

# ACCOUNTABILITY AND CONSTITUTIONAL FEDERALISM: RECONSIDERING FEDERAL CONDITIONAL SPENDING PROGRAMS IN LIGHT OF DEMOCRATIC POLITICAL THEORY

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## INTRODUCTION: THE ELECTED, THE ELECTORATE, AND CONSTITUTIONAL FEDERALISM

“The powers not delegated to the United States by the Constitution are reserved to the Department[] of . . . Treasury, except when the states are willing to forsake Federal financing.”<sup>1</sup> While originally written as a satire,

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<sup>1</sup> John Perry Barlow, Op-Ed., *Bill O’Rights Lite*, N.Y. TIMES, Jan. 27, 1993, at A23 (restating the Tenth Amendment for satirical effect), quoted in William Van Alstyne, “*Thirty Pieces of Silver*” for the *Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL’Y 303, 319 n.37 (1993).

this revision of the Tenth Amendment<sup>2</sup> starts to seem disturbingly accurate when one learns that federal grants to the states comprise almost 30% of states' revenues.<sup>3</sup> What drives the point home, though, is the nature of these grants: virtually all of them come with conditions requiring that the states change their policies to conform to federal mandates.<sup>4</sup>

In *South Dakota v. Dole*,<sup>5</sup> the Court articulated a five-pronged test for determining the constitutionality of conditional spending programs.<sup>6</sup> But over the years, this test has not presented a meaningful barrier to conditional spending.<sup>7</sup> Worse yet, the *Dole* test, relying on the Court's conclusion that Congress's spending powers<sup>8</sup> are quite broad,<sup>9</sup> asks only a structural federalism question: Does Congress have the power to impose conditions on its grants of money to the states? Commentators likewise have discussed the *Dole* test only in terms of federalism.<sup>10</sup> To this day, the test remains good law.<sup>11</sup>

This Comment aims to shift the analytical model for studying conditional spending programs. It assumes, if only for purposes of argument, that Congress has broad powers under the Spending Clause and that conditional spending programs do not violate federalism.<sup>12</sup> But this Comment poses a different (and, surprisingly, unanswered) question: When the states

<sup>2</sup> For the real version of the Tenth Amendment, see 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.").

<sup>3</sup> See Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 461–62 (2002) [hereinafter Somin, *Pandora's Box*] (citing RONALD L. WATTS, *THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY* 53 (1999)).

<sup>4</sup> *Id.* at 462 (citing WATTS, *supra* note 3, at 56).

<sup>5</sup> 483 U.S. 203 (1987).

<sup>6</sup> See *infra* notes 34–38 and accompanying text.

<sup>7</sup> See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 441 (2005) (asserting that "federal appellate courts have been extremely reluctant to strike down federal programs for exceeding the scope of the spending power"); Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1364 n.86 (2005) (listing cases supporting the argument that "the lower courts have followed the Court's lead, upholding virtually all spending power based regulations since the *Dole* Court's ruling"); see also Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 105 (2001) [hereinafter Baker, *States' Rights*] (stating that the *Dole* Court failed to portray the limiting factors "as having much bite").

<sup>8</sup> The Constitution enumerates Congress's power to "provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

<sup>9</sup> *Dole*, 483 U.S. at 207.

<sup>10</sup> See *infra* notes 77–78 and accompanying text.

<sup>11</sup> See cases cited *infra* note 31.

<sup>12</sup> But see Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 317 & n.112 (collecting authorities in support of the proposition that "the so-called Spending Clause was written as a limitation on the taxing power and was carefully drafted so that it would not imply a general power to spend—thus leaving Congress to spend only as permitted under its other powers").

comply with the federal government's conditions and change their policies, what effect does this compliance have on state officials' accountability to their electorates? And if, as I argue, such compliance undermines accountability, does the underlying spending condition violate any constitutional limitation on Congress's legislative power? This Comment will show that the Court's current standard of review for conditional spending cases does not, but should, address accountability concerns and will propose an alternative that does.

Meaningful accountability<sup>13</sup> received some attention from the Court in *New York v. United States*.<sup>14</sup> While this Comment is not about the Court's decision in *New York* per se, the decision does provide a useful illustration of accountability run amok. On one hand, the Court sought to protect "the accountability of both state and federal officials" to their electorate.<sup>15</sup> Employing this rationale, the Court held unconstitutional a federal statute that commanded the states either to remove radioactive nuclear waste or to take title to it.<sup>16</sup> If Congress's scheme were permitted, state and federal officials could engage in a kind of political shell game where each level of government might disclaim responsibility by pointing fingers at the other.<sup>17</sup> There was a danger, then, that accountability would wither.

On the other hand, accountability concerns did not bother the *New York* Court when it considered a different provision of the Act. The Act, in a separate section, conditioned federal funds to the states on their compliance with Congress's implementation schedule for waste removal programs.<sup>18</sup> Under the *Dole* test, the Court in *New York* easily upheld the conditional funding provision.<sup>19</sup>

One might, and should, wonder why the accountability logic should not apply when Congress conditions federal funds on a state's implementation of a congressionally mandated waste removal schedule. If a state institutes waste removal programs to comply with Congress's schedule, the decision may displease some voters. When pressed by these voters at the next elections to explain the decision to comply, state officials may shift the blame to Congress for imposing conditions on federal funds. But, because federal officials may in turn point fingers at their state counterparts and explain to the upset voters that the state officials always had the option of foregoing federal funding and refusing to comply, the buck would not stop

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<sup>13</sup> In this Comment, I use the terms "accountable" and "accountability" in the sense of *meaningful* accountability. See discussion *infra* Part I.B.1. Meaningful accountability presupposes more than the electorate's technical ability to vote someone out of office. It also focuses on the electorate's ability to judge public officials' performance.

<sup>14</sup> 505 U.S. 144 (1992).

<sup>15</sup> *Id.* at 168–69.

<sup>16</sup> *Id.* at 176.

<sup>17</sup> *Id.* at 182–83.

<sup>18</sup> *Id.* at 152–53.

<sup>19</sup> *Id.* at 173.

with Congress either. Thus, conditional spending programs may very well lead to a diffusion of responsibility that ultimately results in voter confusion. If commandeering state legislatures through a take title provision results in voter confusion, it is difficult to see how conditioning federal funding on the state taking certain actions is not equally as violative of the accountability principle.

The most reasonable explanation as to why the *New York* Court did not raise accountability concerns when analyzing the conditional spending provision of the Act is that it did not recognize federalism and accountability as distinct constitutional values. Remember, the *Dole* decision had already put to rest the federalism objection by establishing that conditional spending was within Congress's enumerated powers.<sup>20</sup> Thus, the *New York* Court did not think it needed to raise the accountability concerns, which, in its opinion, were but a subset of the federalism objections.

This Comment picks up where the *New York* Court left off and aims to accomplish two things. First, it will show that accountability is solidly grounded in modern democratic theory.<sup>21</sup> As it turns out, while federalism and accountability are interrelated constitutional values, they independently limit Congress's legislative powers.<sup>22</sup> And they do this by protecting the electorate from the tyranny of a too-powerful government. Moreover, the federal judiciary can legitimately strike down acts of Congress that undermine accountability, a power courts derive from accountability's grounding in the text of the Constitution.<sup>23</sup>

Second, this Comment will demonstrate that the *Dole* test for judging the constitutionality of conditional spending programs is inadequate in that it does not preserve accountability, nor does it pretend to.<sup>24</sup> To supply courts with a constitutional method to preserve accountability, I propose an alternative test.

Establishing normative foundations for the centrality of accountability, this Comment looks to modern democratic theory that has informed many values underlying the core of American political society. Forming the foundational pillar of modern democratic theory, accountability prevents a democratic government from becoming unresponsive to the electorate and protects as much self-governance as the populace can reasonably expect to retain in a representative democracy.

But normative arguments grounded purely in political theory are not enough justification, standing alone, for a court to set aside democratically

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<sup>20</sup> *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

<sup>21</sup> *See infra* Part II.A.1.

<sup>22</sup> *See infra* Part II.A.2.

<sup>23</sup> *See infra* Part II.B.1.

<sup>24</sup> *See infra* Part III.B.

enacted legislation.<sup>25</sup> Fortunately, the long-forgotten Guarantee Clause in the Constitution<sup>26</sup> supplies the necessary textual support for raising the accountability arguments when interpreting the extent of Congress's powers. Litigants, then, can use the Guarantee Clause to challenge acts of Congress that undermine the accountability of state officeholders.<sup>27</sup>

Having grounded the accountability arguments both normatively and textually, this Comment examines the *Dole* test and concludes that the test is woefully inadequate, as it fails to protect accountability. Instead, the appropriate test for determining the constitutionality of conditional spending programs should direct the courts to ask the following question: Does Congress, in legislating pursuant to one of its enumerated powers, create voter confusion? If impermissible voter confusion—the kind that undermines accountability of state officials to their electorate—is the likely result of Congress's legislation, the legislation should be deemed unconstitutional.

The proposed test emphasizes the accountability of *state* public officials to the *state* electorate. Such emphasis derives from the language of the Guarantee Clause—the textual foundation for the accountability barrier—that concerns only the state governments.<sup>28</sup> But since this Comment argues that conditional spending programs allow both federal and state officials to avoid responsibility, preserving state public officials' accountability has the incidental effect of protecting this value on the federal level as well.

Part I sets out a brief explanation of the two Supreme Court cases that bear most strongly on my thesis: *South Dakota v. Dole* and *New York v. United States*. *New York* is especially important because its inconsistent application of the accountability rationale provides a launching point for my arguments.

After showing that neither courts nor scholars have yet provided adequate discussion of the conditional spending doctrine in light of the accountability concerns, Part II presents the normative and textual arguments for preserving accountability of public officials to their electorate. Part II also explains how accountability and federalism independently limit Congress's legislative powers.

Part III, then, argues that the *Dole* test for measuring the constitutionality of federal conditional spending grants should be replaced by a test appropriately tailored to the accountability rationale. I suggest such a test. Finally, Part III also provides examples of the proposed test's application, compares the test to one current proposal that inadvertently comes closest to

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<sup>25</sup> Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

<sup>26</sup> U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

<sup>27</sup> I address the justiciability objection to this approach *infra* in Part II.B.2.

<sup>28</sup> U.S. CONST. art. IV, § 4.

addressing some accountability problems, and addresses potential criticisms of the proposed accountability test.

In *New York*, the concept of accountability did not receive proper grounding in constitutional or political theory. As a result, the Court failed to apply it in the context of a conditional spending program. My hope in this Comment is to do what the Court in *New York* should have done and elevate accountability to a higher status in constitutional discourse.

