could be one arena in which this battle is fought. The Supreme Court recently resolved its first RLUIPA case. In *Cutter v. Wilkinson*\(^{15}\) the Court held that RLUIPA did not violate the Establishment Clause. But, despite being invited to do so, the Court did not rule on the validity of RLUIPA under the Commerce and Spending Clauses.\(^{16}\)

Focusing exclusively upon the prisoner provisions, this Comment explores the exercise of the spending power in RLUIPA and assumes, *arguendo*, that RLUIPA is beyond the grasp of the Commerce Clause, Section Five of the Fourteenth Amendment, and that it does not violate the state sovereignty. In other words, if the constitutionality of RLUIPA’s prisoner provisions depended solely upon the spending power, would it withstand constitutional scrutiny? This Comment ultimately concludes that it would not because the spending conditions in RLUIPA are not sufficiently related to the appropriations to which they are attached, creating a coercive Hobson’s choice for the states. Part I describes RLUIPA’s history and background. Part II explores the application of the current Spending Clause jurisprudence to RLUIPA, and Part III offers a normative suggestion for courts to follow in future spending cases.

**PART I: HISTORY AND BACKGROUND**

**A. The Road to RLUIPA**

RLUIPA was not a spontaneous proposal. Congress enacted RLUIPA in response to specific governmental activities it viewed as particularly threatening to religious liberty, and which Congress believed it had the power to regulate.

**1. RLUIPA’s Inspiration**

Several Supreme Court decisions in the late 1980s led Congress to believe that prisoners’ religious exercise rights were particularly vulnerable, and these concerns deepened in 1990 when the Court reinterpreted its Free Exercise Clause jurisprudence.

\(^{14}\) Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 77 (2001) ("there has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism."). *See also* Adler, supra note 13, at 434 (predicting that the question of the spending power’s limits is "[l]ooming on the horizon").

\(^{15}\) Brief in Response to Petition for a Writ of Certiorari at 18, Cutter v. Wilkinson, 125 S. Ct. 308 (2004) (No. 03-9877).
a. Prison Cases

The Supreme Court’s October 1986 Term produced two decisions that inspired RLUIPA’s specific inclusion of state prison regulations. In Turner v. Safley, the Court reviewed a class action challenge to two Missouri prison regulations. One of the regulations required an inmate to obtain the warden’s permission before marrying and limited the warden to granting such permission only “when there were compelling reasons to do so.” The other regulation prohibited inmates from corresponding with one another unless they were writing to “immediate family members who were inmates in other correctional institutions,” or “concerning legal matters.”

The trial court applied a strict scrutiny standard in striking the regulations because they infringed upon inmates’ fundamental right to marry and were an overly broad violation of the inmates’ First Amendment rights. The Eighth Circuit Court of Appeals agreed. The Supreme Court affirmed the decision to strike the marriage regulation, but reversed the decision regarding the correspondence regulation. The Court rejected the application of strict scrutiny and held that “a lesser standard of scrutiny is appropriate in determining the constitutionality of prison rules.” According to the Court, a prison regulation will withstand constitutional scrutiny if it is “reasonably related to legitimate penological objectives.” The correspondence regulation met this standard, the marriage regulation did not.

The Court applied this rule in another prisoner case decided just a week later. In O’Lone v. Estate of Shabazz, two Muslim inmates challenged a New Jersey regulation preventing them from returning inside during Friday afternoons to celebrate the weekly Muslim congregational service of Jumu’ah. The Court reiterated its standard from Turner and rejected the inmates’ argument that the Free Exercise Clause required the state to accommodate their religious practices.

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17 See Baker & Berman, supra note 8, at 496 (2003).
19 Id. at 82 (noting that permission was generally given only in the event of pregnancy or the birth of an illegitimate child).
20 Id. at 81.
22 Id. at 595.
23 Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985).
24 Turner, 482 U.S. at 99-100.
25 Id. at 81.
26 Id. at 79.
27 Id. at 99-100.
29 Id. at 342.
unless it was too dangerous to do so.\textsuperscript{30} The Court ruled that the proper standard to apply to prisoners’ claims of free exercise was one of reasonableness, and the regulation at issue was reasonably related to a legitimate penological interest.\textsuperscript{31} According to one observer, “the plight of the Orthodox Jewish prisoner worsened dramatically after \textit{Turner},”\textsuperscript{32} because “[t]he new ‘rational relation to legitimate penological interests’ test effectively validated any prison regulation.”\textsuperscript{33}

\textbf{b. Neutrality and General Applicability}

\textit{Turner} and \textit{O’Lone} applied only to challenges by inmates; but the Court later restricted any individual’s ability to successfully challenge a government action limiting religious exercise.

The First Amendment’s Free Exercise Clause protects an individual’s right to engage in religious activity.\textsuperscript{34} Prior to 1990 this meant that any state action which imposed a substantial burden upon the free exercise of religion was subject to strict scrutiny review,\textsuperscript{35} or a similar requirement that government demonstrate an “overriding governmental interest” before infringing upon religious exercise.\textsuperscript{36} However, in \textit{Employment Division, Department of Human Resources of Oregon v. Smith},\textsuperscript{37} the Court abandoned the substantial burden test and adopted a narrower interpretation of the Free Exercise Clause.

