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City of Boerne v. Flores: Another Boost for Federalism

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The United States Congress passed the Religious Freedom Restoration Act of 1993[1] ("RFRA" or the "Act") with the noble goal of increasing protection for religious freedom.[2] The product of compromise among groups as varied as the American Civil Liberties Union and the Traditional Values Coalition,[3] the bill enjoyed broad political support.[4] Congress passed RFRA almost unanimously,[5] and President Clinton signed it into law with lavish praise.[6]

RFRA was drafted in response to a very unpopular and widely criticized[7] Supreme Court decision, *Employment Division v. Smith* (*Smith II*)[8]. Critics of *Smith II* claimed that the Court abruptly

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1. Pub. L. No. 193-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

2. *See* 42 U.S.C. § 2000bb(a) (describing congressional findings supporting passage of RFRA).

3. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretative Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 13-14 (1994).

4. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 40 (1995) ("Indeed, the political support for RFRA was so widespread as to indicate a national consensus.").

5. RFRA was reported out of the House Committee on the Judiciary without dissent, passed the full House by unanimous voice vote, passed the Senate by a vote of 97-3, and was reapproved with conforming technical amendments by the House. *See* Berg, *supra* note 3, at 17 n.64.

6. *See* President's Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993) [hereinafter President's Remarks]. The Clinton administration was very supportive of the bill. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438-39 (1994); Wendy S. Whitbeck, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 857 n.204 (1994).

7. *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1108 (1994) ("[T]he general response [to *Smith II*] among scholars has been one of dismay."); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 ("Like many others, I believe that [*Smith II*] is substantively wrong and institutionally irresponsible."); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 117 (noting there are "relatively few who believe that the Court reached the right doctrinal result in *Smith* [*II*]").

8. 494 U.S. 872 (1990). *Employment Division v. Smith* first came to the Supreme Court from the Supreme Court of Oregon in 1987. *See* Employment Div. v. Smith, 485 U.S. 660 (1988) (*Smith I*). The Supreme Court of Oregon determined that the Employment Division violated the Free Exercise Clause of the First Amendment when it denied unemployment benefits to two counselors who ingested peyote as part of a religious ceremony. *See* Smith v. Employment Div., 721 P.2d 445, 450-51 (Or. 1986),

changed its interpretation of the Free Exercise Clause[9] and compromised religious liberty as a result.[10] With RFRA, Congress intended to restore the protection of religious freedom to the level that existed prior to *Smith II*.[11] The particular language used by the drafters and supporters of RFRA made it clear that RFRA was promoted as overruling *Smith II*,[12] and many commentators expected the Supreme Court to strike down RFRA as an unconstitutional violation of the separation of powers.[13]

In *City of Boerne v. Flores*,[14] the Supreme Court did in fact strike down RFRA, but not because it violated the separation of powers by overruling a Supreme Court decision;[15] rather, the Court held that Congress had exceeded the scope of its authority when it enacted RFRA.[16] The Court thus used *Flores* as an opportunity to revisit an issue that had been in confusion since 1966: the scope of Congress's authority under its Enforcement Clause powers.[17] Consequently, the Court added *Flores* to its recent series of federalism cases,[18] again

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vacated, 485 U.S. 660 (1988). In doing so, the Oregon Court found it irrelevant that peyote use was criminal. *See id.* at 450. Therefore, it did not decide whether peyote use for sacramental purposes might be permitted under Oregon law, or protected under Oregon's constitution. *See Smith I*, 485 U.S. at 673. The Supreme Court found the illegality of peyote use to be relevant and thus vacated the Oregon court's judgment and remanded the case. *See id.* at 662. On remand, the Oregon Supreme Court determined that sacramental peyote use violated state law, but that its prohibition was invalid under the Free Exercise Clause. *See Smith II*, 494 U.S. at 876. The case returned to the Court in *Smith II*. *See id.*; *infra* notes 144-60 and accompanying text (discussing *Smith I* and *Smith II*).

9. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

10. *See infra* notes 161-68 and accompanying text (discussing the response to *Smith II*).

11. *See* 42 U.S.C. § 2000bb(a)-(b) (1994).

12. *See infra* notes 242-44 and accompanying text (describing the rhetoric accompanying the passage of RFRA).

13. *See infra* notes 245-55 and accompanying text (summarizing the arguments that RFRA violated the separation of powers).

14. 117 S. Ct. 2157 (1997).

15. Violation of the separation of powers was, however, the basis for the district court's decision to strike RFRA. *See infra* notes 52-56 and accompanying text (summarizing the district court opinion in *Flores*).

16. *See Flores*, 117 S. Ct. at 2160.

17. Congress is given the power to enforce the provisions of the Fourteenth Amendment, which, by incorporation, include the Free Exercise Clause. *See* U.S. CONST. amend. XIV, § 5; *infra* notes 35-36 and accompanying text (explaining the incorporation). "The nature and limits of Congress' enforcement power are among the deepest questions of contemporary constitutional law . . . ." Conkle, *supra* note 4, at 41.

18. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997) (striking a provision of the Brady Handgun Violence Prevention Act on federalism grounds); United States v. Lopez, 514 U.S. 549 (1995) (striking the Gun-Free School Zones Act because it exceeded

shifting the power balance away from Congress toward the states.

This Note summarizes the provisions of RFRA and the proffered basis for congressional authority to enact the statute.[19] It then presents the facts of the case, the various approaches to RFRA taken by the lower courts, and a summary of the Supreme Court's decision in *Flores*.[20] Next, the Note describes the Court's Free Exercise Clause jurisprudence, with particular attention given to the *Smith II* decision[21] and the reaction to *Smith II* that culminated in the passage of RFRA.[22] After providing a brief discussion of the Court's case law pertaining to Congress's Enforcement Clause powers,[23] the Note analyzes the *Flores* decision in terms of its impact upon constitutional interpretation.[24]

Congress passed RFRA[25] in direct response to the *Smith II* decision.[26] In *Smith II*, the Court held that generally applicable laws apply equally to all, regardless of incidental burdens to religious exercise.[27] Congress took an opposing view. Congress's findings stated that the Framers recognized the free exercise of religion as an "inalienable right" and that even neutral laws might burden that right.[28] Further, Congress found that governments should not "substantially burden" that right without a compelling justification, but *Smith II* had eliminated this requirement.[29] Finally, Congress determined that "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

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Congress's Commerce Clause powers, and imposing federalism limits in the process). *See generally* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125 (describing the cyclical nature of the judiciary's treatment of federalism).

19. *See infra* notes 25-38 and accompanying text.

20. *See infra* notes 39-114 and accompanying text.

21. *See infra* notes 115-60 and accompanying text.

22. *See infra* notes 161-75 and accompanying text.

23. *See infra* notes 176-238 and accompanying text.

24. *See infra* notes 239-370 and accompanying text.

25. RFRA is a short statute, consisting only of a declaration of congressional findings and purposes, *see* 42 U.S.C. § 2000bb (1994), the basic provision of the law, *see id.* § 2000bb-1, some definitions, *see id.* § 2000bb-2, and some explanations, *see id.* § 2000bb-3 to -4.

26. The statute explicitly mentions both *Smith II* and *Smith II*'s precedents. *See id.* § 2000bb(a)-(b). The stated purpose of RFRA was to restore the Court's prior compelling interest test, and thus to "provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b).

27. *See* Employment Div. v. Smith, 494 U.S. 872, 882 (1990) (*Smith II*).

28. *See* 42 U.S.C. § 2000bb(a)(1)-(2).

29. *See id.* § 2000bb(a)(3)-(4).

interests."[30] RFRA provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[31] It allowed an exception to this rule, however, if the government could demonstrate both that it had "a compelling governmental interest" and that the burden on free exercise resulted from the "least restrictive means of furthering that compelling governmental interest."[32] The Act further provided that "[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."[33]

The purported source of Congress's power to pass RFRA was the Enforcement Clause of the Fourteenth Amendment to the United States Constitution.[34] Because the Free Exercise Clause of the First Amendment[35] applies to the states by incorporation under the Due Process Clause of the Fourteenth Amendment,[36] Congress has power under § 5 of the Fourteenth Amendment to protect through "appropriate legislation" the rights of individuals to the free exercise of religion.[37] In *Flores*, the Court addressed the issue of whether RFRA was such appropriate legislation.[38]

The dispute that gave rise to *Flores* began in Boerne, Texas.[39] In Boerne, Saint Peter Catholic Church could not accommodate its

30. *Id.* § 2000bb(a)(5).

31. *Id.* § 2000bb-1(a). Note that "government" is defined broadly to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." *Id.* § 2000bb-2(1).

32. *Id.* § 2000bb-1(b). This test constitutes "strict scrutiny," the Supreme Court's most demanding standard of review. *See Flores*, 117 S. Ct. at 2171.

33. 42 U.S.C. § 2000bb-1(c).

34. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The Enforcement Clause supports congressional authority with respect to state law, but not with respect to RFRA's action on federal law. RFRA's action on state law was the issue before the Supreme Court in *Flores*. *See infra* notes 260-63 and accompanying text (discussing the significance of whether RFRA was applied to state or federal law).

35. The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The Supreme Court held in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), that, in addition to restricting the federal government, this provision restricts the states by incorporation into the Fourteenth Amendment.

36. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1.

37. *See* S. REP. NO. 103-111, at 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

38. *See Flores*, 117 S. Ct. at 2162.

39. *See id.* at 2160.

growing parish.[40] Accordingly, the Archbishop of San Antonio, Bishop P.F. Flores, applied for a building permit so that the church could be enlarged.[41] Under a City of Boerne ordinance, the Historic Landmark Commission was required to preapprove construction affecting buildings in a historic district.[42] The Commission, having designated the area in which the church was located as a historic district, denied the permit.[43] The Archbishop brought suit, challenging the denial of the permit.[44] The Archbishop asserted, among various claims,[45] that the City's action violated RFRA because the denial of the permit substantially burdened the Archbishop's religious exercise.[46] In response, the City challenged the constitutionality of RFRA.[47] In addition to arguing that Congress lacked authority under § 5 to enact RFRA,[48] the City advanced three arguments for finding RFRA unconstitutional: (1) RFRA violated

40. *See id.*

41. *See id.*

42. *See id.* The ordinance was enacted "in order to 'protect, enhance and perpetuate selected historic landmarks' and to 'safeguard the City's historic and cultural heritage.' " Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996) (quoting Boerne, Tex., Ordinance 91-05 (June 25, 1991)), *rev'd*, 117 S. Ct. 2157 (1997).

43. *See Flores*, 117 S. Ct. at 2160. In fact, Saint Peter Catholic Church itself was not designated a historic landmark, but at least part of the church was in the historic district. *See Flores*, 73 F.3d at 1354. The Archbishop claimed that only the facade was located in the historic district, and that the facade would not be affected by the proposed addition. *See id.* However, the City considered the whole building to be within the historic district. *See id.*

44. *See Flores*, 117 S. Ct. at 2160.

45. The Archbishop asserted other claims in addition to a violation of RFRA, including claims under the Free Exercise and Takings Clauses of the U.S. Constitution, and claims under the Texas Constitution. *See* Brief for the United States at 5 n.5, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (No. 95-2074); Brief of Respondent Flores at 2, *Flores* (No. 95-2074); *see also* U.S. CONST. amend. I (Free Exercise Clause); *id.* amend. V (Takings Clause). At the time *Flores* was appealed to the Supreme Court, these claims remained pending in the district court. *See* Brief of Respondent Flores at 2, *Flores* (No. 95-2074). The constitutionality of RFRA was the only issue considered by the Fifth Circuit and the Supreme Court.

46. *See* Brief for the United States at 5, *Flores* (No. 95-2074). Forty to sixty more worshipers than the existing Church building could accommodate attempted regularly to attend Sunday Mass. *See* Brief of Respondent Flores at 1, *Flores* (No. 95-2074). After the adverse ruling in the trial court, the Church began celebrating Mass in a secular auditorium. *See id.* Without enlargement of the Church building, "[t]he Church [would] be unable to accomplish its mission or continue to serve as a parish church," the government argued. Brief for the United States at 5, *Flores* (No. 95-2074). RFRA provided that one whose religious exercise had been "substantially burdened" by government, in the absence of a compelling governmental interest obtained by the least restrictive means, could assert the violation of RFRA as a claim in a judicial proceeding and thereby obtain appropriate relief. *See* 42 U.S.C. § 2000bb-1 (1994).

47. *See Flores*, 73 F.3d at 1354.

48. *See id.* at 1356.

the separation of powers doctrine;[49] (2) RFRA violated the Establishment Clause of the First Amendment;[50] and (3) RFRA violated the Tenth Amendment.[51]

The United States District Court for the Western District of Texas agreed with the City's assertion that RFRA was unconstitutional because it violated the separation of powers doctrine.[52] Although the court acknowledged that Congress has enforcement power under § 5 of the Fourteenth Amendment, the court nevertheless found that Congress had violated the principle of separation of powers "by intruding on the power and duty of the judiciary" to interpret the Constitution.[53] According to the district court, Congress intended to overturn Supreme Court precedent when it passed RFRA[54] and attempted to "unconstitutionally change the burden of proof as established under [*Smith II*]"[55] by requiring that the compelling interest test be applied to all laws that substantially

49. *See id.* at 1361. The City argued that RFRA usurped the judiciary's authority to say what the law is by reversing *Smith II* and restoring a standard of review for Free Exercise claims that the Supreme Court had rejected. *See id.*

50. *See id.* The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The City argued that RFRA failed the test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), for determining Establishment Clause violations because RFRA lacked a secular purpose and had the primary effect of advancing religion. *See Flores*, 73 F.3d at 1364.

51. *See Flores*, 73 F.3d at 1361. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The City argued that RFRA limited the power of Congress to legislate in matters traditionally left to state regulation. *See Flores*, 73 F.3d at 1364.

52. *See* Flores v. City of Boerne, 877 F. Supp. 355, 357 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997). The Supreme Court ultimately agreed that RFRA was unconstitutional, but the Court's reasoning was more subtle, involving consideration of both separation of powers and federalism, in an analysis of the scope of Congress's enforcement powers. *See infra* notes 260-370 and accompanying text (discussing the Supreme Court's analysis).

53. *Flores*, 877 F. Supp. at 357. The court was "cautious in its opinion of RFRA's unconstitutionality" because there was little case law construing RFRA at that point. *Id.* The court referred to one other district court opinion, in which the District Court for the District of Hawaii had found RFRA to be a constitutional use of Congress's enforcement power. *See id.*; Belgard v. Hawai'i, 883 F. Supp. 510, 513 (D. Haw. 1995). The *Flores* court disagreed with the analysis of the *Belgard* court. *See Flores*, 877 F. Supp. at 357 n.1. Specifically, the *Flores* court noted that RFRA itself did not mention § 5 as Congress's empowering provision. *See id.* Moreover, the court questioned the legitimacy of RFRA as applied to federal law, where § 5 power plays no role, because § 5 speaks only to Congress's power vis-à-vis the states. *See id.*; *infra* note 262 (discussing arguments regarding the constitutionality of RFRA as applied to federal laws).

54. *See Flores*, 877 F. Supp. at 357.

55. *Id.* at 358.

burden religious exercise.[56]

The Court of Appeals for the Fifth Circuit reversed the district court,[57] essentially adopting the argument advanced by Archbishop Flores and the United States.[58] In the course of reversing the district court, the Fifth Circuit shifted the focus of the analysis from the separation of powers issue to the scope of Congress's § 5 powers.[59] First the court established that Congress did in fact have authority under § 5 to enact RFRA.[60] The court then noted that the City's constitutional arguments opposing RFRA could not themselves constitute independent bases for holding RFRA unconstitutional; rather, they could constitute only potential limits on Congress's authority under § 5,[61] and Congress had not exceeded those limits by enacting RFRA.[62]

The Fifth Circuit addressed the City's separation of powers argument at length.[63] The court acknowledged that, under RFRA, Congress required stricter judicial scrutiny of laws that created a

56. *See id.* In *Smith II*, the Supreme Court had limited the use of the heightened compelling interest standard to the context of unemployment compensation only. *See* Employment Div. v. Smith (*Smith II*), 394 U.S. 872, 883-85 (1990). For further discussion of the compelling interest test and the *Smith II* decision, see *infra* notes 122-60 and accompanying text.

57. *See* Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997).

58. The United States intervened on the side of plaintiff-appellant Flores. *See Flores*, 877 F. Supp. at 356.

59. *See Flores*, 73 F.3d at 1356-61. The district court barely addressed the issue of whether Congress had any authority to enact RFRA in the first place; the only mention of the source of Congress's power was in a footnote that was primarily devoted to the application of RFRA to federal laws. *See Flores*, 877 F. Supp. at 357 n.1. Thus, the district court found RFRA to be an unconstitutional violation of the separation of powers doctrine without analyzing whether Congress had the authority to pass RFRA in the first instance.

60. *See Flores*, 73 F.3d at 1356-61. The Fifth Circuit determined that Congress had the authority to enact RFRA under § 5 by applying a test that the Supreme Court had articulated in *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

61. *See Flores*, 73 F.3d at 1361. Referring to the City's assertions that RFRA violated the separation of powers doctrine, the Establishment Clause, and the Tenth Amendment, the court stated: "The City treats these arguments as independent of its Section 5 argument .... However,... Congress has no power under Section 5 to violate other individual rights. Stated another way, if RFRA violates other constitutional provisions, it exceeds Congress' Section 5 authority." *Id.*

62. *See id.* at 1361-64.

63. *See id.* at 1361-63. Because the district court held RFRA unconstitutional as a violation of the separation of powers, *see Flores*, 877 F. Supp at 357, it is not surprising that the Fifth Circuit devoted the most time to refuting this proposition. The Fifth Circuit dispensed with the Establishment Clause and Tenth Amendment arguments readily. *See Flores*, 73 F.3d at 1364; *infra* note 73 (summarizing the court's holding). The Supreme Court did not address the Establishment Clause or Tenth Amendment arguments.

substantial burden to religious free exercise than the Supreme Court held was constitutionally required in *Smith II*.[64] The Fifth Circuit found Congress's enactment of RFRA comparable to Congress's enactment of the Voting Rights Act (the "VRA").[65] The Supreme Court had upheld the constitutionality of the VRA,[66] and the Fifth Circuit reasoned by analogy that RFRA also was constitutional: Just as Congress could permissibly dispense with a requirement of proof of purposeful discrimination in voting procedures having an adverse impact on minorities, so could Congress require the courts to scrutinize neutral laws having an adverse impact on free religious exercise, even in the absence of proof of intentional discrimination.[67]

According to the Fifth Circuit, Congress's changing the level of scrutiny amounted to an accommodation of religion.[68] While the court interpreted *Smith II* to stand for the proposition that the

64. *See Flores*, 73 F.3d at 1361; *see also* Employment Div. v. Smith, 494 U.S. 872, 885-86 (1990) (*Smith II*) (holding that requiring the state to show a compelling governmental interest to justify a neutral regulation that burdened religion would create "a private right to ignore generally applicable laws").

