

1998

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Recommended Citation

Michael Van Arsdall, *Enforcing the Enforcement Clause: City of Boerne v. Flores Chips Away at Congressional Power*, 48 Cath. U. L. Rev. 249 (1999).

Available at: <https://scholarship.law.edu/lawreview/vol48/iss1/11>

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ENFORCING THE ENFORCEMENT CLAUSE: *CITY OF BOERNE v. FLORES* CHIPS AWAY AT CONGRESSIONAL POWER

Michael Van Arsdall⁺

It is well settled that our Federal Government is one of enumerated powers.¹ The enumerated congressional powers are itemized in Article I, section 8 of the Constitution.² In addition to the specificity of these enumerated powers, the Constitution contains language that contemplates broader congressional authority.³ For example, the Necessary and Proper Clause gives Congress the power to enact all laws which shall be “necessary and proper” to effectuate, not only the enumerated powers of Article I, section 8, but all other powers constitutionally vested in the Federal Government.⁴ Moreover, the Supreme Court has expansively interpreted constitutional provisions, such as the Commerce Clause,⁵ to provide even greater congressional authority.⁶ The Enforcement Clauses

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1. See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers.”).

2. See U.S. CONST. art. I, § 8. Article I, section 8 of the Constitution begins with precise language: “The Congress shall have Power To . . .” and proceeds to list various congressional powers. *Id.* The first seventeen clauses of section 8 give Congress legislative authority over the following exemplary, but not exhaustive, list of powers: tax collection, establishment of post offices and roads, war declaration, regulation of currency, and raise and support Armies and a Navy. See *id.*

3. See *id.* I, § 8, cls. 1, 18 (“The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

4. *Id.* art. I, § 8, cl. 18.

5. See *id.* art. I, § 8, cl. 3.

6. See generally *Perez v. United States*, 402 U.S. 146, 155-57 (1971) (extending the Commerce Clause to regulating “loan sharking”); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that Congress “acted well within its [Commerce Clause] power” to prohibit racial discrimination in restaurant seating); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (allowing Congress to use the Commerce Clause to prohibit racial discrimination against hotel guests); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that a local activity, not itself commerce, which has substantial effect on interstate commerce, whether it be direct or indirect, is within the scope of the Commerce Clause); *United States v. Darby*, 312 U.S. 100, 115 (1941) (deciding that the Commerce Clause is broad enough to regulate hours and wages of employees in local manufacturing activities); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding even in-

of the Thirteenth, Fourteenth, and Fifteenth Amendments, also referred to as the Civil War Amendments,⁷ further enable Congress to enforce the provisions of those amendments by "appropriate legislation."⁸ This phrase is another example of broad constitutional language open to expansive interpretation.⁹

Although some constitutional language is broad and many Supreme Court interpretations have allowed Congress to exercise its power to the fullest extent under such language, the Constitution does provide inter-

trastate activities that bear a close and substantial relationship to interstate commerce are within congressional commerce power); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (defining commerce to mean *intercourse*, not merely buying, selling, and traffic) (emphasis added). The *Gibbons* Court defined intercourse to include navigation. *See id.* at 190. In fact, the Court in *Gibbons* held that every aspect of commerce is indicated by the Constitution. *See id.* at 194.

7. The Thirteenth, Fourteenth, and Fifteenth Amendments are collectively referred to as the Civil War Amendments because they were adopted shortly after the Civil War to address the problems of slavery and emancipation. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 420 (13th ed. 1997). These amendments were enacted to counter the Southern Black Codes. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 15.1, at 960 (5th ed. 1995). The Black Codes were designed to keep blacks in slave-like conditions. *See* JAMES A. HENRETTA ET AL., *AMERICA'S HISTORY TO 1877* at 486 (1987). Every state of the former Confederacy enacted some type of Black Code in an effort to retain blacks as agricultural laborers, under conditions favorable to white landowners. *See id.*

8. U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

9. These amendments each contain an "enforcement clause" to provide Congress with a means of exacting compliance with the provisions of the amendments. *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation"); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

Shortly after ratification of the Fourteenth Amendment, the Court defined the scope of the amendment's section 5 enforcement power in the broad terms:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879); *see also* *City of Rome v. United States*, 446 U.S. 156, 158 (1980) (stating that an extension of the Voting Rights Act for 7 years was within congressional enforcement power); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (holding that legislation that deters or remedies constitutional violations is within the scope of congressional enforcement power even if interferes with a legislative sphere of autonomy formerly reserved to the States); *Oregon v. Mitchell*, 400 U.S. 112, 133-35 (1970) (upholding a nationwide ban on literacy tests as a voting requirement, enacted to combat nationwide discrimination, as within congressional authority); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (stating that section 5 "is a positive grant of legislative power"); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the suspension of literacy test as a requirement for voting under section 2 of the Fifteenth Amendment).

nal and external limits to Congress's power.¹⁰ An internal limit on Congress's authority is a specific textual prohibition stating what Congress "shall not" do.¹¹ The Constitution externally limits Congress, on the other hand, by granting authority to the states or a different branch of government.¹² Some argue that the enumeration of certain powers presupposes the withholding of other powers.¹³ A source of support for this contention can be found in the Tenth Amendment, which specifically withholds from the Federal Government all powers not delegated to it by the Constitution in favor of the states or the people.¹⁴ The separation of powers contemplated by the Constitution is further evidence that the framers intended to limit Congress's powers.¹⁵

10. See *infra* notes 11-12 and accompanying text (defining internal and external constitutional limits).

11. See U.S. CONST. art. I, § 9, cls. 2-8. Article I of the Constitution proscribes Congress from suspending the privilege of the writ of habeas corpus, passing a bill of attainder or ex post facto law, giving preference to the ports of one state over another, or granting a title of nobility. See *id.* The Bill of Rights also specifically prohibits certain actions by Congress, i.e., establishing a religion or prohibiting the free exercise of religion, abridging the freedom of the press, speech, or right of assembly, or to petition the Government for a redress of grievances. See *id.* amend. I.

12. See U.S. CONST. arts. I-III. The first three articles of the Constitution diffuse the power of the Federal Government between the Executive, Judicial, and Legislative Branches. See *id.* Moreover, the Tenth Amendment limits the Federal Government by explicitly stating that whatever powers not constitutionally delegated to the Federal Government are withheld. See *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

13. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated."). The first sentence of Article I, section 1 of the Constitution also recognizes that some legislative power is beyond the scope of congressional power. See U.S. CONST. art. I, § 1. It states that only the legislative powers "*herein granted*" are vested in the Federal Government. *Id.* (emphasis added).

14. See U.S. CONST. amend. X (declaring that powers not delegated to the Federal Government are reserved to the states or to the people); see also THE FEDERALIST NO. 45 (James Madison) (Jacob E. Cooke ed., 1982) (explaining the relationship between federal and state governments). In the *Federalist No. 45*, James Madison provided good discernment of the federal-state balance intended by the framers:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation [sic], and foreign commerce The powers reserved to the several States will extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Id. at 313.

15. See GUNTHER & SULLIVAN, *supra* note 7, at 87 (stating that the drafters of 1787 protected against excessive concentrations of power in the Federal Government primarily through the federal division of powers, and the diffusion of the Federal Government into

Notwithstanding these explicit and implicit limits on congressional power, until recently, the Supreme Court gave Congress expansive legislative authority by (1) broadly interpreting the Commerce Clause; (2) permissively defining what is “appropriate legislation” under the Enforcement Clauses of the Civil War Amendments; and (3) narrowly construing the Tenth Amendment.¹⁶ In the mid-1980s, Congress began passing sweeping legislation in a variety of areas that, if left in place, would have further broadened the scope of congressional legislative authority by redefining its enumerated powers under the Constitution.¹⁷ A convincing example of this type of legislation is the Gun-Free School

three separate branches as well as through the explicit “shall nots” of the Bill of Rights).

16. See *supra* notes 6 and 9 and accompanying text (describing decisions broadly interpreting the Commerce Clause and the Enforcement Clauses). See, e.g., *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)) (“[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies” places no restriction on Congress’s authority “to enforce the Civil War Amendments by ‘appropriate legislation’”); *United States v. Darby*, 312 U.S. 100, 124 (1941) (stating that the Tenth Amendment is but “a truism”). For an excellent history of the Tenth Amendment, see Anthony B. Ching, *Travelling Down The Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99 (1995).

17. See, e.g., The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1994) (protecting the Free Exercise Clause by requiring a compelling state interest, employing the least restrictive means necessary, to justify a neutral, generally applicable law which may directly or indirectly burden an individual’s free exercise of religion); see also The Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994) (making it a federal offense to knowingly possess a firearm in a school zone); Low-Level Radioactive Waste Policy Act of 1985, 42 U.S.C. § 2021e(d)(2)(C)(i) (1994) (containing a “take title” provision which requires states to regulate according to congressional guidelines or accept ownership of radioactive waste); The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (requiring state and local law enforcement officials to run background checks on prospective handgun purchasers); WILLIAM A. KAPLIN, *THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW* 74 (1992). Professor Kaplin states that since *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Congress’s constitutional powers have been construed broadly. See *id.* Kaplin also provides a concise analysis of liberal means/ends construction enunciated in *M’Culloch* which permits extensive congressional power. See *id.*

For an excellent analysis of the unconstitutionality of RFRA based solely on infringement of state sovereignty under the Tenth Amendment, see Patrick G. Kruse, Note, *Free Exercise Claims By Inmates In State-Owned Correctional Facilities: Is Application of the Religious Freedom Restoration Act Unconstitutional Under the Tenth Amendment?*, 73 U. DET. MERCY L. REV. 391, 426-30 (1996). Kruse argues that the dissenting opinions in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and the majority opinions in *New York v. United States*, 505 U.S. 144 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), evidence the Court’s willingness to protect state sovereignty under the Tenth Amendment. See *id.* at 427-28. Arguing prior to the decision in *City of Boerne*, Kruse asserted that if the Court truly wanted to honor its purported interest in protecting the fundamental principles of state sovereignty under the Tenth Amendment, it must invalidate RFRA. See *id.* at 430.

Zones Act of 1990.¹⁸ Under that Act, Congress, utilizing the Commerce Clause, prohibited possession of a firearm in school zones.¹⁹ Another instance of vast congressional legislation is the Religious Freedom Restoration Act of 1993 (RFRA).²⁰ RFRA, enacted pursuant to the Enforcement Clause of the Fourteenth Amendment,²¹ permitted Congress, as opposed to the Supreme Court, to interpret the substance of the Fourteenth Amendment.²² In response, the Supreme Court reined in Congress by more narrowly defining the legislature's enumerated powers and consequently invalidated such sweeping legislation.²³

*City of Boerne v. Flores*²⁴ illustrates the Supreme Court's most recent limitation of Congress's previously broad powers. In this decision, the Court reined in Congress's exercise of its expansive enforcement power under the Fourteenth Amendment.²⁵ The Fourteenth Amendment prohibits states from depriving any person of life, liberty or property, without due process of law.²⁶ As a means of ensuring compliance with these prohibitions, the fifth section of the amendment, also known as the Enforcement Clause, grants Congress the power to "enforce, by appropriate legislation," the provisions of the amendment.²⁷ The enforcement power

18. See 18 U.S.C. § 922(q).

19. See *id.* ("It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.").

20. See 42 U.S.C. § 2000bb.

21. See Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section Five of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 371 (1994) (stating that the Enforcement Clause was invoked as support for RFRA because there was no enumerated constitutional basis for its passage).

22. See *City of Boerne v. Flores*, _ U.S. _, 117 S. Ct. 2157, 2164 (1997) (stating that the design of the Enforcement Clause does not permit Congress to decree the substance of the Fourteenth Amendment).

23. See *id.* at 2172 (holding that the Religious Freedom Restoration Act exceeds congressional power under the Enforcement Clause of the Fourteenth Amendment); see also *Printz v. United States*, _ U.S. _, 117 S. Ct. 2365, 2384 (1997) (overturning the provision of Brady Handgun Violence Prevention Act that imposed federal directives on state chief law enforcement officers on the grounds that Congress cannot, under the Commerce Clause, require state officials to administer or enforce a federal program); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding the Gun-Free School Zones Act overstepped Congress's power under the Commerce Clause); *New York v. United States*, 505 U.S. 144, 188 (1992) (declaring the "take title" provision of the Low-Level Radioactive Waste Policy Act to be outside Congress's enumerated powers and is inconsistent with the Tenth Amendment).

24. 117 S. Ct. 2157 (1997).

25. See *id.* at 2172 (stating that even though congressional enforcement power is broad, RFRA went beyond Congress's authority).

26. See U.S. CONST. amend. XIV, § 1.

27. See *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879) (reiterating Congress's authority to enact legislation, if not prohibited elsewhere in the Constitution, to ensure state

has been interpreted by Congress and the courts as providing Congress with broad power to deter or remedy constitutional violations.²⁸ For more than one hundred years the Supreme Court has upheld a wide range of congressional legislation enacted under the Enforcement Clause of the Fourteenth Amendment and under the almost identical Enforcement Clauses of the Thirteenth and Fifteenth Amendments.²⁹ While this clause is an expansive grant of power, it is not limitless.³⁰ Considering the Court's traditional deference to congressional legislation promulgated under the Enforcement Clauses, *City of Boerne*, however, signifies an emerging trend toward a more prohibitive stance.³¹

The Supreme Court in *City of Boerne* examined the question of whether Congress, acting under the Enforcement Clause, had the authority to enact RFRA.³² RFRA prohibited the government³³ from substantially burdening a person's free exercise of religion without first demonstrating that the burden furthered a compelling governmental interest, and that the interest was advanced by the least restrictive means available.³⁴ Congress enacted RFRA specifically to overturn the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*.³⁵ RFRA, therefore, posed a significant constitutional question as to whether Congress has the authority to overturn a Supreme

compliance with the Fourteenth Amendment).

28. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (citing *Ex parte Virginia*, 100 U.S. at 346-48) (holding that Congress's enforcement power is limited to passing legislation which deters or remedies constitutional violations).

29. See *supra* note 7 and accompanying text (describing the reason the Thirteenth, Fourteenth, and Fifteenth Amendments are often considered in a group as the Civil War Amendments); *supra* note 9 and accompanying text (discussing the over 100 years of permissive legislation enacted under the enforcement powers of the Civil War Amendments).

