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## THE RELIGIOUS FREEDOM RESTORATION ACT IS A CONSTITUTIONAL EXPANSION OF RIGHTS

ERWIN CHEMEKINSKY\*

For almost a half century since *Brown v. Board of Education*,<sup>1</sup> conservatives have railed against liberal judicial activism.<sup>2</sup> Republican presidential candidates from Richard Nixon to Bob Dole have campaigned against the Court and have excoriated what they perceive as judicial activism. Almost three decades after the end of the Warren Court, at a time when the Supreme Court and all federal courts remain dominated by Republican judges, the attack on liberal judicial activism continues. In July, 1997, the Senate Judiciary Committee held hearings titled *Judicial Activism*.<sup>3</sup> Thomas Jipping, a prominent conservative critic

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1. 349 U.S. 294 (1954).

2. See, e.g., *Text of 96 Congressmen's Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 (criticizing *Brown* as impermissible judicial activism); see also ROBERT BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 4 (1996) (arguing modern liberalism is the source of American decline); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 8-9 (1990) (criticizing the judicial branch for improperly making moral and political decisions).

3. See *Judicial Activism, 1997: Hearings on S.J. Res. 26 Before the Subcomm. on*

of the courts, wrote an editorial in August, 1997, expressing "[c]oncern about a federal judiciary out of control."<sup>4</sup>

The irony is that the real judicial activism of the 1990s is in a conservative direction. The Supreme Court's recent decision in *City of Boerne v. Flores*<sup>5</sup> is extremely important on many levels, including as a striking example of conservative judicial activism. Ultimately, *Flores* posed basic questions concerning the relationship between the Court and Congress in interpreting the Constitution, between the power of the federal government and the states in protecting rights, and between a narrow and a broad content for a basic constitutional right.

The Court resolved these issues by choosing in favor of its own power and invalidating a statute overwhelmingly passed by Congress. Whether one agrees or disagrees with the result, and however one defines judicial activism, this is it. Moreover, the Court rejected the federal statute, in part, based on federalism concerns and the perceived need to protect states from such federal encroachments.<sup>6</sup> Additionally, the obvious effect of *Flores* is to reduce protection of free exercise of religion by returning the law to the test articulated in *Employment Division v. Smith*.<sup>7</sup> A neutral law of general applicability does not violate the Free Exercise Clause.<sup>8</sup> The invalidation of a federal statute on federalism grounds and the substantial narrowing of the scope of constitutional rights are obviously conservative victories. *Flores*, by any measure, is dramatic conservative judicial activism.

This observation, however, does not mean that the Court decided *Flores* wrongly. Identifying it as "activist" and "conservative" is descriptive. Although it is true that critics usually reserve the phrase judicial activism to attack decisions with which they disagree, the reality is that activism and restraint are nei-

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*the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. 2847 (1997).

4. Thomas Jipping, *Fighting for Justices*, WASH. TIMES, Aug. 27, 1997, at 15, available in LEXIS, News Library, Papers file.

5. 117 S. Ct. 2157 (1997).

6. See *id.* at 2171.

7. 494 U.S. 872 (1990). Because *Flores* declared RFRA unconstitutional as an exercise of Congress's power under Section 5 of the Fourteenth Amendment, it remains uncertain whether RFRA is constitutional as to federal government actions.

8. See *id.* at 885.

ther inherently good nor bad. Rather, each case must be analyzed normatively to assess judicial activism's desirability. If nothing else, perhaps *Flores* will reveal how absurd it is for conservatives to lament liberal activism from a Supreme Court that is controlled by five conservative Justices and that lacks a single progressive Justice in the mold of William Douglas, William Brennan, or Thurgood Marshall. The judicial activism of the 1990s, as *Flores* powerfully illustrates, is conservative.

What makes *Flores* wrong is not its activism or its conservatism, but instead its failure to accept a basic constitutional principle, most clearly expressed in the Ninth Amendment: Other government institutions, federal and state, may expand the scope of constitutional rights.<sup>9</sup> Congress, by statute, may confer more rights than the Court finds in the Constitution. The Religious Freedom Restoration Act of 1993 (RFRA)<sup>10</sup> is constitutional because in it, Congress, by statute, expanded constitutional rights.<sup>11</sup>

This defense of RFRA can be presented as a simple syllogism. *Major premise:* Congress, acting under Section 5 of the Fourteenth Amendment ("Section 5"), statutorily may create more constitutional rights than recognized by the Supreme Court, so long as Congress does not dilute or lessen rights.

*Minor premise:* RFRA is a statute, enacted under Section 5, that creates more constitutional rights and neither dilutes nor lessens rights.

*Conclusion:* RFRA is constitutional.

Part I of this Essay defends the major premise of the syllogism: Congress, acting under Section 5, may expand the scope of rights. Part II examines the minor premise and explains why the Supreme Court should have recognized RFRA as a statute creating additional rights. Part III considers what might be done now to protect free exercise of religion in light of *Flores*'s improper invalidation of RFRA.

By any measure, *Flores* is an enormously important decision. It speaks to basic issues concerning the powers of Congress and

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9. See U.S. CONST. amend. IX.

10. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

11. See *id.*

the Supreme Court in interpreting the Constitution. It concerns the scope of Congress's authority under an increasingly important constitutional provision—Section 5 of the Fourteenth Amendment.<sup>12</sup> As the Court narrows the scope of Congress's commerce power, in cases such as *United States v. Lopez*,<sup>13</sup> alternative sources of congressional authority, such as Section 5, grow in significance.<sup>14</sup>

Perhaps most importantly, *Flores* means that people in the United States will have far less protection for their religious practices. Laws of general applicability—whether prison regulations, zoning ordinances, or historical landmark laws—that seriously burden religion might have been challenged successfully under RFRA, but not any longer. Put most simply, *Flores* means that many claims of free exercise of religion that previously would have prevailed now certainly will lose. People in the United States have less protection of their rights after *Flores* than they did before it. This, in short, is why *Flores* was decided wrongly.

## I. MAJOR PREMISE: CONGRESS, ACTING UNDER SECTION 5, MAY EXPAND THE SCOPE OF CONSTITUTIONAL RIGHTS

### A. *The Issue*

The Constitution's protection of rights long has been understood as the floor—the minimum liberties possessed by all individuals. The Ninth Amendment provides clear textual support

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12. While this article was in production, an excellent critique of *Flores* was published by Professor Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997). Professor McConnell carefully reviews Justice Kennedy's majority opinion in *Flores* and persuasively argues for a presumption of deference in favor of laws adopted by Congress under Section 5 of the Fourteenth Amendment.

13. 115 S. Ct. 1624 (1995).

14. Moreover, the Court's recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), increases the importance of the scope of Congress's Section 5 powers. In *Seminole Tribe*, the Court held that Congress, by statute, may override the Eleventh Amendment and authorize suits against state governments only when acting pursuant to Section 5 and not when acting under its Article I powers such as the Commerce Clause. *See id.* at 59-60. This makes the scope of Section 5 critical in determining the ability to sue states in federal court to enforce federal laws.

for this view in its declaration: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>15</sup> The Ninth Amendment is a clear and open invitation for government to provide more rights than the Constitution accords.

