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ANTIDISESTABLISHMENTARIANISM: WHY RFRA REALLY WAS UNCONSTITUTIONAL

*Jed Rubenfeld**

Two months ago, the Supreme Court struck down the Religious Freedom Restoration Act of 1993 (RFRA),¹ handing down its most important church-state decision, and one of its most important federalism decisions, in fifty years. Through RFRA, Congress had prohibited any state actor from "substantially burden[ing] a person's exercise of religion" unless imposing that burden was the "least restrictive means" of furthering "a compelling governmental interest."² RFRA was a response to *Employment Division, Department of Human Resources of Oregon v. Smith*,³ in which the Supreme Court abandoned the very same compelling interest test that RFRA mandated. *Smith*, overturning decades-old precedent, held that a law burdening religious practices is constitutional so long as it is a law of general applicability, not targeting religion or any particular religious practices as such.⁴ RFRA, in effect and by design, was enacted to "reverse" *Smith*.⁵

But how could Congress displace the Supreme Court on a matter of constitutional law? According to the law's supporters,⁶ the

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1. See *City of Boerne v. Flores*, 65 U.S.L.W. 4612 (U.S. June 25, 1997). The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), was codified at 42 U.S.C. § 2000bb (1994).

2. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(b), 107 Stat. 1488, 1488-89.

3. 494 U.S. 872 (1990).

4. See 494 U.S. at 879.

5. See President's Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993) (characterizing RFRA as an exercise of "power to reverse . . . by legislation, a decision of the United States Supreme Court"). RFRA referred to *Smith* by name and stated that its purpose was 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)." Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488.

6. See, e.g., Douglas Laycock, *RFRA, Congress and the Ratchet*, 56 MONT. L. REV. 145 (1995); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996).

answer lay in section 5 of the Fourteenth Amendment,⁷ which empowers Congress to "enforce" the free exercise guarantee as it applies against the states.⁸ This answer was buttressed by a line of voting rights cases dating back to 1966, in which the Supreme Court upheld under section 5 federal statutes banning states from engaging in certain practices despite the fact that the Court itself had previously held the banned practices constitutional.⁹ Reasoning that RFRA too merely ratcheted up states' Fourteenth Amendment duties beyond the judicially determined constitutional minimum, most of the lower courts confronting RFRA had found that the statute fell within the legitimate scope of Congress's section 5 powers.¹⁰

The Supreme Court disagreed. It held that RFRA was an attempt to "change," rather than to "enforce," the protections of the Fourteenth Amendment,¹¹ whose meaning the judiciary alone has the ultimate power to determine.¹² But the Court did not overrule the voting rights cases. Rather, it distinguished them, holding that Congress may *sometimes* "prohibit[] constitutional state action in an effort to remedy or to prevent unconstitutional state action," but

7. U.S. CONST. amend. XIV, § 5.

8. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court held that the Fourteenth Amendment incorporated the First Amendment's free exercise guarantee.

9. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding under section 5 a ban on certain voter literacy tests despite the constitutionality of such tests under *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959)); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (same under section 2 of the Fifteenth Amendment); see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (holding that Congress may under section 5 invalidate state voting laws that have disparate racial impact even though disparate impact is not unconstitutional as such); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding a five-year nationwide ban on voter literacy tests).

10. See, e.g., *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) ("Congress has not 'overruled' *Smith* or assumed a paramount authority of constitutional interpretation [Instead, RFRA] creates a new statutory right designed to buttress the constitutional right."), *cert. granted and judgment vacated*, 117 S. Ct. 2502 (1997); *In re Young*, 82 F.3d 1407 (8th Cir. 1996), *cert. granted and judgment revd. sub nom.* *Christians v. Evangelical Free Church*, 117 S. Ct. 2502 (1997); *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996), *revd.*, 65 U.S.L.W. 4612 (U.S. June 25, 1997); *Abordo v. Hawaii*, 902 F. Supp. 1220 (D. Haw. 1995); *State v. Miller*, 538 N.W.2d 573 (Wis. Ct. App. 1995), *affid.*, 549 N.W.2d 235 (Wis. 1996). But see *Hamilton v. Schiro*, 74 F.3d 1545, 1566 (8th Cir.) (McMillian, J., dissenting), *cert. denied*, 117 S. Ct. 193 (1996); *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996); *Smith v. Fair Employment & Hous. Commn.*, 913 P.2d 909, 937-39 (Cal. 1996) (Mosk, J., concurring), *cert. denied*, 117 S. Ct. 2531 (1997).

11. See *City of Boerne v. Flores*, 65 U.S.L.W. 4612, 4618 (U.S. June 25, 1997) ("RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. . . . It appears, instead, to attempt a substantive change in constitutional protections.").

12. See 65 U.S.L.W. at 4620 ("[I]t is this Court's precedent, not RFRA, which must control.").

only when the "means" used are "proportionate to [the] ends."¹³ RFRA, the Court concluded, lacked such "proportionality."¹⁴

Boerne will undoubtedly provoke considerable future debate about the proper scope of Congress's section 5 powers and the soundness of the Court's "proportionality" test. A particularly lively debate will probably develop over the extent to which a modified RFRA, more narrowly tailored or better supported by the kind of findings the Court deemed most pertinent,¹⁵ might be enacted that would pass constitutional muster. Already RFRA's chief supporters have urged Congress to reenact RFRA's protections for religion by compiling a more "careful record" or by invoking different bases of congressional power.¹⁶ In this debate over the reach of section 5 and other grants of federal legislative power — the same debate that engrossed commentators on RFRA before the statute reached the Court¹⁷ — a more important point will be missed.

RFRA violated the Establishment Clause, and a new RFRA modified along the lines suggested above would also violate the Establishment Clause. It is not, however, as some have argued, that RFRA was so protective of religion that it amounted to an establishment in its own right.¹⁸ But if RFRA did not establish religion,

13. 65 U.S.L.W. at 4619.

14. See 65 U.S.L.W. at 4619.

15. The Court found little evidence in the congressional hearings that Congress had acted to deter governmental practices of the kind "unconstitutional . . . under the Free Exercise Clause as interpreted in *Smith*." 65 U.S.L.W. at 4619. Moreover, despite the lack of evidence of any "widespread pattern of religious discrimination in this country," RFRA applied to all levels of government and all kinds of governmental conduct. See 65 U.S.L.W. at 4618-19. The statute lacked "termination dates" or "geographic restrictions." See 65 U.S.L.W. at 4619. Finally, RFRA's "stringent test" would have imposed "substantial costs" on states. See 65 U.S.L.W. at 4619.

16. As reported in the *New York Times*:

Marc D. Stern, legal director of the American Jewish Congress, urged Congress to compile a "careful record" of the negative impact that regulations burdening religion can have on the economy

. . . .
Mr. Stern and Douglas Laycock . . . also urged Congress to consider requiring a high level of protection for religious observances as a condition of receiving Federal money. Linda Greenhouse, *Laws Urged to Restore Religion Act*, N.Y. TIMES, July 15, 1997, at A11.

17. The best pre-*Boerne* scholarship arguing that RFRA exceeded the bounds of Congress's legislative jurisdiction was 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), and Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 460-69 (1994). For other excellent discussions, see, for example, Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEXAS L. REV. 247, 302-22 (1994).

18. See Eisgruber & Sager, *supra* note 17, at 452-60. This position might be inferred from Justice Stevens's short concurrence in *Boerne*, see 65 U.S.L.W. at 4620 (Stevens, J., concur-

how could it have violated the Establishment Clause? By seeking to dictate church-state relations.

Although many have forgotten it, the First Amendment, under which Congress can "make no law *respecting* an establishment of religion,"¹⁹ does not only prohibit Congress from establishing religion; it prohibits Congress from dictating to the states how to legislate religion. The First Amendment excludes Congress from an entire legislative subject matter. Congress may not dictate a position on religion to individuals, and it may not dictate a position on religion to the states.

RFRA did so. RFRA was the first-ever direct effort by Congress to prescribe a regulatory framework governing church-state relations for the country. It marked a massive, unprecedented shift in the triangular relation among the federal government, the state governments, and religion. It was a law quintessentially respecting establishment: RFRA was a congressional effort to dictate the terms of religious neutrality to which state law must conform.

But RFRA not only sought to regulate a subject matter from which Congress is expressly excluded. RFRA was also *disestablishing*. It required states to abolish the favoritism of majority religious practices that their laws of general applicability inevitably effect. In this way, RFRA violated the First Amendment's specific *anti-disestablishmentarian* requirement.²⁰ RFRA would therefore have been unconstitutional even if it had fallen within Congress's section 5 powers, and it will still be unconstitutional if reenacted along the lines its supporters now propose.

Disabling Congress from dictating church-state relations is not a matter of protecting state sovereignty, in the sense of carving out a domain in which states are to have supreme legislative authority. If Congress could dictate church-state relations, even in the name of religious diversity and religious neutrality, Congress would have the power to intercede directly and profoundly into the nation's religious life.²¹ Paradoxical though it may seem, antidisestablishmentarianism is essential to the fundamental constitutional separation of religion and government.

Part I below addresses the meaning of "respecting" establishment and explains First Amendment antidisestablishmentarianism.

ring), but Justice Stevens never actually says that RFRA established religion, and his statement is, therefore, also consistent with the argument developed in this article.

19. U.S. CONST. amend. I (emphasis added).

20. See *infra* Part II.

21. See *infra* section II.D.

Part II explains how RFRA is a law respecting and in fact disfavoring establishment. Part III explains why section 5 of the Fourteenth Amendment, no matter what its outer boundaries may be, could not make RFRA — or a new version of RFRA modified in light of *Boerne* — constitutional. Part IV adds a postscript on *Employment Division, Department of Human Resources of Oregon v. Smith*, defending that case against criticisms that it eviscerates the constitutional protection of religion.

I. RESPECTING ESTABLISHMENT

The first words enacted in amendment of the United States Constitution were these: "Congress shall make no law respecting an establishment of religion"²² The First Amendment also bars Congress from making laws "*prohibiting*" the free exercise of religion and "*abridging*" the freedom of speech.²³ Why *respecting* establishment?

Because in 1791, established churches were features of the American landscape. How many there were is a matter of dispute. Cobb's 1902 study found two states with establishments of religion during the founding period;²⁴ Pfeffer concludes that four had a "substantial establishment";²⁵ Van Alstyne identifies five;²⁶ Levy says there were seven.²⁷ The truth is that by the standards of modern doctrine, almost every state in post-Revolutionary America had laws establishing religion.²⁸ For example, from 1776 to 1791, almost all the states adopted Christian or Protestant tests for public office.²⁹ The critical point is that while 1780s Americans in some places, such as Virginia, were fiercely debating and *rejecting* state laws that would strike us today — and struck some, including

22. U.S. CONST. amend. I.

23. See U.S. CONST. amend. I (emphasis added).

24. See SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 512-15 (1902).

25. See LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 141 (rev. ed. 1967).

26. See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 773 n.8 (citing 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 559 (1950)).

27. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 76 (2d ed., rev. 1994).

28. See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 19-68 (1987). Bradley observes that, under the modern definition of establishment, "every" American state in the founding period was an "establishment state[.]" See *id.* at 46. Even the most antiestablishment states "aided, encouraged, and sponsored Christianity, including providing direct material and financial assistance to religious institutions and societies." *Id.*

29. See THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 221 (1986); LEVY, *supra* note 27, at 77. For a brief state-by-state summary, see MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 11-15 (1984).

Madison, then — as establishing religion,³⁰ Americans elsewhere were *insisting on* such laws and had no intention of permitting the federal government to undo them.

In Massachusetts, for example, the constitution of 1780 authorized each town to tax its residents “for the support and maintenance of public Protestant teachers” of their choosing.³¹ The laws of Connecticut, New Hampshire, and Vermont were similar in this respect.³² In every one of these states, a majority of the voters in each locality “decided which Protestant ministry to settle in the town and voted a tax on all inhabitants to raise funds for church construction and a ministerial stipend.”³³ An individual dissenting from the majority church typically had the right to direct his money toward “his own religious sect or denomination,”³⁴ but only if he could obtain a certificate attesting that he attended another appropriate place of worship.³⁵

New England’s town-by-town establishments had three important coercive implications. First, all persons were compelled to finance some church. Second, certain Protestants, such as Baptists and Quakers, were obliged to contribute to their own ministries in contravention of their religious doctrines, said to forbid any coerced religious contributions.³⁶ Third, the “unchurched,” together with

30. From 1776 to 1786, Virginians engaged in a sustained and, by 1785, intense public debate about the propriety of establishing Christianity in general and about compulsory religious assessments in particular. See THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787* (1977). In 1779, the Virginia legislature had before it not only Jefferson’s famous bill “for Establishing Religious Freedom,” which condemned any compelled support for religion, but also a bill declaring Christianity to be the “established religion” of the state and calling for general assessments for the support of Christian ministries. See CURRY, *supra* note 29, at 139. Neither bill passed. See *id.* In 1784, Patrick Henry introduced another general assessment bill, which Madison argued against on establishment grounds. See LEVY, *supra* note 27, at 61-63. Madison elaborated these antiestablishment arguments in his equally famous *Memorial and Remonstrance Against Religious Assessments*. See JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in 8 *THE PAPERS OF JAMES MADISON* 295, 298-304 (Robert A. Rutland et al. eds., 1973). This was one of many petitions circulated and widely subscribed during the public debate in 1785 over Henry’s general assessment bill. See CURRY, *supra* note 29, at 142-43. Henry’s bill was defeated, and Jefferson’s bill passed, in 1786. See *id.* at 146.

31. See MASS. CONST. OF 1780, Decl. of Rights, art. III, cl. 1, reprinted in 5 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 93 (William F. Swindler ed., 1975) (hereinafter *SOURCES*).

32. See BRADLEY, *supra* note 28, at 20-27; LEVY, *supra* note 27, at 28-51.

33. BRADLEY, *supra* note 28, at 23.

34. MASS. CONST. OF 1780, Decl. of Rights, art. III, cl. 4, reprinted in 5 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS*, *supra* note 31, at 93.

35. See BRADLEY, *supra* note 28, at 23-24.

36. See CURRY, *supra* note 29, at 171-72; LEVY, *supra* note 27, at 33-34. For contemporaneous Baptist protest, see, for example, 2 ISAAC BACKUS, *A HISTORY OF NEW ENGLAND WITH PARTICULAR REFERENCE TO THE BAPTISTS* 342-46 (photo. reprint 1969) (David Weston ed., 2d ed. 1871), and JOHN LELAND, *THE YANKEE SPY* (1794), reprinted in *THE WRIT-*

those unfortunate enough not to be Christian at all, were forced to contribute to the majority church against their will.³⁷ At the same time, churchgoing was often compulsory,³⁸ blasphemy (against the Christian faith) was everywhere criminal,³⁹ and civil and political rights were frequently limited to Protestants.⁴⁰

These laws were not pre-Revolutionary relics. As in Massachusetts, they had the imprimatur of the post-1776 state constitutions.⁴¹ Nor were they passed without intense public debate.⁴² Baptists and others vigorously inveighed against them.⁴³ But to most New England eyes, constitutional recognition of Protestantism, together with town-by-town establishment of Congregationalism — or, in a few cases, Presbyterianism — was no evil. On the contrary, New Englanders had fought for this relation between church and state from the founding of their colonies right up until 1776.⁴⁴ “We might as well expect a change in the solar syst[e]m,” John Adams is

INGS OF THE LATE ELDER JOHN LELAND 213, 225 (photo. reprint 1969) (L.F. Greene ed., 1845).

37. See CURRY, *supra* note 29, at 166, 182-84; LEVY, *supra* note 27, at 29, 46-47.

38. See BRADLEY, *supra* note 28, at 21 (“[I]rregular church attendance cost 3 shillings in Connecticut and 10 shillings in Massachusetts.” (citations omitted)).

39. See *id.* at 22 (“Criminal prohibitions of blasphemy were just as pervasive . . . and amounted to nothing less than an official declaration of the truth of Christianity.”); see also LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 260-71 (1993). In Maryland, blasphemers were to be “bored through the Tongue” with a hot iron — for a *first* offense. See 34 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY (13) 1720-1723, at 733 (Clayton Colman Hall ed., 1914).

40. Massachusetts guaranteed that “every denomination of Christians . . . shall be equally under the protection of the law,” MASS. CONST. OF 1780, pt. 1, art. III, cl. 5, *reprinted in* 5 SOURCES, *supra* note 31, at 92, 93-94, and required elected officers to declare themselves Christian, see MASS. CONST. OF 1780, pt. 2, ch. VI, art. I, *reprinted in* 5 SOURCES, *supra* note 31, at 100, 106. New Hampshire limited elected office to Protestants. See N.H. CONST. OF 1784, pt. 2, *reprinted in* 6 SOURCES, *supra* note 31, at 344, 350, 351. In its first constitution, Vermont provided, “nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right” on the basis of religion, VT. CONST. OF 1777, ch. I, § III, *reprinted in* 9 SOURCES, *supra* note 31, at 487, 489, and both founding-era constitutions required Protestant oaths of office, see VT. CONST. OF 1777, ch. II, § IX, *reprinted in* 9 SOURCES, *supra* note 31, at 491; VT. CONST. OF 1786, ch. II, § XII, *reprinted in* 9 SOURCES, *supra* note 31, at 496, 501. Even in Rhode Island, Jews were denied full citizenship. See BORDEN, *supra* note 29, at 13; IRVING BERDINE RICHMAN, *RHODE ISLAND: A STUDY IN SEPARATISM* 180-81 (1905). Needless to say, such laws were not limited to New England. For a brief survey, see BORDEN, *supra* note 29, at 11-15.

41. See LEVY, *supra* note 27, at 29-30, 43, 46, 49-50.

42. See BRADLEY, *supra* note 28, at 26.

43. See M. LOUISE GREENE, *THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT* 372-76 (1905); CHARLES B. KINNEY, JR., *CHURCH AND STATE: THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE 1630-1900*, at 75-78 (1955); 1 WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* 613-35 (1971); 2 *id.* at 789-832, 926-38.

44. See CURRY, *supra* note 29, at 105-33.

supposed to have said in 1774, "as to expect they would give up their establishment."⁴⁵

The First Amendment's religion clauses emerged against this background, growing directly out of powerful antiestablishment and antidisestablishment concerns about the new Constitution. Some argued that nothing in the Constitution prevented Congress from establishing a single national church and violating rights of conscience.⁴⁶ But many others objected that the document nowhere paid obeisance to Christian religion and nowhere prevented the national government from abolishing the support for Christianity to which the laws of many states were dedicated.⁴⁷ "That the proffered Constitution was a pagan document, or at least insufficiently infused with Christian orthodoxy, was a theme resounding throughout the Union and accounted for perhaps half of all the popular criticism of the new government's relationship with religion."⁴⁸

Federalists replied to all such objections by saying that Congress had no legislative power over religious matters one way or the other. Thus Madison told the Virginia convention, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with [religion], would be a most flagrant usurpation."⁴⁹ Iredell said the same thing in North Carolina: "They [the Congress] certainly have no authority to interfere in the establishment of any religion whatsoever . . ."⁵⁰

But such assurances did not assuage either the antiestablishment or antidisestablishment forces, both of which pressed for amendments to memorialize Congress's inability to "interfere" or "intermeddle" with religious establishments.⁵¹ Not surprisingly, the New

45. Isaac Backus, *Diary 1774*, in 2 *THE DIARY OF ISAAC BACKUS* 895, 917 (William G. McLoughlin ed., 1979).

46. See ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* 6-7 (1982); CURRY, *supra* note 29, at 194-95, 197-98.

47. See BORDEN, *supra* note 29, at 15-20; BRADLEY, *supra* note 28, at 74-76; CURRY, *supra* note 29, at 195-96.

48. BRADLEY, *supra* note 28, at 74.

49. James Madison, *General Defense of the Constitution* (June 12, 1788), *reprinted in* 11 *THE PAPERS OF JAMES MADISON* 129, 130 (Robert A. Rutland et al. eds., 1977).

50. James Iredell, *Debate in North Carolina Ratifying Convention* (July 30, 1788), in 5 *THE FOUNDERS' CONSTITUTION* 90 (Philip B. Kurland & Ralph Lerner eds., 1987). Similarly, Edmund Randolph maintained that "no power is given expressly to Congress over religion." 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 204 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836). Richard Spaight of North Carolina said, "As to the subject of religion . . . [n]o power is given to the general government to interfere with it at all." 4 *id.* at 208. Perhaps most influentially, James Wilson asserted the no-power position in Pennsylvania. See 2 *id.* at 455.

