COMMENT

INSTITUTIONS AND INTERPRETATION: A CRITIQUE OF *CITY OF BOERNE v. FLORES*

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Last Term, in *City of Boerne v. Flores*,[1] two of the most important and contested issues of modern constitutional law converged in a single case. Of most immediate practical importance was the scope of the right of free exercise of religion. Of scarcely less importance to our structure of government was the relationship between congressional and judicial authority in interpreting and enforcing constitutional rights.

The case arose from a fundamental difference of opinion between Congress and a current majority of the Court over the scope and meaning of the Free Exercise Clause. In the 1990 case of *Employment Division v. Smith*,[2] the Court overturned precedent and adopted a narrow view of the Free Exercise Clause of the First Amendment. Under this view, "neutral, generally applicable law[s]" are categorically exempt from constitutional scrutiny, even when they prohibit or substantially burden religious exercise.[3] In 1993, Congress responded by passing the Religious Freedom Restoration Act (RFRA),[4] which protected religious exercise from any governmentally imposed substantial burden, subject to a compelling interest standard.[5] As applied to state and local governments, RFRA was enacted pursuant to Congress's power under Section Five of the Fourteenth Amendment to pass "appropriate legislation" to "enforce" the provisions of that Amendment,[6]

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1 117 S. Ct. 2157 (1997).

2 494 U.S. 872 (1990).

3 *Id.* at 881.

4 42 U.S.C. §§ 2000bb–2000bb-4 (1994).

5 *See id.* § 2000bb-1.

6 U.S. CONST. amend. XIV, § 5.

which have been held to apply most of the Bill of Rights, including the Free Exercise Clause, to the states.[7] Thus, the Court interpreted the Free Exercise Clause to establish a modest nondiscrimination norm for religion, while Congress interpreted it to create a robust substantive liberty for religious exercise. This clash of interpretations set the stage for what could have been serious reflection on the nature of the judicial process and the role of congressional judgment in matters of constitutional interpretation, as well as the nature and importance of religious freedom. Instead, the Court presupposed that the judiciary has exclusive authority to interpret the Constitution, and without even discussing the merits of the disagreement between itself and Congress over the meaning of free exercise, held that Congress had no right to legislate on the basis of an interpretation of the Constitution contrary to judicial precedent.

Boerne was an ideal case for exploring these institutional questions because the free exercise issue, over which Congress and the Court disagreed, is such a close question on the merits. For purposes of this Comment, I do not challenge the correctness of the Court's decision in *Smith*.[8] But there are substantial arguments supporting the opposite conclusion, based on constitutional text, precedent, and analogies to other parts of the First Amendment.[9] Indeed, the general (though far from unanimous) weight of scholarly opinion has been critical of *Smith*.[10] Its reasoning has been criticized and rejected by five of six

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[7] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[8] I have criticized that decision elsewhere. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1114–16 (1990).

[9] On the constitutional text, consult Allan Ides, *The Text of the Free Exercise Clause As a Measure of* Employment Division v. Smith *and the Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 151–53 (1994), and McConnell, cited above in note 8, at 1114–16. On precedent, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 564–71 (1993) (Souter, J., concurring in part and concurring in the judgment), and McConnell, cited above in note 8, at 1120–28. Even supporters of the *Smith* decision have found its treatment of precedent unconvincing. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 & n.3 (1991). On analogies to other parts of the First Amendment, see McConnell, cited above in note 8, at 1137–41.

[10] *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 754 (1992) (describing the academic commentary on *Smith* as "mostly critical"). Among the critics of *Smith* are JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 54–57 (1995); Stephen L. Carter, *The Supreme Court, 1992 Term — Comment: The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 118, 140–41 (1993); John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 114–16 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; McConnell, *supra* note 8; and Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231–37 (1991). Other scholars believe *Smith* was correct. *See* Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 94–96 (1990); Lino A. Graglia, Church of the Lukumi Babalu Aye*: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 20–23 (1996); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Marshall, *supra* note 9; Suzanna Sherry, Lee v. Weisman*: Paradox Re-*

state supreme courts in interpreting their state constitution's free exercise provisions; further, the sixth refused to embrace its reasoning.[11] It has also been rejected by overwhelming majorities of both houses of Congress[12] — not to mention four Justices in *Smith*,[13] three in *Boerne*,[14] and a unanimous Supreme Court as recently as 1972.[15] In *Boerne* itself, Justice O'Connor presented impressive arguments that *Smith* was contrary to the original understanding of the Free Exercise Clause.[16] Even Justice Scalia, who challenged Justice O'Connor's historical analysis, did not purport to find the issue clear-cut. After considering all the historical evidence, Justice Scalia stated only that the material "is more supportive of [*Smith*'s] conclusion than destructive of it."[17] Similarly, Justice O'Connor acknowledged that "[a]s is the case for a number of the terms used in the Bill of Rights, it is not exactly clear what the Framers thought the phrase signified."[18] By common consent, then, whether the Free Exercise Clause is confined to laws that single out religion presents a close question, with plausible arguments on both sides.

It is precisely in a close case that the independent judgment of Congress on a constitutional question should make a difference. When translating constitutional text into judicially enforceable doctrine, a responsible court necessarily takes into consideration not only the meaning of the constitutional provision at issue, but also the institutional implications of the doctrine for the allocation of power between the courts and the representative branches. One reason for a broad

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dux, 1992 SUP. CT. REV. 123, 150–53; and Maria Elise Lasso, Comment, Employment Division v. Smith*: The Supreme Court Improves the State of Free Exercise Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 569 (1993).

11 *See* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990) (interpreting state constitution to require a compelling government interest to justify restraints on religious exercise); State v. Hershberger, 462 N.W.2d 393, 396–97 (Minn. 1990) (same); St. John's Lutheran Church v. State Compensation Ins. Fund, 830 P.2d 1271, 1276 (Mont. 1992) (same); State v. DeLaBruere, 577 A.2d 254, 272 (Vt. 1990) (same); First Covenant Church v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992) (same); *see also* Rupert v. City of Portland, 605 A.2d 63 (Me. 1992) (seeing "no reason to decide whether . . . to follow the Supreme Court's lead in *Smith*," although citing *Smith* with approval for the proposition that the Free Exercise Clause was not violated by state drug regulation).

12 *See infra* p. 160.

13 Justices Brennan, Blackmun, and Marshall dissented, and Justice O'Connor, expressly disagreeing with the majority on the issue of interpretation, concurred on other grounds. *See* Employment Div. v. Smith, 494 U.S. 872, 893–97 (1990) (O'Connor, J., concurring in the judgment).

14 Justices O'Connor, Souter, and Breyer dissented.

15 *See* Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (voting 7-0 that a general requirement that children under 16 attend school could not be applied against Amish families who objected on religious grounds).

16 *See Boerne*, 117 S. Ct. at 2178–85 (O'Connor, J., dissenting). For a discussion of the historical debate, see Michael W. McConnell, *A Comment on the Free Exercise Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. (forthcoming Mar. 1998).

17 *Boerne*, 117 S. Ct. at 2175 (Scalia, J., concurring in part).

18 *Id.* at 2179 (O'Connor, J., dissenting).

construction of the term "commerce," for example, is that a rigorous judicial examination of effects on commerce would entail making economic judgments of a kind ill-suited to courts.[19] The same institutional implications can inform judicial interpretations of provisions of the Bill of Rights. Indeed, as I will show below,[20] the *Smith* decision was based not on what "free exercise of religion" means (either historically or normatively), but on the institutional point that "democratic government," despite its admitted inability to accord full and equal accommodation to all religious denominations, is to be "preferred" to a system in which courts make highly subjective and intrusive judgments that "weigh the social importance of all laws against the centrality of all religious beliefs."[21] In other words, *for purposes of judicial review*, the Court has concluded that the Free Exercise Clause must be given a nondiscrimination interpretation because under the alternative interpretation, unelected courts would assume an unwarranted degree of discretion over a broad range of governmental decisions. The Court made clear, however, that the same concerns do not constrain representative bodies. They are free to decide that the "value" of religious freedom requires exceptions from neutral laws of general applicability.[22] The issue in *Smith* was not what free exercise demands but which institution — the Court or the legislature — would decide the balance.

My thesis is that when Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question. Because these institutional constraints are predicated on the need to protect the discretionary judgments of representative institutions from uncabined judicial interference, there is no reason for Congress — the representatives of the people — to abide by them. Congress need not be concerned that its interpretations of the Bill of Rights will trench upon democratic prerogatives, because its actions *are* the expression of the democratic will of the people. Indeed, the same institutional constraints that lead the courts, in many cases, to adopt a reading of the Constitution that produces a more modest judicial role should have led the Court to be more respectful of the congressional decision represented by RFRA.

I therefore conclude that the Religious Freedom Restoration Act was a legitimate exercise of Congress's power to enforce the provisions of the Fourteenth Amendment, even on the heuristic assumption that

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19 *See* United States v. Lopez, 514 U.S. 549, 604–07 (1995) (Souter, J., dissenting).

20 *See infra* p. 190.

21 Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

22 *See id.*

Smith was a correct rendition of the doctrine that courts should apply in enforcing the Free Exercise Clause.

I. FREE EXERCISE DOCTRINE AND THE PASSAGE OF RFRA

Some 206 years after ratification of the First Amendment, the meaning of the Free Exercise Clause remains in doubt. Under one view, the clause, like that governing free speech, protects a specified *freedom*: presumptively, all people may worship God in accordance with the dictates of their own conscience, subject only to governmental interference necessary to protect the public good. Under a second view, the Free Exercise Clause, like the Equal Protection Clause, protects against a particular kind of governmental *classification* or *discrimination*: the government may not "single out" religion (or any particular religion) for unfavorable treatment.

A great deal turns on the choice between the freedom-protective interpretation and the nondiscrimination interpretation. Demonstrably hostile or discriminatory acts against religion are blessedly rare in this country,[23] but ostensibly neutral impositions on religion — especially minority religions — are common. The natural tendency of regulatory regimes is to make no exceptions for private concerns and to overinflate the importance of their own objectives — even when those private concerns are rooted in constitutional rights and accommodation could be made at reasonably low cost to public purposes.[24] If confined to deliberate discrimination against religion, the Free Exercise Clause would be of little practical importance to the hundreds of sects and millions of religious citizens who inhabit this pluralistic and religious nation. By contrast, a freedom-protective Free Exercise Clause of the type reflected in RFRA enables churches, synagogues, mosques, temples, and religious groups of all kinds, and their adherents, to challenge governmental interference with their religious practice. The genius of RFRA (like the pre-*Smith* constitutional standard) was not that it imposed a "compelling interest" standard, which was never rigorously applied in any event,[25] but that it required government officials to think seriously about the feasibility of accommodations and gave aggrieved persons the right to a hearing on the accommodation issue from a more disinterested governmental figure, a judge. This re-

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[23] Much governmental discrimination against religion is motivated by mistaken or exaggerated interpretations of the Establishment Clause or the principle of separation between church and state. Examples include *Rosenberger v. Rector & Visitors of the University*, 115 S. Ct. 2510, 2520–25 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395–97 (1993), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 485–89 (1986), and *Widmar v. Vincent*, 454 U.S. 263, 270–76 (1981).

[24] *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 249–50 (1995).

[25] *See* McConnell, *supra* note 8, at 1127.

quirement counteracted the bureaucratic imperative of "no exceptions," and made reasonable accommodations much more likely, often without the need for litigation. Under *Smith* and without RFRA, religious claimants have no legal leverage under federal law.

