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CONGRESSIONAL ALTERNATIVES IN THE WAKE OF *CITY OF BOERNE V. FLORES*: THE (LIMITED) ROLE OF CONGRESS IN PROTECTING RELIGIOUS FREEDOM FROM STATE AND LOCAL INFRINGEMENT

Daniel O. Conkle[*]

In its 1990 decision in *Employment Division v. Smith*,[1] the Supreme Court adopted a restrictive interpretation of the Free Exercise Clause. Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA),[2] which was designed to repudiate *Smith* and to adopt a more generous standard of religious freedom. In its recent decision in *City of Boerne v. Flores*,[3] however, the Supreme Court invalidated RFRA, at least in its application to state and local governmental practices, ruling that the Act exceeded Congress's power under Section 5 of the Fourteenth Amendment.[4] As far as state and local governments are concerned, then, the federal law of religious free exercise has reverted to the restrictive standard of *Smith*.[5]

What next? The most pressing issue is whether or how Congress should respond to the *Boerne* decision. In theory, of course, Congress could propose a constitutional amendment to nullify *Smith* or *Boerne*. As a matter of political reality, however, there is no reason to believe that Congress is prepared to move in that direction.[6] More realistic questions relate to the possibility of

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This article is based upon a paper that I presented on September 20, 1997, at the University of Arkansas at Little Rock's Ben J. Altheimer Symposium, entitled "Requiem for Religious Freedom?" Professor Ira C. Lupu offered helpful comments on my written draft, and I also received other thoughtful comments and questions on the basis of my oral presentation. In addition, I have profited from conversations with colleagues, including especially Patrick L. Baude and Lauren Robel, and from discussions on the "religionlaw" and "conlaw" computer list services. I am grateful to everyone who has contributed to this article. I also wish to thank Dean Rodney K. Smith and the editors and staff of the University of Arkansas at Little Rock Law Journal for sponsoring a wonderful symposium.

1. 494 U.S. 872 (1990).
2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).
3. 117 S. Ct. 2157 (1997).
4. U.S. CONST. amend. XIV, § 5.
5. *Boerne* does not address the validity of RFRA insofar as it applies to federal laws and practices. *See generally* 42 U.S.C. §§ 2000bb-2(1) & (2), 2000bb-3(a) & (b) (1994). As a result, the immediate effect of *Boerne*, and my focus here, is on state and local laws and practices that are valid under *Smith* but that would have faced more serious scrutiny under RFRA. On the issue of RFRA's continuing validity at the federal level, see, for example, Christians v. Crystal Evangelical Free Church (*In re* Young), No. 93-2267, 1998 WL 16642 (8th Cir. Apr. 13, 1998) (holding, 2-1, that RFRA is constitutionally valid as applied to federal laws and practices).
6. *See* Linda Greenhouse, *Laws Urged to Restore Religion Act*, N.Y. TIMES, July 15, 1997, at A11; Robert D. McFadden, *High Court Is Criticized for Striking Down Federal Law Shielding Religious Practices*, N.Y. TIMES, June 27, 1997, at A18.

statutory responses. Should Congress enact new legislation that attempts to protect religious freedom from state and local infringement? If so, what form should this legislation take, and what source or sources of congressional power would be adequate to support it? Or should Congress stay its hand, accepting the Court's constitutional judgment and permitting the states to develop their own approaches to religious freedom?

In Part I of this article, I will discuss *Boerne*'s approach to Section 5 and how it led to the invalidation of RFRA. As I will explain, the Court's decision in *Boerne* was not surprising;[7] although the Court elaborated and clarified the scope of Section 5, its decision was well-grounded in constitutional precedent and policy.[8] In Part II, I will discuss a variety of ways in which Congress

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7. Critics have contended, I believe mistakenly, that *Boerne*'s interpretation and application of Section 5 were not only surprising, but also radical. *See, e.g., Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, 105th Cong., 1st Sess. (July 14, 1997) <http://www.house.gov/judiciary/2.htm> [hereinafter *House Committee Hearing on Post-Boerne Legislation*] (testimony of Charles W. Colson) (describing *Boerne*'s interpretation of Section 5 as "novel and dangerous"); *id.* (testimony of Douglas Laycock) (stating that he thinks "*Boerne* has dramatically changed the law"); *id.* (testimony of Marc D. Stern) (contending that *Boerne*'s interpretation of Section 5 was a "distortion of federalism" and that it "massively shifts power from Congress to the courts"); *cf. id.* (testimony of Rev. Oliver Thomas) (comparing the Supreme Court's decision in *Boerne* to its infamous decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)).

8. In a 1995 article foreshadowing the Court's decision in *Boerne*, I argued that RFRA exceeded the power of Congress under Section 5 and therefore was invalid in its application to state and local governmental action. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995). In portions of the current article, I rely and draw upon this earlier piece.

By the time the Court decided *Boerne*, scholars had published a broad range of articles addressing the constitutionality of RFRA and offering a variety of perspectives and conclusions. In addition to my article, see, for example, Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994); Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Robert A. Destro, *"By What Right?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion"*, 29 IND. L. REV. 1 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995); Bonnie I. Robin-Vergeer,

might now respond to the *Boerne* decision. In particular, I will address the following statutory possibilities: more narrowly tailored legislation under Section 5; RFRA-like legislation grounded on Congress's power over interstate commerce or its power to implement treaties; and spending power legislation imposing RFRA-like conditions on the receipt of federal funding by state and local governments. I will argue that Congress's power over interstate commerce probably would not support RFRA-like legislation and that its power to implement treaties, although more plausible, might also be inadequate to the task. More limited congressional responses, grounded on Section 5 or on the spending power, would rest on considerably stronger constitutional footing, although—due to constitutional and practical limitations—they could not accomplish the full objective of RFRA.

In conclusion, I will contend that Congress has a limited but important role to play in protecting religious freedom from state and local infringement. Congress should not repeat the mistake it made in adopting RFRA; in particular, it should not repeat its attempt to repudiate altogether the Supreme Court's basic approach to religious freedom and constitutional federalism. Instead, Congress should proceed with caution, continuing its constitutional conversation with the Court by enacting more limited legislation—grounded perhaps on Section 5 or on Congress's power to implement treaties, but more likely on the spending power. Any congressional legislation, moreover, should be cautiously and carefully framed, steering clear of the confrontational approach that proved fatal to RFRA. This sort of congressional restraint would show a proper respect not only for the states, but also for the Constitution and for the Supreme Court's role in constitutional interpretation. At the same time, carefully drawn congressional legislation could prod the states, and perhaps the Supreme Court as well, to adopt a more generous understanding of religious freedom.

Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act, 69 S. CAL. L. REV. 589 (1996); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996). For a colorful—albeit wildly erroneous—prediction of RFRA's fate in *Boerne*, see Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMM. 7 (1997); compare Suzanna Sherry, *RFRA-Vote Gambling: Why Paulsen Is Wrong, as Usual*, 14 CONST. COMM. 27 (1997). For a helpful symposium addressing an assortment of RFRA issues, see *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 1 (1995).

I. *BOERNE'S* INTERPRETATION OF SECTION 5

A. The Path to *Boerne*

Before its decision in *Employment Division v. Smith*,[9] the Supreme Court had interpreted the Free Exercise Clause to provide significant protection for religiously motivated conduct, even from laws of general application. Under *Sherbert v. Verner*[10] and *Wisconsin v. Yoder*,[11] general laws that had the effect of burdening religious practices were tested by a standard of strict judicial scrutiny. Thus, the Court stated in *Sherbert* that only a "compelling state interest" could justify a burden on religious practices.[12] To the same effect, the Court in *Yoder* wrote that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[13] Under *Sherbert* and *Yoder*, if the government could not satisfy strict scrutiny in justifying the application of a law to religiously motivated conduct, an exemption from the law was constitutionally required.[14]

Smith marked a dramatic turn in judicial doctrine. Although the Court purported to distinguish and preserve its particular rulings in *Sherbert* and

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9. 494 U.S. 872 (1990).
10. 374 U.S. 398 (1963).
11. 406 U.S. 205 (1972).
12. *See Sherbert*, 374 U.S. at 403.
13. *Yoder*, 406 U.S. at 215.
14. Although the Court's test was strict in formulation, its application suggested a somewhat more lenient standard of review. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-60 (1982); Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983). In addition, the Court adopted explicit exceptions to strict scrutiny for military and prison regulations, which it evaluated under a reasonableness or rational basis standard. *See* Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (military); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-50 (1987) (prisons). The Court also ruled that the Free Exercise Clause did not limit the government's internal operations, even if those operations had an adverse effect on religious practices. *See* Bowen v. Roy, 476 U.S. 693, 699-701 (1986) (holding that government's use of Social Security numbers in administering federal food stamp programs does not implicate Free Exercise Clause even though parent of Native American child believed such use would impair child's spirit); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447-53 (1988) (holding that Free Exercise Clause does not limit government's control over timber harvesting and road construction through portions of national forest traditionally used by Native American tribes for religious purposes). Outside these exceptional areas, however, the Court continued to endorse a relatively demanding standard of review until its decision in *Smith*.

closely similar cases,[15] as well as in *Yoder*,[16] the Court essentially renounced the basic free exercise framework that it had been following, holding that general laws affecting religious practices do not require any form of heightened judicial review.[17] The Court wrote as follows: "To make an individual's obligation to obey [a generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense."[18] As a result of *Smith*, the Free Exercise Clause was essentially reduced to a prohibition on purposeful governmental discrimination against religion, that is, on governmental action tainted by "the unconstitutional object of targeting religious beliefs and practices."[19]

The Court suggested that despite its ruling, legislatures remained free to adopt religion-based exemptions, and that they might very well choose to do so. On the particular issue in *Smith*, for example, the Court noted that "a number of States have made an exception to their drug laws for sacramental peyote use."[20] "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable," the Court continued, "is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[21]

In its discussion of religion-based exemptions, the *Smith* Court obviously contemplated specific legislative accommodations, adopted on a state-by-state basis in the context of particular laws. In the enactment of RFRA, however, Congress concluded that this approach was inadequate and, indeed, that *Smith*'s interpretation of the Free Exercise Clause was erroneous.[22] Congress further determined that it had the power, under Section 5 of the Fourteenth

15. Prior to *Smith*, the Court had reaffirmed and relied upon *Sherbert* in several factually similar contexts. *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989). The Court in *Smith* attempted to narrowly limit these decisions, stating that "[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." *Smith*, 494 U.S. at 883.

16. The Court in *Smith* explained *Yoder* as a case involving a hybrid constitutional claim, based not only on the Free Exercise Clause, but also on the constitutional right of parents to control the education of their children. *See Smith*, 494 U.S. at 881.

17. *See Smith*, 494 U.S. at 876-90. In so holding, the Court essentially reverted to the doctrine embraced in its 1878 decision in *Reynolds v. United States*, 98 U.S. 145 (1878).

18. *Id.* at 885 (citing *Reynolds*, 98 U.S. at 167).

19. City of Boerne v. Flores, 117 S. Ct. 2157, 2168 (1997).

20. *Smith*, 494 U.S. at 890.

21. *Id.*

22. *See* 42 U.S.C. § 2000bb(a) (1994) (statement of congressional findings).

Amendment, to reverse the *Smith* interpretation and to impose its own interpretation on the states.[23]

In RFRA's formal statement of findings and purposes, Congress referred to the First Amendment's protection of religious free exercise;[24] declared that "governments should not substantially burden religious exercise without compelling justification;"[25] and noted that "in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[26] Asserting that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests,"[27] Congress declared that the purpose of the Act was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[28] To effectuate this purpose, RFRA's primary substantive provision stated that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"[29] unless the government can "demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[30]

B. *Boerne's* General Approach to Section 5

Over the course of American history, the Supreme Court has become the primary interpreter of the Constitution, and the task of constitutional interpretation has become the Court's central and most important function.[31]

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23. Although the Act, on its face, did not cite § 5 or any other source of congressional power, both the House and Senate Reports explicitly relied on § 5. *See* H.R. REP. NO. 88, 103d Cong., 1st Sess., at 9 (1993) [hereinafter HOUSE REPORT ON RFRA]; S. REP. NO. 111, 103d Cong., 1st Sess., at 13-14 (1993) [hereinafter SENATE REPORT ON RFRA]. The reports also mentioned the Necessary and Proper Clause of Article I, *see* U.S. CONST. art. I, § 8, cl. 18, but at least in terms of RFRA's application to state and local practices, this clause added little if anything to § 5.

24. *See* 42 U.S.C. § 2000bb(a)(1) (1994).

25. 42 U.S.C. § 2000bb(a)(3).

26. 42 U.S.C. § 2000bb(a)(4) (citation omitted).

27. 42 U.S.C. § 2000bb(a)(5).

28. 42 U.S.C. § 2000bb(b)(1) (citations omitted).

29. 42 U.S.C. § 2000bb-1(a).

30. 42 U.S.C. § 2000bb-1(b).

31. As Professors John E. Nowak and Ronald D. Rotunda have noted, "a major part of the Court's history has been its continuing effort to establish, maintain, and strengthen" its role in constitutional interpretation. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL

Most of the Court's constitutional cases, moreover, involve challenges to state and local governmental practices that are alleged to violate the Fourteenth Amendment, either of its own force or through its incorporation of Bill of Rights standards.[32] In deciding these challenges to state and local practices, the Court defines the meaning of constitutionally protected individual freedom. At the same time, however, it also defines the constitutional boundary between national and state power, for to decide that the national Constitution protects an individual right is to remove the issue from state and local control.[33]

Although the Supreme Court is the primary interpreter of the Fourteenth Amendment and of its Bill of Rights component, Congress has a significant role as well. In particular, Section 5 of the Fourteenth Amendment, like the final sections of the Thirteenth and Fifteenth Amendments, grants Congress the "power to enforce, by appropriate legislation, the provisions of this article."[34] In a series of cases predating *Boerne*, the Supreme Court had carefully explored the nature and limits of Congress's enforcement power. As I have explained elsewhere, these precedents authorized Congress to act under Section 5 to supplement or complement the Supreme Court's protection of constitutional rights, but not to undermine the Court's substantive constitutional standards or its basic interpretive function.[35]

In *Boerne*, the Court followed the thrust of its prior doctrine, but it also elaborated and clarified the scope of Section 5.[36] Thus, the Court reaffirmed

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LAW 1 (5th ed. 1995).

32. For an elaboration of the process by which the Court has incorporated almost all of the Bill of Rights into the Fourteenth Amendment, see *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968).

33. As the Court wrote in *Boerne*, a proper interpretation of the Fourteenth Amendment must honor not only the continuing importance of constitutional federalism, but also "the traditional separation of powers between Congress and the Judiciary" in the definition and protection of constitutional rights. *See Boerne*, 117 S. Ct. at 2166. The Court explained:

> The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions .... As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing .... The power to interpret the Constitution in a case or controversy remains in the Judiciary.

Id.

34. U.S. CONST. amend. XIV, § 5; *see also id.* amend. XIII, § 2; amend. XV, § 2.

35. *See* Conkle, *supra* note 8, at 41-55.

36. Justice Kennedy wrote for the Court in *Boerne*. His basic approach to Section 5 and his explanation of RFRA's unconstitutionality were joined by six justices. (Five joined Justice Kennedy's opinion in its entirety; the sixth, Justice Scalia, joined all of the opinion except a discussion concerning the history of the Fourteenth Amendment.) Justice Stevens filed a brief concurring opinion, indicating that in his view, RFRA not only exceeded the power of Congress under Section 5, but also was a "law respecting an establishment of religion" in violation of the First Amendment's Establishment Clause. *See Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring) (quoting U.S. CONST. amend. I). In dissenting opinions, Justices O'Connor, Souter,

that Congress can enact "remedial or preventive legislation" to enforce not only the Fourteenth Amendment as such, but also the Fourteenth Amendment's incorporation of Bill of Rights standards, such as those of the Free Exercise Clause.[37] At the same time, however, the Court rejected the argument that Congress also has a non-remedial, "substantive" power under Section 5, that is, a power to redefine the meaning of constitutional rights.[38] In so doing, the Court limited its earlier decision in *Katzenbach v. Morgan*,[39] which arguably had implied that a substantive power did or might exist.[40]

Boerne thus makes clear that Congress is limited to the "enforcement" of the Supreme Court's substantive understanding of the Constitution; Congress is not permitted to modify the substantive content of constitutional rights.[41] Congress "has been given the power 'to enforce,'" the Court reasoned, "not the power to determine what constitutes a constitutional violation."[42] This limiting effect of *Boerne*, however, should not be exaggerated. A theory of substantive power was, at best, an alternative ground of decision in *Morgan*; the Court had not relied on the substantive theory in its other Section 5 cases; and there had been judicial statements expressing doubts concerning the validity of such a theory.[43]

The essence of Section 5 power has always been remedial, and *Boerne* continues to recognize that Congress has "wide latitude" in the exercise of this power.[44] Not only can Congress create criminal or civil remedies for individual violations of the Fourteenth Amendment, including the Fourteenth Amendment's incorporation of Bill of Rights standards, it also can modify or abbreviate the case-by-case process of adjudicating constitutional claims.[45]

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and Breyer did not dispute the Court's general approach to Section 5; indeed, Justice O'Connor explicitly approved it. *See Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting); *see also id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting). Rather, the three dissenters suggested that the Court should defer the question of RFRA's constitutional validity until the Court itself had reconsidered the *Smith* interpretation of the Free Exercise Clause. In response to historical arguments contained in Justice O'Connor's dissenting opinion, Justice Scalia, joined by Justice Stevens, filed a concurring opinion defending the approach of *Smith*. *See Boerne*, 117 S. Ct. at 2172-76 (Scalia, J., concurring in part).