\textit{Smith} involved a challenge by several Oregon employees who were fired for using peyote, and were denied state unemployment benefits.\textsuperscript{38} The employees, members of the Native American Church, accused the state of unconstitutionally discriminating against them by withholding benefits because of their participation in an activity re-

\textsuperscript{30} \textit{Id.} at 349.
\textsuperscript{31} \textit{Id.} at 350.
\textsuperscript{33} \textit{Id.} The rational basis test is a very permissive standard, it “simply asks whether ‘the statute is rationally related to a legitimate state interest.’ If the question can be answered in the affirmative, which it almost always can, then courts refuse to interfere. It is only in the rare circumstance when the government cannot justify its action as rationally related whatsoever that the court will nullify the statute.” Benjamin D. Cramer, Note, \textit{Eminent Domain for Private Development—An Irrational Basis for the Erosion of Property Rights}, 55 CASE W. RES. L. REV. 409, 420 (2005) (citation omitted).
\textsuperscript{34} U.S. CONST. amend. I (Free Exercise Clause); see, e.g., Locke v. Davey, 540 U.S. 712 (2004); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
\textsuperscript{37} 494 U.S. 872 (1990).
quired by their religion. The Supreme Court ruled against the employees, abandoning its "substantial burden" test in favor of a test of neutral and general applicability. Writing for the majority, Justice Scalia noted that the mere possession of religious beliefs does not relieve an individual from obeying a general law not aimed at the restriction of those religious beliefs. Justice Scalia referred to Reynolds v. United States, an 1879 case in which the Court upheld a polygamy conviction despite a claim that polygamy was within the defendant's religious beliefs because "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Justice Scalia concluded that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest..."


The Smith decision generated a great deal of controversy; but while scholars were split on the issue, Congress was not. Congress passed the Religious Freedom Restoration Act of 1993 in an attempt to overturn Smith and reestablish the substantial burden test. Congress justified RFRA on the grounds that "in [Smith] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." RFRA was Congress's effort "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin..."
v. Yoder\textsuperscript{50} and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . \textsuperscript{51}

Congress enacted RFRA under the Fourteenth Amendment’s Enforcement Clause\textsuperscript{52} because the Fourteenth Amendment allows Congress to enforce the Bill of Rights’s guarantees against the states.\textsuperscript{53} In the opinion of Congress, the Court was not doing enough to protect the First Amendment’s guaranteed right to freely exercise religion.\textsuperscript{54} Congress believed the Smith decision emboldened municipal governments and led them to govern as they pleased without taking religious exercise into account.\textsuperscript{55}

RFRA was first tested before the Supreme Court in \textit{City of Boerne v. Flores}.\textsuperscript{56} Saint Peter’s Catholic Church in Boerne, Texas was planning to expand, but the city designated the area adjacent to the church as a historic district.\textsuperscript{57} While the church itself was not designated a historic site, the church’s façade was located within the historic district.\textsuperscript{58} The church applied for a building permit to enlarge the part of the church that was not located within the district, but the city denied it, claiming that it considered the entire church to be historical, thus there could be no expansion.\textsuperscript{59} The church sued the city under RFRA, claiming that the city was using the historical designation to impose a substantial burden on its free exercise rights by preventing it from expanding to accommodate the size of its congregation.\textsuperscript{60} Interestingly, the city did not deny the accusations, but instead argued that RFRA was unconstitutional because it exceeded Congress’s enforcement power under Section Five of the Fourteenth Amendment.\textsuperscript{61}

The Court agreed with the city, finding that Congress had the power to enforce the amendment, not the power to redefine existing

\textsuperscript{50} 406 U.S. 205 (1972).
\textsuperscript{52} U.S. CONST. amend. XIV, § 5.
\textsuperscript{53} \textit{See} H.R. REP. NO. 103-88, at 9 (1993) ("Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause . . . the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority.").
\textsuperscript{54} 42 U.S.C. § 2000bb(a)(4) (2005) ("in Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion . . . " (citation omitted)).
\textsuperscript{56} 521 U.S. 507 (1997).
\textsuperscript{57} Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996), \textit{aff’d}, 521 U.S. 507 (1997).
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
rights or create new ones. In Smith the Court described the metes and bounds of the protection provided by the Free Exercise Clause; RFRA's aim was to expand those boundaries, not enforce adherence to them. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause." Further, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." Thus, under the Boerne rationale, Congress "is limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court." Since the Fourteenth Amendment only applies to states, RFRA still survives Boerne insofar as it applies to the federal government. As one commentator noted, "Congress's power to control the activities of federal agencies does not rest on the Fourteenth Amendment. Rather, the power to control a federal agency or program rests on whatever power(s) Congress used to create it in the first place, supplemented by the Necessary and Proper Clause." With its commerce and enforcement powers restricted, Congress sought another means to protect religious freedom, and a new legislative effort soon emerged.