30. See *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (stating that congressional enforcement power is broad but not unlimited).

31. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162 (1997) (explaining that Congress enacted RFRA by relying on the Enforcement Clause); see also *infra* notes 46-57 and accompanying text (discussing a similar struggle between the Court and Congress over the appropriate scope of the Commerce Clause).

32. See *City of Boerne*, 117 S. Ct. at 2160. The Defendant, the City of Boerne, raised the question of RFRA's constitutionality in successive court proceedings. See *Flores v. City of Boerne*, 877 F. Supp. 355, 356 (W.D. Tex. 1995); see also *City of Boerne*, 117 S. Ct. at 2160.

33. RFRA defined "government" as 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." 42 U.S.C. § 2000bb-2(1) (1994).

34. See *id.* at § 2000bb-1; see also *infra* note 137 and accompanying text (providing relevant portions of the Religious Freedom Restoration Act).

35. 494 U.S. 872 (1990); see also *infra* note 134 and accompanying text (discussing the findings and purposes behind RFRA).

Court decision.³⁶ Essentially, Congress's attempt to protect the free exercise of religion through use of the Enforcement Clause was in direct conflict with the Court's authority "to say what the law is."³⁷

The Supreme Court found RFRA unconstitutional.³⁸ The Court held that despite Congress's broad power under the Enforcement Clause, RFRA exceeded the limits of this expansive grant of power and, therefore, violated the separation of powers and disturbed the necessary fed-

36. See generally *The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 2 (1990) (opening remarks of Rep. Edwards) ("The bill responds to *Employment Division v. Smith*, a recent Supreme Court ruling that weakened the long-held standard of review for religious freedom cases. H.R. 5377 restores the prior legal standard."); *id.* at 11 (statement of Rep. Sensenbrenner, Jr.) (stating that the purpose of RFRA is to reinstate the compelling interest test that had been the law prior to *Smith*); *id.* at 28-29, 31-32, (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) (remarking that RFRA's purpose is to reinstate the compelling interest test recently abandoned by the Supreme Court); 139 Cong. Rec. E1216 (daily ed. May 11, 1993) (statement of Rep. Margolies-Mezvinsky) (declaring that RFRA rectifies *Smith*, "which severely limits" religious freedom); see also *infra* note 134 and accompanying text (outlining the relevant portions of RFRA, along with the summary and purpose sections of the House and Senate reports); see generally Abner J. Mikva & Jeff Bleich, *When Congress Overrides the Court*, 79 CAL L. REV. 729 (1991); *infra* notes 242-44 and accompanying text (discussing origins of judicial authority and review).

City of Boerne is not the only recent instance where Congress has passed legislation specifically to overturn a decision of the Supreme Court. See *United States v. Bird*, 124 F.3d 667, 691-92 (5th Cir. 1997) (DeMoss, J., dissenting). One of the purposes of the Freedom of Access to Clinic Entrances Act of 1994 was to overturn the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). See Freedom of Access to Clinics Act of 1994 (FACE), Pub. L. No. 103-259, § 2, 108 Stat. 694, 694 (stating that the purpose of the Act is to provide federal remedies for conduct threatening reproductive services). The Findings and Purpose section of the Senate Bill, later adopted into the Act, expressed the specific desire to return to the federal courts the power to enjoin behavior preventing access to abortion clinics, which was taken away in the *Bray* decision. See *id.* Judge DeMoss noted in his dissenting opinion, that the same Congress that passed FACE also passed RFRA. See *Bird*, 124 F.3d at 691.

37. See *City of Boerne*, 117 S. Ct. at 2172 (stating that RFRA's control of cases and controversies was beyond congressional authority and conflicted with the judiciary's duty to say what the law is); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that "[I]t is emphatically the province and duty of the judicial department to say what the law is.>").

38. See *City of Boerne*, 117 S. Ct. at 2172. The controversy in *City of Boerne* arose when the Archbishop of San Antonio gave St. Peter Catholic Church permission to enlarge the physical structure of the church to accommodate a growing congregation. See *id.* at 2160. The Boerne City Council, however, subsequently passed an ordinance requiring the Historic Landmark Commission to preapprove construction affecting buildings within the city's historic district. See *id.* Following the passage of this ordinance, the Landmark Commission subsequently denied the church's application for a building permit to enlarge the church, and the City Council denied the church's appeal. See *id.* The church filed suit claiming that the city ordinance was unconstitutional and violated RFRA's compelling interest test. See *id.*

eral-state balance intended by the Framers.³⁹ This holding illustrates the Court's retreat from an expansive reading of the Enforcement Clause toward a narrower reading that limits attempted exercises of congressional authority to reinterpret the Constitution through dubious legislation.⁴⁰

This Comment will demonstrate that the Court's decision in *City of Boerne v. Flores* displays the Supreme Court's recent tendency to curtail the traditionally expansive sources of congressional power. Part I of this Comment provides an overview of recent decisions that illustrate the Court's resurrection of the Tenth Amendment, and its willingness to limit congressional commerce power.⁴¹ Part II, in contrast, examines Supreme Court decisions that support Congress's broad enforcement powers under the Fourteenth Amendment.⁴² Part III analyzes in detail the Court's decision in *City of Boerne v. Flores*,⁴³ and, in order to appreciate the nature of the rights RFRA was intended to protect, also discusses the environment that led to RFRA's enactment. Finally, Part IV of this Comment submits that the decision in *City of Boerne* is representative of a recent trend in Supreme Court jurisprudence circumscribing Congress's power to interpret the Constitution under the veil of legislation.⁴⁴ This trend is particularly noticeable in the areas of Commerce Clause and Tenth Amendment jurisprudence, to which this Comment will draw parallels. The primary focus of this Comment, however, is the newest method of judicial curtailment under the Enforcement Clause of the Fourteenth Amendment. This Comment concludes that the Supreme Court's trend toward restrictions of Congress's legislative power is restoring the originally intended separation of powers and the proper fed-

39. *See id.* at 2172.

40. *See* discussion *infra* Part IV; *see also infra* note 220 and accompanying text (discussing the Supreme Court's trend toward curtailing broad congressional powers under the Enforcement Clause).

41. *See* discussion *infra* Part II.A.

42. *See* discussion *infra* Part II.B.

43. *See* discussion *infra* Parts II.E.1-3.

44. *See* discussion *infra* Part IV; *see also* *United States v. Bird*, 124 F.3d 667, 691 (5th Cir. 1997) (DeMoss, J., dissenting). In his dissenting opinion, Judge DeMoss argued that the Supreme Court decisions in *United States v. Lopez*, 514 U.S. 549 (1995), limiting congressional power under the Commerce Clause, and in *City of Boerne*, explaining the limitations of the powers granted under section 5 of the Fourteenth Amendment, indicate a significant trend in Supreme Court jurisprudence expressing a renewed awareness of the fundamental principles of the Constitution. *See id.* Judge DeMoss explained that the "Federal Government is a government of limited powers, federalism has a significant place in constitutional analysis, and the separation of powers between the branches of the Federal Government must be respected." *Id.*; *see also supra* note 23 and accompanying text (discussing recent decisions limiting congressional power).

eral-state balance.⁴⁵

I. THE COMMERCE CLAUSE NO LONGER RIDES ROUGHSHOD OVER THE TENTH AMENDMENT

For a majority of this century, the Commerce Clause has been a significant source of congressional power.⁴⁶ As the economic pressures of the early 1930s created a need for a national solution to the Great Depression, the Commerce Clause became an increasingly attractive source of regulatory authority.⁴⁷ Since 1937,⁴⁸ the United States Supreme Court has broadly construed the commerce power to sustain a wide range of congressional actions.⁴⁹ The Court has used the Commerce Clause to enforce civil rights legislation,⁵⁰ to regulate activities of state agencies,⁵¹ and

45. See discussion *infra* Part V.

46. See KAPLIN, *supra* note 17, at 75 (stating that “[i]he commerce power is the most frequently invoked of all Congress’ [sic] domestic regulatory powers”).

47. See GUNTHER & SULLIVAN, *supra* note 7, at 176. Professors Gunther and Sullivan point out that many New Deal provisions derived their authority from the Commerce Clause because the problems of the Great Depression were economic, “and the Commerce Clause was the enumerated power most directly concerned with business and economic, or commercial matters.” *Id.* (quoting Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 646 (1946)). In the famous “sick chicken” case, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), Chief Justice Hughes opined that “[e]xtraordinary conditions do not create or enlarge constitutional power.” 295 U.S. at 528 (footnote omitted). Justice Cardozo concurred with Chief Justice Hughes, and warned that if Congress were allowed to regulate intrastate activities because the economic circumstances of the Great Depression presented the need, it could mark the “end of our federal system.” *Id.* at 554 (Cardozo, J., concurring).

48. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding, for the first time, that Congress may regulate intrastate activities that have a close and substantial relationship to interstate commerce).

49. See KAPLIN, *supra* note 17, at 76. For a more complete review of the history of the Commerce Clause and the Supreme Court’s decisions in this area, see Rachel E. Smith, Note, *United States v. Lopez: Reaffirming the Federal Commerce Power and Re-membering Federalism*, 45 CATH. U. L. REV. 1459 (1996).

50. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding Title II of the Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (reaffirming the constitutionality of Title II). Additionally, the Commerce Clause has been extended to cover legislation pertaining to

gambling; to criminal enterprises; to deceptive practices in the sale of products; to fraudulent security transactions; to misbranding of drugs; to wages and hours; to members of labor unions; to crop control; to discrimination against shippers; to the protection of small business from injurious price cutting; to resale price maintenance; to professional football; and to racial discrimination by owners and managers of terminal restaurants.

Heart of Atlanta Motel, 379 U.S. at 257 (citations omitted).

51. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (upholding the Fair Labor Standards Act).

to enforce federal criminal laws.⁵² Furthermore, challenges to these congressional regulations, based on the state sovereignty principle embodied in the Tenth Amendment, have generally been unsuccessful.⁵³

The Supreme Court's decisions in *New York v. United States*,⁵⁴ *United States v. Lopez*,⁵⁵ and *Printz v. United States*⁵⁶ indicate a decrease in congressional commerce power with a corresponding strengthening of the Tenth Amendment.⁵⁷ In 1992, the Supreme Court held, in *New York v. United States*, that the Tenth Amendment prohibits Congress from forcing a state to carry out a federal regulatory program.⁵⁸ The Court further curtailed congressional commerce power in 1995 when it decided *United States v. Lopez*. Without relying on the Tenth Amendment, the Court in *Lopez* held that the Gun-Free School Zones Act of 1990 exceeded congressional commerce power.⁵⁹ Significantly, Justice Thomas, in his concurrence, called for a modification of Supreme Court Commerce Clause jurisprudence at an appropriate future juncture.⁶⁰ The Court continued

52. See *United States v. Bass*, 404 U.S. 336, 351 (1971) (upholding the Crime Control Act); *Perez v. United States*, 402 U.S. 146, 155-57 (1971) (upholding Title II of the Consumer Credit Protection Act which made "loan sharking" a federal crime); *United States v. Five Gambling Devices*, 346 U.S. 441, 452 (1953) (plurality opinion) (upholding the Gambling Devices Act).

53. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (stating that the challenge to congressional authority to regulate shipments of goods manufactured by workers earning less than minimum wage was insufficient based on the Tenth Amendment because the Tenth Amendment is "but a truism"); see also NOWAK & ROTUNDA, *supra* note 7, § 4.10(d), at 168-94 (discussing in detail federal regulation of state and local government entities).

54. 505 U.S. 144 (1992).

55. 514 U.S. 549 (1995).

56. 117 S. Ct. 2365 (1997).

57. See *id.* at 2384 (extending the decision in *New York*, prohibiting compelled state enforcement of federal regulatory programs, to prevent Congress from employing the Commerce Clause to directly conscript state officials for federal purposes); *Lopez*, 514 U.S. at 565-66 (stating that although congressional commerce power does cover many commercial activities, it does not extend to "every aspect of local schools"); *New York*, 505 U.S. at 177 (stating that take title provision was inconsistent with the federal structure because the provision exceeded congressional commerce power and violated the Tenth Amendment).

58. See *New York*, 505 U.S. at 188. The Court stated that the Tenth Amendment explicitly reserved to the States a "residuary and inviolable sovereignty." *Id.* (quoting THE FEDERALIST NO. 39, p. 245 (C. Rossiter ed. 1961)). The Court also held that although the outer limits of state sovereignty may be uncertain, it does not permit the Federal Government to compel state administration of a federal regulatory program. See *id.*

59. See *Lopez*, 514 U.S. at 567. The Court held that the possession of a gun within 1,000 feet of a school did not constitute an economic activity that could substantially affect interstate commerce. See *id.*

60. See *id.* at 602 (Thomas, J., concurring).

this restrictive trend in 1997 with its decision in *Printz v. United States*.⁶¹ In *Printz*, the Court held that Congress could not circumvent the Court's decision in *New York v. United States* by directly conscripting state officers to implement a federal regulatory program when Congress was prohibited from compelling state governments to enact such programs themselves.⁶² Echoing his earlier remarks, Justice Thomas stated that the Court must "temper our Commerce Clause jurisprudence."⁶³

As a whole, these cases are evidence of the Court's willingness to curb a traditionally broad source of congressional authority.⁶⁴ Recently, this trend, illustrating a restrictive posture toward congressional authority over state action, is also evident in the Enforcement Clause legislative arena.⁶⁵

II. THE TRADITIONALLY BROAD SCOPE OF THE ENFORCEMENT POWER

Congressional enforcement power is derived from the Enforcement Clauses of the Civil War Amendments.⁶⁶ Each of these amendments provides Congress the power to enforce, by appropriate legislation, the provisions of the amendment.⁶⁷ As early as 1879, the Court defined Congress's enforcement power to include any legislation that tended to enforce state compliance with the prohibitions of the Fourteenth Amendment.⁶⁸ The enforcement power was understood further to permit any legislation likely to secure "perfect equality of civil rights" to all persons.⁶⁹ Four years later, in the *Civil Rights Cases*,⁷⁰ the Court stated that

61. 117 S. Ct. 2365 (1997).

62. *See id.* at 2384.