51. The demand for amendments protecting freedom of conscience is well known. See, e.g., CORD, *supra* note 46, at 6-7. Often overlooked, however, is that some states also sought

England states were particularly jealous of their existing ecclesiastical systems. Thus New Hampshire's ratifying convention proposed as an amendment that "Congress shall make no Laws touching Religion, or to infringe the rights of Conscience."⁵² This proposal "grew out of antifederalist fears that the national government was insufficiently devoted to Christianity" and was specifically designed to guarantee "protection from congressional intermeddling with New Hampshire's regime of publicly maintained orthodoxy."⁵³ As Professor Amar has pointed out, of all the state-proposed amendments on religion, New Hampshire's antidisestablishmentarian proposal most closely tracked the actual language eventually adopted in the First Amendment.⁵⁴

Again not surprisingly, Madison's proposed wording of the religion clauses was antiestablishment — "[N]o religion shall be established by law"⁵⁵ — but in no way antidisestablishment. The New Englanders were "not satisfied."⁵⁶ They feared any language that might be construed to "give Congress power to interfere with existing arrangements in the individual states."⁵⁷ New Hampshire Representative Samuel Livermore and Connecticut Representative Benjamin Huntington sought language that would insulate their

to keep Congress from interfering with their pro-Protestant regimes. See, e.g., BRADLEY, *supra* note 28, at 76; CURRY, *supra* note 29, at 203. Some leading federalists were also antidisestablishmentarians. John Jay, for example, who recorded no objection to the Constitution's ban on religious tests for federal office, led the fight in New York to impose a Protestant-test oath for state officeholders. See CURRY, *supra* note 29, at 162. It is unlikely that he, any more than Madison, saw or sought anything in the Constitution that would have empowered Congress "to pass judgment on existing Church-State arrangements in the states." *Id.* at 205. Samuel Livermore, a leading New Hampshire federalist, both proposed that state's antidisestablishmentarian amendment in Congress, see *infra* note 58, and, together with eight other New Hampshire federalists, voted in 1791 against a proposition that would have eliminated religious tests from their state constitution, see BORDEN, *supra* note 29, at 18.

52. See Ratification of the Federal Constitution by the State of New Hampshire (June 21, 1788), in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 143 (Washington, Department of State, 1894).

53. BRADLEY, *supra* note 28, at 76 (footnote omitted); see also 2 CHARLES E.L. WINGATE, LIFE AND LETTERS OF PAINE WINGATE 220-21 (1930).

54. See Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WMS. U. L. REV. 1, 2 (1996).

55. 1 ANNALS OF CONGRESS 729 (Joseph Gales ed., 1834). Actually, Madison's first draft of the Establishment Clause (presented to Congress on June 8, 1789) had read, "nor shall any national religion be established." *Id.* at 434. Madison suggested that the word "national" ought to placate those concerned about threats to state-law or local-law establishments. See *id.* at 731.

56. See *id.* at 731 ("Mr. Livermore was not satisfied with that amendment . . .").

57. CURRY, *supra* note 29, at 203.

states' local-establishment systems from federal attack.⁵⁸ They achieved this result, and the Madisonians achieved theirs at the same time, when the Establishment Clause took its final form, prohibiting Congress from making any law "respecting an establishment of religion."⁵⁹

Thus "respecting" does not mean "showing respect for." It does not mean "tending toward." There were two kinds of paradigmatic abuse of congressional power that those who fought for the Establishment Clause fought to prevent. A law establishing Anglicanism as the national religion would have been one such abuse. But a law declaring that individuals could not be taxed locally "for a support of ministers or building of places of worship"⁶⁰ would also have been a paradigmatic usurpation. "Respecting" means "with respect to" or "regarding." Congress can make no law *concerning* an establishment of religion.⁶¹ As Corwin observed fifty years ago, and as many scholars have reminded us since, "respecting" in the First Amendment is "a two-edged word, which bans any law *disfavoring* as well as any law *favoring* an establishment of religion."⁶²

In this way, the First Amendment excludes Congress from an entire subject-matter jurisdiction. Justice Story, himself an estab-

58. Huntington "said that he feared . . . that [Madison's] words might be taken in such latitude as to be extremely hurtful to the cause of religion." 1 ANNALS OF CONGRESS, *supra* note 55, at 730. His paraphrased remarks go on:

The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.

Id. at 730. Livermore, who according to Levy had drafted the New Hampshire proposal, *see* LEVY, *supra* note 27, at 100, then reintroduced the New Hampshire language as a motion to amend Madison's language, and the House approved Livermore's language by a vote of 31-20. *See* 1 ANNALS OF CONGRESS, *supra* note 55, at 731.

59. U.S. CONST. amend. I.

60. 1 ANNALS OF CONGRESS, *supra* note 55, at 731 (remarks of Rep. Huntington); *see also supra* note 58.

61. *See* CORD, *supra* note 46, at 9 "The word 'respecting' in the First Amendment 'is synonymous with 'concerning, regarding, about, anent' . . .'; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 at 730 (Da Capo Press 1970) (1833) ('[I]t was deemed advisable to exclude from the national government all power to act upon the subject.').

62. Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 12 (1949); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1091 (1995) ("This wording simultaneously forbids the federal government from establishing a religion at the federal level, or attempting to *disestablish* religion at the state level."); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1199 (1990).

lishmentarian when it came to the law of his home state of Massachusetts, painted this exclusion with the broadest possible brush: "[T]he whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice"⁶³ Story's reading may be too extreme — although, echoing Madison, Iredell, and Wilson, it was surely widespread in the early period⁶⁴ — because the religion clauses do not compel the conclusion that Congress is wholly powerless over the subject of religion. There may be distinctively federal domains — say, in the issuance of money, in regulating the armed forces, in making rules for its own legislative sessions, in governing territories, and so on — in which Congress can constitutionally make laws intermeddling with religion.

But the question becomes very different when Congress tries to regulate matters of faith directly or to tell states what relation their laws must have to the fostering of one or all religions. Here Congress undoubtedly enters the domain of subject-matter exclusion referred to by Story and others. Congress has no power to dictate a position on religion for individuals, and it has no power to dictate a position on religion for states. It has no power to dictate church-state relations at all — where "state" refers to the governments of the several states. This is the core meaning of the Establishment Clause.

This means that Congress may not try to dictate church-state relations even to vindicate religious toleration or free exercise. A disestablishmentarian law will characteristically vindicate tolerance and free exercise — as did Jefferson's famous antieestablishment bill in 1780s Virginia.⁶⁵ To the extent that states can constitutionally enact laws favoring one religion over others, Congress can make no law instructing them not to do so. That would be a quintessential violation of the First Amendment, and that is just what RFRA did.

63. 3 STORY, *supra* note 61, § 1873, at 731. Story believed that the states had a "duty . . . to foster, and encourage [Christianity] among all the citizens and subjects." *Id.* § 1865, at 723. He thus argued against complete disestablishment in Massachusetts. See 2 McLoughlin, *supra* note 43, at 1150, 1158, 1255; Lash, *supra* note 62, at 1094-95.

64. See *supra* text accompanying notes 49-50.

65. Jefferson's antieestablishment bill, discussed at *supra* note 30, provided in part that "all men shall be free to profess . . . their opinions in matters of religion" without affecting their "civil capacities," and that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 THE PAPERS OF THOMAS JEFFERSON 545, 546 (Julian P. Boyd ed., 1950).

II. RFRA AND THE ESTABLISHMENT CLAUSE

RFRA was a direct, unprecedented congressional effort to govern church-state relations. It purported to dictate to the states the relation to religion that all their laws must adopt and all their actions must observe. It prevented states from favoring a single religion in their laws, and it prevented states from affording no protection to religion in their laws. Through RFRA, Congress claimed the power to determine what counts as sufficient and insufficient state neutrality toward all religion and especially toward the practices of religious minorities.

The analysis could almost stop here: RFRA cut straight into the heart of the legislative domain from which the Establishment Clause excludes Congress. It was for this reason alone unconstitutional. But to make plain just how deeply RFRA violated the core meaning of the Establishment Clause — and to respond to certain objections that might be raised — I want to draw out the additional point suggested above: that RFRA was in fact a disestablishmentarian law.

How can this be? RFRA protected religious practices; it protected all religious practices, right across the board. How could it also be disestablishmentarian?

A. *Majority and Minority Religions*

RFRA sought to eradicate state favoritism of majority religious practices. It did so, moreover, in the name of religious freedom, of minority religious practices, and of the equal respect due to all religions. These are definitive features of disestablishmentarianism.

A democratic legislature will inevitably defer to majority religious practices but will not extend the same solicitude to less prominent religions. This was the constant refrain of *Smith's* critics and RFRA's champions:

In a world in which some beliefs are more prominent than others, the political branches will inevitably be selectively sensitive toward religious injuries. Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice.⁶⁶

66. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1136 (1990); see also Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 21 (1994) ("A prime goal of granting . . . exceptions . . . is to ensure that minority religious practices receive the same consideration in the courts that majority practices already receive in the political process."); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1,

The *Smith* Court itself acknowledged the point: “[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.”⁶⁷ That is why liquor stores close on Sunday, not Saturday.⁶⁸ That is why our laws of general applicability systematically favor, implicitly and explicitly, majority religious practice.⁶⁹ And that is why RFRA, taken as a whole, would have had so profound a disestablishing effect: in the name of protecting all religions equally, it would have abolished the favoritism of majority religion incorporated in general state law.

An example. Consider a state statute defining marriage in the traditional way. This is just the kind of state action to which RFRA would have applied. Traditional marriage laws represent the single greatest instance of the constitutionally permissible imposition through law of a definite, widespread — but by no means universal — religious tradition. If a religious polygamist had brought a RFRA action, RFRA would have required the state to show a compelling governmental interest in traditional marriage laws — a task that Hawaii recently failed to discharge⁷⁰ and one that, to be frank, could be satisfied only by eviscerating the compelling interest test.⁷¹ The judge in such a case would have had to decide whether the state had given excessive official sanction in its laws to the articles of faith of a certain religious tradition. It is hard to imagine a federal law today more plainly respecting — and disfavoring — an establishment of religion than RFRA.

15 (“[T]he majority’s deeply held beliefs will normally be reflected in legislation without an exemption.”).

67. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 890 (1990).

68. The Supreme Court upheld Sunday laws against establishment clause attack in *McGowan v. Maryland*, 366 U.S. 420 (1961). There can be no doubt, however, that Sunday laws raise genuine establishment issues. See *McGowan*, 366 U.S. at 431-35; 366 U.S. at 576-77 (Douglas, J., dissenting from Establishment Clause holding); *Ex parte Newman*, 9 Cal. 502, 505 (1858) (striking down Sunday law under the state constitution because it “enforce[s], as a religious institution, the observance of a day held sacred by the followers of one faith”).

69. See, e.g., JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* 101-03 (1995).

70. See *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding that no compelling state interest supports a ban on same-sex marriages).

71. Condemnation of polygamy is moral. If enforcing majority morals is a compelling state interest, there is an end to some once-prized constitutional rights. Under current doctrine, the rights to privacy, to equal protection, and to free speech can all be overridden by laws narrowly tailored to achieve compelling state interests. See generally Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988) (collecting cases). Thus, if enforcing majority morality is a compelling interest, then *Roe* should almost certainly be overturned, *Brown* was probably wrong, and the most basic principle of free speech doctrine — precluding censorship of opinions that a majority finds morally repugnant — no longer holds.

