1998

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The Long Road Towards Restoration of Religious Freedom: Congressional Options in Light of City of Boerne v. Flores

BY J. JEFFREY PATTERSON*

In Washington, D.C., a battle has been raging between the U.S. Congress and the Supreme Court over the scope of our religious freedoms. The Supreme Court fired the first shot in 1990 with its decision in Employment Division, Department of Human Resources v. Smith,¹ holding that the Free Exercise Clause does not exempt religious believers from compliance with generally applicable laws that are inconsistent with their beliefs.² In 1993, Congress struck back with the Religious Freedom Restoration Act ("RFRA"),³ which mandated that federal and state courts apply the strictest level of scrutiny whenever government action substantially burdens religious practice. In June of 1997, the Supreme Court retaliated with the case of City of Boerne v. Flores,⁴ which not only reaffirmed Smith but also struck down RFRA as an unconstitutional exercise of congressional power.

Congress has reacted quickly to the Supreme Court’s decision in Flores. The Senate Judiciary Committee began hearings in October 1997 to determine how Congress might react to the Court’s decision.⁵ Judiciary Committee Chairman Orrin Hatch declared, "The City of Boerne decision

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² See id. at 878–79.
⁵ See Congress’ Constitutional Role in Protecting Religious Liberty: Hearing Before the Comm. on the Judiciary, United States Senate, 105th Cong. (1997) [hereinafter Hearing].

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was, to say the least, a deep disappointment to us in Congress, and to all Americans who care about religious liberty."  

Numerous law scholars testified to the Senate Judiciary Committee about the possibilities for "appropriate Federal legislation" in response to the voiding of RFRA. The intent of Congress to restrict its action to the legislative level was clear, and Senator Richard Durbin admitted, "I have to say that I am very loathe to turn to a constitutional amendment to solve our ills. It unfortunately has become a fashionable thing on Capitol Hill and we now have an avalanche of constitutional amendments." However, Professor Michael Stokes Paulsen warned the Committee, "In my view, the best way to restore the protections of RFRA is by a constitutional amendment. . . . It is, in my view, the only absolutely certain way to reenact the substance of RFRA."  

This Note concentrates on the various problems Congress will face in attempting to revive the substance of RFRA. Part I contains a brief summary of RFRA itself, the circumstances that led to its enactment, and the reaction to the new statute. Part II summarizes the Court's opinion in the recently decided Flores case and briefly examines the public reaction to the decision. This Note then considers in Part III the propriety and potential effectiveness of reviving the protections of RFRA through legislative action. Finally, Part IV proposes that an amendment to the Constitution reenacting RFRA would be an appropriate and effective manner of protecting the American people from state intrusion into their religious practices.  

I. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993  

The Religious Freedom Restoration Act became one of the most popular bills to pass through Washington in recent memory. Consequ-
quently, it sped through Congress without a single objection in the House and was approved by a vote of ninety-seven to three in the Senate.\textsuperscript{16} The ACLU and the Southern Baptist Convention, strange bedfellows indeed, were among the coalitions that lined up to support RFRA.\textsuperscript{17} When President Clinton signed the Act, he commented on the incredibly broad base of support it generated by declaring, "'The power of God is such that even in the legislative process miracles can happen.'"\textsuperscript{18}

RFRA was enacted in response to the Supreme Court's 1990 decision in Employment Division, Department of Human Resources v. Smith.\textsuperscript{19} Smith involved the case of two substance abuse counselors who had been fired for ingesting peyote in a sacramental Native American ceremony,\textsuperscript{20} the use of which was banned by Oregon law.\textsuperscript{21} They were denied unemployment compensation because of another state law which disallows unemployment benefits to those discharged for work-related "misconduct."\textsuperscript{22} The respondents claimed that the Court's decisions in Sherbert v. Verner\textsuperscript{23} and Wisconsin v. Yoder\textsuperscript{24} made clear that government action must be justified by a "compelling state interest"\textsuperscript{25} to result in a "substantial infringement"\textsuperscript{26} of an individual's free exercise of religion.\textsuperscript{27} The Smith Court, in a majority opinion by Justice Scalia, held that the religious exemptions doctrine was inapplicable to "an across-the-board criminal prohibition on a particular

\textsuperscript{16} See id.

\textsuperscript{17} See id.

\textsuperscript{18} Id.


\textsuperscript{20} See id. at 874.


\textsuperscript{22} OR. REV. STAT. § 657.176(2)(a).

\textsuperscript{23} Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a state could not deny unemployment benefits to an individual who was fired for refusing to work on Saturday for religious reasons).

\textsuperscript{24} Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating a mandatory school attendance law as applied to Amish parents who refused for religious reasons to send their children to school).

\textsuperscript{25} Sherbert, 374 U.S. at 406.

\textsuperscript{26} Id.

\textsuperscript{27} See Smith, 494 U.S. at 882.
form of conduct," and that Oregon did not need to provide a compelling justification for the burden it placed on the Native American church. In so doing, the Court declined to apply the balancing test it first developed in Sherbert, and while Smith did not overrule Sherbert or Yoder, the decision essentially limited the holdings of those two cases to their facts.

Congress was clearly taking on the Smith decision through its enactment of RFRA. Congress did not even attempt to veil its intent to directly overrule the case, as the short list of findings included the following:

(4) [I]n Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) 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.

