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City of Boerne v. Flores: Religious Free Exercise Pays a High Price for the Supreme Court's Retaliation on Congress

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NOTE

CITY OF BOERNE V. FLORES: RELIGIOUS FREE EXERCISE PAYS A HIGH PRICE FOR THE SUPREME COURT'S RETALIATION ON CONGRESS

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I. INTRODUCTION

The First Amendment of the United States Constitution,[1] made applicable to the states through the Fourteenth Amendment,[2] protects a person's right to the free exercise of religion. This protection, however, fails to provide a framework with which to reconcile the freedom of religious conduct with the need for government to regulate conduct. All three branches of government, as created in the Constitution, create and refine this framework.[3] Traditionally, the judiciary has been the final interpreter of the Constitution and, in this capacity, has defined the powers of the other branches of government.[4] For example, the Supreme Court has interpreted Congress's enforcement power under Section Five of the Fourteenth Amendment to be a remedial one,[5] but at the same time broadened its scope to the degree that Congress could justify stepping into a judicial role for the sake of religious freedom.[6]

To that end, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA")[7] in order to codify a strict scrutiny test for free exercise cases.[8] RFRA represents Congress's response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[9] in which the Court concluded that the First Amendment did not relieve

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1. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (asserting that the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment).

3. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-62 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748) (maintaining, based upon observations of English government, that liberty cannot exist without the separation of all three branches of government).

4. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (establishing the doctrine of judicial review, which gives the Supreme Court the exclusive power to interpret the Constitution and declare invalid any laws in contradiction to it).

5. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (rejecting the argument that this remedial power rests solely with the courts).

6. *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (holding that Congress did not exceed its legislative powers under § 5 of the Fourteenth Amendment when it enacted § 4(e) of the Voting Rights Act of 1965). In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), Justice Kennedy, writing for the majority, noted that *Morgan* "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *Id.* at 2168.

7. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

8. *See id.* § 2000bb(b)(1) (listing, as a purpose of the statute, the "restor[ation of] the compelling interest test" in free exercise cases).

9. 494 U.S. 872 (1990).

individuals from complying with neutral and generally applicable laws that, in effect, infringed upon religious practices.[10] In its 1997 decision in *City of Boerne v. Flores*,[11] the Court responded to the passage of RFRA and addressed whether Congress has an affirmative power to preserve the rights guaranteed by the First Amendment.[12] The Court confronted Congress, fighting back with one of the cornerstone principles of *Marbury v. Madison*,[13] that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[14] The Court concluded that RFRA was unconstitutional because Congress's enforcement power under Section Five of the Fourteenth Amendment is solely remedial.[15]

This decision, though resounding with free exercise overtones, had significant implications for both the separation of powers between the legislative and judicial branches and federalism. Although some of the Justices did not deny the need to look more closely into guaranteeing the protection of individual rights,[16] *Flores* stands for the protection of something more important: the preservation of a federalist, democratic society sustained by the three pillars of government, with each branch sharing in a balanced distribution of power so that citizens can coexist in a workable exchange of guarantees.

This Note contends that *Flores* has significant implications for the future balance of power between the judiciary and legislative branches, as well as for the future of free exercise of religion. First, it discusses the history of the Court's decisions on the right to free exercise, culminating in its decision in *Smith* as the catalyst that encouraged Congress to enact RFRA.[17] A closer look into *Smith* will shed light on the future of free exercise. Moreover, a historical look into the judicial treatment of

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10. *See id.* at 890 (holding that Oregon may deny unemployment compensation when the claimant's dismissal results from drug use, even though the drug may have been used for religious purposes); *see also* 42 U.S.C. § 2000bb(a)(4) (mentioning *Smith* specifically).

11. 117 S. Ct. 2157 (1997).

12. *See id.* at 2160.

13. 5 U.S. (1 Cranch) 137 (1803).

14. *Id.* at 177.

15. *See Flores*, 117 S. Ct. at 2164 (clarifying that Congress only has the power to enforce the provisions of the Fourteenth Amendment and not the power to determine what constitutes a violation).

16. *See id.* at 2176 (O'Connor, J., dissenting) (asserting that *Smith* was wrongly decided and members of Congress had "legitimate concerns"); *id.* at 2186 (Breyer, J., dissenting) (agreeing that the parties should brief the issue of whether the Court correctly decided *Smith*).

17. Refer to Part III.A *infra*.

legislative enforcement power will also explain how Congress gathered the ammunition to pass such a law.[18]

Part II provides a summary of the facts and opinions that comprise *Flores*. Part III analyzes the history of both the Free Exercise Clause and Congress's enforcement power—two subjects that set the stage for, and independently animated the opinions in *Flores*. It also discusses the Court's assertion of its role as the final interpreter of the Constitution and its need to define the boundaries of congressional remedial power. Finally, Part III explains the significance of *Flores* as to the separation of powers and federalism doctrines. While setting limits on congressional enforcement power, *Flores* also significantly affects the future of the free exercise clause. *Flores* clearly reasserts that *Smith* is the law on free exercise.[19] In so doing, however, it left untouched the eventuality that the Court may need to revisit the issue in cases of neutral, generally applicable laws.[20]

II. CASE RECITATION

The St. Peter Catholic Church is located in Boerne, Texas—approximately twenty-eight miles northwest of San Antonio.[21] In 1991, the Archbishop of San Antonio allowed the parishioners to enlarge their church, which at the time could only seat about 230 people.[22] Within a few months, the Boerne City Council passed an ordinance allowing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts.[23] The ordinance required that the Commission pre-approve construction affecting historic landmarks or buildings in a historic district.[24] Because of the ordinance, city authorities denied the Archbishop's application for a building permit to enlarge the church.[25] The Archbishop sued the city in the U.S. District Court for the Western District of Texas.[26] He claimed

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18. *Id.*

19. *See Flores*, 117 S. Ct. at 2172 (reversing the Fifth Circuit's judgment upholding RFRA, which was the statute attempting to vitiate the *Smith* holding).

20. *See id.* at 2176 (O'Connor, J., dissenting) (arguing that *Smith* is not a correct interpretation of the Free Exercise Clause); *id.* at 2186 (Souter, J., dissenting) (expressing "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence"); *id.* (Breyer, J., dissenting) (agreeing with Justice O'Connor that *Flores* should be re-argued to re-examine *Smith*).

21. *See id.* at 2160.

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

that the denial of a permit substantially burdened his constitutional right to the free exercise of religion because the city council did not satisfy RFRA's requirement of showing a compelling state interest for its action.[27] The district court concluded that RFRA was unconstitutional because Congress had exceeded the scope of its enforcement power under Section Five of the Fourteenth Amendment.[28] On appeal, the Fifth Circuit reversed the district court's decision, holding RFRA to be constitutional.[29] The Supreme Court granted certiorari to address the constitutional question at issue.[30]

Justice Kennedy, writing for the majority, first looked at RFRA and Congress's reasons for enacting it.[31] In so doing, he discussed *Smith*—a decision in which the Court had set both the factual and legal stages for *Flores*. In *Smith*, the Court upheld an Oregon statute that criminalized the possession of peyote, thereby infringing upon the religious practices of Native Americans whose use of the drug was central to those practices.[32] In denying the Native American Indians an exemption to the Oregon statute, the *Smith* majority disregarded the "compelling interest" (or "strict scrutiny")[33] test that the Court had established almost thirty years earlier.[34]

According to Justice Kennedy, the Court in *Smith* reasoned that the government's ban of peyote was enforceable because it was a neutral and generally applicable criminal law not targeted toward any religion.[35] Congress responded to *Smith* by using its enforcement power in Section Five of the Fourteenth Amendment to enact RFRA—a statute that prohibited state governments from substantially burdening the free exercise of religion without demonstrating a compelling state interest.[36] Moreover, RFRA

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27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.* at 2160-61; *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 885 (1990) (holding that a generally applicable law, which has the effect of infringing upon one's right of free exercise of religion, does not require a balancing of the state's interest in passing the law with the individual's interest).

33. *See* Sherbert v. Verner, 374 U.S. 398, 408-09 (1963) (balancing the state's interest in denying a Seventh-Day Adventist unemployment compensation benefits against the burden on the individual's religious beliefs).

34. *See Smith*, 494 U.S. at 884-85 (declaring the *Sherbert* test inapplicable to "across-the-board criminal prohibition[s] on a particular form of conduct").

35. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2160-61 (1997) (discussing and quoting *Smith*, 494 U.S. at 885).

