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LOSING OUR RELIGION: THE CONSTITUTIONALITY OF THE RELIGIOUS FREEDOM RESTORATION ACT PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT

INTRODUCTION

There is a holy war being waged in this country. It is a war being fought not with the sword, but with the pen, and at stake is nothing less than one of the most sacred rights guaranteed by our Constitution, the free exercise of religion.¹ For years, the Supreme Court was the main source of guidance for interpreting the Free Exercise Clause. In 1963, in *Sherbert v. Verner*,² a case involving the denial of unemployment benefits to a person who refused to work on Saturday because of her religious beliefs, the Court held that any substantial burden to an individual's religious exercise had to be justified by a compelling state interest. After *Sherbert*, the compelling interest test applied to generally applicable laws that had the incidental effect of burdening religious exercise. With *Sherbert*, the judicial branch undertook to oversee and protect religious freedom, guaranteeing that religious freedom would be protected by the highest constitutional standard. It was unnecessary, and would have been superfluous, for Congress to act with respect to protecting religious freedom. Congress never acted, therefore, and the First Amendment's sacred guarantee appeared safe. Almost thirty years after *Sherbert* was decided, however, in a decision that dealt a devastating blow to religious freedom, the Supreme Court destroyed the substance of the Free Exercise Clause.

In *Employment Division, Department of Human Resources of Oregon v. Smith*,³ the Supreme Court overruled *Sherbert* and the long line of cases that followed its rule. The Court upheld the con-

¹ The right to the free exercise of religion is guaranteed under the Free Exercise Clause of the Constitution. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .").

² 374 U.S. 398 (1963).

³ 494 U.S. 872 (1990).

stitutionality of an Oregon law that criminalized the use of peyote⁴ and had the "incidental" effect of depriving two Native American workers of unemployment benefits because of their religious use of small quantities of the drug.⁵ In addition, although the issue was not addressed by the parties, the Court held *sua sponte* that the *Sherbert* compelling interest test no longer applied to a neutral law of general applicability even if the effect of the law was to burden one's religious exercise.⁶ In so holding, the Court struck down the requirement that government justify laws facially neutral towards religion that have the incidental effect of substantially burdening religious freedom by a compelling state interest. Further diluting the *Sherbert* line of cases, the Court did not even require that an incidental burden to religious freedom meet an intermediate scrutiny test, a lesser, but still heightened, standard of constitutional protection. Rather, after *Smith*, the Court would uphold any generally applicable law that had an incidental burden on religious freedom as long as the Court was satisfied that the law was a rational means of protecting a legitimate government objective.⁷

The *Smith* decision was vehemently criticized by impassioned commentators.⁸ However, no reaction to the decision was more

⁴ Peyote was described as "that plant of the genus *Lophophora* commonly known as peyote [having narcotic properties]" under OR. REV. STAT. § 475.992(5) (1997).

⁵ 494 U.S. at 874.

⁶ *Id.* at 884-85.

⁷ See *Religious Freedom Restoration Act of 1990: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 27, 28 (1990) (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) ("[Protection of religious freedom] wasn't demoted just to the next lower or intermediate stage of requiring an important State interest to trump it, but demoted all the way down to the level of those interests that are not protected by the Bill of Rights where the Government need show only a rational means to protect the legitimate end of government.").

⁸ See, e.g., Robert A. Destro, "By What Right?: The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters 'Touching Religion,'" 29 IND. L. REV. 1, 4 (1995) ("Almost immediately, it became an article of faith among most advocates of religious liberty that *Smith* was wrongly decided and that the rule announced in the case should not be followed.") (citing Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-33 (1991) (stating that the *Smith* decision resulted in "the virtual abandonment of the Free Exercise Clause," "reach[ing] a low point in modern constitutional protection under the Free Exercise Clause," and "leav[ing] the Free Exercise Clause without independent constitutional content and thus, for practical purposes, largely meaningless"); Wendy S. Whitbeck, Note, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 821-22 (1994) (stating that the *Smith* decision had "been variously described as an embarrassment, a sweeping disaster for religious liberty, and a dastardly

impacting than that of Congress, which immediately undertook to remedy the situation. The first bill in response to *Smith* was introduced soon after the case was decided.⁹ Several versions later, Congress agreed on the correct response when, in 1993, it passed the Religious Freedom Restoration Act ("RFRA"),¹⁰ a law that had

and unprovoked attack on our first [amendment] freedom.") (internal quotation marks and citations omitted).

⁹ In 1990, Rep. Stephen Solarz introduced the first version of the Religious Freedom Restoration Act.

¹⁰ Relevant sections of RFRA are set forth in full below:

42 U.S.C. § 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that:

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
- (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards 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.

(b) 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.

42 U.S.C. § 2000bb-1. Free exercise of religion protected

(a) In general

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

(b) Exception

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

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

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim

the express purpose "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."¹¹ Under RFRA, the compelling interest test again applied to generally applicable laws that had the incidental effect of burdening religious freedom.

As decisive as Congress' reaction to *Smith* appeared to be, so too was the reaction of the Supreme Court to the passage of RFRA. In *City of Boerne v. Flores*,¹² the Court struck down the statute. Once again, the Supreme Court effectively removed the highest standard of constitutional protection from one of the most important freedoms guaranteed by the Constitution.

Part I of this comment provides a recent history of free exercise jurisprudence, focusing on the *Sherbert* and *Smith* decisions and Congress' enactment of RFRA. Part II discusses *Boerne* and the facts that gave rise to the decision. Part III analyzes the Supreme Court's decision in *Boerne* and suggests an alternative approach to determining the reach of Congress' power to enact RFRA. This Part argues that Congress' remedial power to expand constitutional rights, the separation of powers doctrine and the Supreme Court's self-imposed principle of judicial restraint caution against limiting Congress' power to enact RFRA under section 5 of the Fourteenth Amendment.¹³ Where Congress has exercised its legislative powers and determined that protection is needed for a constitutional right and the Court has refused to provide that protection, Congress should have the power to act accordingly.

I. A RECENT HISTORY OF FREE EXERCISE JURISPRUDENCE

A. *Sherbert v. Verner* and the Effect of the Compelling Interest Test on the Free Exercise Clause

*Sherbert v. Verner*¹⁴ marked the first time that the Supreme Court applied the compelling interest test to a Free Exercise Clause challenge to a generally applicable law. The Court held that the

or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. §§ 2000bb, 2000bb-1 (1994).

¹¹ 42 U.S.C. § 2000bb(b)(1) (1994).

¹² 117 S. Ct. 2157 (1997).

¹³ U.S. CONST. amend. XIV, § 5.

¹⁴ 374 U.S. 398 (1963).

South Carolina Unemployment Compensation Act,¹⁵ a law facially neutral towards religion, was nonetheless unconstitutional because it had the incidental effect of denying unemployment benefits to a person who refused to work on a Saturday because of her religious beliefs.¹⁶ The challenged law conditioned a person's receipt of unemployment benefits on being "able to work and [being] available for work."¹⁷ Further, the law stated that a person is ineligible for benefits "[i]f the Commission finds that he has failed, without good cause . . . to accept available suitable work when offered to him by the employment office or an employer"¹⁸ The South Carolina Employment Security Commission found that the claimant's refusal to work on Saturday because of her religious beliefs did not constitute "good cause."¹⁹ The decision of the Commission was upheld by the South Carolina Supreme Court.²⁰

The case reached the United States Supreme Court where Justice Brennan, delivering the majority opinion, firmly stated at the outset of his decision, that

[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. . . . Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views.²¹

In analyzing the constitutionality of the South Carolina law, the Court stated that if the law was to survive appellant's challenge, "it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest

¹⁵ S.C. CODE ANN. § 41-35-120 (Law. Co-op. 1986).

¹⁶ 374 U.S. at 399. The appellant in the case was a member of the Seventh-day Adventist Church and was discharged by her employer because she would not work on Saturday, the holy day of her faith. She was unable to obtain further employment because she refused to take Saturday work.

¹⁷ S.C. CODE ANN. § 41-35-120(3).

¹⁸ S.C. CODE ANN. § 41-35-120(3).

¹⁹ 374 U.S. at 401.

²⁰ *Sherbert v. Verner*, 125 S.E.2d 737, 746 (S.C. 1962), *rev'd* 374 U.S. 398 (1963) (holding that the claimant's religious liberties were not unconstitutionally infringed upon because the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.").

²¹ 374 U.S. at 402 (citations omitted) (emphasis in original).

in the regulation of a subject within the State's constitutional power to regulate."²² The Court found that the South Carolina law did infringe on appellant's free exercise rights because it "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."²³ The Court stated that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."²⁴

Considering the question of whether some compelling state interest justified the burden imposed on appellant, the Court stated that, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"²⁵ The State claimed that there was a possibility that the filing of fraudulent claims by merchants claiming religious objection to Saturday work might dilute the unemployment compensation fund and hinder the scheduling by employers of necessary Saturday work.²⁶ The Court rejected this contention as a viable justification for infringing on appellant's First Amendment rights.²⁷

For the next twenty-seven years, the *Sherbert* compelling interest test proved to be "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."²⁸ It gave substance to the Free Exercise Clause. It allowed courts to weigh competing interests and determine the importance of such interests; but it did not render all laws invalid. Courts were able to recognize laws that were of such great importance that even First Amendment rights had to be compromised.

²² 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

²³ 374 U.S. at 404.

²⁴ *Id.*

²⁵ *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

²⁶ 374 U.S. at 407.

²⁷ *Id.* The Court held that it did not have to consider the state's claim because it was not raised in the courts below. The Court further stated, however, that if such a claim had been an issue on appeal, "it is highly doubtful whether such evidence [of false claims] would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*

²⁸ 42 U.S.C. § 2000bb(a)(5) (1994).