RFRA’s purposes were:

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

RFRA’s strict scrutiny test provided that any substantial government burden on religious practices would only be justified if the imposition of the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental

\[82 Id. at 884.\]

\[83 See id. at 885 (“To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’ . . . contradicts both constitutional tradition and common sense.”).\]


\[85 Id. § 2000bb(b).\]

\[86 Id. § 2000bb-1(b)(1).\]
interest. As opposed to the law of Smith, which allowed substantial burdening of religious practices so long as the law was neutral and generally applicable, RFRA set an exacting standard for governments to meet to prove they have not violated the Free Exercise Clause.

RFRA also guaranteed that its effects would be felt at every level of government. Congress defined “government” to mean “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State.” The coverage was expanded even further: "This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." RFRA’s “sweeping coverage” sent a congressional mandate to employees at every level of government, ordering them to keep a close eye on how their actions impacted religious practices.

As opposed to public reaction to the new law, scholarly review tended to be negative. Well before the issue reached the Supreme Court, numerous legal scholars proposed that Congress lacked the power to enact RFRA and threw its constitutionality into question. Treatment of RFRA in the federal courts centered mostly on the applications of RFRA and not the constitutional validity of the Act. A large proportion of the cases filed under RFRA were brought by prisoners. The courts, for the most part, tended to hold that maintaining order and security

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33 Id. § 2000bb-1(b)
34 See Smith, 494 U.S. at 79-82.
36 Id. § 2000bb-3(a).
38 See id. at 2170.
40 See Hamilton, supra note 39, at 358 n.3.
in the prison constituted a compelling state interest under the statute and thus denied relief to the inmates.\textsuperscript{41} The requirement of a compelling state interest also produced challenges to many other types of state action, including loyalty oaths,\textsuperscript{42} takings of land,\textsuperscript{43} and zoning laws.\textsuperscript{44} The constitutionality of RFRA was an issue that many courts neglected to take into serious consideration. The United States District Court for the District of Hawaii confronted the issue, but showed a great deal of deference to Congress in holding that Supreme Court precedent supported allowing Congress to limit the Court's constitutional doctrine in order to expand a right guaranteed by the Fourteenth Amendment.\textsuperscript{45} The issue of whether or not RFRA was truly constitutional did not capture the nation's attention, however, until a little church in west Texas decided to appeal a zoning decision all the way to the Supreme Court of the United States.\textsuperscript{46}

\textsuperscript{41} See Phipps v. Parker, 879 F. Supp. 734 (W.D. Ky. 1995) (finding that a prison haircut policy furthers compelling state interests including security, easy identification, cleanliness, and prevention of escape); Best v. Kelly, 879 F. Supp. 305 (W.D.N.Y. 1995) (holding that a compelling state interest in prison security justifies denial of a disruptive inmate's right to attend religious services); Diaz v. Collins, 872 F. Supp. 353 (E.D. Tex. 1994) (upholding the denial of an inmate's access to religious objects, including a shell, sacred stones, pipes, and drums, because prison security is a compelling state interest and because religious practice was not substantially burdened), \textit{aff'd}, 114 F.3d 69 (5th Cir. 1997). But see Luckette v. Lewis, 883 F. Supp. 471 (D. Ariz. 1995) (deciding that a denial of an inmate's right to follow religious practice requiring Kosher diet, long hair, headdress, and a vow of poverty must be struck down under RFRA as it is unrelated to any compelling state interest, including security).

\textsuperscript{42} See Bessard v. California Community Colleges, 867 F. Supp. 1454 (E.D. Cal. 1994) (holding that requiring employees to take loyalty oaths to the state is not the least restrictive means of promoting a state interest where the employee is a Jehovah's Witness and may swear no allegiance to any entity other than God).

\textsuperscript{43} See Thiry v. Carlson, 887 F. Supp. 1407 (D. Kan. 1995) (holding that a couple did not prove the substantial burden necessary to state a claim under RFRA where the state sought to take land upon which their stillborn child was buried), \textit{aff'd}, 78 F.3d 141 (10th Cir.), \textit{cert. denied}, 117 S. Ct. 78 (1996).

\textsuperscript{44} See Western Presbyterian Church v. Board of Zoning Adjustment, 849 F. Supp. 77 (D.D.C. 1994) (holding that a church was entitled to a preliminary injunction allowing it to continue feeding the homeless in violation of zoning ordinances because the law interfered with an important social welfare and religious program).


\textsuperscript{46} See City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
II. *City of Boerne v. Flores* and the Death of RFRA

*City of Boerne v. Flores*\(^47\) proved to be one of the most volatile decisions of the Supreme Court’s 1997 term. Unlike many controversial decisions of the Rehnquist Court, however, a majority of the Court subscribed to one opinion. Justice Anthony Kennedy wrote the opinion for the majority, joined in its entirety by Chief Justice Rehnquist, Justice Stevens, Justice Thomas, and Justice Ginsburg.\(^48\) Justice Scalia also joined the majority opinion except for one section outlining the legislative history of the Fourteenth Amendment.\(^49\) Concurring opinions were written by Justice Stevens\(^50\) and by Justice Scalia, joined by Stevens.\(^51\)

The case arose when a church in the town of Boerne, Texas, applied for a building permit to enlarge its structure.\(^52\) The church building as it existed was too small to accommodate all of the people who wished to worship there.\(^53\) The zoning authorities denied the permit, citing an ordinance governing historic preservation.\(^54\) The Archbishop of the Diocese brought suit under RFRA seeking to invalidate the ordinance on the grounds that the town could not advance a compelling justification for denying the permit.\(^55\) The United States District Court for the Western District of Texas declared RFRA unconstitutional in ruling for the town,\(^56\) but the United States Court of Appeals for the Fifth Circuit reversed.\(^57\)

The majority’s main holding in *Flores* was that RFRA exceeded the power of Congress under the Constitution and was thus void.\(^58\) The holding established that Congress has no substantive, plenary powers under the


\(^{48}\) See id. at 2159.

