**Campbell Law Review**

Volume 21
Issue 1 *Winter 1998*

Article 3

January 1998

# Conditional Federal Spending and the States "Free Exercise" of the Tenth Amendment

Kristian D. Whitten

# ARTICLES

# CONDITIONAL FEDERAL SPENDING AND THE STATES "FREE EXERCISE" OF THE TENTH AMENDMENT

KRISTIAN D. WHITTEN*

## I. INTRODUCTION

In response to the Supreme Court's decision in *Department of Human Resources v. Smith*,[1] Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA").[2] In enacting RFRA, Congress sought to require States that burden "free exercise" to show a compelling State interest for doing so. As consitutional authority for enacting RFRA, Congress relied on section one of the Fourteenth Amendment, and its power under section five of that Amendment to, "enforce, by appropriate legislation, the provisions of [that] article."[3] Last year, in *City of Boerne v. Flores*[4] the

* Mr. Whitten is Senior Counsel for Bank of America, San Francisco, CA. He received his J.D. from the University of California, Hastings College of Law and his L.L.M. from the Georgetown University Law Center. Mr. Whitten would like to thank Professors Saperstein and Walker for their help and guidance, Judi Collins for patience and technical support and his brother, Alan, for his part in the publication of this article.

1. 494 U.S. 872 (1990). This case involved an Oregon law that criminalized the use of peyote. A group of Native Americans who used the substance as part of a religious ritual challenged the statute. The court sustained the law as it applied to the challengers.

2. 42 U.S.C. § 2000bb(b). The act sought: (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconson v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. *Id.* at § 2000bb(b).

3. U.S. CONST. amend. XIV, § 5.

4. 117 S.Ct. 2157 (1997).

Supreme Court held that RFRA's attempt to redefine the standard for judging constitutionally-protected religious freedoms as set forth in *Smith* was an unconstitutional attempt to use section five of the Fourteenth Amendment to "control cases and controversies."[5]

In doing so, the Court held that Congress' power under section five of the Fourteenth Amendment does not authorize it to pass "general legislation upon the rights of the citizens,"[6] and rejected [a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment.[7] The Court also held that Congress may not establish the ultimate meaning of Constitutional provisions,[8] stating:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior, paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it."[9]

Thus, the Court held that Congress may not define the meaning of the First Amendment's "free exercise" clause, and may not by general legislation impose its definition of free exercise on the States.

The *Boerne* decision prompted Senators Orrin Hatch and Ted Kennedy, and Representatives Charles Canady and Jerrold Nadler, to introduce legislation that would revive the "compelling state interest" test, and would make that test applicable to State "programs or activities" that receive federal funds, and in cases where a State burdens a person's "free exercise" of religon "in or affecting commerce with foreign nations, among the several States, or with the Indian tribes;. . ."[10] In essence, Congress has proposed attaching a "free exercise" condition to all federal spending.[11]

---

5. *Id.* at 2172.
6. *Id.* at 2166, (quoting The Civil Rights Cases, 109 U.S. 3, 13 (1883)).
7. *Id.* at 2167.
8. *Id.* at 2167.
9. *Id.* at 2168 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
10. Religious Liberty Protection Act of 1998, S. 2148, 105th Cong. 2d Sess.; H.R. 4019, 105th Cong., 2d Sess. (June 8, 1998) (hereinafter *RLPA*).
11. U.S. CONST. art. I, § 8, cl. 1. Professor Jesse Choper suggests that the Commerce Clause grants Congress the power to reenact RFRA, "as long as Congress has a 'rational basis' for concluding that incidental religious burdens from generally applicable laws might substantially affect interstate travel, . . ."

This article will examine Congress' power under the Spending Clause, and will seek to determine whether, by using its spending power, Congress can constitutionally impose a "free exercise" condition on States and local governments. Part II discusses federalism and the Court's "free exercise" clause jurisprudence. Part III addresses the substance of the proposed RLPA. Parts IV and V examine the Court's shifting posture towards the Spending Clause and federalism respectively. Part VI contrasts the broad provisions of the RLPA, with the more narrow conditions found in the Equal Access Act. Finally, Part VII concludes that enactment of the proposed RLPA would constitute an unconstitutional commandeering of state police power.

## II. FEDERALISM AND THE FREE EXERCISE CLAUSE

When the Constitution of the United States was signed at Philadelphia on September 17, 1787, it established a federal government of enumerated powers. The Framers intended that:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.[12]

Among those "few and defined" enumerated powers granted to the federal government was the power to "lay and collect Taxes, Duties, Imposts and Excises, . . . and provide for the . . . general Welfare of the United States. "[13]

In order to quiet the protests of Anti-federalists, who were opposed to the Constitution, the Framers agreed to amendments adopted by the First Congress and ratified by the States which

---

*On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Reveiw of the Supreme Court's 1996-1997 Term*, 19 Cardozo L. Rev. 2259, 2306 (1998). On August 6, 1998 the Constutition Subcommittee of the House Judiciary Committee deleted the the Commerce Clause language from the House version of the RLPA. H.R. 4019, 105th Cong. 2d Sess. (August 6, 1998). The Commerce Clause language remains in the Senate version.

12. THE FEDERALIST No. 45 (James Madison).

13. U.S. CONST. art. I, § 8, cl. 1.

have come to be known as the Bill of Rights. James Madison, who enjoyed the reputation as "Father" of the Constitution, initially opposed the Bill of Rights, but ultimately came to support those proposed amendments after his home state of Virginia ratified the Constitution with the stipulation that a "Declaration of Rights," which had been submitted by the Anti-federalists, be sent to the Congress along with the Form of Ratification.[14] The States ultimately ratified ten of the twelve proposed amendments in 1791.[15]

The proposed RLPA involves the First and the Tenth Amendments to the Constitution. The First Amendment provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . ."[16] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[17]

In addition to delegating enumerated legislative powers to the federal Congress, the Constitution established the Supreme Court of the United States, whose power extends "to all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .. "[18] In the early case of *Marbury v. Madison*,[19] the Supreme Court held it was its province to determine whether Congressional legislation is inconsistent with the Constitution. Chief Justice Marshall wrote that

> It is, emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each . . . If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.[20]

---

14. J. Kaminski & G. Soladino, Eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Vol. X at 1512-1515 (State Historical Society of Wisconsin, 1993).