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63 Boerne, 521 U.S. at 519.
64 Chemerinsky, supra note 68 at 291.
65 See, e.g., Holy Land Found. for Relief and Dev. v.Ashcroft, 333 F.3d 156 (D.C. Cir. 2003); Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (holding that unconstitutional provisions of RFRA were severable and the remainder of the act still applied to the federal government); Hartmann v. Stone, 156 F.3d 1229 (6th Cir. 1998) (noting that RFRA might still apply to the federal government); In re Young, 141 F.3d 854, 863 (8th Cir. 1998) (holding that RFRA still applies to the government and effectively amends the bankruptcy code to prevent substantial burdens with religious exercise.);
B. Congress Tries Again: RLUIPA

1. Background

Congress attempted to correct RFRA's constitutional deficiencies by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").\(^{67}\) RLUIPA had the same goal as RFRA, but did so only in the context of prisons\(^{68}\) (in response to *Turner* and *O'Lone*) and land use\(^{69}\) (in response to the factual scenario of *Boerne*). Congress justified RLUIPA using several of its enumerated powers, presumably so that if the statute failed under one of the powers it could still survive under another. Congress sought to bring RLUIPA within Section Five of the Fourteenth Amendment by codifying the *Smith* holding that strict scrutiny applies when a governmental action involves individualized assessments.\(^{70}\) Congress also justified RLUIPA under the Commerce\(^{71}\) and Spending Clauses.\(^{72}\)

2. Challenges to RLUIPA

Challenges to RLUIPA have taken two different forms: some claimed that RLUIPA violated an independent constitutional provision, while others claimed that RLUIPA exceeded Congress's enumerated powers.

a. Claims that Congress violated a Constitutional provision

Several RLUIPA challenges claimed the statute violated a constitutional bar. Some of these cases asserted that Congress infringed upon the powers reserved to the states under the Tenth Amendment by attempting to regulate state correctional and local land use policies,\(^{73}\) while others claimed that RLUIPA violated common law and

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\(^{73}\) *See, e.g.*, Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (holding that RLUIPA did not usurp a core state function in violation of the Tenth Amendment); *see also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 324 (2003) ("the focus of the members of Congress in enacting RLUIPA was on becoming the sole savior of religious liberty, and decidedly not on its disruptive impact on traditional arenas of state control, land use, and prison administration.").
Eleventh Amendment protections of state sovereign immunity. Still others claimed RLUIPA violated the Establishment Clause.

b. Claims that Congress lacked the power to enact RLUIPA

Another common RLUIPA challenge urged the courts to rule that the statute exceeded Congress’s enumerated powers and is no more consistent with Boerne than RFRA was. If RLUIPA merely codified the Smith standard then it just expressed what the Court already stated; but it appears that RLUIPA was enacted because Congress did not believe that Smith provided enough protection to religious exercise. Therefore, according to this argument, RLUIPA must be meant to provide more protection than Smith, in which case Congress is again attempting to expand the boundaries of the Free Exercise Clause, running directly contrary to the Court’s holding in Boerne. Another common objection to RLUIPA has been that it exceeded Congress’s powers under the Commerce Clause. Likewise, some litigants challenged RLUIPA under the Spending Clause; but these arguments have been given little attention and none have been successful.

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74 See Mayweathers v. Terhune, 2001 WL 804140 (E.D. Cal. 2001), aff’d sub nom. Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (rejecting state sovereign immunity claim because federal courts have jurisdiction to grant prospective injunctive relief against state officials who violate federal law).

75 See Hoevenaar v. Lazaroff, 108 Fed. Appx. 250 (6th Cir. 2004) (unpublished) (rejecting Native American inmate’s claim that forcing him to cut his hair would violate RLUIPA because RLUIPA was invalid under the Establishment Clause); Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), cert. granted 125 S. Ct. 308 (2004) (declaring RLUIPA’s application to prisons an unconstitutional violation of the Establishment Clause); Kilaab al Ghashiyah v. Dept. of Corr. of State of Wis., 250 F.Supp.2d 1016 (E.D. Wis. 2003), overruled by Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); but see Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (reinstating inmate’s claim that denial of kosher food violated RLUIPA, reversing lower court determination that RLUIPA violated the Establishment Clause); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (rejecting Establishment Clause challenge);


78 See, e.g., Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004); Charles v. Verhagen, 348 F.3d 601 (7th
II. RLUIPA AND THE DOLE TEST

A. The Breadth of the Spending Clause

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. -U.S. CONST. art. I, § 8, cl. 1.

The General Welfare Clause is the first clause contained within Article I, § 8—the section of the Constitution enumerating Congressional power. The clause is frequently referred to as the Spending Clause, because many believe that it implies a spending power that Congress can use to effectuate federal programs and attach conditions to federal grants.