\(^{49}\) See id.

\(^{50}\) See id. at 2172 (Stevens, J., concurring).

\(^{51}\) See id. (Scalia, J., concurring).

\(^{52}\) See id. at 2160.

\(^{53}\) See id.

\(^{54}\) See id.

\(^{55}\) See id. at 2160-62.


\(^{57}\) See Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), rev’d, 117 S. Ct. 2157 (1997).

\(^{58}\) See Flores, 117 S. Ct. at 2172 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").
Enforcement Clause of the Fourteenth Amendment. Under the Court's view, the police powers belong strictly to the states, and the Enforcement Clause is limited to the purposes of curing violations of the amendment as the Court has defined it.

Before reaching the enforcement issue, the majority tackled its controversial holding in Smith, which gave rise to RFRA in the first place. The Court gave a brief recitation of the facts and background of Smith before reaffirming its holding that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."

Having established that the Smith rationale was still the yardstick for the Free Exercise Clause, the Court moved on to the question of congressional power to change that standard. Justice Kennedy first cited McCulloch v. Maryland and Marbury v. Madison as the early Supreme Court cases that were instrumental to our federalist system of government. The powers of the federal government are enumerated, and not limitless, under McCulloch, and Marbury stands for the principle that Congress's power does not extend to the ability to determine constitutionality.

After laying the foundation for his opinion, Justice Kennedy addressed whether Congress exceeded its Fourteenth Amendment enforcement power "in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States." Conceding that the Free Exercise Clause is indeed within the scope of the congressional enforcement power, the Court examined its earlier holdings regarding the scope of that power. The argument for the respondent was that RFRA simply protected the free exercise liberty of religious minorities beyond

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60 Flores, 117 S. Ct. at 2163-66.
61 Id. at 2161.
62 See id. at 2160-61.
63 See id. at 2162.
65 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
66 See Flores, 117 S. Ct. at 2162.
68 See Marbury, 5 U.S. (1 Cranch) at 137.
69 Flores, 117 S. Ct. at 2162.
70 See id. at 2163 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
what Smith said is necessary. The respondent also argued that the Enforcement Clause empowers Congress to enact legislation beyond what is merely "remedial" or "preventive."

While Justice Kennedy acknowledged that there have been numerous occasions when the Court upheld congressional utilization of its enforcement powers against the states, he used many of those same cases to reiterate the strict limits that the Court placed on those powers. He cited *South Carolina v. Katzenbach* to stress that, contrary to the respondent's contentions, the enforcement power is indeed "remedial." Additionally, the argument that Congress was merely protecting the free exercise rights of religious minorities amounted to a logical fallacy to Justice Kennedy, because "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."

In support of the contention that the enforcement power is remedial, Justice Kennedy briefly recounted the legislative history of the Fourteenth Amendment, taking particular notice of objections to the original Bingham draft of the amendment. Members of Congress objected to this draft on the theory that it would give Congress powers tantamount to what the respondent in *Flores* was arguing that Congress had. The draft that was

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71 See id.
72 Id.
73 Id.
74 See id. at 2163-64.
76 *Flores*, 117 S. Ct. at 2164 (citing *Katzenbach*, 383 U.S. at 326, regarding the Enforcement Clause of the Fifteenth Amendment).
77 Id.
78 See id. Representative John Bingham of Ohio proposed the following draft amendment:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

*Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)). The objections to this draft centered around the fact that giving Congress this power would usurp many of the police powers traditionally reserved to the states. See id.
79 See id.
ultimately ratified was carefully constructed to give Congress powers that were "no longer plenary but remedial."\(^{80}\)

In addition to the legislative history of the amendment, Justice Kennedy noted that the Supreme Court had sharply limited the enforcement power as early as the *Civil Rights Cases*,\(^{81}\) where the Court stressed that the Enforcement Clause "did not authorize Congress to pass 'general legislation upon the rights of the citizen, but corrective legislation.'"\(^{82}\) *Oregon v. Mitchell*,\(^{83}\) in addition to *Katzenbach* and the *Civil Rights Cases*, provided compelling support for voiding RFRA.\(^{84}\) A majority of a very fragmented Court in *Mitchell* concluded that Congress exceeded its enforcement powers by setting a minimum voting age of eighteen for state and local elections, because this legislation "intruded into an area reserved by the Constitution to the States."\(^{85}\) Four of the five justices in the *Mitchell* majority directly stated that the Enforcement Clause does not give Congress the power to interpret the meaning of the Constitution.\(^{86}\)

Finally, the *Flores* majority rejected the alternative argument of the respondent that RFRA was in fact a remedial measure.\(^{87}\) The Court pointed out that the legislative record conclusively established that the Act was not aimed at any instances of deliberate persecution of religious minorities, and hence, could not possibly be "remedial."\(^{88}\) The record, as Justice Kennedy pointed out, did not mention any intentional discrimination within the last forty years.\(^{89}\) When the Court had previously upheld exercises of the enforcement power, Congress had used the power narrowly. Congress had aimed its power at specific instances where the states violated citizens' constitutional rights, in regions where the constitutional violations had been most serious, and had allowed for termination of the enforcement when violations ceased.\(^{90}\) RFRA, on the other hand, had none of these limiting

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\(^{80}\) Id. at 2165.

\(^{81}\) The Civil Rights Cases, 109 U.S. 3 (1883).

