URI AND CAROLINE BAUER MEMORIAL LECTURE

ON THE DIFFERENCE IN IMPORTANCE BETWEEN SUPREME COURT DOCTRINE AND ACTUAL CONSEQUENCES: A REVIEW OF THE SUPREME COURT'S 1996-1997 TERM*

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The general media appraisal of the Supreme Court's past Term was that it was important, dramatic, and possibly historic. A sampling of comments includes that this was the “most significant [Term] of the decade,”' the “most significant in [the Court’s] recent history,”2 a Term with “decisions that, more than any in recent memory, will have an immediate and dramatic impact on American lives,”3 and one that “produced decisions with profound significance for the structure of American government.”4 The New York Times concluded that “[p]erhaps the single most important fact about the term . . . is how important it was.”5

These descriptions were prompted primarily by a cadre of cases that struck down all or part of four acts of Congress; ad-
dressed areas of great social concern like physician-assisted suicide, gun control, and religious freedom; and involved easily sensationalized topics like Paula Jones's charges against President Clinton, the civil commitment of "sexual predators," and sexually explicit material on the Internet. While I generally agree with the media appraisals, the purpose of this Article is to develop one major qualification to the conventional wisdom: There is a great difference between the Supreme Court making important new doctrine and addressing great social concerns—which the Court did in abundance this past Term—and rendering decisions that will have real and substantial consequences. While in my view, with only one exception, all of last Term’s major rulings were doctrinally significant, most tended to be very narrow in scope or have quite limited potential effects.

I.

Having explored the problems of identifying and measuring "consequences" of Supreme Court decisions elsewhere, I do not wish to recreate that effort here. Several of the complexities, however, are worth mentioning, with particular reference to last Term’s decisions.

At the outset, it is important to realize that "the repercussions of all government actions ramify indefinitely and interrelate with other phenomena, both public and private, many of which simply cannot be quantified and indeed often cannot even be identified." Political coalitions present a good example. The force or reasoning of a Supreme Court decision might work as a catalyst for coalition-building in one context leading to new laws and institutions, or utterly demolish an alliance in another. Second, there may be a

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6 See Jesse H. Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1, 6-12 (1984). Although that discussion is pertinent to the issues in this Article, the goal in my earlier piece was precisely the opposite from the present one. There, I had "undertaken to show that the Court's decisions upholding personal rights secured by the Constitution—whether 'right' or 'wrong' doctrinally, or 'good' or 'bad' for society as a whole—have nonetheless enhanced the liberties of many individuals and produced substantial consequences." Id. at 12. Here, I will indicate that many of the Court's major rulings during the 1996-97 Term have not produced substantial consequences.

7 Id. at 7.

8 The politics surrounding the Religious Freedom Restoration Act ("RFRA"), as will be discussed later, demonstrate such disparate consequences. On the one hand, the Court's ruling in Employment Division v. Smith, 494 U.S. 872 (1990), produced an extraordinary political coalition that led to the passage of RFRA. On the other hand, it appears as though the Court's decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), invalidating RFRA, which disparaged neither RFRA's values nor goals, but rather
problem of compliance with judicial decisions. For example, public officials' vigilance in enforcing the Court's rulings may depend on the popularity of the decision, thereby diluting its potential consequences. Third, there is no way to confidently predict whether a judgment produces positive or negative effects because the conflicting rights and conceptions of the public interest create "losers" for every "winner" before the Court. Finally, the mere possibility of judicial invalidation may cause political officials and institutions to refrain from certain activity, a matter that is very difficult to discern. These complexities of identification and measurement make it impossible to conclude with any certainty whether the Supreme Court decisions will or will not have substantial consequences.

Bearing in mind these insoluble problems, and assuming that each of the cases to be discussed is doctrinally significant, it may be helpful to roughly distinguish three levels of impact. First, there are immediate results for individuals, programs, and institutions (including the public fisc). Second, there are consequences disagreed with the source of congressional power used by its supporters, will have little effect on this combine. An example of a decision that had somewhat of a negative effect on a coalition is *Miranda v. Arizona*, 384 U.S. 436 (1966). Despite the fact that "law and order" groups provided strong popular resistance, shortly after the decision "Miranda warnings" were widely implemented and respected. See Jesse H. Choper, *Judicial Review and the National Political Process* 164-65 (1980).

9 See Choper, supra note 6, at 8-9 (noting that judicial decisions prohibiting school prayer had limited consequences in communities that strongly approved of religion in the public classroom and defied the ruling).

10 See id. at 9-11 (observing that the issues of abortion, rights of the accused, affirmative action, and takings are just a few of many contexts where judicial rulings may be impossible to categorize as creating "positive" or "negative" consequences).

11 See id. at 11 & n.30 (speculating that fear of invalidation may be part of the reason that certain proposals to limit the jurisdiction of federal courts did not succeed in Congress).

12 My view that most of the prominent decisions of last Term have "limited consequences" does not diminish their doctrinal significance. My premise is that all of the decisions to be considered at length below represent substantial doctrinal developments. For example, although *Printz v. United States*, 117 S. Ct. 2365 (1997), promises extremely limited practical ramifications, it announces a momentous constitutional principle. See infra Part IV.

13 A slight extension of this first level of immediate impact may be called "interim effect." For example, in *Printz*, the Court invalidated a provision of the Brady Handgun Violence Prevention Act which required local law enforcement officers to perform background checks on prospective handgun purchasers. Although I believe Congress can still easily provide for such investigations through alternative approaches, until Congress does so, there may be some dangerous individuals who are able to acquire handguns without undergoing a background check. Similarly, in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), discussed infra Part X, the Court struck down RFRA as it applied to the states. Again, I believe that Congress may well be able to reenact RFRA under other enumer-
for programs and more general societal interests beyond the immediate facts of the cases in issue. Finally, there are effects that the doctrine articulated in the decision may imply for government policies and individual interests beyond those matters dealt with in the case's holding—including how the Court's ruling might influence other constitutional doctrines.

With regard to the first level of impact, any analysis would be totally myopic if it judged consequences solely by the quantity and quality of a decision's immediate effects. For example, *Marbury v. Madison* would not fare well under such a limited analysis. Its immediate impact was only that William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper did not get their commissions to be justices-of-the-peace in the District of Columbia. (Indeed, even beyond the first level, the Court did not invoke the famed doctrine of judicial review established in *Marbury* to hold another act of Congress unconstitutional for fifty-four years.)

The second level of impact assesses the effect on government programs or individual rights in the "general area" of the decision, and how the judgment will affect future rights or regulations in that area. For example, in *Reno v. ACLU*, which invalidated religious powers, but in the interim, people with claims previously cognizable under RFRA will be without a remedy. See, e.g., *Full Gospel Tabernacle v. Community Sch. Dist.* No. 27, 979 F. Supp. 214, 224 (S.D.N.Y. 1997) ("Plaintiffs also assert a claim under the Religious Freedom Restoration Act of 1993. However, that claim must be dismissed with prejudice in light of the Supreme Court's determination in *City of Boerne* that the Religious Freedom Restoration Act is unconstitutional.") (citations omitted).

See, e.g., infra text accompanying notes 18. The Court's recent decision in *United States v. Lopez*, 514 U.S. 549 (1995), holding that Congress had no authority under the Commerce Clause to pass the Gun-Free School Zones Act of 1990, may be used as an initial illustration. Its immediate results were minor: Not only did the Court's rationale quite clearly suggest how Congress could reenact another statute prohibiting guns near schools, but there is no question that the problem may effectively be handled by state and local laws. See Jesse H. Choper, *Did Last Term Reveal 'A Revolutionary States' Rights Movement Within the Supreme Court'?*, 46 CASE W. RES. L. REV. 663, 666 (1996). At the second level, which I would characterize as the broader power of Congress to control guns (i.e., beyond the specific law invalidated in *Lopez*), the majority affirmed federal authority to regulate guns as long as a jurisdictional element was included as part of the offense that would require the prosecution to prove some nexus to interstate commerce in each case. See id. At the third level, however, *Lopez* presents strong possibilities for judicial curtailment of what had been widely perceived to be a nearly limitless congressional power to control any activity by an individual "even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564.


Congress's attempt to prevent the Internet from being used to send "indecent" or "patently offensive" messages to minors, the "general area" of regulation would be the Internet.

Although the Court often tells the state that it did the wrong thing, sometimes the Court only says that the goal was accomplished the wrong way. In the latter situation, the state may be able to easily avoid the effect of the Court's holding by changing its method of regulation. This may well be the situation in *Reno*, which would result in minimal consequences under the first level of impact analysis. On the other hand, when the Court announces a rule of law for governing a new area of regulation, as it did in *Reno*, its doctrinal choices should be compared to alternative principles. As we shall see, the decision in *Reno* to apply strict scrutiny to content-based regulations of the Internet promises to have substantial consequences for the future of the Internet, as opposed to alternative doctrines, making the *Reno* ruling highly important at the second level of impact, if not the first.

The nature of the final level of impact is most obviously and powerfully demonstrated by the principle of judicial review announced in *Marbury*, although this category may be implicated by the announcement of a new principle with less momentous impact. While almost all of the prominent cases this past Term articulated important doctrines, they generally only filled gaps rather than launched new waves through a given body of law. The one exception is *City of Boerne v. Flores*,19 which may very well carry highly significant limits on the regulatory authority of Congress, and thus will be given substantial attention below.

The major theme of this Article, that most of last Term's salient cases had limited consequences, does not mean that all of them had minor effects at all three levels of analysis. Indeed, as will be explained below, three cases had both notable doctrinal consequences and substantial immediate and prospective impact. However, some rulings produced substantial impact at only one or two levels, and several of the decisions during this "most significant year in [the Court's] recent history"20 manifested limited consequences across all three levels.

II.

Needless to say, there will inevitably be differences of opinion
as to how many and which decisions during this “most significant [term] of the decade”21 were the leading ones. My compilation produces eleven that either established a basic constitutional principle or applied existing doctrine to a matter of major national concern: City of Boerne v. Flores—the Religious Freedom Restoration Act and Congress’s power under Section 5 of the Fourteenth Amendment; Washington v. Glucksberg22—fundamental rights and physician-assisted suicide; Reno v. ACLU23—the First Amendment and regulation of the Internet; Clinton v. Jones24—executive immunity and civil litigation against a sitting President; Printz v. United States25—the Brady Handgun Violence Prevention Act and Congress’s power to require state executive officials to enforce federal law; Kansas v. Hendricks26—civil commitment of sexual offenders and the constitutional definition of “punishment”; Raines v. ‘Byrd27—legislative standing and the Line Item Veto Act; Ohio v. Robinette28—consent to police searches of vehicles during traffic stops; Maryland v. Wilson29—police treatment of passengers during traffic stops; Agostini v. Felton30—the Establishment Clause and public school teachers providing remedial education in parochial schools; Abrams v. Johnson31—race-based legislative redistricting and equal protection.32 Only seven of these cases conform