15. *Id.* at 5.

16. U.S. CONST. amend. I.

17. U.S. CONST. amend. X.

18. U.S. CONST. art. III, § 2, cl. 1.

19. 5 U.S. (1 Cranch) 137 (1803).

20. *Id.* at 177-78.

Thus, the Supreme Court established that its Constitutional power extends to reviewing acts of Congress and that the Court is the final authority on what the Constitution means.

After the Civil War, the Fourteenth Amendment was ratified.[21] During the Congressional debate surrounding the adoption of the Fourteenth Amendment, its proponents sought to have language adopted that would have made the Bill of Rights applicable to the States. One of the Amendment's sponsors in the House of Representatives, Congressman John Bingham of Ohio, believed that the Bill of Rights was originally intended to apply to the States. He believed the Supreme Court's decision in the case of *Barron v. Baltimore*,[22] which held that the Bill of Rights operated as a restraint on Congress only, was mistaken.[23] However, Congressman Bingham's original version of the proposed Amendment was not approved by Congress.[24] After his first draft was rejected, Congressman Bingham disavowed any intention "to take away from any state any right that belonged to it . . . ,"[25] and confirmed publicly during the ratification process that the Amendment as enacted "takes from no State any right which hitherto pertains to the several states"[26] Thus, Congressman Bingham's desire that the first eight Amendments be made applicable to the States by the Fourteenth Amendment was not the will of Congress or of the ratifying States.[27]

As ratified, the Fourteenth Amendment did not make the Bill of Rights applicable to the States, but its Fifth section granted to Congress the power "to enforce, by appropriate legislation, the

21. U.S. CONST. amend. XIV. Section 1 of the amendment states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws. *Id.* at § 1.

22. 32 U.S. (7 Pet.) 243 (1833).

23. H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 62 (1977) ("Meyer")

24. *Id.* at 63-64.

25. R. BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 133 (1989) ("Berger")

26. J. James, *The Ratification of the Fourteenth Amendment* 46 (1983), *citing, Cincinnati Commercial,* 10 August 1866, quoting a speech by Congressmen Bingham.

27. Berger, *supra* note 25 at 133.

provisions of [the Amendment.]"[28] As its sponsor, Senator Jacob Howard of Michigan, made clear that section Five "enables Congress, in case the States shall enact laws in conflict with the principles of the Amendment, to correct that legislation by a formal Congressional enactment."[29] Notwithstanding the Framers' intent, since adoption of the Fourteenth Amendment, in giving content to its due process clause, "the Court has looked increasingly to the Bill of Rights for guidance to the point where many of the rights guaranteed by the first eight Amendments have been selectively absorbed into the Fourteenth."[30] Thus, in *Cantwell v. Connecticut*,[31] the Court determined that the Fourteenth Amendment's "due process" clause effectively incorporated that portion of the Constitution's First Amendment which states: "Congress shall make no law respecting . . . the free exercise [of religion], " thus "render[ing] the legislatures of the states as incompetent as Congress to enact such laws."[32]

In the years since *Cantwell*, the Supreme Court has addressed various challenges to State laws that were alleged to infringe the "free exercise" of religion. In *Sherbert v. Verner*,[33] the Court adopted a balancing test for evaluating State laws that were alleged to burden the "free exercise" of religion. The Court held that a State statute that burdens the "free exercise" of religion may only be upheld if "some compelling state interest . . . justifies the substantial infringement."[34] Twenty-seven years after *Sherbert,* in *Employment Div., Dept. of Human Resources of Oregon v. Smith*[35] the Supreme Court abandoned the *Sherbert* test in favor of a new rule holding that generally applicable State laws may be applied to religious practices even when not supported by a compelling State interest.[36] This holding led to RFRA, which was held unconstitutional in *Boerne*. Since the *Boerne* decision, religious groups have lobbied Congress to resurrect the "compelling state interest" test, using its other enumerated powers, including the Spending Clause. Thus emerged the RLPA.

---

28. U.S. CONST. amend. XIV§ 5.

29. Meyer, *supra.*, note 23 at 84.

30. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 772 (1988), quoting, Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

31. 310 U.S. 296 (1940).

32. *Id.* at 303.

33. 374 U.S. 398 (1963).

34. *Id.* at 406.

35. 494 U.S. 872 (1990).

36. *Id.* at 882.

## III. The Religious Liberty Protection Act

The proposed Congressional legislation, referred to as the Religious Liberty Protection Act of 1998 ("RLPA") provides a "General Rule" in section 2(a): "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; . . . even if the burden results from a rule of general applicability."[37] Section 2(b) of the RLPA provides: "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 the furtherance of a compelling governmental interest; and (2) is the least restrictive means for furthering that compelling governmental interest."[38] The RLPA defines a "program or activity" receiving federal financial assistance by incorporating the definition of that term contained in Title VI of the Civil Rights Act of 1964,[39] which states:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education or other school system; . . . any part of which is extended federal financial assistance.

The relevant part of Title VI of the Civil Rights Act of 1964 provides: "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."[40] The Supreme Court has held that Title VI provides no greater protection than the Equal Protection Clause of the Fourteenth Amend-

37. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. § 2.

38. *See, Id.* § 2(b).

39. 42 U.S.C. § 2000d-4a.