\(^{82}\) *Flores*, 117 S. Ct. at 2166 (quoting the *Civil Rights Cases*, 109 U.S. at 13).


\(^{84}\) *See Flores*, 117 S. Ct. at 2167-68, 2170.

\(^{85}\) *Id.* at 2167 (construing *Mitchell*, 400 U.S. at 125, in which Justice Black's majority opinion indicated that the Framers wanted to limit regulation of state and local elections to a power reserved for the states).

\(^{86}\) *See id.* at 2167-68 (construing *Mitchell*, 400 U.S. at 209).

\(^{87}\) *See id.* at 2168-70.

\(^{88}\) *Id.* at 2169.

\(^{89}\) *See id.*

\(^{90}\) *See id.* at 2170 (construing South Carolina v. Katzenbach, 383 U.S. 301 (1966), which illustrated that the Voting Rights Act is remedial because it impacts
qualities: "Sweeping coverage ensures its intrusion at every level of
government, displacing laws and prohibiting official actions of almost
every description and regardless of subject matter." 91

There were three dissents filed in Flores. Justice O'Connor wrote a
lengthy dissent voicing agreement with the Fourteenth Amendment
reasoning of the majority, but making a strong historical argument in favor
of reconsidering the no-exemptions holding of the Smith decision. 92 Justice
Breyer joined the parts of O'Connor's opinion urging reconsideration of
Smith, but wrote separately to stress that the Fourteenth Amendment
enforcement issues did not need to be considered at all. 93 Justice Souter
wrote a short dissent urging reargument solely on the issue of whether
Smith was good law. 94

Another challenge to Smith could be imminent. However, the fact that
the six majority Justices, plus dissenting Justice O'Connor, rebuked
Congress for its abuse of its powers over the states 95 indicates that the
controversial federalist tenet of the Court's holding in Flores should be
good law for some time. If Congress is to reenact RFRA in substance, it
will have to be very careful in choosing its means.

Unlike RFRA itself, which enjoyed massive public support in spite of
scholarly criticism, 96 the public reaction to the Court's Flores decision was
overwhelmingly negative. The decision was lambasted as "a devastating
salvo, the most brutal attack on the Capitol since the British burned it in
1812." 97 One commentator wondered "whether political authority in our
democracy still rests with the people" 98 and suggested that Congress simply
ignore the Court's ruling and announce that it still regards RFRA as good
law. 99 Counsel for the National Council of Churches likened Flores to the

only a certain portion of the country, affects a small class of state law, and
terminates upon cessation of discrimination).

91 Id.
92 See id. at 2176-85 (O'Connor, J., dissenting).
93 See id. at 2186 (Breyer, J., dissenting).
94 See id. at 2185-86 (Souter, J., dissenting).
95 See id. at 2157-72, 2176.
96 See supra notes 15-18, 39 and accompanying text.
97 Charles W. Colson, Whose Constitution Is It? The Balance of Power Is Dis-
turbed When the Supreme Court Bars Congress from Amplifying Constitutional
98 Id.
99 See id.
Dred Scott decision. Just as RFRA attracted an unusually broad base of public support, the criticism of Flores comes from all angles of the political spectrum. The American people's overwhelming support of the no-exemptions point of view highlights the need for Congress to do something in the face of the Court's recent rebuke of Congress's enactment of RFRA and reiteration of a pro-exemptions standard. The two most viable options in the late 1990s appear to be exercise of the spending power to enact RFRA-like legislation and, probably even better, enactment of a constitutional amendment in wording identical to that of the recently voided Act.

III. THE POSSIBILITIES FOR FEDERAL RFRA-LIKE LEGISLATION

Numerous ways of utilizing the legislative powers of Congress to somehow reenact the substance of RFRA at the state level were suggested by the law scholars in attendance at the Senate Judiciary Committee hearing in October 1997. The methods mentioned included the Commerce Clause, the treaty power, the spending power, and a better-crafted bill based on the Enforcement Clause, section 5 of the Fourteenth Amendment.

It must be noted that none of these powers, for reasons discussed below, are likely to produce legislation that comes anywhere near to providing the protections of the original RFRA. There are many Supreme Court cases in the 1990s which have cut down the extent to which Congress may use its enumerated powers to regulate the states, and Flores is just

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100 See Michael D. Goldhaber, Religious Leaders Fear Implications of Recent Court Ruling, DALLAS MORNING NEWS, July 19, 1997, at 1G (reporting the popularity of the RFRA and discussing the negative implications of its overruling in Flores).
101 Id.
102 See id.
103 See id.; Colson, supra note 97, at B5.
104 U.S. CONST. art. I, § 8, cl. 3.
105 To pass a law implementing the terms of an existing treaty, Congress would formally act under the Necessary and Proper Clause. See id. art. 1, § 8, cl. 18.
106 Id. art. I, § 8, cl. 1.
107 Id. amend. XIV, § 5.
108 See Printz v. United States, 117 S. Ct. 2365 (1997) (invalidating, on state sovereignty grounds, a portion of the Brady Bill requiring local law enforcement officers to perform background checks on prospective gun buyers); United States
one example. The power which remains the largest, under current Supreme Court federalist jurisprudence, is clearly the spending power.

