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CITY OF BOERNE V. FLORES WRECKS RFRA: SEARCHING FOR NUGGETS AMONG THE RUBBLE

*John Gatliff**

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.*[1]

On March 9, 1998, Justice Antonin Scalia spoke to a leadership meeting of the American Medical Association, explaining his philosophy of applying the Constitution to controversial social issues.[2] Scalia said, "It is not supposed to be our judgment as to what is the socially desirable answer to all these questions."[3] Scalia went on to explain that the proper way to confront twentieth century issues like abortion, the death penalty, and physician-assisted suicide is through the legislative process, not through judicial revision of the Constitution. "If you want a right . . . create it the way most rights are created in a democracy: pass a law. If you don't want it, pass a law the other way."[4]

Justice Scalia's AMA speech certainly was not his first profession of faith in majoritarian processes. Scalia's AMA comments echoed his position in a 1997 zoning case, *City of Boerne v. Flores*.[5] Scalia's concurrence in *Boerne* defended the highly unpopular and criticized "peyote case" precedent with a similar majoritarian paean: "The issue presented by *[Employment Division, Department of Human Resources v.] Smith*[[6]] is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. [I]t shall be the people."[7] And ultimately in *Boerne*, "the people," acting through a unanimous vote of the Boerne, Texas, City Council, did decide. Five weeks after the city's victory in the Supreme Court, the council agreed to allow St. Peter's Roman Catholic

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1. THE FEDERALIST NO. 51, at 262 (James Madison) (Garry Wills ed., 1982).
2. Glen Johnson, Associated Press, Justice: Let Congress Decide Laws (Mar. 9, 1998), *available in* NEWSDAY.COM (visited Mar. 10, 1998) <http://www.newsday.com/ap/national.htm>.
3. *Id.*
4. *Id.*
5. 117 S. Ct. 2157 (1997).
6. 494 U.S. 872 (1990).
7. *Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).

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Church to demolish twenty percent of a seventy-four-year-old sanctuary, clearing the way for a new church expansion project.[8]

But the irony of *Boerne* according to its critics, including the prolific religious liberty writer Michael McConnell, is that "the people," acting through the U.S. Congress, had already decided.[9] "The people" had decided to reject *Employment Division, Department of Human Resources v. Smith*,[10] which controversially held that the Free Exercise Clause of the First Amendment did not require a government to demonstrate a compelling interest justification for facially neutral laws which incidentally burden religious practices. Congress attempted to restore the compelling state interest test by enacting the Religious Freedom Restoration Act of 1993 (RFRA).[11] The *Boerne* Court held that RFRA exceeded the scope of Congress' Fourteenth Amendment power.[12] This reinvigorated the much-maligned *Smith* precedent, reducing to rubble both the Church's defense against a zoning law and "the peoples'" attempt to "create a right" through the federal legislative process.

Boerne is but the latest skirmish in a battle touched off by the *Smith* decision. The battle involves fundamental questions of constitutional law, such as federalism, separation of powers and the scope of First and Fourteenth Amendments. The battle has raged though hundreds of law review pages, courtrooms across America, statehouses and the halls of Congress. It has involved a plethora of interest groups and unlikely coalitions. It began with an often-ignored, indigenous ethnic subculture's free exercise claim of the right to engage in spiritual enlightenment through a hallucinogenic, vomit-inducing drug. Its latest round involved a virtually unanimous Congress against the Court, the largest religious organization in the world against a small, suburban community, and Justice Scalia's views on constitutional interpretation against a brutal onslaught of academic and political criticism. But at the center of the conflict is a simple question: Who should decide whether, when and how to grant a religious exception to a facially neutral law? Or, paraphrasing James Madison's words, who should decide when the government would control the governed and how would it control itself on questions of religious free exercise?

This comment will review the significant elements of the *Boerne* controversy. First it will summarize how the Court built toward *Smith*, RFRA, and ultimately *Boerne*, including how the Supreme Court eviscerated a promising federal Indian law solution in route to the peyote decision. Second, it will note important participants, events, and cases in the period between

8. *City, Church End Dispute*, DAILY OKLAHOMAN (Okla. City), Aug. 16, 1997, at 16.

9. Michael W. McConnell, *Institutions and Interpretation: a Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 168 (1997) [hereinafter McConnell, *Institutions*].

10. 494 U.S. 872 (1990).

11. 42 U.S.C. §§ 2000bb (1994).

12. *Boerne*, 117 S. Ct. at 2172.

Smith and *Boerne*. Third, it will brief the Supreme Court opinions in *Boerne*. Fourth it will analyze the effects of the *Boerne* decision, its impact on Indian law, and proposed legislative remedies. Finally, it will attempt to predict what, if anything, remains of RFRA after *Boerne*.

I. Introduction: Why a Free Exercise Claim in a Simple Zoning Case?

Justice Kennedy needed only four brief paragraphs to describe the concrete controversy at issue in *Boerne*.[13] The litigants themselves were given to more prolixity on the facts,[14] especially considering that *Boerne* ascended to the highest court only as the technically necessary "actual case" vehicle for the real main event: the RFRA showdown.[15] The only essential fact was that a private party sought an exception from a generally applicable, facially neutral local ordinance under RFRA.[16]

The plaintiff, Archbishop P.F. Flores set the conflict in motion when he consented to a parish plan to expand the buildings of the St. Peter Catholic Church. The church needed to enlarge its facilities to accommodate a growing number of parishioners in Boerne, a commuter community twenty-eight miles northwest of San Antonio.[17] The church sanctuary could reasonably hold

13. *Id.* at 2160.

14. *See* Brief of Petitioner City of Boerne at *2-*9, *Boerne* (No. 95-2074), 1996 WL 689630; Brief of Respondent Flores at *1-*2, *Boerne* (No. 95-2074), 1997 WL 10293; Brief for the United States at *5-*9, *Boerne* (No. 95-2074), 1997 WL 13201.

15. The trial court certified the RFRA claim as an interlocutory appeal to the Fifth Circuit. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1985). The Fifth Circuit reversed the trial court, holding that RFRA was constitutional. Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996). Thus Supreme Court granted certiorari on only the RFRA question. Boerne v. Flores, 117 S. Ct. 293 (1996).

16. RFRA provides that a person whose religious free exercise rights have been infringed may "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-(c) (1994), *quoted in* Brief for the United States at *2, *Boerne* (No. 95-2074), 1997 WL 13201.

17. *Boerne*, 117 S. Ct. at 2160. Generally, the San Antonio area has long been a Roman Catholic stronghold. Franciscan missionary Father Antonio Olivares founded Mission San Antonio de Valero on May 1, 1718. Four days later, the Spanish military established the Presidio San Antonio de Bexar. This alignment of church and state was the basis for a city which became an economic and cultural center in the Lower Rio Grande Valley during Spanish colonial times. *See* Felix D. Almaraz, Jr., *Spain's Cultural Legacy in Texas*, *in* THE TEXAS HERITAGE 8 (Ben Proctor & Archie P. McDonald eds., 2d ed. 1992). Boerne, however, was settled originally by a German group known as the Free Thinkers. The city's name comes from anarchist poet, teacher and Free Thinker Ludwig Boerne. In the mid-nineteenth century, the Free Thinkers marked Boerne's outer border with a cautionary sign: "Ministers and Priests: Don't let sundown catch you in this town." John W. Alexander, *The Battle of Boerne*, WORLD ON THE WEB, Jan. 11, 1997 (visited Mar. 6, 1998) <http://www.worldmag.com/world/issue/01-11-97/national_3.asp>. Father Emil Fleury founded the mission which became St. Peter's across a creek from the Free Thinkers settlement. The original Fleury-built mission was not involved in the zoning case and is adjacent to the 1923 sanctuary. *Id.*

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about 230 worshipers, resulting in overflow crowds of forty to sixty at some masses.[18] The lack of space forced the church to begin celebrating mass in an "ill-suited secular auditorium."[19] Archbishop Flores authorized the expansion to serve both these ever-growing crowds and the current liturgical standards of the Catholic Church.[20]

While the Church's officials worked through the architectural planning process, the Boerne City Council passed an ordinance granting the local Historic Landmark Commission authority to prepare a historic preservation plan, including both historic landmarks and historic districts.[21] The Church agreed to the inclusion of the sanctuary's front facade in the new historic district, but the remainder of the building and the site was outside the district boundaries.[22]

The architect's plan, submitted to the city in order to obtain the necessary demolition and construction permits, preserved only the facade of the original sanctuary.[23] The Landmark Commission denied the Church's request, reasoning that the substantial destruction of the original building would adversely affect the new historic district.[24] The city council denied the Church's appeal.[25] The parties attempted to negotiate a settlement, but site topography and the Landmark Commission's intractability on allowing any changes to the existing building prevented agreement.[26]

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18. *Boerne*, 117 S. Ct. at 2160. The pastor's affidavit, cited in the respondent's brief, claimed total church membership of 2170. Brief of Respondent Flores at *1, *Boerne* (No. 95-2074), 1997 WL 10293.

19. Brief of Respondent Flores at *1, *Boerne* (No. 95-2074), 1997 WL 10293.

20. Brief for the United States at *5, *Boerne* (No. 95-2074), 1997 WL 13201.

21. *Boerne*, 117 S. Ct. at 2160.

22. Brief of Respondent Flores at *1, *Boerne* (No. 95-2074), 1997 WL 10293.

23. *Id.*

24. Brief of Petitioner City of Boerne at *5, *Boerne* (No. 95-2074), 1996 WL 689630. Whether the church building merited saving was at issue in the dispute. The aesthetic judgments of the Catholic Church and the City agreed on very few points. The City described the building as "a beautiful stone church, whose times and memories are graven into the souls of a city. [It is] a striking example of mission revival architecture consciously referring back to the original Spanish missions in South Texas." *Id.* at *1. In contrast, the Church's position was that the building lacked historic value: "The church building is not an historic landmark, and in fact is merely a modern imitation of a Spanish mission." Brief of Respondent Flores at *1, *Boerne* (No. 95-2074), 1997 WL 10293. Furthermore, the Flores brief contended that the ordinance unreasonably defined "historical" broadly to "'fool' its citizens," sweeping into regulatory reach insignificant structures from as late as the 1950s. *Id.*

25. Brief of Petitioner City of Boerne at *6.

26. The Church is built on a "highly visible" location on a hill. Brief of Petitioner City of Boerne at *2, *Boerne* (No. 95-2074), 1996 WL 689630. The Church's brief claimed that the City would have permitted construction on another part of the site "provided that [the Church] perpetually maintains the old church building as a sort of architectural museum." Brief of Respondent Flores at *2, *Boerne* (No. 95-2074), 1997 WL 10293. The Church's architect estimated $500,000 in additional soil and site preparation costs to build on the City's proposed location. *Id.* Following the Landmark Commission's recommendation, the City Council rejected

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Archbishop Flores then moved to challenge the historic preservation ordinance and permit denials in court.[27] Challenging historic landmark zoning has become more difficult since *Penn Central Transportation Co. v. City of New York* recognized its general validity under the police power.[28] But the Landmark Commission's inflexibility combined with the inadequacy of any alternative solution made the ordinance's effect arguably a taking and an intrusion on the Church's religious use of the property.[29] RFRA also provided the Church with a federal statutory weapon to challenge the zoning ordinance.[30]

II. Building Toward Boerne: Conflicting Interpretations of the Free Exercise Clause

A. The Traditional Design: The Compelling Interest Test

RFRA's roots are in the judicially created compelling interest test for balancing free exercise claims.[31] Like most balancing tests, the free exercise clause application of the compelling interest test developed through a series of cases.[32] These cases show a transformation in the Court's Free Exercise

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a settlement proposed by an architect jointly hired by the Church and the City. The renovation proposal would have preserved seventy percent of the existing structure. Alexander, *supra* note 17, at 5.

27. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1985); *see supra* note 15.

28. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978) (holding historic preservation zoning valid if in application the property owner is left with a prospect of a reasonable rate of return on investment). *See generally* OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW § 118, at 381-82 (1982 & Supp. 1996); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991).

29. Flores' challenge to the ordinance included several state and federal constitutional claims, including a Fifth Amendment Takings Clause claim and a Free Exercise Clause claim. Because the RFRA claim was heard on an interlocutory appeal, the other claims were not reached by the Fifth Circuit or the Supreme Court. *See* Brief of Respondent Flores at *2, *Boerne* (No. 95-2074), 1997 WL 10293.

30. A RFRA claim, however, did not guarantee churches success against zoning laws. *See, e.g.*, Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M..D. Fla. 1995) (holding no substantial burden to free exercise because zoning only channeled conduct); Keeler v. City of Cumberland, 928 F. Supp. 591 (D. Md. 1996) (holding RFRA an unconstitutional violation of separation of powers doctrine); Germantown Seventh Day Adventist Church v. City of Philadelphia, Civ. No. 94-1633, 1994 U.S. Dist. LEXIS 12163 (E.D. Pa. 1994) (denial of permit for church addition under zoning code provision did not affect freedom of religion). *But see, e.g.*, Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994) (finding that city had not demonstrated a compelling interest in denial of zoning approval for homeless shelter as an accessory use to church); Jesus Center v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698 (Mich. Ct. App. 1996) (enjoining city from enforcing zoning ordinance against feeding homeless).

31. *See* 42 U.S.C. § 2000bb(a) (1994) (describing, in part, the case law basis for the compelling interest test before *Smith*).

32. Most commentators include their own versions of how the test developed, often with a

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Cause reasoning, moving from a bright line belief-conduct distinction to an analytical balancing and then partially retrenching to the bright line. Generally, scholars note that courts heard few free exercise claims before *Reynolds v. United States*, which introduced the belief-conduct distinction into the Court's free exercise jurisprudence.[33] In *Reynolds*, the Supreme Court upheld a federal criminal law banning polygamy as applied to a Mormon.[34]

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particular ideological perspective. *See, e.g.*, JOHN EIDSMOE, THE CHRISTIAN LEGAL ADVISOR 156-64 (1984) (explaining the key cases for conservative lay audience); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 54-57 (1995) (emphasizing the *Smith* court's return to the *Reynolds* belief-conduct distinction); Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 28 U. RICH L. REV. 53, 60-62 (1994) (explaining that *Smith* "salvaged" the test in hybrid rights foster care cases); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 176-78 (1995) [hereinafter Lupu, *Lawyer's Guide*] (concluding that RFRA's claim of restoration is both prospective and retrospective, emphasizing the trend away from the test before *Smith*); Harry F. Tepker, *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991) [hereinafter Tepker, *Hallucinations*] (arguing that Scalia misused precedent in *Smith*, that the real test is "close" scrutiny, and that the best unification theory for free exercise jurisprudence is a right to religious privacy); John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1 (1997) [hereinafter Whitehead, *Demise*] (a comprehensive 139-page, 1078-footnote analysis of free exercise cases, concluding that conflicting conservative and liberal challenges to the supremacy of the free exercise clause have produced inconsistent results). Other significant scholarship on the compelling interest test includes Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1991); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*]; Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 623 (1990).

33. Reynolds v. United States, 98 U.S. 145 (1878); *see* Lupu, *Lawyer's Guide*, *supra* note 32, at 176.

34. *Id.* The Mormons are formally known as the Church of Jesus Christ of Latter-day Saints. Doctrinally, the Mormon religion's official name is somewhat misleading, in that Mormon theology diverges significantly from orthodox denominational forms of Christianity. Mormon apologists and some secular or secularized religion scholars operating at a higher level of abstraction may argue against the implicit assumption that Mormonism is not merely a divergent denomination within Christianity. Notwithstanding semanticist S.I. Hayakawa's sagacious observation that definitions are only descriptive about how people use language, *see* S.I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 155-63 (3d ed. 1972) [hereinafter LANGUAGE], any definition of the Christian faith reasonably based on generally held, orthodox theological doctrines must exclude the LDS cult. Some scholars argue that terms such as cult, sect, and denomination should be used interchangeably. *See Cult*, *in* THE ENCYCLOPEDIC DICTIONARY OF THE WESTERN CHURCHES 246-47 (T.C. O'Brien ed., 1970) [hereinafter DICTIONARY OF WESTERN CHURCHES]. Other scholars argue that analytical precision is fostered by meaningful, exclusive definitions based on the relative level of theological orthodoxy. *See e.g.*, Ronald M. Enroth, *What Is a Cult*, *in* A GUIDE TO CULTS AND NEW RELIGIONS 11-24

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Although polygamy is an ancient tradition practiced in patriarchal cultures, and enduring to modern times chiefly through the spread of Islam since A.D. 610, Christianity's doctrine of monogamous marriage banished polygamy from Western law and practice.[35] The Mormon religion, however, revived polygamy as an arguably central tenet of their religious practice by the time *Reynolds* was decided in 1878.

The centrality claim stems from Mormon epistemological and eschatological contentions. The cult's founder, Joseph Smith claimed to have received an uncorroborated visit from the angel Moroni on September 21, 1823. Moroni allegedly tipped Smith to a series of golden plates hidden on a New York hillside containing the story of God's work among the ancient indigenous Americans.[36] The golden plates, which unfortunately for scholars were repossessed by Moroni after Smith finished translating them into English, revealed the spectacular story of two elaborate, but lost civilizations which existed on the North American continent.[37] Smith was inspired to

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(Ronald M. Enroth ed., 1983) [hereinafter A GUIDE TO CULTS]; EIDSMOE, *supra* note 32, at 326-27; Irving Hexham, *Cults*, in EVANGELICAL DICTIONARY OF THEOLOGY 289 (Walter A. Elwell ed., 1984) [hereinafter EVANGELICAL DICTIONARY]. Systematic Theologian Anthony A. Hoekema suggests nine factors which differentiate cults from churches or denominations: (1) Cults abruptly break from historic Christian structures and confessions; (2) Cults build major doctrines around insignificant points from the Bible; (3) Cults tend to view their members as having superior holiness or advocate perfectionism; (4) Cults attach significant importance to extrascriptural authority sources; (5) Cults elevate a person or persons to equal or similar importance to Jesus Christ; (6) Cults reject traditional Trinitarian formulations of the Godhead; (7) Cults deny orthodox views on justification by grace, substituting works or combination forms of salvation; (8) Cults tend to claim that their group is the exclusive community of saved or redeemed persons; (9) Cults believe that their group will have a central role in eschatology. EIDSMOE, *supra* note 32, at 326 (citing ANTHONY A. HOEKEMA, THE FOUR MAJOR CULTS 373-88 (1965)). Essential Mormon doctrines place the religion squarely within Hoekema's factors. *See infra* notes 35-46. The legal significance of this distinction may seem minimal, but if a court uses a Free Exercise Clause balancing test which prompts a centrality or relative importance of belief analysis, overinclusive majoritarian categorizations of a religion can minimize the importance of unorthodox practices to a religion's essence. It would be far easier for a court to rationalize dismissing a peripheral practice, as compared with the bulk of "Christian" practices, as not being central to "Christian beliefs," than it would be to dismiss a unique practice of a distinct religion. The *Boerne* majority feared that such centrality analyses were required by RFRA, unless the court deferred to any objector's claim. *See Boerne*, 117 S. Ct. at 2171. The Ninth Circuit actually adopted a centrality test in its RFRA jurisprudence. The harsh Ninth Circuit test required a religious free exercise exemption claimant to show that the burdened practice was mandated by the claimant's faith, was a central tenet or belief of religious doctrine and was substantially interfered with by the law at issue. *See e.g.*, Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995).

35. *See* J.T. Mueller, *Polygamy*, *in* EVANGELICAL DICTIONARY, *supra* note 34, at 861. *See generally* David J. Hesselgrave, *Polygamy*, *in* BAKER'S DICTIONARY OF CHRISTIAN ETHICS 514-15 (Carl F.H. Henry ed., 1973).

36. Donald S. Tingle, *Latter-day Saints (Mormons)*, *in* A GUIDE TO CULTS, *supra* note 34, at 119 [hereinafter Tingle, *LDS*]. Conveniently, the plates supposedly came with special translator's glasses, called Urim and Thummim, to assist the unlearned 17-year old Smith in deciphering the text. *Id.*

37. *Id.* The historicity and archaeological evidence (or lack of same) for the Book of

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found the Church of Jesus Christ of Latter-day Saints on April 6, 1830, and publish his translation of the golden plates as the *Book of Mormon* in the same year.[38] Due in no small part to Smith's incredible claims that he received revelations from God as a modern-day prophet and apostle, including the announcement that all Christian sects were in complete apostasy, Smith's group was not well-received in his home town of Palmyra, New York. Nor was the group free from opposition at subsequent settlements in Kirkland, Ohio and Jackson County, Missouri.[39] Smith's problems were compounded by a July 12, 1843, revelation that he claimed to receive at the Mormon's new Nauvoo, Illinois settlement. Smith determined that reviving Old Testament-style polygamy was God's will for members in the "Holy Order" of church leaders. This caused an intra-Mormon conflict, culminating with the arson of an anti-Mormon newspaper allegedly committed by Joseph Smith and his brother Hyram Smith. A mob murdered Joseph Smith during a shoot-out at the Carthage, Illinois jail on June 7, 1844.[40] Brigham Young regrouped and removed the majority of Smith's followers in 1847 to the Great Salt Lake. Young's group became the nucleus of Utah Territory, which was formed through the Compromise of 1850.[41] Although Utah Territory formally outlawed polygamy, the controversy did not end with the Mormons' relocation.

Smith's polygamy revelation remained part of Mormon doctrine and practice at the time of *Reynolds*.[42] Contrary to the Christian teaching that

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Mormon is a highly contentious and technical field of study beyond the scope of this comment. For the purposes of religious liberty analysis, the reader should assume that the unorthodox beliefs of Mormons are "sincerely held." Interestingly from the Native American perspective, Smith's revelation teaches that American Indians, known as the Lamanites, are said to be the descendants of apostates from these groups, the Jardeites and the Nephites. The Lamanites were supposedly cursed with dark skin for their apostasy. Irving Hexham, *Mormonism*, in EVANGELICAL DICTIONARY, *supra* note 34, at 735-36 [hereinafter Hexham, *Mormonism*].

38. Hexham, *Mormonism*, *supra* note 37, at 735. Originally, Smith named his new group "Church of Christ," but this should not be confused with the modern offshoot from the Campbellite movement known as the Church of Christ. *See* Tingle, *LDS*, *supra* note 36, at 120.

39. Hexham, *Mormonism*, *supra* note 37, at 735.

40. *Id.*; *see also* Tingle, *LDS*, *supra* note 36, at 121-22.

41. JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES TO 1877, at 322-24 (4th ed. 1979).

42. In addition to the Bible and the Book of Mormon, Smith left the Mormons with *The Pearl of Great Price* (containing Smith's translations of portions of the Bible and two Egyptian papyri which some modern non-Mormon scholars have determined to be Roman period portions of the Egyptian Book of the Dead, not the "Book of Abraham" as Smith claimed) and *The Doctrines and Covenants* (preserving a number of Smith's revelations, including the polygamy teaching and a subsequent non-Smith revelation holding it to be unnecessary). *See* Tingle, *LDS*, *supra* note 36, at 122-30. The reigning LDS prophet, known as the church's President, has the authority to receive new revelations and to revise Mormon scriptures. Consequently, the Mormons have amended their organic documents numerous times. *Id.*; *see also* Hexham, *Mormonism*, *supra* note 37, at 736.