21 Marquand, supra note 1, at 1.
32 Two very interesting cases just missed the list. In Idaho v. Coeur d’Alene Tribe, 117 S. Ct. 2028 (1997), the most intriguing development is what did not happen. The Tribe claimed, under federal law, ownership of Lake Coeur d’Alene in Idaho and brought suit in federal court, invoking the principle of Ex parte Young, 209 U.S. 123 (1908), for prospective relief forcing all state officers to cease their unlawful possession of the lake. The Eleventh Amendment clearly barred a direct quiet title action against the State. The Court, in a fractured majority, claimed that what the Tribe had asked for was the “functional equivalent” of a quiet title claim and denied the Ex parte Young qualification for federal court actions against the State. See Coeur d’Alene, 117 S. Ct. at 2040. It was not insignificant that the suit was brought by an Indian tribe, as members of the majority noted that a finding for the Tribe would mean that the “lands in question are not even within the regulatory jurisdiction of the State,” as opposed to merely not being in the possession of the State but subject to all land-use regulations. Id. What did not happen was any kind of reformulation of Ex parte Young, the primary circumvention of state sovereign immunity to suit in federal court.
The fears that the Court's ruling one year earlier in Seminole Tribe v. Florida, 517 U.S. 44 (1996) "may signal the demise of Ex parte Young were fueled by the Court's action less than three weeks later granting the state of Idaho's petition for certiorari in [Coeur d'Alene]." Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 SUP. CT. REV. 1, 45. In Coeur d'Alene, seven members of the Court, including Justices O'Connor, Scalia, and Thomas, three of the Court's leading supporters of states' rights, vigorously reaffirmed Ex parte Young in the face of a radical reformulation by Justice Kennedy, joined only by Chief Justice Rehnquist. Justice Kennedy argued that when a state forum is available for an action against state officers, which it almost always would be, federal concerns should be balanced case-by-case against state interests. Justice Kennedy noted the "special sovereignty interests" in submerged lands under navigable waters, surveying their "unique status in the law" of England and the United States. Coeur d'Alene, 117 S. Ct. at 2040-41. Justice Kennedy concluded that the "dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts." Id. at 2043. Surprisingly, Justices Scalia and Thomas refused to join Justice Kennedy and Chief Justice Rehnquist in this significant recharacterization of Ex parte Young and joined Justice O'Connor's opinion that not only was highly critical of Justice Kennedy's pro-federalism, "case-by-case balancing approach" narrowing of Ex parte Young, but also seemed to specifically endorse that decision's continued merit. Id. at 2046. In response to the speculation that Justices O'Connor, Scalia, and Thomas wanted to assure continued possible federal jurisdiction for takings cases, but cf. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (stating that ripeness doctrine effectively results in takings cases being litigated in state courts), another constitutional issue that they are seen as championing, Justice Kennedy's opinion incorporated this desire. He concluded that "the substantive provisions of the Fourteenth Amendment themselves offer a powerful reason to provide a federal forum," Coeur d'Alene, 117 S. Ct. at 2039, and Congress has the power to abrogate state sovereign immunity and require federal jurisdiction under Section 5 of the Fourteenth Amendment. Despite the not unexpected aversion of Justices Scalia and Thomas to a "balancing approach," it is still very puzzling that the five Justices, so consistently intent on defending state sovereignty, could not come up with a majority rationale to narrow Ex parte Young—a "massive, judge-made exception," Henry Paul Monaghan, The Sovereign Immunity "Exception", 110 HARV. L. REV. 102, 127 (1996), to the Eleventh Amendment that "rests on the purest fiction, ... is illogical [and is] only doubtfully in accord with [the] prior decisions." CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 311 (5th ed. 1994); see also Kenneth Culp Davis, Suing the Government by Falsely Pretending to Sue an Officer, 29 U. CHI. L. REV. 435 (1962).

In Chandler v. Miller, 117 S. Ct. 1295 (1997), the Court held that a Georgia law, requiring candidates for various state offices to submit to a drug test in order to qualify for a place on the ballot, violated the Fourth Amendment. The State claimed that the statute was intended "to deter unlawful drug users from becoming candidates" and prevent any ensuing effects on the "official's judgment and integrity." Chandler, 117 S. Ct. at 1303. The Court, however, found that "[n]othing in the record hints that the hazards [the State] broadly describe[s] are real and not simply hypothetical for Georgia's polity." Id. Indeed, respondents even admitted at oral argument that Georgia had no current problems involving drug-using elected officials. See id. In addition, the Court found the Georgia scheme poorly fitted to the State's purported goals. Drug test dates were known well in advance, so all but candidates "prohibitively addicted" could likely avoid detection by abstaining prior to the tests. See id. at 1304. Concluding that Georgia's program was "not needed and cannot work to ferret out lawbreakers," the Court used this very narrow reasoning to hold that Georgia had not demonstrated sufficient "special needs," in accordance with existing doctrine, for the requisite invasion of privacy. Id. at 1302-05. Had the Court announced a broader principle regarding compulsory drug testing in this context, Chandler v. Miller might have been a much more important case.
to my thesis, and they will be treated at some length. The remaining four decisions do promise to have significant practical consequences, but only three articulated important new substantive principles.\footnote{The specific effects of Abrams v. Johnson, 117 S. Ct. 1925 (1997), can be easily stated: whereas in 1992 the Georgia legislature, prodded by the U.S. Department of Justice acting pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §§ 1973-1973bb, provided that Georgia should have three majority-black congressional districts, Abrams upheld a district court order creating only one majority-black district. See Abrams, 117 S. Ct. at 1929-41. The district court’s judgment and the Court’s affirmance were controlled by doctrinal principles most clearly established in Miller v. Johnson, 515 U.S. 900 (1995). Miller struck down the initial Georgia plan for three majority-black districts, finding that since race was the predominant factor in drawing the Eleventh Congressional District, it violated equal protection. See id. at 917. After Miller, the district court concluded that the Second Congressional District, like the Eleventh, also violated equal protection and deferred to Georgia’s legislature to draw up a new plan. Although the Georgia House of Representatives adopted a plan with two majority-black districts, the legislature failed to reach an agreement, and the district court drew up its own plan with only one majority-black district. See Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995). The Court affirmed the district court’s Abrams holding, stating that “[t]he District Court was . . . careful to take into account traditional state districting factors, and it remained sensitive to the constitutional requirement of equal protection of the laws.” Abrams, 117 S. Ct. at 1941. Although Abrams has significant practical consequences for all voters in Georgia, particularly minorities, it does not create new doctrine because the Court simply applied the principles of Miller.}

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In Kansas v. Hendricks,\footnote{117 S. Ct. 2072 (1997).} Ohio v. Robinette,\footnote{117 S. Ct. 417 (1996).} and Maryland v. Wilson,\footnote{117 S. Ct. 882 (1997).} large numbers of individuals who will be directly and possibly profoundly affected by the cases’ respective holdings can be readily identified. In Hendricks, a 1994 state law established procedures for the civil commitment of persons who have “been convicted of or charged with a sexually violent offense” and “suffer[] from a mental abnormality or a personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”\footnote{Hendricks, 117 S. Ct. at 2077 (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).} This law was invoked for the first time against respondent “who had a long history of sexually molesting children, and who was scheduled for release from prison shortly after the Act became law.”\footnote{Id. at 2076.} The Court held five-to-four that the law, rather than criminally punishing prisoners, provided for civil proceedings and permissible incapacitation as well as potential treatment of “mentally unstable individuals who present a danger to the pub-
lic. Given this key determination, the Court easily found that the law "neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible ex post facto lawmaking." The Court's ruling in Hendricks will encourage an increasing number of jurisdictions to civilly commit sexual offenders for indefinite terms.

The State of Washington, joined by thirty-eight other states, filed an amicus brief in support of Kansas. Within days of the Hendricks decision, "the New York State Legislature hurriedly passed its own version of the law and officials in several other states said they planned swift action to make it easier to forcibly hospitalize sex offenders who are deemed dangerous."

"In the last few years, more than 250 sex offenders have been committed to mental hospitals" in the several states that had already enacted such rules, and we should expect this number to rise with the "legislative assault on pedophiles and rapists."

The other two cases with weighty effects both involved traffic stops. In Ohio v. Robinette, the Court held eight-to-one that the Fourth Amendment does not require a law enforcement officer to inform lawfully detained motorists that they are "free to go" in order to recognize their consent to a search as voluntary. Thus, a police officer can obtain lawful consent from persons who are completely free to leave without advising them of this fact, even if

39 Id. at 2083 (quoting United States v. Salerno, 481 U.S. 739, 748-49 (1987)). In summarizing its conclusion with regard to the alleged punitive nature of the law, the Court stated:

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Id. at 2085.

40 Id. at 2086. Even the dissenters, led by Justice Breyer, appeared to "validate the Kansas statute as to persons who committed the crime after its enactment, and [possibly] even validate the statute as to Hendricks, assuming a reasonable level of treatment." Id. at 2087 (Kennedy, J., concurring) (assessing commonalities between the dissent and the majority). Thus, Justice Kennedy characterized the whole Court as agreeing that "the power of the state to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established." Id. (citations omitted).

41 For discussion of this type of effect in my earlier work regarding the consequences of Supreme Court cases, see Choper, supra note 6, at 11.


43 Id.

they did not think they could refuse the request or that they were in fact free to leave. The “consent” must only appear objectively “voluntary” amidst the totality of the circumstances.\(^4\) In the other case, *Maryland v. Wilson*, the Court held seven-to-two that police officers may order the passengers out of a lawfully stopped car.\(^5\) Twenty years earlier, in *Pennsylvania v. Mimms*,\(^6\) the Court had held that the Fourth Amendment did not preclude drivers of lawfully stopped cars from being ordered to exit, primarily because of concerns for officer safety. Here, the *Wilson* Court found that the “weighty interest in officer safety” was just as applicable with passengers as with drivers.\(^7\)

The actual results of *Robinette* and *Wilson* could be felt by anyone who is ever pulled over in a legal traffic stop. For example, the officer in *Robinette* had made 786 traffic stops in the year the incident occurred, and he had routinely asked the driver whether he could search the car for drugs. The Ohio Attorney General attested to the effectiveness of such efforts, boasting that in the two years leading up to *Robinette*, these tactics had yielded over 400 narcotics prosecutions in the state.\(^8\) Thus, *Robinette* not only stands to affect a very large number of people, but the quality of that impact—criminal prosecutions—is also highly significant. *Wilson*, on the other hand, is meaningful primarily for the vast array of instances in which persons may feel its results. Justice Stevens, dissenting, pointed to the “literally millions of other cases that will be affected by the rule the Court announces.”\(^9\) To prove that his claim was not mere hyperbole, he reported that Maryland alone had “well over one million non-tort motor vehicle cases during a 1-year period between 1994 and 1995” and that “this figure is probably a fair rough proxy” for the number of lawful traffic stops.\(^10\) The obligation to step out of the vehicle, often inconvenient and embarrassing, is not trivial for the individuals involved, but the nature of these consequences is obviously not as significant as searches that may lead to criminal prosecutions.

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\(^{45}\) See id. at 421.
\(^{46}\) 117 S. Ct. 882, 884 (1997).
\(^{48}\) See *Wilson*, 117 S. Ct. at 885.
\(^{50}\) *Wilson*, 117 S. Ct. at 886 (Stevens, J., dissenting).
\(^{51}\) Id. at 888 n.5.
IV.

In Printz v. United States, sheriffs from Montana and Arizona challenged the constitutionality of a provision in the Brady Handgun Violence Prevention Act ("Brady Act") commanding "state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks." These duties were only meant as an interim measure because the Brady Act "requires the [U.S.] Attorney General to establish a national instant background check system by November 30, 1998." The sheriffs objected "to being pressed into federal service, and contend[ed] that congressional action compelling state officers to execute federal laws" violated constitutional principles of federalism.

The Court was faced with two doctrinal alternatives: (1) extend New York v. United States, which held that Congress cannot compel state legislatures to enact federal regulatory programs, or (2) extend Testa v. Katt, which held that state judges may be compelled to apply federal law. In a five-to-four opinion by Justice Scalia, the Court chose the former path, concluding that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." The decision constituted a major doctrinal development by filling a noticeable gap in this area. The ruling, however, is somewhat ambiguous as to its scope and, more importantly, is of very limited consequence at all levels of impact.

As to the reach of the principle established by Printz, the government had contended that "requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of New York [v. United States]." In responding that "[t]his argument fails even on its own terms," Justice Scalia's opinion rejected the notion of balancing local burdens and na-

52 117 S. Ct. 2365 (1997).
54 Printz, 117 S. Ct. at 2368.
55 Id.
56 Id. at 2369-70.
59 Printz, 117 S. Ct. at 2384 (emphases added).
60 Id. at 2382.
tional interests, emphasizing that "[i]t is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." Perhaps it was this refusal to allow for any possible qualifications of an absolute rule that prompted Justice O'Connor's brief concurrence, stating that "the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid." Since Justice O'Connor was part of the five-member majority in Printz, as a realistic matter, her refrain is the Court's position, notwithstanding Justice Scalia's categorical dismissal of weighing federal and state interests.

Justice Stevens's dissent takes this point even further, questioning what the Court's holding means for "[m]atters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist." The Court does not respond to this charge, which suggests that under Justice Scalia's unbending refusal to balance, state officers could refuse national commands even in an emergency. While it could be argued that Congress's Article I War Power could limit state sovereignty, Justice Scalia's opinion makes no effort to restrict the Court's rationale to the Commerce Clause (the source of congressional authority for the Brady Act). Rather, both the Court's words and tone consistently refer to the national government's complete absence of power "to impress into its service—and at no cost to itself—the police officers of the 50 states." In any event, the War Power exception would plainly not apply to such civilian emergencies as public health epidemics, natural disasters, or purely domestic acts of terrorism. Whether Printz extends to these extreme, yet realistic, situations remains unclear.

61 Id. at 2383. To underline his point, Justice Scalia again emphasized in the opinion's concluding paragraph that "no case-by-case weighing of the burdens or benefits is necessary [as] such commands [as the Brady Act] are fundamentally incompatible with our constitutional system of dual sovereignty." Id. at 2384.