36. *See id.* at 2161-62 (quoting 42 U.S.C. § 2000bb(a)(5) (1994)).

required the government action at issue to be the least restrictive means of furthering that compelling interest.[37]

The Archbishop defended RFRA by explaining that Congress's enforcement power was not limited to remedial or preventive legislation.[38] Disagreeing with the Archbishop's arguments, the Court held that Congress's enforcement power was remedial, and that it could not decree the substance of the Fourteenth Amendment's restrictions on the states.[39] As the Court explained: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[40]

In so stating, the Court discussed the history of the Fourteenth Amendment, describing one of its original purposes as the preservation of the separation of powers between Congress and the judiciary to prevent the centralization of power.[41] The Court noted that the perceived danger of giving Congress primary responsibility for enforcing legal equality was that power would be placed in the hands of changing congressional majorities.[42] The Court explained that Congress's enforcement power was limited to being remedial and preventive in nature.[43] As an example, the Court cited the *Civil Rights Cases*,[44] in which it invalidated sections of the Civil Rights Act of 1875. According to the Court, Congress was not authorized to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . . . ."[45] In addition to the *Civil Rights Cases*, the Court discussed more recent cases that have emphasized the strong, but nevertheless remedial, nature of Congress's Section Five power,[46] such as *South Carolina v. Katzenbach*[47] and *Oregon v. Mitchell*.[48]

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37. *See id.* at 2162 (quoting 42 U.S.C. § 2000bb-1).

38. *See id.* at 2162-63 (arguing that Congress may enact legislation to prevent constitutional violations).

39. *See id.* at 2164.

40. *Id.*

41. *See id.* at 2166.

42. *See id.* at 2165. Another argument advanced against passing the original draft of the Fourteenth Amendment was that Congress would have the power to legislate in areas of traditional state autonomy. *See id.* at 2164.

43. *See id.* at 2166 (citing nineteenth-century cases that established this idea).

44. 109 U.S. 3 (1883).

45. *Id.* at 13-14.

46. *See Flores*, 117 S. Ct. at 2166-68 ("Any suggestion that Congress has a

Within this jurisprudential framework, the majority identified several problems with RFRA. First, it was not designed to identify and counteract laws likely to be unconstitutional for their treatment of religion.[49] Instead, the Act curtailed the states' traditional authority to regulate the health and welfare of its citizens.[50] Second, RFRA's "substantial burden test" did not meet its stated purpose of illuminating the discriminatory effects of a law.[51] A neutral and generally applicable law that burdens a large class of citizens does not automatically imply that it burdens a specific religious belief any differently than another.[52] By requiring the "least restrictive means" of imposing such a burden on religion, the Court argued, RFRA became more than just a remedial or preventive measure.[53] The Court was also wary that Congress had imposed RFRA on every level of federal and state government—a feature the Court described as "[s]weeping coverage."[54]

This sweeping coverage indicated that the reach and scope of RFRA was larger than other measures passed under Congress's enforcement power because the Act lacked restrictions.[55] For instance, Congress did not include any mechanism to terminate the Act.[56] As a result, under RFRA, an individual who claimed a substantial burden on his or her free exercise of religion could challenge any law at any time.[57]

The Court stated that Congress could use its enforcement power as a remedial or preventive measure when there was "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[58] It

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substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

47. 383 U.S. 301, 308 (1966) (upholding various provisions of the Voting Rights Act of 1965 because they were remedies for voting discrimination).

48. 400 U.S. 112, 118 (1970) (Black, J.) (upholding a five-year national ban on literacy tests and similar requirements for voter registration to prevent discrimination).

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

50. *See id.* (characterizing the intrusion as "considerable").

51. *See id.*

52. *See id.*

53. *See id.* (noting that RFRA's "least restrictive means" requirement was not a part of free exercise jurisprudence before *Smith*).

54. *See id.* at 2170 (suggesting that remedial legislation would be more confined).

55. *See id.*

56. *See id.*

57. *See id.*

58. *Id.* at 2164.

continued to explain that "[l]acking such a connection, legislation may become substantive in operation and effect."[59]

The dissenting opinions of Justice O'Connor and Justice Breyer disagreed with the majority's use of *Smith* as the precedent against which it should measure the constitutionality of RFRA.[60] They emphasized the need to protect the free exercise of religion and questioned whether *Smith* represented the best way to ensure its protection.[61] For purposes of preserving the right to free exercise of religion, they opined that a compelling state interest test would be appropriate to justify any government law that infringed upon religious conduct.[62] Justice O'Connor agreed with the majority's decision that Section Five of the Fourteenth Amendment gives Congress a remedial power that it can use only if there is "congruence and proportionality" between the injury and the means of remedying it.[63] Justice Breyer, however, disagreed with the majority's and Justice O'Connor's discussion of the scope of Congress's enforcement power.[64]

In his dissent, Justice Souter also disagreed with the majority that *Smith* was controlling, but also disagreed with Justice O'Connor and Breyer's rejection of *Smith*.[65] Justice Souter felt that the Court should have fully examined the merits of *Smith* instead of assuming it was correct.[66]

The concurrence of Justices Scalia and Stevens responded to Justice O'Connor's contention that *Smith* was inconsistent with precedent.[67] They noted that the dissent failed to point to any historical material inconsistent with *Smith*.[68] Justices Scalia and

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59. *Id.*

60. *See id.* at 2176 (O'Connor, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

61. *See id.* at 2176 (O'Connor, J., dissenting) (suggesting that the *Smith* decision was incorrect and that *Boerne* is the proper vehicle for the Court's re-examination of *Smith*).

62. *See id.* at 2177 (O'Connor, J., dissenting) (noting that this compelling state interest test was the standard before *Smith*).

63. *See id.* at 2176 (O'Connor, J., dissenting).

64. *See id.* at 2186 (Breyer, J., dissenting) (declining to join in the first paragraph of part I of Justice O'Connor's dissent, claiming this analysis to be unnecessary).

65. *See id.* at 2186 (Souter, J., dissenting).

66. *See id.* (Souter, J., dissenting) (contending that because the Court did not re-examine *Smith*, *Flores* could not be decided soundly and, therefore, certiorari was improvidently granted).

67. *See id.* at 2172 (Scalia, J., concurring in part) (disagreeing with the dissent's argument "that historical materials support a result contrary to the one reached in *Employment Div., Dept. of Human Resources of Oregon v. Smith*").

68. *See id.* at 2172-73 (Scalia, J., concurring in part) (addressing Michael

Stevens contended that the dissent's argument did not support the conclusion that *Smith* failed to protect religious conduct from neutral laws of general application because the examples the dissent used were state actions that targeted a religion in some specific way, rather than actions only incidentally affecting free exercise.[69] They also argued that before the enactment of the Bill of Rights, the legislatures accommodated religious practice.[70] Justices Scalia and Stevens contended that this history of legislative accommodation suggests that the drafters of the Bill of Rights did not believe that "accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause."[71] In other words, Justices Scalia and Stevens argued that the Bill of Rights, as originally understood, consisted of a set of principles that were legislatively desirable, but not constitutionally required.[72]

The concurrence emphasized that the dissent's opinion was attractive to the populace, but the evidence it used for its arguments was incorrect.[73] Justices Scalia and Stevens asserted: "The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people" who will decide the outcome of neutral laws that nevertheless burden religious practices.[74] In other words, they would defer to the state legislatures as the entities best situated to determine the need for their own neutral laws of general applicability, despite a possible infringement upon the practices of some religious groups.

McConnell's suggestion that *Smith* is compatible with the original intent of the Free Exercise Clause). Professor McConnell discusses the major philosophical, legal, and historical sources for the Free Exercise Clause in *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

69. *See Flores*, 117 S. Ct. at 2173 (Scalia, J., concurring in part).

70. *See id.* at 2174 (Scalia, J., concurring in part).

71. *Id.* (Scalia, J., concurring in part).

72. *See id.* (Scalia, J., concurring in part) ("There is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable.").

73. *See id.* 2175-76 (Scalia, J., concurring in part) (noting that abstract arguments must be supported by cases, of which the dissent cites none, because none exist).

74. *Id.* at 2176 (Scalia, J., concurring in part) (explaining that the issue in *Smith* was "whether the people, through their elected representatives, or rather this Court, shall control the outcome of" cases in which a generally applicable law burdens a particular religious practice).

III. ANALYSIS

A. *Legal Background to the Free Exercise of Religion*

1. No Definite Answer to Free Exercise. Two concepts embrace freedom of religion in the First Amendment: the freedom to believe or not to believe in a god; and the freedom to act on that belief.[75] The freedom to have certain religious beliefs is personal and unique.[76] Conduct, on the other hand, is usually interpersonal and may infringe on the rights of others; therefore, it is subject to government regulation in order to protect society at large.[77] Conduct and belief commonly overlap through the performance of religious practices.[78] Governments regulate conduct in order to maintain a functional civil society.[79] The extent of governmental regulation can be difficult to measure, however, especially when it crosses over into individual rights such as religious freedom.[80]

The Supreme Court's stance on the unconstitutionality of a law that outwardly denies an individual the right to disseminate religious beliefs is clear. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[81] the Court applied a strict scrutiny test to strike down a Florida ordinance that had banned the religious sacrifice of animals.[82] In that case, the Court ruled that the ordinance was

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75. *See* McConnell, *supra* note 68, at 1488 (stating that "the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief"); *see also* Cantwell v. Connecticut, 310 U.S. 296, 300-03 (1940) ("Thus the [First] Amendment embraces two concepts,—freedom to believe and freedom to act.").