Prior to *Smith*, the freedom-protective interpretation was a firmly established (albeit haphazardly enforced) doctrine of constitutional law.[26] In 1972, the Court held unanimously that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion,"[27] and only a year prior to *Smith*, Justice Scalia cited four cases holding that "the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws."[28] In 1990, however, the Court did an about-face. In a majority opinion joined by four other Justices, Justice Scalia declared that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,"[29] and held that the Free Exercise Clause provides no protection against a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[30] *Smith* involved the application of criminal laws against the use of peyote, a hallucinogenic drug, to the ceremonies of the Native American Church, for which peyote use is the central act of religious worship. Under prior law, the question in *Smith* would have turned on whether the state had a "compelling interest" in enforcing the drug laws in this context, and the case was litigated by both sides on that basis. Neither of the parties argued that the constitutional standard should be changed. Nonetheless, without benefit of briefing or argument by counsel on the issue,[31] and without reference to the historical background of the provision, the Court announced the rule insulating "neutral, generally applicable law[s]" from constitutional review under the Free Exercise Clause.[32] The Court reasoned that allowing exemptions for all believers from all laws conflicting with their religious beliefs would be "courting anarchy,"[33] and that the only available alternative — requiring judges to "balance

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[26] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-4, 14-12, 14-13 (2d ed. 1988); McConnell, *supra* note 8, at 1120–28.

[27] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[28] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting).

[29] Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990).

[30] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)) (internal quotation marks omitted). Justice O'Connor concurred in the judgment, but dissented on the interpretation of the Free Exercise Clause. *See id.* at 891 (O'Connor, J., concurring in the judgment).

[31] *See* Petition for Rehearing at 1, *Smith* (No. 88-1213); McConnell, *supra* note 8, at 1113–14.

[32] *Smith*, 494 U.S. at 881–82.

[33] *Id.* at 888.

against the importance of general laws the significance of religious practice" — would give too much discretion to the courts.[34] "It may fairly be said," the Court said, "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[35] Nonetheless, the Court held that this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[36]

The *Smith* decision aroused a remarkable groundswell of opposition from religious and civil liberties groups across the political spectrum, who quickly realized that the ruling would have wide-ranging consequences.[37] The decision implied that the Constitution would provide no protection if women sued under employment discrimination laws to be allowed to be Roman Catholic priests,[38] if Muslim or Hindu girls were required to wear what their religion deems to be immodest dress during gym classes,[39] if cities with gay rights ordinances forced churches to hire open homosexuals as worship leaders or teachers,[40] if Jewish or Muslim prisoners were denied kosher or hallel food,[41] if believers who take literally the requirement of "judge not" were punished for refusing jury service,[42] or if priests or ministers were required to testify to what they have learned in the confessional.[43] Other examples abound.[44] If RFRA's "[s]weeping coverage

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[34] *Id.* at 890 n.5.

[35] *Id.* at 890.

[36] *Id.*

[37] *See* Petition for Rehearing at 2–5, *Smith* (No. 88-1213).

[38] *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1058 & n.36 (1996); *cf.* Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (recognizing free exercise right of church to hire ministers without scrutiny under Title VII).

[39] *Cf.* Mitchell v. McCall, 143 So. 2d 629, 632 (Ala. 1962) (concluding that religious principles would not excuse a student from wearing a prescribed physical education outfit that she considered immodest). This example is discussed in Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 688–89 (1980), and Gey, cited above in note 10, at 182–84.

[40] *See* Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762, 764–65 (Cal. Super. Ct. 1980) (organist); Lewis *ex rel.* Murphy v. Buchanan, 21 Fair Empl. Prac. Cas. (BNA) 696, 698 (Minn. Dist. Ct. 1979) (parochial school teacher).

[41] *See* Hunafa v. Murphy, 907 F.2d 46, 47–48 (7th Cir. 1990); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975).

[42] *See In re* Jenison Contempt Proceedings, 125 N.W.2d 588, 589 (Minn. 1963).

[43] *See Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 200–02 (1955).

[44] *See, e.g.*, Menora v. Illinois High Sch. Ass'n, 683 F.2d 1030, 1035 (7th Cir. 1982) (evaluating a claim brought by Orthodox Jewish basketball players who were excluded from interscholastic competition because their yarmulkes violated a "no-headgear" policy); St. Agnes Hosp. v. Riddick, 748 F. Supp. 319, 331–32 (D. Md. 1990) (ruling on a challenge brought by a Catholic teaching hospital required to perform training in abortions); *No Exemption From Hard Hat Wear Based on High-Court Decision, OSHA Says*, 20 O.S.H. Rep. (BNA) 1018 (Nov. 14, 1990) (discussing OSHA

ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," as the *Boerne* Court noted,[45] this is because governmental action at every level, of every description, and regardless of subject matter, can intrude deeply into the freedom of Americans to practice their religion in accordance with the dictates of conscience.

Congress then got into the act. Using what it believed to be its powers to protect constitutional rights under Section Five of the Fourteenth Amendment, Congress considered and ultimately enacted the Religious Freedom Restoration Act. Both Houses of Congress held hearings at which witnesses testified about the practical implications of the *Smith* decision and criticized its historical and jurisprudential underpinnings.[46] As the Supreme Court later noted, members of Congress debated the "points of constitutional interpretation" raised by the *Smith* decision, and many "criticized the Court's reasoning."[47] After due consideration, the House of Representatives passed RFRA unanimously[48] and the Senate did so by a vote of 97-3.[49] Unquestionably, these votes constituted an overwhelming and bipartisan rejection of the Court's constitutional analysis in *Smith*. The Act's stated purposes included "restor[ing]" the free exercise test as set forth in cases before *Smith*.[50] The statute incorporated findings that, among other things:

> [•] laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
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> [•] governments should not substantially burden religious exercise without compelling justification; [and]
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> [•] in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . .[51]

The Act prohibited governmental agencies and officials at all levels from imposing a "substantial burden" on a person's exercise of religion unless the government could demonstrate that the burden furthered a

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Notice CPL 2, which requires construction workers to wear helmets, effectively barring turban-wearing Sikhs from employment).

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

46 *See The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. (1993); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. (1993); *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 49 (1991).

47 *Boerne*, 117 S. Ct. at 2161.

48 *See* 139 CONG. REC. H8713–15 (daily ed. Nov. 3, 1993).

49 *See id.* at S14,470–71 (daily ed. Oct. 27, 1993).

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

51 *Id.* § 2000bb(a).

"compelling governmental interest" in the "least restrictive" fashion.[52] In other words, RFRA adopted, for statutory purposes, the freedom-protective interpretation of the Free Exercise Clause that *Smith* had rejected.

While RFRA was on the books, successful claimants included a Washington, D.C. church whose practice of feeding a hot breakfast to homeless men and women purportedly violated zoning laws;[53] a Jehovah's Witness who was denied employment for refusing to take a loyalty oath;[54] the Catholic University of America, which was sued for gender discrimination by a canon-law professor denied tenure;[55] a religious school resisting a requirement that it hire a teacher of a different religion;[56] a Catholic prisoner who was refused permission to wear a crucifix;[57] and a church that was required to disgorge tithes contributed by a congregant who later declared bankruptcy.[58] RFRA also unleashed a flood of cases — many filed by prisoners — of a less meritorious, sometimes even frivolous or abusive, character.[59] In response, state and local government defendants challenged the constitutionality of the Act. Those challenges generally rested on three arguments: first, that RFRA, as applied to state and local governments, exceeded the enumerated powers of Congress (a federalism argument); second, that by attempting to overturn Supreme Court precedent, Congress had usurped the authority of the judiciary (a separation of powers argument); and third, that RFRA favored religion over nonreligion, in violation of the Establishment Clause (a First Amendment argument).

II. THE *BOERNE* LITIGATION

The *Boerne* case arose when St. Peter Church outgrew its facility, a 1920s imitation Spanish mission style structure in the City of Boerne

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[52] *Id.* § 2000bb-1.

[53] *See* Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 544–46 (D.D.C. 1994); *see also* Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698, 702 (Mich. Ct. App. 1996) (affirming a ruling that zoning laws could not be applied to prevent a church from providing shelter for homeless persons). *But cf.* Daytona Rescue Mission Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1559–60 (M.D. Fla. 1995) (rejecting a similar claim under RFRA).

[54] *See* Bessard v. California Community Colleges, 867 F. Supp. 1454, 1462–65 (E.D. Cal. 1994).

[55] *See* EEOC v. Catholic Univ., 83 F.3d 455, 467–70 (D.C. Cir. 1996).

[56] *See* Porth v. Roman Catholic Diocese, 532 N.W.2d 195, 197 (Mich. Ct. App. 1995).

[57] *See* Sasnett v. Sullivan, 908 F. Supp. 1429, 1446, 1449 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997).

[58] *See In re* Young, 82 F.3d 1407, 1418–20 (8th Cir. 1996), *vacated and remanded sub nom.* Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997).

[59] *See Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (July 14, 1997) [hereinafter *Protecting Religious Freedom Hearing*] (testimony of Jeffrey Sutton, Solicitor, State of Ohio), *available in* 1997 WL 394530, at *2–*3. Others have taken a different view of prison RFRA litigation. *See id.* (testimony of Charles W. Colson, President of Prison Fellowship), *available in* 1997 WL 394527 at *1–*2.

(pronounced "Bernie"), Texas.[60] The building, originally designed to seat only 230 worshipers, could no longer accommodate its growing 2170-person congregation. Although the church itself is not a historic landmark, the front facade is located within a historic district.[61] The city refused to approve any plan of expansion that would require demolition of any part of the church building, whether inside or outside the historic district. Raising claims under both RFRA and the First Amendment, the Archbishop of San Antonio sued the city on behalf of the church.[62]

On a motion to dismiss, the district court ruled RFRA unconstitutional as a "violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary."[63] The opinion was brief and conclusory; the primary precedent cited was *Marbury v. Madison*.[64] The Fifth Circuit reversed in a comprehensive opinion by Judge Patrick Higginbotham.[65] On petition by the City, with the acquiescence of the Archbishop, the Court granted certiorari solely on the question of the constitutionality of RFRA.[66]

In a 6-3 opinion by Justice Kennedy, the Supreme Court held the Religious Freedom Restoration Act unconstitutional. At least for the time being,[67] therefore, the exercise of religion is once more at the mercy of formally neutral acts of state and local governments, as far as federal law is concerned.[68] For the parties, however, the case ended on

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60 The facts here are taken from the respondent's brief. *See* Brief of Respondent Flores at 1, *Boerne* (No. 95-2074), *available in* 1997 WL 10293.

61 After the lawsuit was filed, the boundaries of the historic district were redrawn to include the entire church. *See id.*

62 *See* Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996).

63 Flores v. City of Boerne, 877 F. Supp. 355, 357 (W.D. Tex. 1995).

64 *See id.* at 356–57 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

65 *See Flores*, 73 F.3d at 1364.

66 *See* City of Boerne v. Flores, 117 S. Ct. 293 (1996).

67 Congress is considering the possibility of reenacting RFRA, or parts of it, in ways consistent with the *Boerne* opinion. *See Protecting Religious Freedom Hearing*, *supra* note 59.

68 *Boerne* should not affect the application of RFRA to federal actions. By its terms, RFRA applies to every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to states and their subdivisions. 42 U.S.C. § 2000bb-2(1) (1994). The Court's ruling that RFRA cannot be justified as an exercise of Congress's authority under Section Five would not seem to affect Congress's authority under the Necessary and Proper Clause, U.S. CONST., art. I, § 8, cl. 18, to regulate federal instrumentalities. *See* EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (upholding RFRA as applied to federal law). When exercising its enumerated powers, Congress may consider countervailing social policies, including freedom of religion. Because these considerations need not be rooted in constitutional values, it is irrelevant that Congress's conception of the freedom of religion is broader than that of the First Amendment as interpreted in *Smith*. Only if RFRA were held to violate the Establishment Clause — a position espoused by Justice Stevens but not joined by any other Justice — would its application to federal action be unconstitutional. It is surprising that the Court did not drop a footnote mentioning that the decision in *Boerne* did not resolve the constitutionality of RFRA as applied to federal action, and even more surprising that the Court vacated and remanded for reconsideration in light of *Boerne* a case involving application of RFRA to the federal bankruptcy laws. *See* Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997).

a happier note. After the Supreme Court rendered its decision, the Archdiocese prepared to continue the case under other legal and constitutional theories. On August 12, 1997, the City Council unanimously adopted what it styled a "settlement," under which the Church may build a new 850-seat sanctuary behind, and partially hidden by, the original building, most of which will be repaired and preserved intact at Church expense.[69] The plaintiffs thus accomplished their religious objective with minimal loss to public purposes, though at much greater cost to themselves — arguably the kind of reasonable accommodation that RFRA was designed to bring about.