State governments certainly can expand protective rights both by judicial decisions and by statute. For instance, in *PruneYard Shopping Center v. Robins*,<sup>16</sup> the Supreme Court held that the California Supreme Court could recognize a state constitutional right to use shopping centers for speech purposes,<sup>17</sup> even though previously the U.S. Supreme Court had ruled that no such right exists under the U.S. Constitution.<sup>18</sup>

Likewise, there is no doubt that Congress, by statute, can provide rights greater than the Court recognizes in the Constitution. For example, private race discrimination does not violate the Constitution because it lacks government action. Federal civil rights laws that prohibit discrimination in private places of accommodation and by private employers create statutory rights in which the Court has found no constitutional protections.<sup>19</sup>

This seemingly obvious premise, based on the Ninth Amendment, that Congress can expand the scope of rights, means that Congress may do so even when it disagrees with a Supreme Court decision that refused to find a right in the Constitution. Some critics of RFRA emphasized that Congress should not be able to overrule the Supreme Court's "reading" of the Constitution.<sup>20</sup> But if the Court reads the Constitution to not include a right, Congress or the states may act to create and protect that right. In other words, the Court's interpretive judgment that a

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15. U.S. CONST. amend. IX.

16. 447 U.S. 74 (1980). *PruneYard* is discussed in more detail in *infra* text accompanying notes 110-18.

17. See *id.* at 81.

18. See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976).

19. See, for example, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), that upheld Title II of the Civil Rights Act of 1964 prohibiting racial discrimination in places of public accommodation.

20. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 443 (1994) (criticizing RFRA as a subversion of the Court's constitutional judgment).

particular right is not *constitutionally* protected is in no way incompatible with a legislature's *statutory* recognition and safeguarding of the liberty.<sup>21</sup>

Therefore, if Congress enacts a statute that expands rights, the key question is whether Congress has authority under some constitutional provision for its action. It is axiomatic that Congress may act only if it can point to express or implied constitutional authority.<sup>22</sup> One possible source of congressional authority is the Commerce Clause, which Congress used to prohibit private discrimination in the Civil Rights Act of 1964.<sup>23</sup>

Another logical source of authority is Section 5 of the Fourteenth Amendment, the focus of the *Flores* decision. Section 5 is brief and states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>24</sup> The issue, then, is what does this provision mean; may Congress use it to expand the scope of rights? More specifically, is Congress limited to providing remedies for violations of constitutional rights recognized by the Supreme Court; or may Congress use its power under these amendments to adopt an independent interpretation of the Constitution, even overruling Supreme Court decisions?

### *B. The Inadequacy of Justice Kennedy's Attempt to Define Congress's Section 5 Power*

As is usually the case with difficult constitutional issues, the answer to this question cannot be found in the Constitution's text or the Framers' intent. The word "enforce" is sufficiently ambiguous to allow either view as a plausible interpretation of Section 5. The Supreme Court in *Flores* claimed that the word necessarily means that Congress only can remedy and that Congress cannot determine the substantive meaning of rights.<sup>25</sup> Justice Kennedy, writing for the majority, stated:

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21. Part II argues that RFRA should be seen as a statutory expansion of rights.

22. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995) (stating that Congress's powers are limited to those enumerated in the Constitution).

23. See *infra* notes 160-61 and accompanying text.

24. U.S. CONST. amend. XIV, § 5. The same issues can be raised as to Congress's powers under Section 2 of the Thirteenth Amendment and Section 2 of the Fifteenth Amendment that contain almost identical language.

25. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997).

Congress' power under §5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. . . . The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. *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.*<sup>26</sup>

But this begs the key question of what enforce means. One dictionary defines "enforce" as: "Urge, press home (argument, demand); impose (action, conduct *upon* person . . . ); compel observance of."<sup>27</sup> Another dictionary defines "enforce" as: "1: to give force to: strengthen 2: to urge with energy 3: constrain, compel 4: . . . to effect or gain by force 5: to execute vigorously."<sup>28</sup> From the perspective of these definitions, Congress very much is enforcing the Fourteenth Amendment when it expands the scope of liberty under the Due Process Clause or increases the protections available under the Equal Protection Clause. In this sense, congressional expansion of rights enforces, by strengthening, the Fourteenth Amendment.

Dictionaries, of course, do not determine the meaning of words in the Constitution. My point is simply that there is nothing about the meaning of "enforce" that supports Justice Kennedy's claim that Congress is precluded from expanding the scope of constitutional rights. Justice Kennedy argued as if the term enforce had a precise meaning that supported his position as the correct way to understand Congress's Section 5 power. No such precise meaning exists.

Phrased slightly differently, "enforce" might be defined in many alternative ways, two of which are "to implement" and "to remedy." Justice Kennedy chooses the latter.<sup>29</sup> But the former seems equally plausible in the context of Section 5. That defini-

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26. *Id.* (emphasis added).

27. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 270 (1925).

28. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 275 (7th ed. 1965).

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



tion, gives Congress the authority to implement, as best it can, the protections of the Fourteenth Amendment, such as due process and equal protection.<sup>30</sup> Congress can expand the scope of these rights if it decides that is the best way to ensure, or to implement, these protections.

I am not making the strong claim that my definition is correct and Justice Kennedy's is wrong. Rather, my point is that the literal language of the Fourteenth Amendment does not answer the question of whether Congress may use its Section 5 power to expand the scope of constitutional rights. This is hardly surprising; rarely does the literal language of the Constitution resolve difficult contemporary constitutional issues.

Nor does the intent of the Fourteenth Amendment's Framers answer the issue. Even assuming that Framers' intent should be controlling in constitutional interpretation, a premise that I reject,<sup>31</sup> there is no indication that the Framers ever considered the issue when they drafted and ratified the Fourteenth Amendment. Justice Kennedy's opinion in *Flores* argued that the legislative history of Section 5 resolves the issue. Justice Kennedy declared: "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause."<sup>32</sup>

Justice Kennedy asserted that Congress's rejection of the Bingham Amendment shows that Congress meant Section 5 power to be remedial only.<sup>33</sup> Specifically, Representative John Bingham had introduced a draft amendment that would have provided:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>34</sup>

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30. See U.S. CONST. amend. XIV, § 5.

31. See ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* (1987) (arguing against originalism as a method of constitutional interpretation).

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

33. See *id.* at 2164-65.

34. *Id.* at 2164.

Justice Kennedy said that there was strong opposition to this provision and that the revised provision, the current Section 5, was not opposed in the same manner.<sup>35</sup>

The revised Section 5 has less sweeping language than the Bingham proposal. Yet, the debates Justice Kennedy quotes are silent on whether Congress's power should be only to remedy what the Court determines to be a constitutional violation or whether it includes congressional authority to expand rights.<sup>36</sup> All that Justice Kennedy demonstrated is that Congress enacted language with narrower phrasing. Justice Kennedy completely assumed the substantive difference in the phrasing.