76. *See Cantwell*, 310 U.S. at 303 (asserting that an individual's freedom to believe as she chooses is absolute).

77. *See id.* at 304 (relating that the freedom to act in this context must be defined appropriately so as to be enforceable and still protect the public); *see also* Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (upholding a federal law criminalizing bigamy despite a Mormon's claim that polygamy was his religious duty).

78. *See Reynolds*, 98 U.S. at 166-167 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."); *see also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (stating that religious "belief and action cannot be neatly confined in logic-tight compartments").

79. *See Yoder*, 406 U.S. at 220 (describing religious practices, such as ritual sacrifice and self-immolation, that the government can almost certainly regulate).

80. *See* McConnell, *supra* note 68, at 1430-35 (discussing the various philosophies that influenced the formation of the Bill of Rights and addressed the issue of religious beliefs conflicting with governmental policy).

81. 508 U.S. 520 (1993).

82. *See id.* at 545-46 (explaining that non-neutral laws that burden a religious practice "most undergo the most rigorous of scrutiny").

facially discriminatory and targeted a specific religious group.[83] Moreover, the government's objectives were not compelling enough to allow such a burden targeted at a religious practice to stand.[84]

Laws that are facially discriminatory toward the free exercise of religion are rare.[85] More common are generally applicable statutes that place some neutral impositions on religious practices.[86] The Court has historically handled these types of statutes in different ways.

Before the 1960s, for example, the Court upheld facially neutral statutes that incidentally burdened religious conduct,[87] although it seemed to require "that government pursue the least drastic means to a compelling secular end."[88] Much of the protection of free exercise, though, coincided with the protection of free speech.[89]

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83. *See id.* at 533-35.

84. *See id.* at 535 (noting that the ordinances attempted a "'religious gerrymander,'" *i.e.*, targeting religious practices under the guise of a proper governmental end (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))).

85. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 157 (1997). Governmental discrimination against religion is usually the result of mistake or incorrect interpretation of religious jurisprudence. *See id.* at 157 n.23.

86. *See id.* at 157 (suggesting that otherwise neutral burdens on religion are often placed on religious minorities); *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (upholding an Oregon statute that criminalized the use of peyote despite arguments from American Indians that such a ban violated their freedom to use the drug for religious practices); Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (upholding an Air Force regulation requiring uniform dress that prohibited an Air Force captain from wearing a yarmulke while on duty); Sherbert v. Verner, 374 U.S. 398, 399-402 (1963) (striking down South Carolina's refusal to grant a Seventh-Day Adventist unemployment benefits for not working on Saturdays, her religious day of rest); Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961) (upholding a state Sunday closing law despite complaints from orthodox Jewish merchants that the law impaired their ability to earn a livelihood because their religion prohibited working on Saturdays); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (using free speech arguments to protect a group of Jehovah's Witnesses' right not to follow a regulation requiring students to salute the flag); Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (sustaining the federal government's right to make bigamy a crime despite its imposition on the Mormon religious practice of polygamy).

87. *See, e.g.*, *Reynolds*, 98 U.S. at 166-67.

88. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 1251 (2d ed. 1988); *see also* Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (requiring the state to use "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to . . . the State").

89. *See, e.g.*, *Barnette*, 319 U.S. at 634 (invalidating regulations requiring a flag salute under free speech grounds rather than free exercise); *see also Smith*, 494 U.S. at 881 (stating that prior decisions banning the application of a neutral, generally applicable law to religiously motivated conduct involved the Free Exercise Clause in

In 1963, the Court decided its landmark free exercise case, *Sherbert v. Verner*.[90] In *Sherbert*, the Court clearly established that a state must show a compelling interest before passing a neutral law of general application that incidentally burdened an individual's right to free exercise.[91] In *Sherbert*, a Seventh Day Adventist was fired for refusing to work on Saturdays, which was her religious day of rest.[92] She filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.[93] The state, however, denied her benefits because she would not work on Saturdays.[94] The Court held that it was unconstitutional for South Carolina to apply the eligibility provisions of its unemployment compensation act if doing so would force a worker to abandon his or her religious practices of respecting "the day of rest."[95] *Sherbert* is a good example of the Court's attempt to address the common constitutional problem that generally applicable laws create when, though not intentionally targeted toward any particular religious practice, they conflict with such practices. The case established a strict scrutiny test against which to measure the constitutionality of state actions that incidentally burden a person's religious practices, even if the action did not purport to prohibit any specific religious conduct.[96]

The Court reasoned that the government's denial of compensation forced the appellant "to choose between following

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conjunction with other constitutional protections, including the Freedom of Speech Clause). *But see id.* at 896 (O'Connor, J., concurring) (responding to the majority's attempt to distinguish prior Court decisions that banned neutral and generally applicable laws on free speech grounds by arguing that those "hybrid" decisions expressly relied upon the Free Exercise Clause and are part of "the mainstream of our free exercise jurisprudence").

90. 374 U.S. 398 (1963).

91. *See id.* at 403 (stating that the South Carolina's Supreme Court decision may be upheld if "any incidental burden on the free exercise of . . . religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

92. *See id.* at 399.

93. *See id.* at 399-400 (explaining that the plaintiff was unable to obtain other employment because she would not take Saturday work).

94. *See id.* at 401 (quoting the South Carolina law which provided that a claimant was ineligible for benefits "'[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . .'" (alterations in original)).

95. *See id.* at 410 (noting that the holding does not apply to a state's adoption of a given method of unemployment compensation).

96. *See id.* at 403 (stating that "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest'" (quoting *Button*, 371 U.S. at 438)); *id.* at 406 (holding that it is insufficient merely to show "a rational relationship to some colorable state interest").

the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[97] According to the Court, the state action's specific discriminatory effect on Saturday Sabbatarians only compounded its unconstitutionality.[98] Furthermore, the Court noted that the state failed to offer an overriding, compelling state interest that justified the state's denial of unemployment benefits.[99] The state's interest to prevent the filing of fraudulent claims feigning religious objections to Saturday work was not sufficiently compelling.[100] For the Court to uphold such a statute, the state needed to show that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[101] In other words, the state failed to prove that an exemption for the Saturday Sabbatarians, which would have allowed them unemployment benefits, would impair the furtherance of a compelling state interest.[102]

Sherbert not only established a strict scrutiny test for free exercise cases, but it also expanded the meaning of "compelling" to include the lack of feasible exemptions to the state action.[103] Accordingly, the state interest is compelling only if no feasible exemptions to a state law can exist without impairing the state's interest.

In *Wisconsin v. Yoder*,[104] the Court reaffirmed *Sherbert*.[105] It decided that an exemption for fourteen- and fifteen-year old Amish students from attending school until the age of sixteen

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97. *Id.* at 404.

98. *See id.* at 406 (noting that the South Carolina law does not require Sunday worshippers to choose between work or religion although it requires Saturday Sabbatarians to do so).

99. *See id.* at 406-07.

100. *See id.* at 407 (refusing to scrutinize the interest in preventing fraudulent claims because it was not argued before the state supreme court).

101. *Id.*

102. *See* McConnell, *supra* note 68, at 1412 (quoting Justice Harlan's dissent in *Sherbert* to demonstrate that a state must carve out an exception for claimants whose unavailability is due to their religious convictions).

103. *See Sherbert*, 374 U.S. at 406-07 (stating that the government bears the burden of demonstrating that no alternative, less-restrictive forms of regulation would combat spurious claims which threaten to dilute the unemployment compensation fund); *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (upholding the application of the state Sunday closing law to orthodox Jewish merchants, who argued that such a law impaired their ability to earn a livelihood, because granting an exemption would have undermined the state's secular purpose of assuring a uniform day of rest).

104. 406 U.S. 205 (1972).

105. *See id.* at 215 (citing *Sherbert* for the proposition that a state's interest in compulsory education is not absolute).

would not impair the state's interest in educating its citizens to be "self-reliant and self-sufficient participants in society."[106] The Court concluded that the tradition of education within the Amish religion sufficiently satisfied Wisconsin's interest in maintaining educated and functional citizens.[107] Therefore, providing an exemption to compulsory education until the age of sixteen for Amish children would not inhibit the state's compelling interest.[108] Once again, the Court emphasized that a government regulation that appears "neutral" on its face may be unconstitutional if, in its general application, it nevertheless unduly burdens the free exercise of religion.[109]

A state's failure to provide an exemption from regulations burdening a religious belief, however, will not automatically invalidate those regulations. In *United States v. Lee*,[110] the Court upheld the federal government's refusal to allow an exemption to Amish employers who sought to avoid paying social security taxes on religious grounds.[111] The Court reasoned that such an exemption would have significantly impaired the government's objective to maintain a funded social security system because mandatory participation was necessary to achieve that objective.[112] In this case, therefore, the lack of a feasible exemption to the payment of social security taxes made the government's objective even more "compelling."[113]

After *Sherbert*, the Court implemented a strict scrutiny test that turned on the feasibility of an exemption to the regulation that interfered with religious practices.[114] This heightened scrutiny resulted in stricter limitations upon state regulations in general and, in particular, on neutral laws of general application that had only an "incidental effect" upon the free exercise of any religion.[115]

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106. *Id.* at 221.