37. *See id.* at 2163-64 (majority opinion).

38. *See id.* at 2162-68.

39. 384 U.S. 641 (1966).

40. *See Boerne*, 117 S. Ct. at 2167-68; *see also* Conkle, *supra* note 8, at 46-53.

41. *See Boerne*, 117 S. Ct. at 2162-68.

42. *Boerne*, 117 S. Ct. at 2164. In reaching this conclusion, the Court relied not only on the text of Section 5, but also on the history of its enactment as well as early and more recent judicial interpretations of its meaning. *See id.* at 2162-68. For a critique of the Court's historical argument, see Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 174-83 (1997).

43. *See* Conkle, *supra* note 8, at 46-53.

44. *See Boerne*, 117 S. Ct. at 2164.

45. *See* Conkle, *supra* note 8, at 42.

Thus, Congress can adopt statutory provisions that are designed either to ensure that prior violations of the Amendment are fully remedied or to guard against the risk of future violations.[46] As the Court wrote in *Boerne*, "[L]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ."[47]

Although Congress's remedial power is broad, it is not without limit. Previous cases had suggested that Congress's remedial judgments must be "rational,"[48] and *Boerne* confirms this approach. Thus, although Congress retains "wide latitude,"[49] its lawmaking must reasonably be understood as an attempt to vindicate constitutional rights as the Supreme Court has defined them. In order to satisfy this condition, according to *Boerne*, "There must be a congruence and proportionality between the injury to be prevented or remedied [that is, violations of the Constitution, as understood by the Supreme Court] and the means adopted to that end."[50]

Boerne's requirement of "congruence" demands that the congressional statute, viewed as an attempt to prevent or remedy constitutional violations, not be unduly overinclusive.[51] Congress certainly need not limit itself to individual violations of the Constitution. *Boerne* explicitly reaffirms that Congress is free to write more general laws, explaining that "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[52] But if Congress adopts a law that indiscriminately sweeps in a broad array of otherwise lawful state and local practices, the very breadth of the law suggests that it cannot be understood as remedial.[53]

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46. *See* Conkle, *supra* note 8, at 42-45.

47. *Boerne*, 117 S. Ct. at 2163. The Court cited with approval a series of prior decisions granting Congress broad leeway in its exercise of remedial power, including South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); and City of Rome v. United States, 446 U.S. 156 (1980). *See Boerne*, 117 S. Ct. at 2163; *see also* Conkle, *supra* note 8, at 42-45.

48. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 324 ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."); *City of Rome*, 446 U.S. at 177 ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").

49. *See Boerne*, 117 S. Ct. at 2164.

50. *Id.*

51. *See id.* at 2169.

52. *Id.* at 2170.

53. *See id.*

A remedy is "proportional" if it is justified by the magnitude of the constitutional injury. "Strong measures appropriate to address one harm," the Court wrote in *Boerne*, "may be an unwarranted response to another, lesser one."[54] Properly understood, however, the requirement of proportionality is not an independent variable; instead, it is closely related to the requirement of congruence.[55] In particular, the *nature and extent* of the constitutional problem being redressed affect the *degree* of overinclusiveness that is permissible. An extremely broad congressional prohibition may be rational if there is evidence of serious and widespread constitutional violations by state and local governments, especially if those violations would be difficult to prove through case-by-case litigation. For example, as the Court explained in *Boerne*, "strong remedial and preventive measures" have been upheld when they have been designed to redress "the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination."[56] Conversely, if the constitutional problem is less severe, Congress must proceed more cautiously. Indeed, the less serious the constitutional problem, the more likely it is that broad legislation is designed not to remedy that problem, but instead to accomplish another end, such as the substantive redefinition of constitutional rights.

C. *Boerne's* Section 5 Analysis as Applied to RFRA

Even as refined by the requirements of congruence and proportionality, the rationality standard for remedial legislation is hardly a bright-line test.[57] Applications require the exercise of judgment, and close questions may arise concerning the validity of particular exercises of congressional power. However imprecise the rationality standard, however, not all applications are difficult, and *Boerne*'s invalidation of RFRA can fairly be described as an easy case.[58]

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54. *Id.* at 2169.

55. Indeed, the Court in *Boerne* did not clearly distinguish the two requirements. My discussion in the text is designed to explain how these two requirements can and should be understood. I believe that my explanation is consistent with the basic reasoning of *Boerne*, if not with all of the Court's specific language.

56. *Boerne*, 117 S. Ct. at 2167.

57. As the Court conceded in *Boerne*, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *Id.* at 2164.

58. It therefore is not surprising that no justice dissented from the Court's reasoning or result on this question, that is, assuming the continued validity of *Smith*. *See supra* note 36.

Assuming the continued validity of *Smith*, the interesting question in *Boerne* was not whether RFRA could be defended on a remedial theory; it plainly could not. *See* Conkle, *supra* note 8, at 42-45, 61-62. The interesting question was whether the Act could be defended

Under the remedial theory of congressional power, the definition of constitutional violations depends on the Supreme Court's interpretation of the relevant constitutional right. In *Smith*,[59] the Court held that general laws affecting religious practices ordinarily do not violate the Free Exercise Clause.[60] Instead, the Court suggested, religious practices are constitutionally protected only from laws that target religion for special disadvantage[61]—that is, from laws that discriminate against religion.[62] Although the Court's understanding of "discrimination" in this context is not entirely clear, it appears to contemplate deliberate or purposeful discrimination against religion. Accordingly, the Court wrote in *Boerne* that RFRA could survive as a remedial measure only if it were designed to redress state and local laws "enacted with the unconstitutional object of targeting religious beliefs and practices."[63] Only then, the Court explained, could RFRA be regarded as "a reasonable means of protecting the free exercise of religion as defined by *Smith*."[64]

In the enactment of RFRA, however, Congress forthrightly rejected the *Smith* interpretation of the Free Exercise Clause. Thus, in RFRA's formal statement of findings, Congress directly contested the Supreme Court's belief that general laws do not implicate the Free Exercise Clause, stating that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[65] Proceeding on the mistaken assumption that it had a substantive power to redefine the meaning of the Constitution, Congress formulated broadly-framed legislation reaching all laws that operate to substantially burden religious practices, however general those

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nonetheless, on a substantive theory permitting Congress to redefine the meaning of the Free Exercise Clause. Addressing this question prior to *Boerne*, I contended that Congress should be accorded a limited substantive power under Section 5, but that RFRA went beyond the limits that such a power necessarily would require. *See* Conkle, *supra* note 8, at 46-55, 66-79. In *Boerne*, of course, the Court categorically rejected the substantive theory of congressional power, leaving only the remedial theory and thereby ensuring RFRA's invalidation. *See supra* notes 38-43 and accompanying text.

59. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

60. *See id.* at 876-90.

61. In its attempt to explain prior precedents, the Court suggested that certain situations, including unemployment cases and hybrid constitutional claims, were outside the scope of this general principle. *See id.* at 881-84; *see also supra* notes 15-16 and accompanying text.

62. Laws that in fact discriminate against religion are subject to extremely rigorous constitutional scrutiny, a level of scrutiny that all but ensures invalidation. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."); *id.* ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

63. *Boerne*, 117 S. Ct. at 2168.

64. *Id.*

65. 42 U.S.C. § 2000bb(a)(2) (1994).

laws might be. Such legislation could not plausibly be understood as an attempt merely to remedy past or future violations of free exercise rights, as defined in *Smith*.

To be sure, a state might target religion in violation of the *Smith* standard through a general law that disguised the legislature's underlying purpose, or a prosecutor might use a general law to persecute religious believers on a selective basis. In such a situation, RFRA would eliminate the challenger's difficulties of proof in a manner analogous to other congressional legislation that the Court has approved on a remedial theory.[66] But only a small fraction of RFRA's applications could be justified on this basis. In the vast majority of situations, general laws are enacted with no thought of their possible application to religious practices, and prosecutors are engaged in good faith efforts to enforce the general policies that these laws are designed to promote. Although the remedial theory permits Congress to formulate administratively convenient remedies, an argument of administrative convenience—even under a standard of rationality—simply could not explain RFRA's broad application to general laws of all sorts. In terms of *Boerne*'s requirement of congruence, RFRA's "[s]weeping coverage" made it radically overinclusive.[67]

In terms of proportionality, moreover, the Act's overinclusiveness could in no way be explained or justified by the magnitude of the constitutional problem being addressed. As the Court noted in *Boerne*, there was no persuasive evidence that state and local discrimination against religion—overt or covert—was a significant or serious problem.[68] To the contrary, "the emphasis of the [congressional hearings on RFRA] was on laws of general applicability which place incidental burdens on religion," as opposed to "legislation enacted or enforced due to animus or hostility to the burdened religious practices."[69] Lacking anything like a "widespread pattern of religious discrimination in this country,"[70] the Act's intrusion on the power and prerogatives of state and local governments was grossly disproportionate to whatever constitutional benefit it would produce. As the Court explained, "The substantial costs RFRA exacts, both in practical terms of imposing a heavy

66. For an argument along these lines, see *Religious Freedom Restoration Act of 1991: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 357-58 (1992) [hereinafter *House Committee Hearings on RFRA*] (testimony of Douglas Laycock); *The Religious Freedom Restoration Act: Hearing Before the Committee on the Judiciary, United States Senate*, 102d Cong., 2d Sess. 95-96 (1992) [hereinafter *Senate Committee Hearing on RFRA*] (testimony of Douglas Laycock); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 251-52; *see also* Berg, *supra* note 8, at 67-68.

67. *See Boerne*, 117 S. Ct. at 2170.

68. *See id.* at 2169-70.

69. *Id.* at 2169.

70. *Id.*

litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[71]

Especially in the absence of relevant congressional findings or other persuasive evidence that Congress actually relied on a remedial theory,[72] RFRA simply could not be justified on that basis. As the Court concluded in *Boerne*, the Act could only be explained as an impermissible attempt to redefine the substance of the Free Exercise Clause:

> RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.[73]

According to the Court, such a congressional effort was fatally flawed because it compromised "vital principles necessary to maintain separation of powers and the federal balance."[74]

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71. *Id.* at 2171. The Court rejected the possibility of interpreting RFRA, despite its language, to mandate something less than strict judicial scrutiny, noting that even "intermediate scrutiny" of state laws and practices, "with the attendant likelihood of invalidation," would be an unconstitutional "congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* For a pre-*Boerne* suggestion that RFRA might be construed narrowly to help protect its constitutional validity, see Lupu, *supra* note 8, at 212-25.

72. Professor Laycock urged Congress to make specific findings that might have made a remedial theory more plausible. *See House Committee Hearings on RFRA*, *supra* note 66, at 357-58, 398 (urging Congress to find, inter alia, that facially neutral laws have been used as instruments of active religious persecution and that judicial review of legislative motive is insufficient to protect against this possibility); *Senate Committee Hearing on RFRA*, *supra* note 66, at 95-96, 129 (making the same recommendation). But Congress's formal statement of legislative findings made no mention of any such problems. *See* 42 U.S.C. § 2000bb(a) (1994) (statement of congressional findings).

In arguing that the *Smith* approach offered too little protection to religious exercise, the House Report did comment that "legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators." HOUSE REPORT ON RFRA, *supra* note 23, at 6. But this language was omitted from the Senate Report, and neither report made any effort to elaborate a remedial theory. *See generally* HOUSE REPORT ON RFRA, *supra* note 23; SENATE REPORT ON RFRA, *supra* note 23.

73. *Boerne*, 117 S. Ct. at 2170.

74. *Id.* at 2172.

II. POTENTIAL CONGRESSIONAL RESPONSES TO *BOERNE*

Boerne reinstates *Employment Division v. Smith*[75] as the governing federal standard for state and local practices that burden religiously motivated conduct. As demonstrated by its enactment of RFRA, Congress prefers a more generous standard of religious freedom. In the wake of *Boerne*, therefore, Congress is certain to consider lawmaking that would once again expand religious freedom beyond the restrictive approach of *Smith*. Indeed, congressional hearings have already begun.[76]

New legislation might take a number of forms, and it might be grounded on any of several sources of congressional power. Thus, Congress might adopt more narrowly tailored legislation under Section 5, RFRA-like legislation grounded on Congress's power over interstate commerce or its power to implement treaties, or spending power legislation imposing RFRA-like conditions on the receipt of federal funding by state and local governments. I will discuss each of these alternatives in turn, focusing primarily on the scope

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75. 494 U.S. 872 (1990).

76. On July 14, 1997, less than three weeks after the Court's decision in *Boerne*, the Constitution Subcommittee of the House Judiciary Committee held a hearing on "Protecting Religious Freedom After *Boerne v. Flores*." *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7; *see also* Greenhouse, *supra* note 6; *Religious Freedom Issue Examined Before House Judiciary Subcommittee*, 66 U.S.L.W. 2059 (1997). The Senate Judiciary Committee followed suit on October 1, 1997, holding a hearing on "Congress' Constitutional Role in Protecting Religious Liberty." *See Congress' Constitutional Role in Protecting Religious Liberty: Hearing Before the Committee on the Judiciary, United States Senate*, 105th Cong., 1st Sess. (1997) [hereinafter *Senate Committee Hearing on Post-Boerne Legislation*].

I was one of the witnesses at the Senate Judiciary Committee hearing, where I presented testimony tracking the arguments that I advance in this article. Two other contributors to this symposium, Professors Thomas C. Berg and Douglas Laycock, also presented congressional testimony—Professor Berg on the House side, and Professor Laycock at the House and Senate hearings alike. (In his Senate testimony, Professor Laycock substantially repeated most of his House testimony, but he also included additional observations; in this article, I cite to Professor Laycock's House testimony except for points made only at the Senate hearing.) In their contributions to this symposium, Professors Berg and Laycock elaborate and explain some of the arguments that they offered in their congressional testimony. *See* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, pt. I (1998); Professor Douglas Laycock, Address at the Univeristy of Arkansas at Little Rock, Symposium (Sept. 19 & 20, 1997).

of Congress's constitutional power,[77] but also touching on related questions concerning the desirability or effectiveness of each alternative.

A. More Narrowly Tailored Legislation Under Section 5

Perhaps the most obvious response to *Boerne* would be congressional legislation grounded once again on Section 5, but designed to meet the Supreme Court's objections to RFRA. In proceeding under Section 5, Congress would have to accept *Smith*'s interpretation of the Free Exercise Clause. If Congress were willing to accept that interpretation, however, it would have "wide latitude" in the enactment of remedial legislation.[78] Thus, as long as its remedial judgments were "rational,"[79] it could act to redress state and local laws and practices that are animated by "the unconstitutional object of targeting religious beliefs and practices."[80]

To meet the test of rationality, any congressional enactment would have to satisfy *Boerne*'s requirements of congruence and proportionality. Accepting *Smith*'s interpretation of the First Amendment, the problem of free exercise violations in the contemporary United States cannot be described as extreme or extensive; there simply is no broad or general pattern of governmental discrimination against religion.[81] As a result, a "proportional" response to this

77. My focus is on issues of constitutional federalism, and I therefore am largely ignoring the question of whether new congressional legislation could be successfully challenged on the ground that it prefers or favors religion in violation of the Establishment Clause of the First Amendment. *See* U.S. CONST. amend. I. Suffice it to say that I doubt that the Establishment Clause would present an obstacle to legislation of the sort that I discuss in this article. *But cf. Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring) (arguing, but only for himself, that RFRA not only exceeded the power of Congress under Section 5, but also was a "'law respecting an establishment of religion'" in violation of the Establishment Clause). For further discussion of potential Establishment Clause issues, see Conkle, *supra* note 8, at 77 n.187; Idleman, *supra* note 8, at 286-306; Marshall, *supra* note 8, at 237-42. For an argument that RFRA-like legislation should be found to violate the Establishment Clause simply for "seeking to dictate church-state relations," see Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2350 (1997).