62 Id. at 2385 (O'Connor, J., concurring). Justice O'Connor gives as an example of these "purely ministerial" duties the reporting of missing children to the Department of Justice. See id. In his majority opinion, Justice Scalia commented that "federal statutes... which require only the provision of information to the Federal Government, do not involve the precise issue before us here." Id. at 2376.

63 Id. at 2387 (Stevens, J., dissenting).

64 Id. at 2378.
Despite the doctrinal significance of Printz, its practical consequences are exceedingly limited. First, the invalidated background checks were to operate only until November 30, 1998, when a national instant check system is scheduled to be implemented. Congress could likely find some federal officials to conduct background checks during the transition if needed. Second, most state police will continue to check, regardless of Printz. Finally, as will be discussed below, Congress could readily accomplish its goal of state assistance to enforce the Brady Act by using an alternative source of authority.

Under current spending power doctrine, reaffirmed within the past decade in South Dakota v. Dole, if three criteria are met, Congress may condition state receipt of federal funds on designated conduct by the state, even though Congress has no power to directly require the state to act. First, the condition must relate "to the federal interest in particular national projects or programs." Second, "other constitutional provisions may [not] provide an independent bar to the conditional grant of federal funds." Finally, "the financial inducement offered by Congress [may not] be so coercive as to pass the point at which 'pressure turns into compulsion.'"

Applying these factors, and assuming that the Rehnquist Court's agenda does not include modification of Dole's exceedingly generous grant of spending authority to the national government, Congress could, for example, easily condition receipt of some portion of federal law enforcement assistance funds on state officials performing background checks on handgun purchasers, a strategy suggested by Justice O'Connor in her concurrence.

65 For my own disagreement with judicial enforcement of this principle, see Jesse H. Choper, Federalism and Judicial Review: An Update, 21 HASTINGS CONST. L.Q. 577 (1994).
66 The Brady Act applied only to the 23 states that did not already have a background check system in place. Where state-mandated background checks govern, Printz is irrelevant. See Dennis A. Henigan, N.R.A. Should Not Rejoice: Brady Act Lives On, NAT'L L.J., July 28, 1997, at A17. Moreover, it appears that Ohio has been the only state to openly refuse to do background checks voluntarily since Printz. See Michael Hawthorne, Ohio in Dispute over Gun Checks, CINCINNATI ENQUIRER, Aug. 15, 1997, at D1.
68 Id. at 210.
69 Id. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
70 Id. at 208.
71 Id. at 211 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
These investigations plainly relate to federal law enforcement interests, the states are not asked to violate any specific constitutional provision, and, given the Court's great reluctance to find "coercion" in this area, there would be no difficulty finding "encouragement" rather than "compulsion." The same is true even if the stricter spending power test, proposed in Justice O'Connor's dissent in *South Dakota v. Dole*, were adopted. She would demand that "the requirement specify in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated." With the Brady Act, Congress could simply mandate that a certain portion of the funds must be spent on background checks of gun purchasers in order to advance the cause of law enforcement.

While it is by no means certain, given the extensive reach of federal spending programs, it would seem that the few other instances of desired congressional enlistment of state enforcement authority could be similarly accomplished as well.

V.

Title I of the Elementary and Secondary Education Act of 1965 provides federal funds to "local educational agencies" for "remedial education, guidance, and job counseling to eligible students," who include those in low-income areas who are (or at risk

74 But see Justice Thomas's view that the Second Amendment may be "read to confer a personal right to 'keep and bear arms.'" *Id.* at 2386 (Thomas, J., concurring).


76 *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting Brief for the National Conference of State Legislatures et al., as Amicus Curiae, at 19-20, *Dole* (No. 86-260)).


78 In addition, Congress may force states to choose between administering federal programs or having their laws preempted and replaced with either a federally enforced policy or even a regulatory void. . . . For example, assuming this would be a valid exercise of its Commerce Clause power, Congress could enact a law preempting any and all state regulations of gun purchases unless CLEOs enforced the Brady Act. Or, Congress could do precisely the opposite (if allowed by the Second Amendment) and enact a law prohibiting the sale of guns within a state unless its CLEOs enforced the Brady Act.


of) failing. The New York City Board of Education “first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction,” especially those that are church-related. A plan reviewed by the Court twelve years ago “called for the provision of Title I services on private school premises during school hours,” and “only public employees could serve as Title I instructors and counselors.” Numerous checks sought to insure that the Title I instructors did not stray from their secular purpose, most notably a provision that “a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher’s classroom every month.”

In 1985, in Aguilar v. Felton, the Court found five-to-four that this plan violated the Establishment Clause because of “excessive entanglement of church and state in the administration of [Title I] benefits,” specifically with respect to the monitoring program. In School District of Grand Rapids v. Ball, a companion case with a similar program called “Shared Time,” but without a monitoring system, the Court also found an Establishment Clause violation because of the impermissible “effect of advancing religion.” The Court’s reasoning in Ball stood for three assumptions about public employees teaching supplemental courses in parochial schools: (1) influenced by the sectarian nature of their surroundings, they “may overtly indoctrinate the students in particular religious tenets”; (2) they create a “symbolic union of church and state”; and (3) the public provision of such services may impermissibly “subsidize the religious functions.”

Agostini v. Felton involved the same parties as Aguilar. They returned with a Federal Rule of Civil Procedure 60(b)(5) motion, claiming that “decisional law [had] changed to make legal what the

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81 Id. at 2004 (emphasis added).
82 Id.
83 Id. at 2005 (citations omitted).
86 See Agostini, 117 S. Ct. at 2010 (summarizing Ball). The “Shared Time” program in Ball was a local plan, rather than under Title I, offering courses supplemental to the “core curriculum” embodied in state accreditation standards. The courses were “remedial” and “enrichment” in nature. See Ball, 473 U.S. at 375.
87 Ball, 473 U.S. at 397.
88 Id.
[injunction in *Aguilar*] was designed to prevent,"^{90} pointing in particular to the statements of five Justices in *Board of Education of Kiryas Joel Village School District v. Grumet*^{91} calling for a reexamination or overruling of *Aguilar*.^{92} In *Agostini*, those five members of the Court, agreeing that subsequent decisions had departed from the assumptions of *Ball*, overturned *Aguilar*.

Speaking for the majority, Justice O'Connor's approach emphasized key facts about the Title I program before the Court, placing extensive limits on the reach of her opinion. First, she stressed that the Title I services are "supplemental to the regular curricula," and do not "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students."^{93} Strengthening this point, she added that Title I services are "available only to eligible recipients."^{94} Second, she underlined that "[n]o Title I funds ever reach the coffers of religious schools."^{95} Third, her description of the plan before the Court carefully emphasized that:

> [a]ssignments [of instructors and counselors] to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school.... [A] large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own.... [and] moved among the private schools, spending fewer than five days a week at the same school.

All religious symbols were to be removed from classrooms used for Title I services. The rules acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one

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^{91} 512 U.S. 687 (1994).

^{92} See *id.* at 717-18 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 731 (Kennedy, J., concurring in the judgment); *id.* at 750 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.).


^{94} *Id.* at 2012.

^{95} *Id.* at 2013.
unannounced visit to each teacher's classroom every month.\textsuperscript{96}

Justice O'Connor's fact-specific approach supported her characterization of recent rulings as merely abandoning the presumption that "the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-supported indoctrination or constitutes a symbolic union between government and religion,"\textsuperscript{97} and confirmed her exceedingly narrow statement of the holding in the present case.\textsuperscript{98}

Despite the highly restricted nature of the opinion, \textit{Agostini} is not simply a trivial reversal of result under prevailing Establishment Clause doctrine. The Court quoted an estimate that, following \textit{Aguilar}, "some 20,000 economically disadvantaged children in the city of New York, and some 183,000 children nationwide would experience a decline in Title I services."\textsuperscript{99} Moreover, in the Court's view, the costs of conforming to \textit{Aguilar} were an unfortunate waste of federal and local money that was intended to be used to help disadvantaged children. Since the 1986-87 school year, New York City's Board of Education alone spent over $100 million for compliance through alternative methods, with a good part of these costs involving the unpersuasively distinguishable practice of parking mobile vans next to parochial schools for instruction so that public employees would not teach on the actual premises of the church-related schools.\textsuperscript{100}

While eliminating these costly consequences of \textit{Aguilar} is obviously significant, the Court's holding is too narrow and its majority too fragile to support the bold claims by some that it gives a green light for voucher programs or other substantial public aid to parochial schools.\textsuperscript{101} As I have indicated elsewhere, although four Justices would probably uphold the inclusion of religious schools in voucher plans, the required fifth vote of Justice O'Connor, even
after Agostini, remains elusive.\textsuperscript{102} Her position in Ball is especially instructive. She dissented from that part of the judgment that struck down the “Shared Time” program, and this dissent became the prevailing doctrine in Agostini. However, Justice O’Connor concurred in that part of the judgment in Ball which invalidated a publicly funded program called “Community Education,” offering general academic and hobby courses to children and adults at nonpublic schools:\textsuperscript{103}

The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual affect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach.\textsuperscript{104}

As the only presently available fifth vote to sustain voucher plans that include religious schools, Justice O’Connor calls the tune. Her views in Ball, as well as the narrow and fact-specific nature of her more recent opinions in Rosenberger v. Rector and Visitors of the University of Virginia\textsuperscript{105} and Agostini, seriously caution against counting on her support for any broad program providing aid to parochial schools.

VI.

In Clinton v. Jones, Paula Jones sued the sitting president, Bill Clinton, for alleged sexual harassment that took place before he

\textsuperscript{104} Id. at 399-400 (O’Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added).
\textsuperscript{105} 515 U.S. 819 (1995); see also Choper, Dangers, supra note 102, at 722-23.
entered the White House. President Clinton claimed that "in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends." The Court added to executive immunity doctrine by holding that Clinton is not totally immune from a federal court suit while president, but the Court also restricted the process of suing a sitting president by emphasizing the substantial obligation of district judges to afford respect for the president’s time and energy while in office. At the level of immediate impact, although the Court’s refusal to grant an automatic temporary immunity may pose some political embarrassment for President Clinton (and perhaps for some of his successors), the long-term practical consequences for the office of the presidency promise to be little different than if the Court had granted some form of constitutional immunity.

Clinton v. Jones was the first decision regarding presidential immunity since Nixon v. Fitzgerald. When former President Nixon was sued civilly regarding official conduct that took place during his presidency, the Court held that he was "entitled to absolute immunity from damages liability predicated on his official acts." The Nixon opinion expressed concerns about how litigation might distract the president and the overall value of the president’s time. The Court in Clinton, however, found the dominant concerns in Nixon to be "diversion of the President's attention during the decisionmaking process caused by needless worry as to

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107 Id. at 1639.
108 President Clinton's personal vexation probably would have continued unabated even if the Supreme Court had given him temporary immunity. As indicated by the following headlines, coverage of the allegations shortly after the Clinton v. Jones decision included a host of matters that would surely garner attention regardless of when the suit proceeds. See, e.g., John M. Broder, White House Denies Seeking I.R.S. Audit of Clinton Accuser, N.Y. TIMES, Sept. 16, 1997, at A26; Barbara Ehrenreich, Silence of the Beltway Feminists, N.Y. TIMES, Jan. 17, 1997, at A31; Thomas Galvin, Paula Camp Wants Pix of Bill Below the Belt, N.Y. DAILY NEWS, Sept. 15, 1997, at 12; Neil A. Lewis, Clinton Case Moves to Talk of Settlement, N.Y. TIMES, Sept. 15, 1997, at A15; Neil A. Lewis, Two Lawyers for Paula Jones Want to Withdraw from Case, N.Y. TIMES, Sept. 9, 1997, at A24; Frank J. Murray, Spinning for Paula Jones, WASH. TIMES, July 19, 1997, at A1;

The text was written and, needless to say, takes no account of the effect that ongoing depositions in Paula Jones's lawsuit have had in producing the extraordinary difficulties for President Clinton—unresolved at this writing (and proofreading)—occasioned by Monica Lewinsky's statements. Whether all of this would have been avoided if the Court had granted the immunity sought by President Clinton is, of course, unknown and unknowable.

110 Id. at 749.
111 Id. at 751.
the possibility of damages actions stemming from any particular official decision.”112 Thus, President Clinton’s situation, based on unofficial and pre-presidential conduct, was easily distinguished.113 The government’s separation of powers arguments were also rejected, mainly because of all the burdens the judicial branch can already place on the President’s official conduct.114

While the Court’s ruling will force the President to defend the suit during his presidency, the Court greatly softened its holding with various admonitions to the trial judge. Stressing that “a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity,”115 the Court also stated that the:

[B]urdens [on the President] are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.116

With this caveat, the Court’s rejection of President Clinton’s claim for immunity promises to be little different than the constitutional immunity contemplated by Justice Breyer’s concurrence. He urged that “once the President sets forth and explains a conflict between judicial proceeding and public duties, . . . a federal judge [cannot] interfere with the President’s discharge of his public duties.”117 Neither the Court nor Justice Breyer would allow automatic temporary immunity, but both would provide substantial protections for the Chief Executive.