63. *Id.* at 2385.

64. *Compare supra* notes 48-53 and accompanying text (discussing expansive congressional commerce power), *with supra* notes 51-59 and accompanying text (discussing recent limitation of the Commerce Clause).

65. *See infra* Part III.D (discussing *City of Boerne v. Flores* and the Supreme Court's unwillingness to allow Congress to rely on the Enforcement Clause as a means of circumventing the Court's previous ruling in *Smith*).

66. *See supra* note 9 and accompanying text (discussing the enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments).

67. *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

68. *See Ex parte Virginia*, 100 U.S. 339, 345-46 (1879) (holding that any legislation enacted to ensure compliance with the Fourteenth Amendment and to provide equality of civil rights is appropriate under the Enforcement Clause).

69. *See id.* at 346.

70. 109 U.S. 3 (1883). The *Civil Rights Cases* refers cumulatively to *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson & Wife v. Memphis and Charleston R.R. Co.* *See id.* All of these cases questioned the constitutionality of the first and second sections of the Civil Rights Act of 1875. *See id.* at 8-9.

the Enforcement Clause empowered Congress to pass all laws necessary and proper for abolishing the incidents of slavery.⁷¹

The modern Supreme Court first dealt with the enforcement power in *South Carolina v. Katzenbach*,⁷² where it qualified Congress's authority, holding that in order to "enforce" the provisions of the Fifteenth Amendment, congressional action must be construed as "remedial."⁷³ In a subsequent case, *Katzenbach v. Morgan*,⁷⁴ the Court maintained the breadth of congressional enforcement power by affirmatively holding that the Enforcement Clause of the Fourteenth Amendment "is a positive grant of legislative power" to Congress.⁷⁵ The Court has further clarified that any legislation that "deters" or remedies constitutional violations of the provisions of the Fourteenth Amendment is within the scope of congressional enforcement power.⁷⁶ The power to deter violations, in addition to remedying them, implies that Congress can legislate in a preemptive or anticipatory fashion as opposed to merely a corrective one.⁷⁷ In this line of cases, the Court also found that the Enforcement Clause permitted federal legislation that infringed into spheres of state autonomy.⁷⁸

The Court re-articulated this expansive definition of Congress's enforcement power in *Fitzpatrick v. Bitzer*.⁷⁹ In *Fitzpatrick*, the Court held

71. See *id.* at 20; see also Donald Francis Donovan, *Toward Limits on Congressional Enforcement Power Under The Civil War Amendments*, 34 STAN. L. REV. 453, 458 (1982). Donovan makes a compelling argument that the framers use of the term "appropriate" to qualify the enforcement power, which is the same term used by Chief Justice Marshall to define the necessary and proper clause, suggests that the enforcement power should be given comparable scope. See *id.*

72. 383 U.S. 301 (1966); see also GUNTHER & SULLIVAN, *supra* note 7, at 984-85 (discussing "substantive" versus "remedial" aspects of the enforcement power).

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

74. 384 U.S. 641 (1966).

75. See *id.* at 651.

76. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (quoting *Ex parte Virginia*, 100 U.S. at 346-48). "[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Id.* See also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress enforcement power . . .").

77. See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 541 (Barnes & Noble, 1996) (defining "deter" as "1. to discourage or restrain from acting or proceeding; . . . 2. to prevent . . ."); *id.* at 1629 (defining "remedy" as "2. something that *corrects* or *removes* an evil of any kind") (emphasis added).

78. See *Fitzpatrick*, 427 U.S. at 455 (stating that previous cases "sanctioned intrusions by Congress . . . into the judicial, executive, and legislative spheres").

79. See *id.* at 456 (allowing Congress to grant federal courts the authority to hear pri-

that the scope of the Enforcement Clause of the Fourteenth Amendment was broad enough to overcome the restrictions of the Eleventh Amendment.⁸⁰ The Eleventh Amendment protects the principle of state sovereignty by prohibiting federal courts from hearing suits in law or equity commenced by a citizen of one state against the government of another state.⁸¹ Title VII of the Civil Rights Act of 1964,⁸² enacted under Congress's Fourteenth Amendment enforcement power, granted federal courts the authority to award damages in favor of citizens against state governments.⁸³ The question addressed by the Court in *Fitzpatrick* was whether the enforcement power allowed Congress to authorize federal courts to award money damages to private individuals in discrimination cases, despite the guarantee of state sovereign immunity afforded by the Eleventh Amendment.⁸⁴

The *Fitzpatrick* Court resolved this issue by closely examining the text of the Fourteenth Amendment and interpreting the Enforcement Clause as a broad grant of congressional power.⁸⁵ The Court's analysis divided the amendment into two parts: (1) the substantive provisions of section 1, expressly directing the states as to what they shall not do; and (2) the regulatory provision of section 5, allowing Congress to "enforce" the provisions of section 1 by "appropriate legislation."⁸⁶ The Court concluded that these two parts, taken together, were intended to be "limitations on the power of the States and enlargements of the power of Congress."⁸⁷ In essence, this interpretation tipped the balance of power away from the states and toward the Federal Government by holding

vate suits against states or state officials, thereby circumventing the Eleventh Amendment).

80. *See id.* (holding that when Congress acts pursuant to section 5, it has plenary legislative authority within the terms of the grant, particularly since the substantive provisions of the Fourteenth Amendment contain significant limitations on state authority).

81. *See id.*; *see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

82. *See* 42 U.S.C. § 2000f.

83. *See Fitzpatrick*, 427 U.S. at 447.

84. *See id.* at 448. The Court stated that

[t]he principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment.

Id. (citations omitted).

85. *See id.* at 453.

86. *Id.*

87. *Id.* at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)).

that every grant of federal power is carved out of what once was a traditional sphere of state power.⁸⁸

In *City of Rome v. United States*,⁸⁹ the Court further expanded congressional enforcement power under the Civil War Amendments by permitting regulation of electoral laws that were absent of discriminatory intent, but had a discriminatory effect.⁹⁰ In *City of Rome*, the Court stated that even if the Fifteenth Amendment only prohibited purposeful discrimination, its Enforcement Clause was broad enough to allow congressional regulation of those laws that have a discriminatory effect as well.⁹¹ By approving as “remedial” a law not within the scope of the amendment itself, the Court essentially allowed Congress to determine the *scope* of the Civil War Amendments rather than simply *enforcing* them.⁹² Together, *Morgan*, *Fitzpatrick*, and *City of Rome* illustrate the Supreme Court’s deferential position toward Congress’s authority to enact legislation purporting to enforce the Civil War Amendments.⁹³

88. *See id.* at 455.

89. 446 U.S. 156 (1980).

90. *See id.* at 177.

91. *See id.*

92. *See* Donovan, *supra* note 71, at 469; GERALD GUNTHER, CONSTITUTIONAL LAW 983 (12th ed. 1991) (arguing that “if the ‘remedial’ power is as broad as *Rome* suggests, Congress, in many circumstances, may be able to play a very significant role in giving effective meaning to constitutional rights without any need to resort to the ‘substantive’ [protections of the amendments]”).

93. *See* *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997). For further elucidation of the Court’s historically accommodating position toward congressional enforcement power under the Fourteenth Amendment, one should examine the Court’s decisions interpreting the analogous Enforcement Clause of the Fifteenth Amendment. *See* *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by ‘appropriate legislation’ the provisions of the [Fifteenth A]mendment.”); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding enactment of the Voting Rights act as constitutional under the Enforcement Clause of the Fifteenth Amendment). In *City of Rome v. United States*, the Court held that legislation attacking racial discrimination in voting need only be “appropriate” to come within the purview of the Enforcement Clause of the Fifteenth Amendment. 446 U.S. at 177. The Court used this method of analysis in *City of Boerne*. The majority distinguished, however, the substantive scope of the two amendments, permitting an opposite outcome. *See id.* The Fifteenth Amendment protects the rights of citizens to vote regardless of race, color, or previous condition of servitude. *See* U.S. CONST. amend. XV, § 1. The Fifteenth Amendment also provides Congress with an enforcement power identical to the Fourteenth Amendment. *Compare id.* amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”), *with id.* amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). In a number of cases, the Supreme Court upheld restrictions placed upon the states by the 1970 amendments to the Voting Rights Act, 42 U.S.C. § 1973aa-1 (1994), which limited the constitutional authority of the States to administer their own elections. *See* U.S. CONST. art. I, § 4; *see also* *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (declaring that the

III. RFRA, *CITY OF BOERNE*, AND STRIKING A BALANCE BETWEEN ENFORCEMENT AND SUBSTANCE

A. *Religious Freedom and the Compelling Interest Test: The Environment Leading to RFRA*

In order to understand RFRA's impact on congressional authority and religious freedom, it is helpful to examine briefly the Court's prior decisions involving the Free Exercise Clause. This summary will help illustrate the ultimate conflict in *City of Boerne*: an individual's First Amendment right to free exercise of religion versus congressional enforcement power under the Fourteenth Amendment. *Sherbert v. Verner*⁹⁴ and *Wisconsin v. Yoder*⁹⁵ are two important decisions that provide analytic frameworks for appreciating the Court's subsequent holding in *Smith*. The Court's holding in *Smith*, in turn, led to the enactment of RFRA.⁹⁶ These decisions provide the standard of judicial scrutiny applied to laws that infringe upon an individual's free exercise of religion.⁹⁷

In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was discharged for her refusal to work a six-day work week that included Saturday, the Sabbath Day of her religion.⁹⁸ The issue in *Sher-*

enforcement power of the Civil War Amendments were specifically designed to expand federal power and to intrude on state sovereignty); *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (prohibiting literacy tests, abolishing state durational residency requirements, and providing for absentee balloting in presidential elections was within congressional enforcement power); *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 337 (1966) (upholding several provisions of the Voting Rights Act of 1965). In *City of Rome*, the Court went so far as to state that the specific purpose of the Enforcement Clauses of the Civil War Amendments was to tip the balance of federalism away from the states in favor of the Federal Government. 446 U.S. at 179; see also NOWAK & ROTUNDA, *supra* note 7, §§ 15.1-12 at 960-85 (reviewing congressional enforcement power under the Civil War Amendments).

94. 374 U.S. 398 (1963).

95. 406 U.S. 205 (1972).

96. See *infra* note 134 and accompanying text (discussing the legislative purpose of RFRA).

97. See *Yoder*, 406 U.S. at 215 (holding that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert*, 374 U.S. at 406 (stating that a mere rational relationship to some colorable state interest is insufficient to justify infringements of paramount interests such as freedom of religion).

98. See *Sherbert*, 374 U.S. at 399. As a member of the Seventh-day Adventist Church, appellant was fired and subsequently unable to obtain other employment due to religious convictions that prohibited her from accepting Saturday employment. See *id.* The South Carolina Unemployment Compensation Act provided in relevant part that eligibility for unemployment benefits was conditioned on ability and availability for work. See *id.* at 399-400. Further, the Act indicated that a claimant was ineligible for benefits "[i]f . . . he has failed, without good cause . . . to accept available suitable work when of-

bert was whether the South Carolina Employment Security Commission could deny the plaintiff unemployment compensation based upon the Commission's finding that the plaintiff was "unavailable" for work, pursuant to the guidelines of the South Carolina Unemployment Compensation Law of 1936.⁹⁹ The Supreme Court held that the South Carolina law was unconstitutional because it required an individual to abandon his religious convictions respecting the day of rest.¹⁰⁰ The Court applied the strict scrutiny standard of review to the law at issue in *Sherbert*.¹⁰¹ Under *Sherbert*, once an individual demonstrated a substantial burden¹⁰² on his

ferred him by the employment office or the employer" *See id.* at 400 n.3 (emphasis added).

99. *See id.* at 400-01. The law provides in part that in order to be eligible for unemployment benefits, a claimant must be "able to work and is available for work," S.C. CODE ANN. § 41-35-110(3) (Law Co-op. 1986), and shall be considered ineligible if claimant has failed, "without good cause," to accept available suitable employment. *Id.* § 41-35-120(3).

100. *See Sherbert*, 374 U.S. at 410.

101. *See id.* at 406 (holding that a mere rational relationship is insufficient, and that a compelling interest is necessary before free exercise may be infringed).

102. *See id.* at 403. The Court noted that a merely incidental, as opposed to a substantial, burden of free exercise may be justified by a compelling state interest. *See id.* In order to determine whether a law violates the strict scrutiny standard, courts first examine what constitutes a "substantial burden." *See Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (declaring that the first step in analyzing a claim under strict scrutiny is to look first at whether a substantial burden has been placed upon the free exercise of a sincerely held religious belief, and then examine whether the state can justify that burden). The Supreme Court has held that a law or policy which merely "operates so as to make the practice of [an individual's] religious beliefs more expensive," does not amount to a substantial burden. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality opinion). Some courts have found that a substantial burden occurs only when an individual is compelled to engage in conduct forbidden by his religion, or forced to abstain from action mandated by his religion. *See Goodall*, 60 F.3d at 172-73; *see also Woods v. Evatt*, 876 F. Supp. 756, 762 (D.S.C. 1995) (holding that a substantial burden exists when inmates are coerced into violating their religious beliefs, or they are compelled by threat of sanctions to refrain from religious conduct).