I also am putting aside the contention that new legislation, even if otherwise within the scope of congressional power, might violate separation of powers as an unconstitutional "congressional intrusion into the exclusive judicial case-or-controversy arena." *See* Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, NEXUS, Fall 1997, at 73, 81. Again, suffice it to say that I doubt that this argument, in itself, would justify an invalidation of the sort of legislation that I discuss.

78. *See Boerne*, 117 S. Ct. at 2164.

79. *See supra* notes 48-55 and accompanying text.

80. *Boerne*, 117 S. Ct. at 2168 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

81. One could argue that governmental officials in the contemporary United States, in general, are inclined to appreciate and support the exercise of religious freedom. Witness, for example, the overwhelming congressional support for RFRA itself. *See* Conkle, *supra* note 8,

problem would have to be tailored in a reasonably narrow fashion.[82] In other words, the magnitude of the constitutional problem could not be said to justify any special or unusual congressional leeway with respect to the requirement of congruence.

Although Congress would not be given *special or unusual* leeway in redressing free exercise violations, it would have considerable power and discretion nonetheless. More specifically, Congress probably would have the power to adopt at least three sorts of remedial legislation—assuming that it could support the legislation with appropriate congressional findings.

First, Congress could enact purely procedural legislation. In particular, Congress could enact legislation that would be designed to alleviate difficulties in proving discrimination against religion, as contemplated by *Smith*. For example, Congress might provide that once a religious believer has proved that a law or governmental practice has a substantially discriminatory *effect* on religion,[83] that proof, in itself, would permit the fact-finder to infer the existence of discriminatory purpose. Such legislation thus would authorize a permissive inference of discriminatory purpose upon a claimant's showing of substantially discriminatory effect; this showing would permit a finding of discriminatory purpose—although it would not require such a finding, even if the government presented no competing evidence.[84] Another form of

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at 88-89. In any event, there is little evidence that governmental officials are inclined to discriminate against religion in a manner that would violate the standard of *Smith*. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Mark E. Chopko) ("We do not believe that anti-religious discrimination is rampant . . . . Intentional discrimination is not the rule and discrimination is not tolerated in this society."); *but cf. Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Douglas Laycock) (arguing that large numbers of Americans are hostile to religious fundamentalists and to members of minority cults and sects; that this hostility infects the discretionary decisionmaking of governmental administrators, juries, and perhaps even judges; and that "if all the facts were known in every case, widespread violations" of the *Smith* standard would thereby be revealed).

82. *But see Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Erwin Chemerinsky) (suggesting that, if it compiled an appropriate record and engaged in detailed fact-finding, Congress could "reenact the Religious Freedom Restoration Act"—presumably without any modification of its substantive provisions—as an exercise of its remedial power under section five of the Fourteenth Amendment").

83. A law or governmental practice might have a substantially discriminatory effect on religion either because its primary application—assuming full implementation and enforcement—is to religious conduct, or because its actual implementation or enforcement reveals that, in operation, the law or practice in fact is applied primarily to religious conduct.

84. Congress might go further, creating a genuine (rebuttable) presumption of discriminatory purpose upon a showing of substantially discriminatory effect. Thus, Congress might provide that such a showing would *require* the fact-finder to find discriminatory purpose unless the government presented evidence sufficient to rebut the presumption. This approach probably would be within the remedial power of Congress, but it might be challenged under *Boerne* on the basis of congruence or proportionality. The approach described in the text, by contrast, would be virtually unassailable under *Boerne*, and, as a practical matter, it probably

procedural legislation would enhance the judicial remedies for purposeful discrimination against religion, however proved. For example, the legislation might authorize not only equitable relief and the recovery of actual damages, but also the recovery of reasonable attorney fees. In addition, it might permit the award of statutorily specified minimum damages[85] or even punitive damages, which, according to the Supreme Court, "are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights."[86]

Second, Congress probably could go further in the context of particular fields of state and local regulation, based upon the risk of purposeful discrimi-

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would have a very similar effect in the context of actual litigation. For a helpful explanation of evidentiary presumptions and inferences, see GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 55-65 (2d ed. 1987); *see also id.* at 80-82 (discussing relevant provisions of the Federal Rules of Evidence and the interaction of these provisions with congressional statutes creating particular presumptions).

Among other procedural suggestions, Professor Michael Stokes Paulsen has proposed that the government be required to bear "the burden of proof . . . to justify its actions as *not* being discriminatory" in any case in which the claimant can demonstrate a "substantial burden" on the exercise of religion. *See Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen) (emphasis in original). Paulsen thus would have Congress create a genuine (rebuttable) presumption of discriminatory purpose upon a claimant's showing merely of a *substantial burden* on the exercise of religion, even in the absence of any evidence affirmatively suggesting *discrimination* against religion, either in purpose or effect. Paulsen goes further, arguing that this presumption should force the government to prove the absence of discriminatory purpose by "clear and convincing" evidence. *See id.* Paulsen's proposed presumption would severely test the boundaries of Section 5, and it probably would be invalidated. Because it would extend to every case involving a "substantial burden" on the exercise of religion, this presumption would apply in every case previously covered by RFRA itself. *See* 42 U.S.C. § 2000bb-1(a) (1994). Unlike under RFRA, the government could avoid strict scrutiny by proving the absence of discriminatory purpose. Like RFRA, however, a presumption of this kind would adversely affect the government in a broad range of cases, the vast majority of which would not involve an actual violation of the Constitution, as interpreted by the Supreme Court. As a result, the Court probably would invalidate this sort of presumption on the basis of *Boerne*'s requirements of congruence and proportionality.

85. *See Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen).

86. Carlson v. Green, 446 U.S. 14, 22 (1980); *see also* Smith v. Wade, 461 U.S. 30 (1983).

When acting within the proper scope of its authority under Section 5 of the Fourteenth Amendment, Congress is free to abrogate the Eleventh Amendment immunity of the states, as long as it clearly expresses its intent to do so. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976); *see also* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1125 (1996); *id.* at 1131 n.15 (noting that Congress's Fourteenth Amendment authority to abrogate Eleventh Amendment immunity is "undisputed"); *see generally* U.S. CONST. amend. XI. Thus, Congress could authorize federal-court actions for these various types of relief without regard to any Eleventh Amendment immunity that might otherwise be available. For an introduction to the Eleventh Amendment and its many complexities, see 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.12 (2d ed. 1992).

nation against religion in those particular fields. Land use regulation, for example, may be one area in which a serious risk or likelihood of purposeful discrimination could be documented, making it possible for Congress to make detailed and persuasive congressional findings.[87] According to *Boerne*, Congress has the power to address governmental practices that "have a significant likelihood of being unconstitutional"[88] under *Smith*, even if the congressional legislation sweeps in "conduct which is not itself unconstitutional."[89] Because *Smith* prohibits purposeful governmental discrimination against religion, Congress could move against governmental practices that are *likely* to reflect such discrimination, even if the discriminatory purpose could not be proven in any given case. If Congress were to follow this course, it might choose to make unlawful, or presumptively unlawful (for example, subject to a "compelling interest" test), specified governmental practices in particular areas such as land use regulation. Or Congress might declare presumptively unlawful all governmental practices in these areas that can be proven in litigation to have a substantially discriminatory *effect* on religion.

Third, Congress probably would have the power to go even further, declaring that the difficulties of proving purposeful discrimination justify a more broadly framed remedial response. Thus, Congress probably could enact a general law—not limited to particular areas of state and local regulation—that was designed to redress governmental practices that have a substantially discriminatory *effect* on religion in situations suggesting a serious risk or significant likelihood of discriminatory purpose. For example, the legislation might authorize relief for religious claimants if they are able to (a) prove that the challenged law or governmental practice has a substantially discriminatory effect on religion and (b) present some degree of credible evidence suggesting discriminatory purpose. This evidence of discriminatory purpose might be based on historical patterns of governmental decisionmaking, for example, or on the contemporary circumstances surrounding the adoption of the law or governmental practice at issue.[90] At least in this context, moreover, it might be

87. *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock) (arguing that "[t]he clearest example [of such an area] is land use regulation, which has enormous disparate impact on churches, which is administered through highly discretionary and individualized processes that leave ample room for deliberate but hidden discrimination, and where there is substantial evidence of widespread hostility to non-mainstream churches and some hostility to all churches").

88. *Boerne*, 117 S. Ct. at 2170.

89. *Id.* at 2163.

90. This evidence of discriminatory purpose would be enhanced if the claimants could show that their religious group, or their religious practice, was generally unpopular in the state or locality in question. *Cf. Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Douglas Laycock) (presenting evidence that religious fundamentalists and the members of minority cults and sects are the subject of widespread hostility in the United States,

enough for the claimant to present credible evidence of governmental "mixed motives," some portion of which involved discrimination against religion.[91]

In the context of voting rights, the Supreme Court has upheld remedial legislation directed toward state and local practices having a discriminatory effect on racial minorities in situations presenting a serious risk of purposeful—and therefore unconstitutional—discrimination based on race.[92] Although Congress may have particularly broad discretion in dealing with racial discrimination,[93] the Court would be likely to approve similar legislation in the context of religious freedom, at least if Congress developed a suitable record and made appropriate findings.[94] Indeed, the Court in *Boerne* specifically noted that RFRA was not a "discriminatory effects or disparate impact" statute, implying that such a statute would present a very different situation.[95]

Although Congress probably would have the power to enact remedial legislation in one or more of the three forms that I have described, the impact of this legislation would be limited. At most, Congress could expand upon *Smith* by moving against certain governmental action that has a discriminatory

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and arguing that this hostility is likely to infect discretionary governmental decisionmaking).

91. *Cf. Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen) (arguing that Section 5 would permit Congress to authorize relief in *any* case in which governmental action substantially burdening the exercise of religion were shown to rest *in part* on the impermissible motivation of discrimination against religion).

92. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 177 (1980) ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").

93. *See* Conkle, *supra* note 8, at 68-69.

94. To be sure, it might not be easy for Congress to develop a suitable record and make appropriate findings. In particular, it might not be possible for Congress to make reasonable claims about the risk of purposeful discrimination against religion, and therefore about the need to redress that risk. On the other hand, such claims might well be reasonable, at least with respect to certain fields or areas of governmental regulation. *See supra* note 87 and accompanying text (discussing land use regulation); *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Marc D. Stern) (arguing that "[t]he problems of religious discrimination are apparent in many areas of discretionary governmental authority," including "zoning, schools, prisons, and others"). If Congress were only able to make reasonable claims with respect to particular fields, of course, the scope of its remedial legislation would have to be limited accordingly. *Cf. Boerne*, 117 S. Ct. at 2170 (noting that remedial legislation approved in the past had been "limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth)").

95. *See Boerne*, 117 S. Ct. at 2171. The Court explained:

> In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. *Cf.* Washington v. Davis, 426 U.S. 229, 241 (1976). RFRA's substantial burden test, however, is not even a discriminatory effects or disparate impact test.

Id. (parallel citations omitted).

effect on religion.[96] Although undoubtedly more common than demonstrable, purposeful discrimination, even unintentional discrimination against religion is not prevalent in state and local lawmaking. This problem, such as it is, was not the problem that moved Congress to enact RFRA, which (however ill-advised as a matter of congressional power) was designed as it was for a reason. Congress was not concerned—and it had no great reason to be concerned—about discrimination against religion, whether purposeful or

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96. Testifying before Congress in the aftermath of *Boerne*, Professor Douglas Laycock has argued that *Smith* itself, coupled with the Supreme Court's subsequent decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), could be interpreted to protect religious practices from certain laws that have a discriminatory effect on religion—even in the absence of discriminatory purpose. *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock). In particular, Laycock contends that "[w]here a law has secular exceptions or an individualized exemption process, any burden on religion requires compelling justification under reasonable interpretations of *Smith*." *Id.*; *see generally* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1. If Laycock is right about the meaning of the Free Exercise Clause, as interpreted by the Supreme Court, then remedial *legislation* under Section 5 might permissibly go even further, extending its reach to state and local laws and practices that are *likely* to reflect what Laycock contends are the *constitutionally* forbidden discriminatory effects.

The difficulty with this argument is that it depends, as Professor Laycock acknowledges, on a disputed interpretation of *Smith* and *Lukumi*. To be sure, *Smith* suggested that as compared to general laws, situations involving "individualized governmental assessments" would be more likely to trigger serious judicial scrutiny under the Free Exercise Clause, and *Lukumi* makes clear that a law having a *dramatically* discriminatory effect on religion is likely to be invalidated under the Clause—if only because that sort of effect makes evident the law's discriminatory purpose. *See Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. 520. In the absence of unusual or special circumstances, however, the Supreme Court is unlikely to find that the Free Exercise Clause, standing alone, has been violated in the absence of purposeful discrimination against religion. This is all the more so after *Boerne*, in which the Court described the rule of *Smith* and *Lukumi* as a prohibition on governmental action tainted by "the unconstitutional object of targeting religious beliefs and practices." *Boerne*, 117 S. Ct. at 2168.

Despite my reading of the cases, however, a more expansive interpretation of *Smith* and *Lukumi*—an interpretation along the lines suggested by Professor Laycock—certainly is possible. But this possibility itself creates a potential problem in the crafting of remedial legislation. In the absence of congressional legislation, litigants might advance their interpretive arguments in the courts, potentially expanding the constitutional protection available under the Free Exercise Clause. Conversely, congressional legislation, in order to avoid the risk of invalidation, probably should accept a narrow understanding of *Smith* and *Lukumi*—that is, one that finds unconstitutional discrimination only in the presence of purposeful discrimination against religion. This congressional approach, however, could have the effect of conceding a narrow understanding of the Free Exercise Clause, and it therefore could tend to impede a favorable evolution of judicial doctrine on this point.

For an argument different from Laycock's, but raising somewhat similar issues, see *Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen) (suggesting that congressional legislation under Section 5 probably could extend to governmental action that is the product of "'deliberate indifference' to or 'reckless disregard' of" an adverse impact on religious conduct, on the ground that such action comes close to purposeful discrimination).

otherwise. The problem Congress wished to address in RFRA was *nondiscriminatory* governmental action that has the incidental effect of burdening religious conduct. That type of governmental action is immune from challenge under *Smith*, it is immune from challenge after *Boerne*, and it would remain immune from challenge under remedial legislation grounded on Section 5. Remedial legislation under Section 5 could benefit religious freedom to a degree, but it would not advance the basic objective of RFRA.[97]

B. RFRA-Like Legislation Grounded on Congress's Power Over Interstate Commerce or Its Power to Implement Treaties

To accomplish all that RFRA was designed to accomplish, of course, Congress would have to reenact RFRA, or enact a law similar to RFRA; that is, Congress would have to make all state and local laws and practices, however nondiscriminatory they might be, presumptively invalid to the extent that they substantially burden religious conduct. As *Boerne* makes clear, Section 5 of the Fourteenth Amendment cannot support such legislation, but *Boerne* does not foreclose the use of other sources of congressional power. In the aftermath of *Boerne*, two possible sources of power have been suggested: Congress's power to regulate interstate commerce[98] and its power to implement treaties.[99]

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97. Professor Thomas C. Berg has suggested that Congress might rely on Section 5 as the basis for protecting religious practices implicating "hybrid" constitutional claims, which the Supreme Court excluded from the restrictive approach that it adopted in *Smith*. *See supra* note 16. In particular, Professor Berg argues that Congress could "find that religious practices in certain areas implicate one of the 'hybrid rights' preserved in *Smith*: religion combined with rights of speech, association, parental control over education, and presumably other constitutional interests such as property rights." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg). Professor Michael Stokes Paulsen goes further, arguing that "Congress should . . . identify and restate those areas where the Court has reaffirmed Free Exercise Clause and hybrid rights," including not only a variety of hybrid situations, but also situations requiring the protection of religious belief or religious expression, the autonomy of religious institutions, or religious practices in the context of a governmental system of individual exemptions. *See Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76. Paulsen also suggests that Congress "could make explicit legislative findings specifying that certain categories of asserted governmental interests do *not* suffice to state a 'compelling' interest . . . ." *Id.* (testimony of Michael Stokes Paulsen) (emphasis in original). But it would appear that legislation along the lines suggested by Professors Berg and Paulsen either would do no more than protect religious practices that the Supreme Court would protect independently, or else it would exceed the limits of Congress's Section 5 power by redefining the substantive meaning of the Constitution.