The framers sharply debated just how broad the spending power actually was, and modern academics have debated about whether it is a grant of power at all. The framers' debate primarily fell along two lines: the Madisonian enumerated powers approach, and the Hamiltonian approach. James Madison believed the Spending Clause was merely a statement that Congress could spend its treasury to accomplish those tasks delegated to it by Article I, § 8. He noted that the phrase "general welfare" was directly imported from the Articles of
Confederation, and he argued that no one believed those words to give the Confederation plenary spending power.

Madison's view conflicted with that of his colleague, and coauthor of The Federalist Papers, Alexander Hamilton. Hamilton believed the General Welfare Clause to be a plenary grant of authority to legislate for any purpose that Congress deemed to be within the "general welfare." This version of Hamilton's idea has been referred to as the "strong-Hamilton" position, to distinguish it from the "soft-Hamilton position" proffered by Justice Story. Story's view suggests that the General Welfare Clause did not give Congress plenary legislative power, but did give it plenary spending power.

This debate was largely unresolved until the mid-1930s when the Court unequivocally adopted the Story-Hamilton position. In United States v. Butler, the Court resolved a challenge to the Agricultural Adjustment Act of 1933, a law intended to stabilize agricultural prices by paying subsidies to farmers to limit crop production, thus raising prices. While Butler ultimately rejected the Act as violating the Tenth Amendment, the opinion contained a detailed analysis of the breadth of Congress's spending power. The Court directly stated that the Hamiltonian view was correct: Congress could spend in whatever manner it deemed beneficial to the general welfare so long as the expenditure did not violate a separate constitutional provision.

B. A New Twist on an Old Debate: Conditional Spending

Congress has used its spending power to not only directly spend its funds, but also to give grants to states—provided they spend the

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84 See ARTICLES OF CONFEDERATION, art. III ("The said states hereby severally enter into a firm league of friendship with each other, for the common defence, the security of their liberties, and their mutual and general welfare . . .") (emphasis added); id. at art. VIII ("All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury. . . .") (emphasis added).
86 CHEMERINSKY, supra note 68, at 268-69.
87 Renz, supra, note 88, at 87; Natelson, supra note 86, at 8-9. See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1861) (1833).
88 Renz, supra, note 88, at 87.
89 United States v. Butler, 297 U.S. 1, 66 (expressly adopting Justice Story's position).
90 297 U.S. 1 (1936).
92 Butler, 297 U.S. at 53-54.
93 Id. at 58-67.
94 Id. at 68 ("It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.").
money according to Congress's criteria.95 This is particularly important in determining the constitutionality of the prison provision imposed upon the states in RLUIPA because "[a]ll state criminal justice systems obtain federal funding of one kind or another."96 By conditioning the grant of federal funds upon compliance with Congress's imposed criteria, Congress can use the spending power to indirectly achieve a level of regulatory compliance that it could not directly command under the Commerce Clause. As one commentator explained, "[i]n other words, Congress could use its spending power not only to exercise powers that were not delegated to it, but also to exercise some powers that were explicitly denied."97 In this sense, the spending power is the broadest power in the Congressional arsenal.98

The conditional spending power is not without limits, but its boundaries are flexible and generous. The Butler Court delineated the breadth of the spending power in general, but it was not until South Dakota v. Dole99 that the Court specifically announced a test for adjudicating conditional spending challenges. Dole involved a challenge to a Congressional mandate that withheld a percentage of federal highway funds from any state that did not adopt a minimum drinking age of twenty-one years.100 South Dakota claimed that the link between a minimum drinking age and the highway funds was not close enough to empower Congress to require the change.101 Writing for the majority, Chief Justice Rehnquist stated that such a condition was a constitutionally proper exercise of the spending power so long as it meets four criteria: (1) the appropriation of funds is for the "general welfare,"102 (2) there is no constitutional bar to the imposed conditions;103 (3) the conditions are clear and unambiguous;104 and (4) the conditions are related to the federal interest that the spending seeks to advance.105 In addition to this four-part test, the Court noted—without

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97 Renz, supra note 88, at 85.
98 See CHEMERINSKY, supra note 68, at 268.
100 Id. at 205.
101 Id. at 205-06.
102 Id. at 207.
103 Id.
104 Id.
105 Id. at 208. The fourth prong of the test was the primary motivation behind Justice O'Connor's dissent in Dole. She believed that the condition was both over-inclusive in that it prohibited individuals younger than twenty one years of age from drinking when they were not
example or explanation—that conditional spending could reach a point where it was overly coercive, effectively denying the states' ability to make a choice.\textsuperscript{106} While courts have given little attention to Spending Clause challenges, there are serious doubts that RLUIPA could withstand serious scrutiny under \textit{Dole}.