## I. THE CONDITIONAL SPENDING DOCTRINE AND THE ACCOUNTABILITY CONCERNS

### A. *The Dole Test*

Congress likes to attach strings to the money it gives to the states: to receive federal grants, states often must change their policies to reflect the federal government's preferences.<sup>29</sup> In its 1987 decision in *South Dakota v. Dole*,<sup>30</sup> the Supreme Court laid out the test for determining whether a conditional spending program is within the boundaries of federal power under the Constitution. To this day, the test remains good law.<sup>31</sup>

Through the conditional spending program at issue in *Dole*, Congress required all states receiving federal highway funds to maintain a minimum drinking age of twenty-one.<sup>32</sup> South Dakota maintained its minimum drinking age at nineteen, and, as a result, the program directed the Secretary of Transportation to withhold 5% of federal highway funds otherwise earmarked for South Dakota.<sup>33</sup> To determine whether the program was constitutional, the *Dole* Court asked five questions: (1) Did the conditional spending program aim at the pursuit of general welfare?<sup>34</sup> (2) Was the condition stated unambiguously?<sup>35</sup> (3) Did the condition relate to the federal interest or policy in the overall spending program?<sup>36</sup> (4) Would a state, in complying with the condition, have to violate an independent provision of

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<sup>29</sup> See *supra* notes 3–4 and accompanying text.

<sup>30</sup> 483 U.S. 203 (1987).

<sup>31</sup> See, e.g., *Sabri v. United States*, 541 U.S. 600, 608 (2004) (distinguishing the case at issue from *Dole*, but preserving the *Dole* test for determining the constitutionality of conditional spending programs); *United States v. Am. Library Ass'n*, 539 U.S. 194, 203–14 (2003) (applying the *Dole* test to uphold a conditional spending program).

<sup>32</sup> *Dole*, 483 U.S. at 205.

<sup>33</sup> *Id.* at 211.

<sup>34</sup> *Id.* at 207. The Court's "general welfare" language connects the test with Congress's spending power. See U.S. CONST. art. I, § 8, cl. 1 (enumerating Congress's power to "provide for . . . general Welfare of the United States").

<sup>35</sup> *Dole*, 483 U.S. at 207 (quoting *Penhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1980)).

<sup>36</sup> *Id.* at 207–08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

the Constitution?<sup>37</sup> And, (5) did Congress, by threatening to withdraw federal funding, compel the states rather than induce them?<sup>38</sup> The *Dole* Court itself did not say whether failing on any one question would bar the program as unconstitutional. One conclusion is straightforward, however: the program does not violate the Constitution if all five questions lead to satisfactory answers. After reasoning that the program under review in *Dole* satisfied all five factors, then, the Court upheld its constitutionality.<sup>39</sup>

The first three queries were unproblematic. The first question—whether the program is in pursuit of general welfare—rarely presents a challenge because the Court largely defers to Congress’s judgment on this issue.<sup>40</sup> In *Dole*, the Court deferred to Congress’s conclusion that preventing young people from drinking and driving advanced general welfare.<sup>41</sup> Likewise, the question whether the condition was stated unambiguously was easy to answer: the states clearly knew that they would lose 5% of their federal highway funds unless they raised the minimum drinking age to twenty-one.<sup>42</sup>

With respect to the third inquiry—whether the condition serves Congress’s overall purpose—the Court said, “the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”<sup>43</sup> Because highway safety was frustrated by the variations in minimum drinking ages among the states, Congress’s condition that the states increase the age to twenty-one was germane to highway safety.<sup>44</sup>

The fourth query asked whether a state, in complying with Congress’s condition, would be forced to violate some other provision of the Constitution.<sup>45</sup> In *Dole*, the challenged federal law required South Dakota to raise

<sup>37</sup> *Id.* at 208.

<sup>38</sup> *Id.* at 211. The Court grouped the first four restrictions and articulated the fifth one almost as a gloss on the other four. In other words, the Court perhaps viewed the test as a four-part test that has an overall requirement that the fifth restriction not be violated. Effectively, then, the Court did endow the test with five factors. *But see* Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439, 473–74 (2002) (“[T]he opinion’s structure and language suggested that ‘coercion’ might be simply a synonym for *Dole*’s four numbered tests or a part of the fourth and final of those tests (the independent constitutional bar).”).

<sup>39</sup> *Dole*, 483 U.S. at 212.

<sup>40</sup> *See id.* at 208 (explaining that it is Congress that determines what is and is not welfare).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 209.

<sup>45</sup> *Id.* at 210. The fourth prong of the *Dole* test was at the heart of the disagreement between the litigants. *Id.* at 209. The state argued that because the Twenty-First Amendment did not allow Congress directly to control the minimum drinking age in the states, it forbade Congress from achieving this end via conditional spending. *Id.* But, as stated in the main text, the Court disagreed and limited the appli-

the minimum drinking age to twenty-one as a precondition to receiving the full allocation of federal highway funds.<sup>46</sup> Unlike in the Court's examples where Congress conditions federal grants "on invidiously discriminatory state action or the infliction of cruel and unusual punishment," Congress's minimum drinking age requirement did not force South Dakota to violate the Constitution in order to comply.<sup>47</sup> Thus, the condition satisfied the fourth factor of the *Dole* test.<sup>48</sup>

Nor did the final factor—whether Congress's condition is so coercive that it turns inducement into compulsion—limit the program in *Dole*. In the Court's assessment, taking away 5% of federal highway funds from a non-complying state did not amount to coercion.<sup>49</sup> Instead, "Congress offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose."<sup>50</sup> Satisfied that the spending program did not exceed Congress's enumerated powers, the Court concluded that the conditional spending at issue was constitutional.

Justice O'Connor dissented, though she agreed that the majority used the right test.<sup>51</sup> Her disagreement lay with the Court's analysis under the germaneness factor, which asks whether the condition related to Congress's overall interest or policy in a particular spending program. Raising the minimum drinking age, according to Justice O'Connor, was not sufficiently related to the interest in constructing safe highways.<sup>52</sup> She viewed the germaneness prong as strictly as the Court had viewed the overall spending power many years earlier in *United States v. Butler*.<sup>53</sup> The Court in *Butler* explained that conditions effectively allowing Congress to regulate outside of the realm of its delegated powers are unconstitutional.<sup>54</sup> Similarly, the conditional spending program in *Dole*, according to Justice O'Connor, attempted to accomplish via the Spending Clause the type of regulation that it could not accomplish without it.<sup>55</sup> Such an end run would not have satisfied

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ability of the fourth prong to cases where a state would have had to violate a provision of the Constitution to comply with Congress's conditions. *Id.* at 210.

<sup>46</sup> *Id.* at 205.

<sup>47</sup> *Id.* at 210–11.

<sup>48</sup> *Id.* at 211.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 213 (O'Connor, J., dissenting) ("I agree that there are four separate types of limitations on the spending power . . ."). Justice O'Connor did not mention the fifth limitation—the coercion factor.

<sup>52</sup> *Id.* at 213–14 (O'Connor, J., dissenting).

<sup>53</sup> 297 U.S. 1 (1936); see *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) ("This approach harks back to *United States v. Butler* . . .").

<sup>54</sup> *Butler*, 297 U.S. 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.").

<sup>55</sup> *Dole*, 483 U.S. at 218 (O'Connor, J., dissenting) ("Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor.").

the Court in *Butler*; Justice O'Connor thought the same fate should have been accorded the spending program in *Dole*.

### B. Accountability

The *Dole* test has survived to date unscathed.<sup>56</sup> But the Court's 1992 decision in *New York v. United States*<sup>57</sup> introduced the accountability rationale into the jurisprudence supporting constitutional federalism. This should have changed the conditional spending doctrine by directing courts to consider the effect of conditional spending programs on accountability but, unfortunately, had no such effect.

1. *The Meaning of Accountability.*—What does it mean to say that elected representatives are “accountable” to the populace for their actions? On one hand, the word “accountable” may simply mean that the electorate can vote a public servant out of office. This definition does not explain why it might be desirable for the voters to have such an awesome power, but looks only to the mechanics of what actually happens at the polls. It does not address what ought to be but merely describes what is.

On the other hand, a different meaning emerges when one replaces the adjective “accountable” with its synonyms “responsible” or “answerable.”<sup>58</sup> For their actions, public officials are *responsible* to the electorate. Unlike the mechanical definition in the previous paragraph, defining “accountable” as “responsible” has a normative component that makes accountability meaningful. The populace, when voting either for or against a candidate, expresses its agreement or disagreement with the candidate's policy choices. By this definition, people do not vote in the automaton-like fashion. Instead, they judge the candidate's prior performance and vote based on this judgment.<sup>59</sup>

This Comment uses the terms accountable and accountability in the sense of this *meaningful* accountability. The focus is not simply on the voters' raw power over public officials but on the ability to judge their performance. Meaningful accountability played a role, albeit an incomplete one, in *New York v. United States*.

2. *New York: Recognizing Accountability.*—At issue in *New York v. United States*<sup>60</sup> was an act of Congress attempting to solve the problem of low-level radioactive waste buildup in the states. The Act set out the pro-

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<sup>56</sup> See cases cited *supra* note 31.

<sup>57</sup> 505 U.S. 144 (1992).

<sup>58</sup> See J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 267 (1979) (“In the first place, responsibility means accountability, in the sense of answerability. . . . A person is responsible to another for his actions when that other person can hold him to account for them.”).

<sup>59</sup> As I explain below in Part III.A.1, accountability enters the picture only when an incumbent (or someone who has held an office sometime in the past) is running for reelection.

<sup>60</sup> 505 U.S. 144.

cedures for the states to resolve the problem of waste accumulation and provided three incentives for the states to comply.<sup>61</sup>

The first incentive required any state that had not disposed of all waste generated within its borders by a certain date to take title to the waste<sup>62</sup>—thereby becoming liable for any damages resulting from the waste and its disposal. The Supreme Court, however, held that this “take-title” provision passed the point where encouragement becomes coercion.<sup>63</sup> Although on its face the provision allowed the states a choice of either regulating according to Congress’s mandate or taking title to the waste, the provision in practice required the states to accept one of the options that Congress could not impose on the states directly.<sup>64</sup> The provision was unconstitutional.<sup>65</sup>

The Court did not stop here and addressed the Government’s argument that the take-title provision was constitutional because representatives of the State of New York had supported its enactment.<sup>66</sup> In key language explaining why the State could not consent to being commandeered by Congress, Justice O’Connor relied on the accountability rationale:

[I]t is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. . . . [F]ederalism is hardly being advanced.<sup>67</sup>

Thus, at least insofar as the Court chose to address the respondent’s arguments, it employed the accountability concerns.