65. *See* 42 U.S.C. §§ 1973 to 1973bb-1 (1994); *Flores*, 73 F.3d at 1360. For further discussion of the Voting Rights Act, see *infra* notes 180-238 and accompanying text.

66. *See* City of Rome v. United States, 446 U.S. 156, 177 (1980); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

67. *See Flores*, 73 F.3d at 1359-60. The Fifth Circuit cited *City of Rome*, 446 U.S. at 177, in which the Court upheld the provision of the VRA that prohibited the use of voting procedures having either a discriminatory effect or purpose. *See Flores*, 73 F.3d at 1360; *infra* notes 198-223 and accompanying text (discussing *City of Rome*).

68. *See Flores*, 73 F.3d at 1362. RFRA accommodated religion by providing additional protection (beyond what was constitutionally mandated) of free exercise through the requirement that a substantial burden of free religious exercise must be justified by a compelling state interest. *See* 42 U.S.C. § 2000bb-1 (1994); *Flores*, 73 F.3d at 1362-63.

The Fifth Circuit acknowledged that RFRA was unusual in its "codification of terms drawn directly from constitutional decisions," but nonetheless held that this did not make RFRA unconstitutional. *Flores*, 73 F.3d at 1362. The court labeled RFRA a "foundational statute." *Id. But see* Eisgruber & Sager, *supra* note 6, at 441-44 (arguing that RFRA is not a foundational statute). Professors Eisgruber and Sager characterize foundational statutes as those that "supplement . . . the Court's constitutional judgment," and "offer the court conceptual room in which to give working content to [the statutes'] general precepts." Eisgruber & Sager, *supra* note 6, at 443. Such statutes may arise, for example, in situations where the Court has held that certain conduct is constitutional, and Congress acts to make that conduct illegal. *See id.* With the VRA, for example, Congress banned the use of literacy tests after the Court had held that their use was not per se unconstitutional, because Congress had good reason to believe that such tests were regularly being used in a discriminatory manner. *See id.*; *infra* notes 180-238 and accompanying text (discussing the VRA). Professors Eisgruber and Sager also cite Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. §§ 2000e to 2000e-17 (1994), and the Sherman Act, *see* 15 U.S.C. §§ 1-7 (1994), as classic examples of foundational statutes. *See* Eisgruber & Sager, *supra* note 6, at 443.

Constitution does not require the government to accommodate religion under neutral laws, it determined that *Smith II* did not preclude the government's accommodation beyond what is constitutionally mandated.[69] In fact, the Fifth Circuit stated that the *Smith II* Court intended to leave religious accommodation to the political process[70] and that the Supreme Court reaffirmed in post-*Smith II* decisions that religious accommodations are not unconstitutional.[71] The Fifth Circuit concluded that RFRA was a constitutionally permissible religious accommodation and thus determined that a choice by Congress to extend greater protection than the Court had found to be constitutionally required does not necessarily violate separation of powers.[72] The Fifth Circuit also

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69. *See Flores*, 73 F.3d at 1362; *see also Smith II*, 494 U.S. at 890 (determining that it is preferable to leave the accommodation of religion to the political process). The First Amendment's directives to government require certain accommodations in order to satisfy the Free Exercise Clause, but prohibit others in order to comply with the Establishment Clause. Somewhere in between there is room for government to elect certain accommodations without violation of the Establishment Clause, or to choose not to accommodate without violating the Free Exercise Clause; this is the area left open by *Smith II*, according to the Fifth Circuit:

> [T]he Court recognized that legislatures were free to enact religious exemptions more expansive and accommodating than that required by the Free Exercise Clause. Even when the Court held that a particular religious accommodation violated the Establishment Clause, Justice Brennan cautioned that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."

Flores, 73 F.3d at 1362 (quoting Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion)).

70. *See Flores*, 73 F.3d at 1362. Quoting the Supreme Court, the Fifth Circuit stated:

> "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."

Id. (quoting *Smith II*, 494 U.S. at 890); *see also* Berg, *supra* note 3, at 65-66 (arguing that *Smith II* intentionally left the creation of religious exemptions to legislatures).

71. *See Flores*, 73 F.3d at 1362.

72. *See id.* at 1363 ("Every legislatively mandated accommodation of religion reflects a legislature's judgment regarding the free exercise of religion.") A difficulty with RFRA was that it was a "meta-accommodation," in that it did not create an exemption to a particular law, but rather required that a certain level of judicial scrutiny be applied to every law that created a burden on free exercise. *See Flores*, 117 S. Ct. at 2170. The City argued that because the *Smith II* Court had rejected application of the compelling interest test, it was a violation of the separation of powers for Congress to attempt to reinstate that test. *See Flores*, 73 F.3d at 1363. The Fifth Circuit responded that the *Smith II* Court's holding that such a test was not mandated by the Constitution did not preclude Congress from restoring that test: "[I]t is one thing to apply the compelling interest test

rejected the City's Establishment Clause and Tenth Amendment arguments and held that RFRA was not unconstitutional.[73]

The Supreme Court adopted the Fifth Circuit's analytical framework,[74] but reversed, holding that Congress had in fact exceeded its Enforcement Clause power.[75] Justice Kennedy, writing for the majority,[76] focused on the meaning of "enforce" as it appears in § 5 of the Fourteenth Amendment.[77] In the analysis of this term, the Court distinguished between remedial or preventive legislation on the one hand, and substantive legislation on the other.[78] Remedial or preventive legislation—legislation that protects the constitutionally guaranteed right to free exercise of religion—would be a valid exercise of congressional power under the Enforcement Clause; however, substantive legislation—legislation having the effect of defining the constitutional right—would not constitute "enforcement" and, therefore, would exceed Congress's power.[79] The Court found support for this distinction in the text of the

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drawn from a statute where Congress can amend the underlying law if it disagrees with the resulting balance; it is another when the only response to the judiciary's application of the compelling interest test is a constitutional amendment." *Id.*

73. *See Flores*, 73 F.3d at 1364. The Fifth Circuit countered the City's Establishment Clause argument by pointing out that RFRA, by its own terms, provided that it would not violate the Establishment Clause, *see* 42 U.S.C. § 2000bb-4; nor did RFRA, any more than any other legislatively mandated religious accommodation, advance religion in violation of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as the City had argued. *See Flores*, 73 F.3d at 1364. The Fifth Circuit disposed of the City's Tenth Amendment argument in an equally abrupt manner, noting that " 'the principles of federalism that constrain Congress's exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments.' " *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 468 (1991)).

74. The Supreme Court, like the Fifth Circuit, framed the issue as that of determining the scope of Congress's § 5 powers. *See Flores*, 117 S. Ct. at 2162-63. The separation of powers issue was thus only one component of this analysis, and not the major issue in the case.

75. *See id.* at 2160.

76. Justice Kennedy was joined by Chief Justice Rehnquist and Justices Stevens, Scalia (except in Part III-A-1), Thomas, and Ginsburg. *See id.* at 2159. Justices Stevens and Scalia filed concurring opinions. *See id.* at 2172 (Stevens, J., concurring); *id.* (Scalia, J., concurring in part). Justices O'Connor, Breyer, and Souter each wrote dissents. *See id.* at 2176 (O'Connor, J., dissenting); *id.* at 2185 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

77. *See id.* at 2162-68.

78. *See id.* at 2163-64.

79. *See id.* The terms "remedial" and "substantive" were used by Justice Harlan writing in dissent in *Katzenbach v. Morgan*, 384 U.S. 641, 666-68 (1966) (Harlan, J., dissenting), and by subsequent commentators, *see* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 693 & n.421 (1996); *infra* notes 224-38 and accompanying text (discussing *Morgan*).

Fourteenth Amendment,[80] in the history of enactment of the Fourteenth Amendment,[81] and in the Court's prior case law.[82]

Examining the Fourteenth Amendment's history, the Court found significance in the rejection of the first draft of what would become the Fourteenth Amendment.[83] Unlike the adopted version of the Fourteenth Amendment, which gives Congress the power to enforce prohibitions against the states,[84] the Bingham draft[85] would have given Congress primary responsibility for protecting civil rights.[86] Many members of Congress were concerned that the Bingham draft gave too much power to Congress at the expense of the states.[87] Both Democrats and Republicans contended "that the

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80. *See Flores*, 117 S. Ct. at 2163-64. Having noted that the text of § 5 gives Congress the power to "enforce . . . the provisions of this article," U.S. CONST. amend. XIV, § 5, the Court stated that

> Congress' power under § 5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.

Flores, 117 S. Ct. at 2164 (alteration in original) (citation omitted).

81. *See Flores*, 117 S. Ct. at 2164-66; *infra* notes 83-94 and accompanying text (summarizing the Court's review of the history of the Fourteenth Amendment's enactment). The Court discussed the first draft of what would become the Fourteenth Amendment, a draft that was rejected because it "gave Congress too much legislative power at the expense of the existing constitutional structure." *Flores*, 117 S. Ct. at 2164. Justice Scalia declined to join this section of the Court's opinion. *See id.* at 2160.

82. *See Flores*, 117 S. Ct. at 2166-68; *infra* notes 95-101 and accompanying text (summarizing the Court's analysis of prior case law). The Court found support for limiting Congress's power in its earliest cases construing the Fourteenth Amendment, *see Flores*, 117 S. Ct. at 2166, and in more recent cases in which the Court upheld the constitutionality of the VRA, *see id.* at 2166-68; *infra* notes 180-238 and accompanying text (discussing the Court's VRA cases).

83. *See Flores*, 117 S. Ct. at 2164.

84. *See* U.S. CONST. amend. XIV, §§ 1, 5.

85. This draft was reported to the House of Representatives by Republican Representative John Bingham of Ohio on behalf of the Joint Committee on Reconstruction. *See Flores*, 117 S. Ct. at 2164.

86. *See id.* "Bingham's first proposal would have placed on Congress the primary responsibility of enforcing all civil rights so as to bring within federal jurisdiction most of the offenses known to the criminal law, and many civil actions as well." ROBERT J. HARRIS, THE QUEST FOR EQUALITY 34 (1960). The Bingham draft read as follows:

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

Flores, 117 S. Ct. at 2164 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 813 (1866)). The adopted form left the primary responsibility for protecting civil rights with the states, "but empowered Congress to correct state acts of omission and commission by supplying positive protection." HARRIS, *supra*, at 44.

87. *See* HARRIS, *supra* note 86, at 33 ("The implications of such a proposal with

proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution."[88] Instead, Congress adopted the present form of the amendment, with the result that Congress's power was merely remedial, not plenary.[89] Thus, the Court concluded, Congress elected to give itself only the power to remedy constitutional violations, as defined by § 1 of the Amendment,[90] and not the power to determine what constitutes a violation of those substantive provisions.[91]

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regard to congressional power and federalism were shocking to the moderates and even to some Radicals . . . .").

88. *Flores*, 117 S. Ct. at 2164. The Court based this observation on the views expressed by various members of the 39th Congress. *See id.* at 2164-65 (relying on CONG. GLOBE, 39th Cong., 1st Sess. 1063-95 (1866)).

89. *See id.* at 2165. Thus, Congress has the power "to enforce . . . the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, rather than the broader power encompassed by the Bingham draft, *see supra* note 86.

90. Section one of the Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

91. *See Flores*, 117 S. Ct. at 2165; Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97 ("Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions.").

A contrary view of the significance of the change in language is offered by tenBroek. *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 192-217 (1951) (arguing for a broader interpretation of the Fourteenth Amendment). He argued that the fact that a "negative" form of the amendment was substituted for the "positive" form is not dispositive of the intended meaning, and he advanced a textual argument that Congress retained substantive power: § 5 would be nugatory if Congress had no affirmative power. *See id.* at 204-05. tenBroek stated:

> The only possible method by which Congress could by appropriate legislation enforce section 1 would be itself to supply the protection to individuals which the state had withheld . . . . From this, however, it would follow that, even granting that section 1 does nothing more than forbid state acts, if section 5 is to be given any meaning at all it must authorize Congress to legislate affirmatively for the protection of individuals.

Id. The issue of the intent of the framers of the Fourteenth Amendment with regard to congressional power is a matter of controversy.

> The evidence in the debates with respect to the scope of congressional power to secure the rights of persons and to enforce the equal protection clause is inconclusive, and its weight is perhaps on the side of those who would confine congressional power to legislation corrective of unequal state legislation, partial administration of state laws, or failure to enforce them at all.

HARRIS, *supra* note 86, at 36-37. Professor Flack suggested that the framers intended to create broad congressional power in the final form of the Amendment, despite the change

According to the Court, the adopted form of the Fourteenth Amendment "has proved significant" for maintaining the separation of powers.[92] The substantive provisions of § 1 are self-executing, meaning that they are enforceable by the courts, not, as the Bingham proposal would have provided, left to Congress to determine.[93] Congress, through the enforcement power granted by § 5, has the power to remedy violations of § 1, while "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[94]

Turning from this discussion of the Fourteenth Amendment's history to a discussion of prior case law, the Court found support in its earliest Fourteenth Amendment cases for limiting Congress's § 5 enforcement power.[95] The Court also discussed more recent cases, in

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in language. *See* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 68-69 (1908). The change, Professor Flack argued, was not for the purpose of changing the meaning, but to put the words in "such a form that the people might not fully realize the power that was being conferred." *Id.* at 69.

Regardless of where one comes out on the proper meaning to give to the historical debates, it is important to the Court's point that no one disputes the concern of many members of the 39th Congress: They were concerned for the federal system, and hesitant that a grant of too much power to Congress might result in a uniform, national law. *See Flores*, 117 S. Ct. at 2165. "The Radical leaders were as aware as any one of the attachment of a great majority of the people to the doctrine of States Rights [,] ... the right of the States to regulate their own internal affairs." FLACK, *supra*, at 68; *see* HARRIS, *supra* note 86, at 24-56; TENBROEK, *supra*, at 183-217.

92. *See Flores*, 117 S. Ct. at 2166.

93. *See id.* ("The Bingham draft, some thought, ... vest[ed] in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation."). The Court noted, however, that members of the 39th Congress were more concerned with the Bingham proposal's threat to the federal balance than with its threat to the separation of powers. *See id.* ("While this separation of powers aspect did not occasion the wide-spread resistance which was caused by the proposal's threat to the federal balance, it nonetheless attracted the attention of various Members."). *But see* HARRIS, *supra* note 86, at 53-55 (noting the hostility of the Radical Republicans toward the judiciary, and the reluctance of the Radicals to rely too heavily on the courts).

94. *Flores*, 117 S. Ct. at 2166; *see* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 83-93 (arguing that the framers of the Fourteenth Amendment did not intend for Congress to have interpretive power, because that was the role of the judiciary).

95. *See Flores*, 117 S. Ct. at 2166. The Court cited several cases in support of its proposition that the nature of Congress's power to enforce the substantive provisions of § 1 is remedial and preventive, and inherently limited. *See id.* at 2166 (citing James v. Bowman, 190 U.S. 127, 139 (1903) (striking a statute that punished individual, not state, action that violated the Fifteenth Amendment); The Civil Rights Cases, 109 U.S. 3, 18-19 (1883) (striking legislation the Court found to be of a general, rather than corrective, nature, and therefore inconsistent with Congress's limited enforcement power); United States v. Harris, 106 U.S. 629, 639-40 (1883) (holding that legislation directed toward individual action is not authorized by the Enforcement Clause of the Fourteenth Amendment); United States v. Reese, 92 U.S. 214, 218 (1875) (holding that legislation providing for punishment of offenses not limited to wrongful discrimination on account of

which it was asked to determine the constitutionality of certain provisions of the VRA.[96] The Court characterized these cases as confirming that the nature of Congress's enforcement power is remedial and preventive.[97] The Court emphasized that its case law does not support any substantive, non-remedial power in Congress; indeed, the Court had struck down legislation that it determined had exceeded Congress's enforcement power.[98] Thus, according to the Court, its prior case law is consistent with the assertion that Congress has the power to remedy or prevent constitutional violations, but does not have the power to define constitutional violations.[99]

Within the category of remedial legislation, the Court had recognized a prophylactic power of Congress: the power to legislate against acts that are not necessarily unconstitutional, in order to protect individuals against possible constitutional violations by the

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race and similar immutable traits was beyond congressional authority under the Fifteenth Amendment)). Although noting that subsequent cases have overruled or modified the holdings of some of these early cases, the Court asserted that "their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned." *Id.* at 2166. Note that in addition to cases involving the Enforcement Clause of the Fourteenth Amendment, the Court relied on cases involving the Enforcement Clause of the Fifteenth Amendment, which has been construed similarly. *See infra* note 178.

96. *See Flores*, 117 S. Ct. at 2167-68. The VRA is comprehensive legislation that was designed to eliminate discrimination in voting against African-Americans. *See* 42 U.S.C. §§ 1973 to 1973bb-1 (1994). Provisions of the VRA were challenged in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), *Oregon v. Mitchell*, 400 U.S. 112 (1970) (plurality opinion), and *City of Rome v. United States*, 446 U.S. 156 (1980), all of which the Court cited for support of its interpretation of the meaning of "enforce." *See Flores*, 117 S. Ct. at 2166-68. Some of the VRA cases involve a parallel enforcement provision in the Fifteenth Amendment. *See infra* note 178. The VRA and the cases involving it are discussed at greater length *infra* notes 180-238 and accompanying text.

97. *See Flores*, 117 S. Ct. at 2167. The Court characterized the provisions of the VRA as "new, unprecedented *remedies*" and "strong *remedial and preventive* measures" made necessary by the long history of racial discrimination in voting. *Id.* (emphasis added). RFRA supporters argued that the VRA and RFRA were analogous statutes: that RFRA protected religious freedom in the same way that the VRA had protected the right to vote. *See, e.g.*, Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 152-53 (1995). But the Court distinguished the two statutes on the grounds that, while the VRA was remedial, RFRA was substantive legislation. *See infra* notes 293-332 and accompanying text (discussing the Court's analysis of RFRA).

98. *See Flores*, 117 S. Ct. at 2167-77 (discussing *Mitchell*, 400 U.S. at 117-18, in which the Court struck down legislation lowering the minimum voting age in state elections, and *Morgan*, 384 U.S. at 658, in which the Court upheld a section of the VRA as "appropriate legislation to enforce the Equal Protection Clause," and disavowing any language in *Morgan* that suggested Congress had the power to expand the rights defined in § 1 of the Fourteenth Amendment).