Professor Paulsen's testimony goes on to suggest procedural and remedial provisions that clearly would do more than protect what the Supreme Court would protect independently. *See id.* But these provisions, combined with a congressional attempt to "identify and restate" the Supreme Court's constitutional doctrine in a manner favorable to religious freedom, would only increase the risk that the Court would find the legislation unconstitutional.

98. *See, e.g.*, *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7

1. *Congress's Power Over Interstate Commerce*

During the twentieth century, Congress's power over interstate commerce[100] has been interpreted to justify broad and far-reaching federal legislation. Utilizing this power, Congress has addressed various sorts of economic problems,[101] but its power has not been limited to the pursuit of economic objectives. For example, Congress relied primarily on the Commerce Clause in its enactment of Title II of the Civil Rights Act of 1964, which prohibited racial and religious discrimination in places of public accommodation, and the Supreme Court upheld the law on that basis.[102]

Like its power under Section 5 of the Fourteenth Amendment, Congress's power under the Commerce Clause is broad. As the Supreme Court explained in *United States v. Lopez*,[103] Congress has the power not only to regulate and protect the channels and instrumentalities of interstate commerce, a power not relevant here, but also "the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[104] In essence, this latter power gives Congress the ability to regulate local activities, as long as those activities have a substantial effect on the national economy. In determining the "substantiality" of the effect, moreover, Congress need not focus on the individual impact of any particular local activity; rather, it can aggregate the effect of *all* the local activities the law is designed to regulate.[105] Congressional judgments of this sort will be upheld as long as they are "rational,"[106] giving Congress the same degree of discretion as it has under Section 5.

(testimony of Thomas C. Berg); *id.* (testimony of Douglas Laycock); *id.* (testimony of Marc D. Stern); *Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Erwin Chemerinsky).

99. *See, e.g.*, *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock).

100. "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ." U.S. CONST. art I, § 8, cl. 3.

101. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Perez v. United States, 402 U.S. 146 (1971).

102. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

103. 514 U.S. 549 (1995).

104. *Id.* at 558-59 (citation omitted).

105. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); *see also Lopez*, 514 U.S. at 556.

106. "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). *See also* Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 276 (1981); *Lopez*, 514 U.S. at 557.

As *Boerne* made clear for Section 5, broad discretion does not mean unlimited license.[107] And what *Boerne* is to Section 5, *Lopez* is to the Commerce Clause.[108] Thus, in *Lopez*, the Supreme Court ruled that the Commerce Clause did not justify a congressional attempt to ban the possession of guns in the vicinity of schools.[109] The Court noted that the activity being regulated, that of gun *possession* (not sale), was in no sense "commercial" or "economic."[110] Although its opinion is subject to interpretation,[111] the Court suggested that the Commerce Clause ordinarily does not authorize the regulation of non-economic activity, even if that activity affects interstate commerce. At the very least, *Lopez* means that any congressional attempt to regulate such activity will be subject to serious judicial scrutiny.[112] Thus, the Court will not regard a congressional attempt to regulate non-economic activity as a "rational" regulation of interstate commerce unless the non-economic

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107. *See supra* Part I.

108. *Cf.* John M.A. DiPippa, *The Death and Resurrection of RFRA: Integrating Lopez and Boerne*, 20 U. ARK. LITTLE ROCK L.J. 767, pt. VI (1998) (arguing that *Boerne* and *Lopez*, taken together, suggest a new, unified standard for the review of congressional legislation challenged on federalistic grounds).

109. *See Lopez*, 514 U.S. at 551.

110. The Court explained:

> Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.
>
> Even *Wickard* [Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal wheat-farming quotas as applied to the production and consumption of homegrown wheat)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not . . . .
>
> [The gun-possession statute] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.

Id. at 560-61. *See id.* at 551 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.").

111. The five-justice majority opinion is ambiguous in its own right. In addition, there is a concurring opinion by Justice Kennedy, joined by Justice O'Connor, which could be read to limit the reach of the Court's decision. In this concurring opinion, Justice Kennedy emphasized that the congressional law in question intruded upon education, "an area of traditional state concern." *Id.* at 580 (Kennedy, J., concurring). "The statute now before us," he wrote, "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Id.* at 583 (Kennedy, J., concurring). Kennedy's opinion could be read to imply that Congress might have greater leeway in regulating other matters, not traditionally reserved to the states—perhaps even if those matters are not commercial or economic in nature. *See id.* at 580-83 (Kennedy, J., concurring).

112. In his dissenting opinion, Justice Breyer noted that the Court was making a "critical distinction" between commercial and non-commercial activities, a distinction that he believed to be ill-conceived. *See id.* at 627-30 (Breyer, J., dissenting).

activity has an adverse effect on the national economy that is not only substantial, but also direct and demonstrable.[113]

As the Court conceded in *Lopez*, the line between economic and non-economic activity can be difficult to draw.[114] Depending on where and how one draws the line, however, *Lopez* may present a problem for RFRA-like legislation grounded on the Commerce Clause. Religious conduct sometimes is economic conduct as well,[115] but this is not the ordinary situation.[116] In any event, to focus on the potentially economic character of some religious conduct might be to miss the point. Read literally, *Lopez* suggests that the critical question is whether *the activity being regulated by Congress* is or is not economic. In RFRA-like legislation, Congress is not regulating religious conduct, but rather is protecting it from state and local regulation. What *Congress* is *regulating*, in reality, is the state and local regulation that the congressional law is designed to restrain. The Court might regard this state and local activity not as economic, but rather as governmental or regulatory—even though the state and local activity might itself be regulating private conduct of an economic (as well as religious) nature.

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113. In *Lopez*, the government argued that Congress should be permitted to regulate gun possession in the vicinity of schools because this activity not only contributes to the economic cost of crime in general, but also impairs the educational process, thereby leading to a long-term decline in the economic productivity of American citizens. In his dissenting opinion, Justice Breyer accepted this argument. *See Lopez*, 514 U.S. at 618-25 (Breyer, J., dissenting). The majority did not deny that a link to interstate commerce might be present, but it determined that any such link was too attenuated to support the exercise of congressional power. *Id.* at 563-65 (majority opinion); *cf. id.* at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

The majority also noted the absence of relevant congressional findings on the asserted link to interstate commerce, although it left the potential significance of such findings open to question. *See id.* at 563 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."); *see also id.* at 612-14 (Souter, J., dissenting) (discussing the potential role of congressional findings).

114. *See Lopez*, 514 U.S. at 566 (majority opinion); *see also id.* at 627-30 (Breyer, J., dissenting).

115. *Cf.* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1596-97 (1997) (holding that a church camp was engaged in interstate commerce and therefore was protected by the dormant Commerce Clause); *see generally id.* at 1602 ("We see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause.").

116. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg) (suggesting that *individual* religious practices rarely are economic in nature, but that *institutional* religious practices more often are, because religious institutions engage in such activities as "hiring employees, purchasing materials and supplies, and so forth").

If the Supreme Court were to treat the RFRA-like legislation as a regulation of non-economic activity, the legislation would be extremely difficult to sustain on the authority of the Commerce Clause. If *Lopez* ever permits the regulation of non-economic activity, it is only when the activity has an adverse effect on the national economy that is direct, substantial, and demonstrable. In certain circumstances, state and local burdens on religious conduct might have a meaningful effect on the national economy,[117] but it is doubtful that that effect—even in the aggregate—would be sufficiently direct and substantial to satisfy the scrutiny that *Lopez* appears to contemplate for congressional attempts to regulate non-economic activity.

Although this analysis might follow from a literal reading of *Lopez*, a literal reading of the Court's opinion might be unduly restrictive. At least in some situations, Congress surely is permitted to *protect* private economic activity from unduly burdensome state regulation by enacting federal laws that govern the field and preempt state law to the contrary. Perhaps the Supreme Court would see RFRA-like legislation to be serving a similar function to the extent that it protected conduct that was economic as well as religious, and this might serve to immunize the legislation from an attack based on *Lopez*. On the other hand, *Lopez* certainly signals renewed attention to the judicial enforcement of limitations on the Commerce Clause. As the Court noted in *Lopez*, moreover, even its prior precedents would not support Congress's "use [of] a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[118] Thus, even if *Lopez* permitted a RFRA-like law to be applied upon a showing that particular governmental burdens on religion actually had a significant economic impact,[119] this would leave the congressional legislation invalid or inapplicable in many or most of the situations that RFRA itself was designed to address.[120]

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117. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock) (arguing that governmental regulations preventing the building of churches or affecting the operation of religious hospitals can have a significant effect on interstate commerce); *id.* (testimony of Marc D. Stern) (suggesting that state regulations burdening particular religious practices, such as the drinking of communion wine by minors or the observation of Jewish holidays, might make the states maintaining those regulations unattractive to the affected religious believers, thereby discouraging interstate travel and migration and impairing interstate commerce).

118. *Lopez*, 514 U.S. at 558 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

119. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock) (arguing that "Congress could enact RFRA's level of protection for religious practices affecting commerce").

120. Rather than frame its legislation broadly, Congress might attempt to draft legislation that limited its coverage to those situations in which governmental burdens on religion actually had a significant economic impact. But if Congress were to move in this direction, it might well be difficult to develop statutory language that would both (a) support the Commerce Clause theory of congressional power and (b) address the non-economic burdens about which Congress

As this analysis suggests, *Lopez* might well require the invalidation of RFRA-like legislation grounded on the Commerce Clause, at least in many or most of its applications. In addition to *Lopez*, moreover, there is an independent constitutional difficulty that such legislation would face: it probably would violate state sovereignty, as protected by the Supreme Court's decisions in *New York v. United States*[121] and *Printz v. United States*.[122]

Congress typically uses the Commerce Clause to regulate private-sector activities, although it sometimes extends the same regulations to state and local governments as well. When Congress is primarily engaged in the regulation of private-sector activities, laws that survive *Lopez* are constitutionally valid without further analysis.[123] As the Supreme Court explained in *New York* and confirmed in *Printz*, however, it is one thing for Congress to extend private-sector regulations to the comparable activities of state and local governments; it is something altogether different, and constitutionally more troubling, for Congress to address its legislation to government alone, effectively requiring state and local bodies to govern in a particular way.[124]

"[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," the Court wrote in *New York*.[125] Thus, "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[126] The Court elaborated in *Printz*: "[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state

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presumably is most concerned—that is, burdens resulting not from the economic costs of governmental regulation, but rather from the conflicts that can arise when secular obligations conflict with the demands of religious conscience. Legislation granting religion-specific relief from burdens that are merely economic, moreover, might also present serious issues under the Establishment Clause. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating a Texas sales tax exemption that was granted to religious literature, but not to other literature); *see generally supra* note 77.

121. 505 U.S. 144 (1992).

122. 117 S. Ct. 2365 (1997).

123. This is true as long as the Supreme Court adheres to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court discarded the doctrine of *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had provided some special protection for state and local governments even from general federal laws that applied to the private and public sectors alike. The Court's more recent decisions in cases like *New York* and *Printz* may make the current validity of *Garcia* an open question. *See generally infra* notes 222-227 and accompanying text (discussing the trend of recent Supreme Court decisions reinvigorating constitutional federalism).

124. *See New York*, 505 U.S. at 160-61, 177-78; *Printz*, 117 S. Ct. at 2383.

125. *New York*, 505 U.S. at 166.

126. *Id.* at 162.

and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"[127] As a result, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[128]

Although RFRA-like legislation might not directly require state lawmaking or state executive action, it would appear to violate the basic principle of state sovereignty that *New York* and *Printz* are designed to protect. In particular, such legislation would be targeted at state and local governments,[129] and, in effect, it would mandate that state and local laws and executive actions include religion-based exemptions in accordance with congressionally mandated criteria.[130] The Supreme Court would be unlikely to countenance this substantial intrusion on state sovereignty.[131]

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127. *Printz*, 117 S. Ct. at 2377 (quoting THE FEDERALIST No. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

128. *Printz*, 117 S. Ct. at 2380.

129. Professor Thomas C. Berg has noted that as long as Congress continued to apply the provisions of RFRA, or of RFRA-like legislation, to federal laws and practices as well as state and local ones, Congress in fact would not be "singl[ing] out the states for regulation" because "the whole federal government [would be] subject to the same rule." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg); *see* 42 U.S.C. §§ 2000bb-2(1) & (2), 2000bb-3(a) & (b) (1994) (extending RFRA's coverage to federal laws and practices); *see also supra* note 5. This observation, however, misses the point of *New York* and *Printz*; even if the federal legislation continued to apply to the federal government's own activities, it presumably would not apply to the private sector, and it therefore would not "govern the Nation directly." *See New York*, 505 U.S. at 162.

Even if the federal legislation were somehow crafted to extend to certain private-sector activity, moreover, this might not save the legislation from a state-sovereignty challenge—especially not if the legislation's primary focus continued to be governmental activity. *See generally supra* note 123 (raising the question of whether *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), remains a viable precedent).

130. In his contribution to this symposium, Professor Berg suggests that RFRA-like legislation should be seen as nothing more than a "deregulatory statute" that "displaces" state law. *See* Berg, *supra* note 76, at part III.C. But such legislation would not merely deregulate a field or displace state law. Instead, it would affirmatively require state and local governmental bodies to govern in a particular way; thus, whenever they were confronted with claims for religion-based exemptions, the state and local bodies would be required to apply congressionally mandated standards and, in accordance with those standards, to recognize and grant exemptions that they otherwise would be free to reject. Like RFRA itself, such legislation would thereby "substantively coerce[] states into respecting religious liberty, within state institutions, as a matter of federal policy." Lupu, *supra* note 8, at 214.

131. The state-sovereignty doctrine of *New York* and *Printz* is a matter of constitutional principle that appears to be largely unaffected by the *degree* to which the federal law intrudes on state and local prerogatives. To the extent that the degree of the intrusion is relevant, however, the intrusion caused by RFRA-like legislation surely would be no less than the relatively modest intrusion that the Court found impermissible in *Printz*. *See Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting) (arguing that the federal gun control provisions invalidated in *Printz*, which required state officials to perform background checks and related tasks on an

As I have suggested, the state-sovereignty doctrine of *New York* and *Printz* is independent from the basic Commerce Clause analysis of *Lopez*. Considered separately, either line of attack could lead to the invalidation of RFRA-like legislation. Taken together, they would make this result extremely likely, if not inevitable. Indeed, the two lines of reasoning might coalesce. Thus, the Supreme Court's analysis might be as follows: congressional lawmaking that regulates state and local governmental activity is not a regulation of commercial or economic activity, and it therefore is not a permissible regulation of "interstate commerce"; at the same time, and precisely because of its focus on state and local governmental action, it is an impermissible intrusion on state sovereignty. In support of this reasoning, the Court might well repeat what it said in *New York*: "The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[132]

2. *Congress's Power to Implement Treaties*

However unlikely it may seem, Congress's power to implement treaties is a plausible source of authority for RFRA-like legislation[133]—or at least a more plausible source than the Commerce Clause. The United States is party to a treaty that contains a relevant provision, and, to date, the Supreme Court has not recognized a state-sovereignty limitation on Congress's implementation power. Even so, this alternative theory of constitutional power certainly is not free from doubt, and it probably would not support congressional legislation as broad or as strong as RFRA. Beyond the question of constitutional power,

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interim basis, involved only "the imposition of modest duties on individual officers" and therefore imposed no more than a "trivial burden on state sovereignty.").

The Supreme Court's state-sovereignty doctrine limits Congress's power under the Commerce Clause, but this doctrine does not apply when Congress properly invokes its enforcement power under Section 5 of the Fourteenth Amendment. *See* City of Rome v. United States, 446 U.S. 156, 178-80 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). The protection of state sovereignty, however, is nonetheless at work in the Court's refusal to give Congress *carte blanche* under Section 5. *See supra* Part I. Thus, by rejecting an unduly expansive interpretation of Section 5, the Court has limited the ability of Congress to avoid the constitutional doctrine and policy of cases like *New York* and *Printz*. *See* Conkle, *supra* note 8, at 70-71; *cf.* Gregory v. Ashcroft, 501 U.S. 452, 469 (1991) ("[T]he Fourteenth Amendment does not override all principles of federalism.").

132. *New York*, 505 U.S. at 166.

133. This potential source of authority was first identified in an important and enlightening article by Professor Gerald L. Neuman. *See* Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMM. 33 (1997).

moreover, this path to RFRA-like legislation might be politically or prudentially unattractive.