The *New York* Court understood the concept of accountability in the sense of affording the electorate a meaningful way of checking their representatives. If Congress were allowed to commandeer state legislatures, said the Court, then state and federal officials could engage in a kind of political shell game whereby both levels of government deny responsibility by blaming each other.<sup>68</sup> State officials would blame Congress for inducing the

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<sup>61</sup> *Id.* at 151–54. One of the incentives is outside the scope of this Comment. It allowed the states in which the disposal sites were located to levy higher surcharges on, and eventually deny access to, the states that did not comply with the Act’s requirements. *Id.* at 153. Because this provision affected only relations among the states, it does not implicate this Comment’s thesis.

<sup>62</sup> *Id.* at 153–54.

<sup>63</sup> *Id.* at 175–76.

<sup>64</sup> *Id.* at 176.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 181.

<sup>67</sup> *Id.* at 182–83.

<sup>68</sup> *Id.*

states to remove the waste; Congress, in turn, would respond that the states always had the option not to. This mutual blaming would make it harder for the voters to determine who was responsible for the ultimate decision.

3. *New York: Incomplete Treatment of Accountability.*—The second incentive created by the congressional scheme at issue in *New York* operated by withholding a certain amount of federal funding from any state that failed to meet Congress’s implementation schedule for waste removal.<sup>69</sup> The Court held that this conditional spending program satisfied the *Dole* test<sup>70</sup> and was “thus well within the authority of Congress under the . . . Spending Clause.”<sup>71</sup>

Justice O’Connor, it seems, perceived *New York* mainly as a case about federalism.<sup>72</sup> It is therefore not surprising that her conclusions followed ostensibly as a matter of federalism: the take-title provision was unconstitutional (i.e., it fell outside Congress’s regulatory authority),<sup>73</sup> while the monetary incentive provision was constitutional (i.e., it fell within Congress’s spending powers). But what about the accountability considerations that informed the analysis of the take-title provision?

Writing for the Court, Justice O’Connor explained that there was an important distinction between encouragement and compulsion. If Congress simply encouraged the states to regulate according to Congress’s wishes, the states were free to ignore Congress’s overtures and remained accountable to the electorate.<sup>74</sup> If, on the other hand, Congress compelled the states to regulate, “the accountability of both state and federal officials is diminished.”<sup>75</sup> Justice O’Connor, however, neglected to explain why problems with accountability did not also plague Congress’s attempts merely to encourage state governments to regulate according to federal mandates.

If one probes deeper than the Court did in *New York*, harmless encouragements in the form of conditional spending programs exhibit the full potential to diminish the accountability of public officials. When a state implements a particular policy because it does not want to lose federal funding, voters within the state who disagree with the policy will presumably

<sup>69</sup> *Id.* at 152–53.

<sup>70</sup> *Id.* at 171–72.

<sup>71</sup> *Id.* at 173.

<sup>72</sup> *Id.* at 149 (“The constitutional question . . . consists of discerning the proper division of authority between the Federal Government and the States.”).

<sup>73</sup> Congress might exceed its regulatory authority either by enacting a statute “lying outside Congress’ enumerated powers, or [by] infringing upon the core of state sovereignty reserved by the Tenth Amendment.” *Id.* at 177. In either case, however, the law would be “inconsistent with the federal structure of our Government established by the Constitution.” *Id.*

<sup>74</sup> *Id.* at 168 (“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”).

<sup>75</sup> *Id.*

challenge the public officials.<sup>76</sup> The officials' response likely will be, at least in part, that they complied in order to retain federal funding—in other words, “Blame Congress.” Congress may, in turn, point out to the voters that the state always had the option to decline federal funding and pursue its own policy. When the dust settles, both federal and state public officials have successfully shifted, and diffused, responsibility for their policy choices. Thus, by affirmatively thinning responsibility and confusing voters, conditional spending programs undermine accountability no less than do the commandeering provisions that compel the states to regulate according to federal mandates.

What creates a constitutional problem, however, is not just *any* voter confusion. After all, the American political system, founded on precepts of constitutional federalism, can be seen to sanction a certain amount of cloudiness in voters' minds. A two-tiered federal system is inherently more confusing than a strictly national government with only one identifiable sphere of power. Thus, the very structure of our Constitution creates *some* voter confusion.

My analysis, instead, singles out the additional voter confusion brought about by affirmative acts of Congress, and not by an incidental byproduct of constitutional federalism. In other words, while constitutional federalism might cause confusion by separating governmental responsibility into two parallel levels, conditional spending programs further confuse voters by diffusing responsibility so that it may be impossible to determine on which level the responsibility lies. That American politics contains a certain level of vagueness does not mean that Congress should be allowed to exacerbate this problem by creating programs that further confuse voters by insulating federal and state public officials from effective public oversight.

The main implication of *New York* for this Comment can be restated quickly: Justice O'Connor did not fully explain that accountability and federalism, while interrelated, are two separate constitutional mechanisms to check Congress's legislative powers. Part II will show that accountability concerns have a strong foundation both in democratic political theory and in the text of the Constitution. In the process, accountability will emerge as an independent constitutional barrier that operates in addition to—rather than as a corollary to—federalism.

## II. NORMATIVE AND TEXTUAL FOUNDATIONS FOR THE ACCOUNTABILITY CONCERNS

Several commentators have analyzed the *Dole* test both before and after the *New York* decision introduced the accountability factor. Most have examined the conditional spending doctrine exclusively from the perspec-

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<sup>76</sup> Part III.D, below, addresses possible counterarguments based on political ignorance of the electorate.

tive of federalism.<sup>77</sup> As a result, even when one of these commentators has acknowledged that accountability concerns expressed in *New York* might apply to conditional spending programs, he or she has failed to perceive accountability and federalism as two independent checks on Congress's powers.<sup>78</sup> It is only fitting, then, to proceed by demonstrating that accountability has strong normative underpinnings irrespective of federalism, as well as support in the Constitution's text.

### A. *The Normative Rationale*

1. *Accountability in a Representative Democracy.*—Alexander Meiklejohn has reaffirmed the founding principle that to possess democratic legitimacy, government must derive its powers “from the consent of the governed.”<sup>79</sup> Even if a government is representative in form, the consent of the people is still required to make it a legitimate democratic government.<sup>80</sup> The form of government to which the Americans have consented on both the federal and state levels<sup>81</sup> is a representative democracy.<sup>82</sup>

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<sup>77</sup> See, e.g., Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 89 (2001) (arguing that “Congress’s spending power should be broadly interpreted” to preserve the part of federalism that protects the powers of the federal government); Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 165 (2001) (suggesting that the *Dole* test has loopholes that may cut back on Congress’s power and “vindicate federalism interests”); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 87 (“The *Dole* holding thus seriously undermines the role of state government in the federal system.”); Somin, *Pandora’s Box*, *supra* note 3, at 462 (arguing that, in general, federal grants to the states are a threat to federalism); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1436 (1994) [hereinafter Note, *Federalism, Political Accountability*] (“Principles of federalism . . . call for a reevaluation of Spending Clause analysis as well for heightened sensitivity to the ways in which conditional grants create impediments to political accountability.”).

<sup>78</sup> See, e.g., Note, *Federalism, Political Accountability*, *supra* note 77, at 1436 (urging heightened attention to accountability concerns while preserving the framework of federalism).

<sup>79</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 9 (1960); see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments . . . deriv[e] their just powers from the consent of the governed . . .”).

<sup>80</sup> After all, even totalitarian governments—not generally thought of as democratically legitimate—can claim to represent many of their citizens’ interests. See H.B. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 97 (1950) (“At the low level of modern dictatorship, Lenin used to claim this god-like gift of divination of the people’s ‘real’ interests, and Hitler used to say ‘My pride is that I know no statesman in the world who with greater right than I can say that he is the representative of his people.’” (quoting ALAN BULLOCK, *HITLER: A STUDY IN TYRANNY* 367 (1952))).

<sup>81</sup> The Constitution sets up representative governments at both the federal and state levels. See U.S. CONST. art. I, § 2, cl. 1 (House of Representatives elections); *id.* § 3, cl. 1, *amended by* U.S. Const. amend. XVII cl. 1 (Senate elections); *id.* at art. II, § 1, cl. 2 (Executive elections); *id.* at art. IV, § 4, (republican form of government in the states). See also *infra* Part II.B.1 for the argument that the Guarantee Clause ensures the presence of representative governments in the states.

<sup>82</sup> When I say “representative democracy,” I mean to distinguish it from the pure, direct democracy that characterized some Greek city-states, most notably Athens. The distinguishing feature, of course, is that people elect someone to make policy choices on their behalf. See ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789*, at 642 (2d ed. 2005) (describing Madi-

One of the essential features of any democracy—pure or representative—is the participation of the populace through voting.<sup>83</sup> To accommodate, if only for purposes of argument, minimalist theories of democracy that call on the electorate to vote a public official into office and to remain passive until subsequent elections,<sup>84</sup> this Comment takes “participation” to mean only that people have the opportunity to express their preferences at the polls.<sup>85</sup> Participation, then, may involve much more than voting,<sup>86</sup> but voting is at least a minimum requirement.

Unfortunately, there is no certainty that the elected, having assumed their official duties, will faithfully serve the electorate. Just the opposite may be true. Political science literature has long recognized this “tendency of officials to abuse their public trust.”<sup>87</sup> There is no small degree of pessimism about human nature.<sup>88</sup> A reasonable system of government, then, should provide some mechanism to check a public official’s performance the next time he or she is up for reelection.<sup>89</sup>

Consequently, the function of voting should at the very least encompass a checking mechanism. According to Madisonian liberal theory, as explained by William Riker, “the function of voting is to control officials, and no more.”<sup>90</sup> This theory provides a useful floor for the *minimum* func-

son’s belief that “political liberty could survive in a republic only if the people were faithfully represented”); GIOVANNI SARTORI, *THEORY OF DEMOCRACY REVISITED* 233 (1987) (noting “the distinguishing characteristic of committee systems in democracies: the existence of committees that are *responsive* and *accountable* to the citizenry at large and, in this sense, of representative committees”); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 451 (2006) (“The concept of constitutional democracy necessarily implies that the bulk of subconstitutional policy choices will be made by those who are representative of and accountable to the electorate.”).

<sup>83</sup> See WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 5 (1988); see also ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 25 (1989) (“Republican doctrine insisted further that no political system could be legitimate, desirable, or good if it excluded the people from participating in ruling.”).

<sup>84</sup> See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 272 (3d ed. 1950) (explaining that “the primary function of the electorate [is] to produce a government” and wait until reelection to exercise control over the elected government).