However, the use of any of these powers to reenact RFRA is not likely to soften relations between Congress and the Court. The Supreme Court took care to note in its *Flores* opinion that Congress explicitly evidenced its intent to overrule *Smith*,109 and whether or not Congress cites its intent as unambiguously in a subsequent RFRA, the Court would probably view the bill as another means to the same end. *City of Boerne v. Flores* stands for nothing if it does not mean that the Court's interpretation of the Constitution and the Free Exercise Clause is controlling. Codifying the no-exemptions reading of the Free Exercise Clause is obviously an extremely important goal of Congress, but a legislative solution should not be resorted to without serious thought. The most likely effect of a reenactment under another power would be that the new law would have a short life, as did RFRA. Another unsavory possibility is that the Court might further restrict whatever power Congress chooses to invoke in order to comport with the state-federal boundary set by *Flores*.

A. The Commerce Power

Legislation based on the congressional power to regulate interstate commerce was a frequent suggestion at the Senate Judiciary Committee hearing.110 However, *United States v. Lopez*111 significantly diminished congressional power over the states by means of the Commerce Clause after sixty years of virtual free reign. There, the Court struck down the Gun-Free School Zones Act on the premise that possession of guns, even in the aggregate, is not an activity that substantially affects interstate commerce.112 The Court took pains in *Lopez* to distinguish between commercial and noncommercial activity.113 The likelihood that the Supreme Court would approve of any bill regulating state conduct burdening religion is exceedingly slim in light of the *Lopez* opinion.

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110 See Hearing, supra note 5.
112 See id. at 567-68.
113 See id. at 566.
Religious practice is simply not sufficiently "commercial" enough in character to justify RFRA-like regulations.\footnote{See id. at 565-66.}

A look back to the situation that brought rise to the Smith case is illustrative. The Smith respondents lost their unemployment benefits because of their religious use of peyote. Even though the unemployment compensation of the two respondents was at issue\footnote{See Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 874-75 (1990).} and financial support is certainly an "activity [that] substantially affects interstate commerce,"\footnote{Lopez, 514 U.S. at 559 ("[T]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").} the Smith opinion focused on the issue of the burden on religion caused by banning peyote use.\footnote{See Smith, 494 U.S. at 875-76.} The Lopez court viewed the issue extremely narrowly,\footnote{The Court asked whether possession of a gun in a school zone is an activity that "arise[s] out of or [is] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Lopez, 514 U.S. at 561. Justice Breyer, in his dissent, asked the considerably broader question, whether "Congress rationally [could] have found that 'violent crime in school zones,' through its effect on the 'quality of education,' significantly (or substantially) affects 'interstate' or 'foreign commerce.'" Id. at 618 (Breyer, J., dissenting).} looking at gun possession and not the broader issue of education. It is thus very difficult to believe that a court reviewing a Smith-like situation would expand the issue from peyote use to unemployment benefits in order to avoid striking down a commerce-based RFRA statute.

Peyote use is a noncommercial activity in much the same way that gun possession is. It would probably be impossible to substantively achieve anything near the broad protections of RFRA through a statute based on the Commerce Clause, assuming a court reviewing the statute were to apply a "substantial effects" test.

Professor Daniel Conkle agrees that Commerce Clause legislation would be inappropriate. He told the Senate Judiciary Committee:

[T]o focus on the potentially economic character of some religious conduct might be to miss the point. . . . And even if Lopez permitted a RFRA-like law to be applied upon a showing that particular government burdens on religion actually had a significant economic impact, this would leave the congressional legislation invalid or inappropriate in many or most of the situations that RFRA itself was designed to address.\footnote{Hearing, supra note 5, at 32-33 (prepared statement of Prof. Daniel Conkle).}
If Congress really desires to use its powers to institute a lasting, comprehensive, pro-exemptions standard that state and local governments must follow, then it must pay attention to Conkle’s warnings about the propriety of using the Commerce Clause to achieve that end.

Not everyone is quite as skeptical about the likelihood of success for a Commerce Clause-based bill. Professor Erwin Chemerinsky believes that the Supreme Court would uphold a law if Congress could document in the record that the free exercise of religion has a substantial effect on interstate commerce.\(^{120}\) Professor Douglas Laycock, who argued *Flores* for the City, concedes that an exercise of the commerce power might not provide quite the scope of the protections of RFRA, but he argues, “[M]any religious practices do affect commercial transactions. . . . Unless we see dramatic changes in Commerce Clause doctrine, Congress can protect many religious practices under the Commerce Clause.”\(^{121}\) The testimony of these scholars indicates that while *Lopez* has probably ended the heyday of unlimited congressional commerce power over the states, the proposition that a more limited, RFRA-like bill based on the Commerce Clause would be struck down by the Court is not universally accepted.\(^{122}\)

**B. The Treaty Power**

An even less likely option is Gerald Neuman’s proposal that Congress use the treaty power to reenact RFRA.\(^{123}\) He argues that this power “would support a verbatim re-enactment”\(^{124}\) of RFRA based on Article 18 of the International Covenant on Civil and Political Rights (“CCPR”).\(^{125}\) Many scholars write this option off rather quickly because the current, conservative Congress would certainly be loath to rely on international law to assert its power over the states,\(^{126}\) but the argument is worth mentioning. Congressional power in this area is again subject to some doubt\(^{127}\) in light

\(^{120}\) See id. at 27 (statement of Prof. Erwin Chemerinsky).

\(^{121}\) Id. at 8-9 (prepared statement of Prof. Douglas Laycock).

\(^{122}\) See discussion supra Part III.A and sources cited supra notes 110-14.


\(^{124}\) Id. at 53.

\(^{125}\) See id.

\(^{126}\) See Hearing, supra note 5, at 34 (prepared statement of Prof. Daniel Conkle).