99. *See id.* at 2164.

states.[100] The hard cases, then, fall within this prophylactic area. The Court must distinguish legislation that only slightly and permissibly "overprotects" constitutional rights from legislation that substantively changes the meaning of the Constitution and treads on state autonomy.[101]

To determine the line separating permissible prophylactic power from impermissible substantive interpretation, the Court articulated a test: The means employed by the legislation must be proportional to the ends the legislation is designed to accomplish.[102] The greater the danger of unconstitutional behavior, the more demanding the preventive legislation can be; but if Congress enacts demanding legislation in the face of an unlikely threat, then Congress effectively changes the Constitution.[103] The Court held that RFRA, falling into the latter category, had crossed the line.[104] Noting the lack of recent examples of purposeful religious discrimination[105] and expressing

100. *See id.* at 2163 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976))).

As an example of Congress's use of its prophylactic power, the Court mentioned the provision of the VRA that bans the use of literacy tests. *See id.* (citing 42 U.S.C. § 1973b). The Court had earlier upheld the use of literacy tests in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), while acknowledging that the discriminatory application of such tests is unconstitutional. *See id.* at 53. Because such tests had been widely used in a discriminatory manner, the Court recognized Congress's authority to suspend the use of the tests, pursuant to Congress's enforcement power under the Fifteenth Amendment, without requiring proof of discriminatory application. *See South Carolina v. Katzenbach*, 383 U.S. at 333-34. Thus, Congress was allowed to prohibit conduct that was not necessarily unconstitutional. *See infra* notes 188-97 and accompanying text (discussing Congress's prophylactic power).

101. *See Flores*, 117 S. Ct. at 2164 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").

102. *See id.* ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.").

103. *See id.* at 2166-68.

104. *See id.* at 2169-71. The Court asserted that "RFRA . . . cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* at 2170.

105. The Court observed that the record before Congress when it passed RFRA did not contain any modern examples of generally applicable laws that were passed because of religious bigotry. *See id.* at 2169. Episodes of religious persecution cited in the legislative record had occurred at least 40 years prior to Congress's consideration of RFRA. *See id.*

concern over the expansive scope of RFRA,[106] the Court concluded that RFRA was not a proportional response to the ends it was designed to effect; RFRA was not remedial legislation, but legislation that had the effect of changing constitutional protections.[107] The Court therefore concluded that Congress had exceeded its power when it enacted RFRA and struck down RFRA in its entirety.[108]

Justice O'Connor dissented from the Court's opinion, although she did not disagree with the Court's analysis of the scope of Congress's § 5 power.[109] She dissented because she believed that *Smith II* was wrongly decided and should therefore not have formed the basis for the majority's holding.[110] Justice O'Connor's dissent was primarily devoted to a historical analysis of the Free Exercise Clause.[111] Justice Scalia concurred solely for the purpose of refuting Justice O'Connor's historical analysis.[112] Justices Souter and Breyer also dissented, without expressing any opinion as to the validity of the Court's § 5 analysis.[113] They dissented because they, like Justice O'Connor, believed that *Smith II* should have been reconsidered.[114]

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106. The Court was concerned that RFRA implicated every sort of law, at every level of government, and had no geographic or temporal limitations. *See id.* at 2170; *infra* notes 308-14 and accompanying text (discussing the Court's concern with RFRA's expansive scope).

107. *See Flores*, 117 S. Ct. at 2170. The Court stated that

> RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

Id.

108. *See id.* at 2172. Because the Court addressed only Congress's authority to pass RFRA as RFRA applied to the states, the decision is ambiguous with regard to whether RFRA applied only to federal laws is unconstitutional.

109. *See id.* at 2176 (O'Connor, J., dissenting) ("I agree with much of the reasoning set forth in Part III-A of the Court's opinion. Indeed, if I agreed with the Court's standard in *Smith* [*II*], I would join the opinion.").

110. *See id.* (O'Connor, J., dissenting). Justice O'Connor would have used *Flores* to reexamine the Court's *Smith II* holding. *See id.* (O'Connor, J., dissenting).

111. *See id.* at 2178-85 (O'Connor, J., dissenting). Justice O'Connor argued that the *Smith II* holding is not supported by this history. *See id.* (O'Connor, J., dissenting). She also stated that *Smith II* departed from the Court's precedent. *See id.* at 2177-78 (O'Connor, J., dissenting).

112. *See id.* at 2172 (Scalia, J., concurring in part) ("I write to respond briefly to the claim of Justice [O'Connor's] dissent . . . that historical materials support a result contrary to the one reached in [*Smith II*].").

113. *See id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting). Justice Breyer specifically stated that he did not see any need to reach the issue of congressional authority, in light of his view that *Smith II* should have been reconsidered. *See id.* at 2186 (Breyer, J., dissenting).

114. *See id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

Despite the fact that the majority did not dwell on religion,[115] the Court's free exercise jurisprudence is an important aspect of the *Flores* decision because it was in reaction to the Court's First Amendment case law that Congress enacted RFRA.[116] Many commentators believed that the *Employment Division v. Smith (Smith II)*[117] decision marked a sharp departure from the Court's free exercise precedent.[118] With RFRA, Congress attempted to mitigate the harm it believed the Supreme Court caused with *Smith II*.[119]

Justice Souter was not prepared to join either Justice O'Connor's opinion rejecting the *Smith II* rule, or the majority's opinion, which was based on the assumption that the *Smith II* rule was correct, in the absence of briefing on the issue by the parties. *See id.* at 2186 (Souter, J., dissenting). He nevertheless stated that he had doubts, intensified by the historical arguments of Justices O'Connor and Scalia, about the soundness of the *Smith II* rule. *See id.* (Souter, J., dissenting); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564-77 (1993) (Souter, J., concurring in part and concurring in the judgment) (explaining why, in his view, the *Smith II* decision could and should be reconsidered).

115. Ironically perhaps, the case was *not* about religion, at least not for the majority. The majority considered religion only to the extent necessary to determine if RFRA satisfied its test for remedial legislation under § 5. Thus, the Court reviewed its Free Exercise standard as announced in *Smith II*. *See Flores*, 117 S. Ct. at 2160-61. Then, with *Smith II* as the reference point for what the Constitution requires, the Court evaluated the legislative record regarding constitutional violations and RFRA's provisions for preventing those purported violations. *See id.* at 2168-72.

The parties to the case briefed the issue of whether RFRA violated the Establishment Clause. *See* Brief for Petitioner at 46-49, *Flores* (No. 95-2074); Brief of Respondent Flores at 46-49, *Flores* (No. 95-2074); Brief for the United States at 40-44, *Flores* (No. 95-2074). The petitioner's argument that RFRA violated the Establishment Clause was adopted by Justice Stevens in his concurrence, *see Flores*, 117 S. Ct. at 2172 (Stevens, J., concurring), but the issue was not mentioned in the opinion of the Court. Justice Stevens argued that RFRA violated the Establishment Clause because RFRA provided potential exemptions from generally applicable laws for religious actors, but not for nonreligious ones. *See id.* (Stevens, J., concurring). Thus, Justice Stevens argued, if an atheist had been denied a permit to expand a museum or an art gallery, RFRA would not be available as a weapon, and "[t]his governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Id.* (Stevens, J., concurring).

116. *See infra* notes 161-75 and accompanying text.

117. 494 U.S. 872 (1990).

118. Actually, a long line of Supreme Court cases prior to *Smith II* rejected free exercise claims. *See* Lupu, *supra* note 7, at 261 (listing cases); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 183 (1992) (same). But these cases could be categorized and dismissed as exceptions: "an Indians case, a military case, a Muslims-in-prison case" Lupu, *supra* note 7, at 261. It was the general nature of the rule of *Smith II* that raised concern. *See id.*; *see also infra* notes 143, 153 (discussing the difference in viewpoint regarding whether *Smith II* departed significantly from precedent).

119. *See* S. REP. NO. 103-111, at 7-9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897-98 (describing the impact of the *Smith II* decision and the intended effect of RFRA); Eisgruber & Sager, *supra* note 6, at 441 (characterizing RFRA as a congressional attempt to undo a Supreme Court decision).

Indeed, an express purpose of RFRA was to restore the free exercise standard that the Court had used in two cases preceding *Smith II*: *Sherbert v. Verner*[120] and *Wisconsin v. Yoder*.[121]

In *Sherbert*, the Supreme Court held that if a state law burdened an individual's free exercise of religion, then the state must justify that burden with a compelling interest.[122] In the case, a Seventh-Day Adventist was fired from her job in a textile mill when she refused to work on Saturdays, the day of her Sabbath.[123] Unable to obtain another job because of her inability to work on Saturdays, she filed for unemployment benefits.[124] The South Carolina Employment Security Commission found that the plaintiff "was unavailable for work" and denied unemployment benefits.[125] The Supreme Court of South Carolina ultimately affirmed the Commission's decision, holding that the plaintiff's constitutional liberties were not infringed because she was not actually prevented from exercising her right to practice religion or observing her religious beliefs.[126]

The U.S. Supreme Court reversed the judgment of the South Carolina Supreme Court.[127] The Court acknowledged that the government may regulate certain conduct prompted by religious belief or principles,[128] but held that Mrs. Sherbert's conscientious

120. 374 U.S. 398 (1963).

121. 406 U.S. 205 (1972). The first stated purpose of RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b) (1994).

122. *See Sherbert*, 374 U.S. at 403.

123. *See* Sherbert v. Verner, 125 S.E.2d 737, 737-38 (S.C. 1962), *rev'd*, 374 U.S. 398 (1963). The employee had worked at the mill for approximately 35 years. *See id.* at 737. About two years prior to her discharge, she became a Seventh-Day Adventist. *See id.* at 738. At that time, Saturday work was on a voluntary basis. *See id.* The employer began requiring Saturday work, and when the employee refused to work, she was discharged. *See id.* at 737-38.

124. The plaintiff applied for a job at three other textile plants, but these, like most of the textile plants in the area, required employees to work on Saturday. *See id.* at 738.

125. *See id.* Under the South Carolina Unemployment Compensation Law, being unavailable for work was grounds for disqualifying an otherwise insured worker for benefits. *See id.* at 739.

126. *See id.* at 746 (noting that the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience").

127. *See Sherbert*, 374 U.S. at 402.

128. *See id.* at 403. For example, the Court has upheld a law prohibiting polygamy, while refusing to grant an exemption from that law to one whose religious beliefs embraced polygamy. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878); *see also* Braunfeld v. Brown, 366 U.S. 599, 601, 609 (1961) (upholding Sunday closing laws as applied to orthodox Jews, who claimed such laws infringed their free exercise rights);

objection to working on Saturday was distinguishable.[129] Thus, the Court stated, if Mrs. Sherbert's free exercise was burdened, then the government must justify imposing that burden by advancing a compelling interest.[130] The Court held that the appellant's free exercise of religion was burdened[131] and rejected as less than compelling the interests advanced by the State of South Carolina.[132]

The holding of *Sherbert* was reaffirmed a decade later in *Wisconsin v. Yoder*.[133] The Court cited *Sherbert* for the proposition that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[134] In *Yoder*, Amish parents had refused to send their children to school beyond the eighth grade and were convicted of violating Wisconsin's compulsory school-attendance law.[135] The parents claimed that the application of that law to them violated their rights under the Free Exercise Clause of the First Amendment.[136] Despite the importance

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Cleveland v. United States, 329 U.S. 14, 20 (1946) (upholding conviction under the Mann Act against a defense of religious belief); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (holding that a child labor law is enforceable against a claim that such enforcement regulates religious conduct of the parent).

129. *See Sherbert*, 374 U.S. at 403 ("Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.").

130. *See id.* The Court stated that

> [i]f ... the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."

Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

131. *See id.* at 403-06. Appellant was burdened by being put in the position of having to choose between her religious convictions and her state unemployment benefits. *See id.* at 404.

132. *See id.* at 406-09. The interests advanced by the state were guarding against the filing of fraudulent claims in order to avoid diluting the benefits fund and preventing hindrance of the employer's scheduling of Saturday work. *See id.* at 407.

133. 406 U.S. 205 (1972).

134. *Id.* at 220.

135. *See id.* at 207 (citing WIS. STAT. ANN. § 118.15 (West 1969) (current version at WIS. STAT. ANN. § 118.15 (West 1991))).

136. *See Yoder*, 406 U.S. at 208-09 (citing U.S. CONST. amend. I). The Amish had a unique lifestyle, and it was necessary that children in their formative years remain in the community in order to acquire the attitudes and skills appropriate to Amish life; moreover, formal high school education would expose Amish children to an environment hostile to Amish beliefs. *See id.* at 209-13. The Amish believed that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely

of the State's interest in educating all of its children, the Court held that this interest "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[137] Applying the *Sherbert* test, the Court held that application of the compulsory attendance law to the Amish constituted a significant burden on their free exercise rights[138] and that the State's interest was not sufficiently compelling.[139]

By many accounts, *Sherbert* and *Yoder* established an approach that the Court would consistently take in interpreting the Free Exercise Clause in the period following *Sherbert*.[140] Under this approach, "a burden on the free exercise of religion is constitutional only if there is a compelling governmental interest that justifies that burden."[141] Thus, many were surprised when the Court, in *Employment Division v. Smith (Smith II)*,[142] rejected the use of its compelling interest test when the laws involved are neutral and of general applicability.[143]

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endanger if not destroy the free exercise of [their] religious beliefs." *Id.* at 219.

137. *Id.* at 214.

138. *See id.* at 219.

139. *See id.* at 221-29.

140. *See* Conkle, *supra* note 4, at 55-56; Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 85-86 (1996); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 84-85; McConnell, *supra* note 118, at 181-82.

141. McConnell, *supra* note 118, at 181-82. The Court did make exceptions to its use of the compelling interest test for military and prison regulations. *See* Conkle, *supra* note 4, at 56; Gressman & Carmella, *supra* note 140, at 85.

142. 494 U.S. 872 (1990) (*Smith II*).

143. *See id.* at 878-89. The decision was characterized as "dramatic and unanticipated," Gressman & Carmella, *supra* note 140, at 93, and as a sharp departure from precedent, *see* McConnell, *supra* note 118, at 183. Some commentators, however, remarked that *Smith II* did not effect the abrupt change in the law that post-*Smith II* rhetoric suggests. *See* Tushnet, *supra* note 7, at 121. Professor Tushnet cited a Ninth Circuit decision in which Judge John T. Noonan collected 72 courts of appeals cases raising free exercise claims, of which only seven (9%) prevailed. *See id.* at 121 n.14 (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 627-29 (9th Cir. 1988) (Noonan, J., dissenting)). Out of 17 Supreme Court cases decided between 1963 and 1990 involving free exercise claims, the free exercise claim prevailed in only four (23%). *See id.* at 121; *see also* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1458-62 (1992) (compiling similar statistics). *But see* Lee, *supra* note 140, at 86-87 ("If the *Smith* [*II*] approach survives, it will work some very large changes in existing free exercise jurisprudence.").

Professor McConnell conceded that, in many cases, the Supreme Court held against the free exercise claimant, either because the Court found an insufficient burden on the individual's free exercise, or because the government successfully demonstrated a compelling interest. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990). At least one commentator has suggested

The facts in *Smith II* resembled those of *Sherbert*, in that discharged employees were seeking unemployment benefits.[144] In *Smith I* and *Smith II*, the employees had been fired because they used peyote, a felony under Oregon law.[145] Although their use of peyote was for sacramental purposes, they were denied unemployment benefits because they had been discharged for work-related misconduct.[146] The *Smith I* and *Smith II* employees claimed that they were being denied benefits because of their religious beliefs and cited *Sherbert* as precedent for holding that they were entitled to benefits.[147]

The Supreme Court reframed the issue. First, the Court noted that Oregon law prohibited even the sacramental use of peyote.[148] The question, then, was whether the federal Constitution protects the sacramental use of peyote. If the United States Constitution does not

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that the Court used a more lenient standard of review than the compelling interest standard. *See* Conkle, *supra* note 4, at 56. Even so, the Court did use heightened scrutiny, and "[t]here is no support in the precedents for the Court to replace the prior test with nothing more than the toothless rationality review that is applicable to all legislation." McConnell, *supra*, at 1128.

144. *See Smith II*, 494 U.S. at 874. The employees in this case, Alfred Smith and Galen Black, had been employed by a nonprofit corporation (the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment, or "ADAPT") that provided treatment for alcohol and drug abusers. *See* Employment Div. v. Smith (*Smith I*), 485 U.S. 660, 662 (1988).

145. *See Smith II*, 494 U.S. at 874. Both Smith and Black formerly had drug or alcohol dependencies, a fact that partially qualified them to be counselors for ADAPT. *See Smith I*, 485 U.S. at 662. ADAPT policy required that counselors such as Smith and Black refrain from the use of alcohol and illegal drugs. *See id.* at 662 & n.3. Smith and Black, members of the Native American Church, each had ingested peyote for sacramental purposes. *See id.* at 663. Their employment was therefore terminated because this violated ADAPT policy. *See id.* at 662-63.

Oregon law prohibits possession of a "controlled substance" unless prescribed by a medical practitioner. *See* OR. REV. STAT. § 475.992(4) (1987) (current version at OR. REV. STAT. § 475.992(4) (1995)). Peyote is included in the class of "controlled substances." *See* OR. ADMIN. R. 855-080-0021(3)(s) (1988) (current version at OR. ADMIN. R. 855-080-0021(3)(s) (1997)). Violation of this prohibition constitutes a Class B felony. *See* OR. REV. STAT. § 475.992(4)(a) (1987) (current version at OR. REV. STAT. § 475.992(4)(a) (1995)). After the *Smith II* decision, Oregon enacted a religious exemption. *See* OR. REV. STAT. § 475.992(5) (1997); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 304 n.35 (1996).

146. *See Smith II*, 494 U.S. at 874; *Smith I*, 485 U.S. at 663-64 & n.6; OR. REV. STAT. § 657.176(2)(a)-(b) (1987) (current version at OR. REV. STAT. § 657.176(2)(a)-(b) (1995)); OR. ADMIN. R. 471-030-0038(3) (1987) (current version at OR. ADMIN. R. 471-030-0038(3) (1997)).

147. *See Smith II*, 494 U.S. at 874-75.