<sup>85</sup> RIKER, *supra* note 83, at 8 (“[P]articipation built on the act of voting is the focus of democracy.”); see also ROBERT A. DAHL, *ON DEMOCRACY* 96 (2000) (“[W]ithout frequent elections citizens would lose a substantial degree of control over their elected officials.”); MAYO, *supra* note 80, at 72 (“The first and broadest of these principles [of democracy] is comprised in the phrase: popular control of policy-makers; and the mechanism is that of free elections.”).

<sup>86</sup> For example, citizens may participate in politics by actually running for office or taking a smaller role in policy-making.

<sup>87</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529.

<sup>88</sup> See *id.* at 541 (“Another premise underlying the checking value is an essentially pessimistic view of human nature and human institutions.”).

<sup>89</sup> See *id.* at 539 (“The check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls . . .”).

<sup>90</sup> RIKER, *supra* note 83, at 9; see also PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM* 35 (1967) (“[T]he role of the electorate in mass society is primarily passive.”).

tion required of voting;<sup>91</sup> in other words, voting may entail more but not less than control over public officials. Weber and Schumpeter likewise “tended to affirm a very restrictive concept of democracy, envisaging democracy, at best, as a means of choosing decision-makers and curbing their excesses.”<sup>92</sup> In Weber’s view of democracy, the electorate would simply ensure that incompetent leaders be dismissed.<sup>93</sup> Similarly, Schumpeter focused his vision of democracy on enabling the electorate to protect itself from non-responsive rulers.<sup>94</sup> According to Madison, either citizens’ liberty or their ability to participate in the government will suffer in the absence of checking.<sup>95</sup> But when the checking function of voting is intact, elections provide some measure of “discipline” for public officials.<sup>96</sup>

At its core, accountability is precisely what allows voters to check their representatives.<sup>97</sup> Describing elections, Professor Key focused on the fact that the candidates depend on the voters “who finally march to the polls to prolong the rule of their champion” or “to thrust him, ungratefully, back into the void of private life.”<sup>98</sup> The emphasis is on candidates who are al-

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<sup>91</sup> Madisonian liberal theory stands in opposition to another theory of voting: Rousseauistic populist theory. See RIKER, *supra* note 83, at 9. This theory places a higher task on voting than does the Madisonian theory, for it requires “participation in rule-making.” *Id.* at 12. For this Comment’s purposes, the difference between the two theories is not important because the Madisonian theory can be viewed as a subset of the Rousseauistic one. In other words, Rousseau demanded more from voting than did Madison.

<sup>92</sup> DAVID HELD, *MODELS OF DEMOCRACY* 143 (1987).

<sup>93</sup> See *id.* at 159 (describing Weber’s theory of assigning to the electorate the role of “dispens[ing] with incompetent leaders”).

<sup>94</sup> See *id.* at 166 (“The essence of democracy was, as the protective theorists of democracy rightly emphasized, the ability of citizens to replace one government by another and, hence, to protect themselves from the risk of political decision-makers transforming themselves into an immovable force.”).

<sup>95</sup> RIKER, *supra* note 83, at 9 (“In Madison’s view, the danger for liberty lies in government officials who might deprive citizens of liberty or fail as agents of citizens’ participation. In either case, the liberal remedy is the next election.”).

<sup>96</sup> *Id.* at 11 (“By reason of [the] anticipation of the next election, officials are . . . subject to electoral discipline as the agents of democratic self-control.”); see also V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE* 1 (1966) (“In his reflective moments even the most experienced politician senses a nagging curiosity about why people vote as they do.”); SARTORI, *supra* note 82, at 155–56 (“[Since] it is true . . . most of the time . . . that the leader subject to periodical electoral removability is concerned with how the voters will react to his actions, it follows that he will be monitored . . . by the anticipation of what that reaction, whether positive or negative, might be.”); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 58 (2003) (arguing that the value of political “competition is twofold: it disciplines leaders with the threat of losing power in the same way that firms are disciplined by the threat of bankruptcy, and it gives would-be leaders the incentive to be responsive to more voters than are their competitors”).

<sup>97</sup> See PENNOCK, *supra* note 58, at 267 (“A government is responsible when its tenure of office is subject to control, within limits, by the electorate.”).

<sup>98</sup> KEY, *supra* note 96, at 1; see also HELD, *supra* note 92, at 66–67 (“Since those who govern will naturally act in the same way as the governed, government must, if its systematic abuse is to be avoided, be directly accountable to an electorate called upon frequently to decide if their objectives have been met.”); ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73–74 (Harvey C. Mansfield & Delba Winthrop trans. & eds., 2000) (1835) (“[S]hould [a New England public] official be guilty of one of these elusive offenses that human justice can neither define nor appraise, he appears annually before a

ready in office and seeking reelection. At the conclusion of the normative discussion of accountability, it will become apparent why the full spectrum of accountability concerns does not apply to a first-time runner for office. For now, suffice it to say that a public official can make campaign promises that will turn out to be completely false once he or she is in office.

Accountability arises from the acknowledgement that public officials must take a stand on any given issue when they enact, or vote against, legislation.<sup>99</sup> They announce to the electorate their policy preferences and expose themselves to future judgment during elections.<sup>100</sup> If a majority of voters disagree with a public official's policy preferences, they vote the person out of office.<sup>101</sup> In other words, after learning that the public official's policy choices diverge from those of the majority, it becomes clear to the voters that their "representative" no longer fits the description. Requiring the legislature to make political commitments enables the electorate to check whether its representatives stray too far from the majority's policy preferences.<sup>102</sup>

To make the same point from another perspective, consider what happens when, by hiding their policy choices from the electorate, public officials cause enough confusion in voters' minds to avoid responsibility. Without unambiguous responsibility, a public official can escape having to answer for policy choices that are contrary to the majority's wishes. Such an official is hardly a representative of the people. It will not overstate the

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tribunal without appeal that can reduce him suddenly to impotence; his power departs from him with his mandate.").

<sup>99</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–32 (1980) (arguing that while "on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted," they must be made to do so if they are to avoid becoming "undemocratic").

<sup>100</sup> See Redish & Pudelski, *supra* note 82, at 440 ("When members of Congress vote for or against proposed legislation, they are making a political commitment that enables the electorate to judge them.").

<sup>101</sup> This description is, of course, a simplistic shorthand for what really happens in politics. The electorate may agree with an elected representative on issue A, but disagree on issues B and C. *See id.* at 452. Nevertheless, accountability is worth protecting to allow the electorate to find out exactly which policy positions its representatives hold on issues A, B, and C. Even an "imperfect representative process fosters the values that underlie democracy far more than would even a benevolent dictatorship." *Id.* at 452.

<sup>102</sup> *See id.* at 440 ("Th[e] process of political commitment facilitates protection of the essential elements of the American democratic process: representation, accountability, and checking."); *see also* MAYO, *supra* note 80, at 78 ("Collectively, the voters bring the representatives under popular control by the ballot, the democrat's ultimate weapon. The election from this viewpoint is a kind of accounting for stewardship . . ."); Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing,"* 40 CASE W. RES. L. REV. 1023, 1028 (1990) ("[T]he notion of political accountability [is] the requirement that those who do make policy choices periodically present themselves to the populace for an accounting, so that the electorate may revoke their power if, on balance, their decisions have not been consistent with the populace's wishes.").

matter to suggest that if the term “representative” is an oxymoron, then the election “simply creates, per se, an absolute ruler.”<sup>103</sup>

One might wonder how an electoral process could ever produce an absolute ruler. After all, an instinctive reaction is to assert that no ruler who is subject to periodic elections is absolute. Still, it turns out that history has seen just as many “unbridled rulers” produced by the election process as through “sheer force or hereditary succession.”<sup>104</sup> What is required, then, to turn an elected individual into a representative one is accountability.<sup>105</sup>

Thus, the modern theory of democracy may be summarized in terms of “(a) legislators (or decision-makers) who are (b) legitimated or authorized to enact public policies, and who are (c) subject or responsible to popular control at free elections.”<sup>106</sup> Unaccountable public officials, while nominally subject to recall at the polls, do not provide voters with a meaningful way to decide on their candidacy, rendering the technical power to recall a cynically hollow exercise. And it is only by meaningful participation that the electorate retains an element of self-governance. Accountability, then, is essential to governance in a democratic republic like the United States.<sup>107</sup>

2. *Accountability and Federalism.*—When accountability helps decide whether an act of Congress violates the Constitution, it plays a role independent from—but reinforcing of—that played by federalism. The two principles are undoubtedly similar. Accountability and federalism enable self-governance within a representative democracy. But the mechanics by which the two principles protect self-governance differ.

Federalism, on one hand, operates by diffusing power into two distinct spheres of federal and state governments.<sup>108</sup> By channeling power in this fashion, the federalism theory posits that any one level of government will be less likely to abuse its powers. This is not unlike the idea behind separating the powers of the federal government into separate branches. Any one branch is, then, less likely to abuse its powers as against the people.<sup>109</sup>

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<sup>103</sup> SARTORI, *supra* note 82, at 30.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (“The linkage is established by a normative expectation (that is also, via removability, a sanctionable expectation) of responsiveness and accountability of the person elected to an electorate.”); *see also id.* at 111 (“[T]he concept of representative democracy comprehends electoral democracy; but the reverse is not true.”).

<sup>106</sup> MAYO, *supra* note 80, at 103.

<sup>107</sup> *See* PENNOCK, *supra* note 58, at 268 (“[I]t is of the essence of democracy that the government should be accountable to the people.”).

<sup>108</sup> *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 988 (1993); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)) (“The diffusion of power, in and of itself, is protective of liberty.”).

<sup>109</sup> *See, e.g.,* Gregory, 501 U.S. at 458.

Accountability, on the other hand, is not concerned with whether a certain power belongs to the states or to the federal government. Instead, it asks whether the electorate can identify which public official is responsible for a given policy decision, regardless of the level of government that made the decision. When Congress passes an act forbidding possession of a handgun in a school zone, it may be found to violate the structural federalism provisions in the Constitution,<sup>110</sup> but such a law would not disturb the accountability rationale. By denying Congress the power to police safety in local schools, federalism promotes the ideal that the federal government should not become too powerful.

However, an act of Congress that made it difficult or impossible for a voter to determine who is responsible for gun-control legislation would undermine accountability, and perhaps federalism as well.<sup>111</sup> The electorate's ability to ascertain which government official is responsible for any particular policy is preserved by accountability. Thus, "much as a modern urban resident bolts his door shut with several different locks,"<sup>112</sup> so too does the American constitutional democracy employ federalism and accountability independently to protect similar values. Federalism and accountability intersect insofar as they serve the same goal of promoting the individual liberty of self-government. But the two mechanisms are not coterminous because each protects this liberty in a unique way.