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marriage is a temporal institution,[43] Mormonism teaches a unique form of polytheism that includes "celestial marriage." The highest aspiration of an obedient Mormon adherent is to have their marriage "eternally sealed" on earth in a Mormon temple, meeting one of the requirements for progression to godhood.[44] For a believer in the Mormon system who is working his way to the third and highest level of the afterlife, these earth-originated celestial marriages are essential in that each god and his family will receive his own planet to populate and rule.[45] Because spiritual procreation can only occur through physical sexual union, a larger number of celestial wives facilitates the planet population process. Thus, preventing a Mormon from having multiple wives significantly compromised his eternal religious free exercise rights.[46]

The *Reynolds* Court recognized the unique place polygamy had in the Utah/Mormon community. A number of jurors were excluded at the trial court level because of their belief in the principle, not withstanding the federal and Utah laws to the contrary.[47] The Court also noted that the Mormon Church taught polygamy as a duty for all male church members.[48] However, the Court did not allow a religious objector's exception to criminal laws against "overt acts."[49] The Court reasoned that "Congress was deprived of

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43. *Matthew* 22:30 (quoting Jesus) ("For in the resurrection they neither marry, nor are given in marriage, but are as the angels of God in heaven.").

44. Hexham, *Mormonism*, *supra* note 37, at 736.

45. Dennis A. Wright, *The Mormon View of Heaven*, BAPTIST MESSENGER, Jan. 8, 1998, at 3.

46. Although the Mormon church has officially modified its doctrine to conform with current matrimonial laws, an unknown number of fundamentalist Mormons remain committed to practicing polygamy underground. For example, one vocal dissident Mormon group, the True & Living Church of Jesus Christ of Saints of the Last Days, based in Manti, Utah, publishes the following declaration:

> We believe and live Plural Marriage because it is a commandment of God, and we fear God more than man. In the 1800's the U.S. Government sought to legally destroy all who believed in it, and eventually succeeded in causing the LDS Church to compromise under the pressure. In today's society, however, we find that the liberal government is far more permissive of non-traditional families. If states can decide on the legality of homosexual marriage, then surely plural marriage cannot be so intolerable. In living our beliefs, we do not break any enforceable laws. We do not obtain marriage licenses for successive marriages, and so are not guilty of bigamy. All parties are consenting adults and are fully aware of the arrangement, so there is no charge of infedelity [sic] or adultery. The only man-made law that is breached is that of "unlawful cohabitation", of which an immense number of citizens of the U.S. and other countries who merely live together and copulate are likewise guilty, thus rendering the law unenforceable.

Website of the True & Living Church of Jesus Christ of Saints of the Last Days (visited Mar. 21, 1998) <http://www.tlcmanti.org/FAQFolder/faqMain.html>.

47. *Reynolds*, 98 U.S. at 157.

48. *Id.* at 161.

49. *Id.* at 167.

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all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[50] Although the *Reynolds* belief-conduct distinction was abandoned in later First Amendment cases, such as *Cantwell v. Connecticut*,[51] *Reynolds* stands as the landmark case establishing that the Free Exercise clause does not require religious exemptions from facially neutral laws of general applicability.[52]

The pivotal event in the Court's development of compelling interest balancing test occurred in 1963, when the Court considered whether refusing to accept a job because it would require working on the claimant's Sabbath would disqualify the claimant for unemployment compensation. In *Sherbert v. Verner*, the Court held that denial of benefits under these circumstances burdened the free exercise of religion in excess of any compelling state interest.[53] The Court continued to expand the scope of *Sherbert*'s compelling interest balancing test in subsequent unemployment compensation cases.[54]

The next milestone for the compelling interest test involved an Old Order Amish plaintiff defying Wisconsin's compulsory school attendance law, by refusing to send his teenaged children to public school after the eighth grade.[55] In this 1972 case, *Wisconsin v. Yoder*, the Court held that the state's interest in universal education did not outweigh the deeply held Amish religious beliefs that public high schools were too secularizing and that informal, agricultural training better prepared their children for adulthood in the Amish faith.[56] Until RFRA attempted to codify the compelling interest test balancing, *Yoder* was probably the zenith for weighing religious claims against facially neutral laws of general applicability.

After *Yoder*, however, the Court used the compelling interest balancing test to reject claims outside the *Sherbert*-line of unemployment cases.[57] The

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50. *Reynolds*, 98 U.S. at 167.

51. 310 U.S. 296 (1940) (holding that the state cannot suppress communication of religious views to preserve the public peace).

52. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990); *see also* Whitehead, *Demise*, *supra* note 32, at 33-38 (discussing *Reynolds* and the "durability" of the no religious exceptions rule in subsequent cases). *But see* Tepker, *Hallucinations*, *supra* note 32, at 15-17 (arguing that Scalia overgeneralized an "overt acts" rule from a precedent that should be limited to marriage).

53. Sherbert v. Verner, 374 U.S. 398 (1963). *Sherbert* and its progeny are extensively discussed in Whitehead, *Demise*, *supra* note 32, at 87-90.

54. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (extending *Sherbert* to cover claimant whose beliefs changed during employment); Frazee v. Illinois Dep't of Employment Servs., 489 U.S. 829 (1989) (extending *Sherbert* to a sabbath work objector who was not a member of any particular sect).

55. Wisconsin v. Yoder, 406 U.S. 205 (1972).

56. *Id.* at 215.

57. *See* Lupu, *Lawyer's Guide*, *supra* note 32, at 178-80 (suggesting that "substantial burden" threshold for the test functioned to exclude free exercise claims); Tepker, *Hallucinations*, *supra* note 32, at 22-24 (explaining the narrowing trend foreshadowed *Smith*); *see, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986) (upholding statutory requirement that social security numbers be used in

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Court also distinguished many cases from the *Sherbert-Yoder* balancing line of decisions.[58] Several of these decisions, however, were corrected with specific legislation.[59] Consequently, portents of both judicial replacement of the test and legislative reaction to remedy the subsequent effects were apparent on the eve of Scalia's free exercise clause renovation in the "peyote case."

B. Scalia Remodels: Employment Division, Department of Human Resources v. Smith

In the AMA speech, Justice Scalia commented that "[h]aving the Constitution mean whatever five out of nine justices think it ought to mean these days is not flexibility but rigidity."[60] Scalia's critics and his supporters will perhaps draw different conclusions, but many will notice the irony of this comment considering that he wrote one of the most controversial and arguably inflexible five-four decisions of the past decade: *Employment Division, Department of Human Resources v. Smith.* Ira Lupu summed up the daunting quantity and tedious redundancy of the academic commentary on *Smith*, suggesting that "[c]riticizing *Smith* is no longer original or useful; we have *all* become repetitive in our criticisms, and by now, *our audiences are either persuaded or turned off.*"[61]

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administering welfare programs notwithstanding religious belief that use of the number would impair the spirit).

58. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (deferring to air force regulation prohibiting the wearing of yarmulkes under an unauthorized headgear regulation intended to preserve uniformity); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (rejecting the applicability of the test because Indian religious claimants were not punished or coerced by desecration of a sacred site on federal lands traditionally used for religious purposes); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (applying lesser "reasonableness" test to prisoner free exercise claims); United States v. Lee, 455 U.S. 252 (1982) (finding an overriding national interest in preserving the Social Security system).

59. *See, e.g.*, 10 U.S.C. § 774 (1994) (responding to Goldman v. Weinberger, 475 U.S. 503 (1986)); 26 U.S.C. § 3127 (1988) (responding to United States v. Lee, 455 U.S. 252 (1982), and repealing the mandatory social security tax obligation as applied to objecting religious employers and employees).

60. Johnson, *supra* note 2.

61. Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court Centrism*, 1993 BYU L. REV. 259, 268 (1993) [hereinafter Lupu, *Supreme Court Centrism*] (emphasis added). The literature on Smith is vast. In addition to the articles cited *supra* note 32, see, e.g., Stephen L. Carter, *The Supreme Court, 1992 Term — Comment: The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993); John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); 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 (1990); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 20-23 (1996); David L. Gregory & Charles Russo, *Let Us Pray (But Not "Them!"): The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 329 (1991); Philip A. Hamburger, *A*

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The facts in *Smith* may not have alarmed many non-Indians outside the discrete and insular community of First Amendment scholars. Oregon's criminal drug possession statute incorporated the federal definition of controlled substances.[62] Unfortunately for the plaintiffs, Oregon had neglected to follow the lead of over twenty states who had written an exception for the ceremonial use of Lophophorawilliamsii Lemaire, a small spineless cactus plant native to the southwestern states, known commonly as peyote.[63] The drug, extracted from eating the tops, or buttons of the cacti, produces mild hallucinations, depression, almost certain nausea, and vomiting.[64] But in the syncretistic Native American Church, which blends traditional indigenous ritual elements with Christianity, the drug functions much like sacramental wine.[65]

Two drug counselors at a drug treatment program were members of the Native American Church. Their ceremonial consumption of trace amounts of peyote ran afoul of both the program's "no tolerance" policy and the poorly drafted Oregon drug possession statute.[66] The counselors were subsequently fired after refusing lesser disciplinary action. They attempted to collect unemployment compensation, but were ultimately denied. After a complex procedural history that included an earlier trip to the Supreme Court, in which the Court remanded the case back down to the Oregon court to determine whether sacramental peyote use violated the state's drug laws, *Smith* returned to the Court to resolve the free exercise claim. Oregon appealed the state

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Constitutional Right of Religious Exemption: An Historical Perspective, 60 GEO. WASH. L. REV. 915 (1992); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991); *Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-37 (1991); Maximillian B. Torres, *Free Exercise of Religion:* Employment Division, Department of Human Resources v. Smith, 14 HARV. J.L. & PUB. POL'Y 282 (1991); Theresa Cook, Note, *The Peyote Case: A Return to* Reynolds, 68 DENV. U. L. REV. 91 (1991); 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); Robert O. Lindefjeld, Note, *The* Smith *Decision: A Legal "Foray into the Realm of the Hypothetical,"* 2 WIDENER J. PUB. L. 219 (1992); *see also* Cunningham, *supra* note 32, at 56 n.6 (containing an extensive listing of student comments and notes on *Smith*).

62. Tepker, *Hallucinations*, *supra* note 32, at 2-3.

63. Lindefjeld, *supra* note 61, at 279 n.75; Ann E. Beeson, Comment, *Dances With Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1129-30 (offering an extensive history of peyotism).

64. Beeson, *supra* note 63, at 1129-30.

65. *Id.* at 1134-35. Justice Blackmun's dissent in *Smith* extensively analyzes peyotism and he develops the sacramental wine analogy. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 913 n.6 (1990).

66. Lindefjeld, *supra* note 61, at 230-36.

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supreme court's ruling that the free exercise clause entitled the claimants to an exception to the facially neutral drug statute.[67]

Scalia's opinion for the four vote plurality was an unexpected retreat from the *Sherbert-Yoder* line of balancing cases. Scalia, leery of balancing and favoring a bright line rule,[68] impliedly resurrected the *Reynolds* belief-conduct distinction.[69] Scalia knitted together a series of arguably distinguishable cases to stand for the rule that the Free Exercise Clause does not entitle anyone to an exception from a facially neutral law.[70] Then, Scalia reasoned that a second group of cases demonstrated *Sherbert*'s lack of viability outside the unemployment compensation niche.[71] Finally, the plurality opinion distinguished the *Sherbert-Yoder* line by finding that each of these actually involved a hybrid claim, linking the free exercise claim with another fundamental right or liberty interest. It was the amalgamated nature of the claims which triggered closer scrutiny.[72] The sacramental peyote users, however, did not have a associated right to transform their free exercise claim into a hybrid claim.[73]

Justice O'Connor filed a concurring opinion, eschewing the analytical gymnastics of Scalia's opinion. O'Connor applied the *Sherbert* test, but found that Oregon's interest in the uniform application of its dangerous drug laws overrode the plaintiffs' free exercise claim. O'Connor objected to the belief-conduct distinction at the heart of the plurality's reasoning.[74]

In contrast, Justice Blackmun also applied the *Sherbert* test, but in dissent. Blackmun disagreed with Justice O'Connor's result, arguing that the state's intangible drug enforcement policy concerns combined with peyote's recreational unattractiveness were insufficient to meet the compelling interest threshold.[75]

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67. *Id.* at 230-57.

68. *See* Tepker, *Hallucinations*, *supra* note 32, at 39-44.

69. *See* Whitehead, *Demise*, *supra* note 32, at 110-13. The belief-conduct distinction is discussed *supra* at notes 33-35, 49-52.

70. *Id.* at 109-12; Tepker, *Hallucinations*, *supra* note 32, at 12-22 (citing Minersville School Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586 (1940) (overruled flag salute case); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Braunfeld v. Brown, 366 U.S. 599 (1961) Braunfeld (Sunday closing); Gillette v. United States, 401 U.S. 437(1971) (national security); United States v. Lee, 455 U.S. 252 (1982)(balancing case))

71. *See* Whitehead, *Demise*, *supra* note 32, at 112 (citing United States v. Lee, 455 U.S. 252 (1982); Bowen v. Roy, 476 U.S. 693 (1986); Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1988); Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).

72. *See* Tepker, *Hallucinations*, *supra* note 32, at 24-27.

73. *Id.* at 24.

74. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 894-96 (1990).

75. *See id.* at 907-21.

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C. Congress Restores: The Religious Freedom Restoration Act and The American Indian Religious Freedom Act Amendments of 1994

1. The RFRA Coalition

Reaction to *Smith* was overwhelmingly swift and critical. Fifty prominent law professors petitioned the court for a rehearing of the case, but the Court denied their request.[76] The Court announced the *Smith* decision on April 17, 1990, and reaction to it in the political branches of government was rapid. In July 1990, RFRA was introduced in the house and by October in the Senate.[77] The bill was introduced in 102d Congress, and the House held hearings in the summer and fall of 1992.[78] More than fifty organizations joined together in an "unprecedented" joint effort to work for RFRA's passage. Groups normally at odds with many conservative sects, such as the ACLU and People for the American Way, united with their erstwhile courtroom foes to secure passage of RFRA.[79] In May 1993, RFRA passed the House on a unanimous voice vote.[80] The Senate passage was slowed by a contentious debate over a prison amendment that failed 58-41. RFRA passed the Senate with only three no votes in October 1993. On November 16, 1993, President Clinton signed RFRA into law.[81]

2. RFRA's Structure

Congressional strategists and First Amendment lawyers determined that a law replacing *Sherbert* and *Yoder* might be adjudged as within Congress' Fourteenth Amendment powers.[82] The final version of RFRA allayed the concerns of some scholars that merely restoring the deracinated version of the compelling interest test that *Smith* supplanted would not significantly change the judiciary's free exercise decisions.[83] RFRA is a brief, simple statute with only five parts. The first section of RFRA reports the congressional findings and declaration of purposes:

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76. 496 U.S. 913 (1990).

77. *RFRA Chronology, Baptist Joint Committee on Public Affairs* (visited Mar. 7, 1998) <www.Religious-freedom.org/chronology.html> [hereinafter *BJCPA*].

78. *Id.*

79. Conkle, *supra* note 32, at 88-89.

80. *Id.*

81. *BJCPA*, *supra* note 77.

82. *See e.g.*, Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221; Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181 (1992).

83. *See* Lupu, *Supreme Court Centrism*, *supra* note 61, at 272-73.

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(a) Findings. The Congress finds that —

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) Laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) 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 of neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[84]

Section 2000bb(b) states RFRA's purpose to legislatively circumvent the effects of *Smith* by extending the compelling interest balancing test to a wider group of free exercise claims:

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

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[85]

RFRA's third part, section 2000bb-1, provides the statute's substantive protection:

(a) In general[:] Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception[:] Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

84. 42 U.S.C. § 2000bb(a) (1994).
85. *Id.*

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> (c) Judicial relief[:] A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.[86]

The fourth RFRA section provides statutory definitions.[87] Section 2000bb-3 grants RFRA broad prospective and retrospective applicability to virtually all acts of government:

> (a) In general[:] This chapter applies to *all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.*
>
> (b) Rule of construction[:] Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.
>
> (c) Religious belief unaffected[:] Nothing in this chapter shall be construed to authorize any government to burden any religious belief.[88]

The final section of RFRA attempts to limit the statute from facilitating Establishment Clause violations and to prevent establishment of religion claims by opponents of RFRA-motivated religious exceptions:

> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.[89]

3. Amendment to American Indian Religious Freedom Act

An elegantly simple solution to *Smith*, which would have allowed a peyote exemption for at least one of the defendants,[90] could have been for the Court

86. *Id.* § 2000bb-1.
87. *Id.* § 2000bb-2.
88. *Id.* § 2000bb-3 (emphasis added).
89. *Id.* § 2000bb-4.
90. One of the Smith defendants was a non-Indian member of the Native American Church.

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to carve out a federal exception to the Oregon drug statute based on the American Indian Religious Freedom Act of 1978 (AIRFA).[91] AIRFA was Congress' response to Indian religious infringements on a variety of fronts, including preservation and access to sacred sites, possession of eagle feathers and other sacred objects, and drug law enforcement intrusions on peyotism.[92] The statute established a federal policy of protecting and preserving traditional religions of Native Americans through a brief aspirational statement:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[93]

Despite its lofty rhetoric, AIRFA, had virtually no effect in court challenges to Indian religious free exercise claims. For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[94] the Court ignored AIRFA as a basis for a free exercise claim. The U.S. Forest Service (USFS) triggered the controversy while attempting to complete a seventy-five-mile paved road linking two California towns, Gasquet and Orleans, by proposing construction of a six-mile segment through the Chimney Rock section of the Six Rivers National Forest.[95] During an environmental impact study and subsequent cultural study, the USFS discovered that Chimney Rock was historically and currently used for religious observances by the Yurok, Karok, and Tolowa tribes of the adjacent Hoopa Valley Indian Reservation.[96] The USFS study determined that no practical route for the road could avoid impacting the

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Lindefjeld, *supra* note 61, at 232 n.67. Under some theories of American Indian Religious Freedom Act and the 1994 amendment, a non-Indian would not fall within the scope of tribal protection as a bona fide member of a protected cultural and political entity. *See generally* Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendments to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19, 23-32, 47-49 (1993) (discussing the federal government's trust doctrine responsibility as applied to protecting indigenous religions).

91. 42 U.S.C. § 1996 (1994). Professor Tepker's attack on Scalia's Smith analysis raises the AIRFA possibility, but Tepker fails to explain how the Court could have reconciled using AIFRA in Smith with the limitation of AIFRA in Lyng only two years earlier. *Compare* Tepker, *Hallucinations*, *supra* note 32, *with infra* notes 94-101.

92. Beeson, *supra* note 63, at 1162-63.

93. 42 U.S.C. § 1996 (1994).

94. 485 U.S. 439 (1988). The case is extensively discussed by commentators. *See e.g.*, Simpson, *supra* note 90, at 34-37; Beeson, *supra* note 63, at 1165-67.

95. *Lyng*, 485 U.S. at 442.

96. *Id.* at 442-43.

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public land-based religious sites. An additional complicating factor was the USFS' decision to allow timber harvesting, but limiting cutting to outside one-half mile protective zones around the identified religious sites.[97] Congress intervened to defuse the exploding court battle between the USFS, the tribes and environmentalists, enacting the California Wilderness Act of 1984.[98] The statute banned the timber plan but protected the road project.[99]

The Supreme Court rejected the tribal challenge to the road under Free Exercise Clause and AIRFA theories. The Court reasoned that building the road, while destructive to current Indian practices, did not implicate the Free Exercise Clause because claimants were not coerced into altering their beliefs nor were their beliefs punished by the USFS project on federal land.[100] The Court discarded AIFRA by arguing that it did not create any enforceable rights or a cause of action.[101] Thus, the *Lyng* Court relegated AIFRA to mere resolutionary status, removing it from the *Smith* Court's calculus.

In 1994, Congress responded partially to the Court's end run around AIFRA by amending the law to specifically protect the ceremonial use of peyote in tribal ceremonies.[102] Congress found that "the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures" and that it was legally protected under federal law since 1965 and in at least twenty-eight states.[103] Congress also found that the failure of twenty-two states to protect the "ceremonial use of peyote by *Indian religious practitioners*" results in a "lack of uniformity [that] has created hardship for *Indian people* who participate in such religious ceremonies."[104] Much like in RFRA, Congress specifically named and criticized *Smith* and found that the Court's revised free exercise jurisprudence creates "the lack of adequate and clear legal protection for the religious use of peyote by Indians [which] may

97. *Id.* at 444.
98. Pub. L. No. 98-425, 98 Stat. 1619.
99. *Lyng*, 485 U.S. at 444.
100. *Id.* at 452-53.
101. *Id.* at 455.
102. 42 U.S.C. § 1996a (1994).
103. *Id.* § 1996a(a)(1)-(3).
104. *Id.* § 1996a(a)(3) (emphasis added). Section (c)(1) defines an Indian as a member of an Indian tribe. Section (c)(2) defines an Indian tribe as

> any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Id. § 1996a(c)(2). Section (c)(3) recognizes two elements to an Indian religion: A religion practiced by Indians, and that the religion's origin and interpretation is from "within a traditional Indian culture or community." *Id.* § 1996a(c)(3).

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serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment."[105]

The 1994 AIFRA amendment extended federal protection to the use, possession, or transportation of peyote only in connection with bona fide ceremonial rituals of a traditional Indian religion.[106] Reversing *Smith* as applied to Indian defendants, the amendment prohibits discrimination against Indians in public benefits because of peyotism.[107] The amendment also empowers the Drug Enforcement Administration to regulate and register peyote producers and distributors, but specifically disclaims preempting or conflicting with a Texas anti-peyote statute.[108] Furthermore, the revised AIFRA does not permit unfettered use of peyote by qualifying Indians. The Amendment allows federal law enforcement, transportation, and safety-related restrictions promulgated after consultation with representatives of "traditional Indian religions for which the sacramental use of peyote is integral to their practice" and subject to RFRA's resurrected free exercise balancing test.[109] Prisoners neither gain nor lose protection under the amendment, because the power for ceremonial peyote access is left to the discretion of prison officials.[110] Motorists and military personnel also fail to gain any independent defenses to peyote-related charges from the AIFRA amendment, unless the underlying regulations are unreasonable.[111]

4. Reactions and Effects

Even before Congress completed RFRA's passage, the Court began to reign in the logical and predictable effects of *Smith*. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[112] the Court defined an outer marker for facially neutral laws of general applicability. A Santeria priest planned to open a Santeria religion[113] worship center, which would feature public

105. *Id.* § 1996a(a)(4)-(a)(5).

106. *Id.* § 1996a(b)(1). *See generally* Michael Waldman, 25 AM. JUR. 2D *Drugs and Controlled Substances* §§ 23, 172 (1996).

107. 42 U.S.C. § 1996a(b)(1) (1994).

108. *Id.* § 1996a(b)(2)-(b)(3). Section (b)(3) provides that AIFRA does not preempt TEX. HEALTH & SAFETY CODE ANN. § 481.111(a) (West 1994).

109. 42 U.S.C. § 1996a(b)(4) (1994).

110. *Id.* § 1996a(b)(5).

111. *Id.* § 1996a(b)(6)-(b)(7). Both sections are subject to RFRA. Section (b)(7) requires the Secretary of Defense to consult with representatives of the traditional Indian religious groups affected before promulgating any restrictions relating to ceremonial peyotism.

112. 508 U.S. 520 (1993). *Lukumi* was argued on November 4, 1992 and decided June 11, 1993, several months before RFRA's final passage. *See supra* note 81.