In 1992, the United States Senate approved a major multilateral treaty on human rights, the International Covenant on Civil and Political Rights (CCPR).[134] According to Article 18 of the CCPR, "Everyone shall have the right to freedom of thought, conscience and religion," including not only "freedom to have or to adopt a religion or belief of his choice," but also "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."[135] Under Article 18, freedom to believe is absolute.[136] "Freedom to manifest one's religion or beliefs" is not, but it "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[137] The President and the Senate plainly had the constitutional power to enter into this treaty,[138] and, as a matter of international law, the United States is obligated to honor its provisions.[139]

In protecting the freedom to manifest one's religion except when limitations are necessary to serve competing interests such as public safety or morals, Article 18 of the CCPR appears to call for the protection of religious freedom, at least to some degree, even from nondiscriminatory, general laws that have the effect of burdening religious practices. Article 18 thus appears to demand more protection of religious freedom than is required by the Supreme Court's decisions in *Smith* and *Boerne*.[140] It also appears, however, that Article 18 is not yet enforceable as part of the domestic law of the United States, because—according to Senate declaration—the CCPR is not self-executing.[141] Nonetheless, Congress has the power to implement Article 18 by

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134. *See* 138 CONG. REC. S4781-84 (1992). For a discussion of the CCPR and of the Senate's long-delayed decision to approve it, see Neuman, *supra* note 133, at 41-43. For a collection of essays concerning the treaty and its various provisions, along with an appendix containing the treaty's complete text, see THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed., 1981).

135. CCPR art. 18(1).

136. *See id.* art. 18(2).

137. *Id.* art. 18(3).

138. *See* U.S. CONST. art. II, § 2; *see also* Neuman, *supra* note 133, at 46 (noting that even if the treaty power is properly limited to matters of legitimate international concern, "there can be no doubt today that human rights are among those matters"). The CCPR, as a valid treaty, is part of the "supreme Law of the Land" under the Constitution's Supremacy Clause. *See* U.S. CONST. art. VI.

139. *See* Neuman, *supra* note 133, at 49.

140. *See supra* Part I.

141. *See* Declaration No. 1, 138 CONG. REC. S4784 (1992); *see also* Neuman, *supra* note 133, at 43 & n.57 (discussing the declaration and noting that its effectiveness has been questioned by some scholars).

virtue of the Necessary and Proper Clause of the Constitution, which authorizes congressional legislation to implement international treaties such as the CCPR.[142]

Noting that Congress properly can adapt the provisions of Article 18 to the American legal system, Professor Gerald L. Neuman has argued that Congress's treaty-implementing power would support a "verbatim reenactment" of RFRA that would be within the power of Congress and that therefore would be constitutionally binding on the states.[143] According to Neuman, "Congress could reasonably find that the traditional categories of religious exercise and compelling interest provide[] an appropriate mechanism for protecting the manifestation of religious beliefs in practice within the legal system of the United States."[144] And any state-sovereignty objection to this treaty-implementing legislation, writes Neuman, would be foreclosed by the Supreme Court's 1920 decision in *Missouri v. Holland*.[145]

Neuman's constitutional argument is creative and interesting, but whether the Supreme Court would accept it is highly questionable. In the first place, anything close to a verbatim reenactment of RFRA would appear to go well beyond what Article 18 requires. Article 18, for example, permits the government to limit the exercise of religion when the limitation is necessary for the protection of public morals;[146] standing alone, this justification surely would not satisfy the "compelling interest" requirement of RFRA.[147] More generally, the "necessary to protect" inquiry under Article 18[148] is considerably more flexible than RFRA's requirement that constraints on religious exercise be "the least restrictive means"[149] for furthering the government's compelling interest.[150] Thus, as Neuman concedes, "The compelling interest test of RFRA appears to be more demanding than the standard for 'necessary' limitations

142. This Clause authorizes Congress to enact all legislation that is "necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18. One such power is the treaty power.

143. *See* Neuman, *supra* note 133, at 50, 53.

144. *Id.* at 50.

145. 252 U.S. 416 (1920); *see* Neuman, *supra* note 133, at 46, 47.

146. *See* CCPR art. 18(3). According to Alexandre Charles Kiss, "public morals," for purposes of Article 18 and the rest of the CCPR, "alludes to principles which are not always legally enforceable but which are accepted by a great majority of the citizens as general guidelines for their individual and collective behavior. Whether they include acts done in private, alone, or between consenting adults, has been debated." Alexandre Charles Kiss, *Permissible Limitations on Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS, *supra* note 134, at 290, 304. Kiss suggests that a uniform, international conception of public morals may be impossible, "thus necessitating a margin of appreciation left to the states." *Id.*

147. *See* 42 U.S.C. § 2000bb-1(b) (1994).

148. *See* CCPR art. 18(3).

149. 42 U.S.C. § 2000bb-1(b) (1994).

150. *See* Neuman, *supra* note 133, at 45-46.

under Article 18."[151] Likewise, "RFRA's category of substantial burdens on the exercise of religion might be broader than the category of limitations on the right to manifest one's religion in worship, observance, practice, and teaching."[152] Neuman concludes that new legislation tracking the language of RFRA would nonetheless be a rational implementation of Article 18.[153] The Supreme Court might agree, but I think it is more likely that the Court would conclude otherwise. At the very least, this is a considerably more difficult question than Neuman appears to believe.

As *Lopez* suggests, the Supreme Court's review of congressional rationality may be more intense than usual when the Court perceives a potential abuse of congressional power.[154] Given the history of *Smith*, RFRA, and *Boerne*,[155] moreover, the Court might well see such a problem in a reenactment of RFRA that was purportedly grounded on Article 18. The CCPR was in effect when Congress enacted RFRA in 1993,[156] but Congress showed no interest then in implementing its provisions. Rather, Congress wanted to repudiate *Smith*, adopt its own understanding of the First Amendment, and impose that understanding on the states.[157] The primary reasons for a reenactment of RFRA would be very similar. Although the Supreme Court would be reluctant to question the motivations of Congress, it might be equally reluctant to approve a congressional circumvention of the Court's decision in *Boerne*.[158] As a result, if Congress did little more than reenact the terms of RFRA, the Court might well conclude that the legislation did not constitute a rational or reasonable implementation of Article 18.[159]

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151. Neuman, *supra* note 133, at 50.

152. Neuman, *supra* note 133, at 50. At the same time, in other respects, a full implementation of Article 18 would go beyond the protections embodied in RFRA. Unlike RFRA, Article 18 protects the manifestation of nonreligious beliefs, and it extends its protections to private as well as governmental interference. *See id.* For an argument that the United States would be well-advised to follow the approach of Article 18 insofar as it extends its protections to matters of non-religious conscience, see Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. REV. 645, 657 & n.42. For further discussion of Article 18, see, for example, Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, *in* THE INTERNATIONAL BILL OF RIGHTS, *supra* note 134, at 209, 210-16.

153. *See* Neuman, *supra* note 133, at 50.

154. *See supra* note 113 and accompanying text.

155. *See supra* Part I.

156. *See supra* note 134 and accompanying text.

157. *See supra* note 65 and accompanying text.

158. *Cf.* Bailey v. Drexel Furniture Co. [The Child-Labor Tax Case], 259 U.S. 20 (1922) (invalidating congressional legislation, grounded on the taxing power, that had been enacted in response to *Hammer v. Dagenhart* [The Child Labor Case], 247 U.S. 251 (1918), which had previously invalidated very similar legislation grounded on the Commerce Clause).

159. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock) (arguing that Congress should not "simply re-enact RFRA and declare it

Beyond the question of congressional rationality, there is the question of state sovereignty. As Professor Neuman observes, *Missouri v. Holland*[160] can be read to preclude a state-sovereignty objection to treaty-implementing legislation, and therefore to RFRA-like legislation enacted on this basis.[161] Once again, however, the question is substantially more troublesome than Neuman allows, and there are reasons to doubt whether *Holland* would be extended in this manner.

In *Holland*, Congress had enacted a statute that prohibited the killing, capturing, or selling of migratory birds that passed over portions of the United States and Canada, this in accordance with the terms of a treaty between the United States and Great Britain.[162] Missouri objected to this exercise of congressional power, claiming that it was the "owner" of wild birds within its territory and that the conditions for their hunting properly were governed by Missouri's own laws.[163] In rejecting Missouri's position, the Supreme Court broadly affirmed the power of Congress to implement treaties, and it specifically rejected the argument that the statute in question was "forbidden by some invisible radiation from the general terms of the Tenth Amendment."[164] But the Court did not reject the federalism argument out of hand. Rather, it balanced the competing interests that were at stake. As against Missouri's interest in wild birds that were only "transitorily within the State," the "national interest" was "of very nearly the first magnitude" and could "be protected only by national action in concert with that of another power."[165]

Whether a similar conclusion would or should be reached for RFRA-like legislation is an open question. The state regulatory interests that would be impaired by RFRA-like legislation are in no way limited to a transitory subject matter. At the same time, the need for concerted national and international action is less obvious; it is hardly self-evident that religious freedom in the American states will be inadequately protected in the absence of federal legislation implementing the CCPR.

The states' rights argument rejected in *Holland*, moreover, was not really a state-sovereignty argument of the quality or strength that could be invoked

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to be an implementation of the [CCPR]" because that would lead to "arguments about whether the implementing legislation went further than the Covenant and whether the power to implement treaties includes the power to go further—the same arguments we had over RFRA").

160. 252 U.S. 416 (1920).

161. *See* Neuman, *supra* note 133, at 46, 47.

162. *See Holland*, 252 U.S. at 431-32.

163. *See id.* at 431, 434.

164. *Id.* at 434; *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.").

165. *See Holland*, 252 U.S. at 435.

against RFRA-like legislation. In particular, the statute approved in *Holland* was a statute through which the federal government was directly regulating the activities of private individuals; the federalism objection, in essence, was nothing more than an objection to the federal statute's preemption of state law. As such, the Court found the challenge unpersuasive: "As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[166]

RFRA-like legislation, by contrast, would be directed to governmental action, effectively requiring state and local bodies to govern in a particular way. To compare these situations to the Commerce Clause cases, *Holland* is like *Lopez*, a case in which no independent, state-sovereignty objection was available.[167] RFRA-like legislation, on the other hand, would be like the legislation invalidated in *New York* and *Printz*.[168] Important national and international interests sometimes may require treaty-implementing legislation that is directed specifically to state and local governmental action,[169] and it therefore would be wrong to conclude that such legislation is categorically barred by *New York* and *Printz*. Nonetheless, the *New York/Printz* problem was not addressed in *Holland*, and the constitutional policy that undergirds these cases might well support the protection of states' rights if the Court, as in *Holland*, elects to adopt a balancing approach. In these circumstances, following language from *De Geofroy v. Riggs*,[170] the Supreme Court might find that Congress's treaty-implementing power is limited by a restraint "arising from the nature of the government itself and of that of the States."[171]

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166. *Id.* at 434.

167. *See supra* note 123 and accompanying text. Indeed, an objection to the federal preemption of private-sector regulation, without more, is the weakest sort of federalism claim. Thus, even under the now-discarded states' rights doctrine of *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court refused to accept such claims, noting that they did not involve the federal regulation of "States as States." *See* Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 283-93 (1981); *see generally* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (overruling *National League of Cities*).

168. *See supra* notes 124-131 and accompanying text.

169. *Cf.* Asakura v. Seattle, 265 U.S. 332 (1924) (upholding and applying treaty provisions that prevented state and local governments from discriminating against Japanese nationals with respect to their trade or business activities in the United States); De Geofroy v. Riggs, 133 U.S. 258 (1890) (upholding and applying treaty provisions that protected French nationals from certain state-imposed disabilities in the disposition and inheritance of property); Hauenstein v. Lynham, 100 U.S. 483 (1880) (upholding and applying treaty provisions that protected Swiss nationals from state-imposed inheritance disabilities).

170. 133 U.S. 258 (1890).

171. *Id.* at 267. ("It would not be contended that [the treaty power] extends so far as to

As with RFRA-like legislation grounded on the Commerce Clause,[172] treaty-implementing legislation amounting to anything like a verbatim reenactment of RFRA probably would be invalidated on the basis of one or both of two lines of argument: that the legislation goes beyond the limits of congressional rationality and that it infringes state sovereignty. In the treaty-implementing context, however, Congress could substantially diminish the risk of invalidation by adopting a weakened form of RFRA-like legislation, grounded not in the language of "substantial burden," "compelling interest," and "least restrictive means," but instead in language reflecting the more flexible approach of Article 18 of the CCPR.[173] This would reduce the appearance of illicit congressional circumvention of *Boerne*, and the statute would be more readily upheld as a reasonable implementation of Article 18. At the same time, precisely because it would be less intrusive on the states, the statute would be less vulnerable to a state-sovereignty objection. Although not entirely free from constitutional doubt, this form of RFRA-like legislation would be likely to survive a judicial challenge.

In addition to the various constitutional issues surrounding Congress's treaty-implementing power, there are political or prudential questions that Congress would need to consider before invoking this power as the basis for RFRA-like legislation. On the one hand, as I have just argued, legislation grounded on this power probably would not be constitutionally sustainable unless it were substantially weaker than RFRA. This weaker form of legislation, however, would protect religious freedom only to a limited degree, and the full objective of RFRA would remain unfulfilled.[174]

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authorize what the Constitution forbids . . . ."). This language from *De Geofroy* was quoted with approval in Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality opinion). With no justice objecting on this point, the plurality in *Reid* declared that "no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution." *Id.* at 16. *See id.* at 17 ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.").

172. *See supra* Part II.B.1.

173. Professor Douglas Laycock has argued that the standard under Article 18 "is something less than the compelling interest test, but it is certainly more than rational basis." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock). As a result, he suggests that "[p]erhaps the best translation into American legal traditions is intermediate scrutiny—substantially related to an important governmental objective. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976)." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Douglas Laycock). If Laycock is right, Congress would have the constitutional power to adopt a treaty-implementing statute "requiring something like intermediate scrutiny for burdens on religious practice." *Id.* The safest form of treaty-implementing legislation, however, would avoid this sort of translation altogether; instead, it would simply track the language of Article 18.

174. *But cf.* Neuman, *supra* note 133, at 53 (suggesting that a more moderate and flexible approach to religious exemptions "may be normatively more attractive than the compelling interest model that RFRA appears to embody").

On the other hand, and conversely, Congress—making its own judgment about the importance of American federalism—might well be reluctant to use its treaty-implementing power to impose *any* new requirements on the states. In approving the CCPR, the Senate included an "understanding" on federalism, noting that the CCPR would be "implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments," with the federal government taking "measures appropriate to the Federal system to the end that the competent authorities of the state or local government may take appropriate measures for the fulfillment of the [CCPR]."[175] Although the precise meaning and effect of this understanding are unclear,[176] it at least "signal[s] the political reality that some members of Congress are reluctant to exercise . . . federal power to enforce the CCPR in areas of traditional state regulation."[177]

In summary, Congress's power to implement treaties might support a weakened form of RFRA-like legislation, but it probably would not support legislation as broad or as strong as RFRA itself. In addition, there are political or prudential reasons for Congress to be reluctant to invoke this power. Like the Commerce Clause, then, the treaty-implementing power is a doubtful basis for congressional action.[178]

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175. Understanding No. 5, 138 CONG. REC. S4784 (1992).

176. *See* Neuman, *supra* note 133, at 51-52.

177. *Id.* at 52-53. Congress has long been sensitive to the question of whether the federal government's power to make and implement treaties could work to undermine our federal system. In the 1950's, for example, Congress seriously considered—but ultimately rejected—a proposed constitutional amendment to formally limit the scope of this power. *See* NOWAK & ROTUNDA, *supra* note 31, at 219 (discussing the proposed Bricker Amendment); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 255-56 (13th ed. 1997) (suggesting that the congressional concerns reflected in the Bricker Amendment were assuaged, in part, by the reassuring language of *Reid v. Covert*, 354 U.S. 1 (1957); *see supra* note 171). For an argument that this congressional sensitivity might be well-advised and that it might properly be extended to questions of religious freedom, see Marci A. Hamilton, *Slouching Toward Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307 (1997) (review essay, reviewing RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE (John Witte, Jr. & Johan D. van der Vyver eds., 1996)) (arguing that the internationalization of religious human rights, at least if extended to the United States, could jeopardize not only federalism, but also popular sovereignty and the containment of power that results from its dispersal among various public and private actors).