A. Justice Kennedy's Opinion for the Majority

Justice Kennedy's majority opinion addressed two seemingly distinct, but in fact interrelated, issues: federalism and separation of powers. The opinion was unsurprising in its treatment of the federalism issue, following the recent trend toward significantly greater solicitude for the autonomy and authority of the states in the federal system.[70] The only surprising thing about this aspect of the opinion is that it was joined by Justices Stevens and Ginsburg, who usually are among the champions of federal authority. In its posture toward separation of powers, however, Justice Kennedy's opinion adopted a startlingly strong view of judicial supremacy. The recent trend in this regard had been toward a more modest role for federal courts in setting national policy through constitutional judicial review.[71] *Boerne*, however, adopted the most judge-centered view of constitutional law since *Cooper v. Aaron*.[72]

The majority's discussion of the Section Five question breaks down into three steps. First, the Court framed the issue as a choice between two, and only two, alternative understandings of congressional authority under Section Five: a "substantive" power, under which "[s]hifting legislative majorities could change the Constitution,"[73] and a "remedial" power, which confines Congress to providing enforcement

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[69] This information comes from Marci Hamilton, counsel for the City, in a message to the Religion Law discussion list, and from a telephone conversation with Douglas Laycock, counsel for the Church. *See* E-mail from Marci Hamilton to Religion Law Discussion Group (August 13, 1997) (on file with the Harvard Law School Library); Telephone Interview with Douglas Laycock (September 16, 1997).

[70] *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997); United States v. Lopez, 514 U.S. 549 (1995).

[71] *See, e.g.*, Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997) (leaving the question of assisted suicide to be determined by other institutions of government). For a critical view of this trend, see Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 87–89 (1989).

[72] 358 U.S. 1 (1958). *See id.* at 18 (declaring the "basic principle" that "the federal judiciary is supreme in the exposition of the law of the Constitution" and that its holdings are "the supreme law of the land").

[73] *Boerne*, 117 S. Ct. at 2168.

mechanisms (causes of action, fines, jurisdictional provisions, and the like) to "prevent as well as remedy"[74] constitutional violations as defined and determined by the Court. As discussed below,[75] this focus on two extremes left out the possibility of an intermediate, "interpretive" role for Congress.

Second, the Court examined the constitutional text, drafting history, and precedent, and concluded that each of these sources "confirms the remedial, rather than substantive, nature of the Enforcement Clause."[76] The Court relied heavily on the history of the framing of the Fourteenth Amendment, making no reference to political theories about the relative competencies of the legislative and judicial branches or the relation of judicial review to democracy.[77] No Justice questioned the Court's reliance on history as the touchstone for interpretation — a fact that should be encouraging to defenders of originalism. Whether the Court's treatment of its sources will persuade historians is another question. The opinion contains several strings of quotations from participants in the debates over early drafts of the Amendment, but is vague about how the ultimate version related to the views expressed. It fails to take account of the shifting political climate of the early months of 1866. And it relies on historical scholarship of the 1960s, 1950s, and earlier,[78] while curiously disregarding the work of the last 30 years (even when it would support the Court's conclusions).[79] It is interesting that the Court's most outspoken proponent of originalist interpretation, Justice Scalia, declined to join this section of the opinion.

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[74] *Id.* at 2163.

[75] *See infra* pp. 170–74.

[76] *Boerne*, 117 S. Ct. at 2164.

[77] Prominent analyses in this vein include Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 251–52 (1971); Thomas J. Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U. L. REV. 129 (1982); and Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[78] *See Boerne*, 117 S. Ct. at 2164–66.

[79] Among the relevant works are JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 438–40 (1973); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); and Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment — The Original Understanding of Section Five*, 3 CONST. COMMENTARY 123 (1986).

The resulting "remedial" interpretation of Section Five eliminated any need for the Court to entertain argument on the underlying question of the meaning of the Free Exercise Clause. Under the remedial interpretation, Congress is limited to enforcing the Fourteenth Amendment *as construed by the Court.* Because the meaning of the Free Exercise Clause had already been determined by the Court in *Smith*, there was no room for congressional interpretation. The Court recognized that Congress, a coequal branch of government, had debated the proper interpretation of the Free Exercise Clause and disagreed with the Court's interpretation in *Smith.*[80] Yet the Court did not trouble itself to explain either the grounds for that disagreement or why the Congress was mistaken. It simply treated the departure from *Smith* as equivalent to an attempt to "change the Constitution."[81] When Congress legislates "against the background of a judicial interpretation of the Constitution already issued," the Court stated, "it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis.*"[82] It is as if the Court wished to stress that, for purposes of the constitutionality of RFRA, the important question is not whether Congress was enforcing the intended protections of the Fourteenth Amendment but rather whether it was giving proper respect to the interpretive authority of the Court itself.

Finally, the Court examined the fit between RFRA and the Free Exercise Clause as defined by *Smith.* Finding that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," Justice Kennedy concluded that RFRA was a congressional attempt to make a "substantive change in constitutional protections" and hence unconstitutional.[83]

This "congruence and proportionality"[84] standard appears to be more rigorous than the standard of review applied in earlier Section Five cases, such as *Katzenbach v. Morgan.*[85] In *Morgan*, the Court stated:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations — the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the

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[80] *See Boerne*, 117 S. Ct. at 2157, 2161.

[81] *Id.* at 2168. At one point, the majority opinion states that "[w]e make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA." *Id.* at 2171. This statement emphasizes that the majority considered it unnecessary to respond to arguments against *Smith.*

[82] *Id.* at 2172.

[83] *Id.* at 2170.

[84] *Id.* at 2164.

[85] 384 U.S. 641 (1966).

> evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected .... 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.[86]

In *Boerne*, by contrast, the Court made independent judgments regarding the risk and frequency of free exercise violations under the *Smith* test,[87] the fit between the constitutional evil and the statutory remedy,[88] and the degree of impact on traditional state functions.[89] In effect, the *Boerne* Court replaced something akin to "rational basis scrutiny" with a narrow tailoring requirement typical of intermediate scrutiny.

This development is reminiscent of the Court's 1995 decision in *United States v. Lopez*, which for the first time in modern history gave serious judicial scrutiny to whether the conduct regulated by a federal statute had a "substantial" impact on interstate commerce.[90] The "congruence and proportionality" standard of *Boerne* has the same virtues and the same vices as the approach in *Lopez*. Without independent judicial means-ends scrutiny, defenders of federal statutes can always "pile inference upon inference" to the point that there would be no limits to the reach of federal power.[91] But serious means-ends scrutiny necessarily transfers essentially political judgments from the legislature to the courts.[92] It is therefore extremely surprising that there was no dissent on the Section Five issue, even from the *Lopez* dissenters, who view themselves as the philosophical heirs of the exponents of broad congressional power under Section Five as well as the Commerce Clause.[93]

The rationale for, and implications of, this apparent tightening of the standard of review applied to the congressional exercise of remedial authority under Section Five are beyond the scope of this Comment, which focuses instead on the Court's rejection of a serious inde-

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[86] *Id.* at 653.

[87] *See Boerne*, 117 S. Ct. at 2169 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

[88] *See id.* at 2170–71 ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

[89] *See id.* (stating that RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description ... RFRA intrudes into state prerogatives").

[90] *See* United States v. Lopez, 514 U.S. 549, 558–59, 567 (1995).

[91] *Id.* at 567.

[92] *See id.* at 604 (Souter, J., dissenting) (noting that the rational basis test "reflects our respect for the institutional competence of the Congress ... and our appreciation of ... Congress's political accountability").

[93] Seven of the Justices expressly endorsed the Section Five holding, and the other two — Justices Souter and Breyer — did not address it. *See Boerne*, 117 S. Ct. at 2159; *id.* at 2176 (O'Connor, J., concurring); *id.* at 2185 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

pendent interpretive role for Congress. It bears mention, however, that in evaluating the "congruence and proportionality" of RFRA, the Court appears to have misstated the holding of *Smith*. *Smith* did not limit free exercise protection to laws motivated by "religious bigotry," "persecution," or even "animus or hostility to the burdened religious practices," as the *Boerne* Court repeatedly implied.[94] Rather, *Smith* held that the Free Exercise Clause applies to laws that are not neutral or generally applicable (regardless of their motivation),[95] to free exercise claims that also implicate other constitutional rights,[96] and in contexts involving individualized governmental assessment of the reasons for the relevant conduct.[97] A great deal of the conduct protected by RFRA would fall within one or more of those categories, even if it were not motivated by "religious bigotry." In their haste to strike down RFRA, the Justices made *Smith* appear more limited than it actually is.

B. The Dissents

In her dissent, Justice O'Connor wrote that she agreed with "much of the reasoning" of the Court on the Section Five issue and stated that if she agreed with the Court's decision in *Smith*, she would have joined the majority opinion.[98] However, she "would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument."[99] Implicit in her opinion is the view that the congressional interpretation of the Free Exercise Clause is entitled to full consideration on the merits, and should not be automatically dismissed on the basis of mere precedent.

Justice O'Connor devoted the bulk of her opinion to explaining why she believes "that *Smith* adopted an improper standard for deciding free exercise claims."[100] After a brief discussion of pre-*Smith* precedent, the practical consequences of *Smith* for religious liberty, and the reasons for departing from stare decisis,[101] she turned to a historical analysis of the "early American tradition of religious free exercise."[102] Contrary to *Smith*, she stated, "the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment,"

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94 *Boerne*, 117 S. Ct. at 2169, 2171.

95 *See* Employment Div. v. Smith, 494 U.S. 872, 878–80 (1990).

96 *See id.* at 881–82.

97 *See id.* at 884.

98 *Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting).

99 *Id.*

100 *Id.*

101 *See id.* at 2177.

102 *Id.* at 2177–78; *see also id.* at 2178–85 (setting forth Justice O'Connor's historical analysis of religious free exercise in America).

but is "best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference."[103]

Justice Breyer, who joined most of Justice O'Connor's dissenting opinion, did not "find it necessary" to reach the broader Section Five issue.[104] Similarly, Justice Souter did not discuss the Section Five question, but echoed Justice O'Connor's call for setting the case down for reargument.[105]

C. Justice Scalia's Concurrence

Justice Scalia joined the majority opinion (with the exception of its discussion of the history of Section Five), but wrote separately to respond to Justice O'Connor's historical analysis of the Free Exercise Clause. He concluded that the historical record shows only that legislatures sometimes found religious accommodation "appropriate" and does not demonstrate that "accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause."[106] He endorsed the "abstract proposition" that "government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice."[107] But the dispositive question, he continued, "is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases."[108] His answer: "It shall be the people."[109]

The oddity, of course, is that RFRA *was* enacted by the elected representatives of the people. In declaring RFRA unconstitutional, the *Boerne* Court overturned the will of "the people" in the name of protecting their democratic voice from undue interference by the judiciary. Justice Scalia's democratic rhetoric thus seems at cross-purposes with his conclusion. His real point must have been that these decisions should be made by the people *of the several states*, rather than the people *in their national capacity*. But that is a different issue, requiring a different form of argument. It is plausible to view the Fourteenth Amendment as having nationalized the definition and enforcement of fundamental rights.[110] To reject that view requires an analysis of the federal-state implications of that Amendment rather than an invocation of the rights of "the people."