1. General Welfare Requirement

The \textit{Dole} Court stated that appropriation of funds must be for the "general welfare," but courts should "defer substantially to the judgment of Congress" in reviewing this prong of the test.\textsuperscript{107} Thus, the Court gave Congress the latitude to issue \textit{ipse dixit} pronouncements of general welfare intentions that satisfy this condition.\textsuperscript{108} Even critics who believe that the General Welfare Clause does contain substantive limitations on the spending power concede that "the contemporary view is that Congress's power to provide for the 'general welfare' is a power to spend for virtually anything that Congress itself views as helpful. The courts have essentially treated whatever limitation the clause might impose as essentially a nonjusticiable political question."\textsuperscript{109} But there is no reason why the Court should not apply some form of scrutiny; even a relatively permissive one would acknowledge that the general welfare requirement exists, otherwise it is mere surplusage.\textsuperscript{110}

2. No Other Constitutional Bar

\textit{Dole}'s proclamation that conditional spending cannot violate a separate constitutional provision was not unique to that case; it simply reiterated the \textit{Butler} Court's holding. Presumably, this limitation

\textsuperscript{106}Id. at 211.
\textsuperscript{107}Id. at 207. The Court has a history of deferring to Congressional determinations of "general welfare." \textit{See} Helvering v. Davis, 301 U.S. 619, 640 (1937) ("The line must still be drawn between one welfare and another, between particular and general . . . [t]he 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.").
\textsuperscript{108}For a detailed history of the use of the phrase "general welfare" in the early Republic, \textit{see generally} Natelson, \textit{supra} note 86.
\textsuperscript{109}Eastman, \textit{supra} note 9, at 66. \textit{See also} This has led at least one commentator to refer to the general welfare prong of the \textit{Dole} test as "nonjusticiable." David Freeman Engstrom, \textit{Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State}, 82 TEX. L. REV. 1197, 1200 (2004); Natelson, \textit{supra} note 86, at 9; Renz, \textit{supra} note 88, at 84-85.
\textsuperscript{110}See Baker, \textit{supra} note 13, at 226.
would, for example, prevent Congress from creating spending conditions requiring states to establish an official religion—not because the action is outside the reach of the Spending Clause—but because it would violate the First Amendment.\textsuperscript{111} One observer noted the breadth of this seemingly innocent requirement: “[t]he broad spending power and the power to attach conditions to it contain no limitation on Congress’ ability to abrogate individual rights guaranteed by the states, so long as those rights are not found in the federal Constitution.”\textsuperscript{112} Thus, while states are free to grant their citizens additional rights beyond those contained in the federal Constitution,\textsuperscript{113} those rights are legitimate targets of the conditional spending power.

3. Clear and Unambiguous

The \textit{Dole} requirement that spending conditions be clear and unambiguous is based upon the belief that, in order for a state to make a rational decision about whether to surrender a portion of its power of self-determination in exchange for federal funds, it must know what burdens it accepts with the funding.\textsuperscript{114} Whatever shortcomings RLUIPA may have regarding other parts of the \textit{Dole} test, the clear and unambiguous prong is satisfied. RLUIPA plainly states that its conditions apply to any “program or activity that receives Federal financial assistance.”\textsuperscript{115} While this language is extremely broad, it would be difficult to argue that it is not clear.\textsuperscript{116} The only RLUIPA case that gave much discussion to the Spending Clause stated that:

Congress need not inform the states of their self-evident ability to decline federal funds nor include within each federal grant a list of all accompanying conditions. It is sufficient for the text of RLUIPA to link unambiguously its conditions to

\begin{itemize}
  \item \textsuperscript{111} \textit{But see} Renz, \textit{supra} note 88, at 85 (claiming that Congress has used the spending power to encourage activities that are contrary to various Constitutional rights).
  \item \textsuperscript{112} \textit{Id.} at 86.
  \item \textsuperscript{113} \textit{See generally} William J. Brennan, Jr., \textit{State Constitutions and the Protection of Individual Rights}, \textit{90 Harv. L Rev.} 489 (1977) (suggesting that parties turn to state constitutions for liberties beyond those guaranteed by the United States Constitution).
  \item \textsuperscript{114} \textit{See} Pennhurst State Sch. \& Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (“legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”).
  \item \textsuperscript{116} In fact, these arguments have been explicitly rejected by the few courts that have reviewed spending challenges to RLUIPA. \textit{See supra} note 84.
\end{itemize}
the receipt of federal funds and define those conditions clearly enough for the states to make an informed choice.\textsuperscript{117}

In that case, \textit{Benning v. Georgia},\textsuperscript{118} the Eleventh Circuit upheld the validity of RLUIPA under the Spending Clause. A Jewish inmate of a Georgia state prison filed a section 1983 action against the state, claiming a violation of his rights under RLUIPA because the prison cafeteria would not provide him with a kosher diet.\textsuperscript{119} The state responded by challenging the constitutionality of RLUIPA.\textsuperscript{120} Georgia complained that RLUIPA did not clearly and unambiguously require the state to change the food it offers to its prisoners in exchange for accepting federal prison funds; yet the Eleventh Circuit ruled that "once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper."\textsuperscript{121} The \textit{Benning} court held that Georgia knew when it accepted the funds that RLUIPA required it not to create a substantial burden upon its inmates' free exercise of religion, and such notice met the clear and unambiguous prong of the \textit{Dole} test.\textsuperscript{122}