In fact, Justice Kennedy's quotations fail to support his position that Congress intended Section 5 to be only remedial in scope. Justice Kennedy quoted Representative Bingham as saying that the new version would give Congress "the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State."<sup>37</sup> Justice Kennedy next quoted Representative Stevens that the new draft amendment "allow[s] Congress to correct the unjust legislation of the States."<sup>38</sup> Finally, Justice Kennedy quoted Senator Howard as stating that Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment."<sup>39</sup>

None of these quotations supports the view that Congress's power is solely to remedy violations of judicially defined rights and not to expand rights safeguarded by the Fourteenth Amendment. Surely, RFRA can be seen, in Representative Bingham's words, as *protecting* rights or as, in Representative Stevens's

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35. See *id.* at 2164-65.

36. See *id.* For an excellent review of the history of the Fourteenth Amendment and an exploration of why it does not support Justice Kennedy's conclusion, see McConnell, *supra* note 12, at 174-83. Professor McConnell concludes his review by stating: "Section Five was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the constitution." *Id.* at 183.

37. *Flores*, 117 S. Ct. at 2165.

38. *Id.*

39. *Id.*

language, "correct[ing] the unjust legislation of the States."<sup>40</sup> Laws expanding the scope of rights are very much in accord with Senator Howard's goal of advancing the principles of the amendment. A careful reading of the legislative history that Justice Kennedy invoked reveals that it persuasively supports either view.

Again, I am not making the strong claim that the legislative history of Section 5 means that my interpretation is correct as opposed to Justice Kennedy's view. Once more, the point is more limited: Nothing in the Framers' intent resolves which approach to Section 5 is preferable. The Framers simply did not consider whether the Constitution limited Congress to remedying violations of judicially-recognized rights or whether Congress could use its power to recognize new rights.

In addition to text and Framers' intent, the Court claims that precedent supports its view that Congress's power is only remedial. Justice Kennedy said that "[t]he Court has described this power as 'remedial.'"<sup>41</sup> Yet, a close look at the precedents shows that they provide better support for the opposite conclusion: Congress may use its Section 5 powers to expand rights.

*Katzenbach v. Morgan*<sup>42</sup> is the leading case interpreting Section 5. *Morgan* held that Congress, under Section 5, may independently interpret the Constitution and even overturn the Supreme Court.<sup>43</sup> *Morgan* concerned the constitutionality of section 4(e) of the Voting Rights Act of 1965,<sup>44</sup> which provides that no person who has completed sixth grade in a Puerto Rican school, where instruction was in Spanish, shall be denied the right to vote because of failing an English literacy requirement.<sup>45</sup> Earlier, in *Lassiter v. Northampton Election Board*,<sup>46</sup> the Supreme Court upheld the constitutionality of an English language literacy requirement for voting.<sup>47</sup>

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40. *Id.*

41. *Id.* at 2164.

42. 384 U.S. 641 (1966).

43. *See id.* at 648-49.

44. 42 U.S.C. § 1973b(e) (1994).

45. *See Morgan*, 384 U.S. at 641.

46. 360 U.S. 45 (1959).

47. *See id.*

By enacting the Voting Rights Act, Congress sought to partially overturn *Lassiter* by providing that failing a literacy test could not bar a person from voting if the person was educated through the sixth grade in Puerto Rico. The Supreme Court in *Morgan* upheld this provision as "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment."<sup>48</sup>

The Court offered two reasons to support this conclusion. First, Congress could have concluded that granting Puerto Ricans the right to vote would empower them and help to eliminate discrimination against them.<sup>49</sup> In essence, this is an argument that the law was constitutional because it remedied discrimination.

Second, the Court held that Congress could find that the literacy test denied equal protection, even though this conflicted with the Court's earlier holding in *Lassiter*.<sup>50</sup> This second reason is much more significant because it accorded Congress the authority to define the meaning of the Fourteenth Amendment. Despite Justice Kennedy's attempt to minimize this aspect of the decision,<sup>51</sup> the *Morgan* case clearly articulates that Congress under its Section 5 power could expand the protection against discrimination by prohibiting the literacy tests.<sup>52</sup>

A specific issue before the Supreme Court in *Morgan* was whether Section 5 limited Congress to remedying what the Court defined to violate the Constitution, or whether Congress could independently interpret the Constitution.<sup>53</sup> The state of New York argued that Congress could not use its Section 5 power to determine independently the meaning of the Fourteenth Amendment, but instead only could provide remedies for practices that the Court deemed unconstitutional.<sup>54</sup>

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48. *Morgan*, 384 U.S. at 646.

49. *See id.* at 652.

50. *See id.* at 652-53.

51. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).

52. *See infra* notes 53-60 and accompanying text.

53. *See Morgan*, 384 U.S. at 649-50.

54. *See id.* at 648. This was also the position taken by Justice Harlan in a dissenting opinion joined by Justice Stewart. Justice Harlan wrote:

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. . . . But it is a judicial question whether the condition with which Congress has thus

In rejecting this approach, the Court spoke broadly of Congress's powers under Section 5 and expressly rejected the view that the legislative power is confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."<sup>55</sup> The Court explained that "[b]y including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."<sup>56</sup>

In fact, Justice Harlan, dissenting in *Morgan*, took exactly the same view as Justice Kennedy in *Flores*. He contended that enforcing meant remedying and that Congress could not use its Section 5 powers to determine the substantive meaning of the Fourteenth Amendment.<sup>57</sup> Justice Harlan wrote:

The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice, or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine.<sup>58</sup>

But Justice Harlan was the dissenter; Justice Brennan's majority opinion explicitly rejected his position.

Justice Kennedy deals with *Morgan* by saying: "There is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in Section 1 of the Fourteenth Amendment. This is not a necessary interpretation,

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sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all.

*Id.* at 666 (Harlan, J., dissenting).

55. *Id.* at 649.

56. *Id.* at 650.

57. *See id.* at 667 (Harlan, J., dissenting).

58. *Id.* (Harlan, J., dissenting).

however, or even the best one."<sup>59</sup> Justice Brennan's majority opinion in *Morgan* expressly argued that Congress may expand, but not dilute, rights.<sup>60</sup> Justice Harlan in dissent argued that Congress's power is limited to remedying violations of rights recognized by the judiciary. Justice Brennan, however, clearly rejected Justice Harlan's position that Congress's power was purely remedial.

Moreover, other cases support Congress's authority under the post-Civil War Amendments to interpret independently the Constitution.<sup>61</sup> In *City of Rome v. United States*,<sup>62</sup> the Court ruled that Congress had the authority under Section 2 to interpret the meaning of the Fifteenth Amendment. *City of Rome* involved a challenge to changes that a city adopted after the enactment of the Voting Rights Act.<sup>63</sup> Specifically, the city annexed a substantial number of outlying areas and thus altered the racial composition of its electorate and also adopted provisions for

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59. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).