113. The Santeria religion began in nineteenth-century Cuba. Western African slaves from the Yoruba tribe blended their traditional religion into Roman Catholicism. Cuban persecution forced Santeria to develop secretly. Although there are an estimated 50,000 devotees among the Cuban refugee population in Florida, it is seldom practiced openly. The religion, also known as "the way of the saints," teaches that every individual has a destiny from God fulfilled through the assistance

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sacrificial killing of chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles.[114] The Hialeah, Florida City Council reacted to public outrage by passing several ordinances outlawing ritualized animal slaughtering by any person or group.[115] The ordinances allowed exceptions for non-ritualized killing and kosher slaughter if performed at a properly zoned and licensed enterprise and involved only animals "specifically raised for food purposes."[116] The largest tactical obstacle for Hialeah's lawyers in the case, however, may have been defusing the intentional targeting implications arising from inflammatory anti-Santeria rhetoric used by some city council members and city officials during the legislative debates.[117] But unlike the Mormon polygamists 115 years earlier or the peyotists only three years before, the Santeria cult members defeated the government in the Supreme Court.

Reversing the trial and appellate courts, the Supreme Court held the Hialeah ordinances were not neutral, generally applicable laws within the *Smith* formula, but were specifically targeted at Santeria practice.[118] The ordinances had an impermissibly religious motivation and were underinclusive in protecting the city's articulated interest of reducing animal cruelty and protecting public health.[119] Applying the compelling interest balancing test, the Court reasoned that the sacrifices were both a traditional type of religious ritual, with historic practice in Judaism and contemporary practice in Islam, as well as integral to Santeria theology.[120] Conversely, the ordinance was not narrowly tailored to advance the city's interests, putting an undue burden on the religion's free exercise right.[121] Furthermore, the Court held that Hialeah's interests underlying the ordinances were less than compelling.[122]

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of spirits called orishas. Santeria adherents demonstrate their devotion to the orishas through animal sacrifice. These sacrifices are arguably central to Santeria. Orishas are not immortal, but depend on sacrifices for survival. Thus, ritual sacrifices are undertaken in association with various important events, including birth, marriage, and death rites, for healing, when initiating new priests and members, and as part of an annual celebration. Often the sacrificial animals are consumed. *Lukumi*, 508 U.S. at 524 (citing trial court fact findings and 13 ENCYCLOPEDIA OF RELIGION 66-67 (Mircea Eliade ed., 1987); 1 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE 183 (Charles H. Lippy & Peter W. Williams eds., 1988); MIGENE GONZALEZ-WIPPLER, SANTERIA, THE RELIGION 3-4 (1989); MIGENE GONZALEZ-WIPPLER, THE SANTERIA EXPERIENCE 105 (1982)).

114. *Lukumi*, 508 U.S. at 525-26.

115. *Id.* at 526-28.

116. *Id.* at 537.

117. *Id.* at 541-42. Interestingly, most of the statements cited by the Court were made by officials with Hispanic surnames, giving rise to the unstated inference that this was an internecine conflict.

118. *Id.* at 531-32. The Court noted that the trial court actually used a standard more strict than Smith required, but the case was decided before Smith. *Id.* at 530.

119. *Id.* at 538-542.

120. *Id.* at 525, 534-35.

121. *Id.* at 546-47.

122. *Id.* at 547.

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Justice Scalia, joined by Chief Justice Rehnquist, concurred in part and in judgment but objected to the Court's extensive assessment of the Hialeah City Council's motive behind the ordinances. Scalia concluded that "it is virtually impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries."[123] Scalia argued, based on textual analysis, that the appropriate First Amendment inquiry is not about legislative motives but about statutory effects.[124] Justice Souter, who was appointed to the Court after *Smith*, used his separate concurrence in *Lukumi* to question the precedential validity of *Smith*.[125] Extensively reviewing Scalia's use of precedent and citing scholarly criticism, Souter concluded that "whatever *Smith*'s virtues, they do not include a comfortable fit with settled law."[126] Justice Blackmun, joined by Justice O'Connor, also attacked *Smith* in a concurring opinion.[127] Blackmun contended that religious targeting per se fails First Amendment analysis.[128] But even in cases of neutral law, Blackmun asserted that compelling interest balancing is the proper test, not *Smith*'s bright line rule.

The clear message of *Lukumi* was that the Court will not tolerate overt or intentional targeting under the guise of a superficially neutral law.[129] But the contours and viability of *Smith*'s return to *Reynolds* remained uncertain and contested in cases where more sophisticated legislatures act with outwardly neutral motives, but with detrimental effects on fringe group religious

123. *Id.* at 558-59 (citations omitted).

124. *Id.*

125. *Id.* at 559-77.

126. *Id.* at 571.

127. *Id.* at 577-80.

128. *Id.* at 580.

129. Tepker argues that "superficially neutral law" is a synonym for "law of general applicability." *See* Tepker, *Hallucinations*, *supra* note 32, at 2. Such loaded language may be useful for partisan advocacy, but analytically it implies that comprehensive, universal rules are inherently pretextual. Clearly that is not the true. Majoritarian legal formulations based on highly specific legal traditions may tend to disadvantage certain minority groups, but without any particular intention of blind-eyed analysis or premeditated, deliberate targeting. For example, murder laws cast a broad prohibitive net which includes banning human sacrifice. Under Tepker's rhetorical approach, murder laws would be "superficially neutral" because they also ensnare primitive, inhumane ritual killing. Semanticist S.I. Hayakawa theorizes that words have both informative connotations and affective connotations. Informative connotations are meanings including definitions and denotations. Affective connotations are the atmosphere of emotions and feelings that a word incites. S.I. HAYAKAWA, *The Double Task of Language*, *in* LANGUAGE, *supra* note 34, at 62-72. Tepker's inductive categorization might technically fall into the informative definition of "superficial" in that the laws are facially neutral. But Tepker's terminology unreliably overstates the affective case with a built-in judgment that implies either wrongful motive or shallow, cursory, uncritical policy judgments. A more reliable approach would be to restrict the judgment-laden label "superficially neutral" to situations of apparent legislative bias, such as in *Lukumi*. Laws based on neutral principle and specific legal traditions ought to be presumed and described as "neutral laws of general applicability" until their intentional or negligent bias is otherwise proven.

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practices. Although *Smith*'s critics on the Court had not marshaled enough votes to reconsider it, RFRA soon attempted legislatively to accomplish the evisceration of the peyote precedent.

RFRA generated a second wave of academic analysis.[130] Although politically popular, RFRA generated some controversy outside of academia and the D.C. Beltway. Several states began to see a trend, if an explosion, of frivolous prison law suits.[131] A LEXIS/NEXIS search by lawyers briefing the case for a group of Attorneys General found that 189 prison-related RFRA claim cases had been decided.[132] Prison officials became burdened with assessing and accommodating RFRA claims, diverting resources from other operational tasks.[133] Claims which would have failed under the *Shabazz* "reasonablility" standard were resuscitated by RFRA's tougher scrutiny.[134]

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130. *See supra* notes 32, 82; Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration* Act, 39 VILL. L. REV. 1 (1994); Joanne Brant, *Taking the Supreme Court At Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Abbott Cooper, *Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation*, 56 MONT. L. REV. 325 (1995); Christopher V. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106 (1994); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995) [hereinafter Laycock, *Ratchet*]; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73; M. Paulsen, *A RFRA Runs Through It*, 56 MONT. L. REV. 249 (1995); Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459 (1996); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996).

131. Brief for [Thirteen] Amici States in Support of Petitioner at *3, *Boerne* (No. 95-2074), 1996 WL 695519. The amici states are Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, the Commonwealth of Pennsylvania, and the territories of American Samoa, Guam And The Virgin Islands.

132. *Id.*

133. *Id.* at *4. Ironically, RFRA-supported inmate demands for diverse services and assistance from prison chaplains may have produced the unintended effect of reduced religious access for some inmates. For example, Colorado and Oklahoma became so disillusioned with trying to accommodate RFRA claims that they abolished all state-funded chaplaincy programs. *Id.* at *6.

134. *Id.* (citing O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)). Many of the RFRA claims prisoners attempted were entertaining, if not innovative. *See e.g.*, Emel v. Mensinger, Civ. No. 95-5197, 1996 U.S. Dist. LEXIS 13498 (E.D. Pa. 1996) (satanist inmates purported a right under RFRA to burn Bibles); United States v. Meyers, 906 F. Supp. 1494 (D. Wyo. 1995), *aff'd*,

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RFRA had some noteworthy successes in protecting religious practices. For example, in *State v. Miller*, a Wisconsin appeals court determined that the state had not shown that requiring a florescent orange slow-moving vehicle triangle on the rear of a Amish plaintiff's buggy was the least restrictive manner of furthering traffic safety.[135] In *Werner v. McCotter*, the 10th Circuit found that a sweat lodge was central and fundamental to a prisoner's free exercise rights.[136] In an important employment law case, *EEOC v. Catholic University*, a Title VII sex discrimination claim against a church-affiliated university by a female canon law professor denied tenure was successfully defended against.[137] The *Catholic University* court recognized both the Title VII "ministerial exception"[138] and RFRA as a basis for the decision.[139]

RFRA, however, did not help some religious liberty claimants. For example, in *Church of Iron Oak v. City of Palm Bay* a Wiccan "church" group was denied a temporary restraining order to prevent a zoning board hearing and further surveillance of a residence used for meetings.[140] The Arkansas

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95 F.3d 1475 (9th Cir. 1996) (inmate claimed membership in the "Church of Marijuana" required prison official to make drug accommodations under RFRA)

135. 538 N.W. 2d 573 (Wis. Ct. App. 1995), *aff'd on other grounds*, 539 N.W.2d 235 (Wis. 1996).

136. Werner v. McCotter, 49 F.3d 1476 (10th Cir.), *cert. denied*, 115 S. Ct. 2625 (1995).

137. EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir 1996) (holding that government policy against discrimination is not sufficient to outweigh a religious institution's interest in minister selection freedom).

138. Civil Rights Act of 1964 §702(a), 42 U.S.C. § 2000e-1 (1994); *Catholic Univ.*, 83 F.3d at 461-63.

139. *Catholic Univ.*, 83 F.3d at 467-70.

140. Church of Iron Oak v. City of Palm Bay, 868 F. Supp. 1361 (1994). The use of the term "church" by the Wiccan plaintiffs and the court is an unfortunate delimitation of language. The Wiccan religion is a pantheistic, pre-Christian, pagan belief system based on "white magic." Typically, wiccan groups are called covens, not churches, however the plaintiffs may have adopted the "church" label to seem less controversial. *See generally* Craig S. Hawkins, *The Modern World of Witchcraft: Part One*, CHRISTIAN RES. J., Winter/Spring 1990, at 8, *available in* Institute for Christian Leadership website (visited Mar. 21, 1998) <http://iclnet.org/pub/resources/text/cri/cri-jrnl/crj0064a.txt>. The term *church* translates two Greek words used in the New Testament for the body of Christian Believers: *Kyriakon* and *ekklesia*. *See* THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 397-98 (Gerhard Kittel and Gerhard Friedrich eds., Geoffrey W. Bromiley trans., abridged one vol. ed., 1985); R.L. Omanson, *The Church*, *in* EVANGELICAL DICTIONARY, *supra* note 34, at 231-33. The origin of the church derives, according to Christian doctrine, from Jesus. *Matthew* 16:17-19; *Matthew* 18:17. Traditionally, courts have limited the use of the term to

> the religious society founded and established by Jesus Christ, to receive, preserve and propagate His doctrines and ordinances. It may also mean a body of communicants gathered into a church order; body or community of *Christians*, united under one form of government by the profession of the same faith and the observance of the same ritual and ceremonies . . . .

BLACK'S LAW DICTIONARY 242 (6th ed. 1990) (emphasis added). In an earlier time, the sacrilegious use of the term *church* for a Wiccan coven, arguably the antithesis of a Christian

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Supreme Court avoided RFRA in *Osborne v. Power*,[141] holding that a massive Christmas light display in a residential zone was a public and private nuisance which failed to implicate a free exercise issue. RFRA also failed to assist landlords who objected to laws forcing them to accept unmarried couples as tenants. In *Smith v. Commission of Fair Employment and Housing*,[142] the California Supreme Court reasoned that a landlord can avoid the rental real estate business to avoid a burden on the landlord's religious convictions or free exercise rights. The Alaska Supreme Court in *Swanner v. Anchorage Equal Rights Commission*[143] found that even if RFRA applies to neutral housing regulations and is within Congress' power, Alaska's compelling state interest in prohibiting marital status discrimination outweighs the landlord's RFRA free exercise defense. Justice Thomas vigorously dissented from the Court's denial of certiorari. He posited that the Alaska decision "drains the word compelling of any meaning and seriously undermines the protection for the exercise of religion that Congress so emphatically mandated in RFRA."[144] Thomas also noted that lower courts "exhibited considerable confusion" in applying the resurrected *Sherbert-Yoder* compelling interest balancing test in cases decided after RFRA's passage.[145]

RFRA disappointed many Indian religious liberty claimants as well. For example, in *United States v. Jim*, a member of the Yakama Nation unsuccessfully invoked RFRA in defending against a charge of killing eagles.[146] Several Indian prisoners also received no additional protection under RFRA. The Eighth Circuit held in *Hamilton v.Schriro* that prison policies prohibiting a weekly sweat lodge observance and enforcing a uniform hair length standard were narrowly tailored to advance the compelling government interest of prison safety.[147] The Federal District Court for Hawaii found RFRA constitutional in a temporary restraining order application which was mooted when prison officials voluntarily accommodated the Indian inmate's request for exemption from the hair length regulation, and for providing a spiritual counselor and a medicine bag with artifacts including, eagle feathers, sweet grass and sage.[148] But in a subsequent case, *Abordo v. Hawaii*, the same district court found similar regulations enforced against an "alleged Native American" to not violate RFRA's standards.[149] The Fifth

group, might have violated blasphemy laws. In modern times, however, such language abuse is emblematic of religious insensitivity and ignorance.

141. 890 S.W.2d 574 (Ark. 1994), *cert. denied*, 115 S. Ct. 2580 (1995).

142. 913 P.2d 909 (Cal. 1996), *cert. denied*, 111 S. Ct. 2531 (1996).

143. 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994).

144. *Swanner*, 115 S. Ct. at 462.

145. *Id.*

146. 888 F. Supp. 1058 (D. Or. 1995).

147. 74 F.3d 1545 (8th cir. 1996), *cert. denied*, 111 S. Ct. 193 (1996).

148. Belgard v. Hawaii, 883 F. Supp. 510 (D. Haw. 1995).

149. 938 F. Supp. 656, 659 (D. Haw. 1996)

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Circuit, in *Diaz v. Collins* denied an Aztec claimant, who was also reputed to be in the Mexican Mafia, an exemption to prison hair length and headband rules, reciting the state's compelling interest in prison security.[150]

The Federal District Court for the Southern District of Ohio extended the inmate cases even further to prison employees in *Blanken v. Ohio Department of Rehabilitation and Corrections.*[151] The claimant, classified as a corrections officer, worked in a prison as a food service coordinator. He also belonged to the Hokshichankiya Society, a group practicing traditional Indian religious rites. The district court found that the state's hair length regulation was the least restrictive means to achieve the compelling interests of safety, discipline and esprit de corps.[152] Thus, RFRA proved to be easy for some courts to avoid, whether by defining the issues outside RFRA's scope, or by delimiting the compelling interest standard. A few courts foreshadowed the *Boerne* court's RFRA demolition by holding the act an unconstitutional exercise of congressional power.[153]

III. Boerne and RFRA's Flawed Foundation

A. The Litigants' Views on RFRA

"This case is not about religious liberty," Marci Hamilton boldly claimed as she began her oral argument for the City of Boerne in the Supreme Court. Hamilton dramatically continued before being interrupted by the inevitable peppering of questions by the Justices:

> This case is about Federal power. It is about the ability of the United States Constitution to restrain Congress, the branch most likely to be controlled by interest groups and by opinion polls, from engaging in a hostile takeover of the Free Exercise Clause of the First Amendment. The Religious Freedom Restoration Act, which was passed in an emotional and heated response to this Court's determination in *Employment Division v. Smith,* is a brazen attempt to reinterpret the Free Exercise Clause and to impose that reinterpretation on the courts, on the State, and to shift the balance of power between church and state dramatically in favor of the churches. This is the worst of legislative overreaching, which violates the fundamental structural constitutional guarantees, the separation of powers, federalism, and separation between church and state.[154]

150. 114 F.3d 69 (5th Cir. 1995).

151. 944 F. Supp. 1359 (S.D. Ohio 1996).

152. *Id.*

153. *See e.g.* Keeler v. Mayor of Cumberland, 951 F. Supp. 83 (D. Md. 1997); *In re* Hodge, 200 B.R. 884 (Bankr. D. Idaho 1996).

154. Transcript of Oral Argument at *3-*4, *Boerne* (No. 95-2074), 1997 WL 87109.

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Hamilton's introduction aptly summarizes the City of Boerne position which ultimately persuaded a majority of the Court. The City of Boerne made a three-pronged attack invoking basic structural doctrines to paint RFRA as a reactionary, extremist attempt to subvert the Court's authority to interpret the Constitution.

In their brief, Boerne argued first that RFRA violates the separation of powers doctrine.[155] Invoking two of the Court's most venerable precedents, *Marbury v. Madison*[156] and *Baker v. Carr*,[157] the City of Boerne challenged a central assumption underlying RFRA by asserting that the Court has superior, if not exclusive authority under Article Three[158] to interpret the Constitution.[159] Thus RFRA, according to the City of Boerne, was an unconstitutional intrusion into the Court's interpretive jurisdiction. If the Constitution functions as fundamental law, limiting Congress to only delegated powers while dividing governmental power between the three federal branches and the states, these limits would be undermined by allowing Congress to usurp the Court's interpretive function through legislative circumvention.[160] The City of Boerne's brief then reminded the Court that RFRA was an overt legislative attempt to overrule *Smith*.[161] The brief noted that 405 pages in RFRA's legislative history[162] contained statements about *Smith*, indicating congressional disapprobation for the Court's current free exercise jurisprudence motivated RFRA's enactment.[163] The City of Boerne's brief then concluded that the Court must strike down RFRA to preserve the balance of power between the courts and Congress.[164]

The second prong of Boerne's attack undercut the legitimacy of Congress's asserted constitutional basis for RFRA. The City of Boerne argued that RFRA is not within the scope of congressional enforcement power under Section 5 of the Fourteenth Amendment.[165] The brief warned the Court that upholding

155. Brief of Petitioner City of Boerne at *12-*26, *Boerne* (No. 95-2074), 1996 WL 689630.

156. 5 U.S. (1 Cranch) 137 (1803). "[It is] emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

157. 369 U.S. 186, 211 (1962) (arguing that the Supreme Court is the "ultimate interpreter of the Constitution").

158. *See* U.S. CONST. art. III, §§ 1, 2.

159. Brief of Petitioner City of Boerne at *13, *Boerne* (No. 95-2074), 1996 WL 689630.

160. *Id.* at *13-*15.

161. *Id.* at *15-*22.

162. *Id.* at *19 n.3. *See generally The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); *The 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., 2d Sess. (1992); *The Religious Freedom Restoration Act: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); S. REP. NO. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892; H.R. REP. NO. 103-88 (1993).

163. Brief of Petitioner City of Boerne at *19-*23, *Boerne* (No. 95-2074), 1996 WL 689630.

164. *Id.* at *23-*26.

165. *Id.* at *26-*46. Section 5 of the Fourteenth Amendment provides that "The Congress

"Congress's attempt with RFRA to force state and local governments to accommodate religious conduct more than this Court has said the Constitution requires runs headlong over a dangerous precipice."[166] First, Boerne contended that RFRA is like no other statute because it blatantly attempted to overrule the Court's interpretation of the Constitution in an entire class of cases.[167] Second, Boerne asserted that RFRA inharmoniously fit with *McCulloch v. Maryland*[168] by violating the Court's bedrock interpretive principle of enumerated powers.[169] RFRA, according to Boerne, fatally lies outside congressional enforcement power because it purports to enforce rights against the states through the Fourteenth Amendment that are not protected by the First Amendment.[170] Boerne posited that RFRA also was not specifically tailored to achieve a constitutional purpose, as required by the *McCulloch* test.[171]

The City of Boerne's brief also attacked two prominent defenses of congressional power to enact RFRA. Attempting to debunk the Fifth Circuit's theory that RFRA falls within the remedial power of Congress under section 5, Boerne insisted that the targeted voting rights enforcement laws upheld in *Katzenbach v. Morgan*[172] and *City of Rome v. United States*[173] were not examples of a broad remedial power, but were limited, detailed statutes addressing specific, discriminatory voting practices, and were supported by congressional fact findings linking the statutory remedies with the underlying constitutional guarantees.[174] In contrast, Boerne viewed RFRA as an

shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

166. Brief of Petitioner City of Boerne at *27, *Boerne* (No. 95-2074), 1996 WL 689630.

167. *Id.* at *29.

168. 17 U.S. (4 Wheat.) 316 (1819).

169. *Id.* at 30. The enumerated powers test articulated by Justice Marshall has three prongs: (1) "Let the end be legitimate"; (2) "[L]et [the end] be within the scope of the constitution," and (3) "[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCullouch*, 17 U.S. (4 Wheat.) at 421. The City of Boerne contended that RFRA violated each prong of the test. *See* Brief of Petitioner City of Boerne at *30-*42, *Boerne* (No. 95-2074), 1996 WL 689630.

170. Brief of Petitioner City of Boerne at *30-*31, *Boerne* (No. 95-2074), 1996 WL 689630 (citing the Court's interpretation of the Free Exercise Clause in *Smith* and *Lukumi* as the scope of the First Amendment).

171. *Id.* at *31.

172. 384 U.S. 641 (1966) (upholding under Section 5 a federal voting rights statute which allowed Spanish-speaking Puerto Ricans migrants to vote in New York elections despite state English literacy laws, which were previously upheld in *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959)).

173. 446 U.S. 156 (1980) (upholding preclearance of new voting standards if they would have a racially discriminatory effect on voting).

174. Brief of Petitioner City of Boerne at *32-*34, *Boerne* (No. 95-2074), 1996 WL 689630.

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extremely overbroad measure, lacking corresponding factual support.[175] The brief also attacked the theory that Section 5 grants Congress substantive power to reinterpret the Constitution.[176] Boerne maintained that interpreting language in *Katzenbach v. Morgan*[177] as authority for congressional power to expand the scope of constitutional guarantees is not only distorting the precedent but that such power was expressly rejected in subsequent cases.[178]

Boerne's final component in its second prong of assault was that RFRA violates the federalism limitations structured into Section 5.[179] Citing *Seminole Tribe of Fla. v. Florida*,[180] *United States v. Lopez*,[181] *New York v. United States*,[182] and *Gregory v. Ashcroft*,[183] the City of Boerne insisted that principles of federalism require Congress to respect state integrity when legislating in areas of state authority.[184] Land use control traditionally falls within the interest of the states. RFRA, according to the City of Boerne, derogates sovereign state power and skews historic preservation contests against local autonomy.[185] Although the Fourteenth Amendment limits the Tenth Amendment, Boerne claimed that it did repeal the Tenth Amendment or grant Congress power to require extra-constitutional accommodations by the states.[186]

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175. *Id.* at *35.

176. *Id.* at *38-*42.

177. Answering Justice Harlan's dissent, Justice Brennan noted

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Morgan, 384 U.S. at 651 n.10.

178. Brief of Petitioner City of Boerne at *39, *Boerne* (No. 95-2074), 1996 WL 689630 (citing Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome, 446 U.S. at 220-21 (Rehnquist, J., dissenting); EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting); ("I have always read Oregon v. Mitchell as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter' . . . ."); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (citing United States v. Reese, 92 U.S. (2 Otto) 214, 217-18 (1875); James v. Bowman, 190 U.S. 127, 138 (1903)).