107. *See id.* at 225 (noting the difference between compulsory education as preparation for a child's entry into modern society and the preparation for life in a segregated Amish farming community).

108. *See id.* at 235-36 (explaining that there is a minimal difference between what the state would require and what the Amish already accepted).

109. *See id.* at 220.

110. 455 U.S. 252 (1982).

111. *See id.* at 254.

112. *See id.* at 258-59 (noting that voluntary participation in funding social security would be virtually impossible to oversee).

113. *See id.* (reasoning that the nationwide aspect of social security highlights the government's interest, and that the necessity of mandatory participation makes that interest "very high").

114. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963). For a discussion of cases in which the Court found exemptions compatible with a state's compelling interest, thereby protecting the right to free exercise, see TRIBE, *supra* note 88, at 1254-62.

115. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (allowing an

2. Employment Division, Department of Human Resources of Oregon v. Smith: *The Supreme Court Closes the Door on Strict Scrutiny.* In 1990, the Supreme Court changed its position regarding the effect that neutral laws of general application may have on the free exercise of religion. A private drug rehabilitation organization fired the respondents in *Smith* because they consumed peyote as a part of the religious ceremony of their Native American religion.[116] The State of Oregon denied them unemployment compensation benefits because of a criminal statute that disqualified employees from benefits for "misconduct" related to their work.[117] The Court upheld the Oregon law that prohibited peyote use[118] and also supported Oregon's refusal to create an exemption for American Indians who used the drug as part of their religious rites.[119] *Smith* reestablished the traditional, pre-1960s position that "a general law not aimed at the promotion or restriction of religious beliefs" does not violate the right to free exercise of religion.[120] The Court emphasized the government's duty to regulate conduct in order to preserve, above all, the integrity of a law-abiding society. Quoting *Reynolds v. United States*,[121] the Court asked: "Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[122]

In *Smith*, the Court confined the scope of *Sherbert* to laws concerning unemployment compensation benefits.[123] Moreover,

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exemption for Amish children to state compulsory education laws because the exemption would not prevent the state from furthering its compelling interest of educating the populace); *Sherbert*, 374 U.S. at 408-09 (finding that the denial of unemployment benefits to Saturday Sabbatarians for not working on Saturdays did not meet a demonstrable, compelling state interest).

116. *See* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 874 (1990).

117. *See id.*

118. *See id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))).

119. *See id.* at 890 (explaining that permitting a nondiscriminatory religious practice exemption does not mean that it is constitutionally required).

120. *Id.* at 879-81 (quoting Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594 (1940)).

121. 98 U.S. 145 (1879).

122. *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166-67).

123. *See id.* at 883 (stating that the Supreme Court has "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation").

the Court replaced the *Sherbert* strict scrutiny test with a lower standard, holding, "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[124]

As a result of *Smith*, neutral and generally applicable laws would be insulated from constitutional review.[125] Therefore, it became more difficult for religious groups, especially religious minority groups, to prove the unconstitutionality of a generally applicable government statute that infringed on their religious practices.[126]

3. Justice O'Connor Leaves the Back Door Open for the Future of Religious Freedom. In her concurrence in *Smith*, Justice O'Connor agreed with the majority's result,[127] but argued for a case-by-case determination of whether a government's criminal laws serve a compelling interest and whether the laws impose an unconstitutional burden.[128] Justice O'Connor was particularly concerned with the general application of neutral laws because they could unduly burden the free exercise of religion[129] and "coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[130] Justice O'Connor demonstrated that applying *Sherbert*'s compelling interest test to the facts in *Smith* would lead to the same conclusion the majority reached.[131] Although Oregon's prohibition on the use of peyote placed "a

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124. *Id.* at 878 (analogizing the applicability of a neutral law with the collection of a general tax).

125. *See* McConnell, *supra* note 85, at 158-59 (suggesting several situations in which discriminatory acts would be protected under *Smith*).

126. *See id.* at 159 (noting that *Smith* resulted in rapid and rigorous opposition from religious and civil liberties groups).

127. *See Smith*, 494 U.S. at 891 (O'Connor, J., concurring) (stating her agreement with the result of the majority decision but noting that the "holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty").

128. *See id.* at 899 (O'Connor, J., concurring) (advocating a case-by-case evaluation of the burden on the plaintiffs even if the law in question "might usually serve a compelling interest in health, safety, or public order").

129. *See id.* at 896 (O'Connor, J., concurring) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972))).

130. *Id.* at 901 (O'Connor, J., concurring).

131. *See id.* at 903 (O'Connor, J., concurring) ("The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.").

severe burden on the ability of respondents to freely exercise their religion,"[132] Justice O'Connor stated that Oregon had "a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens."[133] She identified the issue as whether an exemption from the state's general criminal prohibition would "'unduly interfere with fulfillment of the governmental interest.'"[134] According to Justice O'Connor, the state's interest in protecting society from the dangers of drug use and drug trafficking was compelling enough to justify uniform criminal legislation preventing peyote use.[135] Justice O'Connor concluded that, in this case, an exemption for religious use of peyote "would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens."[136]

Using the *Sherbert* analysis, Justice O'Connor seriously undermined the majority's opinion by demonstrating that there was no need to change the law on free exercise of religion. Justice O'Connor preferred the *Sherbert* test because it provided better protection against future state actions, especially those involving neutral laws of general application: "Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct."[137] Much of Congress's reasoning behind the enactment of RFRA mirrors Justice O'Connor's position in *Smith*.[138]

B. Congress's Mistaken Belief that its Enforcement Power Could Define the Boundaries of Free Exercise

By eliminating the compelling interest standard, the Court left room for state governments to enact generally applicable, neutral laws with minimal deference to the incidental effects

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132. *Id.* (O'Connor, J., concurring).

133. *Id.* at 904 (O'Connor, J., concurring).

134. *Id.* at 905 (O'Connor, J., concurring) (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

135. *See id.* at 905 (O'Connor, J., concurring) (admitting that while "the question is close," the state's interest in protecting its citizens from the "inherently harmful and dangerous" effects of the possession and use of controlled substances outweighs free exercise concerns).

136. *Id.* at 906 (O'Connor, J., concurring).

137. *Id.* 899-900 (O'Connor, J., concurring).

138. *See* S. REP. NO. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897-98 (recommending the legislative adoption of the compelling interest test because it "reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society" (quoting *Smith*, 494 U.S. at 903 (O'Connor, J., concurring))).

they may have on religious practices.[139] Justice O'Connor's strong concurrence demonstrated that there may have been no reason to overturn *Sherbert*.[140]

In effect, RFRA addresses the inconsistencies between the majority opinion and Justice O'Connor's concurrence in *Smith*. For instance, RFRA declared that *Sherbert*—not *Smith*—was the law that best protected free exercise from generally applicable laws.[141] By enacting RFRA, Congress revisited the Framers' struggle to balance the need for state governance and individual religious beliefs.[142] Yet in doing so, Congress also raised another important constitutional question: Was there a separation of powers limitation on Congress's attempt to protect substantive rights? In *Flores*, the Court responded in the affirmative.

1. The Undefined, Remedial Power of Congress. Congress's enforcement power emanates from Section Five of the Fourteenth Amendment, which gives Congress legislative ability to ensure that states comply with that Amendment.[143] According to the Court, this ability does not include the power to enact laws beyond those already in the Constitution.[144] The Court has held that the Fourteenth Amendment does not give Congress the "power to legislate upon subjects which are within the domain of state legislation."[145] Congress disregarded "the domain of state

139. *See Smith*, 494 U.S. at 901 (O'Connor, J., concurring) (stating that neutral laws "can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion"). Refer to notes 129-36 *supra* and accompanying text (discussing Justice O'Connor's concerns).

140. *See Smith*, 494 U.S. at 900-01 (O'Connor, J., concurring).

141. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb(a)(4), 2000bb(b)(1) (1994) (stating that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and, therefore, it was necessary to restore "the compelling interest test as set forth in [*Sherbert*] to guarantee its application in all cases where free exercise of religion is substantially burdened"); *see also* S. REP. NO. 103-111, at 4-9, *reprinted in* 1993 U.S.C.C.A.N. at 1894-97 (explaining that pre-*Smith* precedent required the government to meet the compelling interest test).

142. Refer to notes 75-80 *supra* and accompanying text (discussing why a government may regulate conduct based on a religious belief but not a religious belief itself).