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103 *Id.* at 2177.

104 *Id.* at 2186 (Breyer, J., dissenting).

105 *See id.* at 2185–86 (Souter, J., dissenting).

106 *Id.* at 2174 (Scalia, J., concurring).

107 *Id.* at 2176.

108 *Id.*

109 *Id.*

110 *See* Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164–68 (1992).

D. Justice Stevens's Concurrence

Justice Stevens filed a separate concurrence, joined by no other Justice, in which he maintained that religious accommodations are unconstitutional "governmental preference[s] for religion, as opposed to irreligion."[111] Under that view, RFRA is unconstitutional as applied to the federal government as well as to the states. Yet Justice Stevens also joined Justice Scalia's opinion, which concluded that religious accommodations must be left "to the people." It is hard to see how these views can be reconciled. The very historical evidence on which Justice Scalia relied demonstrates that the Establishment Clause is not offended when legislatures accommodate the free exercise of religion — even if they do not extend comparable accommodation to nonreligious concerns.[112]

If adopted, Justice Stevens's position would work a dramatic change in First Amendment law. Ten years ago, the Supreme Court unanimously rejected the argument that an accommodation statute is unconstitutional simply because it "singles out religious entities for a benefit": when the government acts "with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[113] Even the late Justice William J. Brennan, Jr., whose interpretation of the Establishment Clause was generally quite expansive, approved of "benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs" as long as they "were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause" or would not "impose substantial burdens on nonbeneficiaries."[114]

III. Section Five Interpretation: Approaches to Handling Disagreement Among the Branches

A. Three Options: Substantive, Remedial, and Interpretive Powers Under Section Five

How should the Court respond to actions by other branches of government that take issue with the Court's interpretation of the Constitution? In particular, how should the Court respond when Congress, which is designated by the text as the enforcer of the Fourteenth Amendment, passes legislation that contradicts the Court regarding the

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111 *Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring).

112 For further discussion of the evidence, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511–12 (1990).

113 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

114 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989).

scope and meaning of the provisions Congress is empowered to enforce? Although there are various hypothetical answers, three stand out as logical interpretations of the text of Section Five, in light of our tradition of judicial review.

Section Five of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[115] Section One of the Amendment prohibits states from making or enforcing laws that "abridge the privileges or immunities of citizens of the United States."[116] It is this clause that "incorporated" provisions of the Bill of Rights and made them applicable to the states — not, as the Court has often stated, the Due Process Clause.[117] Because the Constitution nowhere sets forth a list of "privileges or immunities of citizens of the United States," it might be inferred that Congress has authority to promulgate a list of federal "privileges and immunities" and to protect them against state infringement. In other words, Congress could have plenary power to determine, as a legislative matter, what rights it believes the people should have, and could protect those rights against infringement by state and local governments. This is the "substantive" interpretation of the Section Five power.

Second, the courts may be seen as having the exclusive power to "say what the law is,"[118] with congressional power confined to enacting legislation to remedy or deter violations as defined by the Court. Any congressional action that defines constitutional rights in ways that deviate from judicial interpretations is thus seen as a usurpation of the exclusive judicial authority to interpret the Constitution. To be sure, under the remedial power, Congress may enact legislation that "prohibits conduct which is not itself unconstitutional,"[119] but the authority to do so is strictly limited. There "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[120] Unless remedial legislation passes this form of means-end scrutiny, it may be considered "substantive in operation and effect,"[121] and hence unconstitutional. This understanding of Congress's authority under Section Five, which was adopted by the *Boerne* Court, is called "remedial."

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115 U.S. CONST. amend. XIV, § 5.

116 *Id.* § 1.

117 *See* CURTIS, *supra* note 79, at 58–91; JOHN HART ELY, DEMOCRACY AND DISTRUST 14–30 (1980); MALTZ, *supra* note 79, at 113–18; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1233–38 (1992); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, WASH. U. L.Q. 405, 419–20 (1972).

118 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

119 *Boerne*, 117 S. Ct. at 2163.

120 *Id.* at 2164.

121 *Id.*

Third, Congress may be seen as having some degree of authority to determine for itself what the provisions of the Fourteenth Amendment mean, and to pass enforcement legislation pursuant to those determinations. Under this view, when Congress has enacted legislation under Section Five, the question is not whether Congress is enforcing the Fourteenth Amendment *as construed by the Court*, but whether it is enforcing a reasonable interpretation of the *Fourteenth Amendment*. This "interpretive" understanding of congressional authority differs from the "remedial" understanding because Congress is not necessarily bound by judicial interpretations. It differs from the "substantive" understanding because Congress is not free to pass legislation based solely on its legislative judgment about what rights people should have, but is limited to good faith interpretations of the meaning of the Fourteenth Amendment, just as the judiciary is. Congress is interpreting the law rather than making the law.

It may seem odd to say that the legislative branch can engage in constitutional interpretation, but it should not. The congressional power to interpret the Fourteenth Amendment for purposes of passing Section Five enforcement legislation is one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers.[122] Indeed, Congress has the last word on what the Constitution means when judicial review of the congressional action is unavailable — for example, because of justiciability limits. Such situations have occurred, not infrequently, throughout our history.[123] This idea of congressional interpretive authority corresponds to the most straightforward reading of *Marbury*, in which judicial review is justified not by the peculiar status of the judiciary but by the supremacy of the Constitution over other sources of law, and the duty of all officials, not only judges, to enforce the Constitution.

In the context of Section Five, this "interpretive" view does not mean that Congress has the last word. Because enforcement of RFRA gives rise to federal cases or controversies, such as *Boerne*, the Court necessarily will be required to determine whether the congressional action falls within the scope of Congress's enumerated powers. Resolution of that question could take any of several forms.

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[122] *See id.* at 2171 (acknowledging that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution").

[123] For examples of situations in which Congress determined constitutional meaning, consult DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997). Congressional interpretive authority covers such terrain as the constitutionality of most spending decisions, the constitutionality of most decisions not to act, the constitutionality of many actions in the foreign affairs arena, and the constitutionality of standards of impeachment and conviction. In none of these contexts would the Court ordinarily be in a position to second-guess Congress's constitutional interpretation.

Under the most modest understanding of congressional interpretive authority, the Court is not obligated to adopt, or even to defer to, Congress's interpretation. All the Court must do is undertake a reexamination of the issue with a fresh eye, without the constraints of stare decisis. The Section Five power thus can be seen, at a minimum, as a mechanism by which Congress may express its fundamental disagreement with the Court and may force the Court to rethink its reading of the Constitution.[124] This may be called the "dialogic" approach, because it assumes that Congress and the Court are engaged in a mutually productive dialogue over the meaning of the Constitution.[125] This approach was implicit in the Court's statement of the question presented in *Morgan*: "Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies [a state law], could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?"[126] It also appears to have been Justice O'Connor's approach in *Boerne*. According to Justice O'Connor, the Court should have responded to the congressional enactment of RFRA by inviting full briefing and argument on the meaning of free exercise rather than by treating *Smith* as established authority.

A stronger version of congressional interpretive authority holds that congressional interpretation under Section Five is entitled to a substantial degree of deference. If the underlying constitutional provision is fairly susceptible to two or more different readings that are consistent with text, history, and whatever other sources of illumination the Court deems pertinent, the Court cannot say that Congress has acted beyond its authority if it has passed enforcement legislation based on one of those readings, even if the Court — for purposes of its own enforcement — would have thought another reading superior.[127] This is an application of the general position known as the "presumption of constitutionality," under which Acts of Congress are presumed constitutional unless they are plainly foreclosed by the pertinent legal

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124 This approach has been proposed by Stephen Carter. *See* Carter, *supra* note 77, at 824.

125 *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 79 (1995) (arguing that although RFRA is unconstitutional, it is "a powerful statement that Congress rejects the Supreme Court's interpretation of the Free Exercise Clause" and "suggests that the Supreme Court should reconsider *Smith* and, on reconsideration, overrule it"). There is substantial evidence that the Supreme Court, together with the legislative and executive branches, routinely behaves in this dialogic manner. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 261 (1962); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 273 (1988); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–80 (1993).

126 Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).

127 This has been suggested by Professor Michael Paulsen. *See* Paulsen, *supra* note 24, at 252 n.10.

materials. The particular relevance of this view to Section Five is discussed below.[128]

Finally, for reasons discussed below,[129] it may be argued that congressional interpretations of Fourteenth Amendment rights are entitled to special deference when the difference between the judicial and congressional interpretation is attributable to the institutional constraints on the courts as nondemocratic bodies.[130] I show that there is a class of cases in which judicial interpretation of constitutional rights is limited by the need for judicially appropriate standards, a need that does not constrain Congress, a democratic body, when it interprets those rights under its Section Five power.[131]

The one approach that is not consistent with an "interpretive" understanding of the congressional role under Section Five is for the Court to treat Congress's reading of the Constitution as a usurpation of judicial authority. That, however, was the reaction of the *Boerne* Court. The Court did not recognize any distinction between a substantive authority to legislate what constitutional rights should be and an interpretive authority, similar to the Court's, to determine what the Constitution means. The Court did not reject the interpretive understanding; it simply failed to consider the possibility that interpretation differs from a general power of legislation.

This is evident in the Court's repeated suggestion that allowing congressional authority to go beyond a limited remedial role would be tantamount to allowing Congress to "change" or "amend" the Fourteenth Amendment without going through the procedures of Article Five. But Congress was not seeking to change the Free Exercise Clause. It was attempting to correct what it considered to be the Supreme Court's misinterpretation, which is not the same thing. The Court stated: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[132] But no one — not Congress, not the parties, not the Fifth Circuit — thought Congress could "alter[] the Fourteenth Amendment's meaning." The question is which body's good faith interpretation of the Amendment — Congress's or the Supreme Court's — is entitled to legal force in this context. To illustrate, let us transpose the names of the branches in the sentence: "If the *Supreme Court* could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be superior paramount law." Unless we conclude that interpretation is indistinguishable from amendment — a

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128 *See infra* pp. 185–87.

129 *See infra* pp. 184–92.

130 This has been suggested by Professor Larry Sager. *See* Sager, *supra* note 77, at 1239–40.

131 *See infra* pp. 189–92.

132 *Boerne*, 117 S. Ct. at 2168 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

descent into postmodern deconstructionism that I doubt Justice Kennedy intended — the argument no more applies to the congressional enactment of RFRA than it does to the judicial decision in *Smith*. "Shifting legislative majorities"[133] have no greater and no less capacity than shifting *judicial* majorities to "circumvent" the amendment process of Article V. Neither branch has proper authority to "alter" the Fourteenth Amendment's meaning. That does not answer whether Congress's interpretation is entitled to serious weight.

The Court maintained that *Smith* had decided the scope of free exercise protection, and saw no reason why Congress's challenge to that interpretation should merit a reconsideration, or even an answer. The majority did not even go through the motions of examining the constitutional arguments Congress had found persuasive — let alone entertain briefing and argument, as the three dissenters suggested. "It must be understood," the majority said, "that the Court will adhere to its prior decisions, and contrary expectations" generated by congressional disagreement "must be disappointed."[134] Rather than seeing congressional action under Section Five as an invitation to dialogue, let alone as a decision deserving deference, the *Boerne* majority viewed congressional action as an irrelevance, if not an impertinence.[135]

B. Evidence from the Framing of the Fourteenth Amendment

The supporters of the Fourteenth Amendment never seriously entertained the "substantive" interpretation of Section Five described above, and it is, therefore, something of a straw man. Faced with Democratic charges that the Amendment "would give Congress power to legislate about matters previously reserved to the states and thereby result in a consolidation of power and the destruction of the federal system as Americans had known it," as historian William Nelson explains, "[p]roponents of the Fourteenth Amendment made it clear that they did not intend such vast power for Congress."[136] Although the advocates of Reconstruction were nationalistic, they were not prepared

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133 *Id.*

134 *Id.* at 2172.