Prior to the Supreme Court's declaration in *City of Boerne* that RFRA was unconstitutional, the circuits were split concerning whether the courts should consider the "centrality" of a particular belief in determining the existence of a substantial burden. *See Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1238 (E.D. Va. 1996) (comparing the "centrality" factors used by the Seventh, Eighth, and Tenth Circuits, with the Fourth, Ninth, and Eleventh Circuits that refused to consider centrality when determining whether a burden on religion was substantial). The narrow definition of substantial burden adopted by the Fourth, Ninth, and Eleventh Circuits examines only whether there has been "compulsion of that which is forbidden or the compulsory restraint of something compelled" by one's religion. *Id.* at 1238 n.3. The broader definition used by the other circuits considered whether the conduct or expression affected is a "central tenet of a person's religious beliefs." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) *cert. granted and vac.*, 118 S. Ct. 36 (1997); *see also Turner-Bey v. Lee*, 935 F. Supp. 702, 703 (D. Md. 1996) (considering whether a particular practice is obligatory or merely encouraged by a religion).

free exercise of religion, the State would need to show more than a mere rational relationship between the governmental interest and the means of implementation in order to justify its actions.¹⁰³ In order to prevail, the state would need to demonstrate a compelling governmental interest to justify a substantial infringement of a fundamental right such as the free exercise of religion.¹⁰⁴ South Carolina's asserted interest was to prevent fraudulent unemployment claims, which could dilute the unemployment compensation fund and present scheduling hardships for employers.¹⁰⁵ In *Sherbert*, the Court did not find the State's claim concerning the mere possibility of fraud compelling.¹⁰⁶ In dictum, the Court assumed *arguendo* that even if the State's purported interest was compelling, in order to survive strict scrutiny review,¹⁰⁷ the State must prove that no alternative means of regulation would further its professed interest without burdening religious freedom.¹⁰⁸ This standard of review applies if the purpose or effect of the questioned law infringed upon the observance of one or all religions, even if the infringement is indirect.¹⁰⁹

The Court reinforced the strict scrutiny standard articulated in *Sherbert* in its subsequent ruling, *Wisconsin v. Yoder*.¹¹⁰ In *Yoder*, the Court addressed whether a state's vital interest in universal education would prevail when balanced against an individual's First Amendment rights.¹¹¹ The specific conflict in *Yoder* concerned whether Wisconsin could enforce mandatory school attendance for all children until age sixteen, even

103. See *Sherbert*, 374 U.S. at 406.

104. See *id.*

105. See *id.* at 407.

106. See *id.*

107. Courts employ differing levels of judicial scrutiny depending on the nature of the right at issue in a particular case. See 16B AM. JUR. 2D *Constitutional Law* §§ 812-17 (1998). In the areas of economic and social regulation, courts exercise restraint. See *id.* § 813. Legislative enactments are presumed constitutional, and a challenged statute must be only "rationally related to a legitimate state interest." *Id.*

Alternatively, legislation involving a fundamental right receives active and critical judicial analysis. See *id.* § 815. The judicial standard employed is referred to as strict scrutiny, and in such cases, the state has the burden of justifying the law with a compelling governmental interest. See *id.*

For a thorough explanation of the different levels of judicial scrutiny, see generally Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L. J. 161 (1984) (discussing the origins of the multi-level system of judicial scrutiny, outlining criticisms of and flaws in multi-level scrutiny, and advocating for a unified system of review).

108. See *Sherbert*, 374 U.S. at 407.

109. See *id.* at 404.

110. 406 U.S. 205 (1972).

111. See *id.* at 207.

though the Amish religion prohibited Amish children from being formally educated beyond the eighth grade.¹¹² While the Court acknowledged that providing public education is an interest of paramount importance to the states, the majority found that a state's interest in universal education was not absolute.¹¹³

This decision turned on the Court's finding that the application of a facially neutral law may still impermissibly interfere with an individual's free exercise of religion.¹¹⁴ Thus, in *Yoder*, the Court acknowledged that an individual's constitutional right to free exercise could exempt him from laws of general applicability, even if the burden on his fundamental right was indirect.¹¹⁵

B. *Smith: A Line Is Drawn Over Religious Freedom*

As opposed to its previous free exercise decisions in *Sherbert* and *Yoder*, the Court refused to apply the strict scrutiny standard of review in *Employment Division, Department of Human Resources v. Smith*.¹¹⁶ This action by the Court precipitated Congress's enactment of RFRA.¹¹⁷ *Smith* again posed the question of whether an individual's right to free exercise of religion was superior to the states' ability to enact laws of general applicability.¹¹⁸ As in *Sherbert*, the plaintiffs challenged a state's refusal to pay them unemployment benefits.¹¹⁹ The plaintiffs were fired from their jobs because they ingested peyote, a narcotic designated as a controlled substance in Oregon, for sacramental purposes at the Native

112. *See id.*

113. *See id.* at 213 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (holding that states do have the power to enforce reasonable regulations concerning duration of education)); *id.* at 214 (citing *Pierce*, 268 U.S. at 535 (holding that the duty of the state to provide public education to its children must yield to the right of parents to provide equivalent private education)).

114. *See id.* at 220. The Court described the "tight rope" that must be walked between preserving the free exercise of religion, and avoiding the governmental establishment of religion. *See id.* at 221. Enacting facially neutral laws, which apply equally to each citizen regardless of one's religion, avoids the establishment of religion, but may at the same time infringe on an individual's free exercise of religion. *See id.* at 220-21.

115. *See id.* at 220.

116. 494 U.S. 872 (1990); *see also id.* at 884-85 (holding that the strict scrutiny standard applied in the context of unemployment benefits in *Sherbert* should not be extended in *Smith* to generally applicable criminal law).

117. *See* 42 U.S.C. §§ 2000bb(a)-(b) (1994); *see also infra* note 134 and accompanying text (discussing the legislative purpose behind the enactment of RFRA).

118. *See Smith*, 494 U.S. at 874 (declaring the issue to be whether the Free Exercise Clause of the First Amendment allows the use of peyote, inspired by religion, to fall under a general criminal prohibition against the use of peyote).

119. *See id.* at 875.

American Church.¹²⁰ The Oregon Department of Human Resources Employment Division denied the plaintiffs' application for unemployment benefits, claiming the applicants were ineligible because they were dismissed for work-related "misconduct."¹²¹

Justice Scalia, writing for the majority, rejected the application of the *Sherbert* test and held that a compelling governmental interest is unnecessary to justify religion-neutral laws of general applicability that may indirectly burden the free exercise of religion.¹²² In reaching this decision, the Court explained its departure from prior case law by indicating that strict scrutiny analysis is applicable only in situations where state unemployment compensation was conditioned on an applicant's willingness to disregard his religious beliefs in order to work.¹²³ According to the *Smith* majority, *Sherbert* should not be interpreted broadly.¹²⁴ Rather, *Sherbert* stands for the limited proposition that where a state unemployment system already has a system with provisions in place for individual exemptions, the state may not refuse exemptions on the basis of "religious

120. *See id.* at 874. Oregon law considers peyote a "controlled substance," the knowing and intentional possession of which is considered a Class B felony. *See id.* The law makes no exception for the "sacramental use" of the drug. *See id.*

121. *See id.* at 874.

122. *See id.* at 884-86.

123. *See id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987) (applying strict scrutiny to the denial of unemployment benefits to a Seventh-day Adventist); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (applying strict scrutiny to a ruling denying unemployment benefits to a Jehovah's Witness).

A review of the cases employing strict scrutiny analysis in the field of religious freedom provides insight into the Court's traditional resolution of this issue. *See Hobbie*, 480 U.S. at 141 (holding the denial of unemployment benefits to a member of the Seventh-day Adventist Church on the grounds that she refused to work on Saturday, her recognized Sabbath, must be subjected to strict scrutiny and could be justified only by proof of a compelling state interest); *Thomas*, 450 U.S. at 718 (holding that the denial of unemployment benefits to a Jehovah's Witness who quit his job after being transferred to a department which made tank turrets, may be a justifiable infringement of religious liberty only by showing that the infringement is the least restrictive means of achieving a compelling state interest). In situations involving taxation and the Selective Service Laws, the Court found the strict scrutiny test satisfied because the government interest involved was so compelling. *See United States v. Lee*, 455 U.S. 252, 257-60 (1982) (declaring that the overriding governmental interest in refusing to allow denominational exemptions to social security taxes, justified an imposition on the religious liberty of a member of the Old Order Amish); *Gillette v. United States*, 401 U.S. 437, 462 (1971) (holding the requirement that a conscientious objector under the Military Selective Service Act must be opposed to all wars, not merely particular wars, was supported by a substantial government interest in procuring the manpower necessary for military purposes).

124. *See Smith*, 494 U.S. at 884 (noting various limitations on the *Sherbert* holding).

hardship” without a compelling reason.¹²⁵

In *Smith*, the Court rejected the contention that the level of scrutiny afforded in *Sherbert* and *Yoder* should necessarily be extended generally to freedom of expression claims.¹²⁶ The majority explained that prior cases employing a strict scrutiny standard were not premised on the Free Exercise Clause alone, but instead involved a combination of claims such as free exercise along with freedom of speech or press,¹²⁷ or free exercise and the rights of parents to educate their children.¹²⁸

The Court noted that even though the strict scrutiny requirement must be applied in other situations (such as those involving race and speech) before the government may accord different treatment, such a high standard was not applicable to situations involving free exercise.¹²⁹ The majority warned that applying strict scrutiny to all laws that inhibit an individual’s free exercise of religion would create a private right to ignore generally applicable laws.¹³⁰ The Court also held that broad application

125. *See id.*; *see also supra* note 99 and accompanying text (outlining the conditions of the South Carolina law at issue in *Sherbert*). The Court explained its holding in *Sherbert* in part by pointing out that the statutory language there illustrated a “good cause” exemption. *See Smith*, 494 U.S. at 884. Therefore, the narrow interpretation of *Sherbert* by Justice Scalia in *Smith* implied that the free exercise of one’s religion must qualify as a “good cause,” when such an exemption is included in the language of a particular law. This interpretation of *Sherbert* in *Smith* does not mean that an exemption must be carved out for free exercise, where one has not previously been provided.

Obviously, the disputed statutes in *Smith* and *City of Boerne* did not have a general “good cause” proviso. In *Smith*, the only exception provided for the possession of a controlled substance under Oregon law was if the substance had been prescribed by a medical practitioner. *See id.* at 874. Likewise, no general exception was provided under the city ordinance disputed in *City of Boerne*. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997). In *City of Boerne*, the ordinance authorized the Commission to regulate construction in historic districts, without any exceptions for religions or otherwise. *See id.*

In *Yoder* the Wisconsin statute requiring compulsory school attendance until the eighth grade did not provide for any exceptions, however, the Court required one to be created. *See Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972) (noting the difficult decision, and administrative problems, attendant to creating an exemption). In *Smith*, Justice Scalia explained that the exception in *Yoder* was not created to accommodate the free exercise of religion alone, but to oblige additionally the rights of parents to educate and raise their children. *See Smith*, 494 U.S. at 881 n.1.

126. *See Smith*, 494 U.S. at 881.

127. *See id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (invalidating a licensing system which provided the system administrator the authority to determine any cause non-religious) and *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) (invalidating a flat tax on the dissemination of religious literature)).

128. *See Smith*, 494 U.S. at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating mandatory school attendance laws as applied to the Amish)).

129. *See id.* at 885-86.

130. *See id.* at 886. The judicial philosophy of preventing individuals from possessing the private right to ignore general laws was developed as early as the nineteenth century.

of the strict scrutiny standard would create a judicially unworkable system, even if strict scrutiny was applied only when government action burdened conduct "central" to an individual's religion.¹³¹ The Court declared that it would be inappropriate for the judiciary to determine the "centrality" of religious beliefs.¹³² Ultimately, the Court based its decision in *Smith* on the determination that the continued application of the *Sherbert* test, beyond the narrow scope of unemployment benefits, would open the door to constitutionally required religious exemptions from civic obligations of every imaginable kind.¹³³

C. RFRA: Congress Reverses the Court's Decision in *Smith*

Congress, acting under the Enforcement Clause, attempted through

See Reynolds v. United States, 98 U.S. 145, 166-67 (1878). In *Reynolds*, the Court held that interpreting the free exercise clause as to prevent government from regulating the religious "actions" of individuals would "permit every citizen to become a law unto himself." *Id.*

131. *See Smith*, 494 U.S. at 886.

132. *See id.* at 887 (citing *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)). Justice Scalia analogized that determining the "centrality" of religious beliefs prior to employing the compelling interest test in the realm of free exercise, would be as inappropriate as determining the "importance" of ideas prior to employing the compelling interest test in the realm of free speech. *See id.* at 886-87. Justice Scalia questioned rhetorically what "principle of law or logic" could be used in order to contradict what an individual believes to be "central" to his personal faith. *Id.* at 887.

In an earlier free exercise decision, Justice Stevens strongly advocated keeping the courts and the legislature "out of the business of evaluating the relative merits of differing religious claims." *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring). Justice Stevens argued that governmental involvement in determining the validity of religious claims runs the risk of violating the Establishment Clause. *See id.*

The Court also refused to involve itself in determining what is central or indispensable to a particular religion in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 457-58 (1988). The Court held that engaging in these types of determinations would force the Court "to rule that some religious adherents misunderstand their own religious beliefs." *Id.* at 458. The Court concluded, based on the Constitution and other precedents, that this sort of determination was never an intended role for the judiciary. *See id.*; *see also* *Dayton Christian Sch. v. Ohio Civil Rights Comm'n*, 578 F. Supp. 1004, 1033 (S.D. Ohio 1984) (explaining that courts are ill-suited to engage in the scriptural interpretation necessary to determine what is central to an individual's religious beliefs); *supra* note 102 and accompanying text (discussing the split in the circuits concerning whether centrality is a factor in determining if an individual's free exercise has been substantially burdened).

133. *See Smith*, 494 U.S. at 889 (citing various cases where plaintiffs sought exemption from general laws based on free exercise principles: *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (exemption from social welfare legislation including minimum wage laws); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption from compulsory military service); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (exemption from child labor laws); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (exemption from traffic laws)).

legislation to reinstate the balance between the religious rights of the individual and the governmental interests of the states that existed prior to the *Smith* decision.¹³⁴ RFRA's legislative purpose was to overturn the Supreme Court decision in *Employment Division v. Smith*.¹³⁵ Generally, RFRA's mandate was clear; "[g]overnment shall not substantially burden a person's exercise of religion."¹³⁶ RFRA provides an exception to the general rule that government may, however, burden a person's exercise of religion if a compelling governmental interest exists and the burden imposed represents the least restrictive means of furthering that interest.¹³⁷

134. See 42 U.S.C. § 2000bb (1994). The legislative findings of RFRA state in part: Findings

The Congress finds that-

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protections in the First Amendment to the Constitution;
- (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

Purposes

The purposes of this chapter are-

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. § 2000bb.

135. See *id.*; see also *supra* note 134 and accompanying text (outlining the appropriate provisions of RFRA and the "purpose" sections of the House and Senate reports).