1. Cases In Which The Supreme Court Upheld Laws Challenged On Free Exercise Grounds

The Supreme Court, on several occasions, has upheld, in the face of free exercise challenges, the constitutionality of laws that involve maintenance of the military. In *Gillette v. United States*,²⁹ the Court heard two cases in which individuals claimed, among other things, that Congress interfered with their free exercise rights by conscripting them for the Vietnam War, which they claimed to oppose on religious grounds. The Court analyzed the relevant statute under the compelling interest test and determined that any incidental burden to a person's religious beliefs was far outweighed by the government's substantial interest in procuring the manpower necessary to sustain the military.³⁰

In a similar case, *Johnson v. Robison*,³¹ the Court analyzed certain portions of the Veterans Readjustment Benefits Act of 1966,³² an act that allegedly violated the petitioner's free exercise rights. The religion-neutral statute had the incidental effect of denying the petitioner educational benefits under the Act because he was a conscientious objector who completed two years of alternative civilian service instead of serving on full-time active duty in the Armed Forces.³³ Relying on *Gillette*, the Court upheld the statute, once again recognizing that "the Government's substantial interest in raising and supporting armies, is of 'a kind and weight' clearly sufficient to sustain the challenged legislation"³⁴ against an attack based on the petitioner's free exercise rights.

The Court has also found a compelling governmental interest for certain tax laws that were attacked on free exercise grounds. In *United States v. Lee*,³⁵ a member of the Old Order Amish failed to file the necessary quarterly Social Security tax returns required of employers and refused to withhold Social Security tax from his employees or pay the employer's share of Social Security taxes, on the grounds that the imposition of Social Security taxes violated his free exercise rights and those of his Amish employees.³⁶ The Court first

²⁹ 401 U.S. 437 (1971).

³⁰ *Id.* at 462.

³¹ 415 U.S. 361 (1974).

³² 38 U.S.C. §§ 101(21), 1652(a)(1) and 1661(a) (1994).

³³ 415 U.S. at 362-63.

³⁴ *Id.* at 385.

³⁵ 455 U.S. 252 (1982).

³⁶ *Id.* at 254-55. The Court noted that the district court accepted the contention that

determined that subjecting the Amish to compulsory participation in the Social Security system clearly interfered with their free exercise rights.³⁷ Nevertheless, the Court upheld the law as it applied to the Amish, determining that the governmental interest in maintaining a sound nationwide tax system outweighed the rights of the Amish to be free from compliance with the law.³⁸ The Court, recognizing that the compelling interest test does not render all statutes per se unconstitutional, stated that "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."³⁹

In *Bob Jones University v. United States*,⁴⁰ a case raising similar issues to those raised in *Lee*, the Court held that tax-exempt status provided to private religious schools by the Internal Revenue Code could be denied to schools that discriminated in their admissions policies on the basis of race. Several schools challenged the policy of the IRS, arguing that if tax-exempt status could be granted to non-religious private schools, it could not constitutionally be denied to religious schools that practice racial discrimination "on the basis of sincerely held religious beliefs."⁴¹ The governmental interest was clear: "[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."⁴² Such interest unquestionably outweighed whatever burden the denial of tax exempt status placed on the schools' ability to exercise their religious beliefs.⁴³

the Amish believe it is sinful not to provide for their own elderly and needy and are therefore religiously opposed to the national Social Security system. *Id.* at 255. The Supreme Court further accepted the contention that the Amish religion bars contribution to that system. *Id.*

³⁷ 455 U.S. at 257.

³⁸ *Id.* at 260.

³⁹ *Id.* at 261.

⁴⁰ 461 U.S. 574 (1983).

⁴¹ *Id.* at 602.

⁴² *Id.* at 604.

⁴³ *Id.*

2. Cases In Which The Court Struck Down Laws On Free Exercise Grounds

Generally applicable laws that had the incidental effect of burdening one's religious exercise did not always survive under the *Sherbert* test. In *Wisconsin v. Yoder*,⁴⁴ the Court held that Wisconsin's compulsory school attendance law did not apply to Amish parents who claimed that sending their children to school after the eighth grade violated an essential part of their religious beliefs and practices. The State argued that its interest in its system of compulsory education was so compelling that it outweighed the established practices of the Amish.⁴⁵ After accepting the sincerity of the Amish parents' religious beliefs and the validity of the State's interests in compulsory education, the Court held that the latter did not substantially outweigh the former.⁴⁶

In *Thomas v. Review Board of the Indiana Employment Security Division*,⁴⁷ the Court had to consider whether the State's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his own employment because his religious beliefs forbade him from participating in the production of armaments was a violation of his free exercise rights. The State attempted to justify the denial of benefits by urging that the Indiana unemployment compensation scheme served: (1) to prevent widespread unemployment and the consequent burden on the unemployment fund if people were allowed to leave jobs for personal reasons; and (2) to prevent employers from having to engage in a detailed probing of an employee's religious beliefs.⁴⁸ Neither of these proposed interests was accepted by the Court as compelling justifications for burdening religious freedom.⁴⁹

In yet another case involving unemployment insurance, *Hobbie v. Unemployment Appeals Commission of Florida*,⁵⁰ the Court held that a Florida law did not apply to an individual who was forced to cease her employment after becoming baptized into the Seventh-day Adventist Church. She informed her employer that,

⁴⁴ 406 U.S. 205 (1972).

⁴⁵ *Id.* at 221.

⁴⁶ *Id.* at 234.

⁴⁷ 450 U.S. 707 (1981).

⁴⁸ *Id.* at 718-19.

⁴⁹ *Id.* at 719.

⁵⁰ 480 U.S. 136 (1987).

after the baptism, she would no longer be able to work from sundown Friday to sundown Saturday. It was undisputed that working during these hours was in direct conflict with Hobbie's sincerely held religious beliefs.⁵¹ The Florida Unemployment Appeals Commission denied Hobbie benefits, finding that her refusal to work the specified hours constituted "misconduct" which disqualified her from the receipt of benefits.⁵² The Court first rejected the Appeals Commission's argument that it should be subject to a test less strict than the compelling interest test because Hobbie was a convert whose sincerely held religious beliefs arose after she started employment.⁵³ The Court then went on to conclude that Florida's refusal to award Hobbie unemployment compensation benefits violated the Free Exercise Clause.⁵⁴

For twenty-seven years the compelling interest test first enunciated in *Sherbert* served to protect one of the core rights guaranteed by the Constitution. Applying a lower level of constitutional protection to the Free Exercise Clause was expressly rejected by a majority of the Supreme Court in *Bowen v. Roy*,⁵⁵ where Justice O'Connor stated that "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."⁵⁶ It was not long after *Bowen*, however, that the Supreme Court abandoned this notion.

B. Employment Division, Department of Human Resources of Oregon v. Smith and *The End of Heightened Constitutional Protection*

In *Employment Division, Department of Human Resources of Oregon v. Smith*,⁵⁷ members of the Native American Church challenged, on Free Exercise grounds, an Oregon statute⁵⁸ of general applicability that made the use of peyote criminal.⁵⁹ Two members

⁵¹ *Id.* at 138.

⁵² *Id.* at 138-39.

⁵³ *Id.* at 143-44.

⁵⁴ *Id.* at 146.

⁵⁵ 476 U.S. 693 (1986).

⁵⁶ *Id.* at 727 (O'Connor, J., concurring in part and dissenting in part).

⁵⁷ 494 U.S. 872 (1990).

⁵⁸ ORE. REV. STAT. § 475.992(4) (1987).

⁵⁹ The Oregon law in question prohibited "the knowing or intentional possession of a controlled substance," ORE. REV. STAT. § 475.992(4), and defined "controlled sub-

of the Native American Church were denied unemployment benefits by the Employment Division when they lost their jobs because they had used peyote as part of their religious practices.⁶⁰ The two men appealed the decision. The Oregon Court of Appeals reversed the determination of the Employment Division, holding that the denial of unemployment benefits violated the free exercise rights of the two men.⁶¹ The Oregon Supreme Court, relying on *Sherbert*, affirmed the decision of the Court of Appeals.⁶²

The United States Supreme Court obtained the case and had the opportunity to scrutinize Oregon's statute under the compelling interest test set forth in *Sherbert*. Under the *Sherbert* test, the Court would have asked whether Oregon's statute substantially burdened a religious practice and, if so, whether there was a compelling governmental interest justifying the law. However, the Court never reached that question. Despite the fact that the Court had before it a workable test for analyzing a statute that burdened the free exercise of the petitioners' religion, the Court refused to apply that test in *Smith*.⁶³ As the Court later explained in *Boerne*, "[t]he application of the *Sherbert* test . . . would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applica-

stance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812, as modified by the State Board of Pharmacy. ORE. REV. STAT. § 475.005(6). Schedule I contains the drug peyote. Persons who are in violation of the statute by possessing peyote are "guilty of a Class B felony." ORE. REV. STAT. § 475.992(4)(a).

⁶⁰ 494 U.S. at 874.

⁶¹ *Smith v. Employment Div., Dep't of Human Resources of Oregon*, 709 P.2d 246 (Or. Ct. App. 1985) and *Black v. Employment Div., Dep't of Human Resources of Oregon*, 707 P.2d 1274 (Or. Ct. App. 1985).

⁶² *Smith v. Employment Div., Dep't of Human Resources of Oregon*, 721 P.2d 445 (Or. 1986).

⁶³ The Court stated:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" . . . contradicts both constitutional tradition and common sense.

494 U.S. at 885 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)).

bility. The anomaly would have been accentuated . . . by the difficulty of determining whether a particular practice was central to an individual's religion."⁶⁴

The Court noted that in other instances where it struck down laws that violated the Free Exercise Clause, it did so because such laws violated other laws in conjunction with the Free Exercise Clause.⁶⁵ The Court felt that, unless a violation of the Free Exercise Clause is also a violation of some other federally protected right, then no constitutional violation exists.⁶⁶ The Court explicitly rejected the compelling interest test as it applied to free exercise challenges to generally applicable laws, stating that "[t]he 'compelling government interest' requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purposes asserted here."⁶⁷ Thus, after *Smith*, generally applicable laws could burden religious practices even when not supported by a compelling governmental interest.