135 This is reminiscent of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), an opinion written jointly by Justices O'Connor, Kennedy, and Souter. The *Casey* opinion suggested that it would "subvert the Court's legitimacy beyond any serious question" to "overrule under fire" a "watershed decision." *Id.* at 867. Indeed, the opinion claimed that for the Court to give in to contrary sentiments on so important an issue as abortion would endanger our "character" as "a Nation of people who aspire to live according to the rule of law." *Id.* at 868. From the "dialogic" point of view, it is hard to imagine a more inappropriate response to disagreement. When there is intense opposition to a ruling of the Court from other branches of government, including state legislatures, that is not a reason for the Court to dig in its heels, but to consider very carefully whether it may have erred. To consider the possibility of error, and to take the opinions of other actors in our constitutional system seriously, does not endanger the "legitimacy" of the Court. It would, instead, be a healthy sign that the Court is aware of its fallibility.

136 NELSON, *supra* note 79, at 114.

for so radical a transformation in the balance of power between the central government and the states.[137]

For example, during the three and one half years of debate over the Civil Rights Act of 1875, early drafts of which required nondiscrimination, and even desegregation, by common carriers, public schools, and other public and private institutions, opponents repeatedly insisted that the bill went beyond the requirements of the Fourteenth Amendment.[138] Had supporters of the 1875 Act thought that Section Five gave Congress plenary power to determine the substance of the privileges and immunities of citizens, they surely would have made that argument. But despite lengthy debates over constitutionality — including many references to Section Five — no member of Congress asserted any such power. Instead, supporters of the Act insisted that it merely enforced rights already established by the Fourteenth Amendment. Representative Lynch said the Act "recognizes the right which has already been conferred."[139] The Chairman of the House Judiciary Committee said that the supporters of the bill "have all come to a conclusion on this subject . . . that these are rights guaranteed by the Constitution to every citizen, and that every citizen of the United States should have the means by which to enforce them."[140] Senator Edmunds admitted that if the states retained the right to segregate schools and common carriers under the Amendment, "we cannot interfere with it" by legislation.[141]

On the other hand, Congress did not consider itself limited to enforcing judicially determined rights under the Fourteenth Amendment. Between 1866 and 1875, Congress engaged in extensive debates over the substantive reach of the various Reconstruction era Civil Rights Acts. (Which rights pertain to aliens and which to citizens? Should the civil rights laws apply to cemeteries and schools as well as railroads and inns? Must they provide racially mixed facilities or merely facilities of equal quality? Is jury service a civil right?) In these debates, members of Congress considered themselves constrained by the meaning of the Fourteenth Amendment. For example, Senator Howard argued that Congress could not protect the right to vote under the guise of enforcing the Privileges and Immunities Clause;[142] Representative Garfield argued that Congress could not legislate directly

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137 *See* HYMAN, *supra* note 79, at 438–40; NELSON, *supra* note 79, at 114–15; Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 230–36 (1987). Although these sources lend support to the Court's general point, the Court did not cite them.

138 For a summary, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1005–43 (1995).

139 3 CONG. REC. 945 (1875).

140 2 CONG. REC. 457 (1874).

141 2 CONG. REC. 4173 (1874).

142 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

against private individuals in the absence of state action;[143] Senator Conkling insisted (and Senator Sumner agreed) that in the absence of public funding or establishment by the state, private educational institutions could not be covered merely on account of their incorporation.[144] All of these claims followed from the congressmen's own readings of the Constitution, without reference to judicial construction.

Under a purely remedial theory of congressional power, these debates were of no lasting legal significance. If the courts agreed with the list of protected rights, the congressional action would be redundant; if the courts disagreed, the congressional actions would be nugatory. Under a substantive theory, there was no need to be concerned about the meaning of the Amendment. Only the "interpretive" understanding of Section Five adequately explains why the Reconstruction Congresses debated at such length over precisely what rights would be protected under the several Civil Rights Acts: because their interpretation mattered. They were not content to leave the specification of protected rights to judicial decision. The interpretive understanding also explains why they thought it necessary to debate the meaning of the Fourteenth Amendment: because they understood their authority to be limited to enforcing the Amendment, which set determinate (if not always pellucid) limits on what Congress could do.

The historical evidence presented in the *Boerne* opinion proves only that Congress was not intended to have authority to pass general legislation determining what the privileges and immunities of citizens should be. It does not support the more extreme claim that Congress lacks independent interpretive authority. The Court based its analysis on a comparison of an early version of the Amendment, drafted by Representative John Bingham and reported by the Joint Committee on Reconstruction in February 1866, with the revised version accepted by the full House of Representatives the following April. The February draft read as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[145]

As the Court explained, this draft "encountered immediate opposition" on the ground that it would "give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design."[146] As a result, Congress postponed further discus-

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[143] *See* CONG. GLOBE, 42d Cong., 1st Sess. 153 (1871).

[144] *See* CONG. GLOBE, 42d Cong., 2d Sess. 3266–67 (1872).

[145] CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866), *quoted in Boerne*, 117 S. Ct. at 2164.

[146] *Boerne*, 117 S. Ct. at 2164.

sion of the proposal until April,[147] when the Joint Committee reported a revised version, also authored by Bingham:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> . . . .
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.[148]

The Court explained that this proposal was approved because "[u]nder the revised Amendment, Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective."[149] The Court offered no explanation, however, regarding *why* the new language assuaged the concerns over the first draft. Relying on comments made by then-Representative James Garfield in 1871 during debates over the Ku Klux Klan Act, the Court concluded that the change removed "the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property."[150] According to the Court, "[s]cholars of successive generations have agreed with this assessment."[151]

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147 The Court inaccurately stated that "the House voted to table the proposal until April." *Id.* at 2165. Actually, the House voted down a motion to table (by a vote of 41-110), but then postponed further consideration of the proposal until April, with Bingham's consent. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

148 CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

149 *Boerne*, 117 S. Ct. at 2165.

150 *Id.*

151 *Id.* at 2166. This sentence must have slipped past the cite checkers. Even aside from the incongruity of making a claim about "scholars of successive generations" when citing only two examples (Horace Flack in 1908 and Alexander Bickel in 1966), neither of the examples given supports the Court's reading. In his influential work *The Adoption of the Fourteenth Amendment*, Flack argued that the change from the Bingham draft to the final version was "a mere change in dress, but not in meaning." HORACE FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 65 (1908). He stated that Bingham, the author of both versions, "kept the same object in view, and thought that the section, as finally reported and adopted, was as strong as the first one, and intended it to . . . confer the same powers upon Congress." *Id.* at 68. He denied that Congress was limited to "corrective" legislation and maintained that "Congress was unquestionably empowered to define or declare, by law, what rights and privileges should be secured to all citizens." *Id.* at 81; *see also id.* at 82 (noting that the House version of the Fourteenth Amendment "authorized [Congress] to pass any law which it might declare 'appropriate and necessary' to secure to citizens their privileges and immunities"). Bickel, by contrast, espoused a narrow "remedial" interpretation of Section Five in the article cited by the Court. *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 96–98. But it is hard to see how the Court gleans much comfort from that position, since Bickel was arguing that *Katzenbach v. Morgan*, 384 U.S. 641 (1966), was wrongly decided. *See* Bickel, *supra*, at 95–101. The Court's position — that Congress lacks "substantive" power but that it could go beyond judicially defined rights under its "remedial" power — is contradicted by both Flack and Bickel, the only historians whom the Court cited on this point.

This is not quite right. It is far from clear that Congress would have had "plenary" power to promulgate rights under the February draft, and it is unlikely that the change to which the Court referred carried the meaning the Court ascribed to it. Moreover, the Court failed to note that the political climate — and not just the language of the proposed amendment — had changed between February and April: President Andrew Johnson had vetoed the Civil Rights bill,[152] thereby radicalizing the moderates and increasing the urgency of action on an amendment. A closer examination of the differences in wording and the nature of the complaints about the initial text reveals that the change was irrelevant to any issue at stake in *Boerne*.

There are six differences between the two drafts. The pertinent question, which the *Boerne* Court failed to address, is how any of these changes diminished the power of Congress. Two of the changes (switching the verb in Section Five from "secure" to "enforce" and changing the standard of review from "necessary and proper" to "appropriate") were mere changes in nomenclature, with no substantive significance.[153] The change from "privileges and immunities of citizens in the several States," which was lifted from the Comity Clause of Article IV, Section 2, to "privileges or immunities of the citizens of the United States," was later to provide the basis for emasculating the Amendment in the *Slaughter-House Cases*.[154] Although no public explanation was given at the time, this modification probably was inspired by Bingham's theory that the rights subsumed by the language "privileges and immunities" ceased to be subject to the vicissitudes of state law and could now be enforced by the federal government on behalf of all citizens.[155]

Three changes warrant more extended discussion. First, the April draft made the substantive provisions of the Amendment self-executing, and thus ensured that the Privileges or Immunities Clause,

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[152] *See* CURTIS, *supra* note 79, at 58.

[153] I have never seen a suggestion, either in congressional debates or in academic literature, that the first of these changes was of any substantive significance. The replacement of the "necessary and proper" language is likewise insignificant. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the terms "appropriate" and "necessary and proper" were used interchangeably. *See id.* at 421–22. After the change, supporters of the Amendment continued to invoke *McCulloch* in interpreting the reach of Section Five, without any protest from opponents. *See, e.g.*, 2 CONG. REC. 414 (1874) (statement of Rep. Lawrence). Even opponents of civil rights legislation conceded that the enforcement power under Section Five was equivalent to congressional power under the Necessary and Proper Clause. *See, e.g., id.* at 4085–86 (statement of Sen. Thurman). Presumably, the change was made for purposes of achieving parallelism with Section Two of the Thirteenth Amendment.

[154] 83 U.S. (16 Wall.) 36 (1872). *Slaughter-House* held, in effect, that the Privileges or Immunities Clause protected only rights derived from federal citizenship and hence already protected. This is a highly implausible interpretation, for reasons set forth in McConnell, *supra* note 138, at 998–1000.

[155] *See* CURTIS, *supra* note 79, at 114–16; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 94–95 (1993).

the Equal Protection Clause, and the Due Process Clause (as well as the provisions of Sections Two, Three, and Four) would continue to apply to the states even if Congress ceased to support them. Representative Giles Hotchkiss of New York, who proposed this change, stated that civil rights should be "secured by a constitutional amendment that legislation cannot override."[156] Although this change enhanced judicial power, it left congressional power as it was under the February draft. Hotchkiss stated that the "laws of Congress" would continue to be the primary instrument "for the enforcement of these rights"[157] — a sentiment shared by nearly all the participants in this decision.[158]

Another potentially important change was to cast the substantive protections of Section One in terms of prohibitions on the states ("No state shall . . . .") rather than as rights inhering in individuals. Although this change is significant for the question of "state action," it has no bearing on interpretation of the provisions of the Bill of Rights, including the Free Exercise Clause, which by their nature apply only to state action.

The final change was to break the concept of "equal protection in the rights of life, liberty, and property" into two clauses, one forbidding denial of "equal protection of the laws" and the other forbidding deprivation of "life, liberty, or property without due process of law." As legal historian Earl Maltz has shown, this change was the key to relieving the concerns expressed by moderate Republicans about the February proposal.[159] Under the February proposal, Congress was authorized to make laws to secure to all persons in the several states "equal protection in the rights of life, liberty, and property." To be sure, the author of this language (Bingham) insisted that it meant only that Congress could protect preexisting rights.[160] But many members of Congress, including Republicans, feared that it would invest Congress with the power to pass legislation directly regarding life, liberty, and property. Robert Hale, a conservative Republican from New York, explained:

> [T]he language in its grammatical and legal construction . . . is a grant of the fullest and most ample power to Congress to make all laws "necessary and proper to secure to all persons in the several States protection in the rights of life, liberty, and property," with the simple proviso that such pro-

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156 CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866). Hotchkiss further explained:

> Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?