143. *See* U.S. CONST. amend. XIV, § 5 (allocating to Congress the "power to enforce, by appropriate legislation, the provisions of this article"); *see also* HERMINE HERTA MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 158 (1977) (explaining that the Fourteenth Amendment "only prohibits the states from denying certain rights [and that t]he only obligation resting upon the United States is to see that the states do not deny such rights"). Thus, "it is necessary that, first, there must be an action by a state in violation of the guarantees of the fourteenth amendment and, second, an act of Congress to correct such violation." *Id.* at 159.

144. *See* MEYER, *supra* note 143, at 158.

145. *In re* Rahrer, 140 U.S. 545, 555 (1891).

legislation" restriction, however, by applying RFRA "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."[146]

The Fourteenth Amendment prohibits the states from denying the guaranteed rights of due process and equal protection.[147] In determining the purpose of the Fourteenth Amendment, the Court has portrayed Congress as a "watchdog" that oversees state actions: "[T]he amendment guarantees [equality of rights among citizens], but no more. The power of the national government is limited to the enforcement of this guaranty."[148] Therefore, Congress possesses the power to correct state acts that violate the Fourteenth Amendment.[149] However, Congress could only remedy an already established, inappropriate state action and could not prevent possible future inappropriate state actions.[150] According to the Court:

> [U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.[151]

Over the years, the Court has attempted to define the extent of Congress's remedial power.[152] For instance (and by analogy), the Court allowed Congress to exercise its remedial power in the context of voting-rights measures adopted during the 1960s to

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146. 42 U.S.C. § 2000bb-3(a).

147. *See* U.S. CONST. amend. XIV, § 1.

148. United States v. Cruikshank, 92 U.S. 542, 555 (1875) (explaining that the Fourteenth Amendment grew out of the aftermath of the Civil War as a means of ensuring that the states would not deny any citizen, regardless of their race, the rights to due process and equal protection); *see also* MEYER, *supra* note 143, at 158-59 (discussing Congress's role regarding the Fourteenth Amendment).

149. *See* Civil Rights Cases, 109 U.S. 3, 11 (1883) (stating that the Fourteenth Amendment applies to state action and that Congress can pass laws to prevent the states from interfering with the due process and equal protection rights guaranteed in the Fourteenth Amendment).

150. *See id.* at 13-14.

151. *Id.*

152. *See* Donald Francis Donovan, Note, *Toward Limits On Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453, 453-56 (1982) (tracing the development of the Court's definition of congressional enforcement power under the Fourteenth Amendment, beginning in the 1880s with the *Civil Rights Cases*, through the developments of the late 1960s with *Katzenbach v. Morgan*).

eliminate racial discrimination in voting.[153] In *South Carolina v. Katzenbach*, the Court upheld the Voting Rights Act of 1965, a measure that suspended literacy and similar voter eligibility tests for a period of five years.[154] Although a Fifteenth Amendment case, *South Carolina v. Katzenbach* has clear implications for Congress's enforcement power under Section Five of the Fourteenth Amendment.[155] The Court held that Congress could use any rational means to enforce the Fifteenth Amendment's ban on racial discrimination in voting.[156] In *South Carolina v. Katzenbach*, there was sufficient evidence to support a congressional finding that various states used literacy tests as a means of racial discrimination in voting.[157] Therefore, the Voting Rights Act was a rational remedy to the voting discrimination which constituted a per se violation of the Fifteenth Amendment.[158]

Similarly, Congress could employ specific remedies if it found sufficient evidence that states were violating rights protected under the Fourteenth Amendment.[159] Although the Court expanded Congress's enforcement power to include the power to remedy state violations of the Fourteenth Amendment, the Supreme Court had not yet determined whether Congress could use this remedial power in areas other than racial discrimination.

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153. *See id.* at 455 (noting that "in enacting the Voting Rights Act of 1965, Congress expressly used the enforcement clause of the 15th amendment" (footnote omitted)); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 308-15 (1966) (recounting the history of racial discrimination in voting and Congress's ineffectiveness in curtailing it).

154. *See South Carolina v. Katzenbach*, 383 U.S. at 315.

155. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 261-62 (1983) (Burger, C.J., concurring) (analogizing Congress's specifically informed legislative competence in *South Carolina v. Katzenbach* Congress's invocation of its § 5 Fourteenth Amendment power in enacting the Age Discrimination in Employment Act); Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966) (using analysis of § 2 of the Fifteenth Amendment to uphold congressional action under § 5 of the Fourteenth Amendment).

156. *See South Carolina v. Katzenbach*, 383 U.S. at 324, 326 ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."); *see also Ex parte* Virginia, 100 U.S. 339, 345 (1879) (emphasizing that "Congress is authorized to *enforce* the prohibitions by appropriate legislation" and that "[s]ome legislation is contemplated to make the [Civil War] amendments fully effective").

157. *See South Carolina v. Katzenbach*, 383 U.S. at 328 (stating that Congress had concluded that there was persistent voting discrimination in certain geographic areas of the United States).

158. *See id.* at 331.

159. *See* MEYER, *supra* note 143, at 159.

2. Broadening Congressional Power: Katzenbach v. Morgan *and Justice Harlan's Dissent.* In *Katzenbach v. Morgan*,[160] the Supreme Court found that Section 4(e) of the 1965 Voting Rights Act was a valid exercise of Congress's remedial power under Section Five of the Fourteenth Amendment.[161] This section provided that non-English speakers who had completed the sixth grade in an accredited Spanish-language school in Puerto Rico could not be denied suffrage.[162] The Court deferred to Congress's factual conclusions,[163] and honored its finding that the literacy tests were in fact discriminatory.[164] In *Morgan*, as in *South Carolina v. Katzenbach*, the Court emphasized the importance of Congress's superior fact-finding abilities.[165]

The majority did not interpret this deference to Congress's superior fact-finding ability as a grant of power to define the substantive scope of constitutional guarantees.[166] Justice Harlan's dissent, however, described the majority opinion as such an interpretation.[167] He noted that, in this case, Congress did not make an appropriate finding of fact that discrimination was occurring against non-English speakers.[168] He maintained that Congress simply made a legal conclusion that literacy tests for Puerto-Rican voters constituted a violation of their equal protection rights.[169] According to Justice Harlan, Congress assumed a judicial role by determining that a state statute violated the Equal Protection Clause:

> The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there

160. 384 U.S. 641 (1966).

161. *See id.* at 648 (disagreeing with the New York Attorney General's argument that only the judiciary branch may enforce the Equal Protection Clause).

162. *See id.* at 643.

163. *See id.* at 653.

164. *See id.*

165. *See id.* ("Any contrary conclusion would require us to be blind to the realities familiar to the legislators.").

166. *See id.* at 656 (reserving the "question [of] whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent 'with the letter and spirit of the constitution'").

167. *See id.* at 659, 666 (Harlan, J., dissenting) (asserting that "the Court has confused . . . what questions are appropriate for congressional determination and what questions are essentially judicial in nature," and advocating a clear separation between the legislative and judicial functions).

168. *See id.* at 669 (Harlan, J., dissenting) (declaring that there was "no legislative record supporting such hypothesized discrimination").

169. *See id.* (Harlan, J., dissenting) (describing the congressional fact-finding concerning literacy tests and racial discrimination as "at most . . . a legislative announcement" instead of the more appropriate "congressional estimate, based on its determination of legislative facts").

> has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine.[170]

The only substantive matters that the Fourteenth Amendment may touch are those "within the primary legislative competence of the States."[171] Thus, "a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion."[172] Therefore, under Justice Harlan's view, the Fourteenth Amendment could only control state actions that violate the rights protected by that Amendment.[173]

The *Morgan* opinions outline broad understandings of Congress's enforcement power.[174] The majority interpreted Section Five of the Fourteenth Amendment as granting Congress the power to remedy discrimination.[175] The dissent, on the other hand, described the majority's interpretation as an unconstitutional expansion of congressional power to include defining the substantive scope of those rights within the Fourteenth Amendment.[176] Due to the disparity between what the Court said and what it claimed to have done, *Morgan* rendered the scope of congressional enforcement power vague.[177]

C. *The Supreme Court Reasserts Its Power*

1. Defining Congressional Enforcement Power: A New Test. The broad remedial power defined in *Morgan*, labelled a

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170. *Id.* at 667 (Harlan, J., dissenting).

171. *Id.* at 670 (Harlan, J., dissenting).

172. *Id.* at 670-71 (Harlan, J., dissenting).

173. *See id.* at 670 (Harlan, J., dissenting).

174. *See* Donovan, *supra* note 152, at 455 (describing the Court's pronouncement of congressional power "to enforce and perhaps even to define the 14th amendment's guarantees" as "seductively broad").

175. *See Morgan*, 384 U.S. at 651 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

176. *See id.* at 668 (Harlan, J., dissenting) (arguing that judgment and discretion have traditionally been judicial issues, not legislative concerns).

177. *See* Donovan, *supra* note 152, at 456 (stating that although the Court "continues to treat the enforcement power with special deference," the scope of that power remains unclear).