Yet another way of recognizing that federalism and accountability are not coterminous is to look at two of the advantages of federalism: increased participation<sup>113</sup> and diversity.<sup>114</sup> Increased participation simply means that the electorate has an opportunity to vote on a larger number of issues.<sup>115</sup> But, as already argued,<sup>116</sup> accountability is a necessary condition in order for voting to be meaningful. Thus, although the electorate can still vote even if people do not know, or are mistaken about, who really is responsible for any given policy decision, meaningful voting necessarily requires accountability. Federalism, by adding another sphere of politicians, affords more

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<sup>110</sup> See *United States v. Lopez*, 514 U.S. 549, 549 (1995) (invalidating such an act as outside Congress's power to regulate interstate commerce).

<sup>111</sup> See *infra* Part III.D for a discussion of why accountability is important to protect even in light of possible objections based on voters' lack of interest or political knowledge.

<sup>112</sup> Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991).

<sup>113</sup> See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853-56 (1979) (setting out participation via voting as one advantage of federalism).

<sup>114</sup> See, e.g., McConnell, *supra* note 108, at 1504 (arguing that the liberty that federalism promotes comes from diversity); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 107 (2004) ("The jurisdictional competition among states fostered by federalism provides state officials the incentive to permit the local autonomy necessary to attract businesses and people from other states.").

<sup>115</sup> See Kaden, *supra* note 113, at 853-56.

<sup>116</sup> See *supra* Part II.A.1.

opportunities for voting. Accountability makes this voting meaningful by connecting, via responsibility, the representatives and the represented.

Diversity is another advantage of federalism. States, freed from omnipresent federal legislation, can tailor their own legislative packages to compete for out-of-state citizens and businesses.<sup>117</sup> However, in order to make the right choice on whether to move to another state, a citizen surely will want to know who is responsible for the state's legislation that she finds unacceptable. For example, if the citizen finds a state law unattractive and wants to move to another state where the law is different, she might be unpleasantly surprised to learn that all state laws on this issue are being driven by federal mandates. Certainly, such surprises retard rather than promote the diversity advantage of federalism.

Accountability, then, is an indispensable ingredient of the foundation of modern democratic theory. Juxtaposed with federalism, it serves as an independent means to the end of promoting self-governance in a representative democracy. In addition, it alleviates a substantial side effect, and helps achieve some of the important advantages, of federalism. Accountability is certainly important enough to be invited out of its current hiding place in *New York*.

3. *Structural Safeguards in the Constitution*.—Some commentators treat structural constitutional provisions (federalism and separation of powers) as undeserving of judicial review.<sup>118</sup> They want the Supreme Court to preserve its resources for adjudication of the all-important individual rights cases.<sup>119</sup> This is perhaps ironic, because the body of the Constitution itself “contained precious few direct references to the protection of individual rights.”<sup>120</sup> Instead, “the document was primarily devoted to the implementation of an intricate and innovative political theory—a constitutionally limited, federally structured, representative democracy.”<sup>121</sup> Thus, when judges fail to recognize the structural protections in the Constitution, they undermine the central guarantor of individual liberties that ensures that the government not become too powerful.<sup>122</sup>

What is even more destructive of the myth that certain constitutional issues are different for the purposes of reviewability is that the structural values in the Constitution are closely intertwined with the individual liberty values. As I have argued in the previous subsection, accountability helps attain the advantages of federalism and keeps the harmful side effects of

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<sup>117</sup> See sources cited *supra* note 114.

<sup>118</sup> See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 193 (1980) (arguing that federalism questions should be nonjusticiable).

<sup>119</sup> See *id.* at 2.

<sup>120</sup> MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 3 (1995).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 164.

federalism in check.<sup>123</sup> A reasonable system of government that spreads the power to regulate among various tiers and branches (both vertically, as with federalism, and horizontally, as with separation of powers) should not allow these departments to avoid electoral responsibility by engaging in the political shell game. Accountability makes certain that public officials remain responsible to the voters for their actions. Because the structural value of federalism and the individual liberty value of accountability are thus intertwined, it would make little sense to say that one is reviewable by the courts and the other is not.

## B. *The Textual Grounding*

1. *The Guarantee Clause.*—Although accountability is a normative value worth protecting, this alone is not enough to enable the federal judiciary to employ it in overturning acts of Congress. Judges must look to the text of the Constitution before they can strike down laws that pass through the elected branches.<sup>124</sup> In other words, since an argument that accountability permeates through the Constitution is not enough,<sup>125</sup> one must point to a specific textual provision from which judges can derive the accountability concerns. This Part does the pointing.<sup>126</sup>

Tucked inconspicuously amid the Constitution's 6800 words<sup>127</sup> is a brief, opaque provision known as the Guarantee Clause: "The United States shall guarantee to every State in this Union a Republican Form of

<sup>123</sup> See *supra* Part II.A.2.

<sup>124</sup> See Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 4 (1987) (arguing that "neither constitutional nor democratic theory" allows judges to disregard the text of the Constitution when adjudicating constitutional challenges); *id.* at 17 ("[T]he nature of American political theory simultaneously dictates that judges interpret constitutional text and limits them to that role."). See generally Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 820–21 & nn.11–12 (1999) (collecting sources to support the model of constitutional interpretation that directs judges to start, and sometimes stop, with the Constitution's text).

<sup>125</sup> See Redish & Pudelski, *supra* note 82, at 461 ("[A]bsent grounding in the Constitution, the [interpretive] model could be no more than an elaboration of normative political theory."). But see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5–6 (2005) (arguing that "a democratic theme—'active liberty'— . . . resonates throughout the Constitution" and that "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory text").

<sup>126</sup> According to at least one commentator, this cannot be done. See Chemerinsky, *supra* note 77, at 100 ("Obviously, nothing in the Constitution's text supports [the accountability] premise . . ."). As I show in this section, there is nothing "obvious" about Professor Chemerinsky's contention; in fact, it is plain wrong. Interestingly, Professor Chemerinsky allows that "[p]erhaps [accountability] can be justified by political theory." *Id.* As I have shown in Part II.A.1, Chemerinsky's hunch with respect to political theory is exactly right.

<sup>127</sup> Alvin L. Goldman, *Resorting to External Norms and Principles in Constitutional Decision-Making*, 92 KY. L.J. 703, 706 (2004) (excluding from the count the superseded provisions of the Constitution).

Government . . . .”<sup>128</sup> Although dubbed a “sleeping giant,”<sup>129</sup> the Clause was actively employed by Justice O’Connor to support states’ rights and federalism<sup>130</sup> arguments.<sup>131</sup> To sustain the use of the Clause to justify states’ rights arguments, O’Connor relied on the work of Professor Merritt.<sup>132</sup> Merritt argued that state autonomy and national powers should be reconciled via “the federalism principle rooted in the [G]uarantee [C]lause.”<sup>133</sup> Without autonomy, Merritt continued, states could not “enjoy republican governments.”<sup>134</sup> I approach the Clause differently and focus on yet another—perhaps the only—important value embedded in the phrase “a Republican Form of Government”<sup>135</sup>: accountability.

A reasonable construction<sup>136</sup> of the term “Republican Form of Government”<sup>137</sup> contemplates accountability.<sup>138</sup> In his excellent book about the Guarantee Clause,<sup>139</sup> Professor Wiecek points to several factors to explain how the Clause ended up in the Constitution. The most important of these factors<sup>140</sup> is that the very ideology of a republican form of government was

<sup>128</sup> U.S. CONST. art. IV, § 4.

<sup>129</sup> WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 2 (1972) (internal quotation marks omitted) (quoting CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867)).

<sup>130</sup> “States’ rights” and federalism are related but different concepts. See McGinnis & Somin, *supra* note 114, at 89. States’ rights arguments concern state autonomy, while federalism concerns the proper distribution of powers between state and federal governments. *Id.* The difference is most acute when federalism is strengthened by restricting the states’ powers. *Id.*

<sup>131</sup> See WAYNE V. MCINTOSH & CYNTHIA L. CATES, *JUDICIAL ENTREPRENEURSHIP* 93–95 (1997). First, dissenting in *South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (O’Connor, J., dissenting), O’Connor introduced the Guarantee Clause as an argument for state autonomy. See MCINTOSH & CATES, *supra*, at 93. Then, she continued to invoke the Clause both in *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), and in *New York v. United States*, 505 U.S. 144, 184–86 (1992). See MCINTOSH & CATES, *supra*, at 94–95.

<sup>132</sup> Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

<sup>133</sup> *Id.* at 2.

<sup>134</sup> *Id.*

<sup>135</sup> U.S. CONST. art. IV, § 4.

<sup>136</sup> Lest there be an immediate objection that the word “accountability” appears nowhere in the Guarantee Clause, this Comment concedes the point. But to require the text explicitly to set out accountability is to construe the Constitution strictly. “[N]o one ought to be” a strict constructionist. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (1997) (“A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”). Instead, I construe the words of the Clause fairly to make sure that a reasonable construction of the Clause is not at odds with accountability.

<sup>137</sup> U.S. CONST. art. IV, § 4.

<sup>138</sup> Whatever one associates with the term “republican,” it will become apparent that, at the very least, accountability cannot be written out of the term’s definition.

<sup>139</sup> WIECEK, *supra* note 129.

<sup>140</sup> The two reasons mentioned by Wiecek that I am skipping over are Shay’s Rebellion and rumors of an American regency. *Id.* at 33. Shay’s Rebellion does not shed light on accountability because it mostly provides an explanation for the parts of the Guarantee Clause that do not deal with the republican form of government guarantee. See *id.* The second reason—rumors that the United States government

altered around the end of the eighteenth century when the Constitution was ratified.<sup>141</sup> “Republican” certainly implied non-monarchical and non-aristocratic,<sup>142</sup> but pure democracy was out as well.<sup>143</sup> The framers of our Constitution were acutely aware of the tyranny that was made possible in a monarchy, and they feared the anarchy of pure democracy. “Republican government was thought to be an alternative to these extremes, a middle course between the Scylla of tyranny and the Charybdis of anarchy.”<sup>144</sup> The nonhereditary aspects of a republican government dominated discussions during the Clause’s conception<sup>145</sup>: elected public officials had to be made to depend on the voters for continuance in office.<sup>146</sup>

As contentious as the Constitution’s ratification process was, both its proponents (the Federalists) and the opponents (the Anti-Federalists) agreed that they should form a republican government.<sup>147</sup> All agreed that, in a republic, public officials must be responsive to direct or indirect control by the people.<sup>148</sup> But most importantly, the two sides agreed that a republican government had a defining characteristic: representation.<sup>149</sup> Representa-

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might include a monarch—accounts in part for Hamilton’s preoccupation with the negative aspects of the Guarantee Clause. *See id.* at 64. Hamilton wanted to prevent monarchical elements in state governments. *Id.* In fact, one commentator argues that the Clause “appears to have been principally designed to prohibit . . . a state from attempting to establish a hereditary executive.” Rappaport, *supra* note 124, at 830 n.41. Nevertheless, as I will show in the remainder of this subsection, the Clause was originally understood as more than a mere prohibition on monarchies. Hamilton’s understanding of the Guarantee Clause may be more applicable to the parts of the clause that do not deal with the republican form of government guarantee. *See* WIECEK, *supra* note 129, at 64.