40. 42 U.S.C. § 2000d.

ment.[41] Thus, Title VI's conditions on federal spending are authorized by section five of the Fourteenth Amendment, which permits Congress to enforce section one's Equal Protection Clause "by appropriate legislation."[42]

The definitions of "program or activity" were added by Congress as part of the Civil Rights Restoration Act of 1987, in order to overturn a Supreme Court ruling that had held a "program or activity" meant only those entities that actually received federal funds.[43] Thus, statutes that incorporate this definition of "program or activity," "apply to the entirety of any state or local institution that has a program or activity funded by the federal government,"[44] and include *all* of the operations of a State or local institution receiving federal financial assistance.[45] The federal condition applies "on an institution-wide basis, instead of only in connection with a limited program activity actually receiving federal funds . . ."[46] Therefore, it has been held that a State entity is a "program or activity" even though it did not receive federal funds, as long as the State received such funds.[47] An example will illustrate the breadth of the definition:

Section 2000d-4a provides that a "program or activity" (or just a "program") includes "*all* the operations of" any one of a number of entities, subject only to the proviso that at least one (or, as the statute provides, "any") "part of" that entity's operations "is extended Federal financial assistance." Thus, in the case of a public "college" (to use subsection (2)(A) as an example), so long as "any part" of that college's "operations" receive "federal financial assistance," *"all"* of that college's "operations" are "programs or activities" [as defined in that section].[48] If federal health assistance is extended to a part of a state health department, the entire

41. United States v. Fordice, 505 U.S. 717, 732 n.7 (1992), (citing, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *Id.* at 328 (opinion of Brennan, J.)).

42. U.S. CONST. amend. XIV, § 5.

43. *See* Assn. of Mexican-American Educators v. State of California, 836 F. Supp. 1534, 1540 (N.D. Cal. 1993), (citing, Grove City College v. Bell, 465 U.S. 555 (1984)).

44. Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991).

45. *Id.* See also, Hodges By Hodges v. Public Bldg. Comm'n, 864 F. Supp. 1493, 1505 (N.D. Ill. 1994).

46. Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414, 1416 (E.D.N.Y. 1988), *aff'd* 869 F. 2d 130 (2d Cir. 1989).

47. *Mexican-American Educators, supra,* 836 F. Supp. at 1545.

48. *Id.* at 1543-1544.

health department would be covered in all of its operations. If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid. But the [definition] was not, so far as we are able to determine . . . , intended to sweep in the whole state or local government, so that if two little crannies (the personnel and medical departments) of one city agency (the fire department) discriminate, the entire city government is in jeopardy of losing its federal financial assistance.[49]

It has also been held that a City is not a "program or activity" of a State, but a sub-part of a City's operations *is* a "program or activity" if the City receives federal funds.[50] Thus, actual receipt of federal financial assistance is not the *sine qua non* for being subjected to the conditions attached to federal funds; rather, the inquiry is whether the entity in question is part of the operations of a State or a local government that has, itself, received federal financial assistance.[51] Under this broad definition it appears that virtually any subdivision, "department, agency, special purpose district, or other instrumentality"[52] of a State or local government that has received federal funds would be bound by the federal "free exercise" condition if the RLPA becomes law.[53]

## IV. The Federal Spending Power

Article I, Section 8, Clause 1 of the Constitution states: "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; . . . "[54]

---

49. *Schroeder,* 927 F.2d at 962, (quoting, S. Rep. No. 64, 100th Cong., 2d Sess. 16 (1988), U.S. Code Cong. & Admin. News 1988, 3, 18).

50. *Hodges By Hodges,* 864 F. Supp. at 1506-07.

51. *Id.* at 1506.

52. 42 U.S.C. § 2000d-4(a)(1)(A).

53. It might be argued that, by parenthetically setting off "operated by a government" from the rest of its "free exercise" General rule attached to federal funds, Congress intends the RLPA's "free exercise" condition to apply only in those "programs or activities" which actually receive federal financial assistance. However, the RLPA's incorporation of the broad definition of "program or activity" from Title VI of the Civil Rights Act, which was specifically amended in 1987 to overrule a Supreme Court decision which had given such a restrictive definition to that term, negates any such Congressional intent. *See* text accompanying footnotes 43-46, *supra.*

54. U.S. Const. art. I, § 8, cl. 1.

The Supreme Court has interpreted Congress' power to "provide for the Common Defense and General Welfare of the United States" to afford Congress the power "to authorize expenditure of public monies for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution."[55] In the 1923 *Massachusetts v. Melon* decision,[56] the Supreme Court upheld the federal Maternity Act's attempt to reduce maternal and infant mortality by attaching the Act's conditions to federal spending. The Court rejected the State's Tenth Amendment challenge, and held that "the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."[57] The Court noted: "[i]f Congress enacted [the Act] with the ulterior purpose of tempting [states] to yield [a right reserved by the Tenth Amendment], that purpose may be effectively frustrated by the simple expedient of not yielding."[58]

Thirteen years later, in *United States v. Butler*[59] the Court addressed the taxing and spending scheme Congress adopted in the Agricultural Adjustment Act of 1933. That Act increased the price of certain farm products by decreasing the quantities produced. The decrease in quantity was accomplished by paying farmers to let their land lay fallow for a period of time. To pay those farmers for the fallow land a tax was levied on the processing of commodities derived from the farm products being regulated.[60] The Act authorized the Secretary of Agriculture "to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable."[61] The Court held that the tax was a "mere incident" to a program designed to regulate agricultural production,[62] which was beyond Congress' enumerated powers. While the Court noted that the federal government did not try to sustain the Act under the Commerce Clause,[63] it conceded that Congress' power to tax

55. L. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1919 (1995), (quoting, United States v. Butler, 297 U.S. 1, 66 (1935)) (Baker).
56. 262 U.S. 447 (1923).
57. *Id.* at 479-80.
58. *Id.* at 482.
59. 297 U.S. 1 (1936).
60. *Id.* at 54-55.
61. *Id.* at 55.
62. *Id.* at 61.
63. *Id.* at 64.