148. *See id.* at 876. This was the issue for the Oregon Supreme Court to determine on remand of *Smith I*. *See supra* note 8. Oregon now has a religious exemption for peyote use. *See supra* note 145.

forbid Oregon from prohibiting the use of peyote for sacramental purposes, the Court reasoned, then the state may deny benefits to one who has used peyote; if the conduct can be made criminal, consistently with the federal Constitution, then it certainly can be the basis for denying benefits.[149]

The Court thus found a critical distinction between *Smith II* and *Sherbert*: The conduct that formed the basis for the employee discharge in *Smith II* was criminal, while that in *Sherbert* was not.[150] Thus, *Sherbert* did not control the issue in *Smith II*; rather, the issue was whether Oregon could, consistently with the First Amendment, make the use of peyote criminal, even though such a law would adversely impact the religious practices of Native Americans.[151] The Court held that Oregon constitutionally could prohibit the use of peyote and that it therefore also constitutionally could deny unemployment benefits when dismissal resulted from use of that drug.[152]

According to the Court, its *Smith II* decision conformed to its earlier precedents, which consistently held that individuals must comply with " 'valid and neutral law[s] of general applicability.' "[153] The only exceptions to this general principle that the Court recognized form a small group of cases presenting what the Court termed a "hybrid" situation.[154] Such hybrid cases, of which *Yoder* is an example, involve both the Free Exercise Clause and another constitutional protection.[155] Evidently, the presence of the additional

149. *See Smith II*, 494 U.S. at 875.

150. *See id.* at 876.

151. *See id.*

152. *See id.* at 890.

153. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). The Court stated that "the record of more than a century" of its free exercise jurisprudence contradicted the proposition that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. Thus, in the Court's view, *Sherbert* was an exception to a long line of precedent. *Smith II*'s critics, on the other hand, claimed that *Smith II* was a sharp break with precedent. *See, e.g.*, Gressman & Carmella, *supra* note 140, at 90 n.104 (observing that criticism of *Smith II* on the basis of its inconsistency with prior case law is well-founded); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (arguing that "[*Smith II*'s] use of precedent borders on fiction"); McConnell, *supra* note 143, at 1124-27 (describing the precedents relied upon in *Smith II* and criticizing the Court's use of those precedents because they had been repudiated or were inapposite).

154. *See Smith II*, 494 U.S. at 881-82.

155. *Yoder* involved Amish parents' right to educate their children in accordance with their religious principles; thus, free exercise rights were joined by the right of parents "to direct the education of their children." *Id.* at 881; *see also supra* notes 133-39 and accompanying text (discussing *Yoder*). In the *Smith II* Court's words:

constitutional protection beyond the Free Exercise Clause is what triggered heightened scrutiny by the Court.[156] *Smith II* did not present such a hybrid situation and therefore did not escape the operation of the rule that generally applicable laws apply equally to all, regardless of incidental burdens to religious exercise.[157]

The Court put *Sherbert* and subsequent cases involving unemployment benefits into a class by themselves, explaining that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[158] Thus, only for such specialized cases is the *Sherbert* balancing test required.[159] As discussed above, the Court framed the issue presented in *Smith II* in such a way as to make *Sherbert* inapposite. Therefore, *Smith II* fell into that general category of cases that would

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> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children.

Smith II, 494 U.S. at 881 (citations omitted).

156. *See Smith II*, 494 U.S. at 881 & n.1; *cf.* Mary McCrory Krupnow, Note, M.L.B. v. S.L.J.: *Protecting Familial Bonds and Creating a New Right of Access in the Civil Courts*, 76 N.C. L. REV. 621, 645 (1998) (providing an example of a combination of equal protection, substantive due process, and procedural due process concerns yielding heightened scrutiny).

157. "There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls." *Smith II*, 494 U.S. at 882.

158. *Id.* at 883.

159. *See id.* at 882-85. The Court acknowledged that it had applied the *Sherbert* test in other contexts, but compelling governmental interests always were demonstrated and, therefore, the challenged laws were applied to the religious objectors. *See id.* at 883. Further, the Court in recent years had refrained completely from applying the test outside the unemployment compensation context. *See id.* The Court explained at length why the use of the *Sherbert* test should remain confined to the unemployment compensation context, or at least not be applied to require exemptions from generally applicable criminal laws. *See id.* at 884-90. The most significant reason weighing against the general use of the *Sherbert* compelling interest test was the potential impact, given the diversity of religious beliefs in American society, of permitting exemptions to general laws. *See id.* at 888-89. Such a rule could result in exemptions from

> civic obligations of every conceivable kind—ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Id. (citations omitted).

be judged according to the new free exercise standard: So long as a law is neutral and of general applicability, it need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice.[160]

The response to "the Court's dramatic and unanticipated rejection of balancing as the interpretive approach to the Free Exercise Clause"[161] was immediate and critical.[162] Legal scholars accused the Court of abandoning precedent[163] and of misinterpreting the First Amendment and its history.[164] Members of Congress lamented the loss of protection for religious freedoms and raised concerns that the free exercise of religion would be threatened.[165] Several law professors and a number of organizations joined the petition for rehearing of *Smith II*;[166] when the Supreme Court refused

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160. *See id.* at 878.

161. Gressman & Carmella, *supra* note 140, at 93.

162. *See* Berg, *supra* note 3, at 12; Gressman & Carmella, *supra* note 140, at 93. Although most scholars are critical of *Smith II*, there are a few who, although they might take issue with the opinion itself, believed the result was correct. *See* Wayne McCormack, *Subsidies for Expression and the Future of Free Exercise*, 1993 BYU L. REV. 327, 327 ("Along with maybe a handful of others, I tentatively believe that Justice Scalia may have been right in *Smith* [*II*], despite the manifold problems with the opinion." (footnote omitted)).

163. *See supra* notes 143, 153 (discussing whether *Smith II* is a sharp departure from precedent).

164. Whether the decision is correct in its interpretation of the First Amendment is beyond the scope of this Note. *See generally* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (presenting a historical argument that the Free Exercise Clause does not provide a constitutional right to religious exemption from civil laws, thereby supporting the result of *Smith II*); Marshall, *supra* note 153, at 308 (1991) (defending *Smith II*'s rejection of constitutionally compelled free exercise exemptions, while criticizing the opinion itself); McConnell, *supra* note 118, at 181-87 (criticizing *Smith II* as being inconsistent with the text and history of the First Amendment, as well as with Supreme Court precedent); Tushnet, *supra* note 7, at 129-38 (defending the doctrinal outcome of *Smith II* as more respectful of religious exercise than the pre-*Smith II* approach).

165. *See* S. REP. NO. 103-11, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 ("By lowering the level of constitutional protection for religious practices, the decision has created a climate in which the free exercise of religion is jeopardized."); H.R. REP. NO. 103-88, at 5 (1993) ("[T]he Smith [*II*] decision has created a climate in which the free exercise of religion is continually in jeopardy."). Congress held several hearings in the course of considering various versions of RFRA, generating pages of testimony regarding the threat to religious liberty in America as a result of the *Smith II* decision. *See The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Comm. on the Judiciary*, 102d Cong. (1992); *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. (1992); *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. (1990).

166. *See* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the*

to reconsider its decision,[167] "a broad-based coalition of religious and civil liberties groups formed to pursue the next alternative, restoring religious freedom by statute."[168]

Although two attempts at statutory redress were unsuccessful,[169] RFRA became law on November 16, 1993.[170] RFRA was backed by a diverse[171] yet fragile coalition.[172] Because of the differing views of the groups within the coalition, the goals of RFRA had to be kept general in order to maintain the support necessary to obtain passage of the act.[173] RFRA eventually emerged[174] with the stated goal of

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Amicus Brief That Was Never Filed, 8 J.L. & RELIGION 99, 99-100 & nn.2-3 (1990).

167. *See* Employment Div. v. Smith, 496 U.S. 913, *denying reh'g of* 494 U.S. 872 (1990).

168. Berg, *supra* note 3, at 12.

169. The Religious Freedom Restoration Act of 1990 was considered by the 101st Congress as H.R. 5377, 101st Cong. (1990), and S. 3254, 101st Cong. (1990). *See* Whitbeck, *supra* note 6, at 846-48. It died at the end of the 101st Congress, however, because legislators did not have adequate time to consider it. *See id.* at 848 & n.157. What began as the RFRA of 1991, H.R. 2797, 102d Cong. (1991), was delayed in passage by various concerns, including fears on the part of some members that it created a statutory right to abortion; this fear was based on an untested claim by pro-choice groups that the right to abortion was protected by the Free Exercise Clause. *See* Whitbeck, *supra* note 6, at 848-55. Although RFRA supporters attempted to expedite procedures to bring the bill to the House floor before the end of the 102d Congress, they were unsuccessful. *See id.* at 855.

170. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

171. *See* Berg, *supra* note 3, at 13; Conkle, *supra* note 4, at 40, 88-89; Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210-11 (1994); McConnell, *supra* note 118, at 187.

172. The secular civil liberties groups were concerned with protecting members of minority religious groups from the operation of neutral laws passed by legislative majorities; at the same time, however, these groups were wary of allowing too much entanglement of church and state. *See* Berg, *supra* note 3, at 13. The religious groups had widely varying attitudes regarding government support for religion, but were united in eschewing "*Smith* [*II*]'s proposition that religious conscience must be subordinate even to modest secular interests of government." *Id.* "To preserve maximum political attractiveness, the RFRA coalition decided that the most promising route was to design and market the statute primarily as a simple restoration of previously existing free exercise rights." *Id.* at 14.

The major opposition to RFRA was due to the abortion issue. *See id.* at 15; Whitbeck, *supra* note 6, at 849-51, 855-56; *supra* note 169 (describing the abortion issue). The Catholic Church also expressed some concern that RFRA might be used to attack tax exemptions and government funding of religious organizations. *See* Berg, *supra* note 3, at 15.

173. *See* Berg, *supra* note 3, at 14.

174. Since RFRA had bipartisan support from the start, only relatively minor amendments to the language were necessary to address the concerns of the various factions within the coalition; once these concerns were allayed, RFRA was passed easily into law during the 103d Congress. *See* Berg, *supra* note 3, at 17; Whitbeck, *supra* note 6, at 855-63. H.R. 1308, 103d Cong. (1993), sailed through the House, *see* Whitbeck, *supra*

"restor[ing] the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and [of] guarant[ying] its application in all cases where free exercise of religion is substantially burdened."[175]

Although religious issues were the catalyst for the *Flores* decision, the key issue before the Court was the scope of Congress's enforcement power under § 5 of the Fourteenth Amendment.[176] The Enforcement Clause gives Congress the power to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."[177] Prior to *Flores*, this power[178] had been explored in a series of cases deciding the constitutionality of certain provisions of the VRA.[179]

South Carolina v. Katzenbach[180] presented the first challenge to the VRA,[181] with the State alleging that several of its provisions were unconstitutional.[182] In particular, South Carolina challenged a

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note 6, at 857-58. Its companion bill, S. 578, 103d Cong. (1993), after minor amendment, was passed by the Senate with a vote of 97-3. *See* Whitbeck, *supra* note 6, at 858-63. The House considered and accepted the Senate amendment, and President Clinton signed the bill into law on November 16, 1993. *See id.* at 863.

175. 42 U.S.C. § 2000bb(b) (citations omitted).

176. *See Flores*, 117 S. Ct. at 2162.

177. U.S. CONST. amend. XIV, § 5.

178. The Fourteenth and Fifteenth Amendments both have Enforcement Clauses, which are almost identical. The Enforcement Clause of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The Enforcement Clause of the Fifteenth Amendment reads: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. The Court has construed them similarly. *See* City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."); *see also* Lee, *supra* note 140, at 92 ("Both *South Carolina v. Katzenbach* and *City of Rome* suggest, at least by implication, that the enforcement powers of each of the reconstruction amendments are coextensive. Since the language of each of the enforcement provisions is identical, no reason exists to believe that this implication is not, in fact, explicit."). *But see* 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, 376 (1994) ("The discussion over RFRA has presumed that there is no meaningful difference between the two enforcement provisions. There is, however, a decisive difference between the two on the question of whether Congress may regulate itself.").

179. The Voting Rights Act is codified at 42 U.S.C. §§ 1973 to 1973bb-1 (1994).

180. 383 U.S. 301 (1966).

181. *See* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 226 (1971).

182. *See* South Carolina v. Katzenbach, 383 U.S. at 307, 315-16. South Carolina

provision imposing a ban on all voting tests or devices in covered states,[183] as this provision had the effect of temporarily barring South Carolina's enforcement of a statute that required its citizens to pass a literacy test in order to register to vote.[184]

The effect of the VRA was to preempt South Carolina's use of certain voting procedures, in advance of any judicial finding that these procedures were discriminatory.[185] South Carolina objected on the grounds that Congress had usurped the power of the judiciary.[186] The Court rejected South Carolina's argument, holding that Congress, as well as the courts, has the power to fashion and apply specific remedies designed to protect Fifteenth Amendment rights.[187]

With *South Carolina v. Katzenbach*, the Court first recognized Congress's permissible use of the prophylactic power: Congress has the authority under the Enforcement Clause to prohibit conduct that

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challenged 42 U.S.C. §§ 1973b(a)-(d), 1973c, 1973d(b), 1973e, 1973g, 1973i, 1973j(a)-(c), 1973k(a), and certain procedural portions of § 1973*l*. *See Katzenbach*, 383 U.S. at 316-17. The Court did not consider the challenge to 42 U.S.C. §§ 1973i, 1973j(a)-(c) because it was "premature." *See Katzenbach*, 383 U.S. at 317. Section 1973b defines the covered regions, and suspends literacy tests in those regions. *See* 42 U.S.C. § 1973b. Section 1973c requires that a covered state, before instituting new voting regulations, obtain preclearance by the U.S. Attorney General or a declaratory judgment from the District Court for the District of Columbia that the new regulation does not have discriminatory purpose, and will not have the effect of denying or abridging the right to vote. *See id.* § 1973c. Sections 1973d(b), 1973e, 1973g, and 1973k(a) all involve the assignment of federal examiners to supervise elections. *See id.* §§ 1973d(b), 1973e, 1973g, 1973k(a). *See generally Katzenbach*, 383 U.S. at 315-23 (discussing these statutory provisions).

183. *See Katzenbach*, 383 U.S. at 319. Section 1973b(a) of the VRA provides that "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any [covered] State." 42 U.S.C. § 1973b(a). Certain provisions of the VRA apply only to states or political subdivisions of a state—known as "covered areas"—that had engaged in voting discrimination prior to passage of the VRA, as measured by § 1973b(b) of the Act. *See* 42 U.S.C. § 1973b(b); *Katzenbach*, 383 U.S. at 317-19. South Carolina had been designated a "covered" state. *See Katzenbach*, 383 U.S. at 318.

184. *See Katzenbach*, 383 U.S. at 319.

185. South Carolina relied on an earlier Supreme Court holding in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). *See Katzenbach*, 383 U.S. at 333. In *Lassiter*, the Court held that a literacy test applied to all voters does not violate the Fourteenth Amendment, *see Lassiter*, 360 U.S. at 50-53, and the use of literacy tests does not necessarily violate the Fifteenth Amendment, *see id.* at 53-54. Nevertheless the *Lassiter* Court noted that "a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53.

186. *See Katzenbach*, 383 U.S. at 325.

187. *See id.* at 327 ("We ... reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts.").

has not been found to be unconstitutional by a court.[188] Despite the fact that a constitutional violation need not be proven in advance of the legislation's operation against the states, the Court characterized the VRA as "remedial."[189] Moreover, the Court recognized broad authority in Congress to act under its remedial power by announcing a loose standard of review of congressional acts pursuant to the enforcement power.[190] The standard by which the Court judged the appropriateness of this enforcement legislation was the *M'Culloch v. Maryland*[191] standard for the Necessary and Proper Clause:[192] "Let the end be legitimate, let it be within the scope of the constitution, and all 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."[193] Noting the extensive record that Congress had assembled when it enacted the voting rights legislation,[194] the Court determined that the VRA's temporary suspension of literacy tests and similar devices in covered areas[195] was "a legitimate response to the problem, for which there [was] ample precedent in Fifteenth Amendment cases."[196] Thus, the Court held that Congress had not exceeded its power under the Enforcement

188. *See Flores*, 117 S. Ct. at 2163; *see also* Cox, *supra* note 181, at 226-27 (observing that the Court in *South Carolina v. Katzenbach* upheld the prohibition by Congress of conduct that had not been proven to violate the Fifteenth Amendment); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1059-62 (1993) (describing the broad powers of Congress under the Enforcement Clause, including the power to prohibit conduct that is not unconstitutional).

189. *See South Carolina v. Katzenbach*, 383 U.S. at 326.

190. *See, e.g.*, Cox, *supra* note 181, at 226 ("*South Carolina v. Katzenbach* laid the foundation for the exercise of broad congressional authority under section 5." (citation omitted)); Lee, *supra* note 140, at 92 (describing the "breadth" of Congress's enforcement power); Pawa, *supra* note 188, at 1059 ("[A] series of cases involving conflicts over federal voting-rights laws . . . interpret Congress's powers very broadly.").

191. 17 U.S. (4 Wheat.) 316 (1819).

192. U.S. CONST. art. I, § 8, cl. 18.

193. *M'Culloch*, 17 U.S. (4 Wheat.) at 421; *see South Carolina v. Katzenbach*, 383 U.S. at 326.

194. The record detailed the history of racial discrimination in voting by some of the southern states, including repeated violations of and litigation under the Fifteenth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. at 308-15. In particular, this record demonstrated that in South Carolina, literacy tests had regularly been used to discriminate against African-Americans. *See id.* at 333-34.

195. *See supra* note 183 (defining covered areas).

196. *South Carolina v. Katzenbach*, 383 U.S. at 334. Congress made findings that *in most of* the covered states, these tests had been applied in a discriminatory fashion, in violation of the Fifteenth Amendment. *See id.* at 333-34. Presumably then, the VRA acted to prohibit the use of literacy tests in some areas where there was no evidence that the tests had been applied in a discriminatory manner.

Clause of the Fifteenth Amendment.[197]

The Court reaffirmed its *South Carolina v. Katzenbach* holding in *City of Rome v. United States*.[198] The City of Rome, Georgia, had made changes in its electoral system.[199] Pursuant to the VRA, the City submitted the changes to the Attorney General of the United States for preclearance.[200] The Attorney General refused to preclear some of the changes for certain elections.[201] The City brought suit in federal district court,[202] and the district court granted summary judgment for the United States.[203] The court found that, while the contested changes were not made for a discriminatory purpose, they did have a discriminatory effect.[204]

On appeal to the Supreme Court, the City argued that Congress had exceeded its authority by requiring that, in order to obtain preclearance, a voting practice be neither discriminatory in purpose nor in effect.[205] The City maintained that the Supreme Court had

197. *See id.* at 308.

198. 446 U.S. 156 (1980).

199. *See* City of Rome v. United States, 472 F. Supp. 221, 224 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980). The changes included reducing the size and method of election of the Rome Commission and increasing the size and method of election of the Board of Education. *See id.*

200. *See id.* at 227-29.

201. *See id.* at 229.

202. *See* 42 U.S.C. § 1973c (1994).

203. *See City of Rome*, 472 F. Supp. at 249.

204. *See* City of Rome v. United States, 446 U.S. 156, 161-62 (1980). Under the VRA, the fact that a change would have a discriminatory effect alone was enough to justify withholding preclearance. *See* 42 U.S.C. § 1973c; *City of Rome*, 446 U.S. at 172-73.