<sup>141</sup> *See* WIECEK, *supra* note 129, at 11.

<sup>142</sup> *See id.* at 17.

<sup>143</sup> *See id.* at 18.

<sup>144</sup> *Id.*; *see also* THE FEDERALIST NO. 39, at 236 (James Madison) (Clinton Rossiter ed., 2003) (arguing that only a republican government would be consistent “with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government”).

<sup>145</sup> *See, e.g.*, WIECEK, *supra* note 129, at 24 (quoting Letter from Roger Sherman to John Adams (July 20, 1789), reprinted in 6 WORKS OF JOHN ADAMS 437 (Charles Francis Adams ed., 1850)).

<sup>146</sup> *See, e.g., id.*

<sup>147</sup> *See* BERNARD BAILYN ET AL., THE GREAT REPUBLIC 340 (1977); WIECEK, *supra* note 129, at 68. At least one Anti-Federalist explicitly criticized the proposed government under the Constitution precisely because it was “incompatible with the genius of republicanism . . .” 5 THE COMPLETE ANTI-FEDERALIST ¶ 5.16.2, at 219 (Herbert J. Storing ed., 1981) (Patrick Henry).

<sup>148</sup> *See* WIECEK, *supra* note 129, at 68.

<sup>149</sup> *See* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 183 (Nota Bene ed. 2003) (arguing that the Framers agreed that their government had to be a representative democracy); THE FEDERALIST NO. 10 (James Madison), *supra* note 144, at 76 (arguing that a pure democracy, where people themselves assemble to govern, cannot cure “mischiefs of faction,” unlike a republic, where the people elect representatives to govern on their behalf); THE FEDERALIST NO. 14 (James Madison), *supra* note 144, at 95 (“[I]n a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents.”); WIECEK, *supra* note 129, at 72; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 595 (2d ed. 1998) (“Representation—that was the key conception in unlocking an understanding of the American political system.”).

tion, in turn, was structured around the control of public officials<sup>150</sup> by the electorate via frequent elections.<sup>151</sup> And meaningful control by the electorate could not be effected without accountability, as I have shown when discussing the purely normative value of accountability.<sup>152</sup>

During the ratification, the Guarantee Clause was deemed by both the Federalists and Anti-Federalists to assure that the people of the states would retain control over their state representatives, which was essential in a republic.<sup>153</sup> Madison unambiguously stated that only a republican government is consistent with humankind's preference for self-governance.<sup>154</sup> And it is only by means of accountability that at least a modicum of self-governance is preserved in a republic.<sup>155</sup> Thus, it would have been a hollow exercise for the Framers to design a constitution that guaranteed to the states a republican form of government but allowed public officials to undermine their own accountability to the electorate.

To be sure, it was understood in the late 1780s that the danger to the republican government of a state would come from within the state itself.<sup>156</sup> If, for example, the state of New York decided to replace its elected governor with a hereditary monarch, it would fall to the federal government to prevent this abuse. But one can infer from an affirmative duty to prevent certain results a negative duty not to bring about such results. In the hypothetical example above, it is also a duty of the federal government not to enact legislation that results in a monarchy in the state of New York. The federal government certainly has a duty not to enact legislation that under-

<sup>150</sup> See Merriitt, *supra* note 132, at 23 (arguing that “[s]ince at least the eighteenth century,” control of the rulers by the people was central to a republican government).

<sup>151</sup> See WIECEK, *supra* note 129, at 74; see also THE FEDERALIST NO. 37 (James Madison), *supra* note 144, at 223 (arguing that short terms in office are necessary to enable the electorate to control public officials, thus preserving the “genius of republican liberty”); THE FEDERALIST NO. 39 (James Madison), *supra* note 144, at 237 (defining a republican government as one that is “administered by persons holding their offices during pleasure for a limited period, or during good behavior”).

<sup>152</sup> See 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 147, ¶ 2.7.9, at 139 (Centinel 1) (arguing for a system of government where “whenever the people feel a grievance, they cannot mistake the authors, and will apply the remedy with certainty and effect, discarding them at the next election”); *supra* Part II.A.1. Another Anti-Federalist powerfully argued that

[p]erhaps no restraints are more forcible, than such as arise from responsibility to some superior power.—Hence it is that the true policy of a republican government is, to frame it in such manner, that all persons who are concerned in the government, are made accountable to some superior for their conduct in office.—The responsibility should ultimately rest with the People.

2 THE COMPLETE ANTI-FEDERALIST, *supra* note 147, ¶ 2.9.197, at 442 (Brutus 16).

<sup>153</sup> See WIECEK, *supra* note 129, at 68–69.

<sup>154</sup> THE FEDERALIST NO. 39 (James Madison), *supra* note 144, at 236; see also DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 124 (1984) (“Madison’s definition of republic is devised to be compatible with . . . the people’s capacity to choose.”).

<sup>155</sup> See *supra* Part II.A.1.

<sup>156</sup> See THE FEDERALIST NO. 43 (James Madison), *supra* note 144, at 271 (speaking of the federal government’s authority under the Guarantee Clause to defend the states against “aristocratic or monarchical innovations”).

mines the guarantee.<sup>157</sup> Likewise, the federal government has a duty not to enact legislation that undermines the accountability of state public officials to their electorate.<sup>158</sup>

2. *Justiciability of the Guarantee Clause Cases.*—Using the Guarantee Clause to ground accountability raises an important concern. Traditionally, matters involving the Clause have been held to be non-justiciable as political questions.<sup>159</sup> Although this strand of thought dates as far back as the Supreme Court’s 1849 decision in *Luther v. Borden*,<sup>160</sup> it no longer has to be the case. The use of the Guarantee Clause in the accountability test is different from its use in *Luther*.

The *Luther* Court, if it were to proceed on the merits, would have had to choose between two different state governments, and pronouncing one government illegitimate would have led to political chaos in Rhode Island.<sup>161</sup> Under this Comment’s proposal,<sup>162</sup> courts may reference the Guarantee Clause to decide nothing more than whether an act of Congress undermines the accountability of state officials to their electorate. The practical result will be no more severe than striking down an act of Congress on some other ground. The judiciary simply will continue “stand[ing] as the policeman of the democratic process, seeking to assure the continuing viability of representative democracy and the integrity of the fiduciary

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<sup>157</sup> See Martin H. Redish, *Constitutional Federalism: A Foundational Analysis*, 23 OHIO N.U. L. REV. 1237, 1269 (1997) (arguing that “a prohibition [on Congress] against an affirmative destruction of a republican form of government” might follow “[p]urely as a textual matter”); Martin H. Redish, *Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 602 (1994) (same); cf. Merritt, *supra* note 132, at 26 (arguing in a different context that the states, as long as they maintain a republican form of government, should be made by the Guarantee Clause to be “immune from federal interferences”).

<sup>158</sup> The *New York* Court might have seen some connection between the Guarantee Clause and accountability. See *New York v. United States*, 505 U.S. 144, 185 (1992) (reasoning that the Guarantee Clause was not violated by the monetary incentive provision of the Act at least in part because “state government officials remain accountable to the local electorate”). In Part III.B, however, I show that Congress’s provisions like the monetary incentive in *New York* do undermine accountability of state public officials to their electorate. If the *New York* Court had agreed with this proposition, it might well have struck down the monetary incentives part of the Act based on the Guarantee Clause.

<sup>159</sup> For a general critique of the political question doctrine in all instances, see MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 134 (1991) [hereinafter REDISH, *POLITICAL ORDER*] (“Once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all its manifestations.”).

<sup>160</sup> 48 U.S. (7 How.) 1 (1849); see Merritt, *supra* note 132, at 70 & nn.394–96.

<sup>161</sup> See *Luther*, 48 U.S. (7 How.) at 38–39 (reasoning that pronouncing one form of government illegitimate would invalidate much of the legislation enacted under that government).

<sup>162</sup> See *infra* Part III.A.

relationship between the elected and the electorate.”<sup>163</sup> This role is not new; courts have been engaging in judicial review since *Marbury v. Madison*.<sup>164</sup>

At the same time, the proposed test is sufficiently concrete<sup>165</sup> for the courts to apply it.<sup>166</sup> Certainly, it lends itself to adjudication at least as much as do the questions of what process is “due” or what type of protection is “equal.”<sup>167</sup>

Finally, as many commentators have remarked, *Luther* was extended beyond its logical reach<sup>168</sup> when the Court’s decisions from the early- to mid-twentieth century have “held guarantee clause claims nonjusticiable as political questions in a wide variety of cases.”<sup>169</sup> After all, the Constitution’s text does not assign the enforcement of the Guarantee Clause to any one branch;<sup>170</sup> all can partake in its enforcement.<sup>171</sup> As Professor Wiecek points out, there may be three possible justifications for labeling *Luther* a political question case<sup>172</sup>: (1) courts are not the proper governmental bodies to choose between competing political theories (deciding, for example, which government is more republican than the other);<sup>173</sup> (2) courts should not act where their decision would be futile;<sup>174</sup> and (3) the Supreme Court should not act where its action would conflict with unambiguous policies of Congress and the President.<sup>175</sup> But when none of these factors is present—as is the case with courts’ adjudicating challenges under the proposed accountability test—the case should be fully within the courts’ domain.<sup>176</sup>

<sup>163</sup> Redish & Pudelski, *supra* note 82, at 438.

<sup>164</sup> 5 U.S. (1 Cranch) 137, 180 (1803) (holding that the Court has the power to declare void “a law repugnant to the constitution”).

<sup>165</sup> See *infra* Part III.A–B.

<sup>166</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that “lack of judicially discoverable and manageable standards for resolving” a question might indicate that the question is best resolved by the political branches).

<sup>167</sup> But even if the accountability test is perceived as hopelessly vague, there are plenty of other constitutional tests that are vague and still justiciable. See REDISH, POLITICAL ORDER, *supra* note 159, at 135–36.