Id.

157 *Id.*

158 *See* NELSON, *supra* note 79, at 55.

159 *See* MALTZ, *supra* note 79, at 56–60, 100–01.

160 *See* CONG. GLOBE, 39th Cong., 1st Sess. 157–58, 1089–90.

> tection shall be equal. It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms — a grant of the right to legislate for the protection of life, liberty, and property.[161]

Hotchkiss, a consistent supporter of Reconstruction measures, urged revision of the Amendment for similar reasons. He stated that the Amendment, as framed, would "authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property."[162] Hale and Hotchkiss were joined in their opposition to the February proposal by moderate Republicans Thomas T. Davis,[163] Roscoe Conkling,[164] and Senator William M. Stewart,[165] as well as by Democrats, like Andrew Rogers of New Jersey, who opposed any expansion of federal power.[166]

The *Boerne* Court quoted some of these statements.[167] The Court failed to note, however, that this criticism was "directed exclusively" to the equal protection provision of the February proposal.[168] Hale and Hotchkiss expressly stated that their criticism did not apply to the Privileges or Immunities Clause, which was the expected vehicle for incorporation of the Bill of Rights.[169] The target of the revised Amendment was the problem of an open-ended equal protection provision. Under the new formulation, Congress was stripped of any power it might have had under the February draft to provide direct protection for life, liberty, and property; Congress could only remedy or prevent state violations of equal protection or due process.[170] Congress's power to enforce preexisting constitutional rights, such as the freedom of religion, was not affected by the change.

It is not clear whether this modification represented a real change or a mere clarification. Bingham's conception of the Amendment — both before and after its revision — was that it would provide federal protection for preexisting constitutional rights.[171] The Privileges or Immunities clause was unobjectionable because it referred to a fixed set of civil rights defined by some combination of the Bill of Rights and longstanding practice (usually common law). The change in drafting made it clear that the Equal Protection and Due Process

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161 *Id.* at 1063–64.

162 *Id.* at 1095.

163 *See id.* at 1083, 1087.

164 *See id.* at 1095.

165 *See id.* at 1082.

166 *See id.* at app. 133–35.

167 *See Boerne*, 117 S. Ct. at 2164–65.

168 CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale).

169 *See id.* (statement of Rep. Hale); *id.* at 1095 (statement of Rep. Hotchkiss).

170 As a practical matter, the main significance of the change was to reinforce the Amendment's state action requirement. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 151 (1871) (statement of Rep. Garfield).

171 *See* CONG. GLOBE, 39th Cong., 1st Sess. 157–58 (1866); MALTZ, *supra* note 79, at 55.

Clauses, like the Privileges or Immunities Clause, referred to preexisting sets of rights and did not give Congress plenary power to legislate what those rights should be. Contrary to the *Boerne* Court, none of this has any bearing on whether Congress has independent interpretive authority. The debate was not about that issue, and the change from the February draft to the final Amendment is essentially irrelevant to the question in *Boerne*.

The Court's reading of this history is distorted by its unsupported (and in my opinion unsupportable) assumption that any statement that rejects the pure substantive interpretation, or that uses remedial language, must be read as rejecting an independent interpretive role for Congress. For example, the Court quotes Thaddeus Stevens as saying that the Amendment would allow "Congress to correct the unjust legislation of the States,"[172] and Bingham as explaining that it would empower Congress to "protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State."[173] From these and similar statements, the Court concluded that "Congress' power was no longer plenary but remedial."[174] That is true, if by "remedial" one means that the authority of Congress must be triggered by a wrongful act of the state (under which definition, RFRA is "remedial"). But such statements provide no support for the claim that Congress's power is "remedial" in the sense that the definition of "unjust" or "unconstitutional" state acts must be *judicial*.

Thus, the history of the Fourteenth Amendment supports the Court's conclusion that Congress was not vested with plenary "substantive" authority to determine the content of protected rights under Section Five. Rather, Congress was limited to enforcing rights established by the Fourteenth Amendment itself. This limitation was an important protection for the states, because it ensured that neither Congress nor the courts could go beyond the rights enshrined in the Constitution itself. Congress could not supersede ordinary state tort, contract, property, or criminal laws under the guise of providing (equal) "protection." But nothing in that history suggests that Congress was expected to be limited to enforcing judicially decreed conceptions of those rights.

C. Judicial Exclusivity and the Fourteenth Amendment

Even more questionable was the Court's claim that the framers of the Fourteenth Amendment intended to preserve what it called the

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172 *Boerne*, 117 S. Ct. at 2165 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)) (internal quotation marks omitted).

173 *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)) (internal quotation marks omitted).

174 *Id.*

Court's "primary authority" to interpret the Constitution.[175] That is a dubious reading of the historical record. The opinion quotes only two members of the Thirty-ninth Congress in support of this view, and fails to note that both were *opponents* of the Amendment.[176] In the political context of the day, Democratic opponents of the expansion of civil rights were the champions of the judiciary.[177] It is doubtful that the Republicans who drafted and adopted the Amendment would be greatly impressed with the "primary authority" of the institution that had so recently produced *Dred Scott v. Sandford*[178] and *Ex parte Milligan*.[179] Indeed, John Bingham, principal author of the Fourteenth Amendment, advocated taming the Court's power of judicial review by requiring a two-thirds majority of the Court to strike down congressional legislation, and goaded his fellow members of Congress to vote for the proposal by reminding them of the "horrid blasphemy" of *Dred Scott*.[180] The Republican Chairman of the House Judiciary Committee denounced *Ex parte Milligan* as "a piece of judicial impertinence."[181] Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power. Indeed, the initial draft of the Amendment relied exclusively on *congressional* enforcement, and the decision to make Section One self-executing, and thus enforceable through judicial review, was an afterthought. As Republican Senator Oliver Morton explained: "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[182]

The historical record does not support Justice Kennedy's notion that the Fourteenth Amendment was designed to affirm that "this

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[175] *Id.* at 2166.

[176] *See id.* (quoting conservative Republican Hale of New York and Democrat Rogers of New Jersey). Bickel described Rogers as "a partisan given to extreme accusations," whose "remarks are always subject to heavy discount." Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 57–58 (1955). Hale was inconsistent in his opposition to the Amendment. During the debates he spoke against the Amendment; on the initial vote before the House he did not vote; after the proposal came back from the Senate he voted in favor of it. I consider Hale principally an opponent because that was his own self-description. *See* 3 CONG. REC. 979 (1875) (statement of Rep. Hale) (claiming that he "oppose[d] the fourteenth amendment by my vote and by my voice"). Hale's objections centered on the expansive power he thought the Amendment would give to Congress to pass laws directly pertaining to liberty and property, which he did *not* believe was eliminated by the April revision. *See id.*

[177] *See* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 30–41, 67 (1968).

[178] 60 U.S. (19 How.) 393 (1856).

[179] 71 U.S. (4 Wall.) 2 (1866).

[180] CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868).

[181] CONG. GLOBE, 39th Cong., 2d Sess. 1484 (1867) (statement of Rep. Wilson).

[182] CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872).

Court has had primary authority to interpret [the Constitution]."[183] Standard Republican doctrine affirmed, following Lincoln,[184] that outside the confines of a specific case or controversy, judicial constructions of the Constitution do not bind the legislative branch. Republican Senator Alcorn of Mississippi gave voice to this orthodoxy when he commented that:

> This is one branch of this Government, the legislative department; the judiciary is another branch; and we go forward without regard to the opinions of each other unless those opinions have taken the form of judicial decision rendered in answer to the demands of a case properly brought before the court.[185]

George Boutwell of Massachusetts — admittedly one of the most radical of Republicans — stated, in reference to the *Slaughter-House* decision: "It . . . is the law of the case, but it is not law beyond the case; it . . . certainly is not law for the Senate."[186]

Thus, although the *Boerne* Court properly rejected the plenary "substantive" interpretation of Section Five, the Court's conclusion that judicial interpretations of the provisions of the Amendment are the exclusive touchstone for congressional enforcement power finds no support in the history of the Fourteenth Amendment. Members of Congress felt they had a responsibility to read and to interpret the Constitution for themselves, and they expected that their judgments regarding the reach of the Constitution would be given the same presumption of correctness that any other legislative determinations were given in the ordinary course of judicial review. This did not mean that Congress had plenary power to decide what rights should be given federal protection; Congress was limited to enforcing preexisting constitutional rights. But in determining what those preexisting constitutional rights are, Congress would engage in independent interpretation.

Section Five was born of the conviction that Congress — no less than the courts — has the duty and the authority to interpret the Constitution.

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183 *Boerne*, 117 S. Ct. at 2166.

184 On Lincoln's position that the authority of the courts is confined to the particular case and that judicial decisions do not bind the legislature, see JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 86–95 (1984); SANFORD LEVINSON, CONSTITUTIONAL FAITH 39 (1988); and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 272–84 (1994).

185 2 CONG. REC. app. 304 (1874). John Bingham made an earlier speech in response to *Dred Scott*:

> The judiciary are entitled to respect; but if they arrogate powers not conferred upon them, and attempt by such arrogation of power to take away the legislative power of the whole people, and to deprive large numbers of them of their natural rights, I claim, as a Representative, the right to disregard such assumed authority . . . .

CONG. GLOBE, 36th Cong., 1st Sess. 1839 (1860).

186 3 CONG. REC. 1792 (1875).

IV. THE INSTITUTIONAL DIMENSION OF SECTION FIVE

Acceptance of the "interpretive" reading of Congress's Section Five authority does not imply that Congress has the final word on the Amendment's meaning. Even under the Republican doctrine that each branch of the government must interpret the Constitution for itself, within the scope of its own powers, the courts retain final interpretive authority within the context of a proper case or controversy. When RFRA is enforced in the courts — as when Archbishop Flores invoked RFRA as a shield against enforcement of the city's historic preservation ordinance — there is a case or controversy, and the courts must decide whether it would be constitutional for them to enforce RFRA against state or local governmental action. As in any case in which the power of Congress to enact legislation is questioned, the courts must decide whether Congress has acted within the range of its delegated authority:

> Should Congress, . . . under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of [the courts], should a case requiring such a decision come before [them], to say that such an act was not the law of the land.[187]

But if the "interpretive" reading is correct, the courts have no right to insist that congressional interpretation of the substantive provisions of the Fourteenth Amendment be precisely congruent with the judicial interpretation. Legitimate differences of opinion are not pretexts. As Richard Posner has pointed out: "In many cases the conventional materials will lean so strongly in one direction that it would be unreasonable for the [interpreter] to go in any other. But in some they will merely narrow the range of permissible decision, leaving an open area."[188] The question in a Section Five case should be whether the congressional interpretation is within a reasonable range of plausible interpretations — not whether it is the same as the Supreme Court's. An analogy might be drawn to the *Chevron*[189] doctrine, which holds that courts should not overturn agency interpretations of their governing statutes as long as they are within a reasonable range of interpretations of the statutory language.[190] The underlying assumption is that the Constitution is designed to place outer bounds on government activity — not to impose a single "right answer" — and that ambiguities of language are a form of delegation to the body entrusted with the power to effectuate the law.

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187 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

188 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 131 (1990).

189 Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

190 *See id.* at 842–43; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511–12.