178. Beyond the constitutional limitations that I have discussed in the text, the Eleventh Amendment would further restrict the ability of Congress to authorize federal-court remedies against the states. *See* U.S. CONST. amend. XI; 1 ROTUNDA & NOWAK, *supra* note 86, § 2.12. Under *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), legislation grounded on Congress's power over interstate commerce cannot abrogate the Eleventh Amendment immunity of the states. Like its power over interstate commerce, moreover, Congress's power to implement treaties is based upon Article I of the Constitution. As a result, it would seem that *Seminole Tribe* would preclude Congress from abrogating Eleventh Amendment immunity in

C. Spending-Power Legislation Imposing RFRA-Like Conditions on the Receipt of Federal Funding

As we have seen, Section 5 of the Fourteenth Amendment does not authorize Congress to protect religious practices from state and local laws of general application.[179] In all likelihood, neither does the Commerce Clause.[180] Congress's power to implement treaties is more plausible, but there are reasons to doubt the constitutionality, as well as the political or prudential attractiveness, of congressional reliance on this source of authority.[181] Due to the inadequacies of these various sources of power, it may be that Congress cannot directly accomplish the basic objective of RFRA; that is, it may be that Congress cannot directly regulate state and local laws and practices that burden religious conduct in a nondiscriminatory way.

Even if Congress cannot directly accomplish the basic objective of RFRA, however, it might be able to pursue this objective through indirect means. In particular, Congress might be able to impose conditions on the receipt of federal funding by state and local governments, thereby inducing—but not directly requiring—those governments to honor RFRA-like standards in protecting religious conduct even from general laws and practices.

1. *The Breadth of the Spending Power*

Under the Spending Clause of the Constitution, Congress is authorized "to pay the Debts and provide for the common Defence and general Welfare of the United States."[182] This congressional power to spend public monies is a separate and independent power, and it is not limited to the fields of permissible congressional regulation that are specified elsewhere in the Constitution.[183] Congress's power to spend, moreover, implicitly includes the power to restrict the use of its appropriations and to impose conditions that recipients must honor if they choose to accept the federal funding.

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the adoption of RFRA-like legislation grounded on either of these two sources of congressional power.

179. *See supra* Parts I.C & II.A.

180. *See supra* Part II.B.1.

181. *See supra* Part II.B.2.

182. U.S. CONST. art. I, § 8, cl. 1.

183. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987). The Supreme Court first endorsed this view in *United States v. Butler*, 297 U.S. 1 (1936), thereby accepting the view of Alexander Hamilton and Justice Story, as against the contrary position of James Madison. *See id.* at 65-66.

State and local governments receive federal funds under a variety of congressional programs,[184] and the funds often come with strings attached.[185] If, in awarding a particular grant, Congress merely "'specifies in some way how the money should be spent,'"[186] its power under the Spending Clause is clear.[187] Beyond this, Congress also is free to impose more independent conditions on state and local governments. In particular, Congress is free to require, at least to some degree, that states accept or adopt particular legal regimes if they wish to be eligible for federal funding. As the Supreme Court has explained, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[188] Because of the contractual nature of the obligations that states agree to assume, these obligations perhaps should not be regarded as matters of federal law, at least not in the ordinary sense. Instead, these obligations—whatever their form—might best be regarded as matters essentially of state law.[189]

South Dakota v. Dole[190] illustrates the breadth of Congress's power under the Spending Clause. Under the National Minimum Drinking Age Amendment of 1984,[191] Congress directed the federal Secretary of Transportation to withhold five percent of a state's otherwise allocable highway funds if, as a matter of state law, the state did not prohibit the purchase of alcoholic beverages by persons under the age of twenty-one.[192] South Dakota, which

184. Indeed, at least until recently, "[f]ederal funds totaling billions of dollars each year [have] constitute[d] an increasingly large proportion of each state's revenue." Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918 (1995).

185. *See* 1 ROTUNDA & NOWAK, *supra* note 86, § 5.7(b).

186. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al. as Amicus Curiae).

187. Dissenting in *Dole*, Justice O'Connor argued that the Supreme Court's approach to the Spending Clause is far too permissive. *See Dole*, 483 U.S. at 212-18 (O'Connor, J., dissenting). Even so, she agreed that Congress is entirely free to specify how its own appropriations should be spent. *See id.* at 215-17.

188. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

189. Needless to say, federal funding conditions certainly reflect federal policies. But as Professor David E. Engdahl has explained, these conditions "in their essence are creatures of contract." David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 71 (1994). As a result, Engdahl argues, "their only force is contractual," and they should not be regarded as "Laws of the United States" within the meaning of the Supremacy Clause, U.S. CONST. art. VI, cl. 2. *See id.*; *see also id.* at 62-78. *But see* 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, 322-26 (1993) (arguing that some forms of spending conditions—those that by their terms do not require the states to adopt or maintain any particular state laws—are properly regarded as matters of federal law).

190. 483 U.S. 203 (1987).

191. 23 U.S.C. § 158 (1988).

192. See *Dole*, 483 U.S. at 205, 211.

permitted nineteen-year-olds and twenty-year-olds to purchase certain types of beer,[193] challenged the congressional statute as a coercive and illicit attempt to require the state to change its own law.[194] In a broadly worded opinion, the Supreme Court rejected South Dakota's challenge, holding that the designated federal funds could be withheld from South Dakota unless and until its law was amended.[195]

The Court in *Dole* denied that the spending power is "unlimited,"[196] and it noted a number of requirements for its legitimate use. Several of the Court's requirements, however, are so easily satisfied that they provide no serious limitation on the exercise of congressional power. In particular, Congress readily can satisfy *Dole*'s requirements that it act in pursuit of the general welfare; that it express its conditions unambiguously; and that it not induce the states to enact legislation that would otherwise violate the Constitution.[197] If there are meaningful constitutional restrictions on the spending power, they come in the form of two other potential limitations, each of which is mentioned in *Dole*.

First, the Court suggested a "relatedness" limitation, stating that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[198] The Court concluded that this was not a problem in *Dole*, however, finding that the drinking-age condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[199] Second, the Court identified a "non-coercion" limitation, noting that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[200] But

193. *See id.* at 205.

194. *See id.*

195. *See id.* at 211-12.

196. *Id.* at 207.

197. *See id.* at 207-08, 210; *see also id.* at 209 (rejecting South Dakota's argument that the "independent constitutional bar" limitation on the spending power should be read more broadly, and that the congressional legislation in *Dole* should accordingly be found to violate the Twenty-First Amendment, U.S. CONST. amend. XXI).

198. *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444 (1978) (plurality opinion)). The Supreme Court used stronger language in *New York v. United States*, 505 U.S. 144 (1992), stating that spending conditions "must (among other requirements) bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *Id.* at 167 (citations omitted). For an argument that the relatedness requirement is predicated upon an improper understanding of the spending power, see Engdahl, *supra* note 189, at 54-62.

199. *Dole*, 483 U.S. at 208. The Court noted that in the absence of uniform requirements, young people might be inclined to drink and drive while commuting to a neighboring state with a lower drinking age. *See id.* at 209.

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

once again, this was not a problem in the case at hand. Describing the five percent financial incentive as "relatively minor encouragement," the Court declared South Dakota's coercion argument "more rhetoric than fact."[201] The Court concluded that the enactment of drinking-age laws "remains the prerogative of the States not merely in theory but in fact."[202]

As long as the congressional action stops short of coercion, moreover, the state-sovereignty doctrine of *New York* and *Printz*[203] does not apply to conditional spending. Thus, in this context, Congress is free to target state governments for special conditions—such as the condition upheld in *Dole*—that are not imposed on the private sector. According to the Court in *Dole*, sovereignty remains in the states because they have a choice: accept the grant, and with it the condition, or reject the grant, and thereby refuse to yield to the congressional pressure.[204] As the Court stated in *Bell v. New Jersey*,[205] "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty."[206] Unlike with direct congressional regulation, conditional spending programs leave state officials politically accountable for their actions. "Where Congress encourages state regulation rather than compelling it," the Court wrote in *New York*, "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."[207]

Sovereignty remains with the states and state officials remain accountable to their constituents, of course, only in the absence of coercion. And it remains possible that conditional spending, in certain contexts, might be impermissibly coercive. Likewise, particular conditions might be so far removed from the purpose of the congressional funding as to be invalid on that basis. The Court reiterated in *New York* that Congress's power under the Spending Clause is not without limit; "otherwise," the Court wrote, "the spending power could render

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Engdahl, *supra* note 189, at 79-86 (arguing that concerns about coercion might usefully be addressed in terms of the contractual concepts of "unconscionability" and "public policy").

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

202. *Id.* at 211-12.

203. *See supra* notes 124-31 and accompanying text.

204. *See Dole*, 483 U.S. at 210; *see also* New York v. United States, 505 U.S. 144, 168 (1992) ("If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.").

205. 461 U.S. 773 (1983).

206. *Id.* at 790.

207. *New York*, 505 U.S. at 168. By contrast, the Court continued, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished . . . ." *Id.* at 169.

academic the Constitution's other grants and limits of federal authority."[208] Thus, "relatedness" and "non-coercion" continue to stand as potential limitations on the spending power. It is important to note, however, that neither was a bar to the conditional spending upheld in *Dole*, despite a reasonable argument to the contrary with respect to each.[209] The Court's language in *Dole* and *New York* suggests that the Court will not forego all scrutiny of conditional spending, but its holding in *Dole* implies that this scrutiny will lead to invalidation, if at all, only in the most extreme cases.[210]

2. *The Permissibility of RFRA-Like Spending Conditions*

Given the breadth of the spending power, it is hardly surprising that this power has been suggested as a means by which Congress might pursue the objective of RFRA.[211] Thus, through conditional spending, Congress might induce state and local governments to honor RFRA-like standards in protecting religious conduct even from general laws and practices. This legislative route, however, is not entirely free from constitutional limitations, and, depending

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208. *Id.* at 167. The Court particularly emphasized the relatedness requirement, stating that spending conditions "must . . . bear some relationship to the purpose of the federal spending." *Id.*

209. In arguing coercion, South Dakota noted Congress's dramatic success in inducing states to raise their drinking ages, but the Court rejected this argument, refusing to let the constitutional question hinge on a conditional grant's "success in achieving the congressional objective." *Dole*, 483 U.S. at 211. Indeed, some of the language in *Dole*, quoted from an earlier decision, implied that the Court might never find a conditional grant to be unconstitutionally coercive: "'[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.'" *Id.* (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 589-90 (1937)).

In concluding that the drinking-age condition was sufficiently related to the highway funding program, the Court rejected an argument to the contrary by Justice O'Connor. *See* Dole, 483 U.S. at 213-14 (O'Connor, J., dissenting) (arguing that "establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose"); *see also id.* at 213-15 (O'Connor, J., dissenting). The Court left open the question of whether the "relatedness" requirement might be satisfied even in the absence of a direct link "to the particular purpose of the expenditure." *Id.* at 208-09 n.3 (majority opinion).

210. *Cf.* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 126 ("The supposed limitations suggested by the *Dole* majority do not offer much promise to limit the scope of Congress's authority."); *see generally id.* at 117-23 (criticizing the Court's treatment of relatedness and non-coercion as potential limitations on the spending power).

211. *See, e.g.*, *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg); *id.* (testimony of Douglas Laycock); *id.* (testimony of Marc D. Stern); *Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen).

upon the precise form of the congressional enactment, there would be a risk of invalidation. In addition, the spending power is confined by legal and practical limitations that might hinder its effectiveness in this context.

To achieve the same coverage as RFRA had attempted,[212] Congress would have to impose a funding condition that would reach state and local laws and practices of all sorts. Thus, Congress might enact legislation stating that no state shall receive any federal funding—or federal funding of a particular sort or particular amount—unless the state, as a matter of its own law, forbids all state and local governmental action that violates RFRA-like standards. Unless states chose to forego the federal funding, they would be forced to enact state laws mirroring the substantive language of RFRA; if all states followed suit, this would achieve the same coverage as RFRA itself. Such a broad congressional condition, however, would certainly test the limits of the spending power.[213] Indeed, if the relatedness limitation means anything, it would preclude this type of condition, which would not be limited to the purposes—however generously defined—of any particular funding program. At the same time, depending on the amount of federal financing that was at stake, the non-coercion limitation might be implicated.[214] In theory, a state could reject any and all federal funding, but then again, as the Court wrote in *Dole*, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[215]

In an attempt to avoid relatedness and non-coercion issues, Congress could adopt more narrowly confined, program-specific conditions. Congress still might choose to cover a wide range of state and local governmental practices. In so doing, Congress might impose its conditions one appropriation at a time, or it might act more generally. Thus, Congress might enact general legislation stating that any state or local government that receives federal funding for a particular "program or activity" must comply with RFRA-like standards in the context of that state or local program. In the past, Congress has used just this form of legislation to induce compliance with antidiscrimination requirements.[216]

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212. *See* 42 U.S.C. § 2000bb-3(a) (1994) (extending RFRA's coverage to "all . . . State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [the enactment of RFRA]").

213. *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Marc D. Stern) (suggesting that this form of spending-power legislation would carry a serious risk of judicial invalidation).

214. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg) ("Certainly, the bill could not say that any state that receives federal assistance in any of its programs is subject to RFRA in all of them.").

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

216. Title VI of the Civil Rights Act of 1964, for example, includes the following

Although this approach might stretch the relatedness limitation, it could be successfully defended on the ground that one of Congress's purposes, in each of its appropriations, is to protect religious practices in accordance with RFRA-like standards.[217] To express the congressional purpose in negative terms, Congress would be stating that it does not want its appropriations to be spent in ways that improperly burden the free exercise of religion.[218] Seen in this light, Congress would simply be "'specif[ying] in some way how the money should be spent'"[219] by each recipient of federal funds.[220] At the same time, this form of spending-power legislation could substantially reduce the potentially coercive pressure for state compliance, because a state could resist the congressional inducement in a particular program without jeopardizing unrelated governmental functions. Thus, for example, if a state wanted to avoid the standards of RFRA in some or all of its correctional institutions or prisoner programs,[221] it might choose to forego federal funding in those contexts.

3. *New Limits on the Spending Power?*

My analysis to this point has assumed that the Supreme Court would evaluate RFRA-like spending conditions in accordance with the basic approach of *Dole*, which accords Congress generous, if not unlimited, constitutional power. Since *Dole* was decided in 1987, however, the Court, in cases like

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provision: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988).

217. *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Marc D. Stern) (endorsing program-specific spending conditions on the ground that the federal government "has a legitimate interest in seeing to it that its funds are used in keeping with [the policy of RFRA]").

218. *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg) (Congress "can ensure that federal funds will not be used to support the imposition of burdens on religious freedom"); *cf.* (testimony of Douglas Laycock) ("Federal aid to one program does not empower Congress to demand compliance with RFRA in other programs. But within a single program, [the relatedness requirement] is easily satisfied. The federal interest is that the intended beneficiaries of federal programs not be excluded because of their religious practice.").

219. *See Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al. as Amicus Curiae).

220. In effect, as Professor Thomas C. Berg has put it, Congress would be "decid[ing] only to purchase state and local services that do not burden religious freedom." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Thomas C. Berg).

221. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Jeffrey Sutton) (describing the problems that RFRA created for state prisons and prison officials).

Lopez,[222] *New York*,[223] *Printz*,[224] and *Boerne*[225] itself, as well as in cases interpreting the Eleventh Amendment,[226] has issued a variety of decisions that suggest a renewed concern for constitutional federalism.[227] In light of this trend, there is at least some chance that the Court might develop new limits on the spending power.[228] An outright repudiation of *Dole*, however, is certainly not likely,[229] and legislation imposing program-by-program conditions, as noted above, would probably pass constitutional muster.

Although the Supreme Court is unlikely to renounce the basic approach of *Dole*, it might nonetheless identify new limits on the spending power. These limits might come in various forms. Two are potentially relevant to the imposition of RFRA-like conditions on a program-by-program basis.

First, the Court might invigorate the requirement of relatedness. If so, this might affect the Court's willingness to accept a broad congressional definition of the scope of a state or local "program or activity" that receives federal

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222. *See* United States v. Lopez, 514 U.S. 549 (1995).

223. *See* New York v. United States, 505 U.S. 144 (1992).

224. *See* Printz v. United States, 117 S. Ct. 2365 (1997).

225. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

226. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996); Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997). The Eleventh Amendment immunizes the states from certain types of federal-court lawsuits. *See* U.S. CONST. amend. XI; 1 ROTUNDA & NOWAK, *supra* note 86, § 2.12.