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

61. Another major case to consider Congress's authority under Section 5, *Oregon v. Mitchell*, 400 U.S. 112 (1970), does not add much to the debate due to the absence of a majority opinion. The 1970 amendment to the Voting Rights Act prohibited all literacy tests and required that anyone 18 years and older could vote in both state and federal elections. *See id.* at 117. The Court unanimously upheld the prohibition of literacy tests on the ground that this was necessary to remedy an historical form of discrimination. *See id.* at 118. But by a 5-4 decision, the Court declared the 18-year-old vote unconstitutional. *See id.* Unfortunately, there was no majority opinion. Justice Black took the position that Congress could set the age for voting in federal elections, but not state elections because of federalism concerns. *See id.* at 126-31 (Black, J., announcing judgment of the Court). Justices Douglas, Brennan, White, and Marshall concluded that Congress could set the age for federal and state elections because of its power under Section 5 to determine the meaning of equal protection. *See id.* at 135-50 (Douglas, J., concurring in part and dissenting in part); *id.* at 239-50 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part). Finally, Chief Justice Burger and Justices Stewart, Blackmun, and Harlan argued that Congress has no authority to decide the meaning of the Fourteenth Amendment. *See id.* at 152-54 (Harlan, J., concurring in part and dissenting in part); *id.* at 293-96 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., and Blackmun, J.). Indeed, Justice Harlan explained that "Congress's expression of [its] view . . . cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers." *Id.* at 204 (Harlan, J.). However, Justice Harlan's position here was a dissenting view rejected by the majority.

62. 446 U.S. 156 (1980).

63. *See id.* at 159-61.

majority rather than plurality vote for selecting city commissioners.<sup>64</sup> The federal district court found no evidence that these changes were motivated by a discriminatory purpose.<sup>65</sup> On the same day it decided *City of Rome*, the Court held in *City of Mobile v. Bolden*<sup>66</sup> that at-large election systems were constitutional absent proof of a discriminatory purpose.<sup>67</sup> Therefore, the City of Rome's actions did not appear to violate the Fourteenth or Fifteenth Amendments.

Nonetheless, the Supreme Court ruled against the City of Rome based on the Voting Rights Act. Although *Bolden* held that proof of a discriminatory intent was a prerequisite to a constitutional violation,<sup>68</sup> the Court in *City of Rome* concluded that Congress could "prohibit changes that have a discriminatory impact."<sup>69</sup> *City of Rome* thus authorizes Congress to interpret independently the meaning of the Fifteenth Amendment even if that entails a view contrary to that of the Supreme Court. The Court in *Bolden* said that discriminatory impact was insufficient to show a violation of the Fourteenth Amendment, but in *City of Rome*, the Court upheld a statute allowing discriminatory impact to establish liability.

Establishing that precedent supports allowing Congress to expand rights only demonstrates that Justice Kennedy was disingenuous in claiming that prior case law supported his position. However, precedent alone should not dictate the scope of Congress's Section 5 powers. The best response to precedent could be that the Court should simply overrule it.

### C. Interpreting Section 5

Thus, neither the text, the Framers' intent, nor precedent resolves the question of Congress's Section 5 power. The meaning of Section 5 must be decided based on policy considerations. I believe that this is virtually always the case in constitutional

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64. See *id.* at 160.

65. See *id.* at 172.

66. 446 U.S. 55 (1980).

67. See *id.* at 62.

68. See *id.*

69. *City of Rome*, 446 U.S. at 177.

law and that rarely can descriptive sources answer normative questions about the desirable meaning of the Constitution.

So what policy reasons does Justice Kennedy offer to support his view of Section 5? Justice Kennedy invoked the need to preserve the Court as the authoritative interpreter of the Constitution. Justice Kennedy quoted *Marbury v. Madison* and wrote: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it.'"<sup>70</sup> Justice Kennedy concluded this part of the majority opinion by declaring: "Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."<sup>71</sup>

This is the fundamental flaw in Justice Kennedy's opinion: He equated a Supreme Court decision that failed to find a right in the Constitution with the conclusion that Congress can create no such right. The former, however, in no way entails or implies the latter. The Court's conclusion that a particular right does not exist in the Constitution does not mean that the right cannot exist through other legal sources, such as federal or state legislation.

In other words, Justice Kennedy made a crucial error when he assumed that a Supreme Court decision that did not find a constitutional right to exist precluded the legislative process from recognizing such a right. If the Supreme Court concludes that the Constitution *requires* government to act in a particular way, then Congress cannot overturn that result. For instance, Congress cannot by statute violate or ignore the mandate of *Gideon v. Wainwright*<sup>72</sup> that the government must provide counsel in criminal cases in which there is a potential sentence of imprisonment. Similarly, if the Court decides that the Constitution *prohibits* the government from acting in a specific manner, Con-

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70. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

71. *Id.* at 2168.

72. 372 U.S. 335 (1963).



gress cannot authorize the forbidden conduct. For example, no legislature can overturn the holding of *Roe v. Wade*<sup>73</sup> that the Constitution prevents the government from prohibiting abortion.

But it is inherently different when the Court decides that no right exists in the Constitution. Such a ruling means that the government is unconstrained by the Constitution and may act as it wants. This includes the power of the legislature to create the very right that the Court concluded is not constitutionally protected. Had the Court in *Roe v. Wade* found no constitutional protection for the right to abortion, Congress and state legislatures still would have had the power to create and safeguard such a right by statute. As explained in Part II, this is what RFRA did: The Court in *Smith* found no constitutional right of individuals to have an exemption from neutral laws of general applicability that burden religion.<sup>74</sup> Congress, in RFRA, created a statutory right to protect individuals from such laws, except in cases where the government could meet strict scrutiny.<sup>75</sup>

Justice Kennedy's approach to Section 5 suffers from another important flaw: He assumed that it is possible to meaningfully distinguish between laws that remedy violations of rights and statutes that interpret the Constitution. Justice Kennedy's majority opinion states: "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists, and must be observed."<sup>76</sup>

The problem is that any law expanding rights also can be characterized as a remedy for a problem. The legislature only acts based on perceived ills that require solutions. Congress can almost always tie these perceived ills to some constitutional claim. The Court in *Flores* accepted that Congress enacted the Voting Rights Act, and its amendments under Section 5, to remedy discrimination in voting.<sup>77</sup> Likewise, Congress adopted

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73. 410 U.S. 113 (1973).

74. *See Employment Div. v. Smith*, 494 U.S. 872, 885 (1990).

75. *See* 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

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

77. *See id.* at 2169. *But see* Stephen Carter, *The Morgan Power and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 841 (1986) (argu-

RFRA because of its perception that often neutral laws of general applicability wrongly limited people's religious freedom.<sup>78</sup>

Limiting Congress under Section 5 to remedies simply imposes a fact-finding burden on the legislative process. Congress can enact any law expanding rights under Section 5, but it first must document the existence of a problem and call its action remedial. There is, however, no constitutional requirement for legislative hearings or fact finding. Indeed, the presumption in favor of upholding laws assumes that the legislature found sufficient facts to support its action unless it can be shown that the law serves no legitimate purpose or is not rationally related to the end. As Professor Cohen observed, once it is assumed that Congress is a better forum for determining issues of fact, congressional determinations of factual sufficiency should not need any evidence at all.<sup>79</sup>

Demonstrating the error in Justice Kennedy's interpretation of Section 5 does not, however, explain why the alternative approach to Section 5 is preferable; there still needs to be an argument as to why the Court should interpret this provision to allow Congress to recognize and protect additional rights. The Court should have concluded that Section 5 is not limited to remedial legislation, but rather allows Congress to expand rights for two primary reasons.