179. Brief of Petitioner City of Boerne at *42-*46, *Boerne* (No. 95-2074), 1996 WL 689630.

180. 116 S. Ct. 1114 (1996). *See generally* Michael Grant, Comment, Seminole Tribe v. Florida — *Extinction of the New Buffalo*, 22 AM. INDIAN L. REV. 171 (1997).

181. 115 S. Ct. 1624 (1995) (striking down a federal "gun-free school zones" law as beyond congressional power under the Commerce Clause).

182. 505 U.S. 144 (1992) (invalidating statutes which required states to provide for in-state disposal of radioactive waste).

183. 501 U.S. 452 (1991) (exempting state judicial mandatory retirement regulations from the Age Discrimination in Employment Act).

184. Brief of Petitioner City of Boerne at *43, *Boerne* (No. 95-2074), 1996 WL 689630.

185. *Id.* at *45.

186. *Id.* at *45-*46.

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The City of Boerne's third major strike against RFRA was that the statute is an establishment of religion.[187] Invoking the often-maligned *Lemon v. Kurtzman*[188] test, Boerne argued that RFRA has no secular purpose, no neutral effect on religion, and creates excessive entanglement between government and religion.[189] The City additionally asserted that RFRA impermissibly functions as a global endorsement of religion, favoring religion over non-religion. Boerne's attack on RFRA concluded that "[w]hatever the merits of Congress's objection to the *Smith* decision, it cannot 'fix' religious liberty in flagrant disregard of settled principles of separation of powers, federalism, and church-state relations."[190]

Archbishop Flores and RFRA's apologists, of course, held a more sympathetic view of the statute's constitutionality. Douglas Laycock, representing the Archbishop, began his response to the City's oral argument by declaring: "This case is controlled by an unbroken tradition of congressional practice and judicial decision that begins with the Civil War amendments themselves. From the Civil Rights Act of 1866 to RFRA in 1993, Congress has always understood that it has power to make

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187. *Id.* at *46-*49.

188. 403 U.S. 602 (1971). Lemon has been criticized by a majority of the Court and according to Geoffrey Stone, et. al., the Court has not relied on it to invalidate any state action since 1985. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1547 (3d ed. 1996). An often-cited and memorable criticism of Lemon was offered by Justice Scalia in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993):

> Like some ghoul in a late- night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in Lee v. Weisman, 505 U.S. 577 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.
>
> The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.

Id. at 399-400 (citations omitted). Could it be that in the future, *Smith* will be viewed as the Scalia-created ghoul of the Free Exercise Clause?

189. Brief of Petitioner City of Boerne at *47-*48, *Boerne* (No. 95-2074), 1996 WL 689630.

190. *Id.* at *49.

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constitutional rights effective in practice and to go beyond the floor set by this Court."[191] The strategy of RFRA's defenders was to depict the statute as both consistent with prior Fourteenth Amendment enforcement legislation and as a statute which permissibly advanced protection of a constitutional right in the same direction as the Court's more limited view of the baseline. The key to this approach was to convince the Court to accept that RFRA is nothing more than a logical parallel of statutes like the Voting Rights Acts[192] and that Justice Brennan's broad conception of the Section 5's scope in *Katzenbach v. Morgan*[193] should be extended to legitimize RFRA's sweeping interference with local interests. The Archbishop's brief attempted this task through five major arguments.

The Archbishop's first argument was that the Court ought to defer to congressional judgment on RFRA's constitutionality.[194] Perhaps realizing that the presumption of constitutionality argument was at best an unlikely basis for the Court to dispose of the case, Flores' brief devotes only about a page to developing this argument. Flores' reasoning on the presumption issue concluded that "*RFRA represents the considered constitutional judgment of an equal and coordinate branch of government.*"[195] This statement flirts with what Alexander Bickel termed the Taney-Lincoln view on the meaning of a constitutional decision.[196] Under the Taney-Lincoln view, the legislative and executive branches are not bound by the principles or reasoning of judicial precedents, but only by the Court's judgment in the specific case decided.[197] Thus, each branch has an independent responsibility to interpret the Constitution. In requesting deference to Congress on RFRA's constitutionality in such broad terms, the Archbishop's brief impliedly invited the Court to defer, in ultimate effect, to an apparent congressional reinterpretation of the Free Exercise clause, but without explicitly adopting a radical version of the Taney-Lincoln hypothesis that would elevate congressional constitutional interpretations to equal status with the Court's own interpretations. In the oral argument, Laycock was forced to disclaim any hint that Congress could function as an interpretive co-equal:

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191. Transcript of Oral Argument at *34, *Boerne* (No. 95-2074), 1997 WL 87109.

192. *See* Brief of Respondent Flores at *4, *Boerne* (No. 95-2074), 1997 WL 10293 (comparing RFRA's enactment with "various Voting Rights Acts" and to Title VII of the Civil Rights Act of 1964).

193. 384 U.S. 641 (1966). Brennan's view is discussed at *supra* note 177.

194. Brief of Respondent Flores at *5-*6, *Boerne* (No. 95-2074), 1997 WL 10293.

195. *Id.* at *6 (emphasis added).

196. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 101-02 (1975).

197. *Id.* According to Bickel, Lincoln notably articulated his views in 1858 during the Lincoln-Douglas debates and Justice Taney argued this view while he was the U.S. Attorney General. Ironically, Lincoln's view was developed in response to the Dred Scott decision, authored by Taney.

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> QUESTION: . . . Now, you admit, I suppose, that Congress cannot come in and overrule a decision of this Court it doesn't like by legislation.
>
> MR. LAYCOCK: That is not contested.
>
> QUESTION: Excuse me?
>
> MR. LAYCOCK: Everyone agrees with that.
>
> QUESTION: Yes.
>
> MR. LAYCOCK: Congress cannot overrule the Court.[198]

And indeed, *Boerne* would not be decided on the arguably artificial and formal distinctions latently concealed in the deference argument.

The Archbishop's second defense of RFRA was that it fell within delegated congressional authority under Section 5 of the Fourteenth Amendment.[199] Seizing on strands of broad language in *Katzenbach v. Morgan*[200] and a number of other decisions, Flores posited that Section 5's "appropriate" enforcement power can exceed the scope of substantive judicial interpretations of the right being enforced.[201] RFRA, according to the Archbishop, granted federal statutory sanctuary against the burdensome or discriminatory effects of facially neutral laws, and merely appended onto the Free Exercise Clause prohibition against overt or purposeful religious discrimination.[202] Flores then recited a litany of statutes for the proposition that congressional enforcement power was not limited to proven, obvious or deliberate discrimination, disputing the City of Boerne's claim that RFRA uniquely represented an unsupported exercise of substantive or remedial power.[203] Then the Archbishop's brief warned the Court of an apocalyptic Fourteenth Amendment enforcement meltdown if RFRA was found unconstitutional:

> Here are seventeen distinct statutory provisions . . . that clearly go beyond this Court's interpretation of the Constitution. These statutes span 125 years of the nation's history. . . . These statutes and their interpretations are deeply embedded in our law. Americans who know little of the constitutional debate in this case have relied on these laws for protection against exclusionary voting rules, unnecessary testing requirements, discriminatory pension and insurance benefits, and loss of employment due to

198. Transcript of Oral Argument at *35, *Boerne* (No. 95-2074), 1997 WL 87109.

199. Brief of Respondent Flores at *6-*43, *Boerne* (No. 95-2074), 1997 WL 10293.

200. 384 U.S. 641 (1966). "The power 'to enforce, by appropriate legislation' is independent of the power to adjudicate. Congress is not confined 'to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.'" Brief of Respondent Flores at *7, *Boerne* (No. 95-2074), 1997 WL 10293 (citing *Morgan*, 384 U.S. at 649).

201. Brief of Respondent Flores at *6-*7, *Boerne* (No. 95-2074), 1997 WL 10293.

202. *Id.* at *8-*10.

203. *Id.* at *10-*18.

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> pregnancy. *All of these protections would be cast in doubt if the judgment below were reversed; there cannot be a reversal without a drastic shrinkage of the enforcement power.*"[204]

Attempting to allay fears that upholding RFRA's constitutionality would lead to a drastic expansion of congressional power, the Archbishop offered a theory to the Court about the limits of Section 5. First, the Archbishop suggested that the Court need not determine the outer boundary of congressional enforcement power to uphold RFRA. Then the brief candidly admitted the delimiting risk of allowing Congress to enforce implied fundamental rights found under a substantive theory of the Due Process Clause or any classification which could be rationally found within the Equal Protection Clause.[205] Structurally, Flores argued, such substantive activism must be denied to Congress, but federal legislative enforcement should be allowed when it has "a nexus with a constitutional right that, in the judgment of this Court, is plausibly entitled to heightened scrutiny."[206] Therefore, because the Court could theoretically determine,[207] and actually has determined the requisite nexus,[208] Flores concluded that this places congressional actions consistent with the First Amendment within Section 5's "appropriate" enforcement power.[209] Congressional power to enforce constitutional rights functions like a ratchet,[210] allowing Congress to increase protections in concert with the Court's interpretations, but not to reduce or carve out exceptions to the Court's notions on the extent of constitutional guarantees.[211]

The Archbishop next turned to reassuring the Court that Congress rationally acted to grant necessary religious liberty shelter to minority and majority faith adherents.[212] The brief recounted testimony from the congressional hearings which supported the determination that specific legislative exceptions for particular religious practices, as well as ligating in

204. *Id.* at *18-*19 (emphasis added).

205. *Id.* at *22.

206. *Id.* at *22-*23.

207. The brief notes that Congress does not have to wait on a Court determination of a nexus to act. *Id.* at *23 n.5.

208. I.e., the Court has held that the First Amendment applies to the states through the Fourteenth Amendment, and the Court sometimes applies heightened scrutiny to First Amendment rights. The nexus theory gives Congress maximum latitude to legislate under Section 5 on rights recognized by the Court, but subjects congressional recognition of new rights to the Court's veto.

209. Brief of Respondent Flores at *23, *Boerne* (No. 95-2074), 1997 WL 10293.

210. A ratchet is a mechanism, most commonly used in a wrench of the same name, which mechanically restricts effective motion to one direction only. *See* WEBSTER'S COLLEGIATE DICTIONARY 825 (5th ed. 1942).

211. Brief of Respondent Flores at *26-*28, *Boerne* (No. 95-2074), 1997 WL 10293. *See generally* Laycock, *Ratchet, supra* note 130, at 145 (introducing an earlier law review formulation of the argument).

212. Brief of Respondent Flores at *29, *Boerne* (No. 95-2074), 1997 WL 10293.

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the wake of *Smith* did not protect religious liberty as well as RFRA.[213] The brief contended that the need for RFRA was buttressed by an extensive legislative record of specific free exercise intrusions, as well as statistics on anti-minority religious sentiments which could poison local legislative bodies.[214] Flores next compared the congressional findings supporting RFRA with the logically similar ones behind the law upheld in *Morgan*.[215] Finally, the Archbishop's brief attacked the City's remedial/substantive distinction as flawed and superficial, arguing that it turns on a determination of congressional intent, rather than any meaningful substantive measurement.[216]

Archbishop Flores further contended that because of incorporation, power to enforce the Fourteenth Amendment necessarily includes power to enforce religious liberty.[217] Supporting a broad view of the Fourteenth Amendment's original intent, Flores dipped into the legislative history of the amendment and contemporaneous enforcement legislation for proof that Congress intended a broad enforcement power under Section 5.[218] The Archbishop argued that because of congressional suspicion and mistrust of the Supreme Court after the Dred Scott decision,[219] Congress would not have intended to limit Fourteenth Amendment enforcement to only the extent protected by the Court.[220]

The Archbishop's third main defense of RFRA was that the statute did not limit judicial power to interpret or decide the law.[221] Flores insisted that the City's separation of powers argument was only a new label for the flawed argument that congressional enforcement power is limited to the Court's determination of substantive scope of the underlying constitutional provision being enforced.[222] RFRA, the Archbishop concluded, was not a threat to the separation of powers because it created only a statutory right, and does not represent any erosion of *Smith*'s value as a constitutional precedent. The unfortunate use of the word "Restoration" in the act's title, the recitation of specific cases in RFRA' findings section and virulent congressional rhetoric about "overturning" *Smith* did not indicate that Congress was intruding upon judicial territory with RFRA.[223]

213. *Id.* at *29-*30.
214. *Id.* at *30.
215. *Id.* at *31-*32.
216. *Id.* at *32.
217. *Id.* at *36.
218. *Id.* at *37-*42.
219. Scott v. Sandford, 60 U.S. (19 Howard) 393 (1857).
220. Brief of Respondent Flores at *40, *Boerne* (No. 95-2074), 1997 WL 10293.
221. *Id.* at *43.
222. *Id.*
223. *Id.* at *44-*45.

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Flores' fourth primary defense for RFRA was an answer to the City of Boerne's establishment of religion argument.[224] The Archbishop observed the surreal nature of the RFRA dispute by noting that the usual champions of strict church-state separation were amici aligned against the City. Flores interpreted that fact to indicate a total lack of merit to Boerne's *Lemon* test violation analysis.[225] Advancement of religious liberty is not advancement of religion, nor is it an endorsement of religion over non-religion.[226] Nor would RFRA require excessive entanglement by forcing any government entity to keep track of any religious practice, but rather functions as a statutory protection from the establishment of religion.[227]

The Archbishop's final major defense of RFRA was that the respondent's view of congressional enforcement power actually represents "part of the genius of separation of powers."[228] Allowing Congress power to statutorily remedy constitutional violations when the judiciary cannot or will not strengthens protection for liberty by removing its protection from monopoly protection by a single branch of government. Requiring cooperation of multiple branches to curtail liberty prevents any single branch from destroying liberty.[229] The Archbishop's brief concluded by mildly scolding the *Smith* Court for its majoritarian impulse.

The United States intervened on behalf of the Church to support RFRA as a valid exercise of congressional enforcement power. The U.S. advanced four primary defenses of the statute. The Government's first argument was that RFRA was fully within delegated congressional authority under Section 5 of the Fourteenth Amendment.[230] Sensing potential danger to key voting rights precedents, the Government contended that the Court should not reconsider *Morgan*.[231] Responding to the City of Boerne's objection to reading *Morgan* as authority for the substantive power theory, the Government reminded the Court that the potentially troublesome language was only in a footnote and was not essential to the decision.[232] Furthermore, RFRA did not specifically conflict by design with any particular state or local law. The U.S. also urged the Court to reject any challenge to RFRA on the basis that layered judicial

224. *Id.* at *45-*48. The City's argument is summarized at *supra* notes 154-90.

225. Brief of Respondent Flores at *45-*46, *Boerne* (No. 95-2074), 1997 WL 10293. Flores noted that the Americans United for Separation of Church and State, the American Civil Liberties Union, People for the American Way, the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League signed onto the Coalition for Free Exercise of Religion's brief in support of the Respondents. *Id.* at *46 n.15.

226. *Id.* at *46-*47.

227. *Id.* at *48.

228. *Id.*

229. *Id.* at *48-*49.

230. Brief for the United States at *9, *Boerne* (No. 95-2074), 1997 WL 13201.

231. *Id.*

232. *Id.* at *11; *see supra* note 177 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)).

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and legislative protections for free exercise violated the Constitution.[233] The Government claimed that the Fourteenth Amendment's legislative history and construction supported the layered view.[234]

The Government continued its Section 5 analysis by asserting that RFRA is "appropriate" enforcement legislation.[235] The U.S. argued that RFRA statutorily enforced both the Due Process and Equal Protection Clauses,[236] and that the law was plainly adapted to enforce the Fourteenth Amendment's Free Exercise guarantee, as an incorporated component of "liberty" after *Cantwell v. Connecticut*.[237] RFRA deterred governmental free exercise infringements through ostensibly neutral actions,[238] protected minority faiths,[239] and expanded protection beyond the constitutional minimum to limit substantial burdens which, by effect, obstruct religious practices.[240]

The Government's second primary defense of RFRA addressed the separation of powers issue. Denying the City's judicial infringement theory, the U.S. agreed with the Archbishop that RFRA created only a distinct statutory right.[241] The Government further maintained that separation of powers actually permits Congress to statutorily reimpose a level of scrutiny greater than the constitutional baseline.[242]

The Government's final two arguments responded to specific Boerne attacks. The U.S. disputed Boerne's friendless Establishment Clause argument, urging the Court to reject the City's general endorsement theory.[243] Attempting to avoid a result similar to its recent defeat in *United States v. Lopez*,[244] the Government vigorously defended RFRA as consistent with federalism.[245] First, the U.S. observed that RFRA was actually more responsive to federalism principles than previously upheld legislation enacted under Section 5.[246] The Government reasoned that the failure of the

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233. Brief for the United States at *11-*17, *Boerne* (No. 95-2074), 1997 WL 13201.

234. *Id.*

235. *Id.* at *17-*35.

236. *Id.* at *18-*25.

237. *Id.* at *26-*28; *see* Cantwell v. Connecticut 310 U.S. 296, 303 (1940) (incorporation against the states).

238. Brief for the United States at *28, *Boerne* (No. 95-2074), 1997 WL 13201.

239. *Id.* at *29 (citing congressional testimony about Smith's impact on minority religious groups including: Amish, the Hmongs' exercise of animism, Jews, Mormons, Muslims, Native Americans, Quakers).

240. *Id.* at *32-*35.

241. *Id.* at *36.

242. *Id.* at *37-*40.

243. *Id.* at *40-*44.

244. 115 S. Ct. 1624 (1995) (striking down a federal "gun-free school zones" law as beyond congressional power under the Commerce Clause).

245. Brief for the United States at *44-*49, *Boerne* (No. 95-2074), 1997 WL 13201.

246. *Id.* at *44; *see also id.* at *46 n.49. ("RFRA's balancing test pales in comparison to the breadth and depth of intrusion on States' autonomy accomplished by the Voting Rights Act and Civil Rights Acts.")

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Constitution to specifically assign zoning and religious regulation to state governments means that RFRA implicated only general state power, which is completely subject to the Fourteenth Amendment's congressional enforcement power.[247] Consequently, the principles of federalism embodied in the Tenth Amendment do not protect state authority from RFRA because Congress acted within the scope of the Fourteenth Amendment. Citing several cases including *EEOC v. Wyoming*,[248] *Seminole Tribe v. Florida*,[249] and *Gregory v. Ashcroft*,[250] the Government distinguished a broad grant of enforcement power to Congress under the Fourteenth Amendment from the narrower delegation in the Commerce Clause.[251]

The U.S. continued its federalism argument by positing that RFRA functions only as a reasonable federal standard with only a limited effect on state power and preservative of each state's independent policy judgments.[252] Furthermore, RFRA could only be implicated when a state's exercise of power created a substantial burden on a claimant's free exercise rights, but the state could avoid granting an exception to a narrowly tailored law supporting a compelling interest.[253] The Government distinguished *New York v. United States*,[254] arguing that the waste disposal statute was unlike RFRA because it flowed from the more limited Commerce Clause and it directly required the states to enforce federal regulations. By comparison, RFRA only established federal norms similar to other regulatory statutes.[255] RFRA also applied equally to all levels and branches of government, unlike the statute in *New York v. United States*, protecting against power centralization and offloading of regulatory costs.[256] Finally, the U.S. concluded that: "'[T]he Constitution divides authority between federal and state governments for the protection of individuals.'"[257] The Government's argument implies that protecting federalism at the expense of religious liberty would be an exercise in empty formalism, contrary to the doctrine's raison d'etre.

Less than one month before oral arguments in *Boerne*, the Ninth Circuit ruled in *Mockaitis v. Harcleroad* that, under the Court's interpretation in

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247. *Id.* at *45.

248. 460 U.S. 226, 239-42, 243 n.18 (1983) ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers.").

249. 116 S. Ct. 1114, 1125 (1996).

250. 501 U.S. 452, 468 (1991) (arguing that federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments")

251. Brief for the United States at *45 n.46, *Boerne* (No. 95-2074), 1997 WL 13201.

252. *Id.* at *46.

253. *Id.*

254. 505 U.S. 144 (1992).

255. Brief for the United States at *47, *Boerne* (No. 95-2074), 1997 WL 13201 (comparing RFRA to Title VII, the Age Discrimination in Employment Act and the Voting Rights Acts).

256. *Id.* at *48-*49.

257. *Id.* at *49 (quoting New York v. United States, 505 U.S. at 181).

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Morgan, RFRA was a valid exercise of congressional enforcement power granted under Section 5 of the Fourteenth Amendment.[258] The City of Boerne filed a reply brief to, among other argument, dispute this holding.[259] The City began its response by asserting that RFRA redefines the meaning of the Free Exercise clause in violation of the separation of powers doctrine. Boerne observed that the separation of powers protects not only individual rights but also state power.[260] The statutory rights theories, whether layering or ratcheting greater protection onto the Free Exercise Clause requirement, were actually a thin veil for evasion of the Court's constitutional interpretation.[261] Boerne compared the limited anecdotal evidence compiled in the congressional hearings to judicial fact finding and argued that it was vastly out of proportion to RFRA's sweeping nature and was a further indicator of impermissible intent.[262] Furthermore RFRA failed to only restore the pre-Smith version of the *Sherbert-Yoder* test, but it vastly expanded mandatory strict scrutiny analysis to an extent greater than in any other First Amendment clause.[263]

The City then rebutted *Mockaitis'* and the Archbishop's Section 5 interpretations. Boerne claimed that the post hoc defense of RFRA as analogous to valid Equal Protection Clause enforcement statutes was a pretext because RFRA failed to outlaw discrimination against any suspect class, nor did RFRA even use similar statutory language.[264] RFRA also was not analogous to effects test-type anti-discrimination laws. Grouping all the Archbishop's examples of laws which dispensed with the necessity of finding overt discrimination, Boerne distinguished them, claiming that these law were within *Morgan*'s first holding that Congress can use its factfinding ability to discover and outlaw specific acts which ultimate lead to constitutional violations.[265] RFRA, in comparison, established only a judicially applied test, redefining not the means of constitutional protection, but the ends of such protection.[266] Boerne also rebutted the alarmist argument that overturning RFRA was tantamount to undermining all statutes relying on Section 5's delegation to Congress. Distinguishing narrow prophylactic statutes supported by specific discrimination findings from the broad scope of RFRA, the City reasoned that:

258. 104 F.3d 1522, 1529 (1997).
259. Reply Brief of Petitioner City of Boerne, *Boerne* (No. 95-2074), 1997 WL 53105.
260. *Id.* at *1.
261. *Id.* at *2.
262. *Id.* at *3 n.1.
263. *Id.* at *4-*5.
264. *Id.* at *5-*10.
265. *Id.* at *10-*13.
266. *Id.* at *11.