205. *See City of Rome*, 446 U.S. at 173. The City argued that the Court need not reach the merits of the case, because the City was not subject to the VRA. *See id.* at 162. The City argued that it had satisfied the conditions of the so-called "bailout" provisions, under which a state or political subdivision can end its preclearance obligations through a declaratory judgment from the District Court of the District of Columbia. *See id.* at 162-67 (citing 42 U.S.C. § 1973b(a)). The Court held that the bailout provision was available only to the state, and not to the individual political subdivisions. *See id.* at 167-69. Alternatively, the City argued that the Court need not reach the merits because the Attorney General, by not responding to the City's preclearance request in a timely manner, effectively precleared the regulations at issue. *See id.* at 170-72. The Court rejected this argument as well, *see id.* at 171, and reached the merits.

On the merits, in addition to its argument that Congress exceeded its authority by prohibiting electoral changes having discriminatory effect or purpose, the City argued that, correctly interpreted, the VRA required more than a showing of discriminatory effect alone; this claim was rejected. *See id.* at 172-73. Also, the City argued that the VRA violated the principles of federalism. *See id.* at 179; *infra* notes 211-23 and accompanying text. The City advanced two other arguments that were also rejected. *See City of Rome*, 446 U.S. at 180-82 (arguing that even if the VRA was an appropriate means of enforcing the Fifteenth Amendment when originally adopted, the subsequent extension of the Act was unconstitutional); *id.* at 182-83 (arguing that the VRA violated

previously held that a showing of discriminatory purpose was required to establish a violation of the Fifteenth Amendment and that a showing of discriminatory effect alone was insufficient.[206] Because the change proposed by the City was found not to have a discriminatory purpose, the City argued that Congress was preventing it from engaging in activity that was not unconstitutional[207] and therefore Congress had exceeded its enforcement power.[208] The Supreme Court, relying on *South Carolina v. Katzenbach*, rejected this argument, stating that "Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination."[209] The Court held that the provision was not unconstitutional.[210]

In *City of Rome*, the Court directly addressed a claim that the VRA violated principles of federalism.[211] The Court dismissed the argument easily, reiterating its statement in *South Carolina v. Katzenbach* that " 'Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.' "[212] Further, the Court stated, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were

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constitutional rights of the City's citizens because it prevented the holding of elections).

206. *See City of Rome*, 446 U.S. at 173. For this position, the City relied on *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which a plurality of the Court held that purposeful discrimination must be shown to prove a violation of the Fifteenth Amendment. *See id.* at 63; *cf.* Washington v. Davis, 426 U.S. 229, 247-48 (1976) (holding that the Fifth and Fourteenth Amendments are not violated by a facially neutral statute having disparate racial impact, in the absence of a showing of discriminatory purpose). The *City of Rome* Court stated that "even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." *City of Rome*, 446 U.S. at 173 (footnote omitted). Thus, "[f]or the purposes of this case it is unnecessary to examine the various approaches expressed by the Members of the Court in [*Bolden*]." *Id.* at 173 n.11.

207. *See City of Rome*, 446 U.S. at 173.

208. *See id.*

209. *Id.* at 176.

210. *See id.* at 158.

211. *See id.* at 178-80. The City asserted that "even if the Fifteenth Amendment authorized Congress to enact the Voting Rights Act, that legislation violates principles of federalism articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976)." *City of Rome*, 446 U.S. at 178. *National League of Cities* was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985).

212. *City of Rome*, 446 U.S. at 178 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)).

specifically designed as an expansion of federal power and an intrusion on state sovereignty."[213]

Justice Powell and then-Justice Rehnquist both dissented in *City of Rome*, voicing concerns for federalism.[214] Foreshadowing the approach taken in *Flores*, Justice Rehnquist focused on the meaning of "enforce" as the critical means of distinguishing between permissible and impermissible action on the part of Congress.[215] He sketched out three theories of congressional powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments.[216] First, Congress may prohibit conduct that would

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213. *Id.* at 179.

214. *See id.* at 193-205 (Powell, J., dissenting); *id.* at 206-21 (Rehnquist, J., dissenting). Justice Powell took issue with the Court's interpretation of the provision of the VRA providing for bailout; he argued that the VRA allowed the City of Rome to bail out, even if the State of Georgia continued to be covered. *See id.* at 196-200 (Powell, J., dissenting). Moreover, Justice Powell asserted that the majority's construction of the statute rendered it unconstitutional as applied to the City of Rome. *See id.* at 200 (Powell, J., dissenting). According to Justice Powell, the Court recognized in *South Carolina v. Katzenbach* that the preclearance provisions implicated serious federalism concerns, but the Court nonetheless upheld these prophylactic measures on the basis of evidence of actual voting discrimination in the covered areas. *See id.* at 200-02 (Powell, J., dissenting). In Justice Powell's view, federalism concerns were allayed by the purported accuracy of the coverage formula, together with the bailout provisions, which would allow a state or subdivision to exempt itself from the coverage formula when it was proved to be nondiscriminating. *See id.* at 202-03 (Powell, J., dissenting). By withholding the bailout option from the City of Rome, the majority allowed the City to be denied its local autonomy because of the trespasses of other localities in the state; this was a violation of federalism. *See id.* at 203-05 (Powell, J., dissenting).

215. *See id.* at 207 (Rehnquist, J., dissenting). In language that would be echoed in *Flores*, Justice Rehnquist stated:

> Under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment, Congress is granted only the power to "enforce" by "appropriate" legislation the limitations on state action embodied in those Amendments. While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities. Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.

Id. (Rehnquist, J., dissenting) (citations omitted). The *Flores* opinion centered on the proper meaning of "enforce." *See Flores*, 117 S. Ct. at 2162-68; *infra* notes 278-92 and accompanying text (discussing *Flores* and the meaning of "enforce"). Like Justice Rehnquist, the *Flores* Court expressed respect for the acts of a coordinate branch of government yet found that it is the responsibility of the courts to determine if Congress has exceeded its power and to maintain the proper balance between the states and the federal government. *See Flores*, 117 S. Ct. at 2172; *infra* notes 343-70 and accompanying text (discussing *Flores* and the federal-state balance).

216. *See City of Rome*, 446 U.S. at 209-210 (Rehnquist, J., dissenting) (referring to U.S. CONST. amend. XIV, § 5 and U.S. CONST. amend. XV, § 2). The *Flores* Court divided congressional action into the permissible categories of remedial or preventive legislation, and the impermissible category of substantive legislation. *See Flores*, 117 S.

violate the Constitution.[217] Regarding conduct that would not violate the Constitution, as interpreted by the judiciary, Congress might act under the second theory, which provides that Congress may act remedially to enforce "judicially established substantive prohibitions of the Amendments."[218] Under the third theory, Congress has the authority to determine for itself what the substantive provisions of the Amendments entail and to prohibit any conduct that would violate those provisions.[219] According to Justice Rehnquist, only action under the first two theories may properly be viewed as "enforcement" of the Amendments; therefore only legislation based on the first two theories is permissible.[220] To uphold legislation passed under the third theory would give Congress the power to interpret the Constitution, a power that has been reserved to the judiciary and cannot be assumed by Congress without violating the separation of powers doctrine.[221] In Justice Rehnquist's view, the application of the VRA at issue in *City of Rome* could be justified only under the third theory;[222] Congress had "effectively amend[ed]

Ct. at 2164; *infra* notes 281-92 and accompanying text (discussing the *Flores* Court's analysis of congressional action).

217. *See City of Rome*, 446 U.S. at 210 (Rehnquist, J., dissenting).

218. *Id.* (Rehnquist, J., dissenting). Within this "remedial" category of legislation, Justice Rehnquist included congressional prohibition of conduct that might not itself violate the Constitution, if either "that prohibition is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit." *Id.* at 213 (Rehnquist, J., dissenting). Thus, for example, he would include under this theory of congressional authority the nationwide ban on literacy tests, *see* 42 U.S.C. § 1973aa (1994), which was upheld by the Court in *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (plurality opinion). *See City of Rome*, 446 U.S. at 215-16 (Rehnquist, J., dissenting). "The Court [in *Oregon v. Mitchell*] found the nationwide ban to be an appropriate means of effectively preventing purposeful discrimination in the application of the literacy tests as well as an appropriate means of remedying prior constitutional violations by state and local governments in the administration of education to minorities." *Id.* at 215 (Rehnquist, J., dissenting).

219. *See City of Rome*, 446 U.S. at 210 (Rehnquist, J., dissenting).

220. *See id.* at 210-11 (Rehnquist, J., dissenting).

221. *See id.* at 211 (Rehnquist, J., dissenting).

222. *See id.* at 210 (Rehnquist, J., dissenting). Justice Rehnquist read *City of Mobile v. Bolden*, 446 U.S. 55, 63 (1980), as holding that without purposeful discrimination there is no violation of the Fifteenth Amendment. *See City of Rome*, 446 U.S. at 208 (Rehnquist, J., dissenting). Because the district court had found that the City of Rome did not purposefully discriminate, *see id.* at 209 (Rehnquist, J., dissenting), application of the VRA to the City would amount to a prohibition by Congress of conduct on the part of the City which the judiciary had ruled was constitutional, *see id.* at 210 (Rehnquist, J., dissenting). Consequently, Justice Rehnquist stated that "the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution." *Id.* at 211 (Rehnquist, J., dissenting). This is in contrast to the "remedial" sections of the VRA, such as the banning of literacy tests, with which Congress prohibited conduct that was likely to be unconstitutional, without requiring

the Constitution."[223]

Although the Court recognized broad enforcement powers in *South Carolina v. Katzenbach* and *City of Rome*, the Court's decision in *Katzenbach v. Morgan*[224] potentially extended Congress's power even further.[225] *Morgan*, heard during the same term as *South Carolina v. Katzenbach*, considered a section of the VRA[226] providing that a person who completed the sixth grade in a Puerto Rican school could not be denied the right to vote because of an inability to read, write, understand, or interpret English.[227] This provision conflicted with New York State's election law, which required English literacy as a condition of voting.[228] Registered voters from the State of New York challenged the constitutionality of the provision.[229]

The *Morgan* Court advanced two theories for upholding this section of the VRA.[230] First, the Court determined that Congress, by ensuring that Puerto Rican Americans had access to the polls, protected the Puerto Rican Americans' civil rights through their voting rights.[231] According to this theory, Congress's action fell

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actual proof of unconstitutionality. *See id.* at 215 (Rehnquist, J., dissenting).

223. *City of Rome*, 446 U.S. at 210 (Rehnquist, J., dissenting). If one begins with the assumption that only the courts may properly interpret the Constitution, then enforcing legislation that enacts a constitutional interpretation by Congress differing from that of the courts would amount to an amendment of the Constitution. Thus, for example, in *City of Rome*, the Court allowed Congress to change the meaning of the Constitution by upholding legislation prohibiting conduct that the "real" Constitution allowed. *See id.* at 209-11 (Rehnquist, J., dissenting). The *Flores* Court also developed this theme. *See Flores*, 117 S. Ct. at 2168 (stating that "if Congress could define its own powers by altering the Fourteenth Amendment's meaning," then "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V").

224. 384 U.S. 641 (1966).

225. *See* Bickel, *supra* note 91, at 96-97 ("May [Congress] determine, not what means are appropriate to the enforcement of the Fourteenth and Fifteenth Amendments . . . , but the content of those Amendments . . . ? These questions did not arise in *South Carolina v. Katzenbach* . . . . But in *Katzenbach v. Morgan*, the Court did answer these questions."); Cox, *supra* note 181, at 227 ("The potential scope of *South Carolina v. Katzenbach* became apparent in *Katzenbach v. Morgan*."); Pawa, *supra* note 188, at 1060 (describing *Morgan* as "generally recognized as the Court's most deferential treatment of congressional power under the Civil War Amendments").

226. *See* 42 U.S.C. § 1973b(e) (1994).

227. *See id.*; *Morgan*, 384 U.S. at 643.

228. *See Morgan*, 384 U.S. 643-44 (citing N.Y. CONST. art. II, § 1; N.Y. ELEC. LAW §§ 150, 168 (Consol. 1950 & Supp. 1955) (abrogated by VRA)).

229. *See id.*

230. *See* Bickel, *supra* note 91, at 95-101; Cox, *supra* note 181, at 227-31.

231. *See Morgan*, 384 U.S. at 652-53; *see also* Paul Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 70 (1986) (stating that, under this theory, the challenged provision of the VRA was not essentially different from those upheld in *South Carolina v. Katzenbach*). *But see* Bickel, *supra* note

within its remedial power under the broad construction of that power described in *South Carolina v. Katzenbach*.[232] Second, and alternatively, the Court stated that the VRA provision in question was "legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications."[233] This characterization of the VRA supports a theory that Congress has some substantive power; that is, Congress has the authority to determine for itself what constitutes a violation of the Fourteenth Amendment.[234]

Morgan was a significant case because of its potential implications for the nature of congressional power, as suggested by this second theory.[235] In particular, the "substantive" or

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91, at 98-101 (criticizing this rationale as an interpretational stretch and only superficially attractive).

232. *See Morgan*, 384 U.S. at 653 (allowing Congress wide latitude in choosing the best means to protect the civil rights of the Puerto Rican minority). The theory is explained as follows: Congress may have been concerned with discrimination against the Puerto Rican community by New York public agencies; instead of attacking such discrimination directly, Congress chose instead to secure the vote to the Puerto Rican community, thereby enabling the community to ensure non-discrimination for itself. *See* Bickel, *supra* note 91, at 98-100; Brest, *supra* note 231, at 70.

233. *Morgan*, 384 U.S. at 653-54.

234. *See* Burt, *supra* note 94, at 81 ("In *Katzenbach v. Morgan*, the Supreme Court proclaimed that Congress had independent authority, to which courts would defer, to interpret the substantive provisions of the Fourteenth Amendment." (footnote omitted)); Cox, *supra* note 181, at 228 ("The net effect was that Congress effectively determined that a State law violated the fourteenth amendment and set it aside even though the Supreme Court—so often billed as the ultimate interpreter of the Constitution—would have sustained the same State law.").

235. *See* Burt, *supra* note 94, at 81 (observing that Congress viewed the *Morgan* decision as an invitation to interpret for itself the substance of equal protection when it passes legislation); Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 303-07 (1982) (posing hypothetical actions that Congress might take under a broad interpretation of *Morgan*'s alternative holding).

In *Morgan*, Justice Harlan expressed concern in his dissent that the majority's finding of a substantive power in Congress might result in Congress having the power to restrict rights:

> In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.

Morgan, 384 U.S. at 668 (Harlan, J., dissenting). Responding in a footnote, the majority stated:

> Contrary to the suggestion of the dissent, § 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

"definitional" theory raised questions regarding how much latitude Congress had in its authority to interpret the Constitution.[236] Because the theory was an alternative holding, it did not have precedential force; the Court has neither relied on it in a subsequent case nor repudiated it.[237] Thus, the significance of this alternate theory has been open to question until *Flores*.[238]

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guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Id. at 651 n.10 (quoting *id.* at 668 (Harlan, J., dissenting)) (citation omitted). This response by the Court, asserting that Congress may act to expand, but not to contract, Fourteenth Amendment rights, has been called the "ratchet" theory. *See* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975); Pawa, *supra* note 188, at 1062. Commentators have found the ratchet theory troubling. *See* Brest, *supra* note 231, at 74-78 (discussing problems with arguments justifying the ratchet theory); Burt, *supra* note 94, at 118-34 (illustrating the difficulty with distinguishing the expansion and contraction of rights and questioning whether such a distinction is desirable); Conkle, *supra* note 4, at 53-55 (arguing that even if Congress is prevented from restricting constitutional rights, other sorts of congressional action may interfere with the Court's function).

Commentators have wrestled with possible theories to justify such a substantive power in Congress. *See* Cohen, *supra*, at 613-16 (distinguishing between congressional judgment regarding "liberty" and "federalism" and arguing that the courts should enforce limits on the former, but allow the political process to limit the latter); Cox, *supra* note 181, at 226-39 (justifying the power on the basis of Congress's superior fact-finding ability); Eisgruber & Sager, *supra* note 6, at 442-44 (defending Congress's role in assisting the Court in implementing constitutional norms); *see also* Pawa, *supra* note 188, at 1062-69 (summarizing three defenses of the power that have appeared in academic literature).

236. *Compare, e.g.*, Burt, *supra* note 94, at 81-84, 133-34 (characterizing *Morgan* as a bold opinion, and cautioning that its rhetoric threatened to remove an important restraint on congressional action), *and* Laycock, *supra* note 97, at 165 ("The word 'remedial' suggests that Congress must accept the Supreme Court's definition of a [constitutional] violation, but that Congress can provide additional remedies for such violations. But it is settled that these additional 'remedies' can consist of redefining the substantive violation."), *with* Cox, *supra* note 181, at 234 ("Nothing in *Morgan* suggested that the Court should defer to Congress in the process of deriving the applicable legal standard from the [Constitution] or other sources of law; the opinion seemed to require Congress to *apply the same standard* as the Court, merely leaving it free to apply the standard differently where the application turned on 'questions of fact.' ").

237. *See* Conkle, *supra* note 4, at 52; *see also* Gressman & Carmella, *supra* note 140, at 131 (observing that the alternative theory of *Morgan* has never been expressly adopted by the Court); Lee, *supra* note 140, at 94 (same). The Court had the opportunity to embrace the ratchet theory in *Oregon v. Mitchell*, 400 U.S. 112 (1970) (plurality opinion) (unanimously upholding a VRA amendment effecting a nationwide ban on literacy tests, upholding by a vote of 5 to 4 a provision that lowered the voting age for federal elections, and striking by a vote of 5 to 4 a provision lowering the voting age in state elections). *See* Cox, *supra* note 181, at 230-32; Pawa, *supra* note 188, at 1072-74. But "[a] bare majority held, upon diverse and inconsistent grounds, that none of the three provisions could be sustained under the fourteenth amendment." Cox, *supra* note 181, at 231-32; *see also id.* at 232 (observing that the "contrariety of opinion [in *Mitchell*] throws into confusion the status of the [substantive] branch of *Morgan*").