Even beyond granting the president the opportunity to delay

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113 Id. at 1644.
114 The Court stated:
   If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President’s official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President’s time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.
Id. at 1650.
115 Id.
116 Id. at 1650-51. The Court added that “there is no reason to assume that the District Courts will be either unable to accommodate the President’s needs or unfaithful to the tradition—especially in matters involving national security—of giving ‘the utmost deference to Presidential responsibilities.’” Id. at 1651-52.
117 Id. at 1652 (Breyer, J., concurring).
a civil action regarding unofficial conduct by persuading a district judge that the demands of the suit are too burdensome, the Court also affirmed the power of Congress to “afford the President stronger protection” with appropriate legislation. Finally, noting that “[h]istory indicates that the likelihood that a significant number of such cases will be filed is remote,” the Court apparently left room to reconsider its holding should a scourge of civil suits regarding unofficial actions begin to plague the presidency.

VII.

In Washington v. Glucksberg and Vacco v. Quill, the Court unanimously upheld laws from Washington and New York that prohibited physician-assisted suicide. The Washington statute survived a substantive due process challenge and the New York regulation overcame an equal protection attack. In Glucksberg, the Court first established that the due process analysis required examining “our Nation’s history, legal traditions, and practices.” After surveying 700 years of the “Anglo-American common-law tradition,” and noting that nearly every western democracy and forty-four states make it a crime to assist suicide, the Court concluded: “The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.... [T]he asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”

Because the Glucksberg Court concluded that prohibiting assisted suicide does not burden a “fundamental” right under either the Equal Protection Clause or the Due Process Clause, mere rationality review applied. Nonetheless, in Quill v. Vacco, the Second Circuit found an equal protection violation, even under this greatly relaxed standard of review. The court reasoned that “those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs [and] the

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118 Id.
119 Id. at 1651.
122 Glucksberg, 117 S. Ct. at 2262.
123 Id. at 2263.
124 Id. at 2271.
ending of life by [the withdrawal of life-support systems] is nothing more nor less than assisted suicide." The Supreme Court reversed, finding that "the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical[, and] it is certainly rational." It furthers state interests in the preservation of life and medical ethics, the prevention of less than voluntary suicide, and the protection of economically and physically vulnerable groups.

Part of the broader doctrinal significance of Glucksberg—at the third level of impact—beyond the denial of a general fundamental right to assisted suicide, is the Court’s undisguised reluctance to recognize new substantive due process rights. The fundamental rights argument upheld by the United States Court of Appeals for the Ninth Circuit sitting en banc emphasized Planned Parenthood v. Casey and Cruzan v. Director, Missouri Department of Health. It drew particularly plausible analogies between the decision to terminate one’s life in Glucksberg and statements regarding the decision to abort a fetus in Casey as being "central to personal dignity and autonomy," and one of "the most intimate and personal choices a person may make in a lifetime." The Court, however, implicitly recognizing institutional wounds it has suffered since accepting a new fundamental right in Roe v. Wade, observed in Glucksberg that: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

125 Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996).
126 Vacco, 117 S. Ct. at 2298.
127 See Glucksberg, 117 S. Ct. at 2272-75.
128 See Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996).
129 505 U.S. 833 (1992) (holding that a state may not place undue burdens on the right to an abortion).
130 497 U.S. 261, 279 (1990) (assuming that the Constitution grants competent persons a "right to refuse lifesaving hydration and nutrition").
131 Compassion in Dying, 79 F.3d at 813-14.
133 Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997); see also id. at 2303 (O'Connor, J., concurring) ("Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between [competing] interests...."); id. at 2293 (Souter, J., concurring in the judgment):

We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which
Although the *Glucksberg* Court unanimously refused to articulate a general fundamental right to assisted suicide,134 five members of the Court offered concurring opinions addressed to a slightly narrower issue—one that would appear both to conflict with the Court’s caution in finding new substantive rights, and to greatly confine any immediate results of the decision.

Justice O’Connor’s concurrence posited the case of a “mentally competent person who is experiencing great suffering” and wishes to “obtain[] medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death.”135 Although she found “no need to reach that question,”136 her preview of the constitutional issue, hinting strongly that the Due Process Clause protects this right to palliative treatment even though it may accelerate dying, was agreed to by Justices Ginsburg, Breyer, and Stevens.137

Similarly, Justice Souter wrote that the “importance of the individual interest . . . cannot be gainsaid,” and “[w]hether that interest might in some circumstances, or at least some time, be seen as ‘fundamental’ to the degree entitled to prevail is not, however, a conclusion that I need draw here.”138 But, he then went on to distinguish physician-assisted suicide from “shortening life to kill pain,”139 equating the latter with “the disconnection of artificial life support,”140 a practice that has been generally assumed to fall within the “fundamental” rights category.141 Thus, counting the votes, a majority of the Court seemed prepared to recognize a right to treatment for suffering from pain even though it hastens death—a right only somewhat more limited than the general right

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134 In his opinion, Chief Justice Rehnquist spoke for himself, Justices O’Connor, Scalia, Kennedy, and Thomas.
135 *Glucksberg*, 117 S. Ct. at 2303 (O’Connor, J., concurring).
136 *Id.*
137 Justice Ginsburg concurred in the judgment “substantially for the reasons stated by Justice O’Connor.” *Id.* at 2310 (Ginsburg, J., concurring). Justice Breyer, who partially joined Justice O’Connor’s opinion, made clear that he shares her views on this point and expanded on her hypothetical case. See *id.* at 2310-12 (Breyer, J., concurring). Justice Stevens did not join Justice O’Connor’s opinion but reiterated her hypothetical, or perhaps an even broader one, stating that, “I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge.” *Id.* at 2309 (Stevens, J., concurring).
138 *Id.* at 2290, 2293 (Souter, J., concurring in the judgment) (citation omitted).
139 *Id.* at 2291 n.17.
140 *Id.* at 2291 n.16.
141 See *id.* at 2281 (citing several opinions in *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1996)).
Indeed, Ronald Dworkin has argued that the concurring opinions reveal that a majority of the Court actually reserved the basic question of whether there is a fundamental liberty to physician-assisted suicide, as opposed to a narrower right to palliative treatment: "Five of the six justices who wrote opinions made it plain that they did not reject [a fundamental right to physician-assisted suicide] in principle, suggesting that the Court might well change its mind in a future case when more evidence of the practical impact of any such right was available." In response to Yale Kamisar's much narrower reading of the concurrences as providing nothing more than a right to pain relief "even if that relief is likely to hasten death or cause unconsciousness," Dworkin constructed the following argument: When "severe pain cannot be controlled in some terminal patients by conventional painkillers," these persons would have a constitutional right to "total and sustained anesthesia" to relieve pain, provided the doctors prescribing it did so "primarily to relieve pain when no other means for doing so were available." If so:

What possible justification could there be for allowing doctors to induce terminal unconsciousness and a certain though protracted death, but forbidding them to prescribe pills that would bring a quicker and more humane death? Surely the former technique would leave patients just as vulnerable to the pressures the justices feared as the latter would.

The primary difficulty with Dworkin's broader reading of the five Justices' views is that respondent's equal protection challenge in Vacco asked the Court a question very similar to Dworkin's, based on medical practices permitted in New York:

What purpose could possibly be "rationally" furthered by permitting one who is not dependent on life support to seek physi-

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142 Even Yale Kamisar, the most ardent academic opponent of physician-assisted suicide, admitted that "quite possibly" a majority of the Court held the view that:

[If a state were to prohibit the administration of pain relief desperately needed by a patient if and when the increased dosage of medication is highly likely to bring about death, they would want to revisit the law of death and dying and consider whether such a restriction on pain relief is constitutionally permissible.


144 Kamisar, supra note 142, at 68.


146 Id.
cian assistance to end his own life—but only if he is willing to do so in a way that is horrific and cruel: by consenting to be made unconscious, rendering him dependent on life support (in the form of artificial nutrition and hydration) if he is to remain alive, and then deliberately causing his own death by having a physician withhold it.\footnote{Brief for Respondents at 49, Vacco v. Quill, 117 S. Ct. 2293 (1997) (No. 95-1858).} The Court unanimously denied this equal protection challenge in \textit{Vacco}. Chief Justice Rehnquist’s opinion, noting that the distinction between assisting suicide and withdrawing life-sustaining treatment is rational and “widely recognized and endorsed in the medical profession and in our legal traditions,”\footnote{\textit{Vacco}, 117 S. Ct. at 2298.} would appear to encompass Dworkin’s point as well.\footnote{Even if Dworkin is correct, however, the right that he contends has been left open by the concurring majority is explicitly tied to relief of pain, which clearly does not encompass terminally ill persons who simply wish to die even though they are not (yet) experiencing great physical discomfort. \footnote{See id.; Brief for Petitioners at 15-16 n.9, Vacco v. Quill, 117 S. Ct. 2293 (1997) (No. 95-1858).}}

Finally, it should be noted that even if the Court actually established the right to palliative treatment implied by five of its members, thereby significantly minimizing the thrust of its judgments in \textit{Glucksberg} and \textit{Vacco}, it would only be of marginal consequence because the current notion of “assisted suicide” already allows for pain-mitigating treatment that might hasten death. As Justice O’Connor observed, in the states of Washington and New York no legal barriers exist “to obtaining medication, from qualified physicians, to alleviate [great pain], even to the point of causing unconsciousness and hastening death.”\footnote{\textit{Vacco}, 117 S. Ct. at 2303 (O’Connor, J., concurring).} The prevailing theory—strongly criticized by the respondents,\footnote{\textit{See id.}} but widely recognized\footnote{See id.; Brief for Petitioners at 15-16 n.9, Vacco v. Quill, 117 S. Ct. 2293 (1997) (No. 95-1858).}—as to why such prescriptions are not “assisted suicide” is called the “double effect” and relies on the “fiction that the clearly foreseeable consequences of an act are not intended.”\footnote{Kamisar, supra note 142, at 68 (“So far as I know, however, no state bans the use of pain relief when it is likely to hasten death.”); see also Yale Kamisar, \textit{On the Meaning and Impact of the Physician-Assisted Suicide Cases}, 82 MINN. L. REV. 895, 908 n.56 (1998). But see Robert A. Burt, \textit{Disorder in the Court: Physician-Assisted Suicide and the Constitution}, 82 MINN. L. REV. 965, 969-70 (1998) (stating that practical impediments deter physicians from prescribing adequate pain relievers).} Since it appears that no state prohibits the use of pain relief, even when it would fall under the theory of the “double effect,”\footnote{Brief for Respondents at 15, Vacco, (No. 95-1858).} this
existing practice already preempts the kind of constitutional right to assisted suicide the Court might be inclined to accept in the future. Thus, it is unlikely that the issue will reach the Court.

VIII.

Reno v. ACLU,\textsuperscript{155} one of the most celebrated cases of the Term, involved the initial encounter between government regulation of the Internet and the First Amendment.\textsuperscript{156} The Communications Decency Act of 1996\textsuperscript{157} ("CDA") prohibited "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age,"\textsuperscript{158} and "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."\textsuperscript{159} The ambiguous terms and sweeping breadth of the CDA made for easy invalidation on grounds of vagueness, especially once the Court determined that content regulation of the Internet would receive strict scrutiny under the First Amendment—a highly important principle of constitutional law. However, there are few practical consequences at the first level of impact. Both the opinion's rationale and developing technology leave substantial room for satisfaction of Congress's core concern of shielding minors from smut on the Internet.