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> This Court's expansive reading of congressional power vis-a-vis the Equal Protection Clause should be the *zenith* of congressional authority, however, *not the springboard for ever-expansive federal power*. Thus, the Voting Rights Act and Title VII can stand as exercises of prophylactic power, but RFRA must fall as a statute that enforces no constitutional guarantees but rather attempts to recast such guarantees.[267]

The City then urged the Court to reject the apologists' view that Section 5 created congressional power to determine the Constitution's substantive scope.[268]

Attempting to breathe life into the Establishment Clause argument, Boerne responded that RFRA required government to investigate the theology and practices of every locally practiced religion, leading to unconstitutional entanglements.[269] Both to avoid RFRA litigation claims and to comply with the sweeping scope of RFRA as applied to all levels of government, local governments could not risk waiting for the natural emergence of RFRA claims, but must proactively determine which statutes, ordinances or policies might have an unlawful effect on religious practices. Waiting for claims to arise could cause a state actor to fall within Prevailing Party status under a federal attorney's fees statute, substantially raising the risk level for government challenges to violators of facially neutral laws.[270]

Finally, Boerne replied to the contradictory chorus of historical analysts fighting[271] over whether individual, court-ordered religious exemptions were originally intended by the First Amendment's drafters, suggesting that these histories were irrelevant to deciding RFRA's constitutionality.[272] The framers would not have considered *any* legislation concerning religion within the power of Congress. Boerne cited Federalist opposition to the Bill of Rights and noted Alexander Hamilton's reluctant acquiescence to drafting the First Amendment as support for their originalist position.[273]

B. Battle of the Amici

When the court considered *Smith*, only four interest groups filed amicus curiae briefs.[274] But when the court granted certiorari to *Boerne*, the interest

267. *Id.* at *14 (emphasis added).

268. *Id.* at *15-*16.

269. *Id.* at *17.

270. *Id.* (citing 42 U.S.C. § 1988(b) (1994)).

271. *Id.* at *17 (comparing McConnell, *Origins*, *supra* note 32, at 1420, to Hamburger, *supra* note 61, at 947-48).

272. *Id.* at *18-*19.

273. *Id.*

274. Beeson, *supra* note 63, at 1172. The briefs filed by the American Jewish Congress, the American Civil Liberties Union, and the Association on Indian Affairs argued the specific details of peyotism, seeking to prove that the burden on the Native American Church practice was not

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level soared. In addition to the briefs filed by the parties, twenty-five amici curiae briefs were filed.[275] The briefs represent an amazingly wide range of special interests concerned with RFRA's survival or demise. Several friends of the Court urged the Justices to view *Boerne* as an opportunity to discard *Smith*. Other amici urged various theories under which the Court could uphold RFRA's constitutionality. Many amici battled RFRA issues among themselves that were completely unrelated to *Boerne's* actual fact pattern. And a majority of the briefs made policy arguments about RFRA, realizing that the Court might search for a constitutional rationale only after determining a desired result.

The largest category of amici were religious interest groups. Predictably, all of these briefs supported Archbishop Flores. The unlikely and theologically diverse group of religious organizations, known formally as the Coalition for the Free Exercise of Religion, argued in defense of their legislative accomplishment.[276] The Coalition argued for an accommodationist

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outweighed by any compelling interest claimed by Oregon. The Council on Religious Freedom also filed a brief in the case. *Id.*

275. *See Boerne*, 117 S. Ct. at 2160. The author estimates the total number of pages in the 29 briefs filed, including the four briefs of the parties, at 585-600 pages. Interestingly, Justices O'Connor and Breyer wrote that the Court should direct the parties to brief whether *Smith* was correctly decided. *Id.* at 2176, 2185. A cynical view of this argument is that O'Connor and Breyer are somewhat disingenuous on the briefing issue given the enormous volume of scholarly commentary and amici addressing that specific issue. The Justices may be using the argument to further emphasize their criticism that the *Smith* Court decided the facially neutral law rule without briefs or argument on the issue. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571-72 (1993); *Boerne*, 117 S. Ct. at 2186.

276. *See* Brief Amicus Curiae of the Coalition for the Free Exercise of Religion in Support of Respondents, *Boerne* (No. 95-2074), 1997 WL 10286. The coalition listed 75 supporting organizations: Agudath Israel of America; Aleph Institute; American Association of Christian Schools; American Baptist Churches USA; American Civil Liberties Union; American Conference on Religious Movements; American Ethical Union; Washington Ethical Action Office; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church & State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian Life Commission, Southern Baptist Convention (Renamed Ethics and Religious Liberty Commission of the Southern Baptist Convention during the pendency of the case); Christian Science Committee on Publication;. Church of Jesus Christ of Latter-day Saints; Church of the Brethren; Church of Scientology International; Coalition for Christian Colleges and Universities; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Council on Spiritual Practices; Criminal Justice Policy Foundation; Episcopal Church; Evangelical Lutheran Church In America; Federation of Reconstructionist Congregations and Havurot; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, the Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; International Association of Jewish Lawyers and Jurists; International Institute for Religious Freedom; Japanese American Citizens League; Jewish Reconstructionist Federation; Justice

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position on the issue of whether RFRA violated the establishment clause.[277] They also recited the conventional defense of congressional power under Section 5 of the Fourteenth Amendment.[278] But the Coalition's separation of powers argument featured an analysis which did not become an issue in the final decision. Citing an 1872 case, *Ex Parte Klein*,[279] which held that Congress cannot impose a rule of decision on the courts, the Coalition distinguished RFRA, positing that *Klein* does not prohibit legislative standards. RFRA's application to all governmental actors, not just judges, transformed RFRA into a legislative standard,[280] not unlike Title VII.[281]

The National Jewish Commission on Law and Public Affairs (COLPA) argued in their brief that the First Amendment "impliedly" grants plenary power to Congress, based on the disjunctive structure of the religion clauses.[282] COLPA suggested that the verb "prohibiting" in the free exercise clause implies that Congress may enact laws which *protect* religious freedom.[283] Yet the brief candidly admits no direct authority exists for this interpretive innovation.[284]

Other briefs in the religious amici category were filed by groups wanting to remind the Court of particularized free exercise issues. The Mormon Church's brief recounted the cult's history of persecution before the Fourteenth Amendment, much of which resulted from majoritarian prejudice in applying

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Fellowship Liberty Counsel; Mennonite Central Committee U.S.; Muslim Prison Foundation; Mystic Temple of Light, Inc.; National Association of Evangelicals; National Campaign for a Peace Tax Fund; National Committee for Public Education and Religious Liberty; National Council of Churches of Christ in the USA; National Council of Jewish Women; National Federation of Temple Sisterhoods; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; Native American Rights Fund; North American Council for Muslim Women; People For the American Way Action Fund; Peyote Way Church of God; Presbyterian Church (USA), Washington Office; Rabbinical Council of America; Sacred Sites Inter-faith Alliance; Soka-Gakkai International-USA; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church & Society; United Synagogue of Conservative Judaism.

277. *Id.* at *3-*13.

278. *Id.* at *13-*24.

279. 13 Wall. 128 (1872). Klein was the basis for a lower court ruling against RFRA. *See* Keeler v. Mayor & City of Cumberland, 928 F. Supp 591 (D. Md. 1996).

280. Brief Amicus Curiae of the Coalition for the Free Exercise of Religion in Support of Respondents at *26-*27, *Boerne* (No. 95-2074), 1997 WL 10286.

281. 42 U.S.C. § 2000e-2 (1994).

282. Brief of the National Jewish Commission on Law and Public Affairs, *Boerne* (No. 95-2074), 1997 WL 9092.

283. *Id.* at *7-*8.

284. *Id.* at *8. COLPA advocated an analogous interpretation from Congress' power to set writ of habeas corpus standards, recognized by Justice Story in *Prigg v. Pennsylvania*, 16 Pet. (41 U.S.) 539, 619 (1842) (inferring power from U.S. CONST. art. I, § 9).

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superficially neutral laws.[285] The Mormons also suggested that Congress has authority to correct a "growing secularist bias that distorts governmental neutrality."[286] The National Committee for Amish Religious Freedom advocated a return to *Wisconsin v. Yoder*, focusing on the importance of *Yoder* to Amish education and as underlying the development of RFRA's compelling interest test.[287]

Other religious interests filed separate briefs as well. Two religious liberty legal defense groups filed amicus briefs analyzing different facets of the dispute. The American Center for Law and Justice brief focused on the Establishment Clause issue.[288] The Rutherford Institute, however, bypassed defending RFRA, directly asking the Court to reconsider *Smith*.[289] Professor McConnell's historical research on original intent and early interpretations of both the Free Exercise Clause and the Fourteenth Amendment was recycled into an amicus brief written for a temporary alliance that linked modern branches of some Christian sects formally separated since the Schism of 1054 and the Diet of Worms.[290] A brief filed by the Knights of Columbus provided additional Catholic support for Archbishop Flores, arguing that RFRA was a permissible accommodation of religious exercise that legislatively grants protection greater than *Smith*'s minimum threshold.[291]

A second category of amici were groups interested in the land use implications of *Boerne*. Supporting the City's position, a group including the National Alliance of Preservation Commissions submitted a brief arguing that RFRA would likely inhibit efforts to preserve historic churches.[292] The National Trust For Historic Preservation's brief supporting the City offered the Court a tactical escape from the constitutional question. The National Trust suggested that the Court ought to determine whether RFRA was even triggered before proceeding to the statute's constitutionality.[293] The National

285. Brief of the Church of Jesus Christ of Latter-Day Saints, *Boerne* (No. 95-2074), 1997 WL 10290; *see supra* notes 34-46 (discussion of Mormon history).

286. Brief of the Church of Jesus Christ of Latter-Day Saints at *21-*28.

287. Brief of the National Committee for Amish Religious Freedom, *Boerne* (No. 95-2074), 1996 WL 744850. The Committee noted, however, that none of its members are actually Amish. *Id.* at *1.

288. Brief for Amicus Curiae American Center for Law and Justice, *Boerne* (No. 95-2074), 1997 WL 7579.

289. Brief of Amicus Curiae of the Rutherford Institute, *Boerne* (No. 95-2074), 1997 WL 79286.

290. Brief for the United States Catholic Conference, The Evangelical Lutheran Church in America, The Orthodox Church in America, and The Evangelical Covenant Church, *Boerne* (No. 95-2074), 1997 WL 9100.

291. Brief of the Knights of Columbus, *Boerne* (No. 95-2074), 1997 WL 10270.

292. Brief of the San Antonio Conservation Society, The Municipal Art Society and the National Alliance of Preservation Commissions, *Boerne* (No. 95-2074), 1996 WL 689741 (following the conventional anti-RFRA analysis on federalism, the Fourteenth Amendment and *Morgan*).

293. Brief of the National Trust For Historic Preservation at *8, *Boerne* (No. 95-2074), 1996

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Trust then encouraged the Court to find that denial of a demolition permit was not a substantial burden on the Church's free exercise right because it did not punish or coerce conduct.[294] Supporting the Archbishop, a diverse group of activist organizations collectively known as the Defenders of Property Rights[295] urged the Court to employ the property rights nexus analysis announced *Nollan v. California Coastal Commission*[296] instead of RFRA's higher compelling interest standard.[297] The Defenders' brief also contended that historic preservation was not a compelling state interest and that banning demolition was not the least restrictive means of achieving preservation.[298]

A third category of amici fought over whether the Court ought to revisit *Morgan*. The Clarendon Foundation submitted a brief on the side of the City[299] but advocated a far more radical solution to Justice Brennan's broad musings on Section 5.[300] Clarendon posited that *Morgan* is inconsistent with both the history and the text of the Fourteenth Amendment and ripe for overruling.[301] The NAACP Legal Defense and Educational Fund responded by filing a brief defending both RFRA and *Morgan*.[302] The NAACP attacked the "overturn *Morgan*" idea as a drastic, unwarranted solution which could limit congressional attempts to protect basic civil rights and pled with the Court that *Morgan* "ought not lightly be scuttled."[303] The Becket Fund for

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WL 686194.

294. *Id.* at *11-*20.

295. Brief of the Defenders of Property Rights, *Boerne* (No. 95-2074), 1997 WL 9079. The Defenders include Alabama Family Alliance, American Homeowners Foundation, American Land Rights Association, American Loggers Solidarity, Americans for Tax Reform, Citizens Against Repressive Zoning, Citizens for Constitutional Property Rights, Inc., Citizens for Private Property Rights, Inc., Committee for a Constructive Tomorrow, Conservative Caucus, Inc., Davis Mountains Trans-Pecos Heritage Association, Environmental Conservation Organization, Frontiers of Freedom Institute, the Heartland Institute, Hill Country Heritage Association, Hill Country Landowners' Coalition, Independence Institute, Individual Rights Foundation, Land Rights Foundation, Maine Conservation Rights Institute, National Center for Public Policy Analysis, National Center for Public Policy Research, New Hampshire Landowners Alliance, Northwest Legal Foundation, Pennsylvania Landowners' Association, People for the West! Accord Chapter, Putting People First, Stop Taking Our Property, Take Back Arkansas, Inc., Texas Public Policy Foundation, Trans Texas Heritage Association, and United States Business and Industrial Council.

296. 483 U.S. 825 (1987) (holding that to survive Fifth Amendment taking analysis, an ordinance which affects private property must substantially advance a legitimate governmental purpose, and there must be a reasonable nexus between the benefit and the burden on the property); *see* REYNOLDS, *supra* note 28, § 125, at 97-98 (Supp. 1996) (bibliography on *Nollan*).

297. Brief of the Defenders of Property Rights at *14-*18, *Boerne* (No. 95-2074), 1997 WL 9079.

298. *Id.* at *23-*28.

299. Brief of the Clarendon Foundation, *Boerne* (No. 95-2074), 1996 WL 686217.

300. Discussed *supra* notes 177-78.

301. Brief of the Clarendon Foundation at *5-*20, *Boerne* (No. 95-2074), 1996 WL 686217.

302. Brief of the NAACP Legal Defense and Educational Fund, *Boerne* (No. 95-2074), 1997 WL 9083.

303. *Id.* at *2.

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Religious Liberty filed a brief specifically and expressly to rebut Clarendon's historical arguments. Becket claimed that the original understanding of Section 5 was at a minimum as broad as Brennan's formulation in *Morgan*.[304]

A collateral skirmish over RFRA's impact on prisoners' rights litigation concerned various amici in a fourth category of briefs submitted to the Court. Twelve states and three territories joined with Ohio to inform the Court of RFRA-induced hardships in prison operations, as well as in education, criminal law enforcement and other traditional state expressions of the police power.[305] Although arguing a conventional narrow-scope Section 5 theory, the Thirteen States' brief warned the Court that upholding RFRA would undermine federalism by vesting unlimited power in the federal government.[306] The Thirteen States analysis preserved *Morgan*, limiting it to a prohibition of specific laws used in the past to violate the Fourteenth Amendment.[307] The United States directly responded to several factual assertions made by the Thirteen States. The U.S. replied that Congress had extensively debated the prisoner religious claims issue and intended for the courts to continue reasonably deferring to state and local prison policies.[308] Challenging the states' claims on the adverse effects of RFRA, the Government noted that the states lost only three of eighty-five RFRA prison cases that had gone to final judgment.[309] The Government also argued that the increase in prisoner litigation was not unique to RFRA because the trend actually started after *Smith* and most prisoner claims have multiple bases, including RFRA[310] Finally, the Government noted that Congress had recently passed legislation to curb frivolous prisoner lawsuits.[311]

Three other amici opposed the Thirteen States' conclusions about RFRA. Four northeastern states filed a brief, arguing that RFRA, if properly interpreted, has not and will not impair prison administration, education or public safety.[312] A group of Family Policy Councils claimed in their brief

304. Brief of the Becket Fund for Religious Liberty, *Boerne* (No. 95-2074), 1997 WL 9090.

305. Brief for [Thirteen] Amici States in Support of Petitioner at *1-*7, *Boerne* (No. 95-2074), 1996 WL 695519. Ohio State Solicitor Jeffrey S. Sutton also appeared at oral argument in support of Petitioner. Transcript of Oral Argument at *20-*33, *Boerne* (No. 95-2074), 1997 WL 87109. The alleged explosion in prisoner claims is discussed *supra* notes 131-34.

306. Brief for [Thirteen] Amici States in Support of Petitioner at *26-*29, *Boerne* (No. 95-2074), 1996 WL 695519.

307. *Id.* at *7-*8.

308. Brief for the United States at *47 n.50, *Boerne* (No. 95-2074), 1997 WL 13201.

309. *Id.* (citing a Westlaw survey performed in preparation of the U.S. brief).

310. *Id.* The brief also noted that "[p]risoner religious exercise suits were less than 1 percent of all prisoner civil rights cases in Ohio when RFRA's higher standard of review was in force." *Id.* (citation omitted).

311. *Id.* (citing the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, § 803(d), 110 Stat. 1321-66, 1321-71 (1996) (codified at 42 U.S.C. 1997e (Supp. II 1996)).

312. Brief of Four States in Support of Respondent at *6-*24, *Boerne* (No. 95-2074), 1997

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that the Thirteen States had distorted RFRA case law to falsely claim intrusions into state authority on home and public education, as well as on traffic and hunting laws.[313] Prison Fellowship Ministries and the Aleph Institute (PFM-AI) filed a brief, supporting RFRA as actually beneficial to securing prisoner religious rights.[314] The PFM-AI brief attempted to convince the Court that prisoner religious free exercise helped rehabilitate inmates and reduce recidivism.[315] Perhaps to distract or placate the Court from RFRA's incendiary, anti-*Smith* legislative history, PFM-AI creatively proposed that *RFRA complements Smith.* This theory divides the field between four situations in which *Smith* requires "exacting scrutiny,[316] and situations involving a facially neutral law of general applicability, which trigger RFRA's higher substantial burden threshold before applying strict scrutiny.[317] Notwithstanding that a literal reading of RFRA explicitly contradicts the PFM-AI complementary protection hypothesis[318] the distinction would only apply in unusual cases of less-than-substantial intentional or overt burdens on free exercise. Thus, PFM-AI's complementary protection analysis substantively added only alternative terminology to the various statutory right justifications for RFRA, but unsuccessfully attempted the affective purpose of providing institutional cover had the Court decided to back down from its duel with Congress.

Prodding the confrontation were some amici in the fifth group, which consisted of legislative and legal supporters of RFRA. A predominantly Democratic group of Senators and Congressmen filed an amicus brief which first sought to remind the Court of the post-*Smith* assault on the religious

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WL 10282. The four amici states were Connecticut, Maryland, Massachusetts, and New York. The Four States brief took a similar position to the U.S.: RFRA requires substantial deference to the states on matters of prison operation and recognize prison discipline, order and security as necessary and compelling state interests.

313. Brief of Family Councils, *Boerne* (No. 95-2074), 1997 WL 9086. The Family Councils were: Minnesota Family Council, Illinois Family Institute, Indiana Family Institute, Massachusetts Family Institute, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Oregon Center for Family Policy, Palmetto Family Council, Pennsylvania Family Institute, Rocky Mountain Family Council, Rocky Mountain Family Legal Foundation and Northstar Legal Center.

314. Brief of Prison Fellowship Ministries and the Aleph Institute, *Boerne* (No. 95-2074), 1997 WL 10274.

315. *Id.* at *10-*12.

316. I.e., Direct targeting, selective burdens, individual exemptions, and hybrid claims. *Id.* at *24-*25.

317. *Id.* at *26-*28.

318. *See supra* notes 84-89. In the findings section, Congress determines that, in general, government should not "substantially burden" religious practice. 42 U.S.C. § 2000bb(a)(3) (1994). In the purpose section, Congress intends for RFRA apply in "all cases," and does not expressly limit the statute to situations outside of Smith. *Id.* § 2000bb(b)(1). And in the operative clause, RFRA applies "even if" the law in question is a facially neutral governmental act of general applicability. *Id.* § 2000bb-1(a).

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liberty reported in the RFRA hearings, and to trumpet to the Court that *Congress acted to protect religious freedom*.[319] The Democratic brief argued the conventional pro-RFRA position on *Morgan*, and Section 5 power, clearly disclaiming that RFRA was anything other than a prophylactic statutory right supporting a fundamental freedom.[320] The Democrats pointed out that under *Lopez*, no findings were necessary but that both houses of Congress had compiled a persuasive record supporting the need for RFRA anyway.[321]

In contrast, the amicus brief submitted by a group of predominantly Republican members of Congress did not tweak the Court by reciting pages of post-*Smith* political grandstanding. The Republican brief sought to provide the Court with a narrow rationale for RFRA under Section 5 and to condemn Brennan's substantive theory in *Morgan*.[322] The Republicans argued that Section 5's "appropriate" legislation standard is rooted in the Justice Marshall's interpretation of the Necessary and Proper Clause in *McCulloch v.Maryland*[323] "Appropriate" legislation, under this theory, means "plainly adapted" to "legitimate constitutional ends," such that the laws "directly and necessary tend to produce the end in question." This formula allows Congress more latitude than merely defining "appropriate" as "indispensably necessary.[324] Yet the Fourteenth Amendment's Section 5 power is limited to enforcing guarantees found in the Constitution[325] RFRA, according to the Republican amici, fell within the narrow limits of Section 5 and was

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319. Brief of Senator Edward M. Kennedy et al., *Boerne* (No. 95-2074), 1997 WL 9077. The Democrats' brief recited some of the more dramatic and potentially inflammatory quotations from the hearings, including the following:

"Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. [I]n time, every religion in America will suffer." *Id.* at *3-*4 (quoting Reverend Oliver S. Thomas, S. REP. NO. 103-111, at 7 (1993)).

"[A] Minnesota trial judge . . . remark[ed] that churches have no more constitutional rights than adult movie theaters." *Id.* at *4 (quoting 139 CONG. REC. H2356, H2361 (daily ed. May 11, 1993)).

"The parade of horribles [has] already begun." *Id.* (quoting Rep. Charles Schumer, 139 CONG. REC. H2356, H2360 (daily ed. May 11, 1993)).

320. *Id.* at *8-*18.

321. *Id.* at *15 n.14.

322. Brief of Senator Orrin G. Hatch et al. at *1-*4, *Boerne* (No. 95-2074), 1997 WL 10291.

323. *Id.* at *11-*13 (examining McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). The *McCulloch* test is discussed at *supra* note 168-69. The Republicans note that following *McCulloch* the Necessary and Proper Clause was read more narrowly than in recent decisions. Brief of Senator Orrin G. Hatch et al. at *13 n.6, *Boerne* (No. 95-2074), 1997 WL 10291.

324. Brief of Senator Orrin G. Hatch et al. at *12-*13, *Boerne* (No. 95-2074), 1997 WL 10291.

325. *Id.* at *20-*24. The Republicans concluded that section 5 does not empower Congress to enforce rights not encompassed in the amendment, adopt remedies insufficiently related to a protected right, regulate solely private conduct, infringe on the Eleventh Amendment protection for state interests without a clearly expressed intent, or to otherwise violate the Constitution. *Id.* The amici specifically reject any penumbrae theories of implied rights as creations of the non-original twentieth-century creations. *Id.* at *20.

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appropriate enforcement legislation because of a need to provide for deterrence against superficially neutral laws[326] and for remediation without requiring claimants to establish a discriminatory motive for the state action in question.[327]

Two other amici in this group sought to preserve the federal role represented by RFRA but for different reasons. A group of Virginia legislators filed an amicus brief, recounting to the Court the Commonwealth's historic commitment to religious liberty and the central role of favorite son and founding father Thomas Jefferson as an advocate for religious freedom.[328] The Virginians then informed the Court that state legislatures are ill-suited for the task of carving out exceptions for minority religious practice. Accordingly, a federally imposed rule which returns exception determinations to the judiciary actually assists state legislatures.[329] The American Bar Association also filed an brief in support of the Archbishop's position. The ABA focused on the risk that finding RFRA unconstitutional might pose to the constitutional basis of other federal civil and individual rights statutes theoretically flowing from the font of Section 5.[330]

The sixth group of amici was a miscellaneous collection of special interest groups and a neutral individual. Supporting the City's position, the American Professional Society on the Abuse of Children (APSAC) and Children's Healthcare is a Legal Duty (CHILD) opposed RFRA as "ratcheting down" due process and equal protection by subordinating the interests of all persons, but most importantly children, to religious interests.[331] APSAC and CHILD also contended that RFRA's least restrictive means test undermines federalism by preventing states from adopting cumulative remedies, and it has skewed Establishment Clause jurisprudence.[332] The National Right to Work Defense Foundation, in contrast, supported the Archbishop but opposed retaining RFRA, advocating instead reversal of the "rootless" *Smith* decision.[333]

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326. *Id.* at *28.