4. Relatedness

While the relatedness prong was Justice O'Connor's primary objection in her \textit{Dole} dissent, few courts have recognized this prong as having any substance.\textsuperscript{123} Observers have noted that "[i]n most instances in which the [relatedness] requirement has been a focus of litigation, the court has done little more than assert, without analysis or elaboration, that the challenged condition is 'reasonably related to the federal interest in the national program.'"\textsuperscript{124} RLUIPA has some potentially fatal relatedness problems because of the breadth of the spending condition involved. Congress is apparently conditioning receipt of \textit{all} federal prison money upon compliance with RLUIPA, without explaining how following RLUIPA would advance the federal objectives behind the appropriation of such funds. For example, it is easy to imagine reasons why Congress would choose to give grants to local governments for prison admini-

\begin{thebibliography}{99}
\bibitem{117} Benning v. Georgia, 391 F.3d 1299, 1306 (11th Cir. 2004) (citation omitted).
\bibitem{118} 391 F.3d 1299 (11th Cir. 2004).
\bibitem{119} \textit{id.} at 1303.
\bibitem{120} \textit{id.}
\bibitem{121} \textit{id.} at 1306 (citing Sandoval v. Hagan, 197 F.3d 484, 495 (11th Cir. 1999), overruled on other grounds sub nom. Alexander v. Sandoval, 532 U.S. 275 (2001)).
\bibitem{122} \textit{id.}
\bibitem{123} See Baker & Berman, \textit{supra} note 9, at 466.
\bibitem{124} \textit{id.}
\end{thebibliography}
stration. What is more difficult to ascertain is how these motivations are substantially related to the motivations involved in RLUIPA. Prison overcrowding, for example, is a problem that Congress may attempt to cure with federal funds; but is religious accommodation a requirement for reducing the overcrowding problem?\footnote{See id. at 496 (discussing relatedness issues inherent in attaching funds to prison spending).}

Professor Lynn Baker, for one, argued that

\[\text{[A]}\]\text{ll federal prison money is partly motivated by an interest in promoting either rehabilitation or, at the least, the humane treatment of inmates—interests that are also served by facilitating greater religious exercise by prisoners. But the Court might reject the premise (that is, it might conclude that some federal prison funds, the receipt of which would make state prisons subject to the RLUIPA condition, do not promote interests in rehabilitation or the like) and could conclude that this relationship is too tenuous . . . .}\footnote{Id. at 497-98 (emphasis added).}

\textit{Dole} allowed Congress to require states to raise minimum drinking ages because it was related to how the highways that the highway funds would eventually create or maintain would be used. However, at some level of abstraction, this argument must necessarily fail. It would be difficult to justify conditioning highway funds upon what time of day alcohol could be sold or in what containers it could be served, even though alcohol sold at certain times of day or served in certain containers may be more likely to contribute to drunk driving.

For the same reason, RLUIPA cannot claim to apply to prison funds used solely to pay for additional guards, or for security modernization because these simply have nothing to do with religious exercise. Under the current permissive application of this rule it is difficult to imagine an area, other than those specifically prohibited by the Constitution,\footnote{See discussion \textit{supra} Part II.B.2.} which Congress could not reach through conditional spending. There is arguably a federal interest in having strong local law enforcement, but could Congress dictate the color of police uniforms as a condition of law enforcement grants? Could Congress prescribe how colleges and universities handle their landscaping, or their parking policies, just because these universities accept federal funds? A scholar analyzing the question of how to handle “unreasonable conditions” wrote that “[o]ne could imagine a situation in which every payment from the federal government to states is conditioned...
upon acquiescence to every jot and title of every mandate contained in every federal statute." In a later case, the Supreme Court expressed similar concern by noting that while Congress had the authority to add conditions to its appropriations, "[s]uch conditions 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."

The Benning court rejected Georgia's claim that federal grants to prisons are not significantly related to the goals of RLUIPA. However, the court sidestepped the relatedness requirement by imposing a "substantiality" standard: "the problem with [Georgia's relatedness argument] is that the United States has a substantial interest in ensuring that state prisons that receive federal funds protect the civil rights of prisoners." No one doubts that the United States has such an interest, but that is not the question asked by this prong of the test. The fact that the United States has a substantial interest in protecting the civil rights of state prisoners shows that the spending meets the general welfare requirement, but it has nothing to do with how that interest is related to the requirements of RLUIPA. The court in Benning treats the relatedness prong as though it is a balancing test weighing the interests of Congress against those of the states. It supports its assertion that Congress can require compliance with RLUIPA by stating that "the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress. . . ." But again, that is not in dispute. Of course they are rational goals, but mere rationality—or even substantiality—does not grant Congress the power to regulate beyond the scope of the Constitution. By hiding behind the shibboleth of a "substantiality" test the Benning court essentially holds that the Constitution imposes limits upon the spending power, unless it involves a highly important issue—a "substantial" one—in which case Congress is free to act as it pleases. In Dole, the Supreme Court noted that it had never struck a federal grant on relatedness grounds, but the application of the relatedness prong is ultimately the key to determining whether the Dole test is a de jure test with real meaning, or a de minimis one that Congress is free to disregard.