First, the protection of additional rights is inherently desirable under the Constitution. The Ninth Amendment, so often forgotten, is significant here.<sup>80</sup> The Ninth Amendment is a constitutional reminder that the rights in the Constitution are just the minimum and that the existence of these rights in no way denies the existence of other liberties.<sup>81</sup> The Ninth Amendment is a powerful signal encouraging the recognition of additional freedoms beyond those explicitly created by the Constitution.

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ing that there was insufficient fact finding to justify concluding that the Voting Rights Act is remedial).

78. In fact, Justice Kennedy cites to the extensive testimony in congressional hearings supporting this view. See *Flores*, 117 S. Ct. at 2169.

79. See William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 612 (1975).

80. See U.S. CONST. amend. IX.

81. For an excellent collection of essays on the Ninth Amendment, see *THE RIGHTS RETAINED BY THE PEOPLE* (Randy Barnett ed., 1993).

How can other rights come into existence? One way, of course, is for the Court to interpret the Constitution to protect rights not enumerated in its text. In *Griswold v. Connecticut*,<sup>82</sup> Justice Goldberg's concurring opinion, joined by Chief Justice Warren and Justice Brennan, invoked the Ninth Amendment as support for a constitutional right to privacy.<sup>83</sup> Another crucial way for additional rights to arise is for legislatures, including Congress, to create and protect them.

Where possible, the Court should interpret the Constitution to fulfill the Ninth Amendment's teaching and allow government to create additional rights. In other words, when choosing between two plausible interpretations of a constitutional provision, one that grants the legislature the authority to safeguard additional rights and one that does not, the Court should choose the former. As described above, there are two ways of interpreting Section 5, one that permits Congress to use its authority to expand rights, and the alternative, which limits Congress to remedying violations of Court-recognized rights.<sup>84</sup> The Court should choose the former under the principle that increasing rights is presumptively desirable under the Constitution.

The reality, of course, is that in a particular instance recognizing a right might be socially undesirable. The general consensus is that judicial protection of a fundamental right to freedom of contract at the time of *Lochner v. New York*<sup>85</sup> era was undesirable.<sup>86</sup> I certainly would not favor creating a right for individuals to sell their labor under any terms they wish, thus preempting state and local minimum wage and maximum hours laws. The Constitution, however, grants Congress the authority to create additional rights, and it is for the political process to ensure their social desirability. There is no articulable principle that would empower Congress to create only good rights and not

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82. 381 U.S. 479 (1965).

83. See *id.* at 486 (Goldberg, J., concurring).

84. See *supra* notes 25-29 and accompanying text.

85. 198 U.S. 45 (1905).

86. See, e.g., James W. Ely, *Economic Due Process Revisited*, 44 VAND. L. REV. 213 (1991) (reviewing PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *Lochner v. New York*); Gerald Gunther, *Learned Hand and the Eight-Hour Day*, CAL. LAW, April 1994, at 56.

bad ones. The only limit on the legislature is that in creating new rights it cannot violate other constitutional provisions. Most notably, as Justice Brennan observed in a footnote in *Morgan*,<sup>87</sup> and as discussed below, Congress cannot dilute rights, it can only expand them.<sup>88</sup> The presumption under the Constitution is that increasing individual rights is good, and the Court should interpret Section 5 to fulfill this objective.

A second reason makes it desirable for the Court to allow Congress to expand constitutional rights under Section 5: It is preferable to allow each branch of government to interpret the Constitution so long as those definitions do not violate Court-defined constitutional rights. Every government official, at every level of government, takes an oath to uphold the Constitution. From the earliest days of the country, presidents have claimed equal authority with the Court in interpreting the Constitution. For example, presidents such as Thomas Jefferson and Andrew Jackson have asserted their right to interpret the Constitution. Jefferson wrote:

[N]othing in the Constitution has given . . . [the judges] a right to decide for the Executive, more than the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.<sup>89</sup>

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87. 384 U.S. 641, 651 n.10 (1966).

88. See *id.*

89. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50-51 (Andrew A. Lipscomb ed., 1905).

Similarly, President Andrew Jackson declared in vetoing a bill to recharter the Bank of the United States:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.<sup>90</sup>

Indeed, all sides of the political spectrum recognize that the other branches of government have independent authority to interpret the Constitution. As explained above, Justice Brennan saw Congress as vested with the power under Section 5 to expand the content of constitutional rights.<sup>91</sup> From the opposite end of the political spectrum, former Attorney General Edwin Meese argued that each branch has the authority to decide for itself the meaning of constitutional provisions.<sup>92</sup> Meese remarked: "The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions."<sup>93</sup>

I do not agree with the implications of the statements by Jefferson, Jackson, and Meese that the other branches have the authority to claim their interpretation equal to or superior to the

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90. Andrew Jackson, Veto Message, in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 582 (James D. Richardson ed., 1896).

91. See, e.g., *Morgan*, 384 U.S. at 651.

92. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987).

93. *Id.*

Supreme Court's.<sup>94</sup> I believe that long ago *Marbury v. Madison*<sup>95</sup> resolved this with its declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>96</sup> To say that the Court is the authoritative interpreter of the Constitution, however, does not imply that the Court is the only interpreter. Every legislator and every executive official should interpret the Constitution, and these interpretations are controlling *unless* there is a Supreme Court decision to the contrary. As explained above, a Supreme Court ruling that the Constitution does not protect a specific right in no way precludes the legislature from interpreting the Constitution to safeguard that liberty; a law protecting a right is in no way inconsistent with a judicial determination that the right is not constitutionally required.<sup>97</sup> Professor Tribe lucidly explained this when he wrote:

It is not difficult to reconcile congressional power to define the content of fourteenth amendment rights with *Marbury v. Madison* and judicial review. Judicial review does not require that the Constitution always be equated with the Supreme Court's view of it. It is the Court's responsibility under *Marbury*, to strike down acts of Congress which the Court concludes to be unconstitutional—nothing more.<sup>98</sup>

In recent years, many constitutional scholars have supported the view that constitutional law is best understood as a dialogue between the Court, the other branches of government, and society.<sup>99</sup> As Professor Stephen Carter has argued forcefully, allowing Congress to protect a right pursuant to Section 5 in response to a Supreme Court decision refusing to recognize a constitution-

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94. Indeed, I have argued elsewhere that the Supreme Court should be regarded as the authoritative interpreter of the Constitution. See CHEMERINSKY, *supra* note 31, at 81-105.

95. 5 U.S. (1 Cranch) 137 (1803).

96. *Id.* at 177.

97. See *supra* text accompanying notes 71-76.

98. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 349 (2d ed. 1988) (footnote omitted).

99. See, e.g., PHILLIP BOBBITT, *CONSTITUTIONAL FATE* (1986); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

al right furthers this notion of constitutional dialogue.<sup>100</sup> Legislatures cannot reverse Supreme Court decisions finding that the Constitution prohibits or requires government conduct. Legislatures, however, can act when the Court finds no right in the Constitution because such a finding in no way implies a limit on the legislative power to create and protect the additional liberties statutorily.<sup>101</sup>

In other words, it is preferable to interpret Section 5 to give Congress the authority to expand rights both because increasing rights is presumptively desirable under the Constitution, and because independent constitutional interpretation that is not inconsistent with Supreme Court rulings is desirable. Limiting Congress to providing remedies for violations of court-defined rights, which is Justice Kennedy's approach, loses both of these benefits and thus should be rejected.