I have no objection to Congress's undoing traditional marriage law in the name of religious freedom, except that Congress's doing so would be unconstitutional. No doubt we are all for states treating various religions with equal respect, but it is not for Congress to dictate what the terms of this equal respect must be.

"But traditional marriage laws are *not* establishments," someone might say. "The Supreme Court has so held.⁷² Do you mean that your argument depends on the claim that polygamy laws really should have been regarded as establishments all this time?"

No. RFRA violated the Establishment Clause regardless of whether the state measures it attacked were establishments. Congress makes a law respecting an establishment of religion whenever it instructs states either to stop favoring in their law certain religious practices or to start favoring them. That is what it means to say that the Establishment Clause imposes a subject-matter limitation on congressional power. Through RFRA, Congress instructed states to stop favoring majority religious practices by dictating terms of neutrality applicable to the practices of all religions. Worthy as it may have been, that goal is precisely what the Establishment Clause forbids Congress to pursue.

This conclusion is important, and it deserves further elaboration. Someone might say: "I really don't see that. If state marriage laws are not establishments within the meaning of the First Amendment, then I don't see how a federal statute requiring a religious exemption from them is a law *respecting* or *concerning* establishment at all. It is a law protecting religious freedom, to be sure, but it does not establish or disestablish anything."

According to this objection, a law could not violate the Establishment Clause unless it either established religion or concerned a state practice that established religion, in the accepted or judicially determined meaning of that term. In one sense, this reading would make the antidisestablishment principle appealingly simple: disestablishment could take place only after an establishment. In another sense, this reading would make the antidisestablishment principle rather strange: Congress would be free to block state fa-

72. See *Reynolds v. United States*, 98 U.S. 145, 162-66 (1879) (upholding a bigamy law as secular in nature). The idea that the federal antipolygamy statute — which governed not states, but federal territories — rested on secular grounds might have surprised its congressional adherents, who called polygamy an "'offense against religion, and against the laws of God,'" and who defended Congress's duty to "'enforce among them [the Mormons] the canons of an approved and Christian morality.'" See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1126 (1994) (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1498, 1515 (1860)).

voritism of religion *unless* the state were favoring it too extremely or blatantly, in which case Congress would perversely be powerless to act.

But putting this strangeness aside, an independent reason makes this reading of the Establishment Clause untenable. It misses the core meaning of the clause. Did New England's ecclesiastical laws described earlier⁷³ establish religion within the then accepted or then judicially determined meaning of the term? The *supporters* of New England's laws — the very men who fought for an amendment prohibiting Congress from interfering with them — overwhelmingly *denied* that these laws established.⁷⁴ The core purpose of the Establishment Clause's antidisestablishmentarian component was to bar Congress from tampering with state religion laws, whether or not those laws amounted to actual establishments.

How could anyone have denied that New England's compulsory assessment systems were establishments? As explained by Zephaniah Swift, whom Levy calls "Connecticut's leading jurist" of the founding era,⁷⁵ "No sect [in Connecticut] is invested with privileges superior to another. No creed is established, and no test act excludes any [from office]."⁷⁶ Similarly, Chief Justice Jeremiah Smith of New Hampshire held that a "religious establishment is where the State prescribes a formulary of faith and worship," whereas in his state "[n]o one sect is invested with any political power."⁷⁷ Bradley may overstate the point, but he surely captures considerable eighteenth-century New England sentiment when he says that the framers of the New England state constitutions — which not only authorized the local-autonomy systems described earlier, but also proclaimed that "no subordination of any one sect

73. See *supra* text accompanying notes 31-40.

74. "As the American Revolution approached," in Curry's words, "'establishment' became another synonym for English tyranny" and "New Englanders would begin to play down or even deny that their system amounted to an establishment at all." CURRY, *supra* note 29, at 129. As early as 1768, a leading Massachusetts pamphleteer declared: "'We are in principle against all civil establishments in religion; and as we do not desire any such establishment in support of our own religious sentiments, or practice, we cannot reasonably be blamed if we are not disposed to encourage one in favor of Episcopal [that is, Anglican] colonists.'" *Id.* at 128 (quoting CHARLES CHAUNCEY, *THE APPEAL TO THE PUBLIC ANSWERED* 152 (Boston, Kneeland & Adams 1768)).

75. See LEVY, *supra* note 27, at 47.

76. 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 142 (Windham, John Byrne 1795). Even a "Jew, a Mehometan, or a Bramin" could worship as he pleased, wrote Swift, and no Christian suffered "any inconvenience, but the payment of his tax to support public worship in the located society where he lives." 1 *id.* at 146.

77. *Muzzy v. Wilkins, Smith* (N.H., 1, 9, 12-13 (N.H. 1803)).

or denomination to another shall ever be established by law"⁷⁸ — "fully intended to disestablish religion and understood nonestablishment to be the effect of their work."⁷⁹ It was rather the *opponents* of compulsory-assessment regimes who damned them as establishments.⁸⁰

Thus the New Englanders who fought for an antidisestablishmentarian First Amendment did not by any means concede that their states had actually established religion. Quite the opposite: they denied that their laws established, but they feared that the federal government might try to abolish or change their laws according to its own determination of the proper neutrality between government and religion.⁸¹ The Establishment Clause was enacted precisely to render Congress irrelevant in the debate over what did and did not amount to an establishment. Congress had no power to force the states to dismantle their support for religion even if their laws were *not* in fact establishments of religion. Indeed, Congress had no authority to interfere with these laws *especially* if, as their supporters claimed, they were *not* establishments.

Yet it might be felt that this conclusion somehow does not make sense of the text. How can a federal law respect an establishment of religion if there was no establishment in the first place? How can RFRA be *disestablishing* if there is nothing established for it to *dis*?

This question asks in effect how those who fought for an antidisestablishment clause could have logically believed *both* (1) that the

78. *E.g.*, MASS. CONST. OF 1780, pt. I, art. III, cl. 5, *reprinted in* 5 SOURCES, *supra* note 31, at 94.

79. BRADLEY, *supra* note 28, at 24. Bradley may overstate the point, because it appears that some New Englanders agreed that their systems established in a sense, or at least expressed doubt about whether they did, but nevertheless defended their ways as poles apart from the opprobrious form of establishment associated with the Church of England. See CURRY, *supra* note 29, at 183-84. Thus, Adams at the First Continental Congress in 1774 responded to Baptist and Quaker protests by saying, according to his later recollection, that the "laws of Massachusetts were the most mild and equitable establishment of religion that was known in the world, if indeed they could be called an establishment." John Adams, *Diary of 1774*, in 2 THE WORKS OF JOHN ADAMS 326, 399 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1850).

80. See, e.g., CURRY, *supra* note 29, at 172, 182-83, 189; JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE, *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 36, at 177, 186; LEVY, *supra* note 27, at 31-32, 47-48, 50; JOSEPH FRANCIS THORNING, RELIGIOUS LIBERTY IN TRANSITION 33-35 (1931) (describing attacks on New England regimes as favoring Congregationalism). In Virginia, Madison and others expressly opposed the general assessment bill as an establishment of religion. See LEVY, *supra* note 27, at 62-63, 67; *supra* note 30.

81. As noted earlier, Representative Huntington of Connecticut said he feared that his state's town-by-town compulsory-assessment system could be federally attacked because it "might be construed into a religious establishment." 1 ANNALS OF CONGRESS, *supra* note 55, at 730; see also *supra* note 58.

state laws they wanted to protect were *not* establishments, and (2) that prohibiting Congress from legislating with respect to ("respecting") establishment protected these laws. If their states' ecclesiastical laws were not establishments, how could a bar against federal law respecting establishment stop Congress from tampering with them? A hypothetical may help answer this question.

Imagine that the Constitution of the United States of the World is being drafted, together with a World Charter of Rights. All member states believe, let's suppose, that racial discrimination must be prohibited. But it turns out there are three camps: some states are committed to race-based affirmative action; a second group condemns affirmative action as a species of racial discrimination; and the final group argues that any law with a sufficiently adverse disparate impact on racial minorities is discriminatory, regardless of the intentions of the legislature or the formal neutrality of the law. Each camp, however, is fearful that the World Congress will not take its particular view. Hence all want to bar the Congress from dictating to the member states what counts and what does not count as racial discrimination. So although the World Congress has been given broad legislative powers, the First Article of the Charter of Rights provides: "The Congress shall make no law concerning racial discrimination."

Now suppose that a month later, the World Supreme Court definitively holds that racial discrimination requires more than unintentional disparate impact. The next day, the World Congress passes a law forbidding all state action with a substantial disparate impact on racial minorities, unless the state action is narrowly tailored to achieve a compelling state interest. The Congress says in its defense: "Everyone agrees that disparate impact is not racial discrimination. Why, the states that engage in it have always denied that it is discriminatory. So you see it is logically impossible for anyone to raise a claim that we have made a law concerning racial discrimination."

But of course the World Congress has done so. It has claimed the power to determine what counts as proper and improper legal neutrality toward race, even though denying this power was the core meaning of prohibiting the Congress from making laws "concerning racial discrimination." The case of RFRA — a *religious* disparate-impact law — is identical. A core meaning of the Establishment Clause is that Congress has no power to dictate to the states what counts as proper or improper legal neutrality toward religion. Congress cannot exercise such a power even if courts have

held that the state laws Congress attacks are not establishments. Indeed, Congress cannot exercise such a power even to attack state laws that merely have a disparate religious impact and no religious motivation behind them whatsoever.

B. *What Congress Understood*

"Just hold on one minute," someone might say. "The point you never address is that Congress passed RFRA to protect *free exercise* principles, not antiestablishment principles. If there were evidence that Congress believed that it was acting to achieve disestablishment, then I might possibly agree with you. But Congress plainly did not think in those terms; in fact, RFRA explicitly states that it does not in any way concern establishment.⁸² If Congress did not think that it was attacking an establishment problem, then I'm sorry: whatever its effects, RFRA simply is not a law respecting an establishment of religion."

This is a crucial objection. The claim is that "respecting an establishment" should be understood narrowly, covering only those instances in which legislators understand themselves to be making a law concerning a religious establishment. A law does not "respect" establishment unless it specifically addresses itself to establishment. Hence a law "merely" protecting free exercise cannot be a disestablishment law.

This objection must be rejected, for three reasons. First, no one would accept it if the law at issue were charged with establishing religion, rather than disestablishing it. Could legislators escape the charge of establishing religion simply by saying (sincerely, let's suppose) that they did not regard themselves as establishing religion? Or by appending to their statute a provision stating that the law does not "in any way address . . . the establishment of religion"?⁸³ If they could, so much for the Establishment Clause.