In analyzing the case at its second level of impact, the doctrinal significance of according speech on the Internet the strongest degree of First Amendment protection should not be minimized. Underscoring the Internet's importance for free expression by referring to its "vast democratic fora,"\textsuperscript{160} and observing that the medium allows its users to "become a town crier with a voice that resonates farther than it could from any soapbox,"\textsuperscript{161} the Court declined the Government's invitation to allow the kind of regulatory leeway that had been granted to Congress over the broadcast media.\textsuperscript{162}

\textsuperscript{155} 117 S. Ct. 2329 (1997).
\textsuperscript{156} The mainstream legal press has consistently characterized the case as at least a "landmark" and at most the Term's most significant decision. See Greenhouse, supra note 5, at A1 ("In terms of practical consequence, [Reno v. ACLU] may have been the term's most significant decision."); Tony Mauro, Scenes from a Historic Week, LEGAL TIMES, June 30, 1997, at 8 (describing Reno v. ACLU as "a true First Amendment landmark").
\textsuperscript{157} 47 U.S.C.A. § 223(a)-(e) (West Supp. 1998).
\textsuperscript{158} Reno, 117 S. Ct. at 2338 (citing 47 U.S.C. § 223(a)).
\textsuperscript{159} Reno, 117 S. Ct. at 2338-39 (citing 47 U.S.C. § 223(d)).
\textsuperscript{160} Reno, 117 S. Ct. at 2343.
\textsuperscript{161} Id. at 2344.
\textsuperscript{162} See id. at 2341 (stating that the Government claimed the CDA could be upheld under FCC v. Pacifica Found., 438 U.S. 726 (1978), a case involving a radio broadcast).
The Court, noting that "[e]ach medium of expression ... may present its own problems,"\textsuperscript{163} could have relied on the uniqueness of the Internet, and given cyberspace some form of intermediate First Amendment protection. Instead, the Court rejected any comparisons to radio and television, for which it has justified only modest First Amendment protection based on a history of extensive regulation, the incipient scarcity of broadcast frequencies, and the invasive nature of these media. The Court reasoned that the Internet does not have a history of extensive regulation,\textsuperscript{164} that it "can hardly be considered a ‘scarce’ expressive commodity,"\textsuperscript{165} and that messages and displays on the Internet do not arrive "unbidden."\textsuperscript{166} In sharp contrast to the treatment of television and radio broadcasting, the Court applied strict scrutiny under the First Amendment to this fledgling medium, rather than permit extensive regulation early on so as to justify further restrictions later.\textsuperscript{167} The most significant doctrinal question of the case was thus answered—unanimously.

A revealing measure of the significance of the Court’s ruling is to consider the alternative of upholding the CDA. It would seem that many frank discussions on homosexuality, birth control, or AIDS prevention might well have violated the CDA. Perhaps even promotional materials for an avant-garde art exhibit would make the speaker subject to criminal penalties. The plain result is curtailment of a very wide range of potential speech regarding issues of public importance.\textsuperscript{168} Moreover, if the intermediate First Amendment scrutiny afforded to broadcast media had been applied, results akin to \textit{FCC v. Pacifica Foundation}\textsuperscript{169} and \textit{Red Lion}
Broadcasting Co. v. FCC would have allowed indecent speech to be prohibited at times when children might have access, and created a right-of-reply to political editorials or personal attacks on the Internet.

In terms of immediate effects, however, the Court left open at least three promising paths for fulfilling Congress's core concerns: (1) the Court upheld the CDA's restrictions on obscenity; (2) current and improved screening technology would prevent minors from accessing indecent Internet material; and (3) a narrower statute could be enacted.

First, noting that "[a]ppellees do not challenge the application of the statute to obscene speech, which, they acknowledge, can be banned totally because it enjoys no First Amendment protection,"
the Court preserved those provisions of the CDA related to obscenity. There are, undoubtedly, a number of practical hurdles to overcome in vigorously enforcing such regulations. One example is establishing the applicable community standard by which to judge obscenity on the Internet. When websites or electronic "bulletin boards" offer images or text that can be accessed by anyone, the creator of the bulletin board may have no idea who is obtaining the material or where it is being transmitted. In these circumstances, should a court apply community standards from wherever the material is eventually received? Still, such questions, which would seem to pertain to any nationwide communication, will inevitably be answered, thus enabling the CDA's obscenity prohibitions to forbid a great deal of "hard core" pornography on the Internet.

More productive in the reach of its statute, Congress could incorporate developing screening technology into a new law. Or,

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171 See Reno, 117 S. Ct. at 2350.
172 In United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), the ACLU's amicus brief urged the Sixth Circuit to apply a community standard "based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial." Id. at 711. The court was able to avoid this precise issue because defendant, the creator of an electronic bulletin board, forced users to obtain a password prior to accessing sexually explicit materials. "This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing." Id. Thus, the bulletin board creator, who operated in California, was tried and convicted of violating federal obscenity laws by a jury drawn from the Western District of Tennessee applying its community standards.
173 See RICHARD POSNER, OVERCOMING LAW 360 (1995) ("The sale of 'hard core' pornography—primarily the explicit photographic depiction of actual or realistically simulated sex acts or of an erect penis, with no pretense of aesthetic or scientific purpose—is illegal even when the persons photographed are adults.") (footnote omitted).
even without further congressional intervention, such technology
may become so widely used by parents and institutions (such as
schools) that they will screen minors from most indecent material
targeted by Congress in the CDA. While much of the Court ma-
majority’s opinion was about the dearth of current technology capa-
ble of screening indecent material, Justice O’Connor’s partial con-
currence and dissent forecasts that “the prospects for the eventual
zoning of the Internet [via ‘gateway technology’] appear promis-
ing.”174 As computer insiders promptly recognized, “[t]he clear
underlying message is that if technology could effectively enable
adult-only cyberzones, well-crafted legislation may be permit-
ted.”175

If Congress acts to incorporate developing technology,176 one
proposed solution is simply to require Internet providers to make
screening technology available to users.177 Another plan would re-
quire anyone with a site on the Internet to rate the content of his
or her material and impose penalties for misrepresentation,178 thus
enabling Internet filters or gateway technologies to work more ef-
efficiently. Apart from any new congressional efforts, Justice
O’Connor in particular was quick to note that an increasing num-
ber of parents and institutions have flocked to various user-based
programs that search for, identify, and block indecent material:
[M]uch as a parent controls what her children watch on televi-

174 Reno, 117 S. Ct. at 2354 (O’Connor, J., concurring in the judgment in part and dis-
senting in part). Justice O’Connor seemed quite confident that the Internet can be
“zoned”:

Cyberspace differs from the physical world in another basic way: Cyberspace is
malleable. Thus, it is possible to construct barriers in cyberspace and use them
to screen for identity, making cyberspace more like the physical world, and con-
sequently, more amenable to zoning laws. This transformation of cyberspace is
already underway.

Id. at 2353 (citing Lawrence Lessig, Reading the Constitution in Cyberspace, 45 EMORY
L.J. 869, 888-89 (1996)).

175 David Moschella, Light Summer Reading. (Not), COMPUTERWORLD, July 21, 1997,
at 41.

176 There was early indication that Congress will make another attempt at regulating
indecent material on the Internet. See T.R. Goldman, Lawmakers Take Steps to Respond

177 See id. For example, major providers of “online services” such as America Online,
CompuServe, the Microsoft Network, and Prodigy, see Reno, 117 S. Ct. at 2334, could be
required to offer users some sort of screening software or service like Cyber Patrol or
SurfWatch. See id. at 2354 (O’Connor, J., concurring in the judgment in part and dissent-
ing in part).

178 See Lee Hollaar, Now That the CDA’s History, Let’s Plan Anew, NAT’L L.J., July 14,
1997, at A22. It should be noted, however, that any rule imposing liability for false speech
presents special (perhaps fatal) constitutional pitfalls, particularly in respect to a potential
chilling effect. Unusually careful drafting is therefore called for.
sion by installing a lock box[,] [t]his user-based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites.179

With a growing market for screening technology and a Congress bent on regulation,180 it is very unlikely that the Internet's current state of anarchy will last. While one ACLU participant in Reno commented that the Court's opinion was "more about speech than about technology,"181 the next Internet case in the Supreme Court may be more about technology than speech.

Finally, Congress could draft a narrower law that might pass constitutional muster. As the Court recognized, the CDA was a hasty solution to a complex problem with relatively little legislative history to explain how Congress thought its statutory terms and prohibitions should be defined.182 A majority of the Court refused to narrow the CDA on two grounds. First, the statute that granted expedited review of the case183 gave "no authority" for an "as-applied" challenge; second, it would be impracticable to create such limits given the "vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute."184 Justice O'Connor, joined by Chief Justice Rehnquist, disagreed, claiming that "where the party initiating the [indecent or patently offensive] communication knows that all of the recipients are minors,"185 the CDA should be upheld. Congress could follow Justice O'Connor's lead. It could also work to more carefully define the terms that the Court found vague. For example, the Court found "no textual

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179 Reno, 117 S. Ct. at 2354 (O'Connor, J., concurring in the judgment in part and dissenting in part).
182 See Reno, 117 S. Ct. at 2338 (noting that the Telecommunications Act of 1996 had "extensive committee hearings" and "discussion," whereas, "[b]y contrast," the CDA "contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation"); id. at 2346 n.41 ("The lack of legislative attention to the statute at issue in Sable suggests another parallel with this case."); id. at 2344 n.37 (noting a void in the legislative history regarding how "patently offensive" and "indecent" should be defined).
184 Reno, 117 S. Ct. at 2350.
185 Id. at 2356 (O'Connor, J., concurring in the judgment in part and dissenting in part).
support for the Government's submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's 'patently offensive' and 'indecent' prohibitions. Similar to the legislative history contradicted the Government's argument that whether something is "patently offensive" and "indecent" should be determined with respect to minors. The Court illustrated the consequences of the law's ambiguities as follows:

Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

The challenge is to craft a new law, building on Justice O'Connor's opinion and precisely defining terms relative to minors and speech without redeeming social value—an effort that might well achieve the ends sought by Congress in the CDA.

IX.

In Raines v. Byrd, the headlined decision with probably the fewest immediate consequences, the Court rejected a challenge to the Line Item Veto Act brought by six members of Congress on the ground that they did not have standing to sue. Since the Court found that the standing issue was one of first impression, a new doctrinal principle was established. The Court distinguished its earlier decision in Coleman v. Miller, which had granted legislative standing, and also rejected a tide of broad legislative standing precedent from the District of Columbia Circuit. Consequently, at the second level of impact, its ruling made it significantly more difficult for legislators and executive branch officials to bring their separation of powers disputes to federal court. As for the constitu-

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186 Id. at 2349.
187 See id. at 2344 n.37.
188 Id. at 2344.
191 See Raines, 117 S. Ct. at 2318 ("We have never had occasion to rule on the question of legislative standing presented here.").
193 See Raines, 117 S. Ct. at 2318 n.4; Byrd v. Raines, 956 F. Supp. 25, 30-31 (D.D.C. 1997); see also infra note 199.
tionality of a line item veto power, however, a decision on the merits was merely deferred until an inevitable justiciable challenge.

The Court reasoned that the legislators who sued had no standing because they claimed a "type of institutional injury" in the "diminution of legislative power" that was not personal to them in any way, but rather, "wholly abstract and widely dispersed." They lacked the "personal stake" and "sufficiently concrete injury" necessary to establish Article III standing. As an example of injury, the plaintiffs argued that while they might vote for a legislative appropriation of ABC, the line item veto would mean that the end result could be any of the AB, BC, or AC combinations for which none of them may have voted. The Court continually described such an injury as one of "dilution of institutional legislative power," contrasting it with "vote nullification," which the Court held would be a cognizable injury in Coleman v. Miller. The Court reasoned that plaintiffs in Raines could only claim dilution, not nullification, particularly since any individual spending measure defeated by a line item veto could be reenacted by a majority of members. Finally, the Court noted that it "attac[ed] some importance to the fact that [the plaintiffs had] not been authorized to represent their respective Houses of Congress"

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194 Raines, 117 S. Ct. at 2318, 2322.
195 See id. at 2322.
197 See Raines, 117 S. Ct. at 2320-21.
198 In Coleman, the members of the Kansas legislature claimed they had votes sufficient to defeat a resolution ratified solely because the Lieutenant Governor was wrongly allowed to cast the decisive vote. See Coleman v. Miller, 307 U.S. 433 (1939).
199 As pointed out by the district judge, however, the D.C. Circuit decisions had frequently been sympathetic to claims of "dilution" of a legislator's power, see, e.g., Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994) (recognizing standing where Republican House minority leader and others claimed dilution of legislative power because territorial and District of Columbia representatives were allowed to vote in the Committee of the Whole), despite the fact that the Supreme Court had "never endorsed the Circuit's analysis." Raines, 956 F. Supp. at 31. The Supreme Court put a slightly different spin on the D.C. Circuit precedent, stating that "[o]ver strong dissent, the [D.C. Circuit] has held that Members of Congress may have standing when (as here) they assert injury to their institutional power as legislators." Raines, 117 S. Ct. at 2318 n.4. This characterization is not surprising, given that some of the "strong dissent" in the D.C. Circuit had come from then-Circuit Judge Scalia. See Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring in judgment).
200 See Raines, 117 S. Ct. at 2320. In fact, Congress has successfully restored some of the line items President Clinton has vetoed. See Senate Votes to Overturn Clinton's Line Item Veto, N.Y. TIMES, Oct. 31, 1997, at A25. The Court added that "[n]ot only do appellees lack support from precedent, but historical practice appears to cut against them as well." Raines, 117 S. Ct. at 2321.
for the purposes of the challenge, and "indeed both Houses actively oppose[d] their suit."201