238. *Compare* Laycock, *supra* note 97, at 154-55 (arguing RFRA's constitutionality on

Thirty years later, when the Court was confronted with the challenge to RFRA in *Flores*, the nature of Congress's enforcement powers was unclear. In *Flores*, influenced both by concerns of federalism and separation of powers, the Court clarified the parameters of this congressional power.[239] Despite strong arguments made by RFRA's opponents,[240] the Court did not explicitly hold that RFRA violated the separation of powers, but rather, the Court held that Congress had exceeded the limits of its authority.[241]

The separation of powers concerns expressed by RFRA's opponents were elicited by comments made by members of Congress and the President, all of whom were explicit that the Act was intended to replace the Supreme Court's free exercise standard announced in *Smith II* with the more protective standard that existed prior to *Smith II*. The Act itself had as its stated purpose "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder."[242] More blatantly, members of Congress had characterized the Act as overturning *Smith II*.[243] Moreover, when he signed the bill into law, President Clinton announced that RFRA

> reverses the Supreme Court's decision Employment Division against Smith, and reestablishes a standard that better protects all Americans of all faiths in the exercise of

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the basis of the substantive power derived from *Morgan*), *with* Gressman & Carmella, *supra* note 140, at 131-33 (arguing that *Morgan* establishes nothing more than a remedial power in Congress).

239. The federalism concerns appear to dominate. *See infra* notes 333-42 and accompanying text.

240. *See* Gressman & Carmella, *supra* note 140, at 119-40; *see also* Conkle, *supra* note 4, at 66-68, 71-78 (stating that RFRA is an attempt to mandate a standard of review that the Supreme Court intentionally rejected and thus is a challenge to the basic principle of separation of powers); Eisgruber & Sager, *supra* note 6, at 445, 469-73 (arguing that Congress overreached its role and compromised the integrity of the judicial process by enacting RFRA); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 173-74 (1995) (stating that RFRA "is a challenge to the concept of judicial supremacy in the interpretation of the Constitution"); Van Alstyne, *supra* note 145, at 307-14 (describing RFRA not as instructing the Supreme Court on how to interpret the Free Exercise Clause, but as directing the Court to give any party's Free Exercise claim the "legal effect appropriate in Congress' view"). The arguments advanced by these commentators for finding RFRA to be an unconstitutional violation of the separation of powers are discussed in more detail below. *See infra* notes 245-55 and accompanying text.

241. *See Flores*, 117 S. Ct. at 2160; *infra* notes 264-92 and accompanying text (discussing the limits on congressional authority imposed by the Court).

242. 42 U.S.C. § 2000bb(b) (1994) (citations omitted).

243. *See* S. REP. NO. 103-11, 6-9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898-99; H.R. REP. NO. 103-88, 4-7 (1993); Gressman & Carmella, *supra* note 140, at 66-67 (describing the President's appraisal of RFRA and congressional sentiments expressed during the development of RFRA).

> their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.[244]

The arguments advanced by RFRA's critics that RFRA violated the separation of powers can be categorized into two basic types.[245] The first type of argument—the *Klein* argument—was based on the allegation that RFRA commanded the judiciary to "prescribe a rule for the decision of a cause in a particular way."[246] By dictating to the courts the standard to be used in judging free exercise claims, RFRA attempted to control the legal effect given to those claims;[247] that is, Congress attempted to substitute its own judgment of the proper interpretation of the Free Exercise Clause for that of the Supreme Court, as expressed in *Smith II*.[248] In this way, Congress has encroached on the role of the judiciary.[249] This interference by the legislative branch in an area properly belonging to the judicial branch was thought to constitute a violation of the separation of powers.[250]

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244. President's Remarks, *supra* note 6, at 2000.

245. *See* Robin-Vergeer, *supra* note 79, at 612-25 (analyzing the separation of powers arguments made by RFRA's critics).

246. United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872) (voiding a congressional statute that dictated to the courts what constituted a presidential pardon).

247. *See* Van Alstyne, *supra* note 145, at 309.

248. *See* Eisgruber & Sager, *supra* note 6, at 470; *see also* Gressman & Carmella, *supra* note 140, at 124 ("Congress, by enacting RFRA, believes that it can better and more properly interpret the Constitution than the Supreme Court. And Congress mandates this better interpretation by requiring the use of a judicial standard of review that has no independent statutory source."); Van Alstyne, *supra* note 145, at 311 ("It does not put too fine a point on the matter to say that the RFRA is meant to make the lack of a meritorious First Amendment claim (an 'unmeritorious' claim, in the Supreme Court's view) utterly irrelevant.").

249. RFRA is a "conscription of the Court by Congress to play a role in a charade—a charade in which the Court is obliged to act as though its own judgment about a matter of consequence is different than it actually is." Eisgruber & Sager, *supra* note 6, at 471; *see also* Gressman & Carmella, *supra* note 140, at 121 ("RFRA [was] a congressional arrow aimed directly at the heart of the independent judicial function of constitutional interpretation.").

250. The emphasis in this theory is on the interference of the legislative branch with the work of the judicial branch. *See* Loving v. United States, 116 S. Ct. 1737, 1743 (1996) ("Even when a branch does not arrogate power to itself ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."). The *Smith II* Court rejected the balancing test in part because of institutional concerns. Balancing the relative importance of a religious claim against a governmental interest was an activity best left to politically accountable legislatures, rather than an unelected judiciary. *See* Berg, *supra* note 3, at 8-9. With RFRA, Congress thrust back on the judiciary an activity that the Court determined was best carried out elsewhere. *See* Employment Div. v. Smith (*Smith II*), 494 U.S. 872, 888-90 (1990).

This argument that RFRA is an unconstitutional violation of the separation of powers under *Klein* has been advanced by several critics of RFRA. *See* Eisgruber &

The second argument that RFRA violated the separation of powers—related to the first, but with a slightly different emphasis—derives from the principle enunciated in *Marbury v. Madison*[251] that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[252] This argument—the *Marbury* argument—is predicated on the view that *Marbury* stands for the proposition that the judiciary is the ultimate interpreter of the Constitution.[253] RFRA was an embodiment of Congress's vision of the First Amendment, and in this sense was an act of constitutional interpretation on the part of Congress.[254] Congress could not constitutionally override the Court's interpretation of the First Amendment, as it had attempted to do with RFRA.[255]

Sager, *supra* note 6, at 470-72; Gressman & Carmella, *supra* note 140, at 134-37; Van Alstyne, *supra* note 145, at 307-12. *But see* Robin-Vergeer, *supra* note 79, at 616-24 (distinguishing RFRA from the statute voided in *Klein* on the grounds that RFRA did not dictate a result, just a standard of review, leaving the courts free to interpret RFRA in particular cases).

251. 5 U.S. (1 Cranch) 137 (1803).

252. *Id.* at 177.

253. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (calling the supremacy of the Court to interpret the Constitution "a permanent and indispensable feature of our constitutional system"); Gressman & Carmella, *supra* note 140, at 120-21; Lupu, *supra* note 240, at 173-74. *But see* Robin-Vergeer, *supra* note 79, at 625-79 (arguing that this interpretation of *Marbury* is incorrect, because it is not supported by history, nor by any statement in the case itself; there are practical reasons for allowing Congress some interpretive authority; and there is case law in which congressional interpretation has been allowed without raising separation of powers issues).

254. *See* Robin-Vergeer, *supra* note 79, at 635 ("[T]here is simply no getting around the fact that in the course of debating and enacting RFRA, Congress interpreted some aspect of the Constitution (the Free Exercise Clause and/or the Fourteenth Amendment).").

255. *See* Eisgruber & Sager, *supra* note 6, at 441 ("RFRA is, after all, precisely what it announces itself to be, and what its supporters praised it as being: a congressional attempt to overturn the Supreme Court's judgment in *Smith* [*II*]."); Lupu, *supra* note 240, at 173-74 ("[T]he entire concept of RFRA is a challenge to the concept of judicial supremacy in the interpretation of the Constitution .... [T]he idea that Congress may replace the Court's view with its own concerning the general rules governing our constitutional arrangements is heretical."); Van Alstyne, *supra* note 145, at 296 ("Congress has claimed no less than an authority to review the Supreme Court for constitutional error.").

The district court in *Flores* embraced this argument. *See* Flores v. City of Boerne, 877 F. Supp. 355, 357 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997); *supra* notes 52-56 and accompanying text (discussing the district court opinion); *see also* Hamilton v. Schriro, 74 F.3d 1545, 1566 (8th Cir. 1996) (McMillian, J., dissenting) ("It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to the delicate balance of the separation of powers.").

Other courts have disagreed. *See* Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir.

The City of Boerne considered separation of powers to be of primary importance, presenting it as the major issue in its brief to the Court.[256] Characterizing RFRA as "an undisguised attempt by

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1996) ("We defer to the Fifth Circuit's analysis of why the Act does not violate the separation of powers . . . ."); Abordo v. Hawaii, 902 F. Supp. 1220, 1231 (D. Haw. 1995) (rejecting the argument that RFRA violated the separation of powers); Belgard v. State of Hawai'i, 883 F. Supp. 510, 513-16 (D. Haw. 1995) (same).

The emphasis here is on the idea that Congress performed an act—constitutional interpretation—that it was not constitutionally empowered to perform. The strictest version of this view maintains that Congress should not engage in any constitutional interpretation whatsoever. *See* Brest, *supra* note 231, at 61. Those who believe that Congress may engage in some interpretive activity may be placed into one of two categories: "[T]hose who acquiesce in judicial supremacy and those who assert legislative independence in constitutional interpretation." *Id.* at 62. Thus, there are those who maintain that Congress should be given some latitude to make constitutional interpretations, but that Congress must defer to the Court when the two bodies differ in their judgments. *See id.* at 62-65; Conkle, *supra* note 4, at 53; Eisgruber & Sager, *supra* note 6, at 442-43. Included in this group are proponents of the idea that Congress may engage in constitutional interpretation in partnership with the Court to enforce constitutional norms. *See* Conkle, *supra* note 4, at 53-54; Eisgruber & Sager, *supra* note 6, at 442-43; *see also supra* note 68 (summarizing the idea behind the foundational statute). Critics of RFRA who espouse this view of congressional interpretive power maintained that RFRA subverted, rather than supplemented, the Court's interpretation of the First Amendment. *See* Conkle, *supra* note 4, at 66-68; Eisgruber & Sager, *supra* note 6, at 443-44.

At the other extreme are those who assert that Congress has independent authority to interpret the Constitution, even if the Supreme Court has already pronounced a contrary interpretation. *See* Robin-Vergeer, *supra* note 79, at 624-79 (arguing that RFRA does not violate *Marbury*, because *Marbury* does not preclude constitutional interpretation by Congress, even after the Supreme Court has spoken). Professor Robin-Vergeer has challenged the view that allows Congress to interpret the Constitution as long as it does not contradict the Supreme Court's prior interpretation: To rest a determination of RFRA's unconstitutionality on the fact that the Court spoke first (*Smith II* preceded RFRA) turns the issue of RFRA's constitutionality into "a race to decision between the Supreme Court and Congress, trivializing the roles of each." *Id.* at 624-25.

256. *See* Brief for Petitioner at 13-15, *Flores* (No. 95-2074). The first question presented by the petitioner, City of Boerne, was "[w]hether Congress violated the separation of powers doctrine by legislatively overruling a Supreme Court determination of the scope of the Free Exercise Clause of the First Amendment." *Id.* at i. The City's separation of powers arguments were based on the writings discussed *supra* in notes 245-55 and accompanying text. *See* Brief for Petitioner at 12-19, *Flores* (No. 95-2074).

At the time, perhaps, federalism arguments did not appear to be the strongest ones to make. *See, e.g.*, Eisgruber & Sager, *supra* note 6, at 460 ("We might excuse thoughtful observers for believing that (at least as a matter of Supreme Court doctrine) federalism concerns no longer impose any independent constraint upon congressional action."); Lupu, *supra* note 240, at 215 (observing that the Court has only recently become more interested in federalism). The City of Boerne did argue that RFRA violated principles of federalism, but this was the City's second argument, after the separation of powers argument. *See* Brief for Petitioner at 42-46, *Flores* (No. 95-2074).

Because the VRA cases had so broadly defined Congress's authority under the Enforcement Clauses, opponents of RFRA attempted to distinguish *Flores* on the grounds that the separation of powers affront was more sharply delineated. With RFRA,

Congress to overtake [the Supreme] Court's core constitutional function and to reverse [the] Court's statement of the meaning of the First Amendment's Free Exercise Clause in Smith [*II*],"[257] the City asserted that "[t]o restore the balance of power between Congress and the Court intended by the Framers to ensure liberty, the Religious Freedom Restoration Act must be struck down."[258] The City alleged that the argument made by Archbishop Flores and the United States—that RFRA enforced the Equal Protection Clause—was a pretext to hide RFRA's "true nature": "a Congressional attempt to define the substantive scope of the First Amendment's Free Exercise Clause."[259]

If the Supreme Court had found that RFRA violated the separation of powers doctrine, then it could have stricken RFRA on that ground, as the district court had done,[260] without regard for whether RFRA was being applied to federal or state law.[261] Instead, the Court addressed *only* RFRA's application to state law and analyzed the scope of Congress's enforcement powers.[262] The Court

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Congress expressly sought to substitute its interpretation of the Free Exercise Clause for that already pronounced by the Court. With the VRA, the separation of powers issues involved the power of Congress to prohibit the use of literacy tests and to prohibit states and political subdivisions from enacting changes in voting procedures that would have discriminatory effect, even if there was no discriminatory purpose. *See supra* notes 180-223 and accompanying text (discussing the VRA cases). RFRA went further by not only enacting a constitutional interpretation differing from the Court's, but mandating to the courts how they should resolve free exercise claims; thus, unlike the VRA, RFRA raised separation of powers issues of both *Marbury* and *Klein* types. *See supra* notes 245-55 and accompanying text (discussing the separation of powers arguments).

257. Brief for Petitioner at 12, *Flores* (No. 95-2074).

258. *Id.* at 25-26.

259. *See* Reply Brief of Petitioner at 10, *Flores* (No. 95-2074).

260. *See supra* notes 52-56 and accompanying text.

261. The City's argument that RFRA violated the separation of powers appears to apply with equal force regardless of whether RFRA was applied to a federal law or a state law. Either Congress had intruded on the role of the judiciary, or it had not; that determination was not dependent on whose law was the object of Congress's action. *See* Robin-Vergeer, *supra* note 79, at 677-78 (observing that the majority of RFRA's critics do not claim that RFRA is unconstitutional as applied to federal law, and that this concession is fatal to their challenge).

262. Although the Court considered RFRA only as it applied to state law, it appears to have struck down RFRA in its entirety, without distinguishing its application to federal laws. *See Flores*, 117 S. Ct. at 2172. The only indication the Court gave—other than quoting the operative sections in the statute—that RFRA applied to federal laws as well as to state laws, was the statement that "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States." *Id.* at 2162. Nevertheless, the Court did question the City's advocate at oral arguments about the separation of powers argument as it applied to both state and federal law. *See* United States Supreme Court Official Transcript, *Flores* (No. 95-2074), *available in* 1997 WL 87109, at *17.

concluded that RFRA was beyond the limits of those powers and this conclusion appears to be based upon federalism and separation of powers concerns.[263]

Both separation of powers and federalism potentially limit the scope of Congress's enforcement powers.[264] The potential limit imposed by separation of powers is determined by the line demarcating the extent of Congress's interpretive authority.[265] If § 5

The issue of RFRA's constitutionality as applied to federal law is discussed in the academic literature. *See* Laycock, *supra* note 97, at 155-56 (arguing that, in addition to being constitutional as applied to the states, RFRA was also constitutional as applied to federal law); Lupu, *supra* note 240, at 213 (arguing that, although RFRA was unconstitutional as applied to the states, it was constitutional as applied to federal law); Van Alstyne, *supra* note 145, at 294 & n.12 (same). Some commentators questioned whether there was any enumerated power under which Congress had authority to pass RFRA, as applied to federal laws. *See* Hamilton, *supra* note 178, at 361-70 (arguing that the First Amendment is a limitation on Congress, not an enumerated power, and therefore Congress has no authority to regulate with respect to free exercise rights). Professors Lupu and Van Alstyne argued that RFRA is constitutional as applied to federal law because whatever enumerated power authorizes Congress to enact a law in the first place would also allow Congress to accommodate religion by making a religious exemption. *See* Lupu, *supra* note 240, at 213; Van Alstyne, *supra* note 145, at 294 & n.12. Neither directly addressed the issue of whether RFRA violated the separation of powers of the *Klein* type. *See supra* notes 245-50 and accompanying text (discussing this separation of powers argument). According to Professor Van Alstyne, "to the extent that the RFRA itself merely prescribes a *rule of construction regarding the manner in which other acts of Congress are to be applied*, it is unremarkable." Van Alstyne, *supra* note 145, at 294 n.12.

263. The concerns for federalism are predominant. *See infra* notes 333-42 and accompanying text.

264. *See* Flores v. City of Boerne, 73 F.3d 1352, 1361 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997); United States v. Bird, 124 F.3d 667, 691 (5th Cir. 1997) (DeMoss, J., concurring in part and dissenting in part); Eisgruber & Sager, *supra* note 6, at 444-45 (arguing that Congress exceeded its authority when it enacted RFRA, violating both separation of powers and federalism); Lupu, *supra* note 240, at 173 ("Seen through the prisms of federalism and power separation,... RFRA is both unprecedented and distinctively problematic.").

265. Prior to *Flores*, especially in light of the *Morgan* decision, *see supra* notes 224-38 and accompanying text (discussing the *Morgan* opinion), there was speculation regarding what, if any, limit existed. *See supra* notes 235-38 and accompanying text (discussing confusion surrounding the issue of the extent of Congress's substantive power).

After *Flores*, it is clear that Congress's enforcement power is limited, but whether separation of powers is violated by exceeding that limit is not clear. *See infra* notes 333-40 and accompanying text (discussing this point). With *Flores*, the Court has set a limit on Congress's interpretive authority; this limit is determined by the line dividing remedial legislation from substantive legislation. *See infra* notes 281-92 and accompanying text (discussing the Court's test). The *Flores* Court, although it discussed the importance of distinguishing between Congress's enforcement of the provisions of the Fourteenth Amendment and Congress's substantive interpretation of those provisions, never stated that substantive interpretation would intrude on the role of the judiciary. *See Flores*, 117 S. Ct. at 2164; *see also infra* notes 333-42 and accompanying text (discussing the Court's focus in its analysis of the harms resulting from an enactment exceeding Congress's

of the Fourteenth Amendment, which grants Congress the power to enforce the substantive provisions of § 1 of that Amendment,[266] does not give Congress the power to interpret those substantive provisions, then Congress exceeds the limits of its authority when it violates the separation of powers as set forth in *Marbury*.[267] When this issue was raised in the VRA cases,[268] the Court responded by recognizing Congress's prophylactic power,[269] and even suggesting, in the *Morgan* decision, that Congress has the authority to interpret the Constitution for itself.[270]

Federalism also potentially limits Congress's exercise of its enforcement powers. A basic principle of federalism is that Congress may not interfere with the autonomy of the states, except insofar as it acts pursuant to an enumerated power.[271] In the case of RFRA and

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authority).