#### D. Why Not?

Three major arguments caution against giving Congress independent authority to expand rights under Section 5. First, Congress could use this power to dilute or infringe upon constitutional rights.<sup>102</sup> The argument is that if Congress can use its power under Section 5 to interpret the Constitution, then it conceivably could use this authority to dilute or even negate constitutional rights. Justice Brennan responded directly to this concern in a footnote to his *Katzenbach* opinion:

Contrary to the suggestion of the dissent, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the

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100. See Carter, *supra* note 77, at 852-56.

101. For an excellent development of this position, see Bonnie I. Robin-Vergeer, *Disposing of Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996).

102. See *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

States to establish racially segregated systems of education would not be—as required by § 5—a measure “to enforce” the Equal Protection Clause since that clause of its own force prohibits such state laws.<sup>103</sup>

In other words, Section 5 is a “one-way ratchet” that allows Congress to expand, not contract, rights.<sup>104</sup>

The response to this argument is that it assumes a clear difference between laws expanding rights and those that “restrict, abrogate, or dilute” rights. Often, because laws help some and hurt others, they can be characterized either as an expansion or a contraction of rights depending on the perspective. For example, conservatives proposed that Congress use its power under Section 5 to declare that the word “person” in the Fourteenth Amendment includes fetuses from the moment of conception.<sup>105</sup> Under Justice Brennan’s theory such a declaration could be unconstitutional as a dilution of a woman’s right to obtain an abortion, or it could be constitutional as an enlargement of the rights of fetuses. Affirmative action provides another illustration: Does it constitutionally enlarge the rights and opportunities of minorities or does it unconstitutionally dilute the rights and opportunities of whites?

First, it is a logical fallacy to say that because sometimes the line distinguishing an expansion from a dilution is unclear that, therefore, it always is unclear. Undoubtedly, there are hard cases here as in every area of constitutional law, but generally the difference between more and less is obvious. There is no reason to believe that granting more protection for the rights of some always entails reducing the rights of others. For example, in *Morgan*, Congress’s prohibition of some literacy tests that the Court had found constitutional expanded the right to vote for some citizens, but it took away rights from no one. Likewise, RFRA expanded the safeguards for religious freedom by protecting individuals from the burdens of neutral laws of general ap-

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103. *Id.* at 651-52 n.10 (citation omitted).

104. *TRIBE*, *supra* note 98, at 346.

105. See Human Life Bill of 1981, S.158, 97th Cong. (1981). The “Human Life Bill” is reprinted in GEOFFREY STONE, ET AL., *CONSTITUTIONAL LAW* 258 (2d ed. 1991).



plicability; the law infringed upon no one's constitutional rights.<sup>106</sup> In *Flores*, allowing the church an exemption from an historic preservation law so that it could build a new facility would have diminished no one's rights.

Second, again a distinction must be drawn between situations where the Court has found that the Constitution prohibits or requires government action and those where the Court has found no constitutional limit. If the Court concludes that the Constitution commands or forbids government conduct, then the legislature cannot by statute overturn that judgment. For example, in the abortion context, the Court's determination that legislatures may not prohibit abortions before viability<sup>107</sup> precludes Congress from doing so, even if Congress claims to safeguard other rights in the process. Where, however, the Court rules that the Constitution is silent as to a matter and that no constitutional right exists, laws creating and safeguarding the liberty are permissible. This is the key difference between the Human Life Bill<sup>108</sup> and the Voting Rights Act<sup>109</sup> or RFRA. Through the Human Life Bill, Congress would have prohibited what the Court interpreted the Constitution to allow. In contrast, the Voting Rights Act and RFRA restricted government in areas where the Court found no constitutional limitations.

Finally, in some instances, the Court will have to decide what is an expansion of rights and what is a dilution. Such an inquiry, however, is not novel or unique to this area of constitutional law. For example, the police power of states grants the authority to protect more rights than the Court finds in the Constitution. The Court, thus, always has had to determine whether the state's claimed expansion of rights is really a dilution. *PruneYard Shopping Center v. Robins*<sup>110</sup> is illustrative on this point.

In *PruneYard*, the Supreme Court held that a state could cre-

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106. It can be argued that RFRA violated the Establishment Clause. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring). The text accompanying notes 143-50 address this argument.

107. See *Roe v. Wade*, 410 U.S. 113, 164 (1973).

108. See Human Life Bill of 1981, S. 158.

109. 42 U.S.C. §§ 1971-74 (1994).

110. 447 U.S. 74 (1980).

ate a state constitutional right of access to shopping centers for speech purposes,<sup>111</sup> even though the Supreme Court previously ruled that no such right exists under the U.S. Constitution.<sup>112</sup> The California Supreme Court found the right under the California Constitution.<sup>113</sup> The shopping center contended that forcing it to allow speakers violated its First Amendment rights and constituted a taking of its property without just compensation.<sup>114</sup> The U.S. Supreme Court rejected both of these arguments and held that states could recognize a state constitutional right of access to shopping centers, even though no such right exists under the U.S. Constitution.<sup>115</sup>

The Court concluded that the regulation did not result in a taking because property owners retained possession of their property and because the regulation did not substantially diminish the value of the property.<sup>116</sup> The Court found no violation of the First Amendment because a shopping center is

not limited to the personal use of appellants. . . . It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.<sup>117</sup>

Moreover, the Court said that "no specific message is dictated by the State to be displayed on appellants' property . . . [and] appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."<sup>118</sup>

In other words, in *PruneYard*, the Court had to decide whether the state's claimed expansion of the protestor's constitutional rights was an impermissible diminution of the rights of the

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111. See *id.* at 81.

112. See *Hudgens v. NLRB*, 424 U.S. 507 (1976).

113. See *PruneYard*, 447 U.S. at 78.

114. See *id.* at 82, 85.

115. See *id.* at 88.

116. See *id.* at 82-85.

117. *Id.* at 87.

118. *Id.*

shopping center owners. The Court confronted the issue directly and evaluated the claimed dilution of rights. Likewise, in implementing Section 5, the Court should engage in the same type of analysis where necessary.

The second major argument against interpreting Section 5 to allow Congress to expand rights is based on federalism. Granting Congress the authority to increase rights constrains state choices in that area.<sup>119</sup> The provision of the Voting Rights Act considered in *Morgan* limited the ability of states to use literacy tests. RFRA invalidated some state and local laws. Indeed, Justice Kennedy's majority opinion expressly invoked federalism in declaring the law unconstitutional.<sup>120</sup>

The question, however, is whether the Court should grant protection of states' choices more deference than Congress's desire to expand the protection of rights. Certainly, federal laws increasing rights constrain state and local governments; but why prefer state and local autonomy over rights? Justice Kennedy and the commentators who object on federalism grounds to Congress's use of its Section 5 power to increase liberties leave this question unanswered.