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128 Adler, supra note 12, at 440.
130 Benning, 391 F.3d 1299, 1307.
131 Id.
132 Id. at 1308.
133 Dole, 483 U.S. at 207-08 (citation omitted).
5. Spending Cannot Amount to Coercion

A final Dole constraint, beyond the four-part conditional spending test, is the requirement that the conditional use of federal funds not be coercive. The Court recognized 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.’" Ultimately, the Court determined that the measure in Dole was not coercive because only five percent of the federal funds in question were dependent upon the state's compliance with the condition. Although Dole made no mention of what percentage would cause a coercive effect, it is presumably more than five percent and less than 100 percent. RLUIPA, however, does not specify how much of the prison funds at stake are subject to the condition; it simply states that it applies to any "program or activity that receives Federal financial assistance." Thus, "seemingly 100 percent of all federal funds received by a covered institution would be subject to withholding." If the coercion requirement truly turns on the percentage of federal funds that would remain if a state chose to reject the condition, RLUIPA appears to be coercive in that states are truly confronted by a "take it or leave it" situation leaving little room for actual choice.

III. TOWARDS A NEW SPENDING SOLUTION

While the Court as a whole has not directly expressed interest in restraining the Spending Clause, one justice has indicated otherwise. Justice Thomas wrote a concurring opinion in United States v. Sabri in which he suggested that the Court's Spending Clause jurisprudence has expanded both the Spending Clause and the Necessary and Proper Clause beyond their proper boundaries. In this section I offer simple solutions for how courts could reign in the spending power, and for how Congress could ensure that its actions pass constitutional scrutiny.

134 Id. at 211 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
136 Baker & Berman, note 9 at 498 (emphasis added).
137 Cf. THOMAS WARD, ENGLAND’S REFORMATION, FROM THE TIME OF KING HENRY THE EIGHTH, TO THE END OF OATE’S PLOT A POEM IN FOUR CANTOS 896 (1731). ("Where to elect there is but one / 'Tis Hobson's choice—take that or none").
138 541 U.S. 600, 610 (2004). In keeping the spirit of this Comment's religious metaphor I would be remiss not to point out that the statute at issue in Sabri was Title 18, § 666. Three sixes, of course, is the notorious "number of the Beast." Revelation 13:18 (NKJV). Justice Thomas did not suggest that the Spending Clause be "cast into the lake of fire and brimstone," cf. Revelation 20:10 (NKJV), but he did express disappointment with the evolution of Spending Clause jurisprudence—albeit in terms not quite as apocalyptic.
139 541 U.S. at 611 (Thomas, J., concurring).
A. How Courts Should Hold Congress Accountable

To ensure that Congress stays within the permissible boundaries of the Spending Clause, courts need to apply a consistent test to balance the legitimate power of Congress against the limits of Article I authority. Fortunately there is such a test; the Supreme Court outlined it in *Dole*. As such, courts have a clear and manageable standard to use to hold Congress accountable.

The problem is *the Court fails to apply its own standard*. In the very opinion that the Court created the *Dole* test, it simultaneously discarded much of it. It reiterated the obvious requirement that Congress must clearly enunciate the conditions that it expects states to follow, and that the conditions cannot violate the Constitution. But then the Court gutted the rest of the test by holding that the general welfare prong is up to Congress to decide, and it could not name a single case in which it had ever struck an act because of lack of relatedness. Finally, while the Court alluded to a hypothetical scenario in which Congress may create a condition that has a coercive effect, it did not define what actions would fall into this category. The elements of a solid test exist, but even the best test will be ineffective if it is never applied.

The *Dole* test could easily have bite if only the Court would use it. The "general welfare" requirement could, as Professor Eastman suggests, mean that Congress can only spend in ways that benefit the general public instead of redistributing wealth from the people as a whole to a select subset. This would cut down on rent seeking and reduce the incentives that cause Congress to engage in the pork-barrel appropriations that routinely fill the federal budget. The requirement that Congress clearly and unambiguously state its conditions is not an issue in *RLUIPA*, and the Court will soon resolve whether *RLUIPA* violates an independent Constitutional provision.

The heart of the *Dole* test is the relatedness prong, and the test is meaningless unless relatedness is enforced. This part of the test requires a nexus between the appropriated funds and the required conditions. For this prong to be an actual limitation the Court needs to en-

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140 *Dole*, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937)).
141 *Id.* at 209.
142 *Id.* at 207.
143 *Id.* at 207-08.
144 *Id.* at 211.
145 *See Eastman*, *supra* note 9, at 66 n.13.
146 *See discussion supra* Part II.B.3.
sure that Congress is actually paying for the conditions it demands rather than merely regulating matters tangential to its spending.148

The coercion prong is also important because without it Congress could present the appearance of a choice while knowing that the state is not able to refuse. Coercion through spending is just as much of a threat to state sovereignty as the other abuses the Court sought to correct in its federalism decisions.149 But this prong, and the rest of the Dole test, is merely a hollow genuflect if it continues to be ignored.