136. See 42 U.S.C. § 2000bb-1.

137. See *id.* RFRA states that:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

D. *City of Boerne v. Flores: The Court Reverses Congress*

In *City of Boerne v. Flores*,¹³⁸ the Court considered the constitutionality of RFRA, and focused particularly on Congress's authority to directly circumvent a Supreme Court ruling.¹³⁹ The dispute in *City of Boerne* arose when the Archbishop of San Antonio initiated plans to expand the St. Peter's Catholic Church, located in Boerne, Texas.¹⁴⁰ Soon after, the Boerne City Council passed an ordinance requiring preapproval by the Historic Landmark Commission for all construction affecting buildings in a historic district.¹⁴¹ The Archbishop applied for a building permit that the Landmark Commission denied based on the ordinance and the argument that the church was located in a historic district.¹⁴² The Archbishop then filed suit in the District Court for the Western District of Texas, challenging the denial of the building permit to enlarge the church and seeking relief under RFRA.¹⁴³ The district court concluded, however, that the enactment of RFRA exceeded congressional enforcement power under section 5 of the Fourteenth Amendment, and denied the Archbishop relief.¹⁴⁴ Reviewing the ruling on interlocutory appeal, the Fifth Circuit reversed, holding that RFRA was constitutional.¹⁴⁵ The Fifth Circuit disagreed with the district court, holding that: (1) RFRA did not exceed Congress's power under section 5 of the Fourteenth Amendment; (2) RFRA did not upset the separation of powers; and (3) RFRA did not violate the Tenth Amendment.¹⁴⁶ The Supreme Court reversed in a six-to-three decision.¹⁴⁷

138. 117 S. Ct. 2157 (1997).

139. *See id.* at 2160-63, 2172.

140. *See id.* at 2160.

141. *See id.*

142. *See id.* The Church seated approximately 230 worshipers and was too small to accommodate its growing parish. *See id.* Pursuant to City Ordinance 91-05, the Landmark Commission proposed, and the City Council adopted, the designation of a Historic District in Boerne, Texas. *See Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1354 (5th Cir. 1996) (*Flores II*), *rev'd*, 117 S. Ct. 2157 (1997). The St. Peter Catholic Church was not designated as a historic landmark but a portion of the church was within the Historic District. *See id.* The Archbishop argued that only the façade of the church was included in the District and that the façade would not be affected by any enlargement plans. *See id.* On the other hand, the city contended that the entire structure was affected. *See id.*

143. *See Flores II*, 73 F.3d at 1354; P.F. Flores v. City of Boerne (*Flores I*), 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997). The church sought a judicial declaration that the ordinance violated the Constitution and RFRA, injunctive relief, and attorneys' fees. *See Flores II*, 73 F.3d at 1354.

144. *See Flores I*, 877 F. Supp. at 357-58.

145. *See Flores II*, 73 F.3d at 1364.

146. *See id.*

147. *See City of Boerne*, 117 S. Ct. at 2159-60. Justice Kennedy delivered the opinion

1. *The Majority Opinion: Reviving Smith*

The Supreme Court decision in *City of Boerne v. Flores*¹⁴⁸ held the enactment of RFRA exceeded Congress's enforcement power.¹⁴⁹ A substantial portion of the majority opinion in *City of Boerne* addressed the scope of Congress's enforcement power under the Fourteenth Amendment,¹⁵⁰ because Congress enacted RFRA specifically to overturn the Supreme Court's decision in *Smith*.¹⁵¹ Specifically, the majority focused on whether the Enforcement Clause of the Fourteenth Amendment enables Congress to overturn a decision of the Supreme Court.¹⁵²

Initially, the Court focused on Congress's reaction to the decision in *Smith* and its legislative intent in enacting RFRA.¹⁵³ The majority briefly reviewed its rationale for refusing to apply the *Sherbert* compelling interest test in *Smith*.¹⁵⁴ In *City of Boerne*, the Court reiterated *Smith*'s holding that the *Sherbert* compelling interest test should be defined narrowly

of the Court, in which the Chief Justice and Justices Stevens, Thomas, and Ginsberg joined; Justice Scalia joined in all but Part III.A.1. *See id.* at 2159. Justice Stevens filed a concurring opinion. *See id.* at 2172. Justice Scalia filed an opinion concurring in part, in which Justice Stevens joined. *See id.* Justice O'Connor filed a dissenting opinion, in which Justice Breyer joined except as to a portion of Part I. *See id.* at 2176. Justices Souter and Breyer each filed separate dissenting opinions. *See id.* at 2185-86.

148. 117 S. Ct. 2157 (1997).

149. *See id.* at 2160.

150. *See City of Boerne*, 117 S. Ct. at 2162-68 (Part III.A of the majority opinion focuses on the definition and scope of congressional enforcement power under section 5 of the Fourteenth Amendment).

151. *See* 42 U.S.C. § 2000bb (1994); H.R. REP. NO. 103-88 (1993) (describing the summary and purpose of RFRA as a "respon[se] to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability") (footnote omitted); S. REP. NO. 103-111, at 2 (1993) (stating the purpose of RFRA is to "respond[] to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest") (footnote omitted); *see also supra* note 134-35 and accompanying text (presenting the legislative purpose supporting RFRA). For a detailed summary of the legislative hearings, see Marci A. Hamilton, *supra* note 21, at 360 n.8.

152. *See City of Boerne*, 117 S. Ct. at 2162 (discussing the limited nature of congressional power as explained in *M'Culloch v. Maryland's*, and *Marbury v. Madison's* holdings that the judiciary has the authority, to determine cases and controversies, not the legislature) (citations omitted); *id.* at 2172 (stating that "the Constitution is preserved best when each part of government respects both the Constitution and the proper actions and determinations of the other branches.").

153. *See id.* at 2160-62.

154. *See id.* at 2160-61.

and that broadening the test's applicability would create an anomaly allowing individuals to ignore the law.¹⁵⁵ The Court re-emphasized the distinction made in *Smith* that facially neutral, generally applicable laws have only been held unconstitutional in cases where free exercise was burdened along with other constitutional rights.¹⁵⁶

In *City of Boerne*, Justice Kennedy, writing for the majority, initiated his discussion of the merits with an analysis of the structure of government provided by the Constitution.¹⁵⁷ Justice Kennedy reiterated that "the Federal Government is one of enumerated powers"¹⁵⁸ and "that the 'powers of the legislature are defined and limited.'"¹⁵⁹ Next, Justice Kennedy examined the text of the Fourteenth Amendment in conjunction with precedent to determine the scope of the Enforcement Clause.¹⁶⁰ The majority concluded that the Enforcement Clause provided Congress with broad, but not unlimited, powers.¹⁶¹ Essentially, the Court inter-

155. See *id.* at 2161 (declaring that application of the *Sherbert* test to the facts in *Smith* would have created "a constitutional right to ignore neutral laws of general applicability").

156. See *id.* at 2161 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (involving "the right to the free exercise of religion [and] the right of parents to control their children's education.")). The Court also reviewed the application of the *Sherbert* test to challenges to state unemployment compensation rules. See *id.* at 2160-61 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Court explained that these cases survived constitutional scrutiny because the holdings stood "for the proposition that where the State has in place a system of individual exceptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason." See *City of Boerne*, 117 S. Ct. at 2161 (quoting *Smith*, 494 U.S., at 884). For an in depth review of modern cases involving the Free Exercise Clause, see NOWAK & ROTUNDA, *supra* note 7, § 17.8, at 1293-1310.

157. See *City of Boerne*, 117 S. Ct. at 2162.

158. *Id.* at 2162 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

159. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

160. See *id.* at 2163 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("[Section] 5 is 'a positive grant of legislative power' to Congress.")). Justice Kennedy also noted the broad scope of Congress's section 5 enforcement power. See *id.* (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). He explained that in order for legislation to qualify as "enforcing" the provisions of the Fourteenth Amendment, it must "deter[] or remed[y] constitutional violations." *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). The majority also cited numerous cases involving the parallel enforcement power under the Fifteenth Amendment. See *id.* (citing *City of Rome v. United States*, 446 U.S. 156 (1980) (holding that a seven-year extension of the Voting Rights Act was a constitutional use of the enforcement power); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding five-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding ban on literacy tests aimed at individuals schooled in Puerto Rico); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the suspension of literacy tests and other voting requirements under congressional enforcement power)).

161. See *City of Boerne*, 117 S. Ct. at 2163 (quoting *Oregon v. Mitchell*, 400 U.S. 112,

preted the Enforcement Clause to permit congressional action, even in legislative areas traditionally reserved to the states, provided the legislation in question deterred or remedied violations of the Fourteenth Amendment.¹⁶²

a. The Majority Defines "Enforcement"

The Court clarified that the breadth of the Enforcement Clause is not without limits.¹⁶³ The language of the clause itself grants Congress only the power to "enforce" the provisions of the Fourteenth Amendment.¹⁶⁴ The Court articulated further that the power to enforce does not confer, nor imply, the power to define the scope of the Amendment.¹⁶⁵

The Court stated explicitly that Congress cannot enforce a constitutional right by redefining the substance of that right.¹⁶⁶ The Court conceded that while it is often difficult to discern the distinction between measures designed to enforce, measures that remedy or prevent unconstitutional actions, and measures that substantively change the law itself, such distinctions exist and must be observed.¹⁶⁷ To aid in making this distinction, the Court articulated a proportionality test to determine where the line must be drawn.¹⁶⁸ The Court held that in order for a law properly to be considered *enforcement*, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means

128 (1970) (opinion of Black, J.)).

162. See *id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

163. See *id.* (quoting *Oregon v. Mitchell*, 400 U.S. at 128 ("As broad as the congressional enforcement power is, it is not unlimited.")). The Court also discussed the literal meaning of the term "enforce," implying that the provision to be enforced is defined elsewhere. See *id.* at 2163-64. "Enforc[ing]" the provisions of the Fourteenth Amendment, by definition may not include substantive revision of said provisions. See *id.* at 2164; see also *infra* note 215 and accompanying text (discussing the literal definition of the verb "enforce").

164. See *id.* at 2163; see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")).

165. See *City of Boerne*, 117 S. Ct. at 2164. Justice Kennedy used formal logic in his examination of the distinction between "enforcing" particular provisions and altering the substance of the provisions that Congress is attempting to enforce. See *id.* In other words, if by attempting to enforce the provisions of the Fourteenth Amendment those provisions are given new meaning or scope, logically, the redefined provisions are no longer the provisions of the Fourteenth Amendment. See *id.*

166. See *id.* ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.")).

167. See *id.*

168. See *id.* (stating that without "congruence and proportionality" between the injury and the remedy, the intended remedial legislation "may become substantive in operation and effect").

adopted to that end.”¹⁶⁹ In other words, the means selected to prevent or remedy a violation of the Fourteenth Amendment must be appropriately related to the desired result. The Court stated that laws without such a connection would in fact be a substantive change in the scope of the Fourteenth Amendment, rather than a means of enforcing the amendment’s existing protections.¹⁷⁰

The Court reconfirmed that the legislative history of the Fourteenth Amendment requires legislation enacted under its Enforcement Clause must be remedial, rather than substantive.¹⁷¹ The Court noted that one of the drafts of the amendment drew strong opposition¹⁷² because it contained a clause granting Congress the power to make all laws “necessary and proper”¹⁷³ to enforce the provisions of the amendment. On the other hand, the debate surrounding the final draft, which gave Congress the power to “enforce, by appropriate legislation,” suggested that the legislators were satisfied that congressional power under the new language would no longer be plenary but remedial.¹⁷⁴

169. *Id.*

170. *See id.*

171. *See id.* at 2164-66 (discussing the legislative debates and draft language of the Fourteenth Amendment).

172. *See id.* at 2164 (“The proposal encountered immediate opposition, which continued through three days of debate.”).

173. *See id.* at 2164. The language of the draft amendment was as follows:

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

See id. (citing CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

174. *See id.* at 2165 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866)). Ironically, almost fifty years before ratification of the Fourteenth Amendment and the debate over whether to grant Congress the power to enact all “necessary and proper” legislation as opposed to all “appropriate” legislation to enforce the amendment, Chief Justice Marshall used these phrases interchangeably when defining the scope of congressional power. *See M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 356-57 (1819). Chief Justice Marshall noted that the word “necessary,” in the constitutional context, does not mean indispensable, requisite, or essential, but instead means “appropriate.” *See id.* (stating that when deciding whether congressional actions are necessary and proper, the Court should determine if the actions are an “appropriate means to an end”).

Preliminarily, the Court established that the Enforcement Clause granted only remedial powers. *See City of Boerne*, 117 S. Ct. at 2164, 2166-67 (citing *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating portions of the Civil Rights Act of 1875 prescribing criminal penalties for individuals who denied any person “the full enjoyment of” public accommodations, on the grounds that the Fourteenth Amendment governed only State, not private conduct); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (emphasizing that the remedial nature of legislation enacted under the Enforcement Clause may be determined by the history of the targeted problem, i.e. a flagrant history of voting discrimination in the South)). The Court clarified the earlier decision in *Katzenbach v. Morgan*, however, that

b. The Proportionality Test: Does RFRA Qualify as Enforcement?

After completely defining the scope of the Enforcement Clause, the second half of the majority opinion applied the proportionality test to RFRA to determine whether it was remedial or substantive in nature.¹⁷⁵ The Court noted that RFRA would not necessarily be placed beyond the scope of the Enforcement Clause if it were determined to be merely preventative in nature, as opposed to being aimed at a specific existing law.¹⁷⁶ RFRA could have been found remedial if there was a “congruence between the means used and the ends to be achieved.”¹⁷⁷ RFRA, however, failed this test.¹⁷⁸

could have been interpreted as conferring upon Congress the power to expand the rights granted under the Fourteenth Amendment. *See id.* at 2168 (conceding that the Voting Rights Act of 1965, which ensured that persons who completed the sixth grade in Puerto Rico could not be denied the right to vote, regardless of their ability to read or write English, approached a substantive change in the scope of the Fourteenth Amendment). The interpretation that the Enforcement Clause conferred substantive legislative power, however, was not the only one. *See id.* The *City of Boerne* Court ruled that the language of the Act could be interpreted as a remedial measure aimed at discrimination in governmental services. *See id.* For example, the decision upholding the Voting Rights Act seemed to greatly expand the “scope” of the Fourteenth Amendment because this decision condoned congressional control over the states’ authority to control the times, places, and manner of elections over which states had traditionally maintained exclusive jurisdiction. *See U.S. CONST. art. I, § 4; see also City of Rome v. United States*, 446 U.S. 156, 180, 182 (1980) (upholding an extension of the Voting Rights Act for seven years); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (holding that legislation that deters or remedies constitutional violations is within the scope of congressional enforcement power even if interferes with an area of governance formerly reserved to the States); *Oregon v. Mitchell*, 400 U.S. 112, 117-19 (1970) (upholding a nationwide ban on literacy tests as a voting requirement); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (stating that “[Section] Five is a positive grant of legislative power”); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the suspension of literacy test as a requirement for voting under section 2 of the Fifteenth Amendment).