Although some Justices have urged dismissal of earlier suits by legislators on prudential grounds,202 the Raines principle confirms that there is a constitutional barrier to such actions. Following Lujan v. Defenders of Wildlife,203 which held that Article III places constitutional limits on Congress’s power to create injuries that are judicially cognizable in federal court,204 Raines restricts the ability of legislative or executive branch officials to have their separation of powers disputes aired in federal court, even if Congress confers standing by statute,205 as was the case in Raines and in other high-profile disputes.206

Nonetheless, at the level of immediate impact, none of the doctrinal developments in Raines will prevent the Court from eventually passing on the merits of the Line Item Veto Act. Within seven weeks of the Court’s decision, the President exercised his rights under the Act by canceling an appropriation. Parties who would have benefited from it then brought a court challenge, which is presently before the Supreme Court.207 They plainly have a judicially cognizable injury, and the merits of the Act will be determined. As the Court acknowledged, its decision "neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the

201 Raines, 117 S. Ct. at 2322.
202 See, e.g., Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring) ("Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.").
204 See id. at 576-78.
205 See 2 U.S.C. § 692(a)(1) (Supp. II 1997) ("Any Member of Congress or any individual adversely affected ... may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.").
206 See, e.g., Buckley v. Valeo, 424 U.S. 1, 8-9 & n.4 (1976) (quoting and discussing jurisdictional statute giving members of Congress and others standing to challenge campaign finance laws).
X.

In *City of Boerne v. Flores*, the Court struck down the Religious Freedom Restoration Act of 1993 ("RFRA"), a law with extraordinary popular support that one observer called "[t]he biggest bridge across the culture wars in the last decade." Congress had enacted RFRA in direct response to *Employment Division, Department of Human Resources v. Smith*, which held that "generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." RFRA restored the pre-Smith test of *Sherbert v. Verner* and *Wisconsin v. Yoder*, explicitly referencing *Sherbert* and *Yoder* in the statute. The pre-Smith test required state and federal governments to grant an exemption for generally applicable regulations that substantially burden religious exercise unless there was a "compelling interest" for not doing so and this was the "least restrictive means" for furthering that state goal. To extend RFRA to state regulations, Congress relied on its power to enforce due process pursuant to Section 5 of the Fourteenth Amendment.

Justice Kennedy's opinion for the Court has been called "one of its most important modern-day rulings on the sources and

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208 *Raines*, 117 S. Ct. at 2322.
211 Peter Steinfels, *Beliefs*, N.Y. TIMES, June 28, 1997, at A27. RFRA passed unanimously in the House of Representatives and drew only three negative votes in the Senate. The political coalition included the liberal left and the religious right, stretching "from the American Civil Liberties Union to the Church of Jesus Christ of Latter-day Saints, from the Union of American Hebrew Congregations to the Southern Baptist Convention and the American Muslim Council." *Id.*
213 *City of Boerne*, 117 S. Ct. at 2161 (explaining *Smith*).
216 See 42 U.S.C. § 2000bb(a), (b) (1994); *City of Boerne*, 117 S. Ct. at 2161-62. In the Court's view, the "least restrictive means" test was unique to RFRA and not a part of "the pre-Smith jurisprudence RFRA purported to codify." *Id.* at 2171. But see *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).
217 Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5. As noted in *City of Boerne*, both the Senate and House Reports expressed reliance on Section 5 for provisions of RFRA imposing requirements on the states. See 117 S. Ct. at 2162. The Court did not inquire beyond these recitals of power in order to assess RFRA's constitutionality.
218 The opinion was joined by Chief Justice Rehnquist and Justices Stevens, Thomas, Ginsburg, and Scalia (the last of whom did not join Part III.A.1, which dealt with the history of the Fourteenth Amendment).
limits of Congressional power.”\textsuperscript{219} The holding may be simply stated: Although Congress has broad power under Section 5 of the Fourteenth Amendment to enforce due process or equal protection rights, this does not include the power to define their substance. Consequently, Congress cannot change the Court’s interpretation of the Free Exercise Clause in \textit{Smith} (made applicable to the states through the Fourteenth Amendment’s Due Process Clause) by requiring religious exemption from neutral government regulations. This overrules the “definitional” branch of \textit{Katzenbach v. Morgan},\textsuperscript{220} where the Court had granted extreme deference to Congress’s authority to determine the content of constitutional rights when legislating pursuant to Section 5.

A.

The history of the \textit{Morgan} ruling began with \textit{Lassiter v. Northampton County Board of Elections},\textsuperscript{221} where the Court unanimously held that state English literacy tests for voting, which are racially neutral on their face and applied nondiscriminatorily, do not violate equal protection.\textsuperscript{222} Six years thereafter, Congress passed the Voting Rights Act of 1965.\textsuperscript{223} Section 4(e) of the Act provided that no person who has completed the sixth grade in a Spanish language school in Puerto Rico could be denied the right to vote because of an inability to read or write English. New York had an English literacy test for voting that was effectively eliminated by this provision. Thus, the crucial question in \textit{Morgan} was: If New York’s law and others like it do not violate equal protection, which was the rule established in \textit{Lassiter}, how can Congress prohibit these state practices pursuant to its power under Section 5 of the Fourteenth Amendment to “enforce” equal protection?\textsuperscript{224}

The \textit{Morgan} Court upheld section 4(e) of the Voting Rights Act on two separate rationales. \textit{City of Boerne} overrules the second and appears to significantly restrict the first. The \textit{Morgan} Court first reasoned that “§ 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition

\textsuperscript{220} 384 U.S. 641 (1966).
\textsuperscript{221} 360 U.S. 45 (1959).
\textsuperscript{222} See id. at 53-54.
of voting qualifications and the provision or administration of public services, such as public schools, public housing and law enforcement."225 "It was well within congressional authority,"226 Justice Brennan reasoned, writing for a majority of seven, to conclude that:

This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.... It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.227

This is Morgan's "remedial" branch.

The Court then offered a second rationale: "[I]t is [also] enough that we perceive a basis upon which Congress might predicate a judgment that [the New York literacy tests]... constituted an invidious discrimination in violation of the Equal Protection Clause."228 This "definitional" branch of Morgan seemingly implies that "Congress may define for itself the provisions that it is empowered to enforce."229 This authority could allow a vastly expansive national legislative "enforcement" of the Fourteenth Amendment. For example, Congress's judgment that government discrimination based on age, disability, or wealth should be subject to "strict scrutiny" could be perceived as enforcing equal protection; mandating that all state courts use the Federal Rules of Criminal Procedure could be enforcing due process; relying on the implications of Shelley v. Kraemer230 to expand current state action doctrine to include most or all judicial enforcement of private discrimination could be enforcing both equal protection and due process.231 Specifically with respect to RFRA, the second rationale of Morgan would allow Congress to define the protections of the Free Exercise Clause.

B.

Justice Kennedy noted Morgan's second rationale by admitting that "[t]here is language... in [Morgan] which could be inter-

225 Morgan, 384 U.S. at 652.
226 Id. at 653.
227 Id. at 652-53.
228 Id. at 656.
229 Choper, supra note 224, at 303.
230 334 U.S. 1 (1948).
231 See Choper, supra note 224, at 303-07 (exploring the potential scope of the "definitional" branch of Morgan).
preted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. Fairly characterizing this as an "alternative holding," the Court found that it "is not a necessary interpretation, however, or even the best one." The Court's reason for disavowing the second branch of Morgan has been often sounded: "Under [this rationale of Morgan], it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." Here, as it did several times before, the Court invoked Marbury v. Madison to emphasize judicial supremacy in interpreting the Constitution. Thus, City of Boerne eliminates one of constitutional doctrine's most fertile sources of congressional power and forecasts potential constitutional problems for important federal statutes.

After City of Boerne, Section 5 of the Fourteenth Amendment only authorizes Congress to provide remedies and preventive rules addressing judicially determined constitutional violations. Most importantly respecting the exercise of its Section 5 remedial power pursuant to Morgan's first branch, Congress seemingly must produce a legislative record of unconstitutional behavior providing "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"—"[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." Otherwise, "legislation

233 Id.
234 Id. For earlier voices, see for example, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 266 (1978) (arguing that the second rationale of Morgan to some significant extent assigns "Congress to the post of constitutional interpreter"); Archibald Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 107 (1966):
[F]or the future [Morgan] logically permits the generalization that Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights.
235 5 U.S. (1 Cranch) 137 (1803).
236 See City of Boerne, 117 S. Ct. at 2162, 2168, 2172.
237 See infra Part X.C.
238 See City of Boerne, 117 S. Ct. at 2170.
239 Id. at 2164.
of being unconstitutional." Otherwise, "legislation may become substantive in operation and effect." In *City of Boerne*, the Court searched in vain for a record of state regulations unconstitutional under *Smith* that RFRA was intended to address or prevent. Instead, the Court found a record that proved RFRA to be nothing more than an overruling of *Smith*, which demanded deliberate discrimination against religion in order to produce a Free Exercise Clause violation. The Court distinguished the earlier Voting Rights Act cases: "In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

Although it is unclear just how detailed or extensive a legislative record of actual or potential unconstitutional behavior the Court will demand, any significant requirement would seem to depart from *Morgan*’s "perceive a basis" test. Highly important examples arise in the area of equal protection. Since the doctrine requires that discrimination against protected groups must be intentional to trigger strict scrutiny under the Equal Protection Clause, a voluminous record showing disparate impact would not alone appear to demonstrate unconstitutional behavior that Congress could outlaw. Thus, the *City of Boerne* majority emphasized that in *South Carolina v. Katzenbach*:

[W]e upheld various provisions of the Voting Rights Act of 1965, finding them to be "remedies aimed at areas where voting discrimination has been most flagrant," . . . and necessary to

240 *Id.* at 2170 (emphasis added).
241 *Id.* at 2164 (emphasis added).
242 See *id.* at 2169.
243 *Id.*
244 In *Morgan*, "the Court seemed not to care that the congressional record said nothing about discrimination in public services in New York. Maybe the Court assumed it could take judicial notice of widespread ethnic discrimination in the delivery of public services." Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 748-49 (1998). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld a provision of the Voting Rights Act of 1970, which banned literacy tests in the states not subject to the 1965 Act . . . despite the lack of evidence that literacy tests had been misused in the newly covered states. The Court in *Flores* cited speculation in several opinions in *Oregon v. Mitchell* about what Congress might have believed when it passed [the 1970 law], but even if the Court accurately attributed these speculations to Congress, they add up to a very thin record of occasional effects in most of the northern and western states. Laycock, *supra* at 749 (footnotes omitted).
246 383 U.S. 301 (1966).
"banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century"... The Act's new remedies... includ[ing] the suspension of both literacy tests and, pending federal review, all new voting regulations in covered jurisdictions... were deemed necessary given the ineffectiveness of the existing voting rights laws... and the slow costly character of case-by-case litigation.247

Similarly, in City of Rome v. United States,248 also approved by the City of Boerne opinion, the Court upheld the Voting Rights Act rule that certain political units preclear all changes in voting practices or procedures. The City of Rome Court reasoned that "since 'jurisdictions with a demonstrable history of intentional racial discrimination create the risk of purposeful discrimination[,] Congress could 'prohibit changes that have a discriminatory impact' in those jurisdictions."249

But what of legislation based on congressional inferences from state actions with discriminatory impact, but with no "demonstrable history of intentional racial discrimination"? For example, suppose public law schools employ the LSAT as an admissions factor and this is shown to have a disparate impact on the admissions prospects of certain underrepresented minorities. Or, suppose public employers impose job qualifications that a disproportionate number of minorities do not possess. If the law schools or public employers do not have a "demonstrable history of intentional racial discrimination," City of Boerne would appear to bar congressional "remedial" laws that are grounded exclusively (or nearly so) in disparate impact, i.e., with no (or very little) evidence of intentional discrimination. If so, the "disparate impact" approach of Title VII of the Civil Rights Act is beyond congressional power pursuant to Section 5 of the Fourteenth Amendment in the absence of a record that the covered public actors have a past record of deliberate discrimination.