Moreover, it must be understood that differences in interpretation between judicial and legislative bodies are not solely a product of intellectual disagreement (let alone pretext), but are a natural and predictable result of institutional differences. Principal among these, as I discuss below,[191] is the policy of restraint and deference with which unelected courts approach the task of reviewing the constitutionality of democratically authorized governmental action. Since the framers of the Fourteenth Amendment vested Congress with the enforcement power, it must be assumed that they expected the Amendment to be enforced through the institutional perspectives of the legislative rather than the judicial branch.

These institutional differences have two important consequences for understanding the scope of the Section Five power. First, legislation under Section Five is entitled to a presumption of constitutionality. This means, in effect, that the Court should not overturn congressional enforcement acts in a close case. Second, where the courts have adopted narrow interpretations of constitutional rights for institutional reasons — meaning reasons arising from the special character of the courts in our democratic system — then Congress is entitled, under Section Five, to adopt an interpretation that is independent of those institutional constraints.

A. Section Five and the Presumption of Constitutionality

It is often said that within a certain range of legitimate interpretations of the Constitution courts must defer to the decisions of the elected branches. This approach has deep roots in our constitutional tradition, and goes by different names: the presumption of constitutionality, deference to political branches, judicial minimalism, and — most commonly — judicial restraint.[192] In 1810, Chief Justice John Marshall stated that, in order for the Court to declare an act of the legislature unconstitutional, "[t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."[193] Later, he stated — even more strongly — that "in no doubtful case, would [the Court] pronounce a legislative act to be contrary to the constitution."[194] This principle has no less vitality today.[195] Justice Souter, for example,

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[191] *See infra* pp. 185–87.

[192] The classic statement of this position is contained in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143–52 (1893).

[193] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810).

[194] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819).

[195] Examples of the applications of this principle abound. *See* Leathers v. Medlock, 499 U.S. 439, 451–52 (1991); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985); Regan v. Taxation with Representation, 461 U.S. 540, 547–48 (1983); Rostker v. Goldberg, 453 U.S. 57, 64, 83 (1981); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973); Madden v. Kentucky, 309 U.S. 83, 87–88 (1940).. For a critical view, see David M. Burke,

stated in a recent opinion: "judicial review . . . has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable."[196]

Judicial restraint, in its various forms, is an internal "check and balance" that mitigates the risks of erroneous decisions by an institution, like the Supreme Court, that lacks democratic accountability and whose decisions are difficult to change, even when mistaken. Judicial restraint has its supporters and detractors, but almost everyone would agree that at least within some domain of cases it does, *in fact*, influence the outcome of constitutional judicial review, and most would agree that it *should* do so, again within some domain of cases (not necessarily the same as the first).

My purpose here is neither to defend nor to criticize the presumption of constitutionality or the idea of judicial restraint, but only to show how it is relevant to the scope of authority of Congress to pass laws enforcing the Fourteenth Amendment. Courts are particularly likely to defer to the judgments of representative bodies when there are no judicially manageable standards for decisionmaking, when more vigorous judicial review would trench on the policymaking prerogatives of democratic bodies, when constitutional questions turn on empirical or predictive judgments, when the motives of legislators are in question, and when the constitutional text provides little guidance. Courts are less likely to defer to legislative judgments when the question presented involves a clash of democratic authorities (such as a conflict between Congress and the President)[197] or when governmental action may infringe upon individual rights or burden the interests of unrepresented minorities.[198]

Boerne was a case about the scope of enumerated powers, and thus — under the tradition of *McCulloch* and *Carolene Products* — should have been treated as an appropriate occasion for the presumption. Indeed, for several reasons, *Boerne* was an especially appropriate case for application of the presumption.

First, it is significant that in enacting RFRA, Congress took seriously its responsibility to engage in constitutional reflection. Both in hearings and in floor debate, members of Congress deliberated about the proper interpretation of the Free Exercise Clause and the proper reach of the Section Five power. Congress's disagreement with the *Smith* decision was neither casual nor thoughtless. It may be true that

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The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty, 18 HARV. J.L. & PUB. POL'Y 73, 76 (1994).

196 Washington v. Glucksberg, 117 S. Ct. 2258, 2281 (1997) (Souter, J., concurring in the judgment).

197 *See* Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting).

198 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

the presumption of constitutionality should not attach when Congress has given no attention to the constitutional question — as in *United States v. Lopez*, where there was no evidence that Congress even considered whether the possession of a firearm near a school has a significant impact on interstate commerce.[199] But the Court has regularly recognized that it owes special deference to Congress when Congress has specifically considered and decided a constitutional question.[200]

Part of the justification for the presumption of constitutionality is that the courts should, as a matter of comity, give a certain degree of deference to a coordinate branch that has addressed the constitutional issue. Legislatures — both state and federal — are sworn to uphold the Constitution no less faithfully than judges. As Justice Frankfurter pointed out, the Supreme Court "is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."[201] Especially when legislators have made a serious and conscientious inquiry into the constitutional dimensions of their actions (as with RFRA), their judgment is entitled to respect.[202] When a unanimous House of Representatives and a nearly unanimous Senate have come to the solemn conclusion that a 5–4 decision of the Supreme Court was incorrect, it is hubristic for the Court to assume that it must be in the right. To be sure, comity goes both ways. Before contradicting the Court's conclusions, the Congress should — and does — give great deference to the judiciary. But by the same token, when Congress has addressed and resolved a constitutional question, the Court should not overturn that interpretation without a powerful justification.

The second point in favor of applying the presumption of constitutionality in *Boerne* is that the Fourteenth Amendment explicitly designates Congress as the body responsible for its enforcement. It would seem to follow that congressional interpretation is entitled to deference.

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199 *See* United States v. Lopez, 514 U.S. 549, 562–64 (1995).

200 *See* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990); *Rostker*, 453 U.S. at 64.

201 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). In *Boerne*, the Court acknowledged that the courts give congressional enactments "the presumption of validity" because "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." *Boerne*, 117 S. Ct. at 2171–72. But the Court went on to hold that "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued," stare decisis must be observed. *Id.* at 2172. But why should the order in which the two branches act determine the proper outcome? Under that theory, RFRA would have been constitutional if it had been passed in 1989, before *Smith*. That result does not make much sense. Indeed, Congress is most likely to make a serious contribution to constitutional thinking when it acts in response to court decisions that it considers inadequately protect constitutional rights.

202 *See* cases cited *supra* note 200.

As the Supreme Court said in *Ex parte Virginia*, the Fourteenth Amendment does not say that "the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged."[203] In the face of this "textually demonstrable constitutional commitment . . . to a coordinate . . . branch of government,"[204] the courts should be hesitant to second-guess congressional determinations about the scope of enumerated rights.

Moreover, by its terms Section Five specifies the standard of review for congressional enforcement legislation: it must be "appropriate."[205] This term has its origins in the latitudinarian construction of congressional power in *McCulloch*.[206] The framers' use of this term suggests an awareness that the question whether legislation serves to "enforce" the Amendment is not clear-cut, and an intention on their part to allow Congress considerable discretion.

Finally, a congressional decision to interpret a provision of the Bill of Rights more rigorously than the courts demand is entitled to particular deference because of an inherent structural safeguard against congressional overreaching. Unlike enactments under the Commerce Clause or most other sources of congressional power, interpretations of the Bill of Rights under Section Five limit the powers of Congress and the federal government to precisely the same extent that they limit the powers of the states. When Congress decides that the freedom of religion warrants greater protection than has been provided by the courts, the federal government will bear no less cost and inconvenience than the states. If administration of state prisons is affected, so is administration of federal prisons; if states are forced to accommodate the religious exercise of their employees, so are federal agencies. Rather than aggrandizing federal power at the expense of the states, legislation like RFRA constrains the power and discretion of federal and state governments alike. This makes it exceedingly unlikely that Congress will act from anything other than a genuine interest in enforcement of constitutional freedoms.

These considerations suggest that the Court should have given greater deference to the congressional judgment in favor of a freedom-protective interpretation of free exercise. If that interpretation is within the range of plausible interpretations of the Free Exercise Clause — as it surely is — the Court should have upheld RFRA even if the Court continues to think that the nondiscrimination interpretation, on balance, is superior.

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[203] *Ex parte* Virginia, 100 U.S. 339, 345 (1879).
[204] Baker v. Carr, 369 U.S. 186, 217 (1962).
[205] *See* U.S. CONST. amend. XIV, § 5.
[206] *See supra* note 153.

B. The Institutional Logic of Smith *and Its Implications for* Boerne

The practice of judicial restraint has further significance for the scope of Section Five of the Fourteenth Amendment, even aside from the argument that the Court should have accorded RFRA a presumption of constitutionality. As already noted, in exercising their power of judicial review, courts defer to many aspects of legislative judgment out of recognition that legislative decisions have presumptive democratic legitimacy. This judicial deference creates a "gap" between the Constitution-as-applied-by-courts and the Constitution-in-the-abstract, which I contend Congress may legitimately fill by passing enforcement legislation extending protection to the full extent of the Constitution.

If judges give serious weight to the presumption of constitutionality, it follows that there will be cases in which judicial interpretations of the Constitution will differ from the way those judges would interpret the Constitution independently of institutional restraints. The restrained judge will give elected officials the benefit of the doubt with respect to governmental purpose, will assume facts favorable to the government in assessing effect, will seek to avoid gratuitous conflict with legislative authority, and will accept reasonable interpretations of the Constitution that support legislative action. If the Court thus errs on the side of caution in constitutional adjudication, there will be systematic underenforcement of the Constitution as viewed from a hypothetical perspective of decontextualized judgment.[207] This difference between the Constitution-in-the-abstract and the Constitution-as-applied-to-a-case has been called "slippage."[208]

The difference between congressional and judicial enforcement of the Fourteenth Amendment is that Congress is not limited by the institutional concerns associated with judicial restraint. Congress is not plagued by the "countermajoritarian" difficulty and it can change its course in response to criticism and experience. When Congress passes legislation to enforce the Fourteenth Amendment, there need be no "slippage." The values underlying the presumption of constitutionality are democratic, and are therefore subject to democratic override. Thus, although it cannot create new rights under the Fourteenth Amendment or disregard the core meaning of the Amendment, Congress is not required to defer to state legislative judgments when it exercises its enforcement power.

This analysis is directly pertinent to the *Smith* decision. The *Smith* Court did not base its interpretation on constitutional text, history, or normative argument about the nature of free exercise of religion. As to text, the Court said only that its nondiscrimination interpretation is

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[207] *See* Sager, *supra* note 77, at 1221.

[208] *See id.* at 1213.

one "permissible reading."[209] The Court was silent regarding original meaning. As to normative issues, the Court conceded that exceptions from generally applicable laws serve the purpose of "protection" of "religious belief."[210] (In *Boerne*, Justice Scalia affirmed "the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice.")[211] Indeed, the *Smith* Court virtually conceded that, under its interpretation, the constitutional principle of free exercise would be underenforced: "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[212]

The real logic of the *Smith* decision has to do with institutional roles. As the *Smith* Court indicated, "to say that a . . . religious-practice exemption is permitted . . . is not to say that . . . the appropriate occasions for its creation can be discerned by the courts."[213] As Professor Ira Lupu has pointed out:

> *Smith* indicates that it is a decision about institutional arrangements more than about substantive merits. A significant portion of the Court's justification focuses on the difficulties that courts encounter in balancing interests in the fashion required by the pre-*Smith* law. The opinion suggests that only the political branches possess the requisite competence and authority to make these judgments. . . . Under this view, *Smith* is a political question case, holding that judicially manageable standards for the resolution of Free Exercise exemption claims are lacking.[214]

The danger, according to the *Smith* opinion, is not "that courts would necessarily permit harmful exemptions from these laws," but rather that courts would "constantly be in the business of determining whether the 'severe impact' of various laws on religious practice . . . suffices to permit us to confer an exemption."[215] It is better, the Court said, to leave "relatively unprotected" those "religious practices that are not widely engaged in" than for judges to "weigh the social importance of all laws against the centrality of all religious beliefs."[216]

What is it that makes this type of decision inappropriate for courts, but appropriate for legislatures? It cannot be the difficulty in evaluating the "centrality" of religious beliefs, even assuming that a "centrality" inquiry was necessary under pre-*Smith* doctrine, because there is no reason to think legislatures are any better at such an inquiry than

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209 Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

210 *Id.* at 890.