The Court addressed the apparent discrepancy between cases interpreting the Enforcement Clause as remedial and those seeming to read substantive authority into it by reconciling the holdings in *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *See City of Boerne*, 117 S. Ct. at 2167-68. Even though the legislation at issue in both cases addressed the states’ power to govern elections granted in the Constitution, the Court held that legislation aimed at remedying discrimination is within Congress’s enforcement power, *see City of Boerne*, 117 S. Ct. at 2168 (citing *Morgan*, 384 U.S. 641), whereas minor regulatory provisions such as age requirements are not. *See City of Boerne*, 117 S. Ct. at 2167 (citing *Mitchell*, 400 U.S. at 112 (holding that changing the voting age in state and local elections from twenty-one to eighteen was beyond congressional enforcement power).

175. *See id.* at 2168-72 (comparing legislative ends to be achieved by RFRA with the means adopted to do so).

176. *See id.* at 2169 (clarifying that “preventive” legislation may still be deemed appropriate under the Enforcement Clause if the proportionality test is satisfied).

177. *Id.*

178. *See id.* at 2170. The Court explained that preventative congressional measures

First, RFRA failed the proportionality test because of the difficulty of refuting an individual's claim that his free exercise of religion has been substantially burdened.¹⁷⁹ Second, RFRA failed this test because once an individual established that a law substantially burdened his right of free exercise, RFRA would require the law in question to survive strict scrutiny review, the most stringent level of scrutiny in constitutional jurisprudence.¹⁸⁰ Finally, RFRA was not considered a proportional enforcement of the Fourteenth Amendment because it affected all laws, not merely those likely to unconstitutionally burden religious expression.¹⁸¹ The Court determined that RFRA so disproportionately protected religious freedom at the expense of a state's ability to exercise its police powers that it could not be considered responsive to unconstitutional behavior.¹⁸²

The majority maintained that the primary problem with RFRA was its sweeping scope.¹⁸³ The Court noted that RFRA's broad language enabled it to be applied to every level of government and to almost every type of law or official action, regardless of the subject matter.¹⁸⁴ The Court distinguished RFRA from other legislation deemed within Congress's enforcement power by showing that these other legislative measures were aimed at specific areas where and situations in which discrimination was historically prevalent.¹⁸⁵ Finally, the Court found that the connection between the means chosen and the end achieved by RFRA lacked the requisite proportionality because, under RFRA, anytime an individual demonstrated that a law substantially burdened his free exercise, the State would be forced to demonstrate that the law in question advanced a compelling governmental interest and was implemented by

are appropriately deemed remedial when such measures anticipate actions that have a "significant likelihood of being unconstitutional." *See id.*

179. *See id.* at 2171 (stating that RFRA's requirement of demonstrating a compelling state interest every time an individual claims a substantial religious burden would place stringent demands on state regulatory authority).

180. *See id.* (noting that imposing the highest level of judicial scrutiny on infringements of free exercise would lead to religious exemptions from almost any conceivable civic duty).

181. *See id.* at 2170-71.

182. *See id.* at 2170.

183. *See id.*

184. *See id.*

185. *See id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (confining the challenged provisions of the Voting Rights Act to regions of the country where discrimination had been extensive); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (targeting literacy tests that had long histories of denying voting rights based upon race); *City of Rome v. United States*, 446 U.S. 156 (1980) (limiting a provision requiring pre-implementation review of changes in electoral practices by the Department of Justice to areas with a tradition of discrimination)).

the least restrictive means.¹⁸⁶ More importantly, the majority noted that RFRA required this analysis even if the law in question was not intended to inhibit the free exercise of religion.¹⁸⁷

2. *The Concurrences and Dissents: Justices Scalia and O'Connor Battle Over the Scope of Free Exercise*

Three Justices filed separate dissenting opinions in *City of Boerne*¹⁸⁸ all questioning the validity of *Smith*'s refusal to extend the compelling interest test.¹⁸⁹ Justice O'Connor's dissent barely addressed whether RFRA exceeded Congress's enforcement power under the Fourteenth Amendment.¹⁹⁰ Rather, her fundamental difference with the majority holding was not its analysis of the Enforcement Clause, but the Court's decision in *Smith*.¹⁹¹ Justice O'Connor fully agreed with the Court's definition of the scope of the Enforcement Clause as being remedial and not substantive.¹⁹² She also stated that Congress lacked the power to define or expand the scope of constitutional rights, and that a remedial law must have a congruence and proportionality between the injury to be prevented and the means chosen to achieve the stated end.¹⁹³ Justice O'Connor argued, however, that the Court's analysis of whether RFRA was constitutionally enacted pursuant to Congress's powers under the Enforcement Clause was dependent on the assumption that the *Smith* decision correctly interpreted the Free Exercise Clause.¹⁹⁴ Justice

186. See *City of Boerne*, 117 S. Ct. at 2171.

187. See *id.* (noting that RFRA is not designed to remedy only laws likely to unconstitutionally inhibit free exercise, but instead it may apply to laws that are not motivated by any unconstitutional behavior).

188. Justice O'Connor filed a dissent with which Justice Breyer joined. See *id.* at 2176 (O'Connor, J., dissenting). Justice Souter filed a separate dissent. See *id.* at 2185 (Souter, J., dissenting). Justice Breyer filed a separate dissent and concurred with all but the first paragraph of Part I of Justice O'Connor's dissent. See *id.* at 2186 (Breyer, J., dissenting).

189. See *City of Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting) (arguing expressly that *Smith* was wrongly decided); *id.* at 2185-86 (Souter, J., dissenting) (questioning the soundness of the *Smith* rule, and suggesting briefing and argument on the merits of that case); *id.* at 2186 (Breyer, J., dissenting) (urging the Court to require the parties to brief the question of whether *Smith* was correctly decided).

190. See *id.* at 2176-85 (O'Connor, J., dissenting). The only portion of Justice O'Connor's dissent that addressed congressional authority under section 5 of the Fourteenth Amendment is the first paragraph of Part I. See *id.*

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

192. See *id.* (agreeing with the majority's contention that "Congress lacks the 'power to decree the substance of the Fourteenth Amendment's restrictions on the States'").

193. See *id.*

194. See *id.* (stating that had she agreed with the Court's holding in *Smith*, she would have joined the Majority in *City of Boerne*).

O'Connor disagreed with that assumption.¹⁹⁵

The concurring opinions, by Justices Scalia and Stevens did not add to or elaborate on the central rationale of the majority.¹⁹⁶ Justice Scalia's concurrence almost exclusively responded to and refuted the arguments put forth by Justice O'Connor in her dissent.¹⁹⁷ Justice Stevens put forth,

195. *See id.* Justice O'Connor's dissent argued that the Free Exercise Clause is in fact "an affirmative guarantee" of an individual's "right to participate in religious practices . . . even [if] such [a practice] conflicts with a neutral, generally applicable law." *Id.* at 2177. Justice O'Connor argued that the Court's prior jurisprudence employed the compelling interest test regardless of whether a law was targeted at religion. *See id.*

A substantial portion of Justice O'Connor's dissent was devoted to an examination of the historical origins of the Free Exercise Clause. *See id.* at 2176-85. She concluded that at the time the Bill of Rights was drafted, the phrase "free exercise" was understood to "require[], where possible, accommodation of religious practice." *Id.* at 2181. Justice O'Connor's historical analysis focused on state charters and constitutions which made allowances for the free exercise of religion. *See id.* at 2180 (quoting GA. CONST. art. LVI (1777) ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State"); MD. CONST. Declaration of Rights, art. XXXIII (1776) ("[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights"); N.H. CONST. art. I. § 5 (1784) ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace, or disturb others, in their religious worship."); N.Y. CONST. art. XXXVIII (1777) ("[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.")). Justice O'Connor concluded that the concept of free exercise was firmly embedded in several states prior to the adoption of the Bill of Rights and, similar to the status afforded freedom of speech, it "should be treated with the highest degree of respect." *City of Boerne*, 117 S. Ct. at 2182, 2185. Therefore, Justice O'Connor concluded that even though *Smith* provides a bright line rule that neutral laws of general applicability do not violate the Free Exercise Clause, the holding is contrary to the constitutional protections intended for the free exercise of religion. *See id.* at 2185.

196. *See infra* notes 197-98 and accompanying text. Justice Stevens filed a concurring opinion and Justice Scalia, joined by Justice Stevens, concurring in part.

197. *See City of Boerne*, 117 S. Ct. at 2172-76. Justice Scalia dissected the text of each of the historical examples put forth by O'Connor in support of her position. *See id.* at 2172-73. Justice Scalia noted that all of the free exercise enactments cited by the dissent were specifically targeted at laws which singled out religious practices. *See id.* at 2172 (stating that all of the examples used in the dissent provide protection against actions that are taken "for," "in respect of," "on account of," or "discriminatory" toward religion). Accordingly, Justice Scalia held that the early free exercise enactments were inapplicable to neutral, generally applicable laws, such as zoning laws. *See id.* Justice Scalia also pointed out that each of the enactments cited in the dissent contained restrictive language

however, an alternative and altogether different rationale—that RFRA violated the First Amendment in that it was a “law respecting an establishment of religion.”¹⁹⁸

IV. *CITY OF BOERNE V. FLORES*: AN APPROPRIATE LIMIT ON CONGRESS’S POWER

A. *Enforcement Has Its Limits*

RFRA’s invalidation, although having a significant impact on an individual’s right to freely exercise his religion, was narrowly decided by addressing the appropriate scope of the Enforcement Clause.¹⁹⁹ The majority properly limited its decision to Congress’s authority to enact RFRA because the merits of the free exercise argument in *City of Boerne* had been already addressed and decided in *Smith*.²⁰⁰ The *Smith* decision clearly held that a state does not need to demonstrate a compelling governmental interest to justify a neutral, generally applicable law.²⁰¹ Once the preliminary question of RFRA’s constitutionality was an-

demonstrating that an individual’s freedom to exercise religion was not absolute. *See id.* (stating that the “provisos” in the enactments forbid one to act in a manner “unfaithful to the Lord Proprietary” or “disturb[ing to] the public peace,” or interfering with the “peace [and] safety of th[e] State”).

198. *See id.* at 2172 (Stevens, J., concurring). Justice Stevens’s concurring opinion did not address the Enforcement Clause or the proportionality test put forth by the majority. *See id.* In a very brief opinion, he concluded that RFRA was a “law respecting an establishment of religion” and therefore violated the First Amendment. *Id.* Justice Stevens reasoned that even if RFRA’s enactment was within Congress’s power, it would not have provided relief from the city ordinance in *Boerne*, if the situation had been one where the city denied a building permit for a museum or an art gallery owned by an atheist. *See id.* Thus, according to Justice Stevens, RFRA provided religious organizations with a statutory entitlement to an exemption from a neutral law of general applicability. *See id.* He concluded that this exemption was an impermissible establishment of religion. *See id.*; *see also* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”). Justice Stevens’s concurrence illustrates the paradox created by the language of the First Amendment in that it forbids Congress from inhibiting the free exercise of religion while at the same time preventing Congress from favoring too heavily any particular religion. *Cf. City of Boerne*, 117 S. Ct. at 2172; *see also* NOWAK & ROTUNDA, *supra* note 7, § 17.1, at 1218 (discussing the “natural antagonism” between the Establishment Clause and the Free Exercise Clause).

199. *See City of Boerne*, 117 S. Ct. at 2172 (stating that although Congress’s power under the Enforcement Clause is broad, RFRA disrupts the separation of powers and the federal-state balance).

200. *See generally* *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872, 876-85 (1990) (discussing the meaning and scope of the Free Exercise Clause and whether it provides for an exemption from laws of general applicability).

201. *See id.* at 885, 879 (holding Oregon’s religion-neutral, generally applicable law banning the ingestion of peyote and denying unemployment benefits for violating that ban, did not require the State to justify the ban with a compelling governmental interest).

swered adversely for the Archbishop, the merits of his free exercise claim did not need to be addressed.²⁰² The question to be decided was whether the enforcement power under the Fourteenth Amendment enabled Congress to reinstate a level of judicial scrutiny, which had been previously ruled unconstitutional by the Court.²⁰³

Justice Kennedy's majority opinion was a textually sound interpretation of the Enforcement Clause.²⁰⁴ Justice Kennedy appropriately defined the scope of the Enforcement Clause within the overall structure of the Constitution by reiterating the long-standing axiom that the Federal Government is one of enumerated powers.²⁰⁵ Justice Kennedy duly noted that even though the Enforcement Clause "is 'a positive grant of legislative power' to Congress,"²⁰⁶ "it is not unlimited."²⁰⁷ Justice Kennedy observed that if a particular measure enacted under the enforcement power was substantive in nature rather than remedial, that measure

202. See *City of Boerne*, 117 S. Ct. at 2160 (stating RFRA's constitutionality and the Archbishop's reliance thereupon were the focus of the Supreme Court's review). After the *Smith* decision, and prior to the enactment of RFRA, the neutral, generally applicable zoning law at issue in *City of Boerne* would have passed the rational basis review mandated in *Smith*. Thus, without RFRA, the city would not have been required to justify its ordinance with a compelling interest and the Archbishop would not have had a successful argument for judicial relief.

203. See *id.* at 2172 (answering that the breadth of congressional enforcement power does not encompass the authority to act contrary to a previously issued judicial interpretation of the Constitution). Although the purpose of RFRA was to increase the level of protection for religious freedom, the means of achieving that end was to re-establish the compelling interest test articulated in *Sherbert*. See 42 U.S.C. §§ 2000bb - 2000bb-1 (1994).