and spend, "is not limited by direct grants of legislative power found in the Constitution."[64]

The Court ultimately held the Act to be a violation of the Tenth Amendment, and beyond Congress' power to tax and spend for the "general Welfare."[65] In reaching its holding, the Court noted that the Constitution gave Congress no power to directly regulate and control agricultural production, and concluded that the Tenth Amendment precluded Congress from enacting conditional spending legislation in order to achieve that regulatory end.[66] Finding that a farmer might refuse to comply with the Act, but that the price of such a refusal would be a loss of benefits,[67] the Court stated: "[t]he amount offered is intended to be sufficient to exert pressure on [the farmer] to agree to the proposed regulation."[68] The Court focused on the "obvious difference between a statute stating the conditions upon which monies shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."[69] The Court found that the Spending Clause did not abrogate other Constitutional limitations on Congressional spending power, holding as one commentator paraphrased it:

> If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, Clause 1 of Section 8 of Article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states, and that the language allowing Congress to spend for the "general Welfare," did not provide a Congressional loophole around the Tenth Amendment. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore Constitutional limitations upon its own powers and usurp those reserved to the states.[70]

Thus, the Court in *Butler* made it clear that, although Congress' spending power is not strictly limited by express grants of legislative power found in the Constitution, it may not use its

64. 297 U.S. at 66.
65. *Id.* at 68.
66. *Baker, supra* note 54 at 1927.
67. *Butler,* 297 U.S. at 70-71.
68. *Id.* at 70-71.
69. *Baker, supra* note 54 at 1927, (citing, *Butler,* 297 U.S. at 73).
70. *Id.,* (citing, *Butler,* 297 U.S. at 74-75).

spending power to usurp State powers reserved by the Tenth Amendment. It should be noted that *Butler* dealt with federal legislation that attempted to regulate individual rather than State conduct, and that the money Congress sought to conditionally spend was to be paid to farmers and not to the State.

The next year, in *Chas. Steward Mach. Co. v. Davis*[71] the Court confronted a challenge to the unemployment insurance provisions of the Social Security Act of 1935. The Act called for payment of a federal tax on individuals' income to fund unemployment insurance, and granted those taxpayers up to a ninety percent credit for unemployment insurance taxes paid to the State, as long as that State's unemployment insurance program was approved by the federal Social Security Board. The federal goal was to encourage States to adopt an unemployment insurance plan in conformance with the relevant federal regulations, which the petitioner asserted was an intrusion into reserved State power in violation of the Tenth Amendment.[72]

The Court found the tax to be a valid exercise of Congressional power and that the unemployment insurance plan was not a "weapon of coercion, destroying or impairing the autonomy of the states."[73] After discussing the unemployment crisis facing the country, the Court characterized the Federal Unemployment Insurance Program as "a cooperative endeavor to avert a common evil,"[74] finding that the petitioner's position "confuses motive with coercion."[75] The Court further stated:

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." In like manner, every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties . . .We do not say that a tax is valid when imposed by an 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 . . . It is one thing to impose a tax dependent upon the conduct of the tax payers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in

71. 301 U.S. 548 (1937).
72. *Id.*
73. *Id.* at 586.
74. *Id.* at 587.
75. 301 U.S. at 589.

> its normal operation, or to any other end legitimately national. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power.[76]

The Court in *Steward Machine* found that the "State is free at pleasure to disregard or to fulfill" the requirements of the Federal Unemployment Insurance Program.[77] Thus, that Program did not force the State to surrender any of its sovereignty, or invade rights reserved to the States by the Tenth Amendment.

Ten years later, the Court addressed the conditional grant of federal money directly to States, and articulated a somewhat less rigorous standard of analysis for those grants than the one announced in *Butler*. In *Oklahoma v. United States Civil Service Commission*,[78] the Court was called upon to decide the constitutionality of the federal Hatch Act's conditioning of an award of federal highway funds upon Oklahoma's compliance with the Act's prohibition against State officials taking "any active part in political management or in political campaigns."[79] Oklahoma refused to remove a member of its State Highway Commission who was found to have violated the Hatch Act, and faced the prospect of losing federal highway funds in an amount equal to two years compensation of the offending official.[80] The Court rejected Oklahoma's Tenth Amendment challenge, noting that Congress "has no power to regulate local political activities as such of state officials," but that Congress "does have power to fix the terms upon which its money allotments to states shall be disbursed."[81] The Court also noted that the Tenth Amendment "has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are *appropriate and plainly adapted* to the permitted end.'"[82] The Court concluded that the federal condition was "appropriate and plainly adapted to the permitted end", because Congress was attempting to insure the integrity of State officials

76. *Id.* at 589-92.
77. *Id.* at 595.
78. 330 U.S. 127 (1947).
79. *Id.* at 129 n.1.
80. *Id.* at 133.
81. *Id.* at 143.
82. *Baker, supra* n. 55 at 1928, (citing, *Oklahoma,* 330 U.S. at 143, (quoting, United States v. Darby, 312 U.S. 100, 124 (1941)) (*emphasis added)*).

who administered federal funds.[83] The Court also noted that Oklahoma had exercised the option left to it by Congress in not removing the offending official; it had chosen "the 'simple expedient' of not yielding to what she urges is federal coercion."[84]

Forty years later, the Court addressed Congress' attempt to directly regulate the States' laws concerning possession of alcohol by minors by conditioning the award of federal highway funds on the States' adopting a 21-year-old drinking age. In *South Dakota v. Dole*,[85] the State challenged Congressional legislation that directed the Secretary of Transportation to withhold a percentage of federal highway funds from States that permit "the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age."[86] South Dakota claimed that, under the Twenty-First Amendment, States have "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[87] The Court declined to address the Twenty-First Amendment issue, deciding instead that the Congressional statute was an appropriate exercise of Congress' spending power.[88]

The Court in *Dole* cited *Butler* in reiterating that "the power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution,"[89] and went on to note that the spending power is limited by four "general restrictions articulated in our cases."[90] First, the exercise of the spending power must be "in pursuit of 'the general welfare.'"[91] Second, Congress' conditioning of federal funds must be unambiguous, "enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation."[92] Third, the Court noted that Congressional conditions on spending "might be illegitimate if they are unrelated 'to the federal interest in particular national projects or pro-

83. *Oklahoma,* 330 U.S. at 143.