\(^{127}\) See id. (prepared statement of Prof. Daniel Conkle).
of a potential state sovereignty objection based on Missouri v. Holland.\textsuperscript{128} An act of Congress enabling a treaty is subject to the limitations of Congress's power;\textsuperscript{129} the fact that there is a treaty to which the United States is a party does not empower Congress to take police powers.\textsuperscript{130}

The words of the CCPR would easily support a watered-down RFRA substituting a form of intermediate scrutiny in place of the stringent strict scrutiny standard of the original bill.\textsuperscript{131} Article 18, unlike the vague text and legislative history of the Free Exercise Clause, indicates that exemption from neutral, generally applicable laws is protected, unless the limitation is "‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'"\textsuperscript{132} However, the words of the CCPR fail to even approach the compelling interest and least restrictive means tests of the original RFRA. In light of the congressional aversion to the treaty power and the weaker standard set by CCPR, the likelihood of a new RFRA based on Congress's ability to enact legislation to implement the treaty is minute.

C. The Enforcement Power

Professor Douglas Laycock supports the concept of another RFRA-like bill based on the enforcement power of the Fourteenth Amendment.\textsuperscript{133} He concedes that a literal reenactment would never pass the Court's scrutiny no matter how good a record Congress compiled to support the idea that the bill was a remedial measure.\textsuperscript{134} Laycock stresses, however, that Flores "does not deprive Congress of all power to protect religious exercise under its power to enforce the Fourteenth Amendment" and believes that the Flores opinion evidences that "the Court means to require a more detailed factual record than Congress compiled for RFRA."\textsuperscript{135} He calls for a new RFRA that would be clearly targeted towards violations of Smith, with findings specifying that Congress seeks to deter such unconstitutional

\textsuperscript{128} Missouri v. Holland, 252 U.S. 416 (1920).
\textsuperscript{129} See id. at 433.
\textsuperscript{130} See id. at 432.
\textsuperscript{131} See Neuman, supra note 123, at 45-46.
\textsuperscript{132} Id. at 44 (quoting CCPR Art. 18(3)).
\textsuperscript{133} See Hearing, supra note 5, at 9-12 (prepared statement of Prof. Douglas Laycock).
\textsuperscript{134} See id. at 9 (prepared statement of Prof. Douglas Laycock).
\textsuperscript{135} Id. (prepared statement of Prof. Douglas Laycock).
conduct. He believes that the Court would uphold burden of proof provisions in a new RFRA, creating presumptions that certain conduct is unconstitutional and reallocating the risk of factual error in close cases.

However, Laycock has a tendency to exaggerate the scope of religious prejudice in neutral laws. During the hearing, Laycock mentioned a "discriminatory" zoning law in Chicago regulating the proximity of churches to places where liquor was sold. Senator Richard Durbin of Illinois had to remind Professor Laycock that the churches themselves banded together and asked for that law. Laycock also attributes the zoning situation in Flores to discrimination, even though there is absolutely nothing in the record to indicate that historic preservation was only a proxy to cover up discrimination against Catholics. A new RFRA including legislative findings that these types of laws are presumed to be Smith violations would certainly never pass the Court's analysis without strong factual support. Although Laycock may cry prejudice here, a simple congressional finding could not legitimately take these types of zoning laws outside the scope of neutral, generally applicable laws deemed acceptable by Smith despite the incidental burden on religious practice. Compiling a record to support such a law under the enforcement power would be an impossible task given the limits Flores put on the use of that power over the states.

D. The Spending Power

The only congressional power that retains its full boundaries is the spending power. The limits of this power have most recently been examined in South Dakota v. Dole, a case decided in 1987 before the Supreme Court began its current federalist trend. The power is used very frequently by Congress to require the states to impose a regulation within their boundaries in exchange for grants of federal funds. The limits on the spending power relevant in the RFRA context are that the condition on

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136 See id. (prepared statement of Prof. Douglas Laycock).
137 See id. (prepared statement of Prof. Douglas Laycock).
138 See id. at 10 (prepared statement of Prof. Douglas Laycock).
139 See id. at 44 (statement of Sen. Richard Durbin).
140 See id. at 10 (prepared statement of Prof. Douglas Laycock).
141 See U.S. CONST. art. I, § 8, cl. 1.
143 See id. at 206.
the grant must be related to the program to be funded and that the condition must be clearly stated.\footnote{See id. at 207.}

The limits, even as they exist, may cause problems in the context of religion. A single broad act granting money to the states in exchange for anything approaching a literal reenactment of RFRA would be impossible. While codifying the no-exemptions view is clearly the intent of Congress and this condition could certainly be stated, there is no related program that could justify such a bill. Congress, under the Establishment Clause, may not spend money on religion,\footnote{See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..”).} and thus the \textit{Dole} requirement that the condition (religious freedom) be related to the spending could never legitimately be satisfied if that requirement is to have any meaning at all. Just as in the Commerce Clause context, the spending power might legitimately be used to justify a number of smaller acts on a program-by-program basis, but then again, the full effect of the original RFRA would not be attained.

Another concern that Congress should address before using the spending power to reenact a no-exemptions policy is the fact that the power could very likely be restricted in light of the Court’s federalist decisions of the 1990s, from \textit{Lopez} and \textit{New York v. United States} up through \textit{Flores} and \textit{Printz} in 1997.\footnote{See supra note 108 and accompanying text.} There has not been a major spending power case yet this decade, and the virtual free reign over the states that Congress may exercise with this power does not logically comport at all with the strict state sovereignty limits the Court has imposed on Congress. Professor Lynn Baker pointed out that “prevailing Spending Clause doctrine appears to vitiate much of the import of Lopez”\footnote{Lynn A. Baker, \textit{Conditional Spending After Lopez}, 95 COLUM. L. REV. 1911, 1914 (1995).} and urged the \textit{Lopez} majority to set their sights on a reexamination of \textit{Dole}.\footnote{See id.} Given the current composition of the Court and recent decisions governing federal power to regulate the states, Congress would be foolish to risk its spending power on another attempt to void the \textit{Smith} decision.