204. See *City of Boerne*, 117 S. Ct. at 2164 (holding that the power to "enforce" a provision does not imply the authority to substantively change the meaning of the provision being enforced); see also *infra* note 215 and accompanying text (discussing the literal definition of the verb "enforce").

205. See *City of Boerne*, 117 S. Ct. at 2162 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). Justice Kennedy's analysis of the Enforcement Clause followed a long standing two-step process of judicial review by (1) determining whether the Congress's action was pursuant to a constitutional grant of power to the Federal Government, then (2) determining whether the action violated another limit on federal power located elsewhere in the Constitution. See NOWAK & ROTUNDA, *supra* note 7, § 3.1, at 118. In *City of Boerne*, RFRA failed the first prong of this analysis because the statute went beyond enforcing the Fourteenth Amendment. Cf. *City of Boerne*, 117 S. Ct. at 2160 (concluding RFRA exceeded Congress's power). RFRA violated the second prong of this analysis because the separation of powers and federal-state balance principles provided for elsewhere in the Constitution do not permit Congress to redefine the scope of the Fourteenth Amendment. See *id.* at 2172 (stating that each branch of government must respect "the proper actions and determinations of the other branches").

206. *City of Boerne*, 117 S. Ct. at 2163 (quoting *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

207. See *id.* (quoting *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

would essentially create a new enumerated power.²⁰⁸ The majority acknowledged that the difference between a substantive change and remedial measure is not always easy to discern.²⁰⁹ As a result, the Court provided a workable proportionality test to determine whether congruence and proportionality existed between “the injury to be prevented or remedied and the means adopted to that end.”²¹⁰

The Court correctly held that a legislative measure cannot be considered remedial or preventative if the measure lacks a congruence and proportionality between the injury to be remedied and the means chosen to achieve the desired end.²¹¹ This requirement is appropriate because without congruence and proportionality between the means and ends, a measure would be necessarily breaking new ground by changing the substantive scope of the Fourteenth Amendment.²¹² The Fourteenth Amendment was specifically enacted to protect individuals against the power of the States.²¹³ Further, the Enforcement Clause grants Congress the power “to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].”²¹⁴ Intuitively, the majority properly held that RFRA cannot be “enforcing” the provisions of the Fourteenth Amendment unless RFRA in fact remedied or prevented unconstitutional violations of that Amendment.²¹⁵

In determining the appropriate limits of the Enforcement Clause, a

208. *See id.* at 2164 (stating that if Congress were given “the power to determine what constitutes a constitutional violation . . . [it] would no longer be [enforcing] . . . ‘the provisions of [the Fourteenth Amendment.]’” *Compare id.* at 2164 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)) (holding the enforcement power is limited to remedial measures), with *City of Boerne*, 117 S. Ct. at 2176 (O’Connor, J., dissenting) (agreeing with the majority’s analysis of the scope of the Enforcement Clause).

209. *See City of Boerne*, 117 S. Ct. at 2164.

210. *Id.*

211. *See id.*

212. *See id.*; *see also supra* note 165 and accompanying text (discussing the formal logic employed by Justice Kennedy in confirming his definition of the Enforcement Clause); *infra* note 215 and accompanying text (providing the formal definition of enforcement). By way of explaining the enforcement/substantive distinction, a police officer enforces the speed limit by ticketing a driver traveling 60 m.p.h. in a 45 m.p.h. zone; an officer substantively lowers the speed limit by ticketing a driver going 40 m.p.h. in the same location.

213. *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; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added).

214. *Id.* amend. XIV, § 5.

215. *See City of Boerne*, 117 S. Ct. at 2170. The definition of the word “enforce” implies that there is something already in place to enforce or buttress. *See* WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 412 (1983) (defining “enforce” as “to give force to” or “to carry out effectively”).

distinction can be drawn between RFRA's attempt to regulate laws that have a discriminatory effect on religious freedom without necessarily a discriminatory purpose, and the election laws at issue in *City of Rome*.²¹⁶ In *City of Rome*, the Court upheld the constitutionality of the Voting Rights Act of 1965.²¹⁷ The Court held that the enforcement power was broad enough to regulate laws discriminatory in effect even if the aim of the Fifteenth Amendment was only to guard against purposeful discrimination.²¹⁸ In *City of Boerne*, however, the Court held that RFRA failed the proportionality test partially because it regulated laws that did not evidence intentional discrimination, but which nonetheless had a discriminatory effect.²¹⁹ This change in rationale indicates the Court's willingness to curtail the expansive breadth of the enforcement power articulated in *Rome*.²²⁰

Ultimately, the Court properly determined that RFRA's scope made it a substantive law rather than a remedial one, as determined by the proportionality test.²²¹ RFRA was not a proportional remedy because its sweeping scope did not correct a specific law or injustice nor was it directed at a particular level of government or region of the country with a history of religious discrimination.²²² A history of racial discrimination is a permissible justification for remedial or preventive congressional action.²²³ Moreover, although not specifically part of the Court's rationale,

216. See *supra* note 185 and accompanying text (discussing the Court's expansion of the enforcement power to cover discriminatory effects without discriminatory purpose).

217. See *City of Rome v. United States*, 446 U.S. 156, 159, 177 (1980).

218. See *id.* at 177.

219. See *City of Boerne*, 117 S. Ct. at 2171; see also *supra* notes 179-81 and accompanying text (discussing the reasons RFRA lacked "congruence and proportionality").

220. Compare *City of Boerne*, 117 S. Ct. at 2170 (noting that most of the "state laws to which RFRA applies are not ones which will have been motivated by religious bigotry"), with *City of Rome*, 446 U.S. at 177 (holding that the mere "risk of purposeful discrimination . . . was [sufficient] to prohibit changes that have a discriminatory impact") (emphasis added). The Court in *City of Rome* broadened its application of the Enforcement Clause beyond purposeful discrimination to laws that risked being discriminatory. See *City of Rome*, 446 U.S. at 158. The Court upheld the Voting Rights Act because it noted that Congress could have rationally concluded that demonstrated past discrimination amounted to a sufficient risk of purposeful discrimination. See *id.* This is a somewhat dubious finding due to the fact that the city of Rome demonstrated at the trial level that it had not racially discriminated against voters in over 17 years. See *id.* at 195 (Powell, J., dissenting).

221. See *City of Boerne*, 117 S. Ct. at 2170.

222. See *supra* note 134 and accompanying text (outlining RFRA's provisions and purposes).

223. See *City of Rome*, 446 U.S. at 182 (stating that "statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination"); *Mitchell*, 400 U.S. at 132 ("In enacting the literacy test ban . . . Congress had before it a long history of

RFRA's application to federal legislation²²⁴ is arguably an overbroad use of the Fourteenth Amendment because the Fourteenth Amendment is only applicable against the states.²²⁵

B. *The Dissent: An Ineffective Response*

Justice O'Connor used her dissent in *City of Boerne* to reargue the merits of the *Smith* decision.²²⁶ In fact, Justice O'Connor agreed with the majority's interpretation of the scope of the Enforcement Clause and the use of the proportionality test to determine when a law is substantive rather than remedial.²²⁷ Justice O'Connor held, however, that the majority's holding in *City of Boerne* is premised on the assumption that *Smith* provided a proper interpretation of the constitutional right to free exercise.²²⁸

The weakness in Justice O'Connor's argument, illuminated by Justice Scalia, is her misguided reliance on the legislative history of the Free Ex-

the discriminatory use of literacy tests to disfranchise voters on account of their race.") (opinion of Black, J.); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ("The constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience. . . it reflects.").

224. See 42 U.S.C. § 2000bb-3 (1994). RFRA states in relevant part:

Applicability

In General

This [Act] applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

Rule of Construction

Federal statutory law adopted after November 16, 1993, is subject to this [Act] unless such law explicitly excludes such application by reference to this [Act].

Id.

225. For an interesting argument that RFRA is unconstitutional because it encompasses federal legislation, and the Fourteenth Amendment is specifically limited to state action, see Hamilton, *supra* note 21, at 372-375. Hamilton's argument relied on Justice O'Connor's dissent in *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 605-06 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (stating that to the extent that *Metro Broadcasting* is inconsistent with the holding that racial classifications by federal, state, or local governmental actors must be subject to strict scrutiny, it is overruled), where she points out that the language of the Fourteenth Amendment limits its applicability explicitly to state action. See *id.* at 372-73. Hamilton also notes that an early draft of the Fourteenth Amendment provided: "No discrimination shall be made by any State, *nor by the United States*, as to the civil rights of persons because of race, color, or previous condition of servitude." See *id.* at 374. As evidenced by the current language of the amendment, however, the reference to the United States was removed prior to ratification. See *id.*

226. See *City of Boerne*, 117 S. Ct. at 2176-79, 2185.

227. See *id.*

228. See *id.* at 2176.

ercise Clause.²²⁹ Every historical example cited in Justice O'Connor's dissent, in an effort to show the strong foundation of the meaning of "free exercise" at the time of ratification of the Bill of Rights, contained a provision limiting the scope of the phrase.²³⁰ The common thread throughout each of the enactments providing for the right to free exercise of religion is that each stopped short of granting an unlimited right to free exercise.²³¹ Each example provided for a right to practice one's religion as long as that practice did not violate other civil laws.²³² Although Justice O'Connor argued that RFRA was constitutional because *Smith* was wrongly decided, her historical citations supported *Smith* by demonstrating that general societal laws have always limited the free exercise of religion.²³³

Justice O'Connor inadequately considered the separation of powers and the federal structure provided for in the Constitution.²³⁴ Her dissent placed the right to free exercise above a state's ability to enact neutral, generally applicable laws pursuant to its police power and above the judiciary's role as the supreme interpreter of the Constitution.²³⁵ Her ar-

229. See *id.* at 2172-74 (Scalia, J., concurring) (illustrating that each free exercise provision relied on by Justice O'Connor in her dissent contained a clause stating that the right to free exercise of religion is limited by an individual's duty to obey societal laws).

230. See *id.* at 2179-81.

231. See *id.*

232. See *id.*

233. See *supra* note 197 and accompanying text (discussing Justice Scalia's critique of Justice O'Connor's "misguided" argument).

234. For a detailed look at the RFRA's unconstitutionality based on a separation of powers argument, see Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 13-30 (1995). Professor Brant argues that RFRA is unconstitutional because Congress did not honor the Court's declaration of the its own limitations in *Smith*. See *id.* at 6. Brant argues that *Smith* was decided on "institutional competence" grounds, that is, the Court held that the judiciary was ill-equipped to determine the necessity for religious exemptions from civil laws. See *id.* at 22-23.

For a strong argument in support of RFRA's unconstitutionality based on federalism grounds, see Kruse, *supra* note 17, at 426-30. Kruse develops a thorough review of modern Tenth Amendment jurisprudence, and concludes that RFRA was an unconstitutional violation of state sovereignty. See *id.* at 408-30.

235. See *City of Boerne*, 117 S. Ct. at 2177. Although not specifically mentioned in the Constitution, Chief Justice Marshall articulated the meaning of the states' "police power" as follows: "[T]hat immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all of which can be most advantageously exercised by the States themselves." See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 203 (1824).

Admittedly, Justice O'Connor disagreed with the rationale in *Smith*. See *City of Boerne*, 117 S. Ct. at 2176. Her opinion, however, failed to adequately address the fact that Congress directly overturned a Supreme Court decision. Following her dissent, one is left to

gument is not compelling enough to undue these two long-standing canons of our country's constitutional jurisprudence.

C. *The Constitution Must Not Be Ignored*

In determining the correctness of the decision in *City of Boerne*, it is helpful to examine the possibility of an alternate holding. The dissent's approach advocates the popular position that government should not unreasonably burden religious practices even through general nondiscriminatory laws.²³⁶ If, however, the Court allowed strict scrutiny to be applied to any law that substantially burdens religious expression, the Court would be faced with an unworkable task. Because courts are ill-equipped to determine the "centrality" of an individual's religious beliefs, this would allow almost any religious expression to effectively nullify nearly any law in its applicability to particular citizens.²³⁷

The Court's willingness to examine the alternative possibility that RFRA, if left in place, would have allowed practically limitless invalidation of generally applicable laws is reminiscent of a similar rationale put forth in *United States v. Lopez*.²³⁸ In *Lopez*, the Court considered the possibility that upholding the Gun-Free School Zones Act under the Commerce Clause would endorse almost limitless federal power, even in areas such as criminal law enforcement.²³⁹ Following this rationale, if RFRA were upheld under the Enforcement Clause, Congress would in effect be prohibiting the states from regulating the criminal and non-criminal activity of citizens who claimed particular laws infringed upon their free exercise rights.²⁴⁰

City of Boerne, however, deals also with an important issue aside from the interplay between state authority and freedom of religion. *City of Boerne* directly addresses whether Congress can overrule the Supreme

assume that Congress has a veto power over the Court.

236. See *City of Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).

237. See *Employment Div., Dep't of Human Serv. v. Smith*, 494 U.S. 872, 887-88 (1990). The Court reaffirmed that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 887 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). Therefore, because courts cannot determine centrality, the compelling interest test would have to be applied uniformly resulting in "constitutionally required religious exemptions from civic obligations of almost every conceivable kind." See *id.* at 888.

238. 514 U.S. 549, 564 (1995) (stating if the Court "were to accept the Government's arguments, . . . [the Court would be] hard pressed to posit any activity by an individual that Congress is without power to regulate").

239. See *id.* at 551, 564.

240. See *City of Boerne*, 117 S. Ct. at 2171 (concluding that RFRA infringes too much upon states' general regulatory power).