Traditionally, when federalism is invoked, several justifications are offered for protecting states. However, none of them justify limiting Congress's power in this context. For example, a primary explanation offered for protecting state governments from federal intrusions is that the division of power vertically, between federal and state governments, reduces the chance of federal tyranny. Professor Rapaczynski noted that "[p]erhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the 'tyranny' that the Framers were so concerned about."<sup>121</sup>

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119. See Cohen, *supra* note 79, at 615; Eisgruber & Sager, *supra* note 20, at 443; Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 212-15 (1995).

120. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997).

121. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380.

However, if Congress is expanding rights, there is no reason to fear tyranny. Indeed, guarding against tyranny explains why Congress should be able to use Section 5 to expand rights without implicating federalism concerns: Expansion of rights furthers the ultimate end of the structure of government. Any claim that laws that appear to protect rights actually dilute rights collapses the federalism argument into the diminution claim that is addressed above.

A second frequently invoked value of federalism is that states are closer to the people and thus more likely to be responsive to public needs and concerns.<sup>122</sup> Professor David Shapiro summarized this argument when he wrote that "one of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized."<sup>123</sup> If it is a choice, however, between a federal legislative process that produces more rights and a state choice for fewer, then why prefer the latter over the former? In other words, is responsiveness desirable when it means that there will be fewer rights? To the contrary, if it is accepted, as argued above, that expanding rights is desirable, then responsiveness resulting in reduced rights is to be avoided.

A final argument that commentators frequently make for protecting federalism is that states can serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>124</sup>

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122. *See id.* at 391.

123. DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 92 (1995).

124. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The same response can be made to this argument: Why protect the ability of states to experiment at the expense of rights? Moreover, in choosing whether to protect rights, Congress certainly can make the choice of whether to allow experimentation or whether to impose a national standard.<sup>125</sup> The creation of a federal right by Congress arguably is a decision that protecting the liberty is more important than permitting states to experiment with it.

The point is that none of the traditional justifications for federalism warrant limiting Congress's authority under Section 5 to expand the protection of constitutional rights. The Fourteenth Amendment, by its very existence, is a limit on state power. Thus, any exercise of authority under the Fourteenth Amendment restricts state and local governments. Federalism should not be a basis for limiting rights, only a way of expanding them. Indeed, as Professor McConnell argues, "[b]y its very text . . . the Fourteenth Amendment rejects the idea that the rights of citizens should vary from state to state and group to group."<sup>126</sup> As Professor McConnell concludes, "RFRA is in accord with the fundamental philosophy of the Fourteenth Amendment."<sup>127</sup>

Finally, a separation-of-powers theory provides an argument that Congress should not have the authority to expand rights using Section 5. Professor William Cohen, for instance, argued that *Morgan* "stood *Marbury v. Madison* on its head by judicial deference to congressional interpretation of the Constitution."<sup>128</sup> Likewise, Professor Lupu contended that:

The entire concept of RFRA is a challenge to the concept of judicial supremacy in the interpretation of the Constitution. On a strong reading of *Marbury v. Madison*, the idea that Congress may replace the Court's view with its own concerning the general rules governing our constitutional arrangements is heretical, a step worse than President Franklin

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125. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 925 (1994).

126. McConnell, *supra* note 12, at 193.

127. *Id.* at 194.

128. William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

Roosevelt's attempted Court-packing in its threat to the judicial role in the interpretation of the fundamental law.<sup>129</sup>

Professors Eisgruber and Sager similarly say that RFRA is "a statute at war with the Supreme Court's constitutional judgment."<sup>130</sup>

It is only with trepidation that one disagrees with four such eminent constitutional scholars, but I believe that they, like Justice Kennedy, mistakenly assume that a Supreme Court decision finding no right in the Constitution means that no right can exist in society. A Court decision refusing to recognize a constitutional right means only that the judiciary will not safeguard the liberty; there is nothing in that determination that precludes the legislature from recognizing and protecting the right. A statute protecting a right that the Court did not find in the Constitution does not turn *Marbury v. Madison* on its head or challenge judicial authority because there is no inconsistency in saying that a right exists through legislative action, but not through judicial interpretation of the Constitution.

Therefore, the key question in evaluating RFRA is whether it is properly understood as a statute expanding rights. If so, it should have been upheld.

## II. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 IS A STATUTE, ENACTED UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT, THAT CREATES MORE CONSTITUTIONAL RIGHTS

Simply put, RFRA created a statutory right protecting individuals from neutral laws of general applicability that burden religious freedom.<sup>131</sup> Congress enacted RFRA in response to a Supreme Court decision that interpreted the Constitution to provide no such right.<sup>132</sup> As such, RFRA is properly understood as expanding rights under Congress's Section 5 authority.

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129. Lupu, *supra* note 119, at 173, 174.

130. Eisgruber & Sager, *supra* note 20, at 445.

131. See Religious Restoration Freedom Act of 1992, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

132. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

In 1990, in *Employment Division v. Smith*,<sup>133</sup> the Court changed the law of the Free Exercise Clause dramatically. The Court in *Smith* held that individuals could not use the Free Exercise Clause to challenge a neutral law of general applicability.<sup>134</sup> In other words, regardless of how much a law burdens religious practices, it is constitutional under *Smith* so long as it does not single out religious behavior for punishment and is not motivated by a desire to interfere with religion. For example, in *Smith*, the Court said that a law prohibiting consumption of peyote, a hallucinogenic substance, did not violate the Free Exercise Clause even though some Native American religions required its use.<sup>135</sup> The Court explained that the state law prohibiting consumption of peyote applied to everyone in the state and did not punish conduct solely because it was religiously motivated.<sup>136</sup>

*Smith* changed the law so that a neutral law of general applicability only had to meet rational basis review, but laws that were directed at religious practices had to meet strict scrutiny.<sup>137</sup> RFRA, however, changed this by negating the effects of the *Smith* decision and restoring strict scrutiny for Free Exercise Clause analysis.<sup>138</sup> RFRA requires that courts use strict scrutiny in analyzing Free Exercise Clause claims, even for neutral laws of general applicability.<sup>139</sup>

In other words, *Smith* said that under the Free Exercise Clause individuals had no right to be free from the burdens on their religion resulting from neutral laws of general applicability. RFRA created a statutory right to protect individuals from this burden. RFRA, then, does not overturn a Supreme Court decision requiring or prohibiting government action. RFRA simply creates a statutory right where the Court found no constitutional right to exist.

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133. *Id.*

134. *See id.* at 877-82.

135. *See id.*

136. *See id.* at 882.

137. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (finding that laws directed at religious practices must meet strict scrutiny).

138. *See Religious Freedom Restoration Act of 1993*, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

139. *See id.*

Suppose that after *Smith*, Oregon revised its law and created a statutory exemption from its peyote law for Native Americans. No one would have argued that the revision was unconstitutional because it overturned a Supreme Court decision. Rather, the response would have been that the political process had created a statutory right where the Court found that none existed under the Constitution. RFRA does exactly the same thing.

Admittedly, RFRA takes an unusual form because it directs the courts to apply strict scrutiny in Free Exercise Clause cases. However, this is just another way for the legislature to declare that it finds, by statute, a fundamental right to exist. The practical effect of a determination that there is a fundamental right is that courts apply strict scrutiny. Congress created the new statutory right by specifying the test to be used to protect it. There is no reason why this phrasing of the right is unconstitutional.