247 City of Boerne, 117 S. Ct. at 2167.
248 446 U.S. 156 (1980).
249 City of Boerne, 117 S. Ct. at 2170 (quoting from City of Rome, 446 U.S. at 177). In Morgan, unlike South Carolina v. Katzenbach and City of Rome, the Court did not point to any "demonstrable history" of unconstitutional behavior. Rather, the Morgan Court said it was enough that it could "perceive a basis" on which Congress had sought to provide a remedy. See supra note 244 and accompanying text. City of Boerne did not approve the upholding of the remedial scheme in Morgan.
C.

The potentially broad, third level effect of *City of Boerne* may be dramatically illustrated by hypothesizing that the Americans with Disabilities Act ("ADA") is interpreted to require a public school to provide full integration of students with HIV, or a state prison to provide wheelchair access for prisoners to recreational facilities. The latter subject has already been raised in the lower courts. In *Clark v. California*, the Ninth Circuit considered whether the State of California had an Eleventh Amendment defense in federal court to a claim that the ADA applies to state correctional facilities. Under established Eleventh Amendment doctrine, Congress can only abrogate state sovereign immunity from suit in federal court pursuant to Section 5 of the Fourteenth Amendment. Thus, the Ninth Circuit had to decide whether the ADA was a valid exercise of Congress's power under Section 5. Although the court heard oral argument before *City of Boerne* was announced, the Ninth Circuit's opinion directly accounted for the Supreme Court's new ruling.

In upholding the ADA as a valid exercise of Section 5 power, thus concluding that California's sovereign immunity from suit was abrogated, the Ninth Circuit relied on parts of *Katzenbach v. Morgan* that were clearly overruled by *City of Boerne*. The court stated that "Congress's powers under the Fourteenth Amendment extend beyond conduct which is unconstitutional." This is true because, as indicated in the discussion of *South Carolina v. Katzenbach* and *City of Rome v. United States*, in formulating a remedy to prevent unconstitutional conduct where a demonstrable history of such action exists, Congress can prohibit rules or practices that are not themselves unconstitutional. But the Ninth Circuit then went on to state that "Congress may create broader equal protection rights than the Constitution itself mandates," again citing *Morgan*. This proposition springs from *Morgan*'s "definitional" branch which was disapproved in *City of Boerne*.

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250 123 F. 3d 1267 (9th Cir. 1997).  
252 *Clark*, 123 F. 3d at 1270.  
253 See supra notes 246-49 and accompanying text.  
254 *Clark*, 123 F. 3d at 1270.  
255 See supra at notes 232-33 and accompanying text. Just a few sentences later, the court stated that Section 5 legislation is valid "if the court can perceive a basis upon which Congress might predicate a judgment that the state action 'constituted an invidious discrimination in violation of the Equal Protection Clause.'" *Clark*, 123 F. 3d at 1270 (quot-
The court then turned to the specific issue of the unconstitutionality of state discrimination against the disabled. Invoking City of Cleburne v. Cleburne Living Center, Inc.,\textsuperscript{256} where the Supreme Court invalidated a zoning provision that required a special permit for a group home for the mentally retarded, the Ninth Circuit stated that "[t]he Supreme Court has previously held that discrimination against the disabled is a form of discrimination protected under the Equal Protection Clause."\textsuperscript{257} But there are two aspects of Cleburne that may distinguish it from the issues raised by the ADA. The discrimination in Cleburne was: (1) de jure discrimination that facially singled out the mentally retarded; and (2) for no reason other than "irrational prejudice."\textsuperscript{258} The Court declined to rule that the disabled are entitled to heightened scrutiny under the Equal Protection Clause; instead, the Court found no rational basis for the discrimination.\textsuperscript{259} While it is true that Cleburne held a particular instance of discrimination against the mentally disabled unconstitutional, it hardly established grounds for a general assumption that the apparently rational discriminations against the disabled in the instances hypothesized under the ADA,\textsuperscript{260} and particularly de facto discriminations,\textsuperscript{261} are invalid. Indeed, since Cleburne, the Court has, if anything, refused to apply

\textsuperscript{256} 473 U.S. 432 (1985).
\textsuperscript{257} Clark, 123 F. 3d. at 1270.
\textsuperscript{258} Cleburne, 473 U.S. at 450.
\textsuperscript{259} See id. at 446. As Justice Marshall noted in his concurrence, the Court's characterization was highly problematic: "The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation." Id. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part). Cleburne belongs to a small class of cases often assembled under the heading "rational-basis with bite." See LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1161-62 (8th ed. 1996).
\textsuperscript{260} For decisions of a decade ago finding only a "remote theoretical possibility" of transmission of the AIDS virus in a school setting, see Martinez v. School Board, 861 F.2d 1502 (11th Cir. 1988), and Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988).
\textsuperscript{261} See Washington v. Davis, 426 U.S. 229, 241 (1976) (holding that only intentional discrimination on the basis of a suspect classification is unconstitutional).
scrutiny with any "bite" to classifications based on mental disability.\textsuperscript{262}

The Ninth Circuit also stated that in enacting the ADA, "Congress explicitly found that persons with disabilities have suffered discrimination."\textsuperscript{263} After City of Boerne, however, it would seem that Congress can only pass a remedial statute in reliance on a demonstrable history of unconstitutional discrimination. Unless a state prison's failure to provide wheelchair access to recreational sites or a public school's refusal to admit students with HIV is the product of "animus or hostility,"\textsuperscript{264} or constitutes de jure discrimination against the disabled without a rational basis, the ADA would appear to be a "definitional" statute, using the old framework of Morgan,\textsuperscript{265} rather than a "remedial" statute. While Congress made concededly accurate findings that persons with disabilities have and continue to suffer discrimination, City of Boerne does not allow Congress to decide that all discriminatory actions against or adverse effects on the disabled violate the Equal Protection Clause. Generally speaking, state discrimination against the disabled will not be "illegitimate" or based on "irrational prejudice," as was the case in Cleburne, but will occur more along the lines of de facto discrimination resulting from a state's economic unwillingness to fund services that would improve the living and working conditions of the disabled. Such de facto discrimination may be unfair and in need of a federal law to be passed under an Article I power, but it is not itself unconstitutional under the Fourteenth Amendment. After City of Boerne, statutes based on definitions of equal protection that are at odds with the Court's interpretations are invalid as they apply to states.

Whether the congressional record underlying the ADA will support a "remedial" or "preventive" rationale for its enactment

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\textsuperscript{262} See LOCKHART ET AL., supra note 259, at 1318-19 (noting a possible retreat from Cleburne).

\textsuperscript{263} Clark v. California, 123 F. 3d. 1267, 1270 (9th Cir. 1997).

\textsuperscript{264} City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997).

\textsuperscript{265} In response to the State's argument that since Cleburne was merely a rational-basis case, Congress could not use Section 5 enforcement power to provide any heightened scrutiny through a statute, as if the disabled were a suspect class under equal protection, the Ninth Circuit replied that "[t]he State does not explain why the Court's choice of a level of scrutiny for purposes of judicial review should be the boundary of the legislative power under the Fourteenth Amendment." Clark, 123 F. 3d. at 1270. But differing levels of judicial scrutiny for different types of discrimination is the very substance of equal protection doctrine, and these levels form the boundary for legislative power under Section 5 because City of Boerne holds that it is the Court's exclusive task to define equal protection.
remains to be seen. The argument would essentially proceed along two lines. First, it will be urged that Congress has found that persons with disabilities have been denied public employment simply because of prejudice and have been “excluded from public services for no reason other than distaste for or fear of their disabilities.” Therefore, the statute’s defenders will assert that “there is reason to believe that many of the laws affected by the . . . [ADA] have a significant likelihood of being unconstitutional” because they are “likely tainted by discrimination.” Second, it will be contended that Congress could reasonably have found government discrimination as a root cause of “people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally.” Consequently, it will be argued that Congress sought to remedy these effects of past discrimination and prevent similar future discrimination by mandating that “qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers.” “When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress may conclude that affirmative measures are necessary to bring them into the mainstream.”

266 See generally Brief for the United States As Intervenor, Pierce v. Assistant Superintendent King, 131 F.3d 136 (4th Cir. 1997) (No. 96-6450).
267 “[T]here is consistent . . . empirical evidence to back up the claims . . . that handicapped persons are more stable workers, with lower turnover, less absenteeism, lower risks of accident, and more loyalty to and satisfaction with their jobs and employers than other workers of similar characteristics in similar jobs.” Id. at 17 (quoting Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in DISABILITY AND THE LABOR MARKET 196, 208 (Monroe Berkowitz & M. Anne Hill eds., 1986)) (citations omitted). “And even when employed, people with disabilities received lower wages that could not be explained by any factor other than discrimination.” Id. at 18 (citations omitted).
268 Id. at 13.
269 See supra note 240 and accompanying text.
270 Brief for the United States As Intervenor at 29, Pierce v. Assistant Superintendent King, 131 F.3d 136 (4th Cir. 1997) (No. 96-6450). The brief continues:

By requiring the State to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs and services, are not the result of prejudice or stereotypes, but rather based on legitimate governmental objectives, . . . [the ADA] attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision.

Id. (citing Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)).
272 Alexander v. Choate, 469 U.S. 287, 301 (1985); see also Brief for the United States As Intervenor at 20, Pierce (No. 96-6450).
273 Brief for the United States As Intervenor at 30, Pierce (No. 96-6450).
Boerne, is whether the Court can be persuaded that "many of the laws affected by the . . . [ADA] have a significant likelihood of being unconstitutional" and, if so, whether the ADA's encompassing activities such as wheelchair access to prison recreational facilities and a public school's policy regarding students with HIV satisfies the "congruence and proportionality" requirement in City of Boerne.

D.

Because of the substantial limits that City of Boerne would appear to place on federal legislative power under Section 5 of the Fourteenth Amendment, if Congress wishes to expand on the scope of judicial interpretations of equal protection or due process, it must turn to its Article I powers, such as the Commerce Clause, as it did in 1964 for civil rights legislation. However, Commerce Clause power also seems more limited than what it used to be.

It is true that in Garcia v. San Antonio Metropolitan Transit Authority, the Court overruled National League of Cities v. Usery, which had held that the Commerce Clause did not empower Congress to "enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act against the States 'in areas of traditional governmental functions.'" But then-Justice Rehnquist wrote a short, MacArthur-esque dissent declaring: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." By most accounts, the majority that now-Chief Justice Rehnquist envisioned has arrived, New York v. United States, United States v. Lopez.

\footnote{City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997) (emphasis added).}
\footnote{Id. at 2164.}
\footnote{See Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II of the Civil Rights Act of 1964 as a valid exercise of Commerce Clause power); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (same).}
\footnote{Garcia, 469 U.S. at 530 (quoting National League of Cities, 426 U.S. at 852).}
\footnote{Id. at 580 (Rehnquist, J., dissenting).}
\footnote{505 U.S. 144 (1992). For a further discussion, see supra text accompanying notes 57-59.}
\footnote{514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Commerce Clause power); see also supra note 15. Chief Justice Rehnquist wrote for the Court: "To uphold the Government's contentions here [that Congress has power under the Commerce Clause to forbid possession of guns near schools because that activity "substantially affects interstate commerce"], we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce
Seminole Tribe v. Florida,\textsuperscript{283} and Printz v. United States,\textsuperscript{284} being the most prominent examples of recent holdings curtailing Commerce Clause power that a majority of the Court views as improperly intruding on state sovereignty.

Suppose Congress attempts to regulate the states under the Commerce Clause in ways, earlier hypothesized, that are foreclosed under Section 5 of the Fourteenth Amendment after City of Boerne. It would not be difficult for the Court to conclude that neither of the ADA provisos has the "substantial effect" on interstate commerce required by Lopez and, even if the LSAT and job qualifications situations were to satisfy the Lopez test, if Garcia were to be overturned, the Court might well find that these regulations of the "States qua States,"\textsuperscript{285} intrude on "areas of traditional governmental functions,"\textsuperscript{286} and hold that Commerce Clause powers have been exceeded.

E.

Despite the portentous doctrinal consequences of City of Boerne, its first-level immediate impact in respect to RFRA itself may be very limited. Such a popular law\textsuperscript{287} is likely to return, and there are signs that it will.\textsuperscript{288} In any event, RFRA still applies to all federal statutes,\textsuperscript{289} unless they specifically provide otherwise. Be-

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\textsuperscript{283} 517 U.S. 44 (1996) (holding that Article I does not grant Congress the power to abrogate Eleventh Amendment state immunity from suit in federal court); see also supra note 32.

\textsuperscript{284} 117 S. Ct. 2365 (1997); see also supra Part IV.