84. *Id.* at 143.

85. 483 U.S. 203 (1987).

86. 23 U.S.C. § 158.

87. *Dole,* 483 U.S. at 205, (quoting, California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 110 (1980)).

88. *Id.* at 206.

89. *Id.* at 207, (quoting, *Butler,* 297 U.S. at 66).

90. *Id.*

91. *Id.*

92. *Dole,* 483 U.S. at 207 (quoting, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).

grams.'"[93] Fourth, the Court noted "that other Constitutional provisions may provide an independent bar to the conditional grant of federal funds."[94]

The *Dole* Court quickly disposed of the first three limitations on conditional federal spending, finding that South Dakota did not "seriously" challenge Congress' meeting those three restrictions.[95] The Court found that the federal drinking age is designed to serve the general welfare, the conditions on federal spending are clearly stated, and South Dakota "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-First Amendment."[96]

Addressing the fourth restriction on conditional federal spending, the Court held that the "independent constitutional bar" limitation on the federal spending power is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[97] Instead, the Court held: "[W]e think that the language in our earlier opinions stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[98] However, the Court also noted 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.'"[99] But in *Dole* the Court found compelling the fact that a State's failure to comply with the federal drinking age would result in it losing only five percent of the funds otherwise available under the federal highway grant programs.[100] This was found to be a "relatively mild encouragement to the States", which allows those States to retain their prerogative over their drinking age.[101] Thus, the Court in *Dole* found that the threat of losing five percent of the allocable highway funds did not amount to Congress

93. *Id.* at 207-08, (quoting, Massachusetts v. United States, 435 U.S. 444, 461 (1978), (plurality opinion)).

94. *Id.* at 208.

95. *Id.*

96. *Dole,* 483 U.S. at 208 (quoting, Brief for Petitioner at 52.)

97. *Id.* at 209-10.

98. *Id.* at 210.

99. *Id.* at 211, (quoting, Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

100. *Id.*

101. *Dole,* 483 U.S. at 211.

regulating "those purposes which are within the exclusive province of the states."[102]

Justice O'Connor dissented in *Dole*, disagreeing with the majority's reading of *Butler*, and finding that the regulation of States' drinking age was outside Congress' power because it falls "within the ambit of . . . the Twenty-First Amendment."[103] She noted:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self imposed.'[104]

Justice O'Connor concluded that:

> "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent",[105] stressing that, "[t]he immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a government of enumerated powers."[106]

Justice Brennan also dissented in *Dole*, agreeing with Justice O'Connor that "regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-First Amendment", and that "Congress cannot condition a federal grant in a manner that abridges this right."[107] His agreement with Justice O'Connor may be puzzling to some, but apparently reflects his belief that the Twenty-First Amendment expressly reserved to the States the power to define their drinking age. It has also been suggested that, while Justice Brennan generally supported "broad national powers", he was "wary of validating" the Chief Justice's argument that the federal government's "greater" power to tax and spend necessarily includes the "lesser" power to condition the spending.[108] In any

---

102. *Butler,* 297 U.S. at 69.

103. *Id.* at 212 (O'Connor, J., dissenting).

104. *Id.* at 217 (O'Connor, J., dissenting), (quoting, *Butler,* 297 U.S. at 78).

105. *Id.* at 216 (O'Connor, J., dissenting).

106. *Id.* at 218 (O'Connor, J., dissenting), (citing, McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

107. *Id.* at 212 (Brennan J., dissenting).

108. *See*, D. Meltzer, *The Seminole Decision and State Sovereign Immunity,* 1996 SUP. CT. REV. 1, 52 n. 240 (1996), (quoting, Baker, *supra* n. 55 at 1915 n.13 ("Th[e] apparent inconsistency in Chief Justice Rehnquist's concern for 'states'

event, even the interstate effects of federal spending for highways was insufficient to overcome the State's reserved power. For Justices Brennan and O'Connor, even this modest federal incursion into an area that is clearly reserved to the States is not permitted by the Spending Clause.

The majority in *Dole* upheld a federal spending plan that clearly conditioned receipt of a portion of the federal funds upon the State's giving up a right reserved to it by the Constitution. In addition, one of the Court's most liberal Justices and one of its most conservative dissented on the ground that "Congress cannot condition a federal grant in a manner that abridges powers reserved to the States"[109] Given the result in *Dole*, how is the Court likely to rule on the RLPA?

## V. FEDERALISM AND THE SUPREME COURT

Since *Dole* was decided, the Supreme Court has decided three cases that have limited Congress' power to enact legislation affecting States, and that may impact the application of *Dole* in subsequent Congressional efforts to regulate States' conduct. In *New York v. United States,*[110] the Court held unconstitutional a portion of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985, which imposed on the States an obligation to provide for the disposal of radioactive waste generated within their borders. The Act provided three "incentives" to States in order to comply with that obligation:

> 1) Financial incentives that were awarded States for developing sites to receive radioactive waste from other States;
>
> 2) "Access" incentives that allowed States with waste sites to gradually increase the cost of access to their sites, and ultimately deny access to waste from States that do not meet federal deadlines; and
>
> 3) "Take Title" incentives that require a State which does not provide for the disposal of all internally generated radioactive

---

rights' might be explained by his long standing attraction to the argument that the government's 'greater power' (for example, the power to not offer the states any money at all) includes the 'lesser power' (for example, the power to offer the states funds subject to any conditions the federal government chooses.")). *See also*, D. Engdahl, *The Spending Power,* 44 DUKE L.J. 1, 61 n. 252 (1994) (asserting that Justice Brennan's *Dole* dissent aligns him with the *Butler* majority).