When the founders debated what would come to be known as the Spending Clause they considered the question of what to do if Congress exceeded its powers. While debating the merits of the Constitution at the Virginia ratifying convention, one Federalist leader addressed this very issue: “[W]ho is to determine the extent of such [General Welfare Clause] powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void....”150

While statements from the Federalists who urged adoption of the Constitution are illustrative of the framers’ understanding, they obviously do not have the force of law. Nevertheless it is clear that courts have the power to check Congressional spending if it exceeds constitutional boundaries.151 The issue is not whether courts have the authority to constrain the use of the spending power152 or cannot determine whether Congress has exceeded the Spending Clause.153 Courts have the test,154 they just lack the desire—or perhaps the courage—to apply it.155

148 See discussion supra Part II.B.4.
149 Adler, supra note 13, at 440.
150 JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 443 (1941) (1836) (quoting George Nicholas); see also Natelson, supra note 86, at 55-56 (describing remedies suggested by Federalists); cf. THE FEDERALIST NO. 16, at 112 (Alexander Hamilton) (Clinton Rossiter ed., Penguin Books 1999) (1961) (“If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional, and void.”).
151 City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (“Under our Constitution, the Federal Government is one of enumerated powers. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the ‘powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.’” Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)) (citations omitted).
152 See id.
153 See Dole, 483 U.S. at 207-08, 211 (describing the Dole test).
154 Id.
155 Baker, supra note 13, at 229-30 (“the only meaningful solution lies in judicial review under the existing Spending Clause, yet the modern Court has aggressively resisted playing any role in this area.”).
B. How Congress Can Save RLUIPA and Other Spending-Based Legislation

There is a way to properly balance the ability of Congress to encourage state action, yet retain the states' sovereign prerogative to govern their own affairs:

If Congress wants compliance, buy it.

While this notion seems simple, and Congress has certainly tried it, Congress has only done so with exceedingly broad strokes. RFRA sought to fit virtually everything under its umbrella and was struck down for doing so. Congress's solution was to narrow the Act's scope, resulting in RLUIPA's limitation to two areas in which Congress believed it had authority. However, to get around the relatedness and coercion problem, Congress needs to go a step further and specifically delineate the actions to which its conditions apply. While this may take more effort in drafting the legislation, it has a better chance of withstanding constitutional muster.

The end result will be a "cafeteria plan" whereby states can accept funds—and their associated conditions—in some areas while rejecting such funds in other areas. For example, if Congress wants to reach the facts of the Benning case, it could earmark a portion of its prison funds available to states to help them with the care and feeding of inmates. Congress has an interest in making sure that the punishment of confinement is not cruel and unusual, and could thus easily justify this expense as being in the general welfare. But, by directly allocating funds to feeding inmates, a related condition could be that states have to use it to provide religiously appropriate food for those whose religions require a special diet. If a state does not wish to do so it can choose to reject those funds, but perhaps it would still accept funds earmarked for security, or rehabilitation, each with its own set of related conditions.

By narrowing the scope of conditions to specific areas, Congress could create a package that is more tightly related to the spending involved and thus more likely to withstand the Dole test. Furthermore, by allowing states to choose the specific provisions, and receive the corresponding funds and obligations, it is less likely that the spending will have a coercive effect. The drawback to this approach, in the view of Congress, is that some states would likely reject the conditions that Congress most wanted to impose; that, however, is the bittersweet nature of federalism. If Congress wants to force requirements upon the several states it will have to do so using one of its
other powers. This plan forces Congress to accept that "an offer of appropriately conditioned federal funds may be the only means to certain regulatory ends," but it also requires that Congress stay within the boundaries of the Constitution. The end result of this "cafeteria plan" is that Congress could use its spending power to encourage desired policies, without using it as a coercive tool against the states; an outcome much more consistent with the original meaning of the Spending Clause.

CONCLUSION

While a "cafeteria plan" could make RLUIPA fit within the Dole test, the current statute's conditions are not sufficiently related to the spending involved and run the risk of being coercive. Congress may indeed have the power to enact RLUIPA under Section Five of the Fourteenth Amendment or one of its other powers, but if it all came down to RLUIPA's validity under the spending power, it would fail the Dole test—assuming the Court actually applied it.

Ironically, through an attempt to enact legislation such as RFRA and RLUIPA, Congress may have obtained the results that it wanted—not through its own mandate—but through a form of statutory evangelism. A number of states, responding to the fall of RFRA, have since passed their own legislation guaranteeing many of the same rights sought by both RFRA and RLUIPA. When Congress's relationship with the states is more like that of a partner, rather than a parent, it can produce positive results. But until Congress repents and absolves RLUIPA's sins, it is not worthy of the Court's blessing.

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156 Id. at 222.
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