The effects of *Smith* on the Free Exercise Clause were immediately felt. In decision after decision, lower courts were forced to apply a new standard of scrutiny that virtually eliminated any protection previously provided by the Free Exercise Clause. Concededly, several of these laws likely would have been upheld even under

⁶⁴ *City of Boerne v. Flores*, 117 S. Ct. 2157, 2161 (1997).

⁶⁵ 494 U.S. at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

⁶⁶ 494 U.S. at 882. The Court stated

Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* [*v. United States*, 98 U.S. 145 (1879) (rejecting the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice)] plainly controls.

Id.

⁶⁷ *Id.* at 885-86 (citations omitted).

strict scrutiny.⁶⁸ What *Smith* accomplished was to also require courts to uphold those laws that burden religious freedom where no compelling state interest exists.

C. *Free Exercise Jurisprudence after Employment Division, Department of Human Resources of Oregon v. Smith*

In *Intercommunity Center for Justice and Peace v. INS*,⁶⁹ the Second Circuit Court of Appeals was asked to determine whether the Intercommunity Center for Justice and Peace, an organization of forty-one Roman Catholic orders and six individual Roman Catholic nuns, was exempt from the Immigration Reform and Control Act of 1986⁷⁰ on the ground that enforcement of the Act violated the Free Exercise Clause.⁷¹ The main purpose of the Act is to deter illegal immigration by sanctioning employers who engage in the practice of employing illegal immigrants. Pursuant to that goal, the Act imposes several requirements on employers with respect to its employees⁷² and authorizes the imposition of civil fines if an employer violates the requirements⁷³ or, in some cases, criminal punishment.⁷⁴ Plaintiffs alleged that they employed people without regard to immigrant status as part of their religious ministries and in accordance with the teachings of the Roman Catholic Church.⁷⁵ The court, after accepting as true the allegation that plaintiffs' religious beliefs were sincere,⁷⁶ noted that the law being challenged was a neutral law of general application and therefore, "[n]o free exercise claim exists under such circumstances."⁷⁷ The court went on to announce, however, that "even without the decision in *Smith*, strict scrutiny would neither be warranted, nor alter the result" in the

⁶⁸ See, e.g., *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (holding that no federal cause of action existed where petitioner challenged, on free exercise grounds, the constitutionality of the Maine Drug Paraphernalia Act, ME. REV. STAT. ANN. 17-A § 1111-A (West 1983), but under the Maine Constitution, the statute was still justified by a compelling governmental interest).

⁶⁹ 910 F.2d 42 (2d Cir. 1990). See also *American Friends Serv. Comm. Corp. v. Thornburgh*, 941 F.2d 808 (9th Cir. 1991).

⁷⁰ 8 U.S.C. § 1324a (1994 & Supp. II 1995-1997).

⁷¹ 910 F.2d at 43.

⁷² See 8 U.S.C. § 1324a(b).

⁷³ See *id.* § 1324a(e).

⁷⁴ See *id.* § 1324a(f).

⁷⁵ 910 F.2d at 43.

⁷⁶ *Id.* at 44.

⁷⁷ *Id.* at 44.

case.⁷⁸ It analogized Congress' interest in controlling the flow of aliens to its interest in a uniform tax system and, therefore, stated that the government's interest would have survived the compelling interest test.⁷⁹

Another decision following *Smith* that likely would have resulted in the same outcome under the compelling interest test is *State v. Flesher*.⁸⁰ In *Flesher*, the petitioner sought a religious exemption for the use of marijuana.⁸¹ The court, citing *Smith*, playfully held that the case "reduces appellant's arguments to a puff of smoke,"⁸² without even considering the merits of appellant's claim. Although the court did not theorize as to how the case might have been decided under the compelling interest test, it is likely that the same result would follow. Other courts have relied on sources other than *Smith* in holding that laws regulating drugs survive the compelling interest test when challenged on free exercise grounds.⁸³

Still, other decisions demonstrate the devastating effect that *Smith* had on free exercise jurisprudence. In *Montgomery v. County of Clinton*,⁸⁴ a Jewish woman claimed that the performance of an autopsy without her consent on her deceased child violated the religious tenets of Judaism.⁸⁵ The court assumed that the performance of the autopsy impinged upon her religious freedom.⁸⁶ It noted, however, that the law under which the autopsy was performed was generally applicable and religion-neutral and that the defendants' actions were reasonably related to a legitimate governmental objective.⁸⁷

In a similar case, *Yang v. Sturner*,⁸⁸ the court was faced with a regrettable situation in which *Smith* proved dispositive. Earlier in the same year that *Sturner* was decided, the court had issued an

⁷⁸ *Id.* at 45-6 (internal citations and quotation marks omitted).

⁷⁹ *Id.* at 46. See *supra* text accompanying notes 35-43.

⁸⁰ 585 N.E.2d 901 (Ohio Ct. App. 1990).

⁸¹ *Id.* at 902.

⁸² *Id.* at 903.

⁸³ See, e.g., *Rupert v. City of Portland*, 605 A.2d 63, 65-68 (Me. 1992) (applying the Maine Constitution's Free Exercise Clause which mandates that a statute that burdens a sincerely held religious belief be justified by a compelling state interest and holding that: (1) Maine met that burden where its interest was to prevent the distribution and use of illegal drugs and (2) under *Smith*, no federal cause of action existed).

⁸⁴ 743 F. Supp. 1253 (W.D. Mich. 1990).

⁸⁵ *Id.* at 1257-58.

⁸⁶ *Id.* at 1259.

⁸⁷ *Id.*

⁸⁸ 750 F. Supp. 558 (D.R.I. 1990).

opinion granting summary judgment to the plaintiffs for damages resulting from the defendant's violation of their First Amendment rights.⁸⁹ The dispute arose out of an autopsy conducted by the defendant on the plaintiffs' son. The plaintiffs are Hmongs and believe that autopsies are a mutilation of the body.⁹⁰ While the court was researching the damages issue, *Smith* was decided. In response to the altered state of free exercise jurisprudence, the court concluded that it was obligated to recall its previous opinion.⁹¹ For what it was worth, the court did not change its decision quietly. Expressing the sentiment felt by many who recognized the effects *Smith* would have on the Free Exercise Clause, the court expressed its "profound regret,"⁹² and offered its support for the *Smith* dissent.⁹³

The case of *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*⁹⁴ involved the refusal of a religious society to pay certain taxes demanded by an IRS Notice of Levy on the grounds that the central tenets of the Society's employees' religious beliefs prohibited them from paying the military portion of their taxes. Of course, after *Smith*, the court had no choice but to dismiss the action.⁹⁵ The court did not do so without objection, however, and instead expressed clear dissatisfaction with *Smith* stating that:

It is ironic that here in Pennsylvania, the woods to which Penn led the Religious Society of Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so. More than three hundred years after their founding of Philadelphia, and almost two hundred years after the adoption of the First Amendment, it would be a "constitutional anomaly" to the Supreme Court, if the Religious Society of Friends were allowed to respect decisions of its employee-members bearing witness to their faith.⁹⁶

⁸⁹ *Yang v. Stumer*, 728 F. Supp. 845 (D.R.I. 1990).

⁹⁰ 750 F. Supp. at 558.

⁹¹ *Id.*

⁹² *Id.* at 559.

⁹³ *Id.* at 559-60.

⁹⁴ 753 F. Supp. 1300 (E.D. Pa. 1990).

⁹⁵ *Id.* at 1304.

⁹⁶ *Id.* at 1306 (internal citation omitted).

D. *The Religious Freedom Restoration Act*

Backed by overwhelming support in both houses⁹⁷ and with the support of a broad spectrum of groups representing various religions in this country,⁹⁸ Congress enacted RFRA. Congress did not hide the fact that it enacted RFRA as a direct response to *Smith*. Congress unequivocally disagreed with the Court's decision in *Smith*, finding that the decision was harmful to religious freedom.⁹⁹ As clear as Congress' disagreement with *Smith* seemed to be, so too was Congress' intent to correct what it saw as a terrible mistake. Congress described its reasons for favoring the *Sherbert* compelling interest test, stating that:

Though laws directly targeting religious practices have become increasingly rare, facially neutral laws of general applicability have nefariously burdened the free exercise of religion in the United States throughout American history. Such laws, often upheld by the courts, undermined the exercise of religion by various groups. Not until the Supreme Court used the compelling governmental interest test in the free exercise context did decisions more protective of religious liberty evolve.¹⁰⁰

Thus, Congress passed RFRA to restore the compelling interest test set forth in *Sherbert* as it applied to free exercise challenges.¹⁰¹ RFRA mandated that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results

⁹⁷ The House of Representatives voted unanimously to enact RFRA while the Senate passed the statute by a vote of 97-3.

⁹⁸ Many groups filed amicus briefs both in favor of RFRA and against its constitutionality. The most striking and revealing group that filed an amicus brief in favor of RFRA, however, is The Coalition For The Free Exercise of Religion. The Coalition, formed in response to *Smith*, is a group of over 60 religious and civil liberties organizations representing a broad spectrum of religious faiths in America, including Christians, Jews, Muslims, Native Americans and Sikhs. Also represented are religious liberals and conservatives, and groups as varied as People for the American Way and Concerned Women for America. See Brief Amicus Curiae of the Coalition For The Free Exercise of Religion In Support of Respondents, Interest of the Amici, at page 1 (1997).

⁹⁹ H.R. REP. NO. 103-88, at 9-10 (1993):

The effect of the *Smith* decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the "rational relationship test" only requires that a law must be rationally related to a legitimate state interest, the *Smith* decision has created a climate in which the free exercise of religion is continually in jeopardy; facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion.

Id.

¹⁰⁰ H.R. REP. NO. 103-88, at 3.

¹⁰¹ See 42 U.S.C. § 2000bb(b)(1) (1994).

from a rule of general applicability"¹⁰² unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹⁰³ With RFRA, Congress codified the strict scrutiny standard and applied it to the Free Exercise Clause.