109. *Dole,* 483 U.S. at 212 (Brennan, J., dissenting).

110. 505 U.S. 144 (1992).

> waste to "take title" and become liable for all damages suffered as a result of, that waste.[111]

The Court held that the "monetary" and "access" incentives were consistent with the Tenth Amendment, but the "take title" incentives were not.[112] Justice O'Connor's majority opinion noted that: "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[113] She found that compliance with the "take title" provisions "would commandeer state governments into the service of federal regulatory purposes", and that Congress has "held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction."[114] She noted, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'"[115] Justice O'Connor concluded:

> Some truths are so basic that, like the air around us, they are easily overlooked . . . But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day . . .States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty', reserved explicitly to the States by the Tenth Amendment.[116]

Less than three years later, in *United States v. Lopez,*[117] the Court held that Congress had legislated beyond its commerce power when it enacted the provisions of the Gun-Free School Zones Act of 1990, which made it a federal offense for "any individ-

---

111. *Id.* at 152-54.

112. *Id.* at 185-86.

113. 505 U.S. at 161, (quoting, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

114. *Id.* at 175-76, (quoting, *Hodel,* 452 U.S. at 288).

115. *Id.*

116. *Id.* at 187-88.

117. 514 U.S. 549 (1995).

ual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone."[118] The Court noted Congress' broad power under the Commerce Clause, but concluded that rather than "commandeering" State government, the statute at issue "ha[d] nothing to do with 'commerce or any sort of economic enterprise, however broadly one might define those terms.'"[119] Chief Justice Rehnquist's majority opinion cited and discussed many of the Court's opinions granting Congress broad power under the Commerce Clause, but found that "when Congress criminalizes conduct already denounced as criminal by the States, it affects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"[120]

Two years later in *Printz v. United States*,[121] the majority Justices who decided *Lopez,* struck down provisions of the Brady Hand Gun Violence Prevention Act which commands State chief law enforcement officers to perform background checks and file reports concerning prospective handgun purchasers.[122] The Court held that the Supremacy Clause of the Constitution[123] "permitted the imposition of an obligation on State judges to enforce Federal proscriptions, insofar as those proscriptions related to matter appropriate for the judicial power,"[124] but, relying on its holding in *New York*, the Court in *Printz*, "conclude[d] categorically . . . [that] [t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[125] Justice Scalia's majority opinion in *Printz* states that the Framers of the Constitution "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"[126] He concludes that the structural separation between the States and the federal

118. 18 U.S.C. § 922(q)(2)(A).

119. *Lopez*, 514 U.S. at 561.

120. *Id.* at n.3.

121. 117 S. Ct. 2365 (1997).

122. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

123. U.S. CONST. art. VI, cl. 2.

124. *Printz*, 117 S. Ct. at 2371.

125. *Id.* at 2383, (citing, *New York,* 505 U.S. at 188).

126. *Id.* at 2377, (quoting, The Federalist No. 15, at 109 (Alexander Hamilton)).

government "reduce[s] the risk of tyranny and abuse from either front."[127]

One commentator has suggested that the Court's opinion in *Lopez* makes Justice O'Connor's dissent in *Dole* the "most attractive alternative to date" for testing Congressional conditions on federal spending.[128] That author concludes: "With its decision in *Lopez*, the Rehnquist Court made clear that the Commerce Clause does not grant Congress 'a plenary police power.'"[129] She believes *Lopez* suggests that "the Court should now reinterpret the Spending Clause to work in concert, rather than in conflict, with its reading of the Commerce Clause."[130]

Another commentator suggests that Justice O'Connor's majority opinion in *New York*, together with her dissent in *Dole*, suggest that the federal government's continuing efforts to force States into policy decisions that serve federal objectives may be beyond Congress' power under the Spending Clause.[131] This commentator cites Justice O'Connor's opinion in *FERC v. Mississippi*,[132] in which she states: "The power to make decisions and set policy is what gives the State its sovereign nature," and "[t]he power to make decisions and set policy . . . embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated."[133] She concludes that opinion stating: "The power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably undermines state sovereignty."[134] That commentator concludes from Justice O'Connor's opinions that: The Constitution's federal design protects against the abuse of governmental power by diffusing that power between the federal and state governments . . . Principles of federalism, as expounded in *New York* . . . , call for a reevaluation of the Spending Clause anal-

127. *Id.* at 2378, (citing, *Gregory,* 501 U.S. at 458).

128. *Baker, supra.* note 54, at 1956.

129. *Id.* at 1988.

130. *Id.*

131. Note, *Federalism, Political Accountability and the Spending Clause*, 107 HARV. L. REV. 1419, 1435-36 (1994) (hereinafter *Harvard Note*).

132. 456 U.S. 742 (1982).

133. *Id.* at 779, (O'Connor, *J. concurring and dissenting*).

134. *Id.* at 785.

ysis as well as for heightened sensitivity to the ways in which conditional grants create impediments to political accountability.[135]

It seems clear that a majority of the Court has articulated a heightened interest in federalism since *Dole* was decided. However, the fate of future Congressional attempts to condition federal spending on States complying with federal regulation may lie in the *Dole* majority opinion itself. In that opinion, Chief Justice Rehnquist stressed that the States had a real opportunity to decline federal aid, and in doing so would only lose five percent of the federal highway funds available. Similarly, in *Steward Machine*, relied upon by the Chief Justice in *Dole*, the Court characterized the federal unemployment insurance program as something the States could freely choose not to participate in. Whether or not participation in those federal programs were realistic options for the States, the Court's holding seems to hinge on the notion that conditional federal spending is appropriate as long as it does not truly coerce a State into compliance with federal regulation. Such a rule is consistent with the holdings in *New York* and *Printz*, and arguably consistent with *Lopez*. Indeed, in *New York* Justice O'Connor found that the State could voluntarily decline to open waste disposal sites for which it was offered a federal financial incentive, and upheld those financial incentives against the State's Tenth Amendment challenge.[136] Thus, as long as a State is truly free to accept or reject the federal funds, according to *Dole* and *New York* there is no improper invasion of reserved State powers.