227. As I have noted earlier, *Boerne*'s invalidation of RFRA was unsurprising, and it was well-grounded in the Supreme Court's prior precedents. *See supra* notes 7-8 and accompanying text; *see generally supra* Part I (discussing *Boerne*'s interpretation and application of Section 5). Even so, the Court refused to expand the reach of Section 5 *beyond* its prior precedents, and it narrowed the scope of one of them—Katzenbach v. Morgan, 384 U.S. 641 (1966)—by categorically rejecting a substantive theory of congressional power. *See supra* notes 38-43 and accompanying text. Standing alone, *Boerne* probably would not signal a significant shift in the judicial protection of federalism. Taken together with the Court's decisions in other areas, however, it is fair to include *Boerne* as part of the trend that I describe in the text.

The Supreme Court's renewed concern for constitutional federalism has given rise to a wealth of scholarly commentary. For a recent symposium containing a collection of important articles, along with citations and references to other relevant literature, see Symposium, *New Frontiers of Federalism*, 13 GA. ST. U. L. REV. 923 (1997).

228. *Cf.* Baker, *supra* note 184, at 1914 ("a reexamination of *Dole* should be next on the *Lopez* majority's agenda").

229. *Dole* is a relatively recent decision, and it was decided by the lopsided vote of seven-to-two. Indeed, the majority opinion was written by Chief Justice Rehnquist and joined by Justice Scalia, two of the current Court's most vigorous defenders of states' rights. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

Most of the Supreme Court's recent decisions limiting the power of Congress have been five-to-four rulings, with the five-justice majority being composed of Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy. *See, e.g.*, *Lopez*, 514 U.S. 549; *Seminole Tribe*, 116 S. Ct. 1114; *Printz*, 117 S. Ct. 2365. Unless Chief Justice Rehnquist and Justice Scalia both were to disclaim the views they expressed in *Dole*, it is doubtful that there would be five votes to overturn that decision.

funding, and that therefore would be subject to the RFRA-like conditions.[230] From the perspective of congressional power, an overly broad understanding of "program or activity" tends to negate the constitutional benefits of program-specificity. In particular, relatedness becomes a more serious issue, because the spending condition is less closely linked to the particular state or local activities that Congress actually is funding.[231] For example, if Congress were to provide funding to support the medical treatment of prisoners with HIV or AIDS, that might not justify the imposition of RFRA-like standards on all of the operations of a state prison that received this funding, much less on all of the operations of the entire prison system of which the prison was a part.[232] And if Congress were to attempt to provide otherwise, by broadly defining "program or activity" to encompass all of the activities of a prison or prison system, the Supreme Court might find the congressional definition to be constitutionally impermissible.[233]

A second potential development would relate to the federal enforcement mechanisms that are available to Congress under the spending power. This potential development requires elaboration.

In *Dole*, the Supreme Court approved what might be considered the classic enforcement mechanism—that is, the federal government simply terminating funding for states that decline to honor the federal condition. Other Supreme Court cases, however, have approved a quite different enforcement scheme: direct private enforcement, under federal law and in federal court, of spending conditions that Congress has imposed on state and local recipients of federal funds.[234] In *Franklin v. Gwinnett County Public Schools*,[235] for

230. *Compare* Grove City College v. Bell, 465 U.S. 555 (1984) (narrowly construing the "program or activity" limitation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1982)) *with* The Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (1988)) (responding to *Grove City* by dramatically broadening the coverage of Title IX and other antidiscrimination provisions).

231. At the same time, non-coercion could also become a more serious issue. *See supra* note 220 and accompanying text.

232. *See generally* John H. Garvey, *The "Program or Activity" Rule in Antidiscrimination Law: A Comment on S. 272, H.R. 700, and S. 431*, 23 HARV. J. ON LEGIS. 445 (1986) (defending a narrow understanding of program-specificity).

233. Recognizing that the scope of operation for RFRA-like spending conditions could affect their constitutionality under a relatedness inquiry, Professor Michael Stokes Paulsen has suggested that Congress could perhaps avoid this problem by stating that the conditions extend "to the maximum extent constitutionally permissible under the spending power." *Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen). As Paulsen concedes, however, this approach could create (and, in my view, probably would create) sufficient ambiguity to render the conditions constitutionally unenforceable. *See id.*; *see also Dole*, 483 U.S. at 207.

234. *See, e.g.*, Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992); Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990); Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987); Maine v. Thiboutot, 448 U.S. 1 (1980); Lau v.

example, a high school student claimed that she had been subjected to intentional gender-based discrimination by a public school teacher, this in violation of federal spending conditions contained in Title IX of the Education Amendments of 1972.[236] The Supreme Court permitted the student, as plaintiff, to seek damages in federal court on the basis of an implied federal right of action.[237] In so doing, the Court rejected the argument that spending-power legislation should not be construed to permit this type of remedy.[238]

Franklin would appear to suggest that Congress has the constitutional power to extract state and local consent to private enforcement, under federal law and in federal court, of RFRA-like spending conditions. If so, then Congress—as long as it made its intentions "unambiguously" clear[239]—could authorize aggrieved religious believers to pursue their claims in this manner, and it could condition a state or local government's receipt of federal funding on its submission to this form of federal jurisdiction.[240] Yet this might be reading the case too broadly. *Franklin* turned not on the question of constitutional power, but rather on congressional intentions and on the propriety of a damages remedy.[241] Further, the Court was addressing intentional and unjustified gender-based discrimination by a state actor, conduct of a sort that clearly violates the Fourteenth Amendment.[242] Utilizing its remedial power under Section 5 of the Fourteenth Amendment, Congress undoubtedly could have barred such discrimination as a matter of unconditional federal regulation, and it could have expressly provided for private enforcement under federal law and in federal court.[243] In *Franklin*, the Supreme Court observed in a footnote that Congress might have relied on Section 5, as well as the Spending Clause, as authority for Title IX; even so, the Court concluded—without elaboration—that a federal-law damages remedy

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Nichols, 414 U.S. 563 (1974).

235. 503 U.S. 60 (1992).

236. *See* 20 U.S.C. § 1681(a) (1988).

237. *See Franklin*, 503 U.S. at 76; *see also* Cannon v. University of Chicago, 441 U.S. 677 (1979).

238. *See Franklin*, 503 U.S. at 74-75.

239. *See* Suter v. Artist M., 503 U.S. 347, 363 (1992).

240. Under this sort of reasoning, it would seem that a waiver of Eleventh Amendment immunity could also be part of the condition, as long as Congress "manifest[ed] a clear intent to condition participation in [the relevant funding programs] on a State's consent to waive its constitutional immunity." *See* Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247 (1985).

241. Likewise, the Court's other private-enforcement cases, *see supra* note 234, have focused largely on issues of statutory interpretation.

242. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

243. *See supra* Part I.B.

was available "irrespective of the constitutional source of Congress' power to enact the statute."[244]

This language from *Franklin* would appear to support private, federal-law, federal-court enforcement of RFRA-like spending conditions. But if the constitutional issue were squarely presented today, and if the Supreme Court were inclined to find new limits on the spending power, the Court might not follow this language from *Franklin*. Instead, the Court might conclude that private enforcement under federal law partakes of direct federal regulation, and that the states' consent to this regulation—through the acceptance of federal funding—is constitutionally ineffective. More specifically, the Court might rule that the spending power, standing alone, cannot justify this type of enforcement scheme; that is, it might rule that such enforcement is contingent upon the presence of another, independently sufficient source of congressional power.[245] In *Franklin*, another source of power in fact was present—Section 5 of the Fourteenth Amendment.[246] In the case of RFRA-

244. *Franklin*, 503 U.S. at 75 n.8.

245. This type of limitation on the spending power would be consistent with the notion that spending conditions are essentially contractual in nature. Thus, as Professor David E. Engdahl has explained, the issue of private enforcement of spending conditions can be considered an issue of contract law—in particular, an issue of third-party enforcement. *See* Engdahl, *supra* note 189, at 93-108. Engdahl argues that so understood, the question "is generally a question controlled by state law," although "state law can be overridden as to spending conditions that promote ends within the scope of an 'enumerated' power [other than the spending power]." *Id.* at 96. As to funding conditions not within the scope of some other congressional power, however, Engdahl maintains that "not even express statutory language can control the third-party enforcement question," which must be left to state law "because constitutionally, there can be no federal law." *Id.* at 97.

Engdahl's argument, as well as the possible limitation on the spending power that I discuss in the text, relate only to the question of private enforcement as a matter of federal law. For a superficially similar—but in fact much broader—proposed limitation on the spending power, see Baker, *supra* note 184, at 1916 (proposing that "the Court presume invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers").

246. Section 5 might also support the protection of individual rights under other spending-power legislation, thereby permitting private, federal-law enforcement on that basis. Title VI of the Civil Rights Act of 1964, for example, prohibits racial discrimination in federally funded programs. *See* 42 U.S.C. § 2000d (1988). It would seem that the application of Title VI to state and local governments would be within Congress's remedial power under Section 5; as a result, private, federal-law enforcement would not be problematic under the approach that I discuss in the text. Although perhaps more debatably, the Equal Access Act of 1984, which applies to "public secondary school[s] which receive[] Federal financial assistance," might likewise be defended as remedial legislation under Section 5—legislation designed to enforce free speech rights under the First Amendment. *See* 20 U.S.C. §§ 4071-4074 (1988); *cf.* Board of Educ. v. Mergens, 496 U.S. 226, 235 (1990) (noting that the Equal Access Act "extended the reasoning" of the Supreme Court's First Amendment decision in Widmar v. Vincent, 454 U.S. 263 (1981)); *Mergens*, 496 U.S. at 247 (reserving the question of whether the First Amendment, standing alone, would have required the same result as that required by the Act); *id.* at 262 (Marshall,

like conditions, by contrast, it is not at all clear that any other source of power would be constitutionally adequate.[247]

Indirect support for this potential limitation on the enforcement of spending conditions can be found in *New York v. United States*,[248] which indicated that the agreement or consent of the states is not always sufficient to justify federal regulatory programs. In *New York*, the Court declared that it would not permit the states to consent to direct federal regulation that would otherwise exceed the constitutional power of Congress and infringe the sovereignty of the states.[249] Such consent could not be given effect, the Court reasoned, without undermining the Constitution's concern for the political accountability of federal and state officials alike.[250] Thus, the Court invalidated direct federal regulation as applied to the State of New York even though New York public officials had themselves supported the enactment of the congressional legislation, which "embodie[d] a bargain . . ., a compromise to which New York was a willing participant and from which New York ha[d] reaped much benefit."[251] Noting that "the Constitution divides authority between federal and state governments for the protection of individuals,"[252] the Court concluded that "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the

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J., concurring) (noting that to a large degree, the Act "simply codifies in statute what is already constitutionally mandated"). If the Equal Access Act indeed can be defended on the basis of Section 5, then private, federal-law enforcement would be justified on that basis.

Even if another source of congressional power is not present, it may be that private, federal-law enforcement is more readily justified when a plaintiff claims that he or she is the intended *financial* beneficiary of a congressional spending program that is being administered by state or local governmental officials. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), for example, the Supreme Court ruled that 42 U.S.C. § 1983 (1976) authorized AFDC recipients to pursue a federal-law claim against the State of Maine for depriving them of benefits to which they claimed they were entitled under spending conditions contained in the Social Security Act, 42 U.S.C. §§ 601 et seq. (1976). *See also* Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) (approving a federal claim by health care providers challenging the adequacy of a state's reimbursement rates under the Medicaid program); *cf.* Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987) (approving a federal claim by tenants to rectify alleged overcharges by a federally funded public housing authority).

For an argument that *Thiboutot* and the cases following it were wrongly decided, and that their current precedential value is dubious, see Engdahl, *supra* note 189, at 101-08; *cf.* Blessing v. Freestone, 117 S. Ct. 1353, 1364 (1997) (Scalia, J., concurring) (questioning the Court's decisions in *Wilder* and *Wright* and suggesting that "[a]llowing third-party beneficiaries of commitments to the Federal Government to sue" may be beyond the legitimate scope of 42 U.S.C. § 1983 (1988)).

247. *See supra* Part II.B.

248. 505 U.S. 144 (1992).

249. *See id.* at 180-83.

250. *See id.*

251. *Id.* at 181; *see also id.* at 189-200 (White, J., concurring in part and dissenting in part).

252. *Id.* at 181.

'consent' of state officials."[253] As a result, the Court ruled that any such consent would be constitutionally ineffectual, because "State officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[254]

Whether the Supreme Court might develop limitations along either of the two lines that I have suggested—invigorating the relatedness requirement or precluding direct private enforcement under federal law—is a matter of speculation. On the one hand, the Court might be reluctant to adopt these limitations, particularly the second one, which would disturb the existing legal landscape to a substantial degree. On the other hand, the Court has demonstrated a strong desire to protect constitutional federalism, and it has stated that the spending power should not be permitted to "render academic the Constitution's other grants and limits of federal authority."[255] Any prediction is hazardous, but I believe there is a distinct possibility that the Court might in fact adopt either or both of the limitations that I have discussed, especially in the context of legislation that the Court might regard as a congressional attempt to circumvent its decision in *Boerne*.[256] As a result, the most cautious form of spending-power legislation would adopt a relatively narrow definition of "program or activity," and it would not authorize private enforcement of the RFRA-like conditions as a matter of federal law.

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253. *Id.* at 182. *See id.* ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.").

254. *New York*, 505 U.S. at 182; *cf. id.* at 183 ("Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.").

The Supreme Court might extend this reasoning to a state's consent to federal regulation in the form of private enforcement of spending conditions, but then again, it might not. Among other possible distinctions, there is a notable difference in the duration of the state's consent. In particular, the state's consent in *New York*, had it been effective, would have been permanent or indefinite in duration—that is, it would have extended for the life of the federal legislation, regardless of the state's own change of heart. By contrast, a state can terminate its consent to spending conditions simply by refusing to accept additional federal funding. For future funding periods, the state would not be subject to the conditions at all, and therefore would not be subject to any enforcement schemes that the state might otherwise find objectionable.

255. *Id.* at 167.

256. *Cf.* Bailey v. Drexel Furniture Co. [The Child-Labor Tax Case], 259 U.S. 20 (1922) (invalidating congressional legislation, grounded on the taxing power, that had been enacted in response to Hammer v. Dagenhart [The Child Labor Case], 247 U.S. 251 (1918), which had previously invalidated very similar legislation grounded on the Commerce Clause).

In his contribution to this symposium, Professor Thomas C. Berg provides additional commentary and a different perspective on the two potential limitations that I have identified, suggesting that, in his view, the Court would be unlikely to adopt either of them. *See* Berg, *supra* note 76, at Part III.B.

4. *Conventional Spending-Power Enforcement Mechanisms and their Potential Effectiveness*

Rather than attempt to authorize private enforcement as a matter of federal law, Congress might adopt other, more conventional enforcement provisions. As the Supreme Court has observed, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State."[257] Thus, Congress could indirectly enforce a state's RFRA-like obligations by authorizing federal agencies to determine if a state was in violation, and, if so, to cut off federal funding for the noncompliant program.[258] Depending upon the terms of the congressional legislation, moreover, this indirect enforcement of a state's RFRA-like obligations could be at the behest of aggrieved religious believers, in the context of particular disputes.[259] More generally, this indirect federal enforcement might be quite effective—although this would depend, of course, on the resources, vigilance, and efficiency of the federal agencies involved. Enforcement might also be influenced by political considerations; in particular, it might be politically difficult for agencies to in fact withhold funding under popular federal programs.[260]

State-law enforcement would be another possibility, and here the Constitution certainly would not preclude direct enforcement in favor of aggrieved religious believers. Although acting under federal encouragement, states assuming RFRA-like obligations would be doing so as a matter of state policy, and their obligations therefore might be enforceable as a matter of state

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257. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

258. Statutory models for this method of enforcement are readily available. *See, e.g.*, 42 U.S.C. §§ 2000d-1 to 2000d-2 (1988) (Title VI of the Civil Rights Act of 1964); 20 U.S.C. §§ 1682-1683 (1988) (Title IX of the Education Amendments of 1972).

259. *Cf.* Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947) (upholding a federal enforcement scheme through which the United States Civil Service Commission had directed a state government to suspend a particular employee who had not complied with the federal policy embodied in a spending condition, or, in lieu thereof, to face a withholding of federal funds).

260. To mitigate the potential problem of nonenforcement by federal agencies, Congress could authorize private suits in federal court, not against state or local governments or their officials, but against the federal agencies themselves. Thus, aggrieved individuals could be authorized to obtain federal-court injunctive relief against recalcitrant federal agencies, requiring them to honor their statutory obligations by investigating alleged violations of the RFRA-like conditions and by cutting off funding to state and local programs that are found to be noncompliant.