The right to the free exercise of religion guaranteed by the Constitution in the First Amendment was once again raised to the heightened standard to which the most important constitutional guarantees were subject. No longer would laws of general applicability which had the incidental effect of burdening religious freedom be upheld because they survived a test of mere rationality. Barely before the ink was dry on RFRA, however, the Supreme Court struck it down in *City of Boerne v. Flores*.

II. CITY OF BOERNE V. FLORES

A. *The Facts*

Standing alone on a hill in the city of Boerne, Texas, is St. Peter Catholic Church.¹⁰⁴ The church, built in 1923, seats approximately 230 worshippers.¹⁰⁵ However, the number of parishioners has grown over the years, and because of the physical size of the church, some forty to sixty parishioners could not attend Sunday Mass.¹⁰⁶ In 1991, the church sought permission from the Archbishop of San Antonio to enlarge its facility.¹⁰⁷ The church received authorization from San Antonio Archbishop Flores to expand the facility to accommodate its growing numbers.¹⁰⁸

Several months later, the Boerne City Council passed an ordinance enacted to "'protect, enhance and perpetuate selected historic landmarks' and to 'safeguard the City's historic and cultural heritage.'"¹⁰⁹ Under the ordinance, the city's Historic Landmark Commission was authorized to prepare a preservation plan with

¹⁰² 42 U.S.C. § 2000bb-1(a).

¹⁰³ 42 U.S.C. § 2000bb-1(b)(1), (2).

¹⁰⁴ *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996).

¹⁰⁹ *Id.*

proposed historic districts.¹¹⁰ The City Council approved one of the historic districts the Commission proposed, which included within the district a part of St. Peter Church.¹¹¹ Although the historic district included only the facade of the church, and although the church itself was not considered a historic landmark, the city considered the entire structure to be within the historic district.¹¹²

In 1993, Archbishop Flores, as required by the city ordinance, applied to the city for a building permit to enlarge the structure of St. Peter Church.¹¹³ He claimed that the structural renovations would in no way affect the facade of the church which fell within the historic district.¹¹⁴ Nonetheless, the Historic Landmark Commission denied the permit application, and the City Council denied the church's appeal.¹¹⁵ Archbishop Flores, on behalf of the church, filed suit seeking a judicial declaration that the ordinance was unconstitutional and violated RFRA.

Although the original complaint contained various claims, the litigation focused on the constitutionality of RFRA. The district court declared the statute unconstitutional, finding that Congress lacked enforcement power under section 5 of the Fourteenth Amendment to enact RFRA and that the statute violated separation of powers principles.¹¹⁶ The Fifth Circuit reversed, finding RFRA to be constitutional pursuant to Congress' broad enforcement power under section 5 of the Fourteenth Amendment.¹¹⁷ The Supreme Court reversed the court of appeals.¹¹⁸

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 73 F.3d at 1354.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995).

¹¹⁷ See *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996).

¹¹⁸ In a 6-3 decision, Justice Kennedy delivered the majority opinion. He was joined in all parts, except Part III-A-1, by Chief Justice Rehnquist and Justices Stevens, Thomas and Ginsburg. Justice Scalia joined in all but Part III-A-1 and also filed a separate concurring opinion to refute the opinions set forth in Justice O'Connor's dissent. Justice Stevens filed a concurring opinion claiming that RFRA violated the Establishment Clause. Justice O'Connor filed a dissenting opinion in which Justice Breyer joined, except as to a portion of Part I. Justice O'Connor urged the Court to reconsider its decision in the *Smith* case. Justices Souter and Breyer filed dissenting opinions.

B. *The Decisions of the Supreme Court*

1. The Majority Opinion

Justice Kennedy, writing for the majority, began his analysis by noting that section 5 is "a positive grant of legislative power."¹¹⁹ He stated that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"¹²⁰ For example, in order to combat racial discrimination, Congress has been given a great deal of latitude in enacting legislation intended to guarantee voting rights.¹²¹ The Court has consistently upheld legislation intended to eliminate racial discrimination despite the burdens that the legislation has placed on the States.¹²²

In the voting rights cases, the Court recognized that Congress' power to stamp out racial discrimination is broad. However, the Court also recognized that that power is not unlimited.¹²³ In determining whether that power extended to allow Congress to enact RFRA, the Court began with the text of section 5. Justice Kennedy acknowledged that, pursuant to the Supreme Court's decision in *Cantwell v. Connecticut*,¹²⁴ in which the Court incorporated the Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment, Congress has the power to enact legislation under section 5 enforcing the constitutional right to the free exercise of

¹¹⁹ 117 S. Ct. 2157, 2163 (1997) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

¹²⁰ *Id.* at 2163 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

¹²¹ The constitutionality of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994), and other legislation intended to protect the right of minorities to vote, were consistently upheld against state challenges. See, e.g., *City of Rome v. United States*, 466 U.S. 156, 161 (1980) (upholding seven year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "standard practice, or procedure with respect to voting"); *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 (1966) (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding several provisions of the Voting Rights Act of 1965).

¹²² 117 S. Ct. at 2163.

¹²³ See *Mitchell*, 400 U.S. at 128.

¹²⁴ 301 U.S. 296, 303 (1940).

religion.¹²⁵ This power, Justice Kennedy said, is only remedial and only extends to enforcing the provisions of the Fourteenth Amendment, not to legislation which alters the meaning of the Free Exercise Clause.¹²⁶ Further, although Justice Kennedy recognized that Congress has wide latitude in determining where the line between remedial measures and measures affecting a substantive change in the law may lie, he also warned that "the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹²⁷

Justice Kennedy's effort to determine where the distinction lies began with the history of the Fourteenth Amendment. He set forth a lengthy account of the history of the passage of the Fourteenth Amendment, including reference to the original debates addressing that amendment.¹²⁸ By referring to the amendment's origins, he sought to demonstrate the "remedial, rather than substantive, nature of the Enforcement Clause."¹²⁹ To determine whether RFRA fit into that definition of Congress' section 5 power, Justice Kennedy addressed the Court's previous cases dealing with that power. One of the earliest instances where the Court addressed the remedial and preventive nature of the Fourteenth Amendment was the *Civil Rights Cases*,¹³⁰ where the Court held that section 5 did not authorize Congress to pass

general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they

¹²⁵ 117 S. Ct. at 2163.

¹²⁶ *Id.* at 2164. Justice Kennedy stated:

The design of the Amendment and the text of Section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

Id.

¹²⁷ *Id.* at 2164.

¹²⁸ *Id.* at 2164-66.

¹²⁹ *Id.* at 2164.

¹³⁰ 109 U.S. 3 (1883).

are prohibited from making or enforcing, or such acts or proceedings as the states may commit or take, and which, by the amendment, they are prohibited from committing or taking.¹³¹

In *South Carolina v. Katzenbach*,¹³² the Court upheld various provisions of the Voting Rights Act, justifying its holding by noting that the provisions in question were "remedies aimed at areas where voting discrimination has been most flagrant."¹³³ The Court stated that the remedies were necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."¹³⁴ Justice Kennedy justified the "unprecedented remedies"¹³⁵ created by the Voting Rights Act by pointing out the "ineffectiveness of the existing voting rights laws"¹³⁶ and "the slow costly character of case-by-case litigation."¹³⁷ Following *South Carolina v. Katzenbach*, the Court continued to allow Congress broad discretion in enacting legislation intended to "respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination."¹³⁸ Notwithstanding Congress' broad discretion, Justice Kennedy stated that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."¹³⁹

Justice Kennedy then considered the issue central to the controversy—whether RFRA can be considered enforcement legislation under section 5 of the Fourteenth Amendment.¹⁴⁰ Respondents claimed that RFRA was a proper exercise of Congress' enforcement power because, "[i]f Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, then it can do the same . . . to promote religious liberty."¹⁴¹ Justice Kennedy disagreed, stating that

¹³¹ *Id.* at 13-14.

¹³² 383 U.S. 301 (1966).

¹³³ *Id.* at 315.

¹³⁴ *Id.* at 308.

¹³⁵ *City of Boerne v. Flores*, 117 S. Ct. 2157, 2167 (1997).

¹³⁶ *Id.* at 2167 (citing *Katzenbach*, 383 U.S. at 313-15).

¹³⁷ *Id.* at 2167 (citing *Katzenbach*, 383 U.S. at 328).

¹³⁸ *Id.* at 2167 (citing *City of Rome v. United States*, 466 U.S. 156, 182 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966)).

¹³⁹ *Id.* at 2167.

¹⁴⁰ 117 S. Ct. at 2168.

¹⁴¹ *Id.* at 2169 (citations omitted).

"[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."¹⁴² Thus, he claimed that strong measures appropriate to remedy harms resulting from racial discrimination may not be appropriate to address religious discrimination.¹⁴³ Justice Kennedy distinguished Congress' power to enact the Voting Rights Act from its lack of power to enact RFRA. While the record that confronted Congress when it enacted the Voting Rights Act presumably contained recent examples of racial discrimination, Justice Kennedy felt that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. . . . Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion."¹⁴⁴ He believed that Congress' concern with incidental burdens imposed on religion did not authorize Congress to utilize its section 5 enforcement power as it did to remedy racial discrimination.

However, this was not RFRA's "most serious shortcoming,"¹⁴⁵ according to Justice Kennedy.¹⁴⁶ Justice Kennedy believed RFRA failed most severely because it could not be considered remedial or preventive "if those terms are to have any meaning."¹⁴⁷ He stated that RFRA was not narrow enough in scope to address the types of problems against which the Fourteenth Amendment was meant to protect. He described the statute as "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."¹⁴⁸ Justice Kennedy envisioned that under RFRA, any law enacted by any level of government would be subject to free

¹⁴² *Id.* (citing *Katzenbach*, 383 U.S. at 308).

¹⁴³ *Id.* (citing *Katzenbach*, 383 U.S. at 334).

¹⁴⁴ *Id.*

¹⁴⁵ 117 S. Ct. at 2169.

¹⁴⁶ In fact, the Court recognized that it is entirely within the power of the legislative branch to determine the method it will utilize to reach a decision. "Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" *Id.* at 2170 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970)).

¹⁴⁷ *Id.* at 2170.