Commentators have called into question whether a State's position vis-a-vis conditional federal spending can ever be truly "voluntary" in light of the federal government's virtually unlimited ability to tax income.[137] But the fact remains that the Court's current posture on conditional federal spending seems to be that so long as the States can realistically "opt out" of the federal program upon which appropriation of federal funds is conditioned, the condition will not be found to violate the Tenth Amendment.

---

135. *Harvard Note*, *supra* note 131 at 1436.

136. *New York,* 505 U.S. at 173 .

137. T. McCoy & B. Friedman, *Conditional Spending: Federalism's Trojan Horse,* 1988 SUP. CT. REV. 85, 86 (1988) ("As a commonsense political matter, [the] financial dependence of the states on Congress's beneficence invites Congress to extract concessions from the states . . . ") (hereinafter *McCoy & Friedman*).

How then is the proposed Religious Liberty Protection Act likely to fare under a Spending Clause analysis before the Court? The answer may lie in the RLPA's "general rule" which states that Congress' "free exercise" condition is imposed on *any* "program[s] or activit[ies]" which receive federal financial assistance, and the expansive definition of "program or activity" given by Congress and the courts. Unlike the federal highway funds at issue in *Dole*, or the "financial incentives" in *New York,* the proposed RLPA may not provide a State or local government with the realistic ability to receive *any* federal funds without subjecting *all* of its programs and activities to the federal condition. A comparison of the RLPA with the federal Equal Access Act[138] provides a good example of the distinction between the federal "encouragement" and "compulsion" contrasted in *Dole.*

## VI. The Equal Access Act

The federal Equal Access Act was enacted to end perceived widespread discrimination against religious speech in public schools. It states that "any public secondary school which receives Federal financial assistance and which has a limited open forum," may not deny students "equal access" to school facilities to conduct a meeting "on the basis of the religious, political, philosophical or other content of the speech at such meetings."[139] In *Westside Community Sch. v. Mergens,*[140] the Supreme Court upheld the Equal Access Act against a First Amendment "Establishment Clause" challenge, but did not address Congress' authority to attach the "free exercise" condition to the federal funds at issue. However, one United States District Court has held that, while the Equal Access Act passed constitutional muster, a broader spending condition "may not survive [constitutional] scrutiny."[141] That Court noted that Congress' spending power is limited "both by the Bill of Rights and the Constitution's implicit protections of state sovereignty", but held that the Supreme Court's interpretation of the Spending Clause in *Dole* led to the conclusion that the Equal Access Act's spending condition is constitutional. That District Court warned, however, that "in other cases, under other slightly different circumstances, that result could change."[142]

138. 20 U.S.C. §§ 4071 - 4074.
139. 20 U.S.C. § 4071(a).
140. 496 U.S. 226 (1990).
141. Hoppock v. Twin Falls Sch. Dist., 772 F. Supp. 1160, 1163 (D. Idaho 1991).
142. *Id.*

Like the Equal Access Act, the RLPA's definition of "program or activity" applicable to colleges, universities, other postsecondary institutions and public school systems[143]applies the "free exercise" condition in the context of educational institutions. Because that provision applies specifically to educational institutions, it can be argued that its application is narrow, and does no more than direct how federal education funds are to be spent. However, that provision has a broader application than the Equal Access Act, which applies to public secondary schools, and may be one of those "other cases, under other slightly different circumstances", which one U.S. District Court has said will not survive a Tenth Amendment challenge.[144] Because it could be read to deny *any* federal funds to *all* educational institutions in States that receive federal funds, unless those institutions adopt Congress' definition of "free exercise", the public education provisions of the RLPA are unlikely to survive under a *Dole* analysis. However, if those provisions are construed to only apply the federal condition at a school which actually receives federal financial assistance, it will be more in line with the reach of the Equal Access Act, and can be said to do no more than direct how the federal money should be spent.

However, unlike the Equal Access Act, the broader and more general definition of "program or activity" in the RLPA purports to condition the receipt of *all* federal funds used in *any* State or local government programs or activities. This is a much more extensive federal intrusion into State and local affairs than the five percent of federal highway funds at issue in *Dole*. The RLPA does not seem to give a State or local government any realistic opportunity to "opt out" of the federal "free exercise" requirement if it wants to receive *any* federal funds at all. In light of the pervasive nature of federal regulation, and the way in which the federal government levies taxes andd returns the money to the States with federal strings attached, it is unlikely a State or local government could realistically accept *any* federal money without subjecting itself to the RLPA's "free exercise" condition.[145] This appears to be the

143. 42 U.S.C. § 2000d-4a(2).

144. *Hoppock,* 772 F. Supp. at 1163.