Professor Conkle also warned the Judiciary Committee that \textit{Dole} could be limited by testing this type of bill.\footnote{See \textit{Hearing}, supra note 5, at 38 (prepared statement of Prof. Daniel Conkle).} He especially noted that the Court might tighten the concept of relatedness or limit the ways in which
Congress might enforce compliance.\textsuperscript{150} He also expressed worries that attempts by Congress to circumvent \textit{Flores} might give the Court even greater incentive to limit the power.\textsuperscript{151} Like Congress’s other potential legislative solutions, the Spending Clause provides no certain answers in the context of using federal law to provide religious exemptions to compliance with neutral laws. Although the spending power is technically still very broad, even it could probably not be used to reenact RFRA and fulfill the Act’s intent.

IV. A RELIGIOUS FREEDOM RESTORATION AMENDMENT

A constitutional amendment incorporating the language and breadth of RFRA is surely the best way for Congress to effectively fulfill the will of the people on the topic of religious free exercise. As mentioned above, any legislative action that is not significantly watered down is likely to be struck down again by the Supreme Court in light of the Court’s federalist decisions of the 1990s.\textsuperscript{152} The amendment solution would certainly be a bigger burden in the short run, but Congress could use this means to cure the exemptions problem for the ages.

To provide some context for the discussion, this author proposes the following Religious Freedom Restoration Amendment to display how Congress could reenact the voided RFRA while maintaining an image of respect for the power and role of the United States Supreme Court:

\begin{quote}
\textbf{Religious Freedom Restoration Amendment}

\hspace{1em}§ 1. The right of residents of the United States to exercise their religion shall not be substantially burdened by either the United States or any State, even if the burden results from a rule of general applicability, except as provided in § 2 of this Article.

\hspace{1em}§ 2. The Government of the United States or a State may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.

\hspace{1em}§ 3. Nothing in this Article shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. Granting government funding,
\end{quote}

\textsuperscript{150} See id. at 39 (prepared statement of Prof. Daniel Conkle).
\textsuperscript{151} See id. (prepared statement of Prof. Daniel Conkle).
\textsuperscript{152} See discussion supra Part III and cases cited supra note 108.
benefits, or exemptions, to the extent permissible under the Establishment
Clause, shall not constitute a violation of this Article.

§ 4. The Congress shall have the power to enforce this article by
appropriate legislation. 153

A Congressional bill providing protections of this extent and depth and
passed by a simple majority would be very unlikely to survive Supreme
Court review as argued above. 154 If Congress really cares about the issue of
religious free exercise unburdened by state regulation lacking compelling
justification, Congress must amend the Constitution.

Congress may currently be avoiding this course of action because the
amendment process as set out in the Constitution requires not only a two-
thirds congressional majority in both houses but also ratification from
three-fourths of the states. 155 However, this difficult process is necessary
now because the Flores Court mandated that Congress shall not substan-
tively declare what an existing constitutional clause means. 156 For all the

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153 An amendment drafting system, proposed by Professor Thomas Baker and
called the "republican veto," would have Congress draft an amendment simply
reading, "The decision of the Supreme Court of the United States in [City of Boerne
v. Flores], decided on June 25, 1997, is disapproved and set aside." Thomas Baker,
Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A
The Baker proposal, while an interesting solution to the problem at hand, presents
some serious issues regarding the structural and linguistic integrity of the
Constitution. It is inconceivable that this language would generate the support of
a two-thirds majority of either house of Congress.

154 See discussion supra Part III.

155 The Congress, whenever two thirds of both Houses shall deem it
necessary, shall propose Amendments to this Constitution, or, on the
Application of the Legislatures of two thirds of the several States, shall call
a Convention for proposing Amendments, which, in either Case, shall be
valid to all Intents and Purposes, as Part of this Constitution, when ratified
by the Legislatures of three fourths of the several States, or by Conventions
in three fourths thereof, as the one or the other Mode of Ratification may be
proposed by the Congress; Provided that no Amendment which may be
made prior to the Year One thousand eight hundred and eight shall in any
Manner affect the first and fourth Clauses in the Ninth Section of the first
Article; and that no State, without its Consent, shall be deprived of its equal
Suffrage in the Senate.

U.S. CONST. art. V.

criticisms and editorials about inappropriate judicial activism in the wake of Flores, the amendment process does give Congress the ultimate trump card when it comes to the substance of the Constitution. While the power to interpret the broad words of the Constitution vests significant power in the Court, congressional power to amend the Constitution is unquestionably greater.

Another factor which may be causing Senator Hatch and the Congress to hesitate before proposing a Religious Freedom Restoration Amendment is the frequency with which proposed constitutional amendments meet quick deaths these days. Senator Hatch himself proposed a Religious Equality Amendment in 1995 which failed to garner any significant support. In fact, since 1787, over 10,000 constitutional amendments have been introduced in Congress, but only twenty-seven have been ratified. Congressional fears that an amendment proposal might be a waste of time appear to be justified by history.