¹⁴⁸ *Id.*

exercise challenges.¹⁴⁹ Even in the voting rights cases, he noted, Congress was more confined when it utilized its enforcement power.¹⁵⁰

Justice Kennedy believed that the compelling interest test was too substantial an obstacle for states to overcome in attempting to justify laws of general applicability.¹⁵¹ He stated that the test is "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."¹⁵² He foresaw that RFRA would impose "a heavy litigation burden on the States"¹⁵³ and would curtail their "traditional general regulatory power,"¹⁵⁴ stating that these burdens "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise clause as interpreted in *Smith*."¹⁵⁵ Justice Kennedy added:

[i]t is a reality of the modern regulatory state that numerous state laws . . . impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.¹⁵⁶

Justice Kennedy then briefly addressed the issue of whether RFRA violated the separation of powers doctrine by intruding on the role of the judiciary to "say what the law is."¹⁵⁷ He stated that where the Court has issued an interpretation of the Constitution, settled principles, including *stare decisis*, dictate that the Court must follow that decision and "contrary expectations must be disappointed."¹⁵⁸ Congress violated this principle, he argued, because it

¹⁴⁹ *Id.* ("Sweeping coverage ensures [RFRA's] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.").

¹⁵⁰ 117 S. Ct. at 2170.

¹⁵¹ *Id.* at 2171 ("Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a state to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.") (citations omitted).

¹⁵² *Id.* at 2171.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 117 S. Ct. at 2171.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2172 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁵⁸ *Id.*

attempted to control cases and controversies through a statute that was beyond congressional authority, and therefore, the Court's precedent controlled.¹⁵⁹

2. Concurring and Dissenting Opinions

Justice Stevens, concurring in judgment, expressed the opinion that RFRA violated the Establishment Clause of the First Amendment because it "provided the Church with a legal weapon that no atheist or agnostic can obtain."¹⁶⁰ He argued that this governmental preference for religion is forbidden by the First Amendment.¹⁶¹

Justice Scalia wrote a concurring opinion primarily to respond to Justice O'Connor's analysis of the history of religious liberty. Justice Scalia disagreed with Justice O'Connor's view of that history. He believed that the material Justice O'Connor relied on either shed little light on the issue or was in fact more consistent with the *Smith* decision.¹⁶²

Justice O'Connor, in her dissent, urged the Court to reexamine its decision in *Smith*, believing that the decision was wrong in light of both the Court's precedent and the Nation's tradition of religious liberty.¹⁶³ She devoted much of her dissent to an analysis of religious liberty to support her claim that

the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. . . . Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law.¹⁶⁴

She urged the Court to reinstate the rule in place before *Smith*, whereby government had to justify any substantial burden on religiously motivated conduct by a compelling state interest.¹⁶⁵

¹⁵⁹ *Id.*

¹⁶⁰ 117 S. Ct. at 2172 (Stevens, J., concurring).

¹⁶¹ *Id.*

¹⁶² *Id.* at 2172-76 (Scalia, J., concurring).

¹⁶³ *Id.* at 2177 (O'Connor, J., dissenting).

¹⁶⁴ *Id.* (citations omitted).

¹⁶⁵ 117 S. Ct. at 2178.

Justice Souter wrote a brief dissent arguing that he doubted the precedential value of the *Smith* case and its entitlement to adherence.¹⁶⁶ He stated that without briefing and argument on the merits of *Smith*, he could neither accept nor reject its rule.¹⁶⁷ Justice Souter suggested that the *Boerne* case be set down for reargument, allowing the parties to reexamine the issue.¹⁶⁸

Justice Breyer also dissented in a brief opinion, agreeing with Justice O'Connor's suggestion that *Smith* be fully briefed and reconsidered.¹⁶⁹ He did not find that it was necessary to consider whether, assuming *Smith* was correct, section 5 would authorize Congress to enact RFRA.¹⁷⁰

III. ANALYSIS

The *Boerne* decision marks the second time this decade that the Supreme Court has actually limited the scope of protection of the Free Exercise Clause. The Court decided that Congress was powerless to restore that protection to the highest constitutional standard after *Smith* rendered the Free Exercise Clause devoid of substance. For reasons set forth below, the Court improperly restricted the power of Congress to perform its essential function by ignoring Congress' power to expand constitutional rights and by intruding on Congress' unique fact-finding ability. In the process, the Court ignored the principle of stare decisis by paying no heed to its own precedent.

Section A of this Part will focus on Congress' power to expand the scope of Constitutional rights. Section B will address the separation of powers doctrine and the principle of judicial restraint. Although no separate section will address the principle of stare decisis, the arguments in sections A and B are based primarily on Supreme Court precedent, and therefore, the Court's failure to adhere to the principle of stare decisis is a pervasive theme throughout sections A and B.

¹⁶⁶ *Id.* at 2186 (Souter, J., dissenting).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (Breyer, J., dissenting).

¹⁷⁰ 117 S. Ct. at 2186.

A. Congress' Power to Expand the Scope of Constitutional Rights

The history of the Fourteenth Amendment reveals that the Supreme Court has gradually, but definitively, expanded Congress' power to enforce the provisions of the Fourteenth Amendment and other provisions of the Constitution that have been incorporated into the sphere of protection guaranteed by the Fourteenth Amendment via the Due Process Clause.¹⁷¹ In *McCulloch v. Maryland*,¹⁷² the Court relied on the Necessary and Proper Clause¹⁷³ and announced what became the origin for Congress' broad section 5 power: "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."¹⁷⁴ In *Ex Parte Virginia*,¹⁷⁵ one of the earliest cases interpreting Congress' power to enforce the Fourteenth Amendment, the Court relied on its interpretation of the Necessary and Proper Clause first enunciated in *McCulloch*. The Court set forth what has become the broad standard on which all subsequent exercises of Congress' enforcement power have been based:

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.¹⁷⁶

Years later, in the voting rights cases, this view of Congress' enforcement power continued to expand. The Court relied on section 5 to justify the enactment of legislation which seemingly redefined the rights guaranteed by the Constitution. The most influential of the voting rights cases is *Katzenbach v. Morgan*.¹⁷⁷ In *Morgan*, the Court relied on section 5 to uphold the constitutional-

¹⁷¹ The Free Exercise Clause was incorporated in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁷² 17 U.S. (4 Wheat.) 316 (1819).

¹⁷³ U.S. Const. art. I, § 8, cl. 18.

¹⁷⁴ 17 U.S. (4 Wheat.) at 421.

¹⁷⁵ 100 U.S. 339 (1879).

¹⁷⁶ *Id.* at 345-46.

¹⁷⁷ 384 U.S. 641 (1966).

ity of section 4(e) of the Voting Rights Act.¹⁷⁸ The Court explained that the expansion of Congress' power under section 5 to enforce the Equal Protection Clause does not depend on a judicial determination that the enforcement of the state law precluded by Congress violated the Equal Protection Clause.¹⁷⁹ In justifying its decision to allow for what seemed like an unprecedented expansion of congressional power, the Court described the effect the Fourteenth Amendment had on the balance of power to interpret the Constitution: "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective."¹⁸⁰ A requirement that the Court first decide that the state law regulated by a federal law violated the Fourteenth Amendment as a condition to finding the federal statute constitutional would depreciate congressional resourcefulness and congressional responsibility for implementing the Amendment.¹⁸¹ The legislative power cannot be confined to the "insignificant role" of invalidating only those laws that the Court is prepared to adjudge unconstitutional.¹⁸² It is clear from *Morgan*, even in the way the Court phrased the issue, that it was substantially expanding Congress' enforcement power. Justice Brennan defined the question before the Court: "Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?"¹⁸³ In answering that question in the affirmative, the Court reiterated that the broad interpretation of congressional power first enunciated in *McCulloch* remained the correct standard to apply.¹⁸⁴ It remains the correct standard to apply today.

¹⁷⁸ 42 U.S.C. § 1973b(e) (1964).

¹⁷⁹ 384 U.S. at 648.

¹⁸⁰ *Id.* (quoting *Ex Parte Virginia*, 100 U.S. at 345) (emphasis added).

¹⁸¹ 384 U.S. at 648.

¹⁸² *Id.* at 648-49.

¹⁸³ *Id.* at 649.

¹⁸⁴ *Id.* at 651.

Under a theory known as the "one-way ratchet" theory,¹⁸⁵ Congress may expand constitutional rights guaranteed under the Fourteenth Amendment but may not dilute such rights. The theory is derived from Justice Brennan's majority opinion in *Morgan*, where he stated:

Contrary to the suggestion of the dissent, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.¹⁸⁶

As an example, Justice Brennan stated that Congress could not authorize the States to establish racially segregated systems of education because such systems would not be enforcing the Equal Protection Clause—such laws would be in direct violation of what the Equal Protection Clause prohibits.¹⁸⁷ The broad holding in *Morgan* might have been interpreted to mean that Congress may take away constitutional rights in addition to granting them. This was the concern expressed by Justice Harlan in his dissent.¹⁸⁸ However, it is clear that Brennan was aware of this possible interpretation and was careful to limit the broad holding in *Morgan* to allow Congress only to enforce constitutional rights and not to dilute such rights.

Justice Brennan's theory is not only an abstract conceptualization of what section 5 means. It is also a real and practical limit on congressional power that guarantees that an increase in Congress' power to expand the scope of the Fourteenth Amendment will not result in a consequential destruction of the rights guaranteed by the Constitution. The dilution of constitutional rights was clearly not contemplated by the framers of the Fourteenth Amendment. Surely, if it was intended that Congress could dilute constitutional rights in addition to expanding them, the word "enforce" would not have been used by the framers. Thus, Justice Harlan's concern in *Morgan* that the case would be interpreted to mean that Congress could take away constitutional rights is without basis. When the Court subse-

¹⁸⁵ For a discussion of three separate defenses of the one-way ratchet theory, see Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1062-69 (1993).

¹⁸⁶ 384 U.S. at 651 n.10 (quoting Harlan, J., dissenting).