"substantive power" in Justice Harlan's dissent, was left open to interpretation.[178] The Court never fully resolved the question of whether the broad remedial power it established for Congress in *Katzenbach v. Morgan* could modify the substantive scope of the rights included within the Fourteenth Amendment rights, thereby leaving unclear the scope of congressional enforcement power.[179]

The Voting Rights Amendments of 1970, which lowered the voting age to eighteen for both state and federal elections, were at issue in *Oregon v. Mitchell.*[180] The Court sustained the sections of the statute pertaining to federal elections, but found the section regulating state and local elections to be unconstitutional.[181] Four Justices believed that Congress could lower the state-election voting age because of its power under the Fourteenth Amendment.[182] Four other Justices, including Justice Harlan, rejected the idea that Congress had the power to lower state or federal voting ages.[183] Justice Harlan argued that Section One of the Fourteenth Amendment did not reach voter qualifications and that the Constitution gave the states, not the federal government, the power to establish voting qualifications.[184] He concluded that Congress's fact-finding ability

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178. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) (arguing that prior cases may be interpreted as allowing Congress some flexibility in deciding the extent of Fourteenth Amendment protection, but stating that Congress may not "define rights wholly independently of our case law"); Oregon v. Mitchell, 400 U.S. 112, 127-29 (1970), *superseded by constitutional amendment as stated in* National Treasury Employees Union v. Nixon, 492 F.2d 587, 612 n.51 (D.C. Cir. 1974) (demonstrating Congress's power to amend the Constitution as a check on the Court).

179. *See* Donovan, *supra* note 152, at 465 (suggesting that the Court's failure to clarify the tests surrounding Congress's enforcement power allows abuse of that power, as evidenced by congressional efforts to reverse the Court's abortion decision by redefining when "life" begins).

180. 400 U.S. 112 (1970). The Twenty-Sixth Amendment to the Constitution, which lowered the voting age to 18 for state and federal elections, effectively overruled the Court's decision in *Oregon v. Mitchell. See National Treasury Employees Union*, 492 F.2d at 612 n.51.

181. *See Mitchell*, 400 U.S. at 118 (holding that Congress may supervise and set qualifications for voters in national elections but not for state and local elections); *see also* Donovan, *supra* note 152, at 463 & n.61 (analyzing the *Mitchell* decision and the varying opinions therein).

182. *See Mitchell*, 400 U.S. at 135 (Douglas, J.) ("The grant of the franchise to 18-year-olds by Congress is in my view valid across the board."). Justices Brennan, White, and Marshall agreed with Justice Douglas' view. *See id.* at 118 (Black, J.).

183. *See id.* at 154 (Harlan, J.) (finding "no other source of congressional power to lower the voting age as fixed by state laws").

184. *See id.* at 200-01 (Harlan, J.) (arguing that the states neither surrendered nor delegated the power to set voter qualifications to the federal government "except to the extent that the guarantee of a republican form of government may be thought to require a certain minimum distribution of political power" (footnote omitted)).

was irrelevant because the voting-age issue did not revolve around the facts.[185] Justice Black, whose opinion determined the outcome of the Court's decision, argued that because Congress's action was not relevant to racial discrimination, it did not have the authority to lower the voting age for state elections.[186] The Fourteenth Amendment was broader in racial discrimination cases, he argued, but regulating voting qualifications falls within the domain of the states.[187]

The Court's decisions in *Morgan* and *Oregon v. Mitchell*, left in their wake ambiguity regarding the extent of congressional enforcement power. Purportedly, this ambiguity allowed Congress to use the *Morgan* interpretation of its Section Five enforcement power, a positive grant of legislative power, to enact RFRA.[188] According to the Fifth Circuit, RFRA was a proper exercise of Congress's Section Five power as defined in *Morgan*.[189] The court stated that protection under the Fourteenth Amendment's Due Process Clause incorporates the right to the free exercise of religion,[190] and that RFRA was a proper remedial use of congressional power.[191] Although RFRA did not address specific state violations of guaranteed rights, it was sufficiently remedial in that it could identify potential violations.[192] In other

185. *See id.* at 205-06 (Harlan, J.).

186. *See id.* at 130 (Black, J.) (reasoning that Congress "exceeded its powers in attempting to lower the voting age in state and local elections" because the action did not have a "foundation for enforcing the Civil War Amendments' ban on racial discrimination").

187. *See id.* at 126 (Black, J.).

188. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2162-63 (1997) ("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."); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (providing the oft-quoted phrase that "[c]orrectly viewed, § 5 is a positive grant of legislative power"); *see also* S. REP. NO. 103-111, at 13-14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 (quoting the broad language of *Morgan* in the report's description of Congress's constitutional authority to enact RFRA).

189. *See* Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996) (holding that Congress was empowered to enact RFRA under the three-part test the Court created in *Morgan*), *rev'd*, 117 S. Ct. 2157 (1997). As applied in the Fifth Circuit, the three parts of the *Morgan* test include: (1) whether the legislation may be regarded as an enactment to enforce the Fourteenth Amendment; (2) whether the legislation is plainly adapted to enforcing the Amendment; and (3) whether the legislation "is consistent with the letter and spirit of the constitution." *See id.* at 1358-64; *see also Arguments Before the Court: Religion*, 65 U.S.L.W. 3577, 3577-78 (reporting on the Fifth Circuit's opinion in *Flores v. City of Boerne*).

190. *See Flores*, 73 F.3d at 1358 (stating that the incorporation "has been long established").

191. *See id.* at 1360 ("Congress considered the need for 'appropriate legislation' to enforce the provisions of the Fourteenth Amendment and responded with legislation that is 'plainly adapted' to that end.").

192. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb(b)(2)

words, RFRA would remedy "budding" constitutional violations, such as neutral laws of general application,[193] that the less stringent *Smith* test might overlook.[194] The Fifth Circuit also stated that RFRA was within the "letter and spirit" of the Constitution and, therefore, did not violate the Separation of Powers Clause, the Establishment Clause, or the Tenth Amendment.[195]

RFRA stated that:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the government] demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[196]

RFRA's restrictions applied to all statutory or any other law adopted before or after its enactment[197] and to any "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."[198] Therefore, a person claiming that the government substantially burdened his or her free exercise of religion would always have a claim or defense, despite a possible Court determination that a specific law's "incidental effects" on religious practices were constitutional.[199] Congress emphasized that the compelling interest test "is a workable test for striking

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(1994) (providing "a claim or defense to persons whose religious exercise is substantially burdened by government").

193. *See Flores*, 73 F.3d at 1359; S. REP. NO. 103-111, at 4-5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1894 (stating that governmental rules of general applicability may undermine the fundamental constitutional right of free exercise of religion).

194. *See Flores*, 73 F.3d at 1359.

195. *See id.* at 1361-63 (dismissing the city's claims that RFRA is inconsistent "with the letter and spirit of the Constitution").

196. 42 U.S.C. §§ 2000bb-1(a), (b).

197. *See id.* § 2000bb-3(a).

198. *Id.* § 2000bb-2(1).

199. *See id.* § 2000bb(b)(2); *see also, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (upholding an Oregon law that prohibited ingestion of peyote without an exemption for religious practices). Examples of cases in which the plaintiff uses RFRA to claim a free exercise violation include *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996); and *Fawaad v. Jones*, 81 F.3d 1084, 1085 (11th Cir. 1996).

sensible balances between religious liberty and competing prior governmental interests."[200]

In passing RFRA, Congress intended to restore the compelling interest test of *Sherbert* to guarantee its application in cases of free exercise violations.[201] In a sense, RFRA provided the courts with direction for deciding free exercise cases.[202] It was Congress's attempt to solidify the standard under which a claimant could bring a free exercise violation case under *one* law.[203] By guaranteeing "a claim or defense to persons whose religious exercise is substantially burdened by government,"[204] RFRA attempted to ensure that even neutral laws of general applicability would not coerce persons to abandon or change their religious practices. Congress was particularly concerned with the rights afforded to prisoners to practice their religions, which the Court's decision in *O'Lone v. Estate of Shabazz* had weakened.[205] Congress was also concerned with certain military regulations that burdened religious practices.[206] After Congress enacted RFRA, several courts applied it, especially when prisoners' free exercise rights were at issue.[207] In many cases in which the courts applied RFRA, they ruled in favor of the prisoners.[208]

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200. 42 U.S.C. § 2000bb(a)(5).

201. *See id.* § 2000bb(b)(1).

202. *See* S. REP. NO. 103-111, at 7-8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 (asserting that because of the *Smith* decision, laws of general applicability that burden religious practices will be analyzed under the rational basis test, the lowest level of judicial scrutiny).

203. *See* 42 U.S.C. § 2000bb(b)(1) (stating, as its purpose, "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder" (citations omitted)).

204. *Id.* § 2000bb(b)(2).