211 *Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).

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

213 *Id.*

214 Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993) (footnotes omitted).

215 *Smith*, 494 U.S. at 889 n.5.

216 *Id.* at 890.

judges. The underlying point must be that legislatures are better able to evaluate the "social importance" of the laws, which is a quintessentially legislative determination, and decide when those laws should properly give way to the countervailing demands of conscience. In other words, the *Smith* Court consciously decided to give less than full protection to free exercise in order to protect legislative prerogative.

In light of this analysis of *Smith*, what was the theory behind RFRA? Congress decided that the benefits of achievement of full protection for religious exercise (even for those practices less frequently engaged in) outweigh the costs, whether to specific social policies or to the legislative-judicial balance. That is a legitimate exercise of the legislative function: the legislature is always entitled (absent special constitutional concerns) to opt for less than full enforcement of social policies in the interest of protecting countervailing interests, such as freedom of religion. Congress also concluded that it serves the First Amendment values of equal treatment to impose a uniform standard (the compelling interest test) on all questions of accommodation rather than to rely on piecemeal judgments, in which the public esteem of the particular religion in comparison with the public assessment of the importance of the particular government policy would likely produce arbitrary decisions. Congress was willing to tolerate the judicial intrusion into political discretion that achievement of this policy of religious freedom restoration would entail.

Seen in this light, the congressional judgments embodied in RFRA are fully consistent with the enforcement mandate of Section Five. Congress has not attempted to "alter" the meaning of the Free Exercise Clause, or to create "new rights,"[217] despite Justice Kennedy's opinion. It has simply decided to enforce the Free Exercise Clause fully, even though doing so involves a greater risk to social policies and a greater likelihood of judicial overreaching than the *Smith* Court was willing to demand. To insist that even the smallest and least powerful of religious groups be accorded the same rights as the most powerful (not placed at a "disadvantage" relative to those able to win accommodations in the political process), and to enable all religious adherents to practice their faith without unnecessary interference, is surely an "appropriate" means of "enforcing" the Free Exercise Clause. If *Smith* had been decided on some other rationale, the constitutional basis for RFRA might be weaker; in light of the *actual* reasoning of *Smith*, however, RFRA would appear to be within Congress's powers under Section Five.

It has been argued that RFRA is unconstitutional because it purports to require courts to engage in a form of review that the *Smith*

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[217] *Boerne*, 117 S. Ct. at 2164.

Court held to be inappropriate for the judiciary.[218] That argument, however, is unconvincing. The type of judgment required under RFRA is not unfamiliar to the courts; it is the everyday task of applying heightened scrutiny. Although concern about the lack of judicially manageable standards is reason for courts to avoid taking upon themselves an inappropriately intrusive role, it is not a sufficient reason for refusing a responsibility vested in them by Congress. Rather, it is the *Boerne* decision that invites the performance of unorthodox roles through Justice Scalia's suggestion that "the people, through their elected representatives" should "control the outcome of . . . concrete cases."[219] Ordinarily, legislatures enact general principles and leave application of those principles in "concrete cases" to the courts. Congress did just that in enacting RFRA. To insist that legislatures deal with "concrete cases" on an individual basis is an invitation to arbitrariness and favoritism.[220]

V. THE FEDERALISM DIMENSION

Justice Scalia's error (which he shared with the majority) was that he failed to distinguish between the free exercise issue presented in *Smith* and the free exercise issue presented in *Boerne*. Justice Scalia's paean to "the people" made sense in the context of *Smith*, where the Court was asked to second-guess the importance of state legislation in the name of a controversial reading of the Free Exercise Clause. However, the argument from democracy cut the other way in *Boerne*, where the Court was asked to overturn a democratic judgment of Congress. Rather than an argument from democracy, Justice Scalia needed an argument from federalism. His point should have been that the power to balance religious freedom against various governmental interests is best left to the states. He did not make that argument, and nothing in the historical materials canvassed in his *Boerne* concurrence was relevant to that issue.

If Justice Scalia had attempted to make a federalism argument, he would have had difficulty finding persuasive support, in light of the Fourteenth Amendment's nationalization of constitutional rights. Under Justice Scalia's vision, the people of each individual state — even

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[218] *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 15 (1995).

[219] *Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).

[220] Indeed, in *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994), the Court suggested (erroneously, in my opinion) that the Establishment Clause disfavors "case-specific" accommodations by a legislature, and that accommodation should be accomplished by means of "a general law." *Id.* at 703. There is some danger that accommodations are caught in a Catch-22: general laws, like RFRA, are rejected on the ground that decisions about accommodation should be made by legislative bodies "in concrete cases," *Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring), and case-specific accommodations, like that in *Kiryas Joel*, are struck down on the ground that they are not general enough.

of each individual locality — should decide "the outcome of . . . concrete cases" involving the clash between religious freedom and generally applicable laws.[221] Accordingly, free exercise rights would be different in every jurisdiction in America. Indeed, even within a single jurisdiction, free exercise rights would vary from case to case because, as Justice Scalia indicates in his concurrence, "the people" will determine the proper application of "the abstract proposition" that government should respect religious freedom in each "concrete case[]."[222] That suggests the possibility, as candidly acknowledged in *Smith*, that smaller and weaker religions will be put at a "relative disadvantage."[223]

By its very text, however, the Fourteenth Amendment rejects the idea that the rights of citizens should vary from state to state and group to group. Prior to the adoption of the Fourteenth Amendment, the source and protection of the basic rights of citizens was grounded in state law. Although Madison proposed that the Bill of Rights include protection for the "rights of conscience" against state interference, his proposal was not adopted.[224] Indeed, Bingham was convinced that the great defect of the original Constitution — a defect that led to the Civil War and to the need for the Fourteenth Amendment — was that Congress had not been granted the authority to enforce the privileges and immunities of citizens against the states.[225] As antebellum history had shown, the states were unreliable guardians of the rights of the people; the states granted rights to some members of the population and denied them to others. After this experience, the framers of the Fourteenth Amendment were prepared to return to the original Madisonian vision. The Fourteenth Amendment enshrined fundamental rights (including those listed in the Bill of Rights) in the federal Constitution as "privileges or immunities of citizens *of the United States*,"[226] and empowered Congress to enforce those rights against recalcitrant states.[227] The framers of the Fourteenth Amendment thus rejected the idea that rights such as the free exercise of religion should vary from state to state.[228] In the words of one promi-

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221 *Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).

222 *Id.*

223 Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

224 McConnell, *supra* note 112, at 1484–85 (quoting Madison's proposed amendment) (internal quotation marks omitted).

225 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866); *id.* at 432; *id.* at 157–58. Bingham's understanding was that the Bill of Rights, as a declaration of the fundamental rights of citizens, was morally binding on the states, but that prior to the Fourteenth Amendment, the federal government had no legal authority to enforce these rights. *See id.* at 2542.

226 U.S. CONST. amend. XIV, § 1 (emphasis added).

227 *See id.* § 5.

228 This assumes that the incorporation doctrine is an authentic reading of the purposes of the Fourteenth Amendment, which is disputed by some scholars. *See* Graglia, *supra* note 10, at 4 n.28 (citing sources). Incorporation of the Religion Clauses — and especially the Establishment

nent supporter of Fourteenth Amendment principles: "Now, the fundamental privileges and immunities of citizens of the United States are beyond the caprice of State legislation."[229] And by insisting that basic civil rights be protected equally for all citizens, the framers of the Fourteenth Amendment also rejected the idea that some citizens should be placed at a "relative disadvantage" to others in the exercise of fundamental rights. Nothing was more central to the Fourteenth Amendment than the idea that all citizens should be equal in their enjoyment of civil rights.[230]

In these respects, RFRA is in accord with the fundamental philosophy of the Fourteenth Amendment. Just as the Fourteenth Amendment was intended to make the fundamental rights of citizens both *national* and *equal*, RFRA ensured that the free exercise of religion would be given a uniform national meaning, and would be applied according to an equal standard for religions large and small. Justice Scalia does not offer a constitutional theory that justifies his insistence that the people of each individual state or local jurisdiction must be free to pursue their own vision of religious freedom in each "concrete case." His position cannot be grounded in appeals to "the people," because "the people," through their elected representatives in Congress, have voted the other way. It also cannot be grounded in federalism, because the allocation of power between the states and the federal government is set through the Constitution, and the relevant provision of the Constitution — the Fourteenth Amendment — cuts the other way.

CONCLUSION

In *Boerne*, the Court erred in assuming that congressional interpretation of the Fourteenth Amendment is illegitimate. The historical record shows that the framers of the Amendment expected Congress, not the Court, to be the primary agent of its enforcement, and that Congress would not necessarily consider itself bound by Court precedents in executing that function. That does not mean that the Court is required to follow Congress's interpretation, any more than Congress is required to follow the Court's. But it does mean that the Court should give respectful attention — and probably the presumption of constitu-

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Clause — against the states presents particular difficulties. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–62 (1991); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479–92 (1991). Perhaps, with sufficient development, a theory based on rejection (or partial rejection) of incorporation of the Free Exercise Clause could be the basis for a coherent argument against the constitutionality of RFRA. This would, of course, require reconsideration of a principle — incorporation of the Religion Clauses — that is firmly entrenched in our law.

229 2 CONG. REC. 3454 (1874) (statement of Sen. Frelinghuysen).

230 *See* MALTZ, *supra* note 79, at 96; NELSON, *supra* note 79, at 111–17; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410–13 (1992).

tionality — to the interpretive judgments of Congress. For the Court simply to assume the correctness of its own prior interpretations, and fail to take the contrary opinion of Congress into consideration, was unjustifiable.

Moreover, differences in interpretation can be expected to arise as a result of institutional differences between Congress and the courts. These differences in interpretation should not be treated as illegitimate or dismissed as attempts to evade the amendment process; rather, they should be understood as an integral part of the structure of rights enforcement under the Fourteenth Amendment. Judicial interpretations of the Constitution are often influenced by institutional considerations, such as the principle of judicial restraint, that create "slippage" between the Constitution as enforced and the Constitution itself. The *Smith* decision, which denied protection for the exercise of religion when it is infringed by a neutral law of general applicability, was predicated on just such an institutional concern: the fear that there are no judicially manageable standards for balancing the impact of a law on religious freedom against its importance to the public interest. This judicial restraint serves democratic values. But when Congress engages in constitutional interpretation under the enforcement power, it is not so constrained. The democratic values underlying the doctrine of judicial restraint do not apply to Congress. Congress is free to insist upon full enforcement of free exercise rights. Congress's decision to adopt a more robust, freedom-protective interpretation of the Free Exercise Clause did not "alter" the Constitution or create "new" rights. Rather, RFRA merely liberated the enforcement of free exercise rights from constraints derived from judicial restraint.

In a more fundamental sense, RFRA is precisely the sort of enforcement statute envisioned by the Fourteenth Amendment. Without RFRA, questions of religious freedom will be decided in different ways in different states, and even for different religious groups. As the *Smith* Court conceded, this places smaller religions at a "relative disadvantage" — a situation inconsistent with the governing ideal of the Fourteenth Amendment. The Fourteenth Amendment established the principle that basic civil rights — the privileges or immunities of citizens of the United States — are national in character, and must be protected equally. By providing a national standard that protected the full and equal rights of all citizens to worship in accordance with their own conscience and convictions, RFRA did not exceed, but fulfilled the mandate of the framers of the Fourteenth Amendment.

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