Second, suppose the Second Congress had passed the Religious Freedom Restoration Act of 1792, outlawing all state compulsory religious assessments, all state religious tests for office, and all state church-attendance laws. Say that Congress claimed authority for its statute under Article IV.⁸⁴ Would this statute have been constitu-

82. RFRA states that it does not "affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion." Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 7, 107 Stat. 1488, 1489.

83. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 7, 107 Stat. 1488, 1489.

84. Congress might, for example, have claimed that such laws were necessary and proper to guarantee each state a republican form of government. See U.S. CONST. art. IV, § 4 ("The

tional if Congress's claim of Article IV power had been accepted? Plainly not: as we have seen, the law would still have paradigmatically violated the First Amendment. The Establishment Clause was enacted precisely to prevent Congress from interfering with state religion laws of just this sort.

But according to the "respecting"-depends-on-congressional-intent objection, Congress could easily have passed this religious freedom law in 1792. It could simply have framed its statute as it framed RFRA: not as an attack on establishment, but as a defense of free exercise. This way of framing the Act would have been no sham. Then as now, Congress could insist on disestablishment, with logic and sincerity, in the name of free exercise. I am not an originalist, but when there are core historical applications of what a constitutional guarantee was enacted to prohibit — core instantiations of the kind of exercise of governmental power that was to be forbidden once and for all — I believe that constitutional interpretation has an obligation to preserve these paradigm cases.⁸⁵ To say that RFRA escapes the antidisestablishment principle because Congress was acting to protect free exercise would surrender the Establishment Clause's paradigm cases. It would advance an interpretation of the clause that would have allowed Congress to engage in precisely those acts forbidden by the core meaning of the clause.

Finally, there *is* evidence — considerable evidence — that Congress *did* consciously understand RFRA as an attack on establishment-related problems. Members of Congress repeatedly defended RFRA in the name of preserving "religious diversity."⁸⁶ Repeatedly Representatives and Senators said that RFRA was necessary to give "minority" religions the same protection already accorded to the dominant — ironically, the word sometimes used is "established" — religions.⁸⁷ These are prototypical *disestablish-*

United States shall guarantee to every State in this Union a Republican Form of Government"); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (suggesting that Guarantee Clause issues are committed to the political branches, not to the courts).

85. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L. J. 1119, 1169-84 (1995). For example, no court has the legitimate authority to interpret the Fourteenth Amendment in such a way that Black codes would be or would have been constitutional. Such an "interpretation" would rewrite or unwrite what the nation committed to writing.

86. See, e.g., 139 CONG. REC. H2359 (daily ed. May 11, 1993) (statement of Rep. Gekas) (describing the "religious diversity" and the "fulsome diversity [sic]" of American religion that "[w]e are sanctifying today"); *id.* (statement of Rep. Nadler) ("What has made the American experiment work . . . has been a tolerance and a respect for diversity enshrined in the freedom of religion clauses of our Bill of Rights."); *id.* at H2362 (statement of Rep. Lowey).

87. See, e.g., S. REP. NO. 103-111, at 7-8 (1993); 139 CONG. REC. H2357 (daily ed. May 11, 1993) (statement of Rep. Fish); see also Brief for the United States at 30, *City of Boerne v. Flores*, 65 U.S.L.W. 4612 (U.S. June 25, 1997) (No. 95-2074) ("Because minority religions

ment arguments. To call for protection of religious *diversity* and religious *minorities* against state favoritism of dominant religious practices is the very essence of disestablishmentarianism.

One RFRA supporter in Congress drew these arguments together in a way that makes RFRA's disestablishmentarian nature unmistakable:

Mr. Speaker The religious liberties which were a driving force behind the formation of this Nation have been seriously eroded by the court ruling in *Oregon versus Smith* and subsequent cases. Only enactment of [RFRA] can repair the damage done

. . . . At the time of the establishment of the American colonies, there was no country in Europe without a state church, and unity of religion was considered essential to the unity of the state. Those whose faiths differed from the officially designated religion were prevented from practicing their own [religion]

But in the United States, we have always cherished our religious liberties. . . . Indeed, our goal in setting public policy has and must always be to accommodate religious diversity to the maximum extent possible. To do otherwise would be to abandon our heritage and to turn our Constitution on its head.

But the Supreme Court [in *Smith*] found that States do not have to show a compelling interest in restricting a religious practice⁸⁸

often lack the political power to obtain accommodations, Congress concluded that legislation was needed to preserve for them the same religious freedom enjoyed by more established faiths." Witnesses at the congressional hearings warned again and again that facially neutral laws had frequently been the instrument of state discrimination, intentional or unintentional, against religious minorities. See *The Religious Freedom Restoration Act: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. (1992); *id.* at 5-7 (statement of William Noyi Yang) (discussing discrimination against Hmong); *id.* at 27 (statement of Ger V. Xiong, Hmong-Lao Unity Association, Inc.) (same); *id.* at 30-39 (statement of Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-Day Saints) (discussing discrimination against Mormons); *id.* at 63-64, 69-71, 129 (statements of Douglas Laycock, Professor, University of Texas School of Law); *Religious Freedom Restoration Act of 1991: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. (1992); *id.* at 23-25 (statement of Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-Day Saints) (discussing discrimination against Mormons); *id.* at 104 (statement of Nadine Strossen, President, National Board of Directors, American Civil Liberties Union) ("It is the minority religions, the unpopular religions, the new religions that are going to be discriminated against."); *id.* at 107-08 (statement of William Yang) (discussing discrimination against Hmong); *id.* at 157-58 (statement of Edward Gaffney, Dean and Professor of Law, Valparaiso University School of Law) (discussing discrimination against Jehovah's Witnesses, Hmong, Jews, Amish, and Muslims); *id.* at 326, 332-38, 398 (statement of Douglas Laycock, Professor, University of Texas School of Law); *id.* at 406-08 (statement of Ruth Flower and Joanna P. McMann, Friends Committee on National Legislation). Representative Orton, a RFRA sponsor, quoted one "Elder Oaks, Apostle of the Church of Jesus Christ of Latter Day Saints," who "could not have stated it more clearly when he said" that "[t]he worshippers who need [Bill of Rights] protections are the oppressed minorities, not the influential constituent elements of the majority." 139 CONG. REC. H2361 (daily ed. May 11, 1993) (statement of Rep. Orton).

88. 139 CONG. REC. H2362 (daily ed. May 11, 1993) (statement of Rep. Lowey).

In other words, the "religious diversity" that RFRA will protect is to be contrasted with the "unity of religion" that obtains when state law favors particular religious practices and prohibits the practice of others. America's precious heritage of religious diversity and freedom was achieved through disestablishment, but *Smith* has "substantially eroded" this achievement. *Smith* allows states to trample religious diversity by passing laws forbidding the practices of "[t]hose whose faiths differ[.]" Only RFRA "can repair the damage done." Only RFRA, in short, will vindicate our heritage of disestablishment.

Representative Lowey's rhetoric may have been for the newspapers, but her logic was telling. Her remarks demonstrate two things: not only did Congress make a law respecting establishment when it passed RFRA, but it intended to do so.

C. *Both Pro-Establishment and Antiestablishment*

To be sure, some of the laws that RFRA would have cut into seem to bear no trace of religiosity about them. To take another familiar case, persons who wish to use peyote for religious purposes might have been able to mount strong challenges under RFRA to state narcotics laws.⁸⁹ But no one thinks of narcotics laws as carrying even a hint of establishment (even though such laws have almost always exempted the sacramental use of wine).⁹⁰ Can RFRA really be viewed as a law respecting establishment in such a case?

Yes, and we have seen why already. The Establishment Clause bars Congress from dictating to states the terms of religious neutrality that they must observe. The question is not whether the states deliberately sought to take a position on religion — they may not have — but whether Congress deliberately sought to dictate a position on religion to the states.⁹¹

But it is worthwhile to explore in more detail RFRA's effect on laws that at least seem — and perhaps are — purely secular. Doing

89. But observe that Justice O'Connor, concurring in *Smith*, would have held that American Indians were entitled to no such exemption under the pre-*Smith* test. See *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 903-07 (1990) (O'Connor, J., concurring).

90. The sacramental use of wine was exempted even during Prohibition. See *National Prohibition (Volstead) Act*, Title II, § 3, 41 Stat. 305, 307, *repealed by* U.S. CONST. amend. XXI.

91. To use the World Congress hypothetical described above, see *supra* text accompanying notes 81-82, a world statute requiring strict scrutiny of all state action having a disparate impact on racial minorities would be a law respecting racial discrimination even though the state actors to whom it applied in a given case had not meant to take any position at all on race or racial discrimination.

so allows us to see how RFRA respected establishment in a simultaneously pro-establishment and antiestablishment manner.

Suppose we granted that RFRA had nothing disestablishmentarian about it as applied to narcotics laws. We would then be saying that the effect of RFRA on narcotics laws had nothing whatsoever to do with any conflict between majority and minority religious practices. Narcotics laws are secular through and through, we would be saying, and RFRA must in such a case be viewed as a law forcing states to protect religion when the states sought to be wholly secular. If so, then RFRA was a law respecting establishment in a *pro*-establishment vein. I am not saying that RFRA thereby established religion, but RFRA clearly forced a state in such a case to favor religion in its law more than the state wanted to do.

In other words, where RFRA attacked laws that genuinely bear no trace of religion, RFRA would have forced a secular state law to provide special, preferential treatment to the religious. Where RFRA attacked laws that *do* bear the stamp of religion, RFRA would have almost always forced states to grant minority religious practices the same degree of legal protection already enjoyed by majority practices. In the first case, RFRA pushed states in the direction of establishment. In the second, RFRA pushed states away. In both, it dictated church-state relations and violated the First Amendment.

But let us not so quickly concede that RFRA, even as applied to what seem the most secular of state laws, would have had no disestablishing effect. Is there a single American statute in force that requires conduct prohibited or forbids conduct required by the religious practices of a majority of the persons in the relevant jurisdiction?⁹² Narcotics laws are hardly a counterexample. It is no coincidence that the overwhelming run of our laws just happen not to contradict the strictures of religion as practiced by the majority.⁹³ In virtually every case in which RFRA had bite, it would have demanded that states cease the favoritism of majority religious practices that laws of general applicability inevitably reflect.

92. I mean the religious practices of the majority as that majority actually understands and lives by those practices. Obviously a theologian may argue, for example, that some or all of our laws requiring persons to support the nation's military apparatus violate the true requirements of Christianity. The point here is that such laws do not violate the majority's own understanding of what its religion requires.