Court's interpretation of the Constitution.²⁴¹ Such an infringement is simply impermissible under the separation of powers doctrine mandated by the Constitution.²⁴² Permitting congressional review of Supreme Court decisions would be an unacceptable violation of the Constitution's requirement of separation of powers²⁴³ and the doctrine of judicial review²⁴⁴ established by Chief Justice Marshall in *Marbury v. Madison*.²⁴⁵ To permit RFRA's congressional reinterpretation of the Court's definition of free exercise, as put forth in *Smith*, would be to redistribute the separation of force, will, and judgment articulated by Alexander Hamilton in the Federalist Papers.²⁴⁶ The decision in *City of Boerne* is an ap-

241. See *City of Boerne*, 117 S. Ct. at 2172.

242. See U.S. CONST. art. III, §§ 1-2. "The judicial Power of the United States, shall be vested in one supreme Court . . ." *Id.* art. III, § 1. The judiciary is charged with resolving all cases and controversies "arising under th[e] Constitution, [and] the Laws of the United States." *Id.*, art. III., § 2. It is the province of the judiciary to say what the law is. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In *City of Boerne*, the Court stated that "experience teaches that the Constitution is preserved best when each part of government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne*, 117 S. Ct. at 2172. The separation of powers refers to the partition of powers between the legislative, executive, and judicial branches of the Federal Government, as set forth in the Constitution. See U.S. CONST. art. I (granting all enumerated legislative powers of the Federal Government to the Congress); *id.* art. II (vesting all executive powers of the Federal Government in the President); *id.* art. III (vesting the judicial power of the Federal Government in one Supreme Court and in other inferior courts that may be established by Congress).

243. Scholars have also held that it is beyond the constitutional authority of Congress to reverse the Court in matters of judicial competence. See *Brant*, *supra* note 234, at 21.

244. Judicial review is the often controversial notion that the Supreme Court of the United States has the power to declare laws unconstitutional. See GUNTHER & SULLIVAN, *supra* note 7, at 13 (describing the controversy as to whether the judicial review asserted by Chief Justice Marshall in *Marbury* was a usurpation of power). Judge Learned Hand makes a notable argument that judicial review is a mere interpolation of the text of the Constitution. See *id.* at 18. Professor Wechsler, on the other hand, finds textual support for judicial review in the Supremacy Clause of Article IV and in Article III. See *id.*

245. See *Marbury*, 5 U.S. (1 Cranch) at 177. Chief Justice Marshall articulated the existence of judicial review by examining first whether William Marbury indeed had a right to assert. See *id.* at 154-62. Second, after Marshall determined that Marbury did indeed have a right to his judicial appointment, Marshall explored whether a remedy existed for Marbury. See *id.* at 162-68. Ultimately, Marshall assumed that it was the duty of the judiciary to resolve conflicts between laws enacted by Congress and the written Constitution. See *id.* at 177. Probably the strongest historical antecedent supporting Marshall's vision of judicial review are the words of Alexander Hamilton who wrote, "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment." See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (J. Cooke, ed. 1961).

246. See THE FEDERALIST NO. 78, at 522-23 (Alexander Hamilton) (J. Cooke ed., 1961).

propriate and necessary assertion of judicial authority over Congress.²⁴⁷

V. CANCELING THE BLANK CHECK: THE COURT RESTRICTS CONGRESSIONAL AUTHORITY

City of Boerne is the most recent addition to an expanding collection of Supreme Court decisions that are depleting the traditionally vast reservoirs of congressional authority.²⁴⁸ The decision in *City of Boerne* was necessary to maintain the separation of powers because nothing in the Constitution allows Congress to substitute its interpretation of the Constitution for that of the Supreme Court's, particularly after the Court has decided a specific controversy.²⁴⁹ If Congress wants to ensure greater protection of the right to the free exercise of religion, it must follow the strictures of the Constitution by creating an amendment.²⁵⁰

Congress's attempts to broaden its reach by expanding the scope of its enumerated powers²⁵¹ have initiated this trend in Supreme Court jurisprudence reining in congressional excess.²⁵² Although some of Congress's motives may seem altruistic,²⁵³ the internal limits of the Enforce-

247. See *United States v. Bird*, 124 F.3d 667, 685, 691 (5th Cir. 1997) (DeMoss, J., dissenting) (supporting a renewed attention to constitutional limits on the powers of the Federal Government, a return to the role of federalism in constitutional analysis, and increased respect for the separation of powers), *cert. denied*, *U.S.* , 118 S. Ct. 1189 (1998).

248. See *supra* note 23 and accompanying text (discussing Supreme Court decisions that curtail congressional commerce power).

249. The judicial power extends to all cases and controversies. See U.S. CONST. art. III, § 2. The Court has articulated that the Constitution is best preserved when each branch of government respects the determinations of the other branches. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997). In *City of Boerne*, the Court reiterated that the Judicial Branch is responsible for interpreting the Constitution and saying what the law is. See *id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The *City of Boerne* Court went further by stating that *stare decisis* binds the Court to follow its precedents and not subsequent congressional actions contrary to its decisions. See *id.*

250. See U.S. CONST. art. V. In fact the decision in *City of Boerne* has prompted new debate over a proposed Religious Freedom Amendment. Rep. Ernest Istook, R-Okla., has renewed his effort to enact the following amendment: "The people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed." Lisa Clagett Weintraub, "Religious Freedom" *Debate Renewed*, Congressional Quarterly's Washington Alert, May 8, 1997.

251. See *supra* note 17 and accompanying text (discussing expansive congressional legislation enacted under the Enforcement and Commerce Clauses).

252. See *supra* note 23 and accompanying text (discussing Supreme Court decisions limiting Congress's power in historically deferential areas such as the Commerce Clause, the Tenth Amendment, and the Enforcement Clause); see also *supra* note 17 and accompanying text (presenting some of the specific congressional enactments which led to this restrictive judicial trend).

253. See Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A)-(B) (1994) (prohibiting possession of firearms within a school zone); Brady Handgun Violence Pre-

ment and Commerce Clauses, along with the explicit restrictions of the Tenth Amendment, cannot be ignored.²⁵⁴ Congress remains an elected body, subject to the will, and potentially the tyranny, of the majority,²⁵⁵ and thus should not be granted leeway merely because it appears to be protecting rather than attacking a constitutional right.²⁵⁶ The Constitution supports this position with explicit language prohibiting Congress from involving itself in matters of religion.²⁵⁷

vention Act, Pub. L. 103-159, 107 Stat. 1536 (1993) (commanding state and local law enforcement officials to conduct background checks on prospective handgun purchasers).

254. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined, and limited; and that those [sic] limits may not be mistaken [sic], or forgotten, the constitution [sic] is written.”); see also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (stating that the best way to preserve the Constitution is for each branch of government to honor the respective roles of the other branches). In *City of Boerne*, the Court held that Congress may not substitute congressional interpretation of the Constitution for that of the Court because it is the Judicial Branch that has the duty to say what the law is. See *id.* The Court’s decisions in *Printz* and *Lopez* illustrate the recent Supreme Court trend of restricting Congress’s overbroad interpretations of its own powers. See *supra* note 23 and accompanying text. In *New York v. United States*, the Court recognized that the expansive powers granted to Congress through the Commerce Clause are still subject to the limits of the Tenth Amendment. See *New York v. United States*, 505 U.S. 144, 156-57 (1992). The *New York* Court specified that the Commerce Clause authorizes Congress to directly regulate commerce, however, it does not permit Congress to dictate how state governments should regulate commerce. See *id.* at 166; see also Kruse, *supra* note 17, at 426 (quoting Memorandum of Law in Support of State Defendant’s Motion to Dismiss at 47, *Muhammad v. Coughlin*, 91 Civ. 6333 (S.D.N.Y. July 1994) as stating “RFRA impermissibly requires the States to exercise their basic police powers in a manner consistent with Congress’ view of wise public policy. If the Tenth Amendment means anything, it means that Congress may not force the States to act as its satellite and carry out its unstructured legislative goals.”).

255. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 114-22 (Richard D. Heffner ed., New American Library 1984). Alexis de Tocqueville wrote eloquently about the “tyranny of the majority” in the United States after visiting from France in 1831-32. See *id.* at 9. *Democracy in America* is an important work in understanding the necessity of having limits on congressional power.

Professor Hamilton also puts forth a strong argument as to why Congress is not the appropriate protector of individual liberties. See Hamilton, *supra* note 21, at 396-97. Hamilton writes that institutionally speaking, Congress, as opposed to the judiciary, is particularly inclined to be negligent of individual liberties. See *id.* She aptly argues that Congress’s national, result-oriented focus makes it ill-equipped to consider adequately individual’s needs which are not pertinent to the nation as a whole, or those needs which may be out of the mainstream. See *id.* Alternatively, Hamilton states that due to the judiciary’s duty to handle cases and controversies, courts focus narrowly upon individuals whose freedoms have been affected by comprehensive legislation. See *id.* at 397.

256. See Hamilton, *supra* note 21, at 378-86 (stating that Congress, through sophisticated drafting and political rhetoric, can be repressive while appearing to protect liberty, and “if one is willing to lower the enumerated power barrier for Congress when it is attempting to improve on liberties, an immediate line-drawing problem arises”).

257. See U.S. CONST. amend. I (“Congress” shall not establish, nor prohibit the free exercise of religion); see also Jay S. Bybee, *Taking Liberties With the First Amendment*:

Recognition of this restrictive trend in Supreme Court jurisprudence toward Congress was noted soon after the Court's decision in *New York v. United States*.²⁵⁸ There was some conjecture among constitutional scholars that the decision in *New York* suggested that a majority of Justices may possess a willingness to give states immunity from generally applicable laws that constitute a severe burden on the state's ability to perform traditional functions.²⁵⁹ There is now speculation that this trend will lead to the invalidation of other laws enacted under the Enforcement Clause, such as the Freedom of Access to Clinic Entrances Act (FACE).²⁶⁰

This restrictive trend is evident in three distinct areas of Supreme Court jurisprudence: the Commerce Clause,²⁶¹ the Tenth Amendment,²⁶² and the Enforcement Clause of the Fourteenth Amendment.²⁶³ Although this movement by the Court is most clearly apparent in the Court's decisions circumscribing Congress's historically broad-based Commerce Clause authority,²⁶⁴ the trend is also plainly apparent in the Court's willingness to revitalize the Tenth Amendment.²⁶⁵ With the addition of *City of Boerne*, it is reasonable to assume that this restrictive trend has expanded to the Enforcement Clause as well. Taken together, this marks a significant reduction in congressional power. Congress may no longer ignore the strictures of the Tenth Amendment and pass practically any

Congress, Section 5, and the Religious Freedom Restoration Act, 48 VAND. L. REV. 1539, 1628-29 (1995). Bybee makes a cogent point that the First Amendment is specifically restrictive of Congress, rather than generally restrictive of the Federal Government. *See id.* at 1628. Bybee also argues that Congress's section 5 power does not supersede its First Amendment limitations. *See id.* at 1628-29. In other words, the Enforcement Clause only permits enforcement of those rights incorporated into the Fourteenth Amendment, assuming *arguendo* that the Fourteenth Amendment does incorporate First Amendment rights, Congress is still left without authority to act. *See id.* This leaves the federal judiciary as the appropriate branch of the Federal Government to determine the level of protection to be afforded to the free exercise of religion. *See id.*

258. 505 U.S. 144 (1992); *see also* NOWAK & ROTUNDA, *supra* note 7, at 170 (questioning whether the decision in *New York* might indicate the Court's willingness to protect the states from burdensome generally applicable federal legislation).

259. *See* NOWAK & ROTUNDA, *supra* note 7, at 170.

260. *See* *United States v. Bird*, 124 F.3d 667, 685, 691 (5th Cir. 1998) (DeMoss, J., dissenting) (asserting that FACE violates the Enforcement Clause as defined in *City of Boerne*), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1189 (1998).

261. *See* discussion *supra* Part I.

262. *See id.*

263. *See* discussion *supra* Part II.

264. *See supra* note 23 and accompanying text (discussing the Court's decisions in *Printz v. United States*, *United States v. Lopez*, and *New York v. United States*).

265. *See* Kruse, *supra* note 17, at 426-30 (discussing the Court's strengthening of the Tenth Amendment with its decisions in *Garcia v. San Antonio Metropolitan Transit Authority*, *New York v. United States*, and *Gregory v. Aschcroft*).

form of legislation under the justification that the activity to be regulated affects interstate commerce.²⁶⁶ The decision in *City of Boerne* suggests that with the doors of the Commerce Clause and the Tenth Amendment closing, Congress will not be able to turn to the Enforcement Clause as an escape. The Court has made it clear with *City of Boerne* that the Enforcement Clause will be limited to those congressional actions that “enforce” the protections already guaranteed by the Fourteenth Amendment, and will not allow Congress to make substantive changes in those protections merely by claiming its actions are *appropriate legislation*.²⁶⁷

After the Court’s decision in *City of Boerne*, it remains permissible, although not required, for states to provide religious exemptions to neutral laws of general applicability.²⁶⁸ If religious exemptions are not granted, this may in fact disadvantage religious practices that do not enjoy wide support.²⁶⁹ The alternative, however, is unacceptable uncertainty. Although tempting, convenience or good intentions should never be a justification for violating constitutional mandates. The Constitution is flexible and may be interpreted, but it should not be changed at the will of an elected body.²⁷⁰

VI. CONCLUSION

The decision in *City of Boerne* is a step in the right direction. By keeping Congress’s authority under the Enforcement Clause in check, the Court maintained the separation of powers between the legislature and the judiciary, and the balance of power between the Federal Government and the States. By enforcing the Enforcement Clause, the Court has added a third prong to its trend toward closer regulation of congressional action. A constrained commerce power, a stronger Tenth Amendment, and an Enforcement Clause strictly confined to remedial measures provides three separate methods for the Court to rein in Con-

266. See *supra* note 23 and accompanying text (discussing the modern limits of the Commerce Clause).

267. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997) (stating that legislation that alters the substantive protections of the Fourteenth Amendment cannot be said to be “enforcing” the Amendment).

268. See *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872, 890 (1990).

269. See *id.*; see also *Bybee, supra* note 257, at 1631. Bybee postulates that *Smith*, prior to the enactment of RFRA, does not necessarily mean greater restrictions on the free exercise of religion. See *id.* Bybee states that the Court’s position in *Smith*, assures less interference with state laws, which allows the states to protect religious freedom under their own constitutions. See *id.*

270. See *supra* note 255 and accompanying text (discussing de Tocqueville’s warnings against an unchecked majority).

gress. The decision in *City of Boerne* permits the States to preserve their ability to legislate for the health and welfare of their citizens under the constitutionally reserved police powers. More importantly, however, *City of Boerne* sustains the Supreme Court's role as arbitrator of all cases and controversies and as ultimate interpreter of the Constitution.