Even in the absence of specific congressional authorization, this form of injunctive relief might be available under current law, at least in extreme situations. *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

law.[261] Thus, aggrieved religious believers could perhaps pursue their claims in state tribunals, whether administrative or judicial. Some state tribunals might be sympathetic to these claims, but others might not. After all, a state might have agreed to the spending condition only reluctantly, and—whatever the United States Supreme Court might think—the state might regard the condition as an improper intrusion on the state's prerogatives. As a result, a state tribunal might interpret the state's RFRA-like obligations narrowly, thereby frustrating the purpose of Congress.[262] At the same time, however, stingy interpretations of a state's obligations could trigger federal-agency scrutiny, and potentially the loss of federal funding.

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Although not free from constitutional scrutiny, the spending power provides Congress with a firm constitutional foundation for a statutory response to *Boerne*,[263] a response that could induce the states to protect religious conduct even from laws of general application. To be sure, the spending power is not a perfect source of authority for the congressional imposition of RFRA-like standards. Precisely because the congressional legislation would impose those standards only through indirect means, its scope and effectiveness might be limited. As I have explained, Congress—to avoid the risk of constitutional invalidation—would be well-advised to impose the standards only on a cautiously defined, program-by-program basis. Not all state and local programs receive federal funding, however, and some states might specifically refuse federal funding in particular contexts in order to avoid the assumption of RFRA-like duties.[264] Even so, many state and local programs do receive federal funding, and it is likely that most of them would accept the RFRA-like duties in order to retain the funding that they receive. Enforcement would still be a question. The most effective type of enforcement probably would be private enforcement under federal law, but there is at least some risk that the Supreme Court might find that method of enforcement to be

261. *See supra* note 189 and accompanying text.

262. It also is possible that some state courts, relying upon anti-establishment provisions in their own constitutions, might find that their states are constitutionally forbidden from honoring RFRA-like conditions, or, perhaps, that they are forbidden to do so in at least some circumstances. If so, these states would face the loss of federal funding, but Congress's RFRA-like objective would remain unfulfilled, at least in the absence of state constitutional amendments. *See generally* Van Alstyne, *supra* note 189 (arguing that state and local governments cannot accept federal funds if those funds come with conditions that would violate state constitutional law).

263. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

264. *See supra* note 221 and accompanying text.

constitutionally impermissible. The RFRA-like obligations could be enforced indirectly by federal funding authorities, however, and more direct, private enforcement might be possible as a matter of state law.[265]

III. CONCLUSION

In response to *City of Boerne v. Flores*,[266] Congress may wish to enact new legislation that is designed, as was RFRA, to protect religious conduct from state and local governmental infringement. If so, it is important that the new legislation be able to survive judicial review; the cause of religious freedom certainly would not be served by the enactment of another statute that the Supreme Court would find unconstitutional.[267] Any legislation that Congress adopts therefore should be grounded on a solid constitutional foundation, and it should be crafted in a manner that limits the risk of judicial nullification.[268] This is not the time for Congress to push the limits of its constitutional power, especially when Congress, without pushing those limits, can respond to *Boerne* in a productive way—even if not as fully or as categorically as Congress might prefer.[269]

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265. As I suggest in the text, the most cautious form of spending-power legislation would adopt a relatively narrow definition of "program or activity," and it would not authorize private enforcement of the RFRA-like conditions as a matter of federal law. Statutory limitations of this sort, however, could reduce the scope and effectiveness of the congressional legislation, and, as a result, Congress might be reluctant to approve them.

If Congress were to adopt a less cautious form of legislation, one that included a broad definition of "program or activity" or one that authorized private, federal-law enforcement, it would certainly be prudent to include "severability" or "fall-back" provisions in the legislation—provisions designed to take effect in the event that any portion of the legislation were declared unconstitutional. Indeed, a severability provision might be advisable for any legislation that Congress might adopt in response to *Boerne*, whether under the spending power or otherwise.

266. 117 S. Ct. 2157 (1997).

267. As Marc D. Stern observed in congressional testimony in the aftermath of *Boerne*, "A rush to legislate with legislation that has not been thoroughly considered is no boon to religious liberty. Nor is it helpful," Stern continued, "to pass legislation which will inevitably be struck down by the Supreme Court in the name of federalism or separation of powers." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Marc D. Stern).

268. As Professor Ira C. Lupu has noted, the congressional consideration and adoption of RFRA were plagued by inadequate constitutional planning and by insufficient constitutional debate and deliberation. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, pt. I (1998). There is reason to believe that Congress may do better in its consideration of post-*Boerne* legislation. Indeed, there already have been committee hearings exploring—in some detail—the sources, nature, and limits of Congress's power to protect religious freedom from state and local infringement. *See supra* note 76.

269. For a dramatically contrary view, see *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Charles W. Colson) (arguing that the Supreme Court "is engaged in a high-stakes war with Congress"; that "Congress cannot duck this fight"; and

Due to the likelihood of invalidation, Congress should not enact legislation that does little more than reenact the terms of RFRA itself; in particular, Congress should not enact legislation that attempts to directly protect religious conduct, under a "compelling interest" standard, from state and local laws and practices of all sorts, no matter how general and nondiscriminatory those laws and practices might be. *Boerne* makes clear, of course, that Section 5 of the Fourteenth Amendment does not authorize such legislation.[270] Neither, it appears, does the Commerce Clause.[271] Congress's power to implement treaties presents a somewhat closer question, but anything approaching a verbatim reenactment of RFRA would severely test the limits of this congressional power, and such a statute probably would be invalidated.[272]

If Congress wishes to directly regulate state and local governmental action without creating a serious risk of invalidation, the congressional legislation would have to be more limited than RFRA. Assuming it could be supported by an adequate legislative record, for example, Section 5 probably would permit Congress to make unlawful, or presumptively unlawful, laws or governmental practices that have a substantially discriminatory *effect* on religion in situations suggesting a serious risk or likelihood of discriminatory purpose.[273] Congress's power to implement treaties, moreover, probably would permit Congress to provide at least limited protection for religious conduct—protection along the lines described in Article 18 of the CCPR—even from laws and practices that are entirely nondiscriminatory in nature.[274] Section 5 legislation, however, would not advance the basic objective of RFRA, which was to protect religious conduct from nondiscriminatory governmental action. Legislation implementing the CCPR would advance that objective to some degree, but it would extend an international obligation into the domestic-law realm of state and local governments; for political and prudential reasons, Congress is unlikely to take this step.[275]

The most promising statutory response to *Boerne* would not directly regulate the states, but instead would work indirectly. Thus, under the

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that, in responding to *Boerne*, Congress "must be as bold as the Court has been"). For a suggestion that Congress should not "push the envelope" as of yet, but that "further and more aggressive corrective measures" might be appropriate if the Supreme Court invalidates new congressional legislation, see *Senate Committee Hearing on Post-Boerne Legislation*, *supra* note 76 (testimony of Michael Stokes Paulsen).

270. *See supra* Part I.
271. *See supra* Part II.B.1.
272. *See supra* Part II.B.2.
273. *See supra* Part II.A.
274. *See supra* note 173 and accompanying text.
275. *See supra* notes 175-177 and accompanying text.

Spending Clause, Congress could impose spending conditions to induce the states to protect religious conduct even from generally applicable laws and practices. If carefully crafted, such legislation would be very likely to withstand judicial review. Even here, however, Congress should resist the temptation to extend the limits of its power. Overly broad legislation, or legislation that seemed but a subterfuge for direct regulation, would trigger serious judicial scrutiny and the risk of invalidation. As a result, any spending-power legislation should be program-specific, and it probably should not attempt to authorize private enforcement as a matter of federal law.[276]

One could argue that Congress should do nothing in response to *Boerne*;[277] that it should simply accept, at least for now, the judgment of the Supreme Court—not only in *Boerne*, but also in *Employment Division v. Smith*.[278] Even prior to its invalidation in *Boerne*, RFRA may not have been particularly effective,[279] and it is not obvious that new legislation will be any more successful. Congressional inaction, moreover, would not make *Smith* and *Boerne* the last word on religious freedom at the state and local level. States remain free (subject to the Establishment Clause) to protect religious freedom to a greater degree than federal law requires, and some states, as a matter of legislation or state constitutional law, will provide such additional protection.[280] Likewise, the Supreme Court itself may eventually adopt a more generous interpretation of the First Amendment's Free Exercise Clause.[281] At this stage,

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276. *See supra* Part II.C.

277. *See* Lupu, *supra* note 268, at pts. III-IV (arguing that religious freedom resists codification, and that the courts should be left free to address and develop the constitutional contours of this freedom through the continuing process of case-by-case, judicial decisionmaking).

278. 494 U.S. 872 (1990).

279. For a well-documented argument that RFRA's accomplishments were limited, see Lupu, *supra* note 268, at Part II. *But cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Mark E. Chopko) (claiming that "in fact, under the Religious Freedom Restoration Act, religion did far better than many of us thought it would," in part because "RFRA served as an important tool in negotiation, bargaining, and reaching compromise").

280. *See House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Jeffrey Sutton) (describing post-*Boerne* efforts to develop state-law, statutory counterparts to RFRA); *id.* (testimony of Rev. Oliver Thomas) (describing state court decisions interpreting state constitutional law to provide greater protection than that required by federal law); *see also* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275.

281. *Compare House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Rev. Oliver Thomas) (suggesting that the Supreme Court might discard the approach of *Smith* in as little as three to five years), *with id.* (testimony of Thomas C. Berg) (noting that *Boerne* solidifies the precedent of *Smith*, making it "less likely than ever" that the Court will soon overturn it); *id.* (testimony of Mark E. Chopko) ("[T]here may not be sufficient votes on the Court to revisit *Smith* anytime soon").

the law might profit from new thinking—theoretical, doctrinal, and practical—on the issue of religion-based exemptions from general laws; new congressional legislation, by contrast, could have the effect of entrenching old approaches and discouraging the investigation and development of new ones.

Yet congressional inaction, in my view, would not be the best response to *Boerne*. Congress has a role to play in the struggle to protect religious freedom. Indeed, as I have argued elsewhere, Congress has a role to play in determining the meaning of the Constitution itself, including the extent to which it should be read to protect religious freedom from state and local infringement.[282] Under our system of government, Congress cannot and should not ignore the roles and functions of other constitutional actors, notably the Supreme Court and the states. That was the mistake of RFRA, and Congress ought not repeat it. But Congress properly can attempt to *influence* those other actors in a manner that not only respects the limits of congressional power, but that also appreciates the Supreme Court's constitutional role, as well as the contributions that the states might make in defining the scope of religious freedom. The spending power may be ideally suited to this purpose.

Under the spending power, Congress probably has the constitutional authority to impose program-by-program conditions tracking the substantive language of RFRA. Such legislation would give the states at least a degree of choice, and it would not intrude on their sovereignty in the manner of direct regulation. Unlike RFRA itself, moreover, such legislation would challenge the Supreme Court only by indirection. Congress would once again be stating its disagreement with *Smith*, but it would not be directly rebuking the Supreme Court or repudiating altogether the Court's understanding of the proper relationship between religious freedom and constitutional federalism. Although it would proceed by indirection and might be hampered by enforcement difficulties, this form of legislation could induce the states to give RFRA-like protection to religious believers. It might also prompt the Supreme Court to reconsider its own position, as expressed in *Smith*.

Although this form of legislation probably would be constitutional, and although it might well advance the cause of religious freedom, Congress also has other spending-power options. For example, it might refrain from extending its spending conditions to all state and local programs that receive federal funding; instead, it might choose to respect the rights of states to make their own decisions in certain contexts, such as prisons, in a manner entirely free from federal inducement.[283] In framing its spending conditions, moreover,

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282. *See* Conkle, *supra* note 8, at 79-90.

283. *Cf.* Lupu, *supra* note 268, at pt. III (arguing that any post-*Boerne* legislation should at least make prison cases "subject to an explicitly different standard than non-prison cases, so that the results in the latter are not dragged down by the interpretations in the former").

Congress might choose not to follow the language of RFRA, complete with its "compelling interest" formula. It might devise other, more flexible, standards for the recognition of religion-based exemptions, permitting the states, within the bounds of these standards, to develop their own concrete formulations.[284] Indeed, Congress could simply require the states themselves, with respect to every program receiving federal funds, to seriously consider—perhaps under specified procedures—the issue of religion-based exemptions, and to formally adopt their own policies.[285] A state could deliberate within the context of each program, or it could consider the issue as a matter of general legislative policy, with the resulting legislation being as general or as program-specific as the state might choose it to be.

These sorts of congressional choices, of course, might limit the scope or force of Congress's substantive policymaking, but they would also express a certain respect for the states, as well as a certain degree of congressional humility. The problem of religion-based exemptions is difficult, complex, and controversial;[286] Congress may not have the only acceptable answer, or even

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284. For example, the spending condition might provide that any request for a religion-based exemption must be granted unless there is "good and sufficient cause" for denying the request, with the states themselves being left to determine the meaning of "good and sufficient cause."

285. In *FERC v. Mississippi*, 456 U.S. 742 (1982), the Supreme Court rejected a state-sovereignty attack on federal legislation, grounded on the Commerce Clause, that had directly required state utility regulatory commissions to "consider" certain federal standards and, in so doing, to follow specified procedural requirements. *See id.* at 746-50, 761-71. It is an open question whether *FERC* survives *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997). *Cf. New York*, 505 U.S. at 161-62 (attempting to distinguish *FERC*); *Printz*, 117 S. Ct. at 2380, 2381 & n.14 (same). But even if *FERC* is no longer controlling with respect to direct federal mandates, there is little doubt that Congress, acting under the Spending Clause, can impose a "consideration" requirement as a condition to the receipt of federal funding.

286. The rule of *Employment Division v. Smith*, 494 U.S. 872 (1990), has been condemned not only by Congress, but also by numerous constitutional scholars. *See, e.g.*, Laycock, *supra* note 96; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7; Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991). But there is contrary scholarly opinion as well, supporting the basic approach of *Smith*, if not the Court's rationale. *See, e.g.*, William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

Even from a religious standpoint, it is not always clear that religion-based exemptions are an unmitigated good. *See, e.g.*, Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, pt. II (1998) (arguing that a generalized, RFRA-like regime of religion-based exemptions paints religion as a weak force, in need of special judicial protection, and that such a regime might thereby contribute to the marginalization of religion in American society); Robin W. Lovin, *Religious Freedom, 1997: Churches and Consensus Building*, CHRISTIAN CENTURY, Aug. 13-20, 1997, at 716, 717 (suggesting that the assertion of claims for religion-based exemptions, in certain contexts, can tend to reduce religious claims about the human good to the status of group preferences); Mark Tushnet, *The Rhetoric of Free*

the best one. In the contemporary United States, moreover, failures to protect religious freedom are more a result of inattention than hostility.[287] As a result, inducing the states to specifically address this problem could move the law in a very healthy direction.[288] And if the states did not respond in a suitable fashion, of course, there would always be room for additional congressional legislation.

Used in a cautious but creative way, the spending power would permit Congress to encourage the states not only to protect religious conduct from general laws, but also to define and implement that protection in new and potentially productive ways. At the same time, Congress could signal its continuing dissatisfaction with the legal regime of *Smith*, thereby prodding the Supreme Court to reconsider that decision. This course of action might not achieve all of its intended results, but it would push the law in the right direction. And, at least for now, that may be all that Congress can or should attempt to do.

Exercise Discourse, 1993 BYU L. REV. 117, 136, 138 (arguing that "pre-*Smith* law put religious believers in the position of supplicants" and that it "instituted a form of idolatry in its acquiescence to the judiciary as an institution that can authoritatively determine when religious conscience ought, in the worldly domain, yield to government demand").

For a discussion and critique of various possible justifications for religion-based exemptions, see Frederick Mark Gedicks, *An Unfirm Foundation: Regrettable Justifications for Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, pts. II-III (1998).

287. As Mark E. Chopko has observed, "burdens can be created for religious practitioners and on religious practices in myriad unintended ways." *House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Mark E. Chopko). And refusals to accommodate the burdened religious believers, Chopko explains, are often a product not of hostility, but of misunderstanding—of a failure to appreciate the adverse impact of the laws or regulations in question. *See id.*

288. This notion of state-by-state decisionmaking, of course, would not be attractive to those who dislike the prospect, even in the short-term, of a diversity of solutions to the issue of religion-based exemptions. *Cf. House Committee Hearing on Post-Boerne Legislation*, *supra* note 7 (testimony of Mark E. Chopko) (expressing concern about a "hodgepodge" of state-law approaches that would create "uneven protection for religion across the country").