327. *Id.* at *29-*30.

328. Brief of Members of the Virginia House of Delegates and Senate at *2-*3, *Boerne* (No. 95-2074), 1997 WL 10275.

329. *Id.* at *4-*5. Curiously, the brief fails to consider why the states must rely on Congress and could not themselves enact state RFRAs to obtain these advantages. The only state legislative remedy considered is drafting specific exceptions to each offending statute. *Id.*

330. Brief of the American Bar Association, *Boerne* (No. 95-2074), 1997 WL 9088.

331. Brief of APSAC at *2-*4, *Boerne* (No. 95-2074), 1996 WL 686052.

332. *Id.* at *5.

333. Brief of the National Right to Work Defense Foundation, *Boerne* (No. 95-2074), 1997 WL 9081. The NRTWDF brief contained two memorable passages. First, the amicus speculated that if Boerne's historic preservation ordinance were in effect, Moses would have been prevented from destroying the golden calf because of its "architectural, archeological, cultural, social, economic, ethnic and political history." *Id.* at *3. *See generally Exodus* 32. And in a passage sure to be universally hailed by politicians and panned by professors, the brief quoted a decision discussing an earlier rule as "consistently criticized by commentators," and then the NRTWDF

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Finally, a brief in support of neither party sought to inform the Court that, unlike freedom of religion, freedom of conscience is not protected by the First Amendment.[334] Not surprisingly, the Court did not apply this unusual amicus insight in resolving *Boerne.*

C. Justice Kennedy's Condemnation: RFRA Exceeds Congress' Fourteenth Amendment Powers

Writing for the Court, Justice Kennedy began the destruction of RFRA as applied to the states by candidly observing an obvious fact: Congress' intent was to, in effect, reverse the hated *Smith* precedent.[335] Kennedy indirectly responded to *Smith's* critics by briefly restating the Court's rationale, but avoided the substance of the protest about the decision's incorrect use of precedent. The majority opinion simply concluded that *Smith* was both methodologically sounder than the hybrid claim compelling interest balancing cases and within the majority of precedents.[336] Kennedy unequivocally implied that *Smith* should be viewed as settled law. As far as the *Boerne* Court was concerned, neutral, generally applicable laws apply to all persons, even if they incidently burden actions taken in the name of religion. The free exercise clause does not require states to demonstrate a compelling interest to justify such intrusions.[337] The optimal solution hoped for by many of the amici, correcting the Court's detour away from *Sherbert* and *Yoder*, would not be implemented by this Court.

The dissenters were virtually ignored by Kennedy's opinion. A single paragraph clinically reported the positions of the four who voted against the bright line test adopted in *Smith.*[338] Kennedy left the task of rebutting the deafening chorus of detractors to Scalia.

Telegraphing the *Boerne* Court's insecurity, if not outrage over the political firestorm surrounding *Smith,* the Court acknowledged RFRAs legislative history and quoted the legislative findings.[339] As the Court implied during the its showdown with Congress over the outer limits of the Commerce Clause in *Lopez,* the Court will look seriously at the legislative judgments when Congress acts near the boundaries of its delegated powers.[340] Kennedy

made the following application to Smith: "If the views of law professors and law students are relevant to whether a matter has been wrongly decided, how much more pertinent is the opinion of Congress, a co-equal branch of government!" Brief of the National Right to Work Defense Foundation at *5-*6.

334. Brief in Support of Neither Party, *Boerne* (No. 95-2074), 1996 WL 687873.

335. *Boerne,* 117 S. Ct. at 2160-61.

336. *Id.* at 2161.

337. *Id.*

338. *Id.* Justices Brennan, Marshall, and Blackmun dissented in Smith. Justice O'Connor concurred in result.

339. *Id.*

340. 115 S. Ct. 1624 (1995). However, the argument in Lopez was that Congress provided

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assessed that *Smith*'s congressional unpopularity was the motive behind RFRA.[341] Then Justice Kennedy quoted the findings section of RFRA, which states in capsule form Congress' retrospective free exercise clause interpretation., complete with its mildly inflammatory, blame-assessing language.[342] The section ends with a summary of the compelling interest test and RFRA's universal scope.[343]

The next step in Kennedy's dismantling was to test RFRA's Fourteenth Amendment roots against the separation of powers doctrine. Invoking the Court's most sacrosanct cases, *McCulloch v. Maryland*[344] and *Marbury v. Madison*,[345] the Court reminded Congress that its powers are enumerated and limited by a written constitution.[346] RFRA's authority over state governments hinged on finding it within the enforcement power in Section 5 of the Fourteenth Amendment. The Court recognized three of the respondent arguments: (1) Congress is only protecting an incorporated liberty interest, the free exercise of religion, at a higher level than *Smith* requires; (2) RFRA is within the Congress' preventative power under Section 5; (3) Section 5 is not limited to preventative power.[347]

The majority opinion then determined the scope of Section 5's positive legislative power. Admitting that prior cases described the power expansively,[348] the majority recalled several statutory examples of legislative enforcement where Congress prohibited constitutional conduct in a traditionally state-regulated area to deter or remedy discriminatory effects.[349] But quoting the opinion of Justice Black in *Oregon v. Mitchell*,[350] Kennedy pronounced that Section 5 does not grant unlimited power to Congress.[351] Based on both the structure and text of the Fourteenth Amendment, the majority unequivocally rejected the substantive power theory:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not

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no specific findings on the relationship between the statute and the supporting constitutional delegation.

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

342. *Id.* "[T]he Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ." 42 U.S.C. § 2000bb(a)(4) (1994).

343. *Boerne*, 117 S. Ct. at 2162.

344. 17 U.S. (4 Wheat.) 316 (1819).

345. 5 U.S. (1 Cranch) 137 (1803).

346. *Boerne*, 117 S. Ct. at 2162.

347. *Id.* at 2162-63.

348. *Id.* at 2163 (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)); *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879); Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

349. *Id.* (referencing literacy test bans, federal preclearance of voting plans, medical prescription of liquor during national prohibition).

350. 400 U.S. 112, 128 (1970).

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

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> enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[352]

Candidly, the majority admits that drawing a line between impermissible substantive interpretation and allowable preventative or remedial measures is difficult. But the Court is guided by congruence and proportionality between the means selected and ends sought by Congress.[353] The majority opinion undertook a lengthy review of the Fourteenth Amendment's legislative history, concluding that it supports the remedial theory, not the substantive theory, of Section 5.[354] Kennedy observed that the first committee draft of the Fourteenth Amendment, commonly referred to as the Bingham proposal, was criticized because it allowed Congress to legislate into traditional areas of state responsibility. The House ultimately tabled the Bingham proposal, effectively killing it.[355] A subsequent committee draft proposal contained a self-executing Section 1 and limited Congress to remedial enforcement in Section 5. After unrelated revisions, the second draft passed the House and Senate and was ratified by the states, becoming the Fourteenth Amendment.[356] A later debate on the Ku Klux Klan Act included statements which clearly indicate that Congress intended to reject the Bingham substantive power enforcement provisions.[357] Furthermore, the Majority observed that the Fourteenth Amendment as enacted maintains the traditional separation of powers between the courts and Congress. During the debate over the Bingham proposal, several legislators noted that the first draft diverged from the pattern of self-executing provisions in the Bill of Rights by giving Congress interpretive power, fundamentally altering the separation of powers. But the enacted version returned to the court-enforced, self-executing pattern, creating substantive rights against the states, and by implication restricting Congress from substantive interpretation.[358]

Kennedy turned next to case law supporting the Court's rejection of the substantive theory and to prove historic acceptance of the remedial and preventative theories.[359] The Court concluded that the early cases invalidating the Civil Rights Act of 1875 continue to stand for the integral

352. *Id.* at 2164 (quoting U.S. CONST. amend. XIV, § 5).
353. *Id.*
354. *Id.* at 2164-66.
355. *Id.* at 2164-65.
356. *Id.* at 2165.
357. *Id.* at 2166.
358. *Id.* at 2166.
359. *Id.* at 2166-68.

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restriction on congressional enforcement power under Section 5, despite being substantively overruled in the 1960s.[360] The Court in contemporary civil rights cases, including *Katzenback v. South Carolina*,[361] *Oregon v. Mitchell*,[362] *City of Rome v. United States*,[363] and *Katzenback v. Morgan*, has inquired as to whether the ends and means undertaken by Congress under the color of Section 5 were remedial.[364] Kennedy also recognized that the modern cases failed to support any substantive or non-remedial power theories. The majority opinion specifically rejected Justice Brennan's unprecedented substantive power speculations in *Morgan*, reasoning that interpreting the case as authority for congressional power to expand the Fourteenth Amendment's catalog of protected rights was "not a necessary interpretation . . . or even the best one."[365]

The Court concluded its rejection of the substantive power theory by reasoning that if Congress could expand the substantive scope of the Fourteenth Amendment, there would be no sustainable limit on congressional power.[366] At least seven justices clearly agreed with the conclusion that Congress lacks substantive power under Section 5. Of the majority, four justices joined the entire opinion.[367] Justice Scalia joined in all but Justice Kennedy's legislative history analysis. Justice O'Connor, in dissent, expressly adopted the majority's conclusions on the remedial scope of Section 5.[368] Only Justice Souter and Justice Breyer left room for doubt. Souter's dissent argued that certiorari was improvidently granted and did not reach the Section 5 question, but resumed his call from *Lukumi* for a briefing and rearguing of the *Smith* rule.[369]

Coyly, Breyer withheld joining O'Connor's endorsement of the majority's Section 5 holding, arguing that it was not necessary to reach the question and vaguely explaining that while he agreed with "some of the views expressed . . . I do not necessarily agree with all of them."[370] But at least for now, the mysterious thoughts of Breyer and Souter do not matter because Bingham and Brennan's nightmare of an unrestricted national legislature, ignoring structural constraints and "enforcing" national solutions to virtually all local problems,

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360. *Id.*

361. 383 U.S. 301 (1966) (upholding provisions of the Voting Rights Act of 1965).

362. 400 U.S. 112 (1970) (upholding a limited national ban on voter literacy tests and other specific limits affecting voter registration, but invalidating legislation lowering the minimum voting age to 18).

363. 446 U.S. 156 (1980) (upholding extension of preclearance for any change to voting procedures in areas with historic patterns of racial discrimination).

364. *Boerne*, 117 S. Ct. at 2166-27.

365. *Id.* at 2168.

366. *Id.*

367. *Id.* at 2159 (Rehnquist, Stevens, Thomas, Ginsburg, JJ.).

368. *Id.* at 2176.

369. *Id.* at 2186.

370. *Id.*

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was firmly reinterred into the graveyard of rejected radical reconstructionist ideas by the *Boerne* Court.

The Court's apparent consensus, however, unraveled a bit as it considered whether RFRA was valid Section 5 enforcement legislation. The majority curtly summarized pages of pro-RFRA rationale into three arguments for the statute as a remedial and preventative act: First, RFRA reasonably protects free exercise as defined by Smith; Second, RFRA prevents and remedies targeting of religious expression; Third, if Congress can prevent racial discrimination under the Equal Protection Clause, then it can also promote religious liberty.[371]

The majority initially restated that congruence between ends and means was a touchstone of remedial and preventative-remedial legislation.[372] But in comparing RFRA to the Voting Rights Act, the majority found a key distinction. Unlike with pervasive racist voting schemes in the 1960s, Congress found virtually no generally applicable laws that were enacted in recent decades because of religious prejudice. The anecdotal evidence harvested from the congressional hearings concerned incidental effects from the normal operation of from neutral laws. Congress focused on these incidental consequences during their fact finding, not on the motives, purposes or objects of the offending government acts.[373] Kennedy, however, admitted that deference did not turn on the legislative record, "but on due regard for the decision of the body constitutionally appointed to decide"[374]

RFRA failed, in the judgment of the majority, to merit deference because its means were out of proportion with the alleged remedial and preventative-remedial ends. Unlike other civil rights laws which were enacted to prevent or respond to demonstrated and likely unconstitutional state action, the Court determined RFRA was a perpetual, sweeping statute aimed at all laws and potentially affecting all governmental actions. Returning to the Voting Rights Act comparison, Kennedy noted that its proportionality was evidenced by its limited scope, geographic effects and duration.[375]

Additionally, the majority flunked RFRA because forcing states to shoulder the burdensome compelling interest balancing test when defending any law against a religious liberty claim lacked proportionality and congruence with any remedial or preventative-remedial objective. Kennedy noted that the compelling interest test was the most demanding test available in constitutional law. Furthermore, local governments would be hard pressed to

371. *Id.* at 2168.

372. *Id.* at 2169. The Court noted that preventative legislation can at times be acceptably remedial. *Id.* Preventative-remedial is a reasonable shorthand for this nexus.

373. *Id.*

374. *Id.* at 2170 (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (opinion of Harlan, J.)).

375. *Id.*

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prove they were using the least restrictive means to regulate incidentally burdened religious objectors. To determine whether the required substantial burden threshold was met, Kennedy reasoned that local governments would be unable to challenge the claimant under either a sincerity of belief or a centrality to belief analysis. Thus RFRA would topple scores of valid neutral laws without any assessment of discriminatory motive.[376] And this excessive cost would incur, according to Justice Kennedy, without the corresponding benefit of reducing unconstitutional discrimination. In practice, RFRA would fail to uncover and neutralize most actual patterns or practices of unconstitutional religious discrimination. Appraising the statutory substantial burden test against the orthodox discrimination theories of disparate treatment and disparate impact, the majority concluded that RFRA would not generally indicate when religious claimants were subject to greater burden than any average citizen comparably situated. Kennedy also noted that the least restrictive means test ratcheted scrutiny higher than the pre-*Smith* cases, indicating an inappropriate overbreadth for preventative-remedial legislation.[377]

Justice Kennedy concluded RFRA's demolition by summarizing the role of deference in context with the separation of powers. He posited that when Congress acts within its sphere of constitutionally delegated power, it has a duty to measure those act against the Constitution using its own institutional judgment.[378] Judicial deference, based on the presumption of validity, assumes Congress follows this duty to preserve the Constitution.[379] Invoking *Marbury v. Madison*, Kennedy admonished Congress that:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, 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, and contrary expectations must be disappointed.[380]

And the expectations of Archbishop Flores, the Congress, and a great portion

376. *Id.* at 2171.
377. *Id.*
378. *Id.*
379. *Id.* at 2171-72.
380. *Id.* at 2172 (citation omitted).

of the amici, apologists and commentators were thus disappointed as the majority finished leveling RFRA as applied to the states.

D. Stevens Concurring Opinion

But as in many constitutional engagements at the Supreme Court, the writer for the majority failed to have the last word. Justice Stevens independently opined in concurrence that RFRA was an unconstitutional establishment of religion. Reasoning that agnostics and atheists would be comparatively disadvantaged to the "federal statutory entitlement" RFRA granted to all churches as a "weapon," Stevens asserted that RFRA amounted to a governmental preference of religion over irreligion.[381] Exercising a Justice's prerogative to ignore contrary authority[382] and oversimplify issues, Stevens, of course, made no effort to refute the contrary arguments presented by the Archbishop,[383] the United States,[384] and a legion of amici.[385]

E. O'Connor's Attack on Smith and Scalia's Response

The serious controversy on the Court, however, surrounded the continuing feud over *Smith.* Justice O'Connor contended that the majority's condemnation of RFRA was based on the flawed assumption that *Smith* established the correct Free Exercise Clause baseline. She suggested that in order to determine whether RFRA was within congressional enforcement power, a proper free exercise rule must first be reestablished.[386] O'Connor repeated the call for briefing the issue in *Smith,* echoing a ubiquitous criticism among the decision's detractors on the Supreme Court.[387] Then O'Connor, armed with numerous cases, law review articles and historical materials, set out to attack *Smith*'s legitimacy.[388] Scalia's response was not far behind.[389]

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381. *Id.*

382. *See e.g.* Kiryas Joel v. Grumet, 512 U.S. 687, 705 (1994) (Souter, J.) ("[W]e do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.").

383. *See* Brief of Respondent Flores at *45-*48, *Boerne* (No. 95-2074), 1997 WL 10293.

384. *See* Brief for the United States at *40-*44, *Boerne* (No. 95-2074), 1997 WL 13201.

385. *See* Brief Amicus Curiae of the Coalition for the Free Exercise of Religion in Support of Respondents at *3-*12, *Boerne* (No. 95-2074), 1997 WL 10286; Brief for Amicus Curiae American Center for Law and Justice at *2-*15, *Boerne* (No. 95-2074), 1997 WL 7579; Brief of the Knights of Columbus at *5-*17, *Boerne* (No. 95-2074), 1997 WL 10270. Perhaps Justice Scalia's response to Justice Stevens in *Kiryas Joel v. Grumet,* 512 U.S. 687 (1994), might also apply in *Boerne* as well: "Justice Stevens' statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation and announces a positive hostility to religion." *Id.* at 749.

386. *Boerne,* 117 S. Ct. at 2176.

387. *Id.* at 2176-77.

388. *Id.* at 2177-85.

389. Actually, Scalia's vote with the majority caused his concurrence responding to

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O'Connor's thesis was that a proper interpretation of the Free Exercise Clause includes more that limiting it to a non-discrimination law aimed at prohibiting the singling out of religious observance, but rather it is an affirmative guarantee, insuring the right to exercise religious beliefs without impermissible government intrusions.[390] Under O'Connor's view, the Free Exercise Clause jurisprudence before *Smith* established a clear rule that substantial burdens on religious conduct must be justified by a compelling state interest and must also be narrowly tailored to achieve that compelling interest.[391] Rejection of this rule in *Smith*, according to O'Connor was not consistent with either history or precedent.[392]

O'Connor then turned to a review of four post-*Smith* lower court decisions, arguing that lower court application of the *Smith* rule damages religious liberty.[393] O'Connor concluded that lower courts "no longer find necessary a searching judicial inquiry" into reasonable accommodations after *Smith*.[394] O'Connor urged repairing the damage by revisiting *Smith*, distinguishing her call from her prior defense of stare decisis in *Planned Parenthood v. Casey*[395] by noting that *Smith* is a recent precedent which is inferior to prior case law and causes results virtually impossible to legislatively correct.[396]

O'Connor then renewed her historical attack on *Smith* by invoking, but not restating prior editions of the anti-*Smith* argument in *Smith*, *Lukumi*, and Professor McConnell's academic commentary.[397] Responding to these earlier

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O'Connor's dissent to be printed first in the *Supreme Court Reporter*, making it seem somewhat like a preemptive strike. *See id.* at 2173-76.

390. *Id.* at 2176.

391. *Id.* at 2177 (citing Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); United States v. Lee, 455 U.S. 252, 257-58 (1982); McDaniel v. Paty, 435 U.S. 618, 626-29 (1978); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Gillette v. United States, 401 U.S. 437, 462 (1971); Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

392. *Id.*

393. *Id.* (citing Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (allowing forced autopsy over Hmong native religious objections); Cornerstone Bible Church v. Hastings, 948 F.2d 464 (8th Cir. 1991) (holding denial of church in a commercial zone did not implicate Free Exercise Clause); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (finding no Free Exercise claim implicated against facially neutral landmark preservation law); State v. Herschberger, 462 N.W. 2d 393 (Minn. 1990) (denying a Free Exercise exemption for an Amish buggy to slow-moving vehicle marking)).

394. *Id.*

395. 505 U.S. 833, 855-56 (1992). In *Casey*, O'Connor posited four criteria to justify the Court in refusing to follow stare decisis: (1) The precedent in question lacks workability; (2) Reliance on the precedent is not such that a great disruption in the law would occur if the case is overruled; (3) Evolution of a legal principle weakens the doctrinal underpinnings of the precedent; (4) A change in factual assumptions undermines the precedent. O'Connor rejected overruling *Roe v. Wade*, 410 U.S. 113 (1973), in *Casey*, arguing that recent reliance on legal abortion weighed against overruling settled precedent. *Casey*, 505 U.S. at 855-56.

396. *Boerne*, 117 S. Ct. at 2177-78.

397. *Id.* at 2178 (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S.

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attacks, Scalia parenthetically quipped that his opinion in *Smith* "adequately answered" this tide of arguments against his use and interpretation of precedent. He summarily concluded that "[t]he historical evidence marshalled by the dissent cannot fairly be said to demonstrate the correctness of Smith; but it is more supportive of that conclusion than destructive of it."[398] O'Connor's latest salvo in the historical skirmish did not focus on Scalia's use of precedent, but rather on examining the early American traditions of free exercise. O'Connor advanced that the earlier historical evidence was more consistent with the pre-*Smith* cases than with *Smith*, casting doubt on the more recent holding.[399] Scalia replied to O'Connor's conclusion that the drafter's intent for the Free Exercise clause undermined the *Smith* rule, labeling it an "extravagant claim," and noting that both pro- and anti-*Smith* scholars failed to find conclusive evidence supporting O'Connor's view.[400]

O'Connor's quest for original intent began by observing that the original draft of the Constitution had no individual liberty safeguards because Federalists believed them to be superfluous and excessively limiting. She explained the pressure from Baptists, Antifederalists and Protestant dissenters led to the inclusion of the Bill of Rights by December 1791.[401] Although the

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872, 894-901 (1990) (O'Connor, J., concurring); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 570-71 (1993) (Souter, J., concurring); McConnell, *Free Exercise Revisionism*, *supra* note 32, at 1120-27).

398. *Id.* at 2175.

399. *Id.* at 2178.

400. *Id.* at 2172-73.