145. *See, e.g.,* L. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism,* 16 HARV. J.L. PUB. POL'Y. 119, 130-31 (1993); McCoy & Friedman, *supra* note 121 at 124-25; L. Kaden, *Politics, Money and State Sovereignty: The Judicial Role,* 79 COLUM. L. REV. 858, 870 (1979); U.S. Advisory Commission on Intergovernmental Relations, *Regulatory*

intent of the RLPA: to subject as many State and local programs and activities as possible to its "free exercise" condition. Because the RLPA goes well beyond specifying how the federal money should be spent, and it appears to attach the federal condition to virtually *all* federal spending, even the narrowest construction of the RLPA is much broader than the federal condition the Supreme Court considered in *Dole*. Thus, the RLPA's "General rule" imposing its "free exercise" condition on federal spending is likely to be found to be "so coercive as to pass the point at which pressure turns to compulsion."[146]

## VII. CONCLUSION

The proposed RLPA purports to tie its "free exercise" condition to the use of federal funds in States' or local governments' "program[s] or activit[ies]" in much the same way that the federal Hatch Act addressed in *Oklahoma v. United States Civil Service Comm'n.*[147] tied the receipt of federal highway funds to the condition that the State officials administering those funds not have "any active part in political management or in political campaigns."[148] In that case the Supreme Court upheld that use of the Hatch Act as an appropriate Congressional regulation to insure the integrity of State officials who administer federal funds. However, the amount of federal funds at issue was only an amount equal to two years compensation of the offending State official[149] and the Court's holding was premised upon its finding that the State could realistically choose to refuse the federal funds.[150] Also, the condition at issue in *Oklahoma* was only imposed on federal

---

*Federalism: Policy, Process, Impact and Reform* 31 (ACIR, Washington, D.C. 1984) ("1984 ACIR Report"); *See also*, U.S. Advisory Commission on Intergovernmental Relations, *Federal Preemption of State and Local Authority: History, Inventory and Issues* 4 (ACIR, Washington, D.C. 1992); U.S. Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s* 1 (ACIR, Washington, D.C. 1993).

146. *Dole,* 483 U.S. at 210, (quoting, *Steward Mach. Co. v. Davis,* 301 U.S. 548, 590 (1937)). *See* Clinton v. New York, 118 S. Ct. 1404, 140 L. Ed. 2d 644 (1998) (stating that Congress may not constitutionally authorize the President to "cancel" parts of a bill passed by the Senate and House of Representatives, even though he could properly veto "parts" if they were sent to him as separate bills).

147. 330 U.S. 127 (1947). *See* text accompanying notes 79-85 *supra.*

148. *Id.* at 129, n.1.

149. *Id.* at 133.

150. *Id.* at 143-44.

highway funds, whereas the proposed RLPA would condition *all* federal spending related to State and local government "programs or activities."

Because one of the definitions of "program or activity" adopted by the RLPA applies specifically to educational institutions, that provision has a better chance of survival if it is narrowly construed to be no broader than the reach of the Equal Access Act, and actually allows a State or local government to reject the federal condition and still receive some federal funds. However, because the more general definition of "program or activity" in the RLPA mandates that *all* "programs or activities" of State or local governments that receive *any* federal funds are subject to the federal "free exercise" condition, virtually every program operated or administered by a State or local government would be subject to that "free exercise" condition. The only entities that are apparently exempt are the State and local governments themselves.[151] This result smacks of the "commandeering" of State governments condemned by the Court in *New York,* and has been called "back door commandeering"[152] because Congress uses its spending power to coerce States into conduct it may not otherwise constitutionally compel. The majority in *Dole* held that such Congressional coercion is a violation of the Tenth Amendment.[153]

The drafters of the RLPA are apparently concerned that the Court's opinions in *New York* and *Printz* may lead courts to find that the RLPA "commandeers" State perogatives, and they address that concern by adding a section entitled "State Policy Not Commandeered" which states: "A government may eliminate the substantial burden on religious exercise by changing the policy that results in the burden, by retaining the policy and exempting the religious exercise from the policy, or by any other means that eliminates the burden."[154] While addressing a legitimate and compelling concern about the constitutionality of the RLPA, this section does more to highlight the constitutional infirmity than alleviate it. This section merely restates the obvious: if States want to avoid losing federal financial assistance they can do what Congress is attempting to compel; "change[ ] the policy that results in the [ "free exercise"] burden, . . . . retain[ ] the policy and exempt[ ] the religious exercise from that policy, or [otherwise]

151. *Supra* notes 47-50.
152. 1984 ACIR Report, *supra* note 146 at 271.
153. *Dole, supra,* 483 U.S. at 210.
154. RLPA, *supra* note 10, 2(d).

eliminate the burden." Congress' expression of concern about possibly commandeering State policy demonstrates its awareness of serious Tenth Amendment problems with the RLPA.

Thus, unlike Title VI of the Civil Rights Act of 1964, which has its constitutional foundation in Congress' power to enforce the Fourteenth Amendment's Equal Protection Clause, and the Equal Access Act, which applies only to public secondary schools, the proposed RLPA is attempting to apply its "free exercise" condition to virtually all federal spending in a way which the Supreme Court has already said is beyond Congress' Fourteenth Amendment enforcement power.[155] The obvious effect of the Court's finding RFRA to be beyond Congress's Fourteenth Amendment enforcment powers should be to allow each State to decide for itself whether it wants to impose a "compelling State interest" test on its laws which burden the "free exercise" of religion. However, if Congress wants to use its spending power to impose the "free exercise" condition on State and local activities, following *Oklahoma* and like the Equal Access Act, it should condition the award of federal funds in particular programs or activities, on a statute-by-statute basis, in a way that allows States and local governments the realistic option of rejecting the funds. Moreover, Congress should keep in mind Justice O'Connor's admonition that the Spending Clause does not allow Congress to "go beyond specifying how the money should be spent."[156] If, as is presently proposed, essentially *all* federal funds will carry the "free exercise" condition, then the States and local governments will have no realistic ability to reject the condition because they cannot operate without federal financial assistance. Such a pervasive condition would be "so coercive as to pass the point at which 'pressure turns into compulsion'",[157] violating the Tenth Amendment.[158]

155. *City of Boerne,* 117 S. Ct. 2157.

156. *Dole,* 483 U.S. at 216 (O'Connor, J., dissenting). *See also* Choper, *supra* note 11 at 2307-2308+.

157. *Id.* at 210.

158. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").