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 659 (Harlan, J., dissenting).

quently had occasion to test the theory, it confirmed Justice Brennan's interpretation and reiterated that Justice Harlan's concern would not become a reality.¹⁸⁹

Justice Brennan's *Morgan* footnote stands for the proposition that Congress may only expand the scope of constitutional rights. Therefore, RFRA can be considered legislation that is within Congress' power under section 5 only if Congress was not diluting the meaning of the Free Exercise Clause by the enactment of RFRA. In order to determine whether that was RFRA's result, it is necessary to compare the meaning of the Free Exercise Clause before RFRA was enacted with its meaning after the statute went into effect.

For almost thirty years prior to the enactment of RFRA, the Free Exercise Clause protected people in the practice of their religious beliefs whether the law being challenged was discriminatory on its face or a neutral law that had the incidental effect of burdening religious freedom.¹⁹⁰ When the Court decided *Smith* it drastically altered the definition of the Free Exercise Clause. The Court confirmed the radical change to the meaning of the Free Exercise Clause in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*¹⁹¹ when Justice Kennedy casually¹⁹² stated that, "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."¹⁹³ After *Smith*, the Free Exercise Clause was confined to protect people against laws that targeted religious beliefs as such or infringed upon or restricted practices

¹⁸⁹ See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁹⁰ See *supra* Section I-A.

¹⁹¹ 508 U.S. 520 (1993).

¹⁹² The Court's statement is characterized here as "casual" because it suggested that this had always been the law. In fact, when Justice Kennedy, who wrote the majority opinion in *Hialeah*, referred to "our cases," he was referring to only one case. He was referring to *Smith*. However, as Justice O'Connor recognized in her dissent in *Boerne*, "*Smith* . . . is a recent decision. As such, it has not engendered the kind of reliance on its continued application that would militate against overruling it." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2177 (1997) (O'Connor, J., dissenting). Justice Souter expressed a similar sentiment: "I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence." *Id.* at 2186 (Souter, J., dissenting).

¹⁹³ 508 U.S. at 531.

because of their religious motivation.¹⁹⁴ It did not protect individuals whose religious freedom was substantially burdened by generally applicable laws.

What RFRA accomplished was to expand the meaning of the Free Exercise Clause beyond the boundaries to which it was confined after *Smith*. In no way did Congress take away any constitutional protection. In Justice Brennan's *Morgan* footnote, he explicitly stated that Congress could not dilute equal protection and due process decisions of the Supreme Court.¹⁹⁵ Had RFRA accomplished this, then surely the statute would have been unconstitutional. Instead, Congress' enactment of RFRA fits squarely within the type of action contemplated by Justice Brennan in *Morgan*. Justice Brennan rejected the notion that the Court was confined to finding a federal statute constitutional only if the Court had already determined that the state law it would invalidate was in violation of the Fourteenth Amendment.¹⁹⁶ Therefore, in *Boerne*, the Court was not confined to finding RFRA constitutional only if it first determined that the laws that it would nullify violated the Free Exercise Clause.

Justice Kennedy stated that legislation which altered the meaning of the Free Exercise Clause could not be said to be enforcing the Clause because Congress does not enforce a constitutional right by changing what the right is.¹⁹⁷ This reasoning is inconsistent with the notion that Congress may expand constitutional rights. By protecting individuals in the practice of their religious beliefs against harms that the Court has determined are not protected by the Free Exercise Clause, Congress is merely expanding the reach of the Clause. It is not redefining what the Clause means. The Free Exercise Clause means that the government, state or federal, may not prohibit the free exercise of religion. RFRA does not change that meaning. It only increases the reach of the Clause so that more protection is granted than that envisioned by the Court in *Smith*. RFRA did not dilute the Free Exercise Clause in any way. Because RFRA only expanded the meaning of the Free Exercise Clause, it was well within Congress' power under section 5 to enact the law.

¹⁹⁴ *Id.* at 533.

¹⁹⁵ See *supra* notes 185-89 and accompanying text.

¹⁹⁶ See *supra* text accompanying note 181.

¹⁹⁷ 117 S. Ct. at 2164.

B. *Separation of Powers and The Principle of Judicial Restraint*

The claim that Congress has the power to expand the sphere of protection of the Free Exercise Clause is based not only on a judicial interpretation of what the enforcement clause of the Fourteenth Amendment means but also on historical and structural reasons which support the contention that Congress should have such power. One such reason is based on the structure of government established by the Constitution and the principle of judicial restraint.

The United States Constitution divides power conferred upon the federal government into "legislative Powers . . . vested in a Congress,"¹⁹⁸ "executive Power . . . vested in a President,"¹⁹⁹ and "judicial Power . . . vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."²⁰⁰ The Constitution does not explicitly attempt to define how far these powers reach.²⁰¹ Rather, "the Constitution's central mechanism of separation of powers depends largely upon common understandings of what activities are appropriate to legislatures, to executives, and to courts."²⁰² Each branch is expected to respect the powers accorded to other branches and to carry out its own duties so as not to intrude upon the business of the other branches. The Separation of Powers doctrine is "violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."²⁰³

The Separation of Powers doctrine mandates that in some areas of constitutional interpretation, the courts must defer to the decisions of the legislative branch.²⁰⁴ This concept of deference, often described as a "presumption of constitutionality," "deference to

¹⁹⁸ U.S. CONST., art. I, § 1.

¹⁹⁹ U.S. CONST., art. II, § 1.

²⁰⁰ U.S. CONST., art. III, § 1.

²⁰¹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

²⁰² *Id.* at 559-60.

²⁰³ *New York v. United States*, 505 U.S. 144, 182 (1992).

²⁰⁴ The same principle applies to the executive branch, but the focus here is on Congress. Therefore, the discussion will be limited to the relationship between the Supreme Court and Congress.

political branches," "judicial minimalism," or simply, "judicial restraint,"²⁰⁵ is based on years of constitutional tradition²⁰⁶ that continues to have relevance in the present day.

Judicial restraint is not a concept that stands alone as a constitutional principle. It is often in conflict with other principles of constitutional law. In *Boerne*, judicial restraint and Congress' enforcement power under section 5 of the Fourteenth Amendment came into direct conflict. While the Court was required to determine whether RFRA was within the scope of Congress' enforcement power, it should have approached this analysis with a presumption of constitutionality.²⁰⁷ It is Congress' unique ability to determine the need for constitutional protection, especially against laws that do not appear discriminatory on their face, that justifies this conclusion. As a practical matter, Congress is better equipped than the Supreme Court to conclude that laws that appear neutral towards religion can in fact be extremely burdensome to religious freedom. It is within Congress' power to enact a remedy in response to such laws where the Court refuses to do so.

The history of section 5 jurisprudence reveals an abundance of legislation enacted pursuant to Congress' section 5 power which the Supreme Court, and other courts interpreting Supreme Court precedent, have upheld as valid exercises of that power. In addition to the many cases in which federal courts have upheld provisions of the Voting Rights Act and other acts meant to protect the right of minorities to vote,²⁰⁸ various federal courts have upheld laws that

²⁰⁵ Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 185-86 (1997).

²⁰⁶ *Id.* at 185 (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-52 (1893)).

²⁰⁷ Professor McConnell notes that:

Courts are particularly likely to defer to the judgments of representative bodies when there are no judicially manageable standards for decisionmaking, when more vigorous judicial review would trench on the policymaking prerogatives of democratic bodies, when constitutional questions turn on empirical or predictive judgments, when the motives of legislators are in question, and when the constitutional text provides little guidance. Courts are less likely to defer to legislative judgments when the question presented involves a clash of democratic authorities (such as a conflict between Congress and the President) or when governmental action may infringe upon individual rights or burden the interests of unrepresented minorities.

Id. at 186 (citations omitted).

²⁰⁸ See e.g., *City of Rome v. United States*, 466 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

protect the civil rights of women who seek to obtain reproductive health services,²⁰⁹ that protect the civil rights of aged persons in employment,²¹⁰ that award attorney's fees to plaintiffs in civil rights cases,²¹¹ that protect women from discrimination due to pregnancy,²¹² and that protect civil rights on a broad scale.²¹³ In each of these cases, the Court found that Congress was justified in enacting remedial legislation pursuant to its section 5 enforcement power.

In determining that RFRA did not fit into the category of cases in which Congress may act pursuant to its section 5 power, the Court relied to an extent on a comparison between the legislative history of RFRA and that of the Voting Rights Act.²¹⁴ While the record confronting Congress when it enacted the Voting Rights Act presumably contained ample evidence to support a finding that racial bigotry was prevalent, the Court found that RFRA's legislative record lacked "examples of modern instances of generally applicable laws passed because of religious bigotry."²¹⁵ By engaging in a comparison between RFRA and the Voting Rights Act, the Court overstepped its bounds and, quite frankly, missed the point. It sat as

²⁰⁹ See *Planned Parenthood Ass'n of S.E. Pa., Inc. v. Walton*, 949 F. Supp. 290 (E.D. Pa. 1996) (upholding the constitutionality of the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994)); see also, *United States v. McMillan*, 946 F. Supp. 1254, 1262 (S.D. Miss. 1995) ("Section 5 of the Fourteenth Amendment empowers Congress to enact FACE inasmuch as this section gives Congress the power 'to enforce, by appropriate legislation, the provisions' of the Fourteenth Amendment, including the provisions dealing with liberty, equal protection, and the privileges or immunities of citizens.").

²¹⁰ See *Equal Employment Opportunity Commission v. Elrod*, 674 F.2d 601 (7th Cir. 1982) (upholding the constitutionality of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994)).

²¹¹ See *Corpus v. Estelle*, 605 F.2d 175, 180 (5th Cir. 1979) (upholding the constitutionality of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), and recognizing that "Section 5 is the source of broad legislative authority to define and carry out the provisions of the amendment, an authority plenary within the terms of the constitutional grant. . . . [I]n *Katzenbach*, the Court welcomed congressional assistance, based on Section 5, in shaping the contours of the sometimes elusive concepts embodied in the Fourteenth Amendment. In doing so, the Court made it plain that the judiciary should not lightly rebuff such Congressional attempts.") (internal quotation marks and citations omitted); see also, *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977).