205. 482 U.S. 342, 345 (1987) (holding that regulations forcing inmates to work on certain days did not violate prisoner's religious freedom even though the regulations caused them to miss their weekly Muslim congregational service). Prison regulations alleged to infringe upon constitutional rights are judged under a less restrictive "reasonableness" standard. *See id.* at 349.

206. *See* S. REP. NO. 103-111, at 11-12, *reprinted in* 1993 U.S.C.C.A.N. at 1901 (citing Goldman v. Weinberger, 475 U.S. 503 (1986), which upheld a military regulation prohibiting a Jewish Air Force officer from wearing a yarmulke while on duty and stating that RFRA will not alter pre-*Smith* decisions that used the compelling interest test for military regulations that burdened religious practices).

207. *See, e.g.*, Diaz v. Collins, 114 F.3d 69, 73 (5th Cir. 1997) (applying RFRA to a prisoner's claims of First Amendment violations but concluding that the plaintiff's claim failed nevertheless); Harris v. Lord, 957 F. Supp. 471, 475 (S.D.N.Y. 1997) (holding that RFRA applied to, and supported, a prisoner's free exercise claims); Campos v. Coughlin, 854 F. Supp. 194, 204-05 (S.D.N.Y. 1994) (noting that RFRA was intended to replace the looser "reasonableness" standard of *O'Lone*); Allah v. Menei, 844 F. Supp. 1056, 1062 (E.D. Pa. 1994) (stating that RFRA is the appropriate standard for prisoners' free exercise claims).

208. *See, e.g.*, *Diaz*, 114 F.3d at 73; Estep v. Dent, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (holding that, under RFRA, the prison administration would be violating a

The City of Boerne argued before the Supreme Court that: (1) the broad congressional remedial power of *Morgan* only applied to equal protection rights; and (2) that *Morgan* marked the "upper limit" for Section Five.[209] In other words, the city asserted, *Morgan* appropriately expanded Congress's remedial power because *Morgan* applied to racial discrimination in the election process, which was directly connected to the guaranteed right of equal protection.[210] The city argued that the congressional findings of fact at issue in *Morgan* were absent in RFRA—Congress did not demonstrate that state governments were readily injuring the religious practices of specific groups.[211] The city urged that RFRA went beyond equal protection to "redefine the meaning of an entire clause of the Constitution."[212]

In *Flores*, the Court placed a ceiling on Congress's Section Five power and established a test for distinguishing congressional measures that are truly remedial from those that are substantive and, therefore, unconstitutional. The Court, however, stated that Congress must have wide discretion in determining the line between remedial and substantive measures.[213] Thus, under the rule in *Flores*, the Court would still defer to Congress for factual findings as it had done in the past.[214] Yet, as Justice Harlan discussed in *Morgan*, Congress's superior fact-finding abilities did not constitute a power to define the substantive scope of constitutional rights.[215] *Flores* gave Congress and the Court a framework that will determine the extent to which Congress may remedy state violations of substantive rights in the future:

> 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,

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Jewish prisoner's free exercise right by cutting his earlocks).

209. *See Arguments Before the Court*, *supra* note 189, at 3578.

210. *See id.*

211. *See id.*

212. *Id.*

213. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997) (indicating that while that line is difficult to discern, it exists and must be observed).

214. *See id.* (giving Congress "wide latitude" to use this fact-finding ability to determine the line of demarcation between measures that are remedial and substantive); *see also* Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) (recognizing that Congress should "assess and weigh the various conflicting considerations" at issue and that the judiciary should not "review the congressional resolution of these factors"); South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966) (describing Congress's factual findings that several states were discriminating in their voting processes).

215. Refer to notes 167-73 *supra* and accompanying text (discussing Justice Harlan's dissent in *Morgan*).

> legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.[216]

The Court did not overturn *Morgan*—it only clarified the ambiguity that *Morgan* produced. It emphasized that the enforcement clause gives Congress a remedial, not a substantive, power.[217] In essence, the Court adopted the rationale of Justice Harlan's dissent in *Morgan*.[218] It also limited *Morgan* to cases involving racial discrimination and the Voting Rights Act.[219]

The Court declared that it must consider the "appropriateness of remedial measures" implemented by Congress in light of the evil presented.[220] In effect, the Court in *Flores* established a rational basis test for measuring Congress's use of its remedial power.[221] To satisfy the test, the legitimate objective of Congress must be rationally related to the means it uses to remedy an established injury.[222] To be rationally related, there must be "congruence and proportionality" between the remedial means adopted and the injury.[223] If the measure fails this test, then it will be construed as substantive and, therefore, unconstitutional.[224]

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216. *Flores*, 117 S. Ct. at 2164.

217. *See id.* ("Congress does not enforce a constitutional right by changing what the right is."); *see also South Carolina v. Katzenbach*, 383 U.S. at 325-26 (describing Congress's power under § 2 of the Fifteenth Amendment as a remedial power).

218. Refer to notes 167-73 *supra* and accompanying text.

219. *See Flores*, 117 S. Ct. at 2168 ("[I]nterpreting *Morgan* to give Congress the power to interpret the Constitution 'would require an enormous extension of that decision's rationale.'" (quoting Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, J.))).

220. *See id.* at 2169.

221. *See id.* at 2164. The purpose of a legislative action should be "legitimate . . . [and] 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." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

222. *See* Donovan, *supra* note 152, at 457 (noting that even though *McCulloch v. Maryland* established the extent of congressional power under the Necessary and Proper Clause, it also has been applied to establish the proper limits of all congressional powers); *see also* United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (stating that the rational basis test is a reflection of "our respect for the institutional competence of the Congress . . . and our appreciation of . . . Congress's political accountability").

223. *See Flores*, 117 S. Ct. at 2164 (noting that legislation that lacks a connection between the injury to be prevented or remedied and the means used to achieve that remedy may become "substantive in operation and effect," placing the legislation beyond the scope of Congress's § 5 enforcement power).

224. *See id.*

2. The Significance of Flores *for Separation of Powers and Federalism. Flores* is to the judicial branch what *INS v. Chadha*[225] is to the executive branch—in both cases, the Court limited Congress's attempts to expand its powers.[226] In *Flores*, the Court reasserted its power of judicial review,[227] which it first established in *Marbury v. Madison*: "[i]t is emphatically the province and duty of the judicial department to say what the law is."[228] The Court restated that it is the final interpreter of the Constitution, and that its judicial authority derives from the premise that "the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'"[229] Many of the original framers of the Fourteenth Amendment feared giving Congress too much power because it would "intrude into traditional areas of state responsibility"[230] and "place power in the hands of changing congressional majorities."[231] Agreeing with the framers, the Court expressed its concern in relying too heavily on those "shifting legislative majorities."[232] Congress may change the Constitution with "legislative acts . . . alterable when the legislature shall please to alter it,"[233] which would "circumvent the difficult and detailed amendment process contained in Article V."[234] The Court has emphasized the importance of its role in society as the protector of minorities whose rights may not be as audible in a Congress that represents the majority.[235]

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225. 462 U.S. 919 (1983).

226. *See id.* at 944-59 (holding that a one-house legislative veto was unconstitutional because it violated presidential veto power, as well as the bicameral requirement of Article I, §§ 1 and 7).

227. *See Flores*, 117 S. Ct. at 2162 (discussing the basis of its judicial authority).

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

229. *See Flores*, 117 S. Ct. at 2162 (quoting *Marbury*, 5 U.S. at 176).

230. *Id.* at 2164.

231. *Id.* at 2165.

232. *See id.* at 2168 (warning that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means" (quoting *Marbury*, 5 U.S. at 177)).

233. *Id.* (quoting *Marbury*, 5 U.S. at 177).

234. *Id.*; *see also* U.S. CONST. art. V (outlining the procedure by which Congress can propose amendments to the Constitution and the state legislatures can ratify those proposed amendments).

235. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (declaring that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

Clearly, the majority in *Flores* took hold of the principles in *Marbury*[236] to fight Congress's attempt to circumvent the judiciary.[237] According to the Court, Congress's attempt to alter its powers by interpreting the Fourteenth Amendment would eliminate the effect of the Constitution as the "'superior, paramount law, unchangeable by ordinary means.'"[238] RFRA was not just a congressional attempt to instruct the Court on how to interpret the Free Exercise Clause of the Constitution—RFRA directed "the legal effect courts are to give to any party's free exercise claim—directing the court to give it the legal effect appropriate in Congress' view . . . ."[239]

In *Flores*, the Court also took a stand for federalism. It criticized the "[s]weeping coverage" of RFRA as an "intrusion at every level of government."[240] RFRA would heavily burden the states with litigation and would diminish their traditional power to regulate for the health and welfare of their citizens.[241]

In *Flores*, the Court attempted to define the role of Congress with respect to the judiciary.[242] First, the Court should defer to

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236. *See Marbury*, 5 U.S. at 176-77 (stating that "[t]he powers of the legislature are defined, and limited" by the Constitution and that "the constitution controls any legislative act repugnant to it").