401. *Id.* at 2178. O'Connor erroneously implies that Baptists are Protestants. In the general sense that all non-Catholics may be viewed as protesting Papal authority, Justice O'Connor is correct. However Baptists are historically not Protestants. Protestants trace their linage to the Diet of Speyer in 1529. Baptists are more accurately classified as part of the Free Church Tradition, whose origins date from the rejection of Anglican Christianity (including Puritan and Separatist forms) and the rebaptism of several members by radical Anabaptist sects in Amsterdam in 1609. *See* ROBERT A. BAKER, A SUMMARY OF CHRISTIAN HISTORY 237-40 (1959); WILLIAM R. ESTEP, THE ANABAPTIST STORY 203-30 (1963). *But see Baptists*, *in* DICTIONARY OF WESTERN CHURCHES, *supra* note 34, at 72 (interpreting the historical evidence as indicating Baptists were a natural development of English Congregationalism). Adding to the confusion is that many scholars have not been precise in grouping or consistent in terminology. *See* TORSTEN BERGSTEN, BALTHASAR HUBMAIER: ANABAPTIST THEOLOGIAN AND MARTYR 16-18 (Irwin J. Barnes et al. trans., William R. Estep ed., 1978); DONALD F. DURNBAUGH, THE BELIEVER'S CHURCH: THE HISTORY AND CHARACTER OF RADICAL PROTESTANTISM 4-33 (1985) (arguing for an expansive view of the Free Church Tradition in part because the indeterminacy of the label and virtually universal acceptance of Anabaptist, Baptist and other radical positions on the separation of church and state). Among the critical distinctions between Protestantism and the Free Church Tradition are divergent positions on both the free exercise of religion and the establishment of state churches. Unique and essential to the Free Churches was advocacy of religious freedom and the separation of church and state. *See* ESTEP, *supra*, at 223-29 (recounting the transmission of Anabaptist views on religious freedom to early Baptists and their subsequent persecution and martyrdom at the hands of James I and other English Protestants before the interregnum and the Acts of Toleration). Even in colonial America, Protestant views often clashed with Free Church

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Congress nor the states held detailed debates on religious freedom or the Free Exercise Clause, O'Connor maintained that the historical record indicates a precise meaning and an intent to guarantee affirmative protection from government intrusion.[402] O'Connor recited detailed facts in four distinct categories for support of her affirmative guarantee hypothesis: colonial free exercise provisions, early state free exercise clauses, legislative accommodations, and the statements of early leaders. First, O'Connor argued that the history of dissenters' colonies,[403] and settlers' agreements[404] support the conclusions that several colonies acknowledged religious liberty as essential, and the government should only interfere with religious free exercise "only when necessary to protect the civil peace or to prevent 'licentiousness.'"[405] Second, O'Connor observed that free exercise clauses were written into every state constitution, except for Connecticut's, by 1789.[406] She quoted the constitutional provisions from four states[407] and the Northwest Territory Ordinance of 1787, concluding that specific exclusions for breaches of the peace and licentiousness would be irrelevant if the drafters did not intend accommodation.[408] O'Connor also contended that Virginia's rejection of toleration and rights language as boundary concepts in favor of an open freedom of conscience formulation implied that the drafters assumed a middle ground position, balancing the individual's religious free exercise liberty against the State's interest.[409] Third, O'Connor noted that although the early United States produced few religious liberty conflicts, due in part to a less intrusive government and religious homogeneity, government accommodated objectors whenever possible. Citing a number of legislative allowances, O'Connor inferred that the Court should reasonably presume that the drafters and ratifiers assumed that the courts would interpret the Free Exercise Clause to similarly protect religious liberty.[410] Fourth, O'Connor quoted various statements of James Madison, Thomas Jefferson, George Washington, Oliver Ellsworth, Isaac Backus and the Continental Congress to support her original understanding argument.[411] She summarized that these

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expressionism. For example, between 1768 and 1777, thirty or more Baptist preachers were punished, either by incarceration or corporally, in Virginia at the behest of the established, Protestant Church of England. ROBERT A. BAKER, A BAPTIST SOURCE BOOK 33 (1966).

402. *Boerne*, 117 S. Ct. at 2178-79.

403. *Id.* at 2179-80 (referring to Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina).

404. *Id.* at 2180 (listing agreements in Carolina, New York, and New Jersey).

405. *Id.*

406. *Id.*

407. *Id.* (quoting N.Y. CONST. art. XXXVIII (1777); MD. CONST. DECLARATION OF HUMAN RIGHTS art. XXXIII (1776); N.H. CONST. art I, § 5 (1784); GA. CONST. art. LVI (1777)).

408. *Id.* at 2180-81.

409. *Id.* at 2181-82.

410. *Id.* at 2182-83.

411. *Id.* at 2183-85.

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four different forms of proof suggest that there is no "one tidy formula," but that accommodating conflicts with facially neutral, generally applicable laws would "give meaning to these ideas."[412]

Scalia grouped together O'Connor's first two categories of historical proof for his response. Initially, he examined the specific provisions quoted by O'Connor, observing that, despite various constructions and terminology, the provisions seemed to protect against only targeted or intentional religious discrimination.[413] Scalia contrasted facially neutral, generally applicable laws, arguing that they "would not constitute action taken 'for,' 'in respect of,' or 'on account of' one's religion, or 'discriminatory' action."[414] Then he responded that even granting O'Connor's interpretation of the breach of peace and licentiousness exclusions common to the early constitutions, the clauses represent generally applicable, facially neutral laws and are consistent with the *Smith* rule. Scalia's argument on the exclusions point featured a bit of creative proof-texting[415] to broaden the scope of exceptions. Scalia stretched the concept of *peace* by citing an eighteenth-century English decision, *Queen v. Lane,* for the proposition that "every breach of the law is a breach of the peace,"[416] and a nineteenth-century definition of peace as "public tranquility."[417] Scalia consigned his paltry analysis of *licentiousness* to a footnote, diluting its meaning to a mere redundancy with a truncated quote from his nineteenth-century dictionary.[418] Additionally, Scalia claimed that his interpretation of the exclusionary language was consistent with

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412. *Id.* at 2185.

413. *Id.* at 2173.

414. *Id.* (quoting early colonial and state free exercise provision language).

415. Proof-texting is a theological term of art for the rhetorical practice of citing to a specific, isolated passage, such as a verse in the Bible, as authority for the writer's proposition. As compared to footnoting, proof-texting is a mildly pejorative term when used by liberal and neo-orthodox theologians to describe the scholastic method of theological conservatives, who, because of their authoritative view of historic texts, legalistically cite to a text fragment as authority for virtually every proposition. The affective connotation of the term proof-texting is that the reciting scholar ought to be suspected of superficially, selectively or conveniently quoting his fragments of proof out of their original context, and thus extending their meaning beyond, if not completely outside the fragment's intended scope. Given appropriate philological care, however, proof-texting is not inherently misleading or facile, but tends to support conservative results. *See* BERNARD RAMM, PROTESTANT BIBLICAL INTERPRETATION 175-78 (1970). Legal arguments often resemble theological disputes, especially in the use of fragmentary support for often arguable positions. Therefore, proof-texting is a reasonably descriptive term in the legal context, especially to communicate skepticism about the accuracy of the citation as authority for the statement at issue.

416. *Boerne,* 117 S. Ct. at 2173 (quoting Queen v. Lane, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B. 1704)).

417. *Id.* at 2174 (citing 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 31 (1828)).

418. *Id.* at 2174 n.1 (quoting 2 WEBSTER, *supra* note 417, at 6). The concept of licentiousness is discussed *infra* at notes 482-91.

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contemporaneous political philosophy, which rationalized that freedom was limited by the law.[419] Finally, he concluded that these exclusions fail to support the compelling interest balancing test.[420]

Scalia discounted O'Connor's historic accommodation and early leaders' intent arguments as well. He concluded that the legislative allowances cited by O'Connor did not prove that the religious exemption concept was constitutionally mandated under the Free Exercise Clause. Furthermore, Scalia repeated *Smith*'s political process rationale, arguing that historic legislative accommodations stood just as well, if not better, for consigning the adjustment process to the political branches, instead of the courts.[421] The judicial accommodationist position is also undermined by the paucity of early cases. Only one case before 1850, according to Scalia, can be cited for O'Connor's position. That case, *People v. Phillips,* is a flawed precedent because it is only a New York City municipal court case, was decided by a non-lawyer mayor, and could have been resolved by invoking common law privilege rules instead of the Constitution.[422] Scalia countered with two early Pennsylvania cases in support of his conclusion that crafting religious exceptions to neutral, generally applicable laws ought to be left to the legislature.[423] Summarizing the overall effect of the early leaders' excerpted statements, Scalia reminded the Court that these quotations were not intended to describe what the Constitution required under the Free Exercise Clause.[424] Scalia specifically discounted O'Connor's James Madison quotations, observing that Madison failed to argue that the Virginia religious assessment bill violated the Virginia Declaration of Rights enacted eight years earlier, but rather relied on a legislative solution.[425] He argued that Thomas Jefferson's free exercise rhetoric should be contrasted against Jefferson's failure to advocate broad, affirmative religious accommodation.[426] Scalia dismissed George Washington's accommodationist remarks to Quakers as reflecting Washington's "wish" and "desire," but not belief about required constitutional protection.[427]

Yet the historical volleys of O'Connor and Scalia ultimately meant little to resolving the conflict at issue in *Boerne.* Much like the various amici

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419. *Boerne,* 117 S. Ct. at 2174.

420. *Id.*

421. *Id.*

422. *Id.* at 2175 (criticizing People v. Phillips (Ct. Gen. Sess., N.Y.C. 1813), *excerpted in Privileged Communications to Clergymen,* 1 CATH. LAWYER 199 (1955)).

423. *Id.* (citing Philips v. Gratz, 2 Pen. & W. 412 (Pa. 1831) (holding no continuance for litigant because the trial fell on his Sabbath day); Stansbury v. Marks, 2 Dall. 213 (Pa. 1793) (imposing a fine on witness who refused to be sworn on his Sabbath day)).

424. *Id.* at 2174.

425. *Id.*

426. *Id.* at 2175 (citing McConnell, *Origins, supra* note 32, at 1449-52).

427. *Id.*

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arguments offered to but not accepted by the Court, the quarrel over *Smith*'s historicity now has currency only to bloat the pages of scholarly journals with incessant proof-texting, bold extrapolating, and exegetical parsing of imprecise, equivocal, ancestral utterances. But the Court, as Justice Kennedy announced, has determined that *Smith* is the law. The Anti-*Smith* contingent failed, and will likely fail for the foreseeable future to marshal enough votes for reestablishing the *Sherbert-Yoder* trend toward judicial accommodation. However, the debate *will* rage on without the Court's official participation.

IV. Reactions and Analysis

A. Surveying the Wreckage: Commentary on Boerne

In the opinion of many analysts, the destruction of RFRA reduced the protection of religious minorities to rubble. Immediate reaction in the religious community was virtually unanimous in condemning *Boerne's* result. For example, Rabbi David Saperstein predicted that "Today's decision in [*Boerne*] — the most important church-state case ever to come before the Supreme Court — will go down in history with *Dred Scott* and *Korematsu*, among the worst mistakes this Court has ever made."[428] Southern Baptist ethicist Richard D. Land lamented "The Smith decision was the worst and most dismaying religious liberty decision handed down by the Supreme Court in my lifetime. [*Boerne*] would qualify for the dubious distinction of dethroning *Smith* as the worst religious liberty decision of the last fifty years."[429] The Rutherford Institute spokesperson Rita Woltz exclaimed that the Court "Bulldozed the last barrier of protection for religious Americans" by returning to the *Smith* rule which "emasculated the Free Exercise Clause."[430] "We are now on the verge of true religious apartheid in this country," Woltz warned.[431] Cathy Cleaver, Director of Legal Policy for the conservative Family Research Council fretted that "The Court is being hostile to religious freedom by ruling that the state can do whatever it wants, short of outlawing religion. [I]f [allowing government authorities to veto demolition and reconstruction of a church building] does not violate the Free Exercise Clause, nothing does."[432] The Baptist Joint Committee on Public Affairs reacted:

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428. *Supreme Court Deals Religious Liberty a Devastating Blow, Strikes Down RFRA*, Religious Action Center of Reform Judaism (visited Mar. 17, 1998) <http://www.ednet.com/RAC/news/062597.html> The RAC represents the Union of American Hebrew Congregations and the Central Conference of American Rabbis. A total of 1.5 million reform Jews are affiliated.

429. *Southern Baptist Agency Decries Supreme Court's Actions on RFRA*, press release, Ethics and Religious Liberty Commission of the Southern Baptist Convention (visited Mar. 17, 1998) <http://www.serve.com/thecaretaker/textversion/trfa.htm>

430. Rita Woltz, *The Rutherford Institute Says Supreme Court Decision Striking Down RFRA Bodes Ill for Religious Americans*, Press Release (visited Mar. 17, 1998) <http://www.serve.com/thecaretaker/textversion/trfa.htm>

431. *Id.*

432. *Supreme Court Restricts Congress From Protecting Free Exercise of Religion*, Press

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> "The least dangerous branch" of government has turned out to be the most dangerous branch for those who value religious freedom. [T]he Court, with a stroke of a pen, nullified a near unanimous act of Congress to protect our God-given religious liberty. In short, our "First Freedom" is not only no longer first, it is barely a freedom at all.[433]

Christian Legal Society Center for Law and Religious Freedom director Steven T. McFarland observed that "[t]he real loser today was our First Freedom. . . . Today's ruling threatens bedrock civil rights laws."[434]

However, all reaction was not unfavorable. For example, the American Family Association (AFA), a Mississippi-based conservative policy organization, bucked the negative tide, exclaiming that "[t]he Court's ruling is not a blow to religious liberty. . . . [I]t has reaffirmed the settled constitutional doctrine that it is the province of the judiciary to say what the law is."[435] The AFA Law Center's Senior Trial Counsel Steve Crampton commented that "RFRA was a classic case of the ends justifying the means. Congress in its zeal . . . steam rolled through the Constitution, obliterating the doctrines of separation of powers and federalism."[436] Commending the Court's effort to restore constitutional balance, Crampton concluded that *Boerne* was one of "those rare occasions were [the Court] got it right. We cannot allow our commitment to principled constitutional analysis to be overwhelmed by our frustration with the federal judiciary."[437] AFA Law Center Litigation Council Brian Fahling agreed, arguing that "religious liberty can never be said to be advanced when it is sought through the dismantling of our written constitution."[438]

Subsequent analysis was perhaps more measured and less quotable, but remained mostly critical of the decision. For example, Charles Colson,[439]

Release of the Family Research Council (visited Mar. 17, 1998) <http://www.abic.org/frc/press/062597.html>.

433. J. Brent Walker & Melissa Rogers, *Statement of Baptist Joint Committee on Public Affairs, City of Boerne v. Flores (long version)* (visited Mar. 3, 1998) <http://www.erols.com/bjcpa/issues/flolong.html>.

434. *City of Boerne v. Flores Case Information Page*, Christian Legal Society website (visited Mar. 17, 1998) <http://www.clsnet.com/flores>. The Christian Legal Society is an association of more than 4000 Christian attorneys and law students.

435. Brian Fahling, *Supreme Court Strikes Down the Religious Freedoms [sic] Restoration Act*, AFA Action Alert press release (visited Mar. 17, 1998) <http://www.serve.com/thecaretaker/textversion/trfa.htm>.

436. *Id.*

437. *Id.*

438. *Id.*

439. Colson, a Nixon Administration official convicted in the Watergate scandal, subsequently became an evangelical Christian, a vocal prison activist, and a prolific Christian writer and broadcaster. *See generally* LEN COLODNY & ROBERT GETTLIN, SILENT COUP: THE REMOVAL OF A PRESIDENT 102-06, 113, 130-34, 174-75, 180-201, 241-61, 281, 342, 375 (1991)

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criticizing Justice Scalia's "literalist" legal philosophy and Justice Kennedy's opposition to "transcendent morality," placed *Boerne* among a group decisions trending toward secular majoritarianism and the erasure of moral law as a source of legislative policy:[440]

> These cases represent a striking departure from the entire history of Western civilization. Since the ancient Greeks, the law was understood to be a codification of a people's moral tradition, resting ultimately on divine law. English common law, which we inherited, reflects that belief. . . . But this great tradition is now being abandoned. And Christians are caught in the jaws of a vice: On one side, conservatives like Justice Scalia say the courts may not consult morality, that it's up to the people to encode morality into the law through legislation. Yet in *Boerne*, the Court denied the people's right to do just that. On the other side, liberals like Justice Kennedy say Christian morality may *not* be encoded into law because it is nothing but prejudice . . . .[441]

Colson announced that he and several other Evangelical, Orthodox, and Roman Catholic leaders had signed a manifesto opposing the Court's hostility to religious values.[442]

A Post-*Boerne* congressional hearing also resumed a tone similar to pre-RFRA inquiries. For example, Rabbi Chaim Baruch Rubin attacked Los Angeles zoning laws:

> What do I tell an 84-year old survivor of Auschwitz, a man who used to risk his life in the concentration camp whenever possible to gather together a minyan to pray? Do I tell him because he is old and weak and an amputee, that he must walk at least a mile

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(chronicling Colson's role in Watergate); *Charles Colson: Thank God for Watergate*, Life Story Foundation website (audio file) (visited Apr. 14, 1998) <http://www.lifestory.org/leaders.html#colson>; Charles Colson, *Chuck Colson's Home Page*, Prison Fellowship Ministries website (visited Apr. 14, 1998) <http://www.pfm.org/pfw/ccolson.html>; John Divito, *A Christian Perspective in a Post-Christian World: Review of Burden of Truth by Charles Colson*, World Wide Web Book Review website (visited Apr. 14, 1998) < http://www.webbookreview.com/Colson1.Htm>.

440. Charles Colson & Nancy Pearcy, *How Courts Censor Morality*, CHRISTIANITY TODAY ONLINE EDITION, Nov. 17, 1997 (visited Mar. 17, 1998) <http://www.christianity.net/ct/7TD/7TD120.html> (commenting on Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Boerne v. City of Flores, 117 S. Ct. 2157 (1997); Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down statute requiring balanced teaching of creation and evolution theories in public school); Lee v. Weisman, 505 U.S. 577 (1992) (Kennedy, J.) (holding public schools cannot obtain or instruct clergy for graduation ceremony prayers); Romer v. Evans, 517 U.S. 620 (1996) (finding law barring special civil rights based on sexual preference unconstitutional discrimination against homosexuals)).

441. *Id.* at 3.

442. *Id.*

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and a half to pray because to quietly gather down the block is illegal?[443]

But the hearing also revealed developing fissures in the RFRA's coalition. Alarmed at the testimony of landlord Evelyn Smith, plaintiff in *Smith v. Commission of Fair Employment and Housing*,[444] Americans United for Separation of Church and State complained that "[w]e are perplexed as to why she would be called to testify. . . . There is no reason to believe that she or others similarly situated would or should prevail under a new version of RFRA."[445]

Early scholarly reaction mostly reflected positions taken by the same writers in the briefs they submitted to the *Boerne* Court. Michael McConnell criticized *Boerne* more narrowly than the religious activists, arguing only against the Court's limitation of congressional power under Section 5.[446] Under McConnell's proposed solution, the Court should have recognized an expanded interpretive role for Congress that would allow legislative creation of a statutory Free Exercise right.[447] John Whitehead insisted that neither *Smith* nor RFRA was the answer to protecting minority faiths.[448] Whitehead's *Smith* attack followed the conventional majoritarian risk analysis. But he also suspected putting the protection of a constitutional right in the hands of the legislature, where politicization and legal instability will produce more frequent showdowns between the Court and Congress, as well as speedier changes in constitutional interpretation, and fewer individual freedoms.[449]

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443. Kenny Bird, *Citizens Cite Abuses in Wake of RFRA Ruling*, BAPTIST STANDARD, Mar. 18, 1998, at 8.

444. 913 P.2d 909 (Cal.), *cert. denied*, 111 S. Ct. 2531 (1996) (reasoning that a landlord can avoid the renting to unmarried, cohabitating persons, which may violate the landlord's moral convictions as facilitating or condoning fornication, only by avoiding the rental business entirely). *See* discussion *supra* note 142.

445. *Id.* It is unclear whether Americans United was concerned that hearing Smith's testimony wasted valuable congressional resources, or that it might become a part of the legislative record for "RFRA II," or that it was so dangerous to their Establishment Clause interests that Smith should be denied the forum. An additional pressure on the coalition has been Rep. Ernest J. Istook's (R.-Okla.) Religious Freedom Amendment. The RFA would amend the Constitution to allow public prayer and recognition of religious beliefs, heritage or traditions on public property. The RFA also prohibits the United States or any state from requiring any person to join in any religious activity, or to prescribe school prayers, and to discriminate against religion or deny equal access to a benefit because of religion. RFA has split the RFRA coalition with approximately one-third favoring RFA and two-thirds opposing it. *See e.g.*, Kenny Bird, *Panel Oks Religious Freedom Amendment*, BAPTIST STANDARD, Mar. 18, 1998, at 1, 8.

446. McConnell, *Institutions*, *supra* note 9, at 194.

447. *Id.* at 194-95.

448. John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between Flores and Smith*, 37 WASHBURN L.J. 105 (1997) [hereinafter Whitehead, *Betwixt*].

449. *Id.*

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Jed Rubenfeld, who actually may not have been recycling a *Boerne* Court-rejected argument into a law review article,[450] reasoned that RFRA indeed lacked constitutionality, but because of First Amendment antidisestablishmentarianism, and not the reasons offered by the Court.[451] Armed with his excerpted version of the First Amendment framers' debates and definitions for the Establishment Clause term "respecting," Rubenfeld concluded that the First Amendment expressly prohibits Congress from making a law interfering in any way with state regulation of religion.[452] RFRA was a disestablishment of religion because it attempted to expunge state partiality toward religious majorities.[453] Arguing that antidisestablishmentarianism is essential to separation of church and state by requiring congressional neutrality, Rubenfeld suggests that although the Fourteenth Amendment altered federalism and selectively incorporated the Bill of Rights, it did not alter or repeal the Establishment Clause.[454] Now that both the states and the courts have rejected state religious establishments, the remaining function of Establishment Clause antidisestablishmentarianism is to "[prevent] Congress from supervising the nation's religious life."[455]

B. Does RFRA Really Violate the Fourteenth Amendment?

At one level of abstraction, the battle over *Boerne* resembles the sort of hypothetical a professor might use to illustrate Hegel's dialectical reasoning. A synthesis of the adversarial positions perhaps represents the most desirable and constitutionally reliable outcome. But politicized, emotionally charged showdowns between branches of government often produce extreme, zero-sum victories. Certainly the pro-RFRA supporters as well as the fans of Justice Brennan's substantively empowered Section 5 theory view their blowout loss in *Boerne* as a disastrous example of Supreme Court extremism. Many see a return to *Smith* as a return to chaotic and indifferent suppression of religious liberty. But are there valuable nuggets among the rubble which point to a manageable solution to the perceived crisis in *Smith*?

One nugget is that the Supreme Court overwhelmingly rejected a functionally substantive reading of the Fourteenth Amendment's congressional enforcement power. The cascade of congressional and interest group policy arguments attempted to distract the Court from RFRA's grave peril to

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450. A word search of the briefs in *Boerne* failed to produce any references to Rubenfeld or to antidisestablishmentarianism. Rubenfeld's argument may, in effect, be a more sophisticated academic version of Justice Stevens neutrality violation position. Compare with *supra* notes 381-85.

451. Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997).

452. *Id.* at 2351-57.

453. *Id.* at 2358.

454. *Id.* at 2373-78.

455. *Id.* at 2383.

federalism and the separation of powers by focusing on desirable results and empty, rationalized distinctions instead of constitutional processes. But *Boerne* stands along with *Lopez* as judicial beacons, marking the boundary where popular, well-intentioned centralized solutions hazardously stray into the jurisdiction thoughtfully preserved for the people acting through the organized level of authority closest to home. The alternative would have been to stimulate ever-expanding federal power by granting Congress virtually unlimited ability to determine as "appropriate" the enforcement of whatever value they could latch to their own reading of the Constitution.

Professor McConnell disagrees. He implied that *Boerne* lacks legitimizing concordance with Fourteenth Amendment's original intent, so thus the case was wrongly decided.[456] Notwithstanding the considerable merit of McConnell's historical approach, the *Boerne* Court selected the approach to Section 5 which best preserves the traditional balance between the Congress, the Court and the states. The Court's interpretation preserves important civil rights cases, which allow Congress to strike preemptively against proven forms of discrimination, but restricts Congress from becoming a sitting constitutional convention with virtually unlimited power. The Court preserves this fragile balance by testing enforcement legislation for appropriateness.