93. See Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 314 (stressing that democratic legislatures are not only unlikely intentionally to transgress against majority religious practices, but are equally unlikely to do so inadvertently).

Both the establishmentarian and disestablishmentarian aspects of RFRA are brought home by *Estate of Thornton v. Caldor, Inc.*⁹⁴ and *Texas Monthly, Inc. v. Bullock*.⁹⁵ In these cases, the Court struck down under the Establishment Clause state efforts to accommodate religious practices in a fashion similar, although by no means identical, to the accommodation mandated by RFRA. In *Thornton*, the Court invalidated a Connecticut statute giving all employees the right to abstain from work on their Sabbath day, if they had one.⁹⁶ In *Texas Monthly*, the Court found an establishment in a statute providing a tax exemption to certain religious publications.⁹⁷ These cases do not compel the conclusion that RFRA established religion, but they do compel the conclusion that RFRA was a law respecting establishment.

Thornton and *Texas Monthly* leave no doubt that Congress had, through RFRA, plunged headlong into a field of contending establishment and antiestablishment forces. If one accepts the basic reasoning in these cases, governmental efforts to carve solely religious exceptions into generally applicable laws always raise establishment issues — even if they do not establish — because they favor the religious over the nonreligious. RFRA was a clear illustration. Nonreligious persons may have the deepest possible moral objections to a state law — they may be burdened in the most profound personal respects by a state law — but they must still obey it.⁹⁸ Yet persons with one particular kind of moral objection to the law — namely, that it burdens their religious practices — receive special legal protection. Under *Thornton* and *Texas Monthly*, this privileging of religion may not actually establish, but it plainly respects establishment. It concerns establishment, and it does so in a pro-religion, pro-establishment vein.

But from another point of view, RFRA entered the same field with an antiestablishment slant. One (commendable) thing Connecticut was trying to do in *Thornton* was to eliminate the favoring of majority-religion Sunday-sabbath practices built into standard workday rules. Connecticut was trying in this sense to disestablish, and RFRA attempted to do the same. Why then was Connecticut charged with establishing religion? Because, according to the Court in *Thornton* (and *Texas Monthly*), a state crosses the line into estab-

94. 472 U.S. 703 (1985).

95. 489 U.S. 1 (1989).

96. See *Thornton*, 472 U.S. at 710-11.

97. See *Texas Monthly*, 489 U.S. at 14-15.

98. See Eisgruber & Sager, *supra* note 17, at 452-60.

lishment when it seeks to give religious exemptions but either fails to accommodate all religious practices equally or fails to strike the proper balance between free exercise claims and secular interests.⁹⁹ If RFRA had solved these problems — if, in other words, RFRA was *not* an establishment under *Thornton* and *Texas Monthly* — then RFRA was a law that *corrected overly establishmentarian state efforts* to accommodate religion, such as those in *Thornton* and *Texas Monthly*. RFRA therefore respected (and disfavored) establishment by ensuring that states accommodated religious practices in non-establishing fashion.

These various views of RFRA are not mutually exclusive. A law may be simultaneously establishmentarian and disestablishmentarian. For example, a law might disestablish one Christian sect, only to establish Christianity in general as the state's religion. Whether RFRA (a) dictated pro-religion church-state relations, (b) required states to give to minority religions the same favorable treatment they already give to "established" religious practices, (c) corrected overly establishmentarian state efforts to accommodate religion, or (d) all of the above, RFRA represented a core violation of the First Amendment.

D. *Why Antidisestablishmentarianism?*

State favoritism of majority religion is a bad thing. Why labor to recover a lost constitutional principle that prevents Congress from taking action against something indefensible?

The Constitution's antidisestablishmentarian principle, strange though it may at first seem, is in reality part of something deeply familiar. To give Congress the power to dictate the terms of church-state neutrality is to run counter to a basic First Amendment objective: the objective of maintaining a fundamental measure of separation between religion and government. This is so even though a disestablishmentarian law is by definition a law disentangling church and state.

Why? Because a disestablishmentarian law can simultaneously be a law through which government commingles itself with religion in the profoundest ways — favoring or disfavoring one or more or all religions. When Maryland's 1776 constitution authorized the legislature to "lay a general and equal tax, for the support of the Christian religion[,] leaving to each individual the power" to desig-

99. See *Thornton*, 472 U.S. at 709; *Texas Monthly*, 489 U.S. at 14-15.

nate as recipient "any particular place of worship or minister,"¹⁰⁰ it thereby disestablished Episcopalianism, which had formerly enjoyed a monopoly on government support.¹⁰¹ The New England laws mentioned earlier, which allowed localities to establish churches by majority vote, were disestablishment provisions in the eyes of some of their champions and in a very real sense. They gave no legal pride of place to any church, instead at least formally treating all (Protestant) sects alike.¹⁰² Disestablishments are not always what they seem.

As a result, religious people have the most to fear from the congressional power that RFRA claimed. Perhaps in a few years, Congress will expressly decide that traditional marriage laws are too religious. Accordingly, Congress passes the New Defense of Marriage Act of 2001, accompanied by copious findings indicating that when the states enacted their marriage laws, they often did so with express reference to protecting and preserving the sanctity of Christian religious practices. This Defense of Marriage Act forces states to permit marriages between any persons, and any number of persons, who wish to marry. Assume that this act rests solely on Congress's asserted authority under section 5 to enforce the religion clauses against the states. Such a statute might well pass muster under *Boerne*.

Once again, I have no stake in traditional marriage laws, but I suspect that the RFRA faithful would be aghast at this statute. I suspect they would condemn this unprecedented seizure of congressional power with every argument they could muster. But if Congress has the power to dictate the terms of religious neutrality to the states, the New Defense of Marriage Act would be constitutional. And it would vividly illustrate how a Congress vested with the power to disestablish would be empowered to intrude — for good or ill — into the nation's religious traditions.

Consider one more hypothetical. Imagine that Congress tomorrow deems state family law insufficiently protective of children's free exercise rights. As Congress sees it, state family law unconscionably permits parents to inculcate children with a particular religious faith. Accordingly, Congress enacts the Children's Religious Freedom Act, which directs that states cannot vest par-

100. MD. CONST. OF 1776 art. XXXIII, reprinted in 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 1686, 1689 (1909).

101. See LEVY, *supra* note 27, at 54.

102. See *id.* at 27-51; *supra* text accompanying notes 31-35.

ents with unsupervised authority over their children's upbringing unless the state ensures that parents do not "compel" their children to practice one particular religion.

RFRA's backers would not likely support the Children's Religious Freedom Act. They would probably say that it violates *parents'* free exercise or privacy rights. So it might, although this result is not certain.¹⁰³ The point is to see how a federal power to dictate rules of religious neutrality for state law is a power to intercede directly into the heart of individuals' religious practices. Even if the Children's Religious Freedom Act did not violate parents' free exercise or privacy rights, it would still violate the Establishment Clause, because it would be an effort to dictate church-state relations. The constitutional wall of separation between Congress and religion may not be absolute, but to avoid a massive breach in it, First Amendment antiestablishmentarianism is not enough. First Amendment *antidisestablishmentarianism* is equally essential. For in a federal system, absent a constitutional prohibition, the central government can project its regulatory designs onto a subject matter by prescribing rules *either to individuals or to states*. As the Children's Act vividly illustrates, a congressional power to regulate church-state relations is a power to regulate the nation's religious life.

RFRA is another vivid example. It was simultaneously the most disestablishing law that Congress ever enacted and the most systematic privileging of religion over nonreligion that Congress ever enacted. Predictably, religious persons vigorously lobbied for RFRA. But if RFRA had been upheld, they may have lived to regret their zeal.

The Establishment Clause, by barring Congress from dictating church-state relations, does not create a states' rights zone of religious affairs in which state legislatures have an unfettered power to establish, persecute, or otherwise regulate as they see fit. The states have no such unfettered power, thanks to the Fourteenth Amendment. Antidisestablishmentarianism is essential not to preserve state sovereignty over religion, but to preserve individual religious liberty.

103. See *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972) (reserving the question of a state's authority to protect children upon evidence that children were being trained in a religious tradition "against their expressed desires").

III. THE EFFECT OF SECTION 5

Turn now to the Fourteenth Amendment. How does section 5 bear on the preceding conclusions?

A. *Section 5 and Constitutional Prohibitions*

Whatever section 5 means, it is not a pro tanto repeal of every constitutional limit on congressional power that came before it. If, for example, Congress added to 42 U.S.C. § 1983 a new punishment for state actors who violate the Equal Protection Clause — namely, slow torture by rack and iron — this new remedy would enforce the provisions of the Fourteenth Amendment, but it would still be unconstitutional. It would violate the Eighth Amendment, which continues to stand as an independent prohibition limiting Congress's section 5 power. As the Supreme Court has held for a century, section 5 does not permit Congress to violate independent constitutional rights or prohibitions laid out in the Bill of Rights or elsewhere.¹⁰⁴ "As broad as the congressional enforcement power is" under the Civil War Amendments, "Congress may not by legislation repeal other provisions of the Constitution."¹⁰⁵

In one critical respect, moreover, the Establishment Clause differs from every other Bill of Rights guarantee incorporated by the Fourteenth Amendment. The other guarantees do not mark out subject-matter prohibitions on Congress's authority. Congress is not barred from making any law "respecting" self-incrimination. Thus if the Supreme Court tomorrow overruled *Miranda v. Arizona*,¹⁰⁶ Congress might constitutionally pass the Custodial Rights Restoration Act, requiring as a matter of federal statutory law that state police officers read the very same warnings the Court had just

104. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879) ("Whatever legislation is . . . adapted to carry out the objects the amendments have in view . . . if not prohibited, is brought within the domain of congressional power." (emphasis added)), quoted in *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court struck down Congress's attempt to lower the voting age in state elections on the ground that such an exercise of section 5 would violate limitations on Congress's powers implicitly established elsewhere in the Constitution. See 400 U.S. at 124-26 (Black, J., announcing the judgment of the Court); 400 U.S. at 154 (Harlan, J., concurring and dissenting); 400 U.S. at 294 (Stewart, J., concurring and dissenting). In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court considered (and rejected) a Fifth Amendment equal protection challenge to a federal statute enacted under section 5. In *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113, 2117 (1995), the Court went further, overturning *Fullilove* and other cases to the extent that these cases held that federal measures enacted pursuant to section 5 were subject to lesser equal protection limitations under the Fifth Amendment than those applicable to states under the Fourteenth.

105. *Mitchell*, 400 U.S. at 128.

106. 384 U.S. 436 (1966).

ruled unnecessary as a constitutional matter. *Boerne* might countenance such a law, and nothing in the Fifth Amendment would bar it.