237. *See Flores*, 117 S. Ct. at 2168 (arguing that allowing Congress to define its own powers "by altering the Fourteenth Amendment's meaning" would result in unlimited congressional power).

238. *Id.* (quoting *Marbury*, 5 U.S. at 177).

239. William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 309 (1996). *Cf.* McConnell, *supra* note 85, at 156, 171 (maintaining that RFRA "was a legitimate exercise of Congress's power to enforce the provisions of the Fourteenth Amendment" because, under a straightforward reading of *Marbury*, Congress has interpretative authority).

240. *Flores*, 117 S. Ct. at 2170. RFRA applies to all branches of federal, state, and local government. *See* 42 U.S.C. §§ 2000bb-2(1), 2000bb-3(a) (1994).

241. *See Flores*, 117 S. Ct. at 2171 (noting that the "substantial costs RFRA exacts . . . far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*"). *But see In re* Young, 141 F.3d 854, 856 (8th Cir.) (concluding that RFRA is constitutional as applied to federal law), *cert. denied*, 119 S. Ct. 43 (1998).

242. *See Flores*, 117 S. Ct. at 2172. The Framers of the Constitution created co-equal branches of government with different responsibilities: "The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts.'" Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1995) (quoting THE FEDERALIST No. 78 (Alexander Hamilton) (alterations in original)). The relationship between the legislature and historical branches has always been difficult. *See* Robert A. Katzmann, *The Underlying Concerns*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7, 8-9 (Robert A. Katzmann ed., 1988) (stating that friction between the judicial and congressional branches is inherent in the U.S. system); Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra*, at 31, 31-33

Congress as a superior fact-finder and allow it to "'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'"[243] Then, the courts should use the power, described in *Marbury* as interpreter of the Constitution, "to determine if Congress has exceeded its authority under the Constitution."[244]

3. The Significance of Flores *for Free Exercise of Religion.* By declaring RFRA to be unconstitutional, the Court left *Smith* as the framework within which courts should analyze free exercise cases. By reviving *Smith*, however, the Court also revived the debate on the best way to protect free exercise. Is the majority's position that neutral laws of general applicability, not targeted toward burdening religious practices, are constitutional and the best protection for free exercise? Or, is Justice O'Connor's assertion, that the stricter *Sherbert* test would better protect free exercise from generally applicable laws while still allowing states to enact laws necessary for their interests, more accurate? In *Flores*, Justice O'Connor asked for a re-examination of the holding in *Smith* and reiterated some ideas first expressed in her concurrence therein.[245] She urged implementing *Sherbert's* balancing test, which requires the state to "justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest."[246] She also concurred with the majority's conclusions concerning the proper limits of congressional remedial power, but disagreed with its elimination of the *Sherbert* test because eliminating it would be inconsistent with judicial precedent and would harm religious liberty.[247] In fact, cases decided after *Flores* attest to Justice

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(providing a short history of the difficult relationship between the judicial and legislative branches).

243. *Flores*, 117 S. Ct. at 2172 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)) (alteration in original).

244. *Id.* Interestingly, the Court has also stated that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." *Id.* at 2171; *see also* United States v. Marengo County Comm'n, 731 F.2d 1546, 1562 (11th Cir. 1984) (noting that "the power of Congress to go beyond the explicit provisions of the Constitution and to take steps that the courts are reluctant to take" is basic to the U.S. governmental system).

245. *See Flores*, 117 S. Ct. at 2178 (O'Connor, J., dissenting) (declaring that "*Smith* is gravely at odds with our earlier free exercise precendents").

246. *Id.* (O'Connor, J., dissenting).

247. *See id.* at 2176-77 (O'Connor, J., dissenting) ("The Court's rejection of this principle in *Smith* is supported neither by precedent nor . . . by history. The decision has harmed religious liberty.").

O'Connor's concern, especially in the area of prison administration.[248]

Flores may also impact a creditor's ability to obtain tithes to religious institutions from debtors. After *Flores*, debtors contributing tithes to their churches as part of their religious duties to the church will no longer be able to claim RFRA as a defense against creditors.[249] Although in *Flores* the Court concluded that RFRA is not applicable to state governments, it was not clear as to whether RFRA was unconstitutional as applied to federal law.[250] RFRA's protection against federal interference may be independent from its protection against state interference.[251] If the Court found RFRA to be constitutional at the federal level, then RFRA could be incorporated into bankruptcy law.[252] The Court does not seem ready to address the

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248. *See, e.g.*, Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997) (stating that *Boerne* restored the "reasonableness" standard of *Turner v. Safley*, which granted deference to prison administration in free exercise cases); Washington v. Garcia, 977 F. Supp. 1067, 1070-71 (S.D. Cal. 1997) (holding that the proper standard for evaluating free exercise cases is the pre-RFRA, reasonableness standard, as articulated in *O'Lone*).

249. *See generally* Cindy Horswell, *Creditors Tell Tithers: Render Debts Unto Us*, HOUS. CHRON., Oct. 19, 1997, at A1 (discussing concerns from Texas religious groups in the aftermath of *Flores*); *see also In re* Young, 82 F.3d 1407, 1420 (8th Cir. 1996) (holding that, under RFRA, a bankruptcy debtor's religious tithes could not be recovered from the church as an avoidable transaction in an adversary proceeding), *vacated*, Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997) (mem.) (remanding the case to the Eighth Circuit for further consideration in light of *Flores*), *cert. denied*, 119 S. Ct. 43 (1998).

250. *See In re* Young, 141 F.3d 854, 858 (8th Cir.) (stating that because the Fourteenth Amendment applies only to the states, and not to the federal government, *Flores* did not decide the constitutionality of RFRA as applied to federal law), *cert. denied sub nom.* Christians v. Crystal Evangelical Free Church, 119 S. Ct. 43 (1998); Aurora R. Bearse, Note, *RFRA: Is It Necessary? Is It Proper?*, 50 RUTGERS L. REV. 1045, 1056 (1998) (recounting the Justice Department's efforts to preserve RFRA claims at the federal level and emphasizing that *Flores* did not address RFRA's applicability to the federal government).

251. *See In re Young*, 141 F.3d at 859 (concluding that if RFRA is constitutional as applied to federal law, then the portion applicable to the federal government is fully severable from the portion that applies to the states). For a discussion of the recent Texas Religious Freedom Restoration Act, see Polly Ross Hughes, *State Senate Gives Overwhelming Approval to Religious Freedom Bill*, HOUS. CHRON., Mar. 16, 1999, at A15.

252. *See In re Young*, 141 F.3d at 860-61 (concluding that Article I of the Constitution, which allows Congress to enact RFRA, would modify U.S. bankruptcy laws so that a recovery that "places a substantial burden on a debtor's exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest"); *see also In re* Saunders, 214 B.R. 524, 526-27 (Bankr. D. Mass. 1997) (concluding that pre-RFRA case law does not support allowing debtors, on the basis of their religion, "to prefer their divine creditor[s] over their earthly ones") (quoting Note, *Tithing in Chapter 13—A Divine Creditor Exception to Section 1325?*, 110 HARV. L. REV. 1125, 1141 (1997)); *cf. In re Young*, 141 F.3d at 863 (Bogue, J., dissenting) (arguing that RFRA is unconstitutional and

issue of RFRA's constitutionality at the federal level, however, declining to grant certiorari in *In re Young*, a case in which the Eighth Circuit held that RFRA was constitutional as applied to the federal government.[253]

IV. CONCLUSION

Although *Flores* raises concerns about the future of free exercise cases, it also defines the scope of congressional enforcement power as one that is remedial in nature and establishes a "proportionality and congruence test" by which to measure that remedial power.[254] Judicial history demonstrates that such clarification was long over due.[255] Unfortunately, free exercise was the victim of the Court's past inability to clearly define the boundaries of congressional enforcement power. Yet, by leaving *Smith* as the controlling law on free exercise, the Court has left room for future free exercise cases to challenge the discrepancies in *Smith*, especially in light of Justice O'Connor's concurrence, which greatly undermines the majority's reasoning and demonstrates that disturbance of *Sherbert* was unnecessary.[256] *Flores*, as the extension of *Smith*, clearly illustrates that the law on free exercise "remains marked by an 'intolerable tension.'"[257]

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that "there is a point beyond which Congress may not go in the exercise of its power without intruding upon the core function of the judicial branch, thereby offending 'vital principles necessary to maintain separation of powers'" (quoting City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997))).

253. *See Christians*, 119 S. Ct. at 43 (denying certiorari to *In re Young*).

254. Refer to notes 58-59, 216-18 *supra* and accompanying text.

255. Refer to Part III.B-C *supra* (discussing the judicial history of defining congressional enforcement power).

256. Refer Part III.A.2 *supra* (discussing Justice O'Connor's concurrence in *Smith*).

257. City of Boerne v. Flores, 117 S. Ct. 2157, 2186 (Souter, J., dissenting) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 574 (1993) (Souter, J., concurring in part and concurring in the judgment)).