Many of the recent failed amendments are easily distinguishable from a potential Religious Freedom Restoration Amendment. The provisions of these other proposals go against what many people believe the plain words of the current Constitution already says. The latest proposed flag-burning amendment would allow Congress and the states to outlaw what many Americans consider to be a very important mode of political speech, thus

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157 See Colson, supra note 97, at B5.

158 "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination." S.J. Res. 45, 104th Cong. (1995); H.R.J. Res. 121, 104th Cong. (1995).


160 This distinction comports with the premise of a recent proposal that the Article V power to amend is not unlimited and that "an [Article VI] oath-bound amender acts always within the terms of the constitutional text and should comport herself as an interpreter, rather than an alterer of the Constitution." Note, The Faith to Change: Reconciling the Oath to Uphold with the Power to Amend, 109 HARV. L. REV. 1747, 1748 (1996).

161 "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." H.R.J. Res. 79, 104th Cong. (1995).

162 For example, newspaper editorials and opinion pieces have come down almost unanimously against the passage of a flag desecration amendment. See Editorial, Burn the Flag Amendment, ROANOKE TIMES & WORLD NEWS, Nov. 1,
directly overruling a significant portion of the current First Amendment and substantially impairing the constitutional freedoms of individual liberty. The school prayer amendments would replace the Court’s current interpretation of the Establishment Clause, a reading which is extremely important to many civil libertarians, religious minorities, and non-believing Americans. The balanced budget amendment, which is less controversial because it does not limit the freedoms of American citizens, is constitutionally unnecessary because Congress can balance the budget under the existing Constitution and an amendment would involve the courts in messy fiscal issues.

In contrast, a Religious Freedom Restoration Amendment would simply add substance to the reading of the Free Exercise Clause which is supported by virtually every religious group in America, as well as by the


163 See generally Troy G. Pieper, Note, Playing with Fire: The Proposed Flag-Burning Amendment and the Perennial Attack on Freedom of Speech, 11 ST. JOHN’S J. LEGAL COMMENT. 843, 866 (1996) (arguing that the “utilization of Article V’s Amendment powers to limit a fundamental right, guaranteed by the First Amendment, runs counter to the intent of the Framers and the spirit of the Constitution”).

164 For example, Representative Ernest Istook introduced the following amendment in November 1995. It is still pending, after minor language changes.

To secure the people’s right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.


American Civil Liberties Union. History fails to provide any conclusive definition of the term "free exercise." The issue cannot be settled by looking at any known documentation, and in the wake of Flores, the power of Congress to introduce legislation which would give real, substantive meaning to the term is virtually gone. In effect, the above Religious Freedom Restoration Amendment would clarify rather than change the existing terms of the Constitution.

The amendment would also be consonant with the constitutional tradition of protecting minorities from stark majority rule. Individuals who happen to be religious minorities in their community would receive bolstered protection from government interference with the expression of their beliefs. In situations like that involved in Flores, even nonpersecuted religious groups could practice without fear of government meddling and supervision.

Finally, a Religious Freedom Restoration Amendment may have a significant chance of being ratified. Although all of the recent, controversial amendment proposals have failed, several have come extremely close to passing through Congress. A 1995 flag-burning amendment passed the House and fell three votes short in the Senate. The balanced budget amendment has fallen one vote short in the Senate twice in the last three years. The Religious Freedom Restoration Amendment will not have any controversial aspect of limiting freedoms, and unlike a balanced budget, the pro-exemptions reading of the Free Exercise Clause is not an objective Congress will be able to fully achieve in the absence of an amendment. Finally, the potential for grass roots mobilization in support of this amendment could be enormous. On the national level, the organizations that spoke up for RFRA and against Flores, from the Southern Baptist Convention to the American Civil Liberties Union, could unite a vast constituency that covers virtually the entire breadth of American society. At a local level, churches could mobilize their congregations to put

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169 See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1511 (1990) (arguing in favor of a historically-based, pre-exemptions reading of the Free Exercise Clause, but conceding that history fails to conclusively settle the issue of intent).
170 See Helen Dewar, Senate Falls Short on Flag Amendment, Desecration Ban Was Measure’s Aim, WASH. POST, Dec. 13, 1995, at Al.
pressure on their representatives to support the amendment. The free practice of religion is a fundamental right that many Americans feel is essential to their freedom as individuals, and it affects nearly everyone on a far more personal level than the right to burn a flag or a balanced federal budget might. A well-organized campaign could conceivably result in this amendment, which would protect that right against government intrusion in the form of neutral laws.

CONCLUSION

James Madison, unquestionably one of the Constitution’s most influential Framers, believed that duty to God is “precedent both in order of time and degree of obligation, to the claims of Civil Society.”¹⁷² A national policy regarding unwarranted government interference in religious affairs, particularly at the state and local level where less heterogeneous communities are likely to be hostile to minority religions, is in complete accordance with the purpose and traditions of the United States.¹⁷³ Congress clearly thought such a policy was necessary when it passed RFRA by a virtually unanimous vote in 1993. The hearing in the Senate Judiciary Committee is evidence that Congress still cares about the issue and intends to use its powers to prevent government interference with religious practice. The legislative proposals that were made in front of the Committee will not produce the protections that the Religious Freedom Restoration Act was intended to provide. If the issue of unburdened religious practice is truly important, a results-oriented Congress must buckle down and secure the full protections of RFRA by amending the Constitution to include exemptions from neutral, generally applicable laws.

¹⁷² JAMES MADISON, Memorial and Remonstrance Against Religious Assessments, in 2 THE WRITINGS OF JAMES MADISON 183, 184-85 (Gaillard Hunt ed., 1901).