<sup>168</sup> See, e.g., ELY, *supra* note 99, at 118 n.\* (describing a “category mistake” when subsequent decisions have inferred that “all cases brought under the . . . Clause must therefore also present political questions”).

<sup>169</sup> Merritt, *supra* note 132, at 70 & nn.394–95.

<sup>170</sup> The Clause itself calls upon “the *United States*,” not any particular branch of it, to guarantee a republican form of government. U.S. CONST. art. IV, § 4 (emphasis added).

<sup>171</sup> See WIECEK, *supra* note 129, at 76; see also REDISH, POLITICAL ORDER, *supra* note 159, at 117 (“There is, then, absolutely nothing in the text of the guarantee clause to distinguish the relevance of judicial review from any other provision.”).

<sup>172</sup> See WIECEK, *supra* note 129, at 125.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.* at 126.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* See generally Merritt, *supra* note 132, at 70–78 (arguing that the Court probably is ready to unveil the modern Guarantee Clause challenges as fully justiciable). The “Court has suggested that

## III. THE PROPOSED TEST

*A. The Accountability Model Formulated*

So far, I have shown that accountability has a solid foundation in modern democratic theory<sup>177</sup> as well as in the text of the Constitution.<sup>178</sup> In addition, I have demonstrated that accountability and federalism are not coterminous;<sup>179</sup> each may raise an independent bar to federal legislation. This section formulates a test that courts can use when deciding whether a conditional spending program, or more generally any act of Congress, undermines the accountability of state public officials to their electorate.

The proposed test asks one question: Does the federal statute permit non-federal public officials to avoid accountability to their electorate by undermining the electorate's ability to identify the public official (or the level of government, state or federal) who is responsible for any given policy choice? An affirmative answer invalidates Congress's legislation.

The next subsection illustrates the test's mechanics through its application to several examples of Congress's conditional grant programs. But first, it is important to note that the constitutionally imposed protection of accountability cannot be waived by the states. For example, the reviewing court should not consider whether some states, or even all fifty states, have acquiesced in receiving federal funds subject to conditions that undermine accountability. Just like federalism,<sup>180</sup> separation of powers,<sup>181</sup> and federal courts' subject matter jurisdiction limitations,<sup>182</sup> the accountability barrier cannot be waived by those who are not the intended beneficiaries of the limitation. Similar to federalism,<sup>183</sup> accountability protects the people's

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perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *New York v. United States*, 505 U.S. 144, 185 (1992) (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)).

<sup>177</sup> See *supra* Part II.A.1.

<sup>178</sup> See *supra* Part II.B.

<sup>179</sup> See *supra* Part II.A.2.

<sup>180</sup> See *New York*, 505 U.S. at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

<sup>181</sup> See *Redish & Cisar*, *supra* note 112, at 486–87 (arguing that congressional acquiescence in the President's exercise of Congress's powers cannot quiet separation of powers objections because the Constitution separates powers between the various branches to protect the populace and *not* the branches).

<sup>182</sup> See *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) ("[The] parties . . . may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy' . . . ." (quoting *Richardson v. Ramirez*, 418 U.S. 24 (1974))); ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* § 5.1, at 261–62 (4th ed. 2003) (explaining that parties' "consent is never adequate to permit federal jurisdiction where none otherwise would exist" because subject matter jurisdiction limitations exist to preserve a limited role of the federal judiciary and an extensive role of state courts).

<sup>183</sup> See *McGinnis & Somin*, *supra* note 114, at 89 ("The constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people.").

self-governance, and it does this by promoting transparency in lawmaking.<sup>184</sup> Since accountability protects the people, the states cannot waive it.

### B. Applying the Accountability Model

The first example to which I apply the accountability test is the conditional spending program upheld in *Dole*.<sup>185</sup> Recall that in *Dole*, Congress conditioned 5% of federal highway funding on a state's raising its minimum drinking age to twenty-one.<sup>186</sup> Under the *Dole* test, this type of conditional spending was held constitutional.<sup>187</sup>

Under the accountability test, courts would have to consider the effect of the condition on accountability. Suppose that the State of South Dakota complies with the condition and raises its drinking age from nineteen to twenty-one years. If members of the South Dakota electorate, disappointed with the new minimum drinking age, want to blame a state official responsible for the program, can they?<sup>188</sup> Presumably, they will ask their state legislators why they voted for the increase. The answer will be that the state legislators did not want to lose 5% of highway funding. But notice that these public officials do not have to address head-on the raised minimum drinking age. They can divert attention to highway funds, which may or may not be as important to the voters. Either way, the result is voter confusion regarding whom to hold responsible for the increased drinking age.

The voters may decide to blame their state representatives without comprehending that the decision was influenced by Congress. Or, they may hold their congressional representatives responsible. In either of these scenarios, can a voter be sure that the representative—state or federal—with the truly objectionable policy preferences is the one removed from office? No. Accountability of state officials, therefore, is undermined and Congress should be prohibited from conditioning highway funds on the states' raising the minimum drinking age.

A second example demonstrates that, under the accountability test, the federal and state governments can continue to rely on each other's expertise in passing legislation. After all, such advice-sharing between the federal government and the states can achieve beneficial results.<sup>189</sup> The following example shows that this is possible under the accountability test.

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<sup>184</sup> See *supra* Part II.A.2.

<sup>185</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>186</sup> *Id.* at 211.

<sup>187</sup> See *supra* Part I.A.

<sup>188</sup> See *infra* Part III.D for discussion of why accountability protections are worth adhering to even if some voters may not care about certain issues.

<sup>189</sup> This type of advice-sharing, dubbed "interactive federalism," has received its share of praise and scorn from commentators. Compare Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 915 (1985) ("The modern realities of governing, often combined with the nation's structure of overlapping integral sovereigns, dictate that state and federal governments join in largely cooperative efforts to meet the nation's prob-

The federal government provides firefighter assistance to a state if the state matches 20% of such assistance with other funds from non-federal sources.<sup>190</sup> Suppose that the State of Illinois applies for federal firefighter assistance funds and agrees to match 20% of the funds out of the state treasury. If Illinois voters disagree with the state's decision, can they identify the responsible party? They can, because Illinois public officials cannot respond to the electorate's inquiry by diverting their attention to an unrelated matter (as they could do in the *Dole* example). Their only answer to the electorate is to say that they wanted to increase firefighter funds and the way to do it was to ask the federal government for assistance. The federal government imposed match conditions and Illinois complied. Such a response does not undermine the accountability of Illinois public officials because they are being challenged only by those voters who disagree with increasing firefighting funds in the first place. If they did agree with Illinois's decision, the voters would not be complaining about the 20% match from the state's treasury. The match program does not undermine accountability and is, therefore, constitutional—at least on the accountability score.

The final example underscores that although Congress may enact certain legislation pursuant to one of its regulatory powers, it may not be able to use conditional spending to achieve the same result under the spending power. For example, Congress may, rather than using its Interstate Commerce Clause powers<sup>191</sup> to ban the intrastate production and transfer of marijuana—as was at issue in *Gonzales v. Raich*<sup>192</sup>—instead condition federal welfare funding to the states upon the states' outlawing medicinal marijuana use. Suppose the State of California complies in order to receive federal funding. Like the South Dakota officials in the first example, California officials are able to avoid responsibility by confusing the displeased electorate. When challenged by the voters, California state legislators can point fingers at Congress's imposition of the condition. As a result, the electorate does not receive a direct answer to the issue at hand—why should medicinal marijuana use be prohibited?

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lems most effectively. In this manner, each sovereign may benefit from the resources, experiences, and ideas of the other.”), with Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950) (“Resting as it does primarily on the superior fiscal resources of the National Government, [Interactive] Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies.”). It seems that when Congress is squarely within one of its enumerated powers and does not violate any other provision in the Constitution, interactive federalism does not present any troubles from the standpoint of constitutional analysis.

<sup>190</sup> See 15 U.S.C. § 2229(b)(6)(A) (2000).

<sup>191</sup> U.S. CONST. art I, § 8, cl. 3 (setting forth Congress's power “[t]o regulate Commerce . . . among the several States”).

<sup>192</sup> 545 U.S. 1, 6 (2005) (holding a federal law that prohibited the use of marijuana for medicinal uses constitutional under “Congress's power to regulate interstate markets”). I use the *Raich* case only as an illustration, without agreeing or disagreeing with the decision's constitutional reasoning.

Of course, as demonstrated by the law upheld in *Raich*, Congress may act directly and prohibit medicinal marijuana use in every state.<sup>193</sup> But there is one key difference between Congress's effecting this prohibition by direct regulation under the Commerce Clause and by conditional grants under the Spending Clause. In the former example, members of Congress take the stand and are ready to answer to the electorate for their policy choice. In the latter scenario, Congress does not necessarily have to take the fall, and neither do the state public officials implementing Congress's condition. Thus, Congress may not use its spending power to avoid political accountability under the regulatory powers.

### C. Distinguishing an Alternative Proposal

The three examples discussed above effectively showcase the similarities and differences between the accountability test and Professor Baker's test for determining the constitutionality of conditional spending programs. Baker, without explicitly addressing the accountability concerns,<sup>194</sup> proposes an alternative to the *Dole* test that turns out to be the one currently existing solution most conscious of accountability problems.<sup>195</sup> No other currently existing proposal comes even close.<sup>196</sup>

Baker's test for determining the constitutionality of conditional spending programs consists of two parts. First, courts should determine whether the condition is one which Congress could impose by direct regulation.<sup>197</sup> In other words, she asks, could Congress achieve the result without relying on its spending powers? If the answer is "yes," then the conditional spending program is valid. If not, then courts must look at the nature of the condition and determine whether it operates like a reimbursement or like a regulation.<sup>198</sup> Only reimbursement spending is valid under Baker's test.<sup>199</sup>

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<sup>193</sup> *See id.*

<sup>194</sup> Baker's test is founded upon considerations of federalism and state autonomy. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995) [hereinafter Baker, *Conditional Spending*] ("Any substitute for the standard of review set out in *Dole*, however, must reconcile two potentially conflicting goals": state autonomy and federalism.).

<sup>195</sup> *See* Baker, *States' Rights*, *supra* note 7, at 105; Baker, *Conditional Spending*, *supra* note 194, at 1916.

<sup>196</sup> In their recent article, Professors Baker and Berman reviewed the existing proposals for replacing the *Dole* test. 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, 524–39 (2003). Of the four existing proposals, only Baker's approach comes close to addressing the accountability concerns. *See id.* at 526–33.