McConnell has attacked the Court's standard for limiting "appropriate" enforcement under Section 5. He compared the congruence and proportionality standard to the heightened means-ends scrutiny in *Lopez*, and was surprised that no justice dissented on the Court's Section 5 holding which he believes "necessarily transfers essentially political judgments from the legislature to the courts."[457] Assuming McConnell's conclusion arguendo, the result of shifting political judgments is not reallocating decisional power from "the legislature to the courts" but from the Congress to the states. Nothing in *Smith* or *Boerne* prevents the states from readjusting the free exercise baseline beyond what the Court found constitutionally required. Ohio Solicitor Jeffery Sutton's oral argument in *Boerne* assumed that the states will act responsibly to protect religious minorities:

> [T]he unanimity behind RFRA strikes me as a wonderful opportunity from a federalist perspective. [I] suggest that there will be fifty-one RFRAs when all is said and done. The states aren't going to stand idle. My boss is not going to stand idle after the argument I'm making today, if it prevails, I promise you that. The states are — they're doing a great job when it comes to Free Exercise Clause issues, so . . . I don't think there should be a concern about underprotection.[458]

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456. McConnell, *Institutions*, *supra* note 9, at 195.

457. *Id.* at 166.

458. Transcript of Oral Argument at *25-*26, *Boerne* (No. 95-2074), 1997 WL 87109.

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Accordingly, the "mini-RFRA" option has been often discussed and is moving forward in several states.[459] While virtually all religious activists prefer a role for the judiciary in crafting religious exceptions, and many fear fragmented, uneven protection under the "mini-RFRA" approach, these result-oriented policy arguments should not alter the constitutional analysis of Section 5 power. The danger is that recognizing quasi-substantive power might minimize the effects of *Smith*, but it also would have opened the door for future congressional action in other areas without a unequivocal limit.

Section 5 limits congressional power to "appropriate legislation."[460] The plain meaning of this provision either invites judicial review, or is merely an aspirational statement meant to encourage a self-policing Congress from inappropriately enforcing Section 1.[461] Regardless of what might be inferred from the fragmentary statements of individual legislators about legislative intent, as a practical matter, Congress would be hard pressed to substantively review its own enforcement legislation for appropriateness. Section 5 establishes no unique structure to do so. Thus in-Congress review would ultimately rely on majority votes. Presumably the same Congress which would achieve a majority to pass enforcement legislation would vote that it is "appropriate." Thus if the statement was limited to congressional application, it foreshadows no real, independent scrutiny of appropriateness. But in order for a meaningfully answer to the "appropriateness" question, the courts must independently review enforcement legislation at a level of ends-means scrutiny greater than rationality. This is a manageable standard.

The *Boerne* Court's holding also recognizes that the political branch of government lacks the structural ability and institutional discipline to dispassionately interpret the Constitution. In contrast to the Court's core beliefs on who should have the final word about what the Constitution means, McConnell argued that of the three options for congressional power under Section 5, substantive, remedial and interpretive, the *Boerne* court mistakenly limited Congress to remedial power, conflicting with the legislative intent behind the Fourteenth Amendment.[462] Maintaining that the Court distorted

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459. *See e.g.* Whitehead, *Betwixt, supra* note 448, at 111 nn.21-28; Melissa Rogers, *Church-State Intersection: July 1997*, Baptist Joint Committee on Public Affairs website (visited Mar. 17, 1998) <http://www.erols.com/bjcpa./Legal%20/csijl97.html> [hereinafter Rogers, *Church-State Intersection*]; *Latest RFRA Efforts at the State Level*, Christian Legal Society website (visited Mar. 17, 1998) <http://www.clsnet.com/flores> (reporting that Connecticut and Rhode Island already have statutes and that action is pending or in the formulation stage in New York, Michigan, California, Ohio, Texas, Maryland, and Virginia).

460. U.S. CONST. amend. XIV, § 5.

461. Logically it could not have any other meaning. Only the three branches of federal government could be candidates for reviewing the appropriateness of enforcement legislation. Presumably it was not intended to inform the political judgment of the President, who is guaranteed an unfettered review of all congressional acts under Article One, Section Seven, Clause Three.

462. McConnell, *Institutions, supra* note 9, at 175-81.

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the legislative history,[463] and reasoning that the Republican-controlled, reconstruction-era Congress would not have entrusted exclusive protection for the newly recognized civil rights of African Americans to the Dred Scott Court,[464] McConnell rejected the Court's conclusion that Congress cannot independently define unconstitutional state acts. He posited that the Fourteenth Amendment expanded the power delegated to Congress, incorporating an independent interpretive role for the federal legislature.[465]

But at best, McConnell's conclusions about legislative intent are inconclusively supported by only the fragmentary statements of individual legislators. Furthermore, the historical record shows that the Reconstruction Congress was far from a self-restraining, dispassionate deliberative body concerned with protecting and preserving the Constitution. Our nation's first impeachment crisis was predicated in a face off between this same Congress and President Andrew Johnson over the scope of congressional power.[466] President Johnson fired Secretary of War Edward M. Stanton to provoke a confrontation over the Tenure of Office Act of 1867, which banned the President from dismissing officials without the consent of the Senate. In a political "showdown caused by emotion more than by practical consideration," the Senate failed by one vote to eject Johnson.[467] Professor Garraty concluded that "[h]ad he been forced from office on such flimsy grounds, the independence of the executive might have been permanently weakened [and] the legislative branch would have become supreme."[468] Thus, some in this self-aggrandizing group of legislators probably did likewise seek to circumvent the Supreme Court's functional jurisdiction. But their motives and lack of constitutional restraint undermine reliance upon their conclusions. Radical reconstruction of the Separation of Powers doctrine ought to rest on more than isolated sentiments of self-interested, vocal congressmen. For the expansive interpretive thesis to be true, the ratifying states would have had to knowingly and voluntarily acquiesced to yielding this expanded power to Congress. This evidence has yet to be produced. Finally, the Court correctly observed that throughout the post-reconstruction history of the reconstruction amendments, Congress has limited its "appropriate enforcement" actions to circumstances of specific, demonstrated threats to interests protected by the amendments.[469]

A modern "rediscovery" of this alleged, but unused congressional power to interpret the Constitution would produce results virtually impossible to

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463. *Id.* at 181.
464. *Id.* at 181-83.
465. *Id.* at 194.
466. *See* GARRATY, *supra* note 41, at 400-01.
467. *Id.*
468. *Id.* at 400.
469. *See supra* notes 359-65.

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restrain with any reasonable principle. Certainly, an examination of modern Fourteenth Amendment jurisprudence, with its focus on implied fundamental rights and substantive due process, powerfully suggests that the Court has found self-restraint difficult.[470] McConnell attempted to contain this mostly dormant, until recently unearthed, congressional power by excluding Congress from the seemingly boundless domain of substantive due process. He concluded that legislative intent limits independent congressional interpretations to express constitutional provisions, like the First Amendment.[471] The problem is that this merely substitutes an implied limitation of "appropriate" enforcement power for the Court's more traditional test. If Congress can interpret for itself the scope of the Fourteenth Amendment's protection as applied to expressed constitutional rights, it is only a small, uncontrolled, independent rationalization away from discovering it can protect penumbral rights ostensibly derived from combinations of expressed rights.

For example, Tepker suggested that the grand unifying solution to the *Smith* problem, as well as virtually all other issues surrounding the religion clauses, would be to discover a right to religious privacy.[472] He justified reading beyond the text by arguing in part:

> The words of the First Amendment were — and are — ambiguous. [A] simple, sensible interpretation of Congress' choice of language for the religion clauses emphasizes style, not substance. Congress approached the subject in a somewhat hasty and absent-minded manner. [T]o see the two clauses as separate, balanced, competing or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there . . . .[473]

So to appropriately enforce the founding fathers abstract, unrecorded conception of religious liberty, Tepker argued that the Court must go beyond the literal language of the religion clauses and into the uncontrolled morass of privacy. Pragmatically, Tepker perhaps wanted to incorporate free exercise cases into the court-fabricated general, implied right to privacy because of privacy's three decade-long winning streak in the high Court. But Tepker assumed that the courts, not Congress would be "appropriately" enforcing this implied fundamental right.

470. *See e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 261-65 (1990) (criticizing the implied fundamental right of privacy decisions flowing out of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 428 (1972), as being results-driven, rather than respectful of constitutional process).

471. McConnell, *Institutions*, *supra* note 9, at 184-85.

472. *See* Tepker, *Hallucinations*, *supra* note 32, at 44-54.

473. *Id.* at 47-48 (citations omitted).

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Yet if Congress can determine what rights are included in the Fourteenth Amendment's scope, arbitrarily limiting them to the "hasty" "absent-minded" and "ambiguous" expressed rights is unsatisfying, formalistic and would be probably shortlived. Robert Bork observed that even celebrated *Lochner*[474] opponent Justice Oliver Wendell Holmes was actually seduced by the siren song of substantive due process, quoting as evidence a forgotten portion of Holmes' *Lochner* dissent:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, *unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our laws.* So Holmes, after all, did accept substantive due process, he merely disagreed with Peckham and the majority about which principles were fundamental. [T]here was no Justice on the Court who was not prepared to substitute his opinions for those of elected representatives at some point. The difference was merely about when that point was reached.[475]

But to accept the arbitrary expressed rights stop sign offered by McConnell, Congress would be forced to interpret the term "liberty" much more narrowly than the Court already has. It is irrational relativism to assume that Congress intended to grant itself *some* interpretive power, but also understood that with the same language it was simultaneously granting the Court carte blanche to fully determine the scope of liberty. Logically, either the Congress can or cannot make a definitive interpretation of the Fourteenth Amendment. The interpretive theory attempts to have it both ways. But once Congress has interpretive power of our organic document that the courts are bound to respect, they will likely feel attracted to substantive due process as a reasonable byproduct of their new role. And the Court would have difficulty reigning this interpretation in without revisiting the source of their own forays into Lochnerizing. As a result, federalism would cease to exist as a meaningful limitation on Congress under the interpretive scheme. Congress would then be substituting its opinion for those of the *local* elected representatives, much like the judiciary has in its quest for implied, fundamental rights.

The proponents of expanded congressional power attempt to deflect such criticism by suggesting one-way directional limitations on the interpretive power. Arguing yet another disguised version of the Ratchet theory for

474. Lochner v. New York, 198 U.S. 45 (1905) (recognizing freedom of contract as an implied fundamental right applied against the states under the Fourteenth Amendment).

475. BORK, *supra* note 470, at 45-46.

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judicial deference,[476] McConnell suggested that the Court ought to defer to "permissible" or "reasonably plausible" congressional interpretations of the Constitution, much as it does under the *Chevron* doctrine in administrative law.[477] Additionally, McConnell insisted that, unlike in *Lopez*, Congress seriously considered the constitutional impact of RFRA, and should have been rewarded for their efforts as a matter of comity by applying the presumption of constitutionality to the statute.[478] These theories gut the Court of any basis for substantive oversight of congressional interpretations. If Congress could prove that its listing of protected rights was rational, in other words, *not insane*, and that they had considered the constitutional implications of their choice, the Court would be hamstrung from overruling them. Thus the judiciary's function would be reduced to review of the process by which Congress arrived at its interpretation. Absent considerations of federalism, this might be acceptable. But given both the Court's own substantive due process demonstrations of "permissible" or "reasonably plausible" interpretations of the Constitution, the states would probably not be able to rely on the Court for protection from Congress. The *Boerne* Court spared itself from having to make these unsettling choices by correctly limiting Congress to its traditional function.

C. *The Return of Smith*

1. *General Effects*

The resurrection of *Smith* revives a number of interpretive issues for the Court. Most importantly, the Court at some point will need to explain the doctrinal bases and limits of the facially neutral law rule. For example, at one level of abstraction, *Reynolds*[479] and *Lukumi*[480] become alarmingly similar. Both cases involved somewhat oppressed religious minorities attempting to reintroduce an unpopular practice as an essential tenet of their faith. Both polygamy and animal sacrifice were common within historic religious cultures. And both groups could argue disparate impact if not disparate treatment resulting from the statutory scheme. But the final results of the two cases are centuries apart in both time and result. Professor Laycock, arguing for the Archbishop at the Supreme Court, suggested his solution to the problem under RFRA:

> QUESTION: Mr. Laycock, do you think [RFRA] overturns Reynolds?

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476. *See supra* notes 206-11.

477. McConnell, *Institutions*, *supra* note 9, at 184 (citing Chevron U.S.A. Inc v. National Resources Defense Council, Inc. 467 U.S. 837 (1984)).

478. *Id.* at 186-87.

479. *See supra* notes 33-52.

480. *See supra* notes 112-29.

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MR. LAYCOCK: Do I think it overturns Reynolds?
QUESTION: Yes.
MR. LAYCOCK: No, I don't think it overturns Reynolds, but the — that's a compelling interest question. That's a question whether protecting women is — and the other harms of polygamous marriage would be a compelling interest.
QUESTION: Well, of course, Reynolds didn't reason on that basis. I mean, there wasn't any compelling interest standard at the time of Reynolds.
MR. LAYCOCK: You would write a different opinion than you wrote in Reynolds, but it's not at all clear the result would be any different than in Reynolds, but that would be up to this Court.[481]

But with the death of RFRA, at least as applied to the states, the Court would be forced to resolve a new polygamy case by either a blind incantation of *Reynolds*, or finding a hybrid right to trigger *Sherbert-Yoder*'s compelling interest test.

Unfortunately, Justice Scalia's crabbed interpretation of licentiousness, ignoring its *usus loquendi* known to the drafters,[482] caused the Court to miss a compromise solution to the doctrinal inadequacies of the *Smith* rule. This concept is the key element which prevents the legislature from squelching legitimate religious exercise, but limits religious freedom from degenerating into antinomianism. Certainly, the framers did not conceive of religious liberty as an unlimited concept, notwithstanding their often expansive rhetoric. Revival of many historic religious practices would have repulsed the early free exercise advocates. For example, it would be difficult to argue that the drafters' and ratifiers' freedom of conscience conceptions included protection for human sacrifice as was practiced by the Aztecs and Mayans in their pre-Columbian era religions.[483] The founding fathers also undoubted were aware that temple prostitution flourished in the ancient near East and in pre-Christian Greece under the color of religion.[484] It is doubtful that the founders, heavily influenced by Puritan morality, would have tolerated a religious exception to their strict laws against prostitution.[485]

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481. Transcript of Oral Argument at *36-*37, *Boerne* (No. 95-2074), 1997 WL 87109.

482. *See supra* note 418.

483. *See* ALFONSO CASO, THE AZTECS: PEOPLE OF THE SUN 73-74 (Lowell Dunham trans., 1958) (describing Aztec religious human sacrifice and cannibalism); J. ERIC S. THOMPSON, THE RISE AND FALL OF MAYA CIVILIZATION 278-85 (2d ed. 1966) (citing a chilling first-hand account of a ritual killing). Thompson observed that "[h]uman sacrifice is shocking, but one can appreciate that it is logical if he accepts the premise that the gods need human blood to give them strength to perform their tasks, and its corollary that it is the duty of a devout people to provide it." *Id* at 283.

484. *See* JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 30-36 (1979).

485. *Id.* at 58. Decker argues, however, that the supply of prostitutes was limited by a

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However, it is unreasonable to overlay modern conceptions of compelling interest balancing on the founders' intent. Yet the inclusion of the licentiousness concept in many of the state-level religion clauses[486] indicates that the founders expected the government to make qualitative moral judgments about fringe religious practices. Licentiousness was a familiar theological term of art to the colonial Christian. For example the New Testament Greek word *aselgeia* is often translated as licentiousness or debauchery.[487] Although the King James translation of the Bible used the synonym lasciviousness, licentiousness was used interchangeably to describe the same misconduct. For example, Jonathan Edwards, a central figure in the Great Awakening and arguably America's most important early theologian,[488] made a typical application of the term when he summarized the moral conditions prevalent in his town before the outbreak of revival:

> Licentiousness for some years greatly prevailed among the youth of the town; there were many of them very much addicted to night walking and frequenting the tavern, and lewd practices wherein some by their example exceedingly corrupted others. It was their manner to get together in assemblies of both sexes for mirth and jollity, which they called frolics; and they would often spend the greater part of the night in them, without regard to order in the families they belonged to: indeed family government did to much fail in the town.[489]

Furthermore, the licentiousness concept was familiar in pre-existing religious toleration formulations of which the drafters would have been aware. In 1653, Lord Protector Oliver Cromwell was limited by the Instrument of Government, which included a modest, but anti-Catholic, toleration restriction:

> That such as profess faith in God by Jesus Christ (though differing in judgment from the doctrine, worship, or discipline publicly held forth) shall not be restrained from, but shall be protected in, the profession of faith and exercise of their religion, so as they abuse not this liberty to the civil injury of others and to the actual disturbance of the public peace on their parts:

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shortage of women, and is a better explanation for the relative absence of prostitution in early American history. *Id.* at 58-62.

486. *See supra* notes 405-08.

487. *See* THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT, *supra* note 140, at 83 (comparing the use of *aselgeia* in 2 *Peter* 2:7 (referring to Sodom and Gomorrah), *Ephesians* 4:19 (referring to the pagan world), and *Galatians* 5:19, *Romans* 13:13, 2 *Corinthians* 12:21, and 2 *Peter* 2:2, 18 (referring to sexual excess)).

488. *See* 1 MYRON A. MARTY & H. THEODORE FINKELSTON, RETRACING OUR STEPS: STUDIES IN DOCUMENTS FROM THE AMERICAN PAST 23 (1972).

489. WILLIAM WARREN SWEET, THE STORY OF RELIGION IN AMERICA 129 (1973) (quoting Jonathan Edwards).

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> provided this liberty be not extended to popery or prelacy, nor to such as, under the profession of Christ, hold forth and practise licentiousness.[490]

Thus unlike Scalia's redundant treatment of licentiousness as an archaic alternative way to say breach of the peace, licentiousness referred to practices adjudged too immoral for protection under a religious objection to facially neutral law of general applicability. Under this reading of the early state religion clauses,[491] the free exercise of religion was only limited by disruptive activity and immorality. Although zoning was a century-and-a-half away from becoming a function of local government, it is unlikely that the founders would have seen such a minor, morally neutral exercise of the police power as falling within the territory proscribed from religious free exercise. But temple prostitution and polygamy would certainly be immoral practices falling outside of the freedom of religious conscience. This formulation lacks the anti-government bias of the rigorously applied compelling interest balancing test. However, some commentators argue that the Court never rigorously applied so-called strict scrutiny to free exercise cases before *Smith*.[492] This view of religious free exercise also allows the Court to avoid subjective inquiries into the importance, sincerity or centrality of a particular religious practice. The relevant inquiries would be whether the practice in question would have offended the objective moral sensibilities of the framers or whether it disrupts the community. Thus reasonable time, place and manner restrictions, such as are generally accepted under freedom of expression doctrine, would be sustainable and the Free Exercise Clause would not become a shelter for every objection to every neutral regulation of personal conduct. But the Court would also return to a higher scrutiny of morally neutral regulations, giving the benefit of the doubt to religious objectors.

2. *Effects on Indian Free Exercise*

Even after *Boerne*, the American Indian Religious Freedom Act Amendments (AIRFA) continue to protect the right of American Indians to ingest peyote during religious ceremonies.[493] This federal protection against state overreaching is valid under the Trust Doctrine.[494] The courts have recognized this unique political status in barring similar drug law exemption claims by non-Indians.[495] On the peyote issue, the Court's wrecking of

490. *Selections from the Instrument of Government, 1653*, *in* DOCUMENTS OF THE CHRISTIAN CHURCH 291 (Henry Bettenson ed., 2d ed. 1963).

491. *See supra* notes 405-08.

492. *See e.g.* Tepker, *Hallucinations*, *supra* note 32, at 22.

493. *See supra* notes 102-11.

494. *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 220-28 (Rennard Strickland et al. eds., 1982).

495. *See, e.g.*, Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991)

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RFRA at most disadvantages some Native American prisoners. A shortcoming of AIFRA, however, is that it fails to protect other central elements of Indian religious practices, such as sweat lodge ceremonies[496] and the public land use problem encountered in *Lyng*.[497] Furthermore, it places Indian religious free exercise on a separate track of statutory protection, rather than the more secure First Amendment basis. While AIFRA affords better protection for a few non-majoritarian religious practices than *Smith*, it is at best an incomplete and imperfect solution to a problem affecting more than just Native Americans. Tribal claimants may be less able than their more mainstream counterparts to navigate a local, legislative exception for misunderstood religious practices because of their relative lack of lobbying power. Conflicts over tribal sovereignty may also make local politicians less receptive to any Indian concerns, inhibiting local efforts to gain accommodation. Jurisdictional confusion and misunderstandings about federal protection may cause some governments to ignore calls for exemptions until an actual case presents itself. Therefore, tribal claimants may have even a steeper journey toward local accommodation than their similarly situated non-Indian counterparts.

V. Conclusion

In *Boerne*, the Court decided that local and state governments, not the Congress or the judiciary should decide when to grant religious exceptions to facially neutral laws. To many observers, the Court missed an opportunity to correct an unfortunate detour away from strong protection for religious minorities. Others, such as Justice Scalia see the Court's current path as consistent with the founding fathers' vision for religious freedom as well as preventing religion-based anarchy. The wisdom of the Court's choice will be debated for some time to come. And RFRA, of course is not dead as applied to the federal government.[498] But one important doctrinal concept was reinforced by the *Boerne* Court: that the Court alone makes the substantive determinations about the scope of the Reconstruction Amendments. The Court was not fooled by disclaiming language meant to sugar-coat a functional attempt to force a rejected constitutional test on the judiciary. As Justice

(reviewed in John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Issues Raised by the Peyote Way Church of God Case*, 22 AM. INDIAN L. REV. 475 (1998)); Kansas v. McBride, 955 P.2d 133 (Kan. App. 1998) (rejecting AIRFA claim of Rastafarian Church members to ingest marijuana).

496. For a description of the sweat lodge ceremony and its historic importance to traditional Indian religious observance, see *Sweat Lodge Ceremony*, *in* THE ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS 287 (Arlene Hirschfelder & Paulette Molin eds., 1992).

497. *See supra* notes 94-101.

498. For example a continuing controversy involves RFRA's impact on the Bankruptcy Code. *See, e.g.*, Christians v. Crystal Evangelical Free Church, 82 F.3d 1407, *vacated*, 111 S. Ct. 2502 (1997); *In re* Hodge, 200 B.R. 884 (Bankr. D. Idaho 1996).

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Marshall proclaimed during the infancy of the republic, it is the Court's duty to say what the law is.[499]

Discussions of how to "fix" the *Smith* problem now must consider *Boerne's* limitation of congressional enforcement power to remedial applications. Congress may attempt to address the problem by specific piecemeal legislation aimed at particularly egregious infringements of facially neutral, generally applied statutes on minority religious practice. Some commentators have suggested bribing the states with contingent federal grants or using the Commerce Clause as authority for a new, revised RFRA.[500] Activists have also discussed a constitutional amendment, but this method has failed to sustain RFRA's broad political coalition.[501] And many states will take further steps to protect religious minorities. But unless and until the Court revisits the *Smith* decision, the primary protector of the people's free exercise rights against governmental intrusions under facially neutral laws of general applicability will be the people themselves operating through their local political processes. And many disputes will undoubtedly be resolved as Archbishop Flores' fight against the zoning law ultimately was in Boerne, Tex.: by reasonable people making sound, local accommodations for religious practices.

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

500. *See e.g.* Whitehead, *Betwixt, supra* note 448, at 111 nn.21-28; Rogers, *Church-State Intersection, supra* note 459; *Latest RFRA Efforts at the State Level*, Christian Legal Society website (visited Mar. 17, 1998) <http://www.clsnet.com/flores>.

501. *See e.g.* Whitehead, *Betwixt, supra* note 448, at 111 nn.21-28; Rogers, *Church-State Intersection, supra* note 459.

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