\textsuperscript{286} Id. at 852.

\textsuperscript{287} See supra note 211 and accompanying text.

\textsuperscript{288} See Linda Greenhouse, Laws Urged to Protect Religion, N.Y. TIMES, July 15, 1997, at A15 (reporting on committee hearing regarding a narrower version of RFRA enacted under Commerce Clause powers or the spending power).

\textsuperscript{289} The question of severability (and perhaps constitutionality) is presently before the Seventh Circuit, see Sullivan v. Sasnett, 908 F. Supp. 1429 (W.D. Wis. 1995), aff'd, 91 F.3d 1018 (7th Cir. 1996), vacated and remanded, 117 S. Ct. 2502 (1997), and the Eighth Circuit, see In re Young, 82 F.3d 1407 (8th Cir. 1996), vacated and remanded sub nom. Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997). Although RFRA's validity as applied to federal law has been seriously questioned, see Marci A. Hamilton, City of Boerne v. Flores: A Landmark for Structural Analysis, 39 WM. & MARY L. REV. 699, 717-20 (1998), I agree with Ira C. Lupu, Why Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 810 (1998): RFRA as applied to the federal government does not rest on Section 5 of the Fourteenth Amendment. Rather, it rests in each possible application to federal law on whatever power authorizes Congress to act in that context. If Congress is empowered to create prisons, as surely it is, then Congress may accommodate religion in those prisons beyond what the Free Exercise Clause requires—up to
yond this, there are at least three other sources of potential power to once again apply RFRA to state regulations. First, relying on the Court’s expansive interpretation of the Treaty Power in Missouri v. Holland, it has been urged that RFRA might be sustained if Congress were to implement the International Covenant on Civil and Political Rights.

Secondly, there is a strong argument that Congress could re-enact RFRA under its Commerce Clause authority. Although this contention may at first seem quixotic because the nexus between religious freedom and interstate commerce is not readily apparent, further reflection on the background of the First Amendment’s religion clauses suggests a persuasive rationale. There are few, if any, matters as powerful as religious belief in affecting one’s choice of where to live and in prompting people to move to more hospitable areas. As every American school child learns, many of the first settlers in America were fleeing religious persecution. Indeed, “[o]ne of the prime causes for early migration to America, and especially to New England, was the desire for religious freedom.” This same desire “played an important part in twentieth-century immigration, especially on the part of Jews of Eastern Europe, and the people of Ireland.” Once in America, many groups found themselves forced to migrate between states because of religious oppression. Quakers fled Massachusetts to Rhode Island and eventually farther south; Mormons began in New York and were persecuted, even to the point of orders to exterminate, in Ohio, Illinois, and Missouri.

On the other hand, at different times some of the colonies attempted to attract residents of other areas through a message of tolerance. In 1692, when the Maryland Council called a halt to the colony’s past policy of tolerance, the policy was described as a the limit of what the Establishment Clause forbids.

290 252 U.S. 416 (1920).
Everyone shall have the right to freedom of thought, conscience and religion.
This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Id. at 44 n.59 (citing The International Covenant on Civil and Political Rights, Art. 18(1)).
293 Id. at 22.
294 See id.
295 See id. at 262.
"'specious' liberty of conscience designed to depopulate Virginia." In Virginia, the government had "strengthened its own religious homogeneity by so pressuring some of its dissidents that they moved to Maryland." Thus, in 1785, when James Madison criticized a bill in the Virginia legislature providing for paying teachers of Christianity because it violated the "undeniable truth" that the religion "of every man must be left to the conviction and conscience of every man," he also offered more pragmatic considerations, including that such enactments "will have a like tendency to banish our Citizens [and] superadd a fresh motive to emigration." Madison called the proposed law a "species of folly which hasdishonoured and depopulated flourishing kingdoms."

All this is not to contend that the Framers meant to encompass RFRA within the congressional authority over commerce. But the Commerce Clause plainly empowers Congress to regulate interstate travel, either by preventing or encouraging it. In Edwards v. California, the Court invalidated a California law that made it a misdemeanor to transport an indigent into the state, relying on the Dormant Commerce Clause: "[I]t is settled beyond question that the transportation of persons is 'commerce,' within the meaning of [the Commerce Clause]," and "[i]t is immaterial whether or not the transportation is commercial in character." These principles drew on earlier rulings that upheld various federal laws prohibiting interstate prostitution and other "white slave" trafficking. Heart of Atlanta Motel, Inc. v. United States and Katzenbach v. McClung employed similar reasoning. In both cases, the Court approved the Commerce Clause as a source of power to prohibit racial discrimination in public accommodations, citing legislative findings "indicat[ing] a qualitative as well as quantitative effect on interstate travel by Negroes." Congress had concluded that "discrimination deterred professional, as well

297 Id. at 42.
299 Id. at 303.
300 Id. at 304 (emphasis added).
301 314 U.S. 160 (1941).
302 Id. at 172.
303 Id. at 172 n.1.
307 Heart of Atlanta Motel, 379 U.S. at 253.
as skilled, people from moving into areas where such practices occurred.\textsuperscript{308} Accordingly, as long as Congress has a "rational basis"\textsuperscript{309} for concluding that incidental religious burdens from generally applicable laws might substantially affect interstate travel, Congress has the constitutional power to pass RFRA under the Commerce Clause.\textsuperscript{310} Moreover, while such legislation would regulate the "States qua States," since it would merely provide a judicially enforceable federal defense to state action, it would not run afoul of the Court's recent decisions prohibiting Congress from commandeering state legislatures or state executive officers.\textsuperscript{311}

Finally, more piecemeal reenactments of RFRA might be achieved under the spending power, but would probably have to occur statute by statute, unlike the ease of reinvention of the Brady Act after Printz.\textsuperscript{312} Even under the very generous power given to Congress regarding conditions on grants to the states, \textit{South Dakota v. Dole}\textsuperscript{313} requires these conditions to be reasonably related to the purpose of the expenditure.\textsuperscript{314} Consequently, RFRA would probably have to be written into individual federal laws concerning the use of funds. As examples, conditions on federal spending could likely reverse the specific rulings in \textit{Department of Human Resources of Oregon v. Smith}\textsuperscript{315} and \textit{O'Lone v. Shabazz},\textsuperscript{316} and replicate the results in cases such as \textit{Sherbert v. Verner},\textsuperscript{317} \textit{Wisconsin v. Yoder},\textsuperscript{318} and \textit{Jensen v. Quaring}.\textsuperscript{319}

To reverse \textit{Smith} and reaffirm \textit{Sherbert}, Congress could condi-

\textsuperscript{308} Katzenbach, 379 U.S. at 300.
\textsuperscript{309} Id. at 304.
\textsuperscript{312} See supra notes 72-77 and accompanying text.
\textsuperscript{313} 483 U.S. 203 (1987).
\textsuperscript{314} See id. at 208-09; supra notes 67-71 and accompanying text.
\textsuperscript{315} 494 U.S. 872 (1990) (holding that Oregon did not violate the Free Exercise Clause by denying unemployment benefits to workers terminated for sacramental peyote use as part of the rituals of the Native American Church); see also supra notes 212-16 and accompanying text.
\textsuperscript{316} 482 U.S. 342 (1987) (rejecting a free exercise challenge to a prison's refusal to excuse inmates from work requirements to attend worship services).
\textsuperscript{317} 374 U.S. 398 (1963) (holding that South Carolina could not withhold unemployment compensation to Sabbatarians who refused to work on Saturdays for religious reasons).
\textsuperscript{318} 406 U.S. 205 (1972) (holding that applying compulsory high school attendance to Old Order Amish children violated the Free Exercise Clause).
\textsuperscript{319} 472 U.S. 478 (1985) (affirming by an equally divided Court a free exercise violation in Nebraska's denial of a driver's license to a person whose sincerely held religious beliefs prohibited her from being photographed).
tion grants to states for unemployment compensation administration on the states creating a religious exemption from otherwise generally applicable disqualifications of benefits. If Congress wanted a broader reversal of Smith to include immunity from state drug use prohibitions, it might condition designated federal law enforcement funds on exemptions for peyote use for religious purposes. To assure the result in Yoder, Congress could qualify federal educational spending on religious exemptions to school attendance, particularly since one of the stated purposes of the federal program is “affording parents meaningful opportunities to participate in the education of their children at home and at school.” Similarly, by adding a stipulation to existing federal conditions on state drivers’ licenses—that states receiving federal highway funds must exempt people from drivers’ license photos for religious reasons—would codify the rule in Quaring. Finally, Congress might even go beyond the pre-Smith free exercise protections and overturn O’Lone by conditioning funds for state prison construction on exemptions for the religious practices of state prisoners, a federal carrot already successfully utilized, as shown by the nearly unanimous passage of state truth-in-sentencing laws to receive federal prison construction funding.

Under Dole’s very deferential approach, all of these potential conditions would likely pass muster as reasonably related to the expenditures at issue, and RFRA could be substantially (if not totally) recreated. Problems would arise, however, if the Court were to narrow the spending power, as suggested by Justice O’Connor in her dissent in Dole. In order to avoid Congress being able “effectively to regulate almost any area of a State’s social, political, or economic life... because of an attenuated or tangential relation-

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327 See State Wins Grant to Add Prison Cells, PROVIDENCE J.-BULL., Oct. 29, 1997, at 5B (“Rhode Island is one of 49 states, in addition to the District of Columbia and three U.S. territories, to receive a total of more than $400 million this year through the justice department’s Violent Offender Incarceration and Truth-in-Sentencing Incentive programs.”).
ship"\textsuperscript{328} to the subject of some federal expenditure, she would require that all conditions relate to "how the money should be spent."\textsuperscript{329} It is hard to see how religious exemptions respecting drivers' license pictures or prisoners' sectarian needs would satisfy Justice O'Connor. Indeed, the existing nonreligious conditions described above, such as those regarding drivers' licenses for drug abusers\textsuperscript{330} and truth-in-sentencing,\textsuperscript{331} would apparently fail her test. Nonetheless, \textit{Sherbert} might still be replicated, and the factual result in \textit{Smith} reversed, because the proposed conditions simply tell the state that it must pay benefits to persons who otherwise qualify but for the dictates of their religion. Essentially, the state is being instructed as to "how to spend the money." \textit{Yoder} might also be affirmed because the state is effectively being told \textit{not} to spend money educating pupils with religious objections to school attendance. A religious exemption from drug prosecutions might be sustained on similar reasoning. Although Justice O'Connor's approach makes it more difficult to resurrect RFRA piece-by-piece through conditions on spending, much of it still could be done.

\textbf{CONCLUSION}

The Supreme Court's 1996-97 Term may well have been "the most significant in the Court's recent history\textsuperscript{332} with respect to important new doctrinal pronouncements affecting areas of great social concern. Several of its rulings portend tangible consequences of varying degrees of breadth and severity for large numbers of persons. But the higher number of momentous decisions, including those with the most headlined articulation of unprecedented constitutional principles, tended to be quite narrow or with very limited impacts.

Does this pattern reveal a specific substantive program or particular ideological attitude? For example, may it be said that while the Warren Court planned an agenda of correcting certain failures of the American political process, the present Court has deliberately determined to play a relatively inconsequential role with respect to public policy?\textsuperscript{333}

\textsuperscript{329} \textit{Id.} at 216 (O'Connor, J., dissenting) (quoting the Brief for the National Conference of State Legislatures); \textit{see also supra} note 76 and accompanying text.
\textsuperscript{330} \textit{See} text accompanying notes 325-26.
\textsuperscript{331} \textit{See} text accompanying \textit{supra} note 328.
\textsuperscript{332} \textit{See} Wittes, \textit{supra} note 2, at 1.
\textsuperscript{333} This possibility was suggested to me by Professor Robert F. Nagel of the University of Colorado Law School.
Although this is possible, at either the Justices' conscious or subconscious level, I doubt it. Indeed, it may well be that the Rehnquist (Reagan-Bush) Court majority has designed its own activist plan, e.g., to resurrect judicial protection of states' rights.\(^{334}\) But, as I have indicated elsewhere with respect to the media's often overgeneralized characterizations of a single Term's product as "liberal," "conservative," or "centrist,"\(^{335}\) I believe that, absent a significant change in the Court's membership or an occasional ideological move by an incumbent Justice,\(^{336}\) the doctrinal and consequential results of any particular Term's decisions are mainly a function of the cases that happen to reach the Court's docket in a given year, in addition to the dynamics of opinion assignment and drafting on a closely divided Court.

\(^{334}\) See supra notes 282-85 and accompanying text. But compare the discussion of Idaho v. Coeur d'Alene Tribe, supra note 32.