266. *See* U.S. CONST. amend. XIV. An analogous statement holds for sections 1 and 2 of the Fifteenth Amendment. *See supra* note 178.

267. *See supra* notes 251-55 and accompanying text (discussing the separation of powers argument of the second type, based on *Marbury*). This is the conclusion reached by the majority in *Flores*, based on the history of enactment of the Fourteenth Amendment. *See supra* notes 92-94 and accompanying text; *see also* Bickel, *supra* note 91, at 97-98 ("[T]he general premise of *Marbury v. Madison*, and of *M'Culloch v. Maryland* also, is that Congress does not define the limits of its own powers. It belongs, rather, to the Court, exercising its function of judicial review, to do so.").

268. *See supra* notes 180-238 and accompanying text (discussing challenges raised in the VRA cases).

269. *See supra* notes 188-97 and accompanying text (discussing the VRA cases and the prophylactic power).

270. *See supra* notes 224-38 and accompanying text (discussing the *Morgan* case). Only Justice Harlan, writing in dissent in *Morgan*, was troubled by the infringement on the rule of *Marbury*. *See* Katzenbach v. Morgan, 384 U.S. 641, 666 (1966) (Harlan, J., dissenting) ("I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature."); *see also* Oregon v. Mitchell, 400 U.S. 112, 205 (1970) (plurality opinion) (Harlan, J., concurring in part and dissenting in part) ("To allow a simple majority of Congress to have final say on matters of constitutional interpretation is ... fundamentally out of keeping with the constitutional structure."). Commentators raised the issue as well. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 713-14 (1996) ("In light of the famous statement in *Marbury v. Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is,' any complete judicial deference to congressional constitutional interpretation would seem insupportable." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); Pawa, *supra* note 188, at 1061 ("For the court to pay such deference to congressional determinations might be seen as endangering the fundamental constitutional principle of *Marbury v. Madison* that the judiciary has the last word in interpreting the Constitution." (citation omitted)).

271. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Flores*, 117 S. Ct. at 2162 (citing THE FEDERALIST NO. 45 (James

the VRA, that enumerated power is Congress's power pursuant to § 5 of the Fourteenth Amendment[272] to enforce the substantive provisions of that Amendment. If Congress relies on its § 5 authority to enforce something other than a substantive provision of § 1 of the Fourteenth Amendment, then it violates the principle of federalism.[273] The federalism arguments advanced in the VRA cases were dismissed by the majority with little comment.[274]

The case law prior to *Flores* suggested that neither separation of powers concerns nor federalism concerns placed substantial limits on Congress's enforcement power.[275] The *Flores* Court took the opportunity to revisit the federalism concerns raised by the dissenters

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Madison)); The Civil Rights Cases, 109 U.S. 3, 10 (1883) (discussing § 5 of the Fourteenth Amendment as a source of power to the federal government); *Ex parte* Virginia, 100 U.S. 339, 346 (1879) (discussing the allotment of powers between the federal government and the states effected by the Fourteenth Amendment); *see also* Brest, *supra* note 231, at 58-59 (discussing the possible enumerated powers pursuant to which Congress might act when considering legislation such as RFRA); Van Alstyne, *supra* note 145, at 299 ("The Tenth Amendment merely made explicit what was otherwise understood by the doctrine of enumerated powers—that Congress *may* make laws overriding state laws, but it may do so *only* to the extent it is granted express authority to do so, and not beyond.").

272. Or, in some of the VRA cases, § 2 of the Fifteenth Amendment. *See supra* note 178 (noting that the Enforcement Clauses of the Fourteenth and Fifteenth Amendments have been similarly construed).

273. Congress might enforce something other than the substantive provisions of the Amendment by, for example, prohibiting conduct that was clearly constitutional. This was then-Justice Rehnquist's concern in his *City of Rome* dissent. *See* City of Rome v. United States, 446 U.S. 156, 221 (1980) (Rehnquist, J., dissenting). Justice Rehnquist wrote that by allowing the federal government to block the City of Rome's implementation of voting procedures that had been judicially determined to be constitutional, the Court had abdicated its responsibility to determine whether Congress had acted within its authority. *See id.* at 207 (Rehnquist, J., dissenting). As a result, Congress was allowed more power vis-à-vis the states than was envisioned by the framers of the Fourteenth Amendment. *See id.* at 221 (Rehnquist, J., dissenting) ("To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned."). Justice Powell expressed similar concerns. *See id.* at 200-05 (Powell, J., dissenting); *supra* note 214 (discussing Justice Powell's *City of Rome* dissent); *see also* Eisgruber & Sager, *supra* note 6, at 465-66 (describing the harm to the states of the "federalization" created by RFRA).

274. *See supra* notes 211-13 and accompanying text (discussing federalism challenges raised in the VRA cases).

275. The *Flores* Court cited *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (plurality opinion), as an illustration of the fact that congressional power is limited. *See Flores*, 117 S. Ct. at 2167. "But the contrariety of views of the Justices in the majority on that issue makes it impossible to say just what limitation has been placed on the rationale that Congress' enforcement power in section 5 of the 14th amendment includes the power to give substantive content to the meaning of due process and equal protection." Cohen, *supra* note 235, at 610.

in the VRA cases.[276] Although the Court hinted at separation of powers problems with RFRA, the opinion in *Flores* suggests that the Court viewed RFRA as posing at least as great a threat to federalism. Indeed, the Court appeared to be more concerned with the balance of power between the federal government and the states than with the balance of power between Congress and the courts.[277]

The Court set a limit on Congress's § 5 power, and it appears that the limits imposed by federalism and the separation of powers are not distinct: The limit imposed by federalism is coextensive with the limit of congressional authority. The limit of congressional authority, according to the *Flores* Court, is the line dividing the remedial from the substantive,[278] that is, the limit imposed by the *Marbury* separation of powers argument.[279] The Court determined this limit, and the test for determining whether Congress exceeded it, by divining the meaning of the word "enforce."[280]

The Court described Congress's enforcement power as though viewed on a spectrum, ranging from clearly constitutional to clearly unconstitutional uses of that power.[281] Purely remedial legislation rests at the clearly constitutional end.[282] Legislation creating substantive rights rests at the clearly unconstitutional end.[283] The

276. *See supra* notes 214-23 and accompanying text (discussing the VRA dissents).

277. Nevertheless, the opinion has ramifications for the power balance of both types. *See infra* notes 343-70 and accompanying text.

278. *See Flores*, 117 S. Ct. at 2164.

279. *See supra* notes 251-55 and accompanying text (discussing this argument).

280. *See Flores*, 117 S. Ct. at 2164.

281. *See id.* (describing Congress's power under § 5).

282. For example, Congress may create criminal and civil penalties for violations of the provisions of the Civil War Amendments, as these provisions have been interpreted by the Supreme Court. *See* Conkle, *supra* note 4, at 42.

283. As discussed above, *see supra* notes 235-38 and accompanying text, prior to *Flores* it was not clear what constituted an example of such an unconstitutional use of Congress's enforcement powers. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court had suggested that Congress might constitutionally use its enforcement power in a way that created additional rights under the Equal Protection Clause. *See supra* notes 233-38 and accompanying text (discussing the substantive theory of *Morgan*). But then, in *Oregon v. Mitchell*, 400 U.S. 112 (1970) (plurality opinion), the Court struck down, as beyond the scope of Congress's § 5 authority, a provision of the VRA that would have lowered the voting age to 18 as applied to the states. *See id.* at 118 (Black, J.). Because *Mitchell* was a splintered opinion (in addition to the judgment there were four other concurring or dissenting opinions), it was difficult to draw any precise conclusions regarding the Court's willingness to grant Congress substantive power under § 5 of the Fourteenth Amendment. *See, e.g.*, Choper, *supra* note 235, at 314 (characterizing *Mitchell* as "[t]he Justices' most thorough if not most informative consideration of the scope of *Morgan*'s definitional branch to date"); Cohen, *supra* note 235, at 610 ("[T]he contrariety of views of the Justices in the majority . . . makes it impossible to say just what limitation has been placed on the rationale that Congress' enforcement power in section 5 of the 14th amendment

middle gray area surrounding the line dividing constitutional from unconstitutional legislation contains the prophylactic, or preventive, power of Congress.[284]

Acknowledging that a line between remedial and substantive legislation is difficult to draw and that Congress should have "wide latitude in determining where it lies," the Court stated that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[285] This new proportionality test is essentially a balancing test. The end of the legislation will be the protection against some constitutional violation, either under the Fourteenth Amendment itself, or under an incorporated right.[286] The means Congress has chosen to obtain that end will presumably have some adverse impact on the states; otherwise the means would not be subject to challenge. The Court weighs the infringement on state authority against the threat of a constitutional violation envisioned in the legislation's end.[287] The factors that go into this balancing include the legislative record compiled by Congress,[288] and whether the legislation "has termination dates, geographic restrictions, or 'egregious

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includes the power to give substantive content to the meaning of due process and equal protection."); Cox, *supra* note 181, at 232 ("The contrariety of opinion throws into confusion the status of the second branch of *Morgan* and the principle of judicial deference to congressional determinations of fact and degree.").

After *Flores*, the Court is not likely to allow the substantive theory suggested in *Morgan*. *See Flores*, 117 S. Ct. at 2168 (disaffirming the substantive theory of *Morgan*). Thus, this alternative theory of *Morgan*, *see supra* notes 233-38 and accompanying text (describing *Morgan's* substantive theory), provides an example of an unconstitutional use of Congress's enforcement powers.

284. *See Flores*, 117 S. Ct. at 2164; *see also* Eisgruber & Sager, *supra* note 6, at 463 (characterizing the prophylactic power as the power to make legislation that "reach[es] further than the Court itself could or would reach"); Laycock, *supra* note 97, at 153 (characterizing the prophylactic power as action by Congress that improves enforcement of a constitutional provision as the Supreme Court interprets it).

285. *Flores*, 117 S. Ct. at 2164. The Court also stated that "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169.

286. That the test also applies to enforcement legislation under the Fifteenth Amendment can be inferred from the Court's comparison of RFRA to the VRA. *See id.* at 2169-71; *supra* note 178 (observing that the Enforcement Clauses are construed similarly). In the case of the VRA, Congress sought to protect voting rights under the Fifteenth Amendment and civil rights under the Fourteenth Amendment. *See supra* notes 180-238 and accompanying text (discussing the VRA cases). In the case of RFRA, Congress sought to protect First Amendment rights. *See supra* notes 25-33 and accompanying text (describing Congress's purpose for enacting RFRA).

287. *See Flores*, 117 S. Ct. at 2169-71.

288. *See id.* at 2169-70.

predicates.' "[289] The legislative record provides evidence regarding the nature and magnitude of the threat;[290] factors such as termination dates and geographic restrictions help to circumscribe the reach and scope of the legislation, thereby limiting the burden on the states;[291] and all the factors, including the existence of "egregious predicates," help to justify the imposition of that burden. The Court stated that such factors are not required, but "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5."[292]

The Court illustrated the use of its test by comparing the VRA and RFRA.[293] When Congress enacted the VRA, it had extensive legislative findings indicating pervasive and ongoing discrimination in the context of voting.[294] By contrast, the legislative record confronting Congress when it enacted RFRA "lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry."[295] The Court hastened to point out, however, that the record itself is not exceedingly important; the Court will defer to Congress regardless of whether there is a record, or how comprehensive it is, provided that Congress acts within its proper authority.[296] The legislative record provides information regarding what Congress was trying to accomplish, thereby allowing the Court to determine if Congress was acting within its authority.[297] The

289. *Id.* at 2170.

290. *See id.* at 2169 (finding no evidence of widespread religious discrimination in the RFRA record, in contrast to the VRA record, which was replete with examples of voting discrimination).

291. *See id.* at 2170-71 (describing the broad reach and scope of RFRA and its effect on the states, in contrast to the more circumscribed and therefore less intrusive reach and scope of the VRA).

292. *Id.*

293. *See id.* at 2169-71.

294. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308-15 (1966).

295. *Flores*, 117 S. Ct. at 2169. *But see* Laycock, *supra* note 97, at 166 ("Many facially neutral, generally applicable laws are in fact based on hostility to a particular religion or to religion in general.... Congress found ... that neutral laws have been used to suppress religion, ... and that therefore we need RFRA." (footnotes omitted)).

296. *See Flores*, 117 S. Ct. at 2169-70.

297. *See id.* The Court stated that "[j]udicial deference ... is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide ....' As a general matter, it is for Congress to determine the method by which it will reach a decision." *Id.* at 2170 (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (plurality opinion) (Harlan, J., concurring in part and dissenting in part)). But the lack of examples in the record of laws passed because of intentional religious discrimination supported the Court's conclusion that RFRA was out of proportion to any remedial or preventive objective. *See id.* Because RFRA was out of proportion to any remedial or preventive object, it was beyond Congress's authority, and

record before Congress when considering the VRA compiled trespasses of the states on the voting rights of African-Americans and thus highlighted previous violations of the Constitution and strongly suggested a threat of continued violations.[298] The record before Congress when considering RFRA, however, highlighted "the incidental burdens imposed, not the object or purpose of the [suspect] legislation."[299] That is, the RFRA record contained no persuasive evidence of an ongoing or continued threat of future violations of constitutional rights,[300] at least as those rights had been articulated in *Smith II*.[301] Thus, while the end of the VRA was clearly the protection of Fourteenth and Fifteenth Amendment rights, the end of RFRA was not so compellingly tied to the prevention of violations of the First Amendment right to free exercise of religion.

The means employed by Congress in the VRA to combat the evils of voting discrimination included the banning of literacy tests and a requirement of preclearance of any changes in voting procedures.[302] The VRA provided that preclearance would be denied if a discriminatory effect alone was shown, despite the fact that the Court had held that proof of discriminatory intent is required to show a violation of the Fifteenth Amendment.[303] The resulting burden to the states was the interference with their ability to determine freely their own voting procedures.[304] That burden would be relieved when the states complied with the bailout provisions of the VRA, thereby showing themselves to be free of discriminatory practices.[305] Moreover, the preclearance provision applied only to the "covered" regions.[306] Thus, the means employed in the VRA were tailored to the evils that they were designed to combat, as well as being limited in scope and time.[307]

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therefore was not entitled to judicial deference. *See id.* at 2171-72.

298. *See South Carolina v. Katzenbach*, 383 U.S. at 308-15.

299. *Flores*, 117 S. Ct. at 2169. *But see* Laycock, *supra* note 97, at 167 (arguing that Congress did have evidence of bad motive).

300. *See Flores*, 117 S. Ct. at 2169 (describing the RFRA record).

301. *See supra* notes 144-60 and accompanying text (summarizing *Smith I* and *Smith II*).

302. *See South Carolina v. Katzenbach*, 383 U.S. at 315-16.

303. *See* City of Rome v. United States, 446 U.S. 156, 173 (1980); *supra* notes 197-213 and accompanying text (discussing the preclearance provisions of the VRA and their prophylactic nature).

304. *See South Carolina v. Katzenbach*, 383 U.S. at 323.

305. *See* 42 U.S.C. § 1973b(a) (1994); *City of Rome*, 446 U.S. at 167 (describing the "bailout" provision).

306. *See supra* note 183 (defining the "covered" regions).

307. *See Flores*, 117 S. Ct. at 2170.

By contrast, the means Congress employed in RFRA to protect free exercise rights consisted of the requirement that a balancing test be applied to state laws that substantially burden an individual's religious exercise.[308] RFRA was not directed to any specific class of laws.[309] Because a claim that a law places a substantial burden on a religious practice can be hard to contest, the Court foresaw the states often being forced to justify their laws with a compelling interest; many laws could not meet such a demanding standard.[310] A religious exemption would be required for every law that could not meet the compelling interest test.[311] In theory, any state or local law was vulnerable to the creation of such religious exemptions.[312] The means adopted by Congress, then, painted in the worst light, could result in exemptions to many laws—laws involving any subject matter, not necessarily ostensibly related to religion, and at any level of government.[313] The Court therefore concluded that RFRA entailed a heavy burden on the states.[314]

Balancing the burden on the states against the threat of constitutional violations, the Court found the VRA and RFRA clearly distinguishable.[315] The burden imposed on the states by the VRA was related to voting procedures; the evidence before Congress pointed to almost a century of voting discrimination.[316] The VRA was remedial legislation,[317] and the burden was confined both in

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308. *See* 42 U.S.C. § 2000bb-1(a) (1994).

309. *See Flores*, 117 S. Ct. at 2170. Unlike the VRA, which affected only state voting laws, RFRA "applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment." *Id.*

310. *See id.* at 2171. To contest a claim that an individual's free exercise of religion is substantially burdened would necessarily involve a discussion of what is central to that individual's religion. *See id.*; Employment Div. v. Smith, 494 U.S. 872, 885-87 (1990) (*Smith II*). The Court in *Smith II* asked, "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?" *Smith II*, 494 U.S. at 887. Because "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim," *id.*, most laws challenged under RFRA would be judged under the compelling interest standard, "the most demanding test known to constitutional law," *Flores*, 117 S. Ct. at 2171; *see Smith II*, 494 U.S. at 887-88.

311. *See Flores*, 117 S. Ct. at 2171. Alternatively, RFRA might invalidate the law. *See id.* at 2168-69, 2171.

312. *See id.* at 2171.

313. *See id.*; *see also* Eisgruber & Sager, *supra* note 6, at 464-65 (describing the potential impact of RFRA on state and local laws).

314. *See Flores*, 117 S. Ct. at 2170 (characterizing RFRA's coverage as sweeping and intrusive); *id.* at 2171 (referring to the "substantial costs" that RFRA exacts).

315. *See id.* at 2169-71.

316. *See id.* at 2167.

317. *See id.* at 2166-67.

geographic scope and in time.[318] RFRA, on the other hand, was limited in no such manner; it extended to every conceivable type of law, regardless of whether specific laws related to religious discrimination, and its reach was not limited in geography or in time.[319] The Court did not find the necessary justification in the form of past documented evil, or future threatened evil, to justify such an encroachment on state authority.[320]

Specifically with regard to prophylactic measures, the Court observed that "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[321] Thus, for example, before passage of the VRA, a literacy test that was being applied in a discriminatory manner would be barred, once intentional discrimination was proved.[322] After the VRA was enacted, all literacy tests in covered areas were barred, perhaps even some that were being applied in a fair and nondiscriminatory manner.[323] Given the legislative history suggesting that, in the covered areas, tests were being applied prevalently in a discriminatory manner, the Court deferred to Congress's judgment that the predominant effect of the VRA would be to eliminate the need for a case-by-case proof of discrimination that existed in most cases.[324]

With RFRA, in contrast, Congress's decision to remove the need to prove intentional religious discrimination[325] effected a substantive change in constitutional protections, because most of the laws that would be affected by RFRA were enacted, more likely than not,

318. *See id.* at 2170.