But when Congress acts to enforce *religious* rights against the states, the situation is different. Did RFRA "enforce" free exercise rights within the meaning of section 5? That question, interesting as it is, turns out to be irrelevant. Even if yesterday's RFRA or tomorrow's new and improved RFRA came within the terms of section 5, it would still violate the Establishment Clause and hence be unconstitutional.

B. *Repealing the Establishment Clause*

It would be possible to grant everything I have said so far and still argue that RFRA was constitutional under the Fourteenth Amendment. The argument would run as follows. The Fourteenth Amendment effected enormous changes in the relations between the states and the federal government. It gave Congress substantial new powers to pass laws directly targeting state action. Shouldn't we read section 5, therefore, to have repealed or amended the Establishment Clause so as to eliminate its bar on congressional disestablishment?

The answer, I think, is plainly no. Constitutional law has lived for a long time now with the idea that the Fourteenth Amendment selectively "incorporates" the Bill of Rights against the states. But no authority whatever supports the proposition that the Fourteenth Amendment selectively eliminated any part of the Bill of Rights. Even the terms of the Tenth Amendment are not, strictly speaking, amended by the Fourteenth.

But the Tenth Amendment would be an inappropriate analogy whether or not it had been, in some sense, amended by the Fourteenth. The Tenth Amendment sets forth no particular substantive rights or freedoms. It marks out no specific domain of liberty into which the federal government may not intrude. The Establishment Clause does. To sustain RFRA under the Fourteenth Amendment, it is not enough to say that section 5 granted Congress new powers in addition to those it originally held under Article I. It is also necessary to say that the Fourteenth Amendment erased a specific, substantive limitation on Congress's power laid down in the Bill of Rights.

Will RFRA supporters make so bold an argument? It is long-established doctrine that repeals of *statutory* provisions must be ex-

pressly made.¹⁰⁷ Surely no less respect is due to constitutional provisions.¹⁰⁸ Indeed, in the case of the Bill of Rights, this rule must apply with the greatest possible force. Absent an express repealer, I cannot imagine a court in this country knowingly holding that any prohibition laid down in the Bill of Rights had been abolished. At the very least, those who claim that such a repeal has taken place must be held to a very substantial burden of proof, under which they ought at least to show that such a repeal was the clear intent or the unavoidable meaning of a later enactment. RFRA's supporters have made no such showing, nor can they. The Fourteenth Amendment undoubtedly added to Congress's powers beyond those enumerated in Article I, but it did not erase any of the specific guarantees against Congress's power enumerated in the Bill of Rights.

Perhaps a partisan of RFRA will deny this conclusion. "I don't accept that," he might say. "The Court has expressly stated that the Fourteenth Amendment altered the preexisting constitutional principles of federalism, and on that ground has held that section 5 trumps the Eleventh Amendment."¹⁰⁹ Your antidisestablishmentarian principle is in essence a principle of federalism. Thus section 5 should trump the First Amendment's antidisestablishmentarian principle as well."

Of course the Fourteenth Amendment permanently altered the federalist structure of the United States government. Of course section 5 is not limited by the principles of federalism expressed in the Constitution prior to the Civil War. But as I have tried to show throughout, the First Amendment's antidisestablishmentarian component is not and never was merely a protection of federalism. It is not merely a states' rights or state sovereignty provision. First Amendment antidisestablishmentarianism is a bulwark of religious freedom. It is a bulwark of the fundamental principle of separation

107. See *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981).

108. State courts, having confronted the problem often enough, have repeatedly so held. See, e.g., *Moore v. McCuen*, 876 S.W.2d 237, 238 (Ark. 1994); *City of San Francisco v. County of San Mateo*, 896 P.2d 181, 186 (Cal. 1995) ("So strong is the presumption against implied repeals' that we will conclude one constitutional provision impliedly repeals another only when the more recently enacted of the two provisions constitutes a revision of the entire subject matter addressed by the provisions" (quoting *Board of Supervisors v. Loneragan*, 616 P.2d 802 (Cal. 1980))).

109. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that under section 5, Congress may subject states to suit in federal court notwithstanding the Eleventh Amendment).

— whether this separation is defined as absolute or not — between the national government and religious affairs.¹¹⁰

To repeat: Disestablishmentarian laws are not always what they seem. A Congress entrusted with the power to dictate the terms of church-state neutrality is empowered to disfavor religion altogether, to favor religion over nonreligion on a nationwide basis, to decide which state laws excessively embody religious traditions, to give special legal preferences to the religious while denying them to the nonreligious, and in sum to intercede directly and profoundly into religious affairs. The New Defense of Marriage Act described above is one illustration.¹¹¹ The Children's Religious Freedom Act is another.¹¹² RFRA is a third. To achieve separation between religion and government in a multitiered political system, the higher level of government must be prohibited from dictating church-state relations at the subordinate levels — even from dictating them in a nominally disestablishing vein.

The point of keeping Congress out of church-state relations is not to give states unfettered authority to dictate religious affairs. The point is to keep the nation's most powerful government from mucking around in the nation's religious life.¹¹³ The erosion of state sovereignty effected by the Fourteenth Amendment furnishes no reason to erode the religious liberty protected by the First.

In fact, the argument that the Fourteenth Amendment partially amended or repealed the Establishment Clause is profoundly perverse. The argument, in its essentials, that a RFRA supporter must make would be this: The Fourteenth Amendment imposed upon the states the duty neither to establish religion nor to prohibit the free exercise thereof, and it gave Congress power to enforce this new duty. Therefore the Fourteenth Amendment repealed the First Amendment to the extent that the First Amendment once prohib-

110. *See supra* notes 97-102 and accompanying text.

111. *See supra* text accompanying note 103.

112. *See id.*

113. Hence the Court's holdings that section 5 overrides the Eleventh Amendment, *see, e.g., Fitzpatrick*, 427 U.S. at 445, are not applicable. The Eleventh Amendment does not exclude Congress from regulating any particular subject matter and does not protect any individual rights or freedoms; it merely protects an attribute of state sovereignty. *See* 427 U.S. at 456. Reading the Eleventh Amendment as it does, the Court has quite rightly held "that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." 427 U.S. at 456 (citation omitted). By contrast, the Establishment Clause is not merely a federalism or state-sovereignty provision. It is a subject-matter limitation on congressional power, *see supra* Part I, a necessary piece of the constitutional separation of religion and government, and hence a fundamental guarantor of religious liberty. *See supra* section II.D.

ited Congress from regulating the proper position of neutrality that states must take toward religion.

This argument may at first seem logical, but it is not. Some Americans of the founding era — including such towering figures as Jefferson and Madison — believed that *all* government should keep its hands, to the greatest extent possible, out of the domain of religion.¹¹⁴ Others believed, on the contrary, that state or local government had the authority to intercede directly in religious life.¹¹⁵ But both parties agreed that the national government should be kept out. Virtually everyone agreed that vesting Congress with a power to intermeddle in religious matters was a core evil to be avoided.¹¹⁶

Over the next seventy years, the view that state or local government should be able to legislate religion gradually dimmed. By 1833, all the New England states had abolished their town-by-town establishment systems.¹¹⁷ In the decades before the Fourteenth Amendment was enacted, state courts in growing numbers discovered in their own constitutions a principle of “complete separation between Church and State.”¹¹⁸ State courts reconceived blasphemy laws and Sunday laws so that they became defensible on wholly secular grounds or struck them down when they could not be so reconceived.¹¹⁹ Assuming that the Fourteenth Amendment memorialized in the federal Constitution this new principle of separation between state government and religion,¹²⁰ this development does not point to a reading of the Fourteenth Amendment that would *cut back* on a fundamental element of the constitutional separation between religion and government — as would a reading

114. See *supra* note 30.

115. See *supra* notes 51, 63.

116. See *supra* text accompanying notes 46-62.

117. Massachusetts, in 1833, became the last state to eliminate its local-establishment regime. See BRADLEY, *supra* note 28, at 24; LEVY, *supra* note 27, at 41-42.

118. *Ex parte Newman*, 9 Cal. 502, 506 (1858). Cooley wrote just before ratification that under American state constitutions, no legislature had the “liberty to effect a union of Church and State.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 469 (Boston, Little, Brown, & Co. 1868).

119. See Lash, *supra* note 72, at 1107-14.

120. There is some evidence that the Fourteenth Amendment’s framers expressly so intended. Thus, Senator Lyman Trumbull excoriated the Southern Black codes because Blacks were prohibited, among other things, from “exercising the functions of a minister of the Gospel,” CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 121 (Alfred Avins ed., 1967), while another Representative complained that “[u]nder the plea of Christianizing [Blacks], [the South] has enslaved, beaten, maimed, and robbed millions of men,” *id.* at 81.

that repealed in part the Establishment Clause. It points to a reading that *extends* this constitutional separation.

In other words, by the 1860s, most American courts judged state governmental intermeddling with religion to be as opprobrious as federal intermeddling. In this sense, the Jeffersonian and Madisonian view had prevailed. If, as a result, the Fourteenth Amendment finally took the hands of state actors off religion, the last thing the Fourteenth Amendment should be read to do is to free Congress to put *its* hands on.

C. Congress's Power to Enforce Religious Liberty

But perhaps one might object that this argument nullifies section 5 with respect to the religious rights protected by the Fourteenth Amendment. Am I saying in effect that the Fourteenth Amendment should never have been construed to incorporate religious rights, or, if it did incorporate such rights, that Congress is powerless to enforce them?

Neither. To be sure, it is possible to mount a case against incorporation of the religion clauses. A number of commentators have reasoned that the Establishment Clause, as a provision designed to keep Congress from interfering with state law, cannot coherently be incorporated against the states.¹²¹ These scholars typically go on to criticize the Court for invalidating state school-prayer laws, nondiscriminatory state aid for religious schools, and so on.¹²²

This argument — that the Establishment Clause, because of its antisestablishmentarian component, cannot logically be incorporated — might, if acceptable, have strengthened the case against RFRA. But the argument has always seemed specious. It is a prisoner of the rhetoric we use when we speak of incorporating

121. See, e.g., BRADLEY, *supra* note 28, at 95 ("To the extent 'respecting an' is thus accurately emphasized, incorporation of the Establishment Clause (via the Fourteenth Amendment) becomes logically impossible; it would be like trying to apply the Tenth Amendment to the states. How does one translate 'Congress shall not interfere with state practices' into a command to state governments?"); Lietzau, *supra* note 62, at 1210; Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 407 ("The inclusion of the establishment clause into the liberty of the Fourteenth Amendment by the Supreme Court has no firm basis in the history of the clause or in logic . . ."); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 (1992).