<sup>197</sup> Baker, *States' Rights*, *supra* note 7, at 111; Baker, *Conditional Spending*, *supra* note 194, at 1962–63.

<sup>198</sup> Baker, *States' Rights*, *supra* note 7, at 111; Baker, *Conditional Spending*, *supra* note 194, at 1963.

<sup>199</sup> Baker, *States' Rights*, *supra* note 7, at 111; Baker, *Conditional Spending*, *supra* note 194, at 1959–61. If the reader recognizes in Baker's test elements of Justice O'Connor's dissent in *Dole*, *see*

Baker defines “reimbursement spending” as spending where Congress specifies a condition and then reimburses a state, either partially or fully, for performing the condition.<sup>200</sup> For example, if Congress gives to the states federal funds only up to whatever amount the states need to implement a higher minimum drinking age, the condition is an example of reimbursement spending. The program in *Dole*, on the other hand, exemplifies regulatory spending because the 5% of federal highway funds that states risked losing did not relate to the cost they incurred in implementing a higher minimum drinking age.

Baker’s test might incidentally solve most of the problems of accountability described in this Comment. If Congress’s conditional funding is strictly limited to reimbursing the states for the cost of implementing the conditions, then states cannot successfully point fingers at Congress when pressed by the electorate. Take, for instance, the example where Congress grants enough money for the states to raise the minimum drinking age to twenty-one. If a voter is upset with his state’s decision to raise the minimum drinking age, he will question the state legislature.<sup>201</sup> The state legislature, in turn, will not be able to shift responsibility to Congress because the state has not received from Congress any benefit beyond what is necessary to raise the minimum drinking age.

Even though Baker’s test in practice may solve most of the problems of accountability, the three examples from the previous subsection demonstrate that compared to the accountability test, Baker’s test protects too much and too little. The first example, dealing with the minimum drinking age, failed the accountability test.<sup>202</sup> It fails Baker’s test as well. If, as the *Dole* Court stipulated,<sup>203</sup> Congress cannot directly mandate that the states increase the minimum drinking age to twenty one, then Congress’s approach in *Dole* fails the first prong of Baker’s test. Can Congress save the condition’s constitutionality by calling it a reimbursement? Probably not, because there is no relationship between the 5% of federal highway funds and the cost of raising the minimum drinking age. If Congress, on the other hand, said that it would give the states however much it would cost to implement a higher drinking age (or up to this amount), then the condition could be labeled “reimbursement.” The accountability test and Baker’s test, thus, reach the same result.

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*supra* notes 51–55 and accompanying text, it is because Baker explicitly borrows Justice O’Connor’s framework. See Baker, *Conditional Spending*, *supra* note 194, at 1962.

<sup>200</sup> Baker, *States’ Rights*, *supra* note 7, at 111; Baker, *Conditional Spending*, *supra* note 194, at 1963.

<sup>201</sup> The next subsection will address the argument that accountability is not worth preserving because the voters do not care about some issues.

<sup>202</sup> See *supra* p. 957.

<sup>203</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The second example, firefighter assistance funds, satisfied the accountability test.<sup>204</sup> But it likely does not satisfy Baker's two-prong analysis. In the first place, Congress does not seem to have an enumerated power directly to order the states to spend a certain amount on firefighting.<sup>205</sup> Assuming that this is true, the first prong of Baker's test is violated. Further, the condition is not a reimbursement because, from the state's standpoint, the 20% that it has contributed to the firefighting fund is not being reimbursed. The firefighting fund itself will get a matching influx of federal money, but that funding cannot be used for anything other than more firefighting. That the second example passes under the accountability test but not under Baker's proposed analysis demonstrates that Baker's test is over-protective from the accountability angle.

If the second example illustrates the tendency of Baker's test to over-protect, the third example,<sup>206</sup> the prohibition on intrastate marijuana growing and transfer, displays its under-protective tendency. The condition failed the accountability test, but Baker's test would allow it. Recall that, at least after *Raich*, Congress can use its Commerce Clause powers to prohibit medicinal marijuana use in every state.<sup>207</sup> Thus, the first prong of Baker's test is satisfied and her inquiry is over. Baker's test is, then, both over- and under-protective of accountability.

#### D. Political Ignorance?

One might criticize the elevation of accountability to an important political and constitutional value on the basis of voters' general lack of knowledge of or interest in politics.<sup>208</sup> A low level of political knowledge might make accountability an empty value not worth preserving.<sup>209</sup> The lack-of-knowledge criticism relies on empirical data showing that voters are not particularly adept at making decisions about how their representatives will behave when elected.<sup>210</sup> Skepticism based on voter disinterest in policy issues, on the other hand, relies on an observation of the electorate in the

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<sup>204</sup> See *supra* pp. 957–58.

<sup>205</sup> Firefighting is probably a purely state function. *But see* *Gonzales v. Raich*, 545 U.S. 1, 13 (2005) (explaining that “Congress has the power to regulate activities that substantially affect interstate commerce”). It is not inconceivable that one might argue that intrastate fires may *substantially affect* interstate commerce when, for example, an interstate corporation's buildings catch fire. Nevertheless, this Comment assumes that fighting intrastate fires can be regulated only by the states.

<sup>206</sup> See *supra* pp. 958–59.

<sup>207</sup> See *supra* note 193 and accompanying text.

<sup>208</sup> See Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304 (2004) [hereinafter Somin, *Political Ignorance*] (“Decades of research on political knowledge have uniformly showed it to be very low.”).

<sup>209</sup> See *id.* at 1305 (arguing that a low level of political knowledge makes it difficult for the electorate to be accurate when they praise or blame public officials).

<sup>210</sup> See *id.* at 1304–15.

real world.<sup>211</sup> It does not make any sense, the criticism might continue, to protect something that is of no real value to the electorate. This subsection takes up these two criticisms in the reverse order.

A concern with low levels of political interest in the electorate is an understandable observation of reality. But what this criticism ignores is that the reality is “far more complex than this simplistic argument suggests.”<sup>212</sup> Consider advertising and its impact on consumers.<sup>213</sup> Conventional wisdom suggests that only about 50% of advertisements are effective.<sup>214</sup> Why then do companies spend exorbitant amounts of money on the other 50% that is bound to be wasted? They do so simply because it is impossible to know which ads are going to be effective.<sup>215</sup>

Likewise, no one can know *ex ante* which legislation is going to pique the electorate’s interest. It may be that some legislation interests only a very narrow subset of the voters, while other legislation—such as that relating to health care, tax, or welfare—appeals to a broader group.<sup>216</sup> “It is impossible for anyone—especially a court—to determine, in an individual case, exactly which laws are matters of public interest.”<sup>217</sup> Since accountability is such an important normative value in modern democratic theory,<sup>218</sup> it should be protected in all cases to avoid depriving the interested electorate of a vital device by which they can check their public officials.

Concerns with the low level of political knowledge rely on the argument that even if the electorate expresses interest in policy issues, voters do not have the skill set to be accurate in judging their representatives. My response to this argument focuses on the retrospective nature of voting.<sup>219</sup> Quite often, what happens at the polls is not voting for a brand new candidate in a vacuum, but a reaction of the electorate to the incumbent’s policy choices while in office.<sup>220</sup> Even if the electorate is not particularly adept at predicting how a candidate *will* behave once elected, it can certainly invest some time figuring out who is responsible for the policies that were, on balance, incompatible with the voters’ preferences.<sup>221</sup> The competitive nature

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<sup>211</sup> For analysis of this criticism, see Redish & Pudelski, *supra* note 82, at 453.

<sup>212</sup> *Id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See supra* Part II.A.1.

<sup>219</sup> *See generally* MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 1–11 (1981) (discussing the retrospective nature of the electorate’s decision-making).

<sup>220</sup> *See id.* at 5–6.

<sup>221</sup> *See* KEY, *supra* note 96, at 7 (defending his “perverse and unorthodox argument . . . that voters are not fools”); FIORINA, *supra* note 219, at 10–11 (same). Although Key analyzed presidential elec-

of the election process helps as well; as candidates compete for office,<sup>222</sup> they will bring to light whatever information necessary to prevail over their opponents.<sup>223</sup> This way, the electorate can vote based on what they disliked about the previous occupant of the office.

If one accepts the retrospective theory of voting, the argument based on low levels of political knowledge fades away because it does not contain any empirical data to show that the voters are incapable of figuring out whom to blame and whom to praise for whatever they liked or disliked. The empirical data employed in assertions about low levels of political knowledge gauge, at best, how adept a particular voter is at understanding some generic political information.<sup>224</sup> These data do not take into account the possibly heightened level of knowledge in someone who is upset with particular government policies and wants to ascertain who is responsible for them. Without accountability, this knowledgeable voter is frustrated and the democratic value of self-governance partially dissipates. In the absence of strong empirical support, it may be wiser to adopt a rule that overprotects the foundational value in a representative democracy.<sup>225</sup>

#### CONCLUSION: DEMOCRATIZING CONDITIONAL SPENDING PROGRAMS

Neither courts nor scholars have adequately explained why accountability should serve as a constitutional limitation on Congress's powers. Specifically, accountability is not even a factor in a multi-prong test developed by the Supreme Court in *South Dakota v. Dole* that currently allows various conditional spending programs. In this Comment, I have shown that, properly grounded in normative and textual support, accountability should be a (if not *the*) factor in deciding whether Congress's conditional spending programs violate the Constitution. The proposed test is one possibility of taking accountability into consideration; there may be others. Whatever alternative test may be suggested, however, one should never for-

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tions, where the electorate arguably pays the most attention to policy preferences, others have shown that Key's argument is also applicable to midterm congressional elections. See PENNOCK, *supra* note 58, at 289.

<sup>222</sup> For discussion about the value of competition in elections, see ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 131–32 (1956) (arguing that elections and political competitions ensure that “the distinction between democracy and dictatorship still makes sense”).

<sup>223</sup> See EPSTEIN, *supra* note 154, at 110 (explaining that elections are best characterized not by “unanimous or nearly unanimous acquiescence in a natural leader,” but by the “divisiveness of men who insist on being the choosers among options”); *id.* at 194 (“Men *run* for election; power is available to those who seek it, if they can prevail on enough other citizens' inclinations. . . . Wholly elective government tends to improve on pure democracy because it forces the ambitious, so to speak, to fight with someone their own size.”).

<sup>224</sup> For a description of the kind of data collected for these assertions, see Somin, *Political Ignorance*, *supra* note 208, at 1304–15.

<sup>225</sup> See Redish & Pudelski, *supra* note 82, at 459 (“Any less formalistic test risks underprotecting the foundations of our democratic system.”).

get the centrality of protecting accountability as one of the foundational pillars of our democratic system of government.