319. *See id.*

320. *See id.* at 2170-71. "The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith* [*II*]." *Id.* at 2171.

321. *Id.* at 2170.

322. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959).

323. *See supra* note 196.

324. *See Flores*, 117 S. Ct. at 2167.

325. Under *Smith II*, a religious objector to a facially neutral law would have to prove that the law was enacted in order to target religious beliefs and practices in order to obtain relief. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 522 (1993). The proponents of RFRA argued that RFRA removed the need to prove the discriminatory motivation behind the neutral law, and functioned analogously to the VRA. *See Flores*, 117 S. Ct. at 2168-69 (relying on arguments of Archbishop Flores and the United States).

without discriminatory intent.[326] Under RFRA, many laws that would be valid under *Smith II* would fall.[327] These laws would fall, not because they were passed with discriminatory intent, but because Congress subjected them to the RFRA balancing test, which was not constitutionally required.[328] In this sense, RFRA created "extra constitutional rights."[329]

Ultimately, the Court concluded that, unlike the VRA, RFRA's goal was not merely to remove the requirement of case-by-case proof that a constitutional violation had occurred.[330] The Court concluded that Congress's intent when it enacted RFRA was to enlarge the substantive protections within the Free Exercise Clause, not just to prevent the states from violating the free exercise protections that the Court had already found there.[331] Thus, Congress had overstepped its power, because it had attempted to effect a substantive change in the Constitution.[332]

RFRA's fault was that it strayed too far from the Supreme Court's interpretation of the First Amendment, with the result that Congress crossed the line into substantive interpretation.[333]

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326. *See Flores*, 117 S. Ct. at 2171; Jonathan Kieffer, Comment, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 KAN. L. REV. 601, 628 (1996). *But see* Laycock, *supra* note 97, at 166-67 (arguing that many neutral laws are passed with discriminatory intent). The Court specifically mentioned zoning regulations and historic preservation laws as examples of neutral laws that have adverse effects on churches and synagogues, but are not passed with any hostility towards religion. *See Flores*, 117 S. Ct. at 2169. Moreover, such laws burden a large class of individuals, and those burdened due to religious reasons are no more burdened than others. *See id.* at 2171.

327. *See Flores*, 117 S. Ct. at 2171.

328. *See id.*; *supra* notes 30-32 and accompanying text (describing the balancing test required by RFRA); *see also* Laycock & Thomas, *supra* note 171, at 244 ("RFRA increases the likelihood of success for religious claims, because government will find it far more difficult to justify restrictions on religious exercise under RFRA's compelling interest test than under *Smith* [*II*]'s nondiscrimination standard.").

329. Brief for Petitioner at 10, *Flores* (No. 95-2074).

330. *See Flores*, 117 S. Ct. at 2171. As the VRA cases showed, such a goal would have been within Congress's authority because it would be within its prophylactic power.

331. *See id.* ("Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.... [RFRA] is broader than is appropriate if the goal is to prevent and remedy constitutional violations.").

332. *See id.* at 2170-71; *see also* Laycock & Thomas, *supra* note 171, at 219 ("The Act is... a statute designed to perform a constitutional function. It is designed to restore the rights that ... Congress believes should exist if the Constitution were properly interpreted."); *id.* at 244 ("RFRA is not a mere technical change from *Smith* [*II*]. Rather, it restores a fundamentally different vision of human liberty.").

333. *See Flores*, 117 S. Ct. at 2170 ("RFRA cannot be considered remedial, preventive legislation .... It appears, instead, to attempt a substantive change in constitutional protections.").

However, this does not necessarily mean that RFRA violated the separation of powers in the "traditional" sense[334] of one branch interfering with the work of another.[335] The Court did not focus on the harm RFRA caused to the judiciary,[336] nor did it seem to be concerned with its own power or authority; rather, the Court focused on the harm RFRA would do to the states.[337] Thus, the Court did not make clear whether RFRA actually violated the separation of powers, but it can at least be inferred that striking RFRA was "significant . . . in maintaining the separation of powers."[338] On the other hand, the Court noted repeatedly that when Congress oversteps the limits of its power, it intrudes upon state sovereignty,[339] and examined the dangers of Congress's intrusion into state matters.[340]

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334. *See* Robin-Vergeer, *supra* note 79, at 624 (referring to the *Klein*-based separation of powers argument as the traditional separation of powers argument); *supra* notes 245-50 and accompanying text (describing this separation of powers argument).

335. If the Court had discussed RFRA's application to federal law, it might have become clear whether RFRA violated the separation of powers, and in what sense. Assuming Congress had some authority pursuant to which it could enact RFRA, then, with regard to federal law, federalism would not be an issue and separation of powers would have emerged as the only potential limit on this authority. The Court would have had to address only the issue of whether Congress infringed on the role of the judiciary, either by substituting its own interpretation for that of the Court's (a *Marbury* issue), or by interfering with the judiciary's work (a *Klein* issue).

336. The Court discussed the extent of Congress's power, without ever explicitly stating that when Congress exceeds it, Congress violates the separation of powers. For example, the Court stated that "[t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Flores*, 117 S. Ct. at 2164. The explicit emphasis here is on "restrictions on the States"; it is left to the reader to infer that if Congress usurps interpretive power, it takes it from the judiciary.

337. *See id.* at 2162-68 (discussing the extent of Congress's § 5 power); *see also* Eisgruber & Sager, *supra* note 6, at 460-69 (describing RFRA's threat to federalism); Van Alstyne, *supra* note 145, at 304-06 (same).

338. *Flores*, 117 S. Ct. at 2166; *see also id.* at 2172 ("RFRA contradicts vital principles necessary to maintain separation of powers . . . .").

339. *See id.* at 2168-72.

340. *See id.* at 2163. For example, while discussing Congress's remedial power, the Court noted that "[l]egislation . . . can fall within Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and *intrudes into 'legislative spheres of autonomy previously reserved to the States.'* " *Id.* (emphasis added) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). The focus here was not on the significance of Congress's prohibiting constitutional conduct per se, but on the ramifications of such actions on the states. The need to be cautious with the prophylactic power arising from the Enforcement Clauses of the Fourteenth and Fifteenth Amendments apparently results not from a threat to the judiciary, but from a threat to state autonomy.

Similarly, when the Court described the distinction between remedial and substantive power, it stated that "[t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's *restrictions on the States*." *Id.* at 2164 (emphasis added). The

Moreover, the Court put its concerns regarding federalism before its concerns regarding separation of powers. Thus, the Court's analysis of the history of the adoption of the Fourteenth Amendment was devoted primarily to establishing that the purpose of the Amendment was to give Congress merely a remedial power over the states.[341] Only in the final paragraph did the Court note that "[t]he design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary."[342]

Perhaps the concern for federalism that the Court demonstrated in *Flores* should not be surprising, given the heightened sensitivity the Court recently has shown towards federalism principles in cases

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concern does not appear to be with Congress's decreeing the substance of the amendment; the Court leaves it to the reader to infer that this would intrude on the Court's role. Instead, the Court's emphasis appears to be on Congress's action against the states. After noting that the design and text imply that Congress may not decree the substance of the Amendment's restrictions, the Court continued, "[w]ere it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].' " *Id.* (second alteration in original) (quoting § 5). This does not mean that by purporting to determine the meaning of a constitutional provision, Congress would usurp power from the Court; rather, if Congress were to attempt to determine the meaning of the Constitution, its "enforcement" laws would be invalid as a nullity, and Congress would be forcing this nullity upon the States. This would clearly violate the principles of federalism. *See supra* notes 271-74 and accompanying text (discussing federalism-based limits on the enforcement powers). The separation of powers doctrine is implicitly affirmed here because the Supreme Court, and not Congress, determines the meaning of the Constitution. *See supra* notes 264-70 and accompanying text (discussing separation of powers limits on the enforcement powers). Any attempt on the part of Congress to "decree the substance of the Fourteenth Amendment" would not be a "meaningful" enforcement of that Amendment. *Flores*, 117 S. Ct. at 2164.

Concerned for all the laws that could potentially fall under RFRA, and that would have been allowed to stand under *Smith II*, the Court stated, "[t]his is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 2171.

Finally, the Court observed that, were Congress able to affect its own powers by altering the meaning of the Fourteenth Amendment, then "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." *Id.* at 2168. Again, the threat of allowing RFRA to stand is not merely an usurpation of the Court's power, but an incursion on the power of the States (and the People), by robbing them of their participation through the formal amendment process. *See* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (plurality opinion) (Harlan, J., concurring in part and dissenting in part) (suggesting that, but for recent Supreme Court precedent, beginning with *Baker v. Carr*, 369 U.S. 186 (1962), the provisions at issue would have required constitutional amendment); *supra* note 223 and accompanying text (discussing Justice Rehnquist's dissent in *City of Rome*, also making this point).

341. *See Flores*, 117 S. Ct. at 2164-65.

342. *Id.* at 2166.

involving the Commerce Clause.[343] Indeed, in *United States v. Lopez*,[344] Justice Kennedy wrote that "uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers" is most evident in the area of federalism.[345] He noted that although the Court has had a difficult task, it has been able to develop well-accepted standards regarding the separation of powers, checks and balances, and judicial review.[346] However, Justice Kennedy pointed out that the Court's "role in preserving the federal balance seems more tenuous."[347] He argued that the Court must assume a role in preserving the federal balance:[348] "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[349]

As it did in the Commerce Clause[350] area in *Lopez*, the Court appears to have corrected an imbalance by tightening the standard of review of Congress's use of its enforcement powers. In his essay discussing the implications of *Lopez*, Julian Epstein noted the conventional view that, prior to *Lopez*, the Court had been using a "diminished rational basis review" for Congress's use of its Commerce Clause power.[351] The test in *Lopez*, however, requires in part that the regulated activity "substantially affects" commerce, suggesting a "strengthened rational basis review."[352] Epstein suggested that *Lopez* has "ratchet[ed] up the rational basis

343. *See* Julian Epstein, *Evolving Spheres of Federalism After* U.S. v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525, 546-49 (1997) (examining the implications of *Lopez* with respect to additional limits on congressional power that the judiciary may impose in other areas); Frickey, *supra* note 270, at 728-30 (examining the Court's increasing emphasis on congressional fact-finding in judicial review as a means of curbing Congress's power under the Commerce Clause, and speculating about the spread to other congressional action); *see also* U.S. CONST. art. I, § 8, cl. 3 (the Commerce Clause).

344. 514 U.S. 549 (1995).

345. *Id.* at 575 (Kennedy, J., concurring).

346. *See id.* (Kennedy, J., concurring).

347. *Id.* (Kennedy, J., concurring).

348. *See id.* at 575-90 (Kennedy, J., concurring).

349. *Id.* at 578 (Kennedy, J., concurring); *see also Flores*, 117 S. Ct. 2172 (discussing the Court's role in preserving the federal balance); Lessig, *supra* note 18, at 130 (observing that *Lopez* "finds implied in the constitutional structure limits on the federal government's power, . . . which today can be supported only by affirmative limits constructed by the Court").

350. *See* U.S. CONST. art. I, § 8, cl. 3.

351. *See* Epstein, *supra* note 343, at 535.

352. *Id.* at 535-36.

scrutiny."[353] Other academic commentators have agreed with Epstein's assessment of the strengthening of the test.[354]

In a parallel manner, what was once a weak rational basis standard in the case of Congress's enforcement power has now been "ratcheted up" in *Flores* to a proportionality test.[355] The VRA cases had relied on what was essentially a rational basis test, based on the test articulated in *M'Culloch v. Maryland*.[356] In later cases, the Court confirmed that it accorded Congress a high degree of deference when Congress acted pursuant to its enforcement powers. For example, referring to the *Morgan* decision, the Court described its role in reviewing congressional action pursuant to § 5 by saying that "[i]t was *enough that the Court could perceive a basis* upon which Congress could reasonably predicate [its] judgment."[357] In a later case, the Court in dicta described its review of an exercise of Congress's § 5 power as requiring only that the Court be able to "discern some legislative purpose or factual predicate that supports the exercise of that power."[358] And, in still a later case, Justice O'Connor, joined by two other Justices, wrote that "Congress ... has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the

353. *Id.* at 536.

354. *See* Frickey, *supra* note 270, at 728 ("The rationality review used ... is far more stringent than the usual, 'anything goes' variety."); Stephen M. McJohn, *The Impact of* United States v. Lopez: *The New Hybrid Commerce Clause*, 34 DUQ. L. REV 1, 2 (1995) (asserting that *Lopez* attempts to create special protection for state sovereignty by heightening the scrutiny of federal legislation regulating areas of traditional concern to the states); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 684 (1995) (characterizing the new Commerce Clause standard of *Lopez* as "rational basis with 'bite' " (citing Gerald Gunther, *Newer Equal Protection*, 86 HARV. L. REV. 1, 20-48 (1972))); *see also* United States v. Wall, 92 F.3d 1444, 1459 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) ("I read *Lopez* as requiring courts to use more than mere rational basis scrutiny in reviewing challenges to Congress's commerce powers.").

355. The Court had earlier applied a very deferential standard of review to congressional action pursuant to its enforcement power. *See* Burt, *supra* note 94, at 114 (calling the standard of review used in *Morgan* "simply a test of rationality, with implications of even greater deference to Congress than that ordinarily deferential standard would itself suggest"). Yet, in *Flores*, the Court was not deferential to Congress, insisting on a showing that the means Congress employed were proportional to legitimate ends. *See Flores*, 117 S. Ct. at 2170-71.

356. 17 U.S. (4 Wheat.) 316, 421 (1819) (articulating the standard of review for congressional action pursuant to the Necessary and Proper Clause); *see supra* notes 180-238 and accompanying text (discussing the Court's application of the *M'Culloch* test in the VRA cases).

357. Fullilove v. Klutznick, 448 U.S. 448, 477 (1980) (plurality opinion) (emphasis added) (citation omitted).

358. EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[359]

RFRA's proponents relied on such language when proclaiming that RFRA would not be found unconstitutional.[360] But Justice Kennedy interpreted the VRA precedents in a different way. In *South Carolina v. Katzenbach*, the Court had to justify Congress's ban on literacy tests in the face of an earlier Supreme Court decision that such tests are not *per se* unconstitutional.[361] The Court defended this provision of the VRA by saying that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."[362] In the context of the decision and its place in history, this statement is easily viewed as providing justification for allowing Congress to ban conduct that is not on its face unconstitutional in advance of adjudication, rather than as placing a limit on such power.[363] Defending the unprecedented nature of the remedies of the VRA more generally, the Court stated that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."[364] Again, a natural interpretation, given the context, is that this statement was meant to *justify* the use of such power by Congress, not to limit that power. Yet, the *Flores* Court cited such statements in support of its conclusion that when Congress acts pursuant to its enforcement power, there must be a congruence between the legislative ends and the means for achieving those ends.[365] Thus, the

359. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989). Justice O'Connor was joined in this part of her opinion by Chief Justice Rehnquist and Justice White. *See id.* at 476. Arguably, Justice O'Connor suggested here that Congress has some substantive power.

360. *See* Laycock, *supra* note 97, at 152-67; Robin-Vergeer, *supra* note 79, at 741; *see also* Pawa, *supra* note 188, at 1097 (asserting that "RFRA would pass the *Morgan* test").

361. *See supra* notes 180-97 and accompanying text (discussing *South Carolina v. Katzenbach*).

362. South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

363. This was Congress's first use of the prophylactic power pursuant to § 2 of the Fifteenth Amendment. To uphold the VRA against a challenge that it violated federalism and the separation of powers, the Court had to justify the existence of such a power used to enact such "unprecedented remedies." *Flores*, 117 S. Ct. at 2167. It seems unlikely that the Court would attempt to limit that power at the same time. *See supra* notes 180-97 and accompanying test (discussing *South Carolina v. Katzenbach*).

364. *South Carolina v. Katzenbach*, 383 U.S. at 308 (quoted in *Flores*, 117 S. Ct. at 2166).

365. *See Flores*, 117 S. Ct. at 2166-67, 2169. The Court did not subject the challenged provisions of the VRA to a balancing test. It simply noted that there was a rational connection between the ends Congress sought to address and the means Congress employed.

Flores Court found in the expansive language of the VRA cases support for limiting Congress's enforcement power by subjecting congressional action pursuant to the Enforcement Clause to a stricter standard of review than had been applied in the VRA cases.

The interpretation the *Flores* Court gave to the language of the VRA cases is not inconsistent with those holdings: In the face of egregious precedents, Congress has the authority to legislate with the prophylactic power. But the *Flores* Court has set new limits on Congress's enforcement power. To say that certain circumstances justify the action of Congress is not equivalent to the statement that, in the absence of such circumstances, congressional action is not justified.[366] Although it has not contradicted or overturned earlier precedent,[367] the Court has effected a change in its Enforcement Clause jurisprudence.[368]

The Court could have based its decision to strike RFRA solely on the separation of powers doctrine.[369] The Court chose instead to analyze Congress's enforcement power, which necessarily involved a consideration of both federalism and separation of powers.[370] Writing the decision as it did, the Court used *Flores* to affect the power balance between the Court and Congress *and* between the federal government and the states.

Regarding the balance between the Court and Congress, it is now clear that with respect to the Civil War Amendments, the Court, not Congress, interprets the substantive provisions of the Constitution. Moreover, the Court has taken on responsibility for enforcing federalism-based limits on Congress's enforcement powers.

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366. It is reasonable to conclude that *Flores* presented the Court, for the first time, with facts that required it to look at the distinction between Congress's use of its remedial power and the use of an unauthorized power, in the form of substantive legislation. While Congress's enforcement power has always been limited, *see id.* at 2163, only now must the Court articulate those limits.

367. The Court clearly approved of its VRA precedents, and indicated that those cases would pass the *Flores* proportionality test. Thus, the Court could be replacing its prior *M'Culloch* standard with a new standard, without disturbing its precedents. The standard has been rearticulated based on a new set of facts. On the other hand, perhaps the weaker rationality standard of *M'Culloch* is still valid, in the sense that, given the proper circumstances, the Court will still defer to Congress.

368. Under the permissive standard employed by the Court in the VRA cases, RFRA arguably could have survived. Congress had a legitimate end in mind: the protection of First Amendment rights. Moreover, there is a rational connection between this end and the means Congress adopted in the form of RFRA, which is all that the Court had required in the VRA cases. *See* Laycock, *supra* note 97, at 167; Pawa, *supra* note 188, at 1097.

369. *See supra* notes 260-63 and accompanying text.

370. *See supra* notes 260-63 and accompanying text.

Regarding the balance between Congress and the states, the Court has shifted some power back to the states, at the expense of Congress, by renouncing any substantive power Congress might have had, and by strengthening the standard of review of Congress's enforcement power.

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