122. See, e.g., BRADLEY, *supra* note 28, at 135-46; Lietzau, *supra* note 62, at 1210. Professor Bybee argues that both religion clauses, together with *all* other provisions of the First Amendment, are "fundamentally different from the other amendments in the Bill of Rights" and should be treated differently in incorporation analysis. See Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1577 (1995).

“clauses” from the Bill of Rights into the due process guarantee of the Fourteenth Amendment.

The real question of incorporation is not a matter of clauses but of rights: the question is which constitutional liberties — which privileges or immunities — the Fourteenth Amendment guarantees against state abridgment.¹²³ A court could logically hold that the Fourteenth Amendment imposed upon the states the First Amendment’s antiestablishment duty without imposing on them the First Amendment’s antidisestablishment duty. On the other hand, a court could also hold that the Fourteenth Amendment *does* make an antidisestablishmentarian principle applicable against the states as well.¹²⁴ Both of these possibilities, however, suggest only that the Fourteenth Amendment at most duplicated the Establishment Clause, in part or in whole, as a constitutional guarantee against state action, not that the Fourteenth Amendment repealed the Establishment Clause, in part or in whole, as a guarantee against congressional action.

But what of the claim that I have made section 5 a nullity in the area of religion? Notwithstanding the Establishment Clause, Congress remains empowered under section 5 to enforce Fourteenth Amendment religious rights against the states. At a minimum, Congress undoubtedly has the authority (1) to enable individuals to bring claims against state actors to enforce their religious liberties, and (2) to provide for the enforcement of any judgment that Fourteenth Amendment religious rights have been violated — a power that probably includes the authority to provide for special remedies in such cases. One might object that even a statute like 42 U.S.C. § 1983 would, on the account elaborated here, “respect” an establishment of religion as applied to religious liberty claims, and hence be unconstitutional. The answer to this objection is that such a law would be no more unconstitutional than one allowing individuals to bring an action claiming that *Congress* had established religion. To be more than hortatory, the Establishment Clause must permit Congress to create the underlying judicial machinery and causes of action through which Establishment Clause claims may be vindi-

123. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1262-66 (1992).

124. The principle would apply not to the state’s local government law, but to its family law. Suppose a state were to pass its own Children’s Religious Freedom Act, preventing parents from exposing their children to only one religion. Insofar as parents in essence establish a religion within the family, this statute could be seen as an attempt to disestablish religion within the sphere of parental authority. Just as the First Amendment bars Congress from dictating church-state relations, a Fourteenth Amendment antidisestablishmentarian principle could bar states from dictating church-family relations.

cated. Nothing I have said requires that "respecting an establishment" be interpreted so perversely as to bar Congress from passing laws of general applicability that permit individuals to enforce their First Amendment rights on terms similar to the enforcement of any other constitutional rights.

What Congress may not do is attempt to specify the *rules* of the states' duty not to establish. Congress may not dictate what rules states must follow to achieve the proper neutrality toward all religious practices or to avoid excessive favoritism of any or all religions. Any such congressional statute would be a foursquare instance of a law respecting an establishment of religion and hence a violation of the First Amendment.¹²⁵ With respect to state religious neutrality under the Fourteenth Amendment, Congress can still enforce whatever duties the Constitution requires of the states. But Congress cannot do what section 5 evidently permits it to do elsewhere: "prohibit[] constitutional state action."¹²⁶

D. *The Establishment Clause in Court*

We can now resolve a final puzzle. How could RFRA violate the Establishment Clause if it merely codified the same standard of review that the Supreme Court used to impose on free exercise claims? Conversely, if RFRA did violate the Establishment Clause, then wasn't the judiciary also violating that clause when, during the reign of *Sherbert v. Verner*, it applied the compelling governmental interest test against the states?

On the contrary: The Establishment Clause permits courts to order disestablishment and to define the terms of disestablishment, even though it forbids Congress to do so. How can this be? How can the Establishment Clause fail to apply to the courts in the same way that it applies to Congress?

The asymmetry is inherent — and has always been inherent — in the Establishment Clause itself. If *Congress* passed a law making Anglicanism the *nation's* official religion, obviously the Establishment Clause would require a court to strike down the law. But in doing so, the court would necessarily render a judgment respecting an establishment of religion. In every case where it reaches the

125. The only way such a law could be constitutional would be if its rules were already commanded by the Constitution, so that Congress would not in fact specify what states may or may not do with respect to religion but merely provide for causes of action and for remedies. Title VII, insofar as it applies to state actors who discriminate on the basis of religion, probably counts as an example of this sort of law.

126. *City of Boerne v. Flores*, 65 U.S.L.W. 4612, 4619 (U.S. June 25, 1997).

merits of an Establishment Clause claim, the judiciary must render a judgment and indeed, in the judicial sense, *make law respecting an establishment of religion*. Which is to say that under the Establishment Clause, courts *must* do what Congress *cannot* do. Congress here labors under a subject-matter limitation on its powers, but the courts do not. Thus if a *state* enacted a statute making Christianity its official religion, the courts must discharge the task of determining that this statute is invalid. Similarly, only the courts can determine whether state laws of general applicability that burden religious practices are valid or invalid. Congress cannot do so.

The Establishment Clause, as a subject-matter limitation on Congress, cannot apply to the judiciary in the same way it applies to the legislature. The judiciary must police church-state relations, but Congress has no such police power.

IV. POSTSCRIPT: SMITH

The foregoing does not compel any particular result in the doctrinal clash between *Sherbert v. Verner* and *Employment Division, Department of Human Resources of Oregon v. Smith*. In deciding the scope of free exercise rights, the Court is not constrained by an antidisestablishmentarian principle. Even though Congress cannot constitutionally enact the compelling interest test for free exercise claims, the Court may constitutionally readopt it.

Nevertheless, there is something to be said in *Smith's* defense that previous commentary has not clearly emphasized. *Smith's* detractors have repeatedly argued that *Smith* eviscerated religion's protected constitutional status. Religion, these critics say, now receives no greater protection under the First Amendment than constitutionally unprotected activities receive under the Due Process and Equal Protection Clauses.¹²⁷ *Smith's* supporters give credibility to this claim when they argue that "there is no constitutional justification for the privileging of religion."¹²⁸

Of course there is: the First Amendment. The privileging of religion requires no other constitutional justification. But *Smith* does not eviscerate this privilege. It does not treat religion on a par with constitutionally unprotected activities. On the contrary, it treats religion on a par with political dissent, whose pride of place in constitutionally protected activity is not open to doubt.

127. See, e.g., Laycock, *supra* note 66, at 11 ("In the Court's view, religious use of peyote, or of wine, is no more protected by the Constitution than is recreational use.")

128. Eisgruber & Sager, *supra* note 17, at 448.

Can you be thrown in jail for expressing your political opinion? Certainly. It all depends on how you express it. You cannot, for example, express your opinion by declining to pay your taxes, by driving in excess of the speed limit, or by blowing your neighbor's head off. You cannot even use the fact that you were expressing an idea to demand that the government show a compelling interest behind its law.¹²⁹ The fact that you were acting on a political opinion gains you no special exemption — from a valid law of general applicability.

But if the law penalizes you for an action *on the ground that you were expressing a political opinion*, then the story is different. Then, whether your action consisted of words or conduct, you will be constitutionally protected. Even if you display the very symbol of genocidal evil, you will be protected from a law that targets your action on the basis of the political opinion it expresses.¹³⁰ This is just the protection that *Smith* recognizes for religiously motivated conduct. A law that targets religiously motivated conduct is unconstitutional, but a generally applicable law remains enforceable against religiously motivated conduct so long as its bar operates without reference to the religious motivation.¹³¹ In other words, under *Smith*, political opinion and religious motivation receive equally profound constitutional protection. They are protected from any legislation singling them out or targeting them for adverse treatment. But they provide no basis on which a person can claim exemption from a generally applicable law.

This does not mean that *Smith* reduces the free exercise guarantee to a redundancy, protecting against only those laws that would independently violate the freedom of speech. *Smith* fully protects practitioners of religious animal sacrifice from adverse legislation even if their conduct would not qualify as speech so as to trigger the

129. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding against First Amendment challenge, and without the application of the compelling interest test, enhanced punishment for a race-motivated assault); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."); *United States v. Malinowski*, 472 F.2d 850 (3d Cir. 1973) (upholding conviction of a defendant who refused to pay taxes on political grounds). The various prongs of the so-called *O'Brien* test applying to symbolic or nonverbal speech are best understood as ensuring that the law at issue, or its application in a given case, is genuinely unrelated to the communicative impact of the conduct regulated. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

130. See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

131. See *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

free speech guarantee.¹³² And practitioners of religious animal sacrifice are protected even though hunters are not: killing animals for sport could be singled out and prohibited, even though killing animals for religious purposes cannot. In general, when prohibiting noncommunicative conduct *x*, legislatures are free to single out and proscribe the doing of *x* with a particular intention or purpose — doing *x* for sport, doing *x* with the intent to threaten — rather than banning all instances of *x*. What distinguishes religion is that the First Amendment forbids government to make a *religious* intention or purpose into the defining element of a legal liability. *Smith* honors that constitutionally special status.

CONCLUSION

If states no longer have the right to establish religion, what is the point of an antidisestablishmentarian principle? Wasn't this state right the predicate of the Establishment Clause, and doesn't its elimination make antidisestablishmentarianism an anachronism?

Eliminating the states' privilege to establish means that the Establishment Clause no longer serves the same "federalist" or state-sovereignty function it once did. But antidisestablishmentarianism remains a necessary piece of the religion clauses' central objective: preventing Congress from supervising the nation's religious life. Without an antidisestablishmentarian bar operative against Congress, the national legislature will be constantly tempted to correct what it deems an imbalance in the states' relation to religion. It will become the manager of church-state relations all over the country, giving religious persons special rights in one case, taking them away in the next. Perhaps traditional marriage laws will be the next target of congressional management, or perhaps Congress will deem state family law insufficiently protective of children's free exercise rights.

Subject to the duty neither to establish nor to prohibit free exercise, a state is obliged to make numerous decisions on religious matters, including decisions about what degree of accommodation to accord the claims of religious practices in managing its work force, in administering its public schools, and in drafting all of its laws of

132. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down an ordinance prohibiting ritual animal sacrifice). A sole practitioner of Santerian animal sacrifice need not be engaging in "conduct possess[ing] sufficient communicative elements to bring the [Free Speech Clause of the] First Amendment into play." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). But he would still be protected under *Smith* and *Hialeah*.

general applicability. The federal government faces the same questions in its own province. If the states' usual answer to such questions will be to give minority religious practices short shrift, and if we regard this state of affairs as a malady, why doesn't the Constitution tolerate a congressionally prescribed remedy? Because the cure, the nation recognized long ago, would be worse than the disease.