²¹² See *Vineyard v. Hollister Elementary Sch. Dist.*, 64 F.R.D. 580 (N.D. Cal. 1974) (upholding the constitutionality of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. 1995-1997)).

²¹³ See *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969) (upholding the constitutionality of the Civil Rights Act, 42 U.S.C. § 1983 (1994 & Supp. 1995-1997)).

²¹⁴ See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997).

²¹⁵ *Id.*

a legislative body and weighed the evidence presented to Congress in an effort to determine whether Congress could have found that religious bigotry resulted from generally applicable laws. This intrusion by the Court into Congress' role as a legislative and fact-finding body is a violation of the separation of powers doctrine and the principle of judicial restraint. It was Congress' role to analyze the evidence before it. The members of Congress believed that laws neutral towards religion were as dangerous to religious freedom as laws that were intentionally discriminatory.²¹⁶ This determination was not arbitrary but was based on a wealth of evidence. Congress is the only branch of the federal government capable of making such an informed judgment. The process of determining whether remedial legislation is needed to combat a particular harm often involves an analysis of a great deal of evidence and data that the Court is simply not able to evaluate.²¹⁷ Congress, and not the Court, is the branch responsible for enacting legislation, and to this end, it is Congress that is better equipped to determine the need for remedial legislation—whether the harm it is seeking to remedy is intentional discrimination or incidental discrimination resulting from seemingly neutral laws.²¹⁸ When determining a congressional

²¹⁶ See 42 U.S.C. § 2000bb(a)(2) (1994) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; . . .").

²¹⁷ See *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1189 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994)) (stating that Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon legislative questions."); see also *United States v. Gainey*, 380 U.S. 63, 66-7 (1965) (quoting *Tot v. United States*, 319 U.S. 463, 466 (1943)). The Court in *Tot* stated:

[T]he constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate facts presumed.' The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

Id.

²¹⁸ See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."); see also, *Flores v. City of Boerne*, 73 F.3d 1352, 1359 (1996) ("Congress' constitutional power to legislate pursuant to Section 5 is tied to Congress' superior ability to find and redress nascent or disguised violations of the Amendment."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and concurring in judgment); *Employment Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in part and dissenting in part).

statute's constitutionality, it is inefficient and, more importantly, unconstitutional for the Court to attempt to reevaluate congressional findings of fact.

The principle of judicial restraint is a Court-created concept. A number of factors have guided the Court towards the implementation of the doctrine. The Court has recognized its own inability to carry out the fact-finding process performed by Congress. It has also recognized that the members of Congress are bound by the same oath as the Court to uphold the Constitution. To that end, the Court has imposed its own limitation on the level of inquiry in which it may partake when it analyzes the means by which Congress performs its essential function. At all times when the Court analyzes a congressional statute, the Court must determine what level of deference to accord to Congress, especially when the Court judges the constitutionality of a statute. As the Court has explained on more than one occasion:

Whenever called upon to judge the constitutionality of an Act of Congress—"the gravest and most delicate duty that this Court is called upon to perform,"—the Court accords "great weight to the decisions of Congress." The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. . . . [W]e must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."²¹⁹

Ironically, the same Court that decided *Boerne* (and the same justice who wrote the *Boerne* majority decision) acknowledged the required deference to Congress in *Turner Broadcasting System, Inc. v. FCC*,²²⁰ a case involving the constitutionality of the must-carry provision of the Cable Television Consumer Protection and Competition Act of 1992.²²¹ The Court described its role with respect to that of Congress:

In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of

²¹⁹ *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted).

²²⁰ 117 S. Ct. 1174 (1997).

²²¹ 47 U.S.C. §§ 521-559 (1994).

data bearing upon legislative questions. . . . We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power.²²²

As Justice Kennedy, himself, suggested, the Court may not sit as a legislative body and weigh the evidence before Congress when Congress enacts legislation. Yet, in *Boerne* the Court ignored its own precedent by refusing to accord the required deference to Congress. Although the Court briefly mentioned that it should defer to Congress' function as a legislature,²²³ it also concluded that such deference was not required in *Boerne*.²²⁴ The Court did not contend that remedial measures are never appropriate but rather, asserted that "there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."²²⁵ In determining whether RFRA was an appropriate remedial measure, the Court engaged in a comparison between RFRA and the Voting Rights Act and carefully scrutinized the evidence presented to Congress when it enacted RFRA. The Court determined, based on its own analysis of this evidence, that "[t]he history of persecution in this country detailed in the [RFRA legislative] hearings mentions no episodes [of religious bigotry] occurring in the past 40 years."²²⁶ Based on this determination, the Court concluded that Congress was

²²² *Turner Broad. Sys.*, 117 S. Ct. at 1189 (internal quotation marks and citations omitted).

²²³ See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970)) ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.' As a general matter, it is for Congress to determine the method by which it will reach a decision."); see also, 117 S. Ct. at 2171-72 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.").

²²⁴ The Court decided that it need not adhere to the principle of judicial deference in *Boerne*. The Court noted that it is within the province of the judicial branch to interpret the Constitution, 117 S. Ct. at 2172, and when another branch of government acts contrary to a judicial interpretation (here, RFRA contradicts *Smith*), the Court will exercise its discretion to strike down that act under the principle of stare decisis. *Id.* Professor McConnell argues, however, that this reasoning is insufficient. McConnell, *supra* note 205, at 187 n.201. He argues that the order in which the two branches act should not determine the proper outcome. *Id.* Under that theory, he argues, RFRA would have been constitutional if it had been passed before *Smith*, a result that "does not make much sense." *Id.*

²²⁵ 117 S. Ct. at 2169.

²²⁶ *Id.*

not justified in enacting RFRA. The Court's own precedent mandates, however, that when the Court inquires into the record before Congress in determining whether remedial legislation is necessary, the Court may not sit as a legislative body. The Court is "not at liberty to substitute [its] judgment for the reasonable conclusion of a legislative body."²²⁷ In deciding the constitutionality of a statute, the Court must "be particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch."²²⁸

Congress, analyzing the same hearings as the Court, determined that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; . . ."²²⁹ It was Congress, not the Court, that conducted these hearings. The members of Congress were present to question witnesses who gave testimony. The members of the Court were not. The members of Congress were able to engage in debate to weigh the evidence presented and consider how much weight such evidence should be given. Based on such evidence RFRA was passed by a unanimous House and a nearly unanimous Senate.²³⁰ The members of the Court also weighed the evidence before Congress, but the Court's own precedent strongly cautions against such action. It is logical that Congress would possess the expertise to evaluate its own hearings while the Court, acting as an observer of those hearings after they were held, would not be in such a position. Supreme Court precedent prohibiting the Court from encroaching on the specific functions of Congress²³¹ and precedent prohibiting en-

²²⁷ *Turner Broad. Sys.*, 117 S. Ct. at 1197.

²²⁸ *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981).

²²⁹ 42 U.S.C. § 2000bb(a)(2) (1994).

²³⁰ See *supra* note 97.

²³¹ See *Turner v. Safley*, 482 U.S. 78, 84-5 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (refusing to award damages in a case of racial discrimination among members of the military where "Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior officers."); *Rostker*, 453 U.S. at 64-65 (holding that the registration provisions of the Military Selective Services Act requiring men, but not women, to register for the draft did not violate the Fifth Amend-

croachment into more general functions supports this conclusion.

The Court has held that deference to the legislature is not limited to only to some constitutional matters. Deference must always be observed. The Court must defer to Congress' superior fact-finding ability even where the most important constitutional guarantees are at stake:

Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.²³²

Not only is this principle based on precedent, it might also be desirable from a practical standpoint. Indeed, when First Amendment rights are at stake, it is an especially relevant time for the Court to defer to Congress. The events leading up to the *Boerne* decision support this conclusion. When Congress enacted RFRA, it was motivated by lengthy testimony about the effects of the *Smith* decision. When the Court decided *Smith*, it might not have been aware of the devastating effects the decision was going to have on free exercise rights. Congress was able to discern the true effects of *Smith* and was able to make an informed judgment that the decision would have an adverse effect on the Free Exercise Clause. When rights guaranteed under the First Amendment are infringed by a decision of the Supreme Court in which the Court lacked evidence available to Congress, it is desirable to allow Congress to take steps to protect those rights.

The Court has established that, despite the required deference to Congress, the legislature may not blindly enact laws that raise significant constitutional issues. The Court has also recognized that where Congress specifically considers the constitutionality of an act, the customary deference is most appropriate.²³³ Congress was wary of the constitutional problems RFRA raised and, therefore,

ment Due Process Clause, in part, because Congress acted pursuant to its "authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

²³² *Turner Broad. Sys.*, 117 S. Ct. at 1189.

²³³ See 453 U.S. at 64 ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.").

considered RFRA's constitutionality before it was enacted.²³⁴ Had Congress enacted RFRA without consideration of the constitutional principles which it might be violating, then surely a stronger argument could be made that the Court was justified in scrutinizing the method by which Congress determined such remedial legislation was needed. However, because Congress had carefully considered RFRA's constitutional implications, and because the Court has recognized that "Congress is a coequal branch of government whose Members take the same oath [as the Court] to uphold the Constitution of the United States,"²³⁵ the Court should have deferred to Congress' findings and justifications for enacting RFRA. There is a presumption of constitutionality inherent in all analyses of legislation enacted by Congress where Congress specifically considers the constitutionality of the legislation it is enacting. When Congress considers an act's constitutionality, it is acting pursuant to its oath to uphold the Constitution. Therefore, the Court must defer to its "coequal" branch.

Assuming for just a moment that the Court was correct to suggest that the legislative record before Congress when it enacted RFRA lacked modern examples of religious bigotry, the Court would still be incorrect in determining that this was a reason to strike down RFRA. Congress need not justify the enactment of remedial legislation by proving that the harm to be prevented has recently occurred. As the Court stated in *Turner*, "[a] fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. Congress is allowed to make a rational prediction of the consequences of inaction and of the effects of regulation in furthering governmental interests."²³⁶ Thus, where Congress determined that the absence of a compelling interest test would have a negative impact on the free exercise of religion, it could have determined that this impact would occur in the future. That Congress was basing this prediction on the real effects of the *Smith* decision when it enacted RFRA supports its predictive judgment.²³⁷

²³⁴ See S. REP. NO. 103-111, at 13 (1993).

²³⁵ 453 U.S. at 64.

²³⁶ *Turner Broad. Sys.*, 117 S. Ct. at 1197.

²³⁷ See *supra* Section I.B.

In *Turner*, the Court evaluated a congressional determination that growth in the cable industry was causing harm to broadcasting and was resulting in the bankruptcy of many broadcasting stations.²³⁸ The Court recognized that congressional findings of fact could have supported a conclusion opposite that of Congress, but the Court deferred to Congress, stating that "it was for Congress to determine the better explanation. [The Court is] not at liberty to substitute [its] judgment for the reasonable conclusion of a legislative body."²³⁹ Of course, in *Boerne*, that is precisely what the Court did. It determined, based on the record before Congress, that there had been no instance of religious bigotry in the past forty years.²⁴⁰ The Court's conclusion depends on the definition of religious bigotry. After lengthy hearings on the subject, Congress determined that religious bigotry can result from neutral laws, as surely as it does from intentionally discriminatory laws.²⁴¹ The Court however, disagreed, finding that a legislative record that contains evidence of discrimination based only on laws neutral towards religion contains no evidence of discrimination at all.²⁴² Such a determination is discomfoting to those who will be affected by the lack of any real protection provided by the Free Exercise Clause after *Boerne*.²⁴³ Congress is capable of determining what protection is needed and when it determines, based on real evidence of discrimination, that more protection is needed than that granted by the Supreme Court, the Court should respect that judgment.

The Court may not look at the same information as Congress and interpret it in a way that substantially differs from the interpretation of Congress. Even assuming the Court was correct to suggest that RFRA's legislative record did lack modern examples of intentional religious bigotry (at least to the extent that the past forty years is the period of modern history in which to judge, which of course it is not²⁴⁴), the Court must realize that Congress was aware of this, for it was in hearings held before Congress that this informa-

²³⁸ *Turner Broad. Sys.*, 117 S. Ct. at 1197.

²³⁹ *Id.*

²⁴⁰ See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997).

²⁴¹ See 42 U.S.C. § 2000bb(a)(2) (1994).

²⁴² 117 S. Ct. at 2169-70.

²⁴³ See, e.g., Di Mari Ricker, *Courts Soul-Search in Religious Law Claims*, STUDENT LAWYER, Oct. 1997, at 22-7.

²⁴⁴ See R. Collin Mangrum, *The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in City of Boerne v. Flores*, 31 CREIGHTON L. REV. 693, 713 (1998).

tion was revealed. The lack of modern instances of intentional religious bigotry was not enough to dissuade Congress from enacting a statute it believed was a necessity in light of the unintentional, but equally substantial, burdens on religious freedom that result from laws neutral toward religion. The Court should not look at the same information and come to a different conclusion than Congress based on its own interpretation of that information. It is simply not the Court's role. As the Court explained in *Nixon v. Administrator of General Services*,²⁴⁵ "[the] Court is not free to invalidate Acts of Congress based upon inferences that [it] may be asked to draw from [its] personalized reading of the contemporary scene or recent history. In judging the constitutionality of the Act, [the Court] may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect." Had the Court approached its analysis of RFRA with the same principle in mind, it is not likely that the Court would have found that Congress was irrational in determining that religious freedom required heightened protection from seemingly neutral laws.

Moreover, although RFRA's legislative record might have indicated a lack of modern instances of intentional religious persecution, it did reveal that a number of generally applicable laws had been enacted which had the incidental effect of significantly burdening religion. Such laws, according to Congress, are as much a threat to the free exercise of religion as laws that intentionally burden religious freedom.²⁴⁶ Congress' conclusion is not a novel one, nor is it one without support. It has been stated previously by the Supreme Court on a number of occasions. In *Smith*, Justice O'Connor, who concurred with the judgment of *Smith*, but not with the decision to strike down the compelling interest test, stated that:

The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, "[s]uch a test has no basis in

²⁴⁵ 433 U.S. 425, 484 (1977).

²⁴⁶ 42 U.S.C. § 2000bb(a)(2).

precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."²⁴⁷

The abandonment of the compelling interest test was also sharply criticized by Justice Souter in his concurrence with the judgment in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, where he urged the Court to reexamine its decision in *Smith*.²⁴⁸ In his concurring opinion Justice Souter noted that "[n]eutral, generally applicable laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government."²⁴⁹

For the members of Congress, such information was significant justification to enact RFRA. Constitutionally, that is all that is required. Congress need not prove that recent events of intentional discrimination were the motivation for its enactment of remedial legislation. It was enough that Congress concluded that neutral laws could also be burdensome to religious freedom.

The Court criticized RFRA not only because its legislative record lacked modern instances of religious bigotry but also because the hearings before Congress emphasized laws of general applicability that place incidental burdens on religion.²⁵⁰ According to the Court, "[i]t is difficult to maintain that [such laws] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country."²⁵¹ Where the Court's reasoning fails is in assuming that Congress' concern must be with laws that intentionally burden religious freedom in order for RFRA to be justified. Not only may Congress justify the enactment of remedial legislation without evidence of recent instances of religious bigotry, but Congress also need not show that the harm which it intends to prevent is the result of intentional discrimination. In *Jones v. City of Lubbock*,²⁵² the Fifth Circuit Court of Appeals re-

²⁴⁷ Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in part) (quoting Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141-42 (1987), and Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring in part and dissenting in part)).

²⁴⁸ 508 U.S. 520, 559 (1993).

²⁴⁹ *Id.* at 577.

²⁵⁰ City of Boerne v. Flores, 117 S. Ct. 2157, 2169 (1997).

²⁵¹ *Id.*

²⁵² 727 F.2d 364 (5th Cir. 1984).

lied on Supreme Court precedent when it was presented with an opportunity to consider the constitutionality of the Voting Rights Act. In analyzing Congress' authority to enact the section of the Voting Rights Act in question, the Court stated that Congress may seek to protect core values of the Fourteenth and Fifteenth Amendments through remedial measures that invalidate election systems that, although constitutionally permissible, have the effect of debasing the guarantees of those amendments. The Court, relying on Supreme Court precedent, stated that "[c]ongressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned."²⁵³ The Court further stated that when Congress adopts lawful and rational means to enforce the Constitution, separation of powers doctrine dictates that the judiciary, rather than Congress, defer.²⁵⁴ Even in the case where a court disagrees with the course taken by Congress, the court must acknowledge the broad nature of congressional power first set out in *McCulloch v. Maryland*.²⁵⁵

In *Jones*, the Court considered the constitutionality of a provision of the Voting Rights Act that Congress enacted in response to the fact that minorities continued to suffer from the effects of electoral systems that hinder minorities.²⁵⁶ The Court pointed out that Congress was considering facially neutral legislation which continued to have the effects of discrimination in voting.²⁵⁷ The Court concluded that, "[w]here Congress, on the basis of a factual investigation, perceives that a facially neutral measure carries forward the effects of past discrimination, Congress may even enact blanket prohibitions against such rules."²⁵⁸ When Congress enacted the legislation in question in *Jones*, it was motivated by similar factors as when it enacted RFRA. The only difference is that one statute deals with racial bigotry while the other deals with religious bigotry. However, this is a distinction that should have no effect on constitutional analysis. In both cases, Congress sought to protect a constitutional right of paramount importance by protecting citizens from the discriminatory effects of facially neutral laws.

²⁵³ *Id.* at 373 (citing *City of Rome v. United States*, 446 U.S. 156, 173 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)).

²⁵⁴ *Id.* at 374.

²⁵⁵ See *supra* note 174 and accompanying text.

²⁵⁶ 727 F.2d at 374.

²⁵⁷ *Id.* at 375.

²⁵⁸ *Id.* (citing 383 U.S. at 334).

To summarize this argument, Congress is more adept at discovering latent discrimination. When Congress made a determination that latent religious discrimination existed, it was based on rational conclusions drawn from an abundance of evidence. The Court is not as proficient as Congress at discovering this type of discrimination and should not be questioning the soundness of legislative findings. When Congress concludes that latent discrimination exists and is as much a threat to people's constitutional rights as discrimination that is intentional, Congress must be allowed the latitude to fashion a remedy. The Court's own precedent, as well as reason, mandate this result.

CONCLUSION

There currently exists in the United States a serious threat to religious freedom. It is the threat of innocent legislation, of seemingly religion-neutral laws, that hinder the practice of religious freedom. The threat is greater than the danger that a government will enact a law targeting a religious group for persecution. Fear of the latter threat is no longer a realistic concern because modern principles of religious freedom have taught us to not tolerate such laws. Religious practitioners are rarely faced with the burden of a law that is intended to target a religious group for discrimination. However, religious practitioners frequently face the burdens to religious freedom from neutral, generally applicable laws. Without protection against such laws, the Free Exercise Clause is rendered virtually meaningless. One cannot help but wonder if the Free Exercise Clause now exists in name only. Under the Supreme Court's most recent interpretation of the Clause, it guarantees nothing more than protection where protection is not needed. It is precisely because no government would be naive enough to pass a law with discriminatory intent that RFRA is essential in order to give the Free Exercise Clause substance.

The Supreme Court has failed to guarantee protection under the Free Exercise Clause. Congress has determined, after properly exercising its legislative function, that the Free Exercise Clause must reach generally applicable laws that have the incidental effect of burdening religion. These two branches, often in conflict, have at least one thing in common: they are both sworn to uphold the Constitution. Congress must be allowed to step in and expand the scope of the Free Exercise Clause as needed, where the Court has

refused to do so. Section 5 of the Fourteenth Amendment, the separation of powers doctrine and the principle of judicial restraint mandate this result.

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