Several responses might be made to this argument. First, Professor Lupu has argued that the Constitution limits Congress's authority to expand rights under Section 5 of the Fourteenth Amendment to due process and equal protection; Congress, therefore, cannot use its Section 5 power to expand the protections of the Bill of Rights.<sup>140</sup> This argument, however, ignores the underlying rationale behind the incorporation of the Bill of Rights into the Fourteenth Amendment. The Supreme Court has held that the term "liberty" in the Due Process Clause of the Fourteenth Amendment includes those parts of the Bill of Rights that are essential to freedom and justice.

Justice Cardozo said that the Due Process Clause included "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and that were therefore "implicit in the concept of ordered liberty."<sup>141</sup> Justice Frankfurter said that due process precludes those practices that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."<sup>142</sup>

In other words, the Court's incorporation decisions apply the

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140. See Lupu, *supra* note 119, at 216.

141. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (holding that certain state criminal procedures do not violate an accused's Fourteenth Amendment rights).

142. *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) (affirming the murder conviction of Admiral Dewey Adamson).



Bill of Rights protections to the states, not because they are listed in the first eight amendments, but because of their importance. Rights are protected under the Due Process Clause because they are fundamental. Accordingly, there is no basis for drawing a distinction among these rights for purposes of Congress's Section 5 power. Indeed, drawing such a distinction would have the perverse effect of allowing Congress much more authority to protect unenumerated rights than those specified in the text. Congress could expand constitutional rights recognized by the Supreme Court, but legislation could not increase those found in the Bill of Rights. Such a distinction would relegate Bill of Rights provisions to an inferior status, a result that simply cannot be right.

A second and more serious objection to RFRA is that it violates the Establishment Clause of the First Amendment. Such an argument suggests not that RFRA exceeds the scope of Congress's Section 5 power, but that it violates another clause of the First Amendment. Congress cannot use its Section 5 authority, or any of its powers, in a manner that infringes the Constitution. Justice Stevens made this argument in his very short concurring opinion in *Flores*,<sup>143</sup> and some scholars have made the same point.<sup>144</sup>

A full response to this argument is beyond the scope of this Essay. It must be noted, however, that all protection of free exercise of religion raises Establishment Clause problems. As the Supreme Court and many scholars have noted, there is an inherent tension between the two constitutional provisions.<sup>145</sup> Indeed, under the primary test used for the Establishment Clause, *Lemon v. Kurtzman*,<sup>146</sup> any protection of free exercise arguably violates the Establishment Clause. Under the *Lemon*

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143. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring).

144. See, e.g., Eisgruber & Sager, *supra* note 20, at 452-55.

145. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) (finding that states may exempt from real property taxes any property owned and operated exclusively for religious purposes); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123.

146. 403 U.S. 602 (1971).

test, the government violates the Establishment Clause if the government's primary purpose is to advance religion, or if the principal effect is to aid or inhibit religion, or if there is excessive government entanglement with religion.<sup>147</sup> Yet, any time the government acts to protect free exercise of religion, its primary purpose is to advance religion; any time the principal effect is to facilitate free exercise, the government is aiding religion.<sup>148</sup> In this sense, RFRA, by definition, has the purpose and effect of advancing religion and thus potentially violates the Establishment Clause.

Prior to *Smith*, however, the Court used strict scrutiny in evaluating Free Exercise Clause claims.<sup>149</sup> Even after *Smith*, the Court has indicated that it will use strict scrutiny for challenges to laws directed at religious practices.<sup>150</sup> The Court, therefore, does not believe that use of strict scrutiny violates the Establishment Clause. Nor is there a violation of the Establishment Clause when Congress, by statute, restores strict scrutiny. The protection of free exercise as a fundamental right should not be deemed incompatible with the Establishment Clause.

Critics might argue that there is a difference between the Court finding that the Constitution requires employment of strict scrutiny and Congress imposing it; the former does not violate the Establishment Clause, but the latter does. The answer to this is that protecting free exercise of religion, as accomplished through RFRA, could be a compelling interest sufficient to justify the statute even if it does infringe the Establishment Clause. The Establishment Clause, like all rights, is not absolute. The protection of free exercise of religion, as implemented through RFRA, should meet strict scrutiny. This is not to say that every imaginable law protecting religious freedom is im-

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147. See *id.* at 612-13.

148. Cf. *id.* at 614 ("[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier . . .").

149. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (declaring unconstitutional a state law that forced public schooling in violation of religious beliefs); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding unconstitutional a state law that denied unemployment benefits to a worker who refused a job because the hours violated her religious beliefs).

150. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

mune from Establishment Clause scrutiny. Rather, it is to say that the Court could find that RFRA simply returned the law to what it was before *Smith* and served the compelling purpose of protecting people from the burdens of neutral laws of general applicability.

### III. CONCLUSION: WHERE TO FROM HERE?

The beauty of deductive reasoning is that if the premises are established, the conclusion naturally follows. Part I defended the major premise: Congress, acting under Section 5 of the Fourteenth Amendment, may create more constitutional rights than recognized by the Supreme Court, so long as Congress does not dilute or reduce existing rights. Part II established the minor premise: RFRA is a statute, enacted under Section 5, that creates more constitutional rights and does not dilute or reduce existing rights. Therefore, the conclusion follows: RFRA is constitutional.

But *Flores*, of course, held to the contrary. What now? Three options seem most desirable. First, Congress could reenact the law as an exercise of its remedial power under Section 5 of the Fourteenth Amendment. Congress would need to do fact-finding to show that there is a serious problem with religious freedom being burdened by neutral laws of general applicability. Congress then could enact a law to remedy the problem. The statute could declare the need to offer protection from such burdens on religious freedom and could do this by instructing courts to apply strict scrutiny when such laws are challenged. This seems entirely consistent with the conclusion of Justice Kennedy's majority opinion that Congress's power is "remedial."<sup>151</sup>

The Court in *Flores* emphasized that RFRA was not "proportional" to the violations of rights.<sup>152</sup> This, however, is a factual question. Congress, by fact-finding, could determine that laws of general applicability are a serious threat to free exercise of religion and thus support the proportional relationship between a new RFRA and the underlying problem.

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151. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997).

152. See *id.* at 2170.

The response to this could be that Congress only can provide remedies for violations of what the Court has determined to be the right. In other words, the Court in *Smith* found that the Free Exercise Clause is violated only if a law burdening religion is not neutral or is not of general applicability.<sup>153</sup> The argument is that Congress only may provide remedies for laws of this type.

This argument, however, ignores the fact that the Supreme Court carefully did not overrule cases like *Katzenbach v. Morgan*<sup>154</sup> or *City of Rome v. United States*.<sup>155</sup> In both the Voting Rights Act of 1965 and its 1982 amendments,<sup>156</sup> Congress went substantially beyond providing remedies for rights recognized by the judiciary. The Court had found that literacy tests were constitutional,<sup>157</sup> but Congress adopted a law prohibiting them in certain circumstances.<sup>158</sup> The Court had concluded that a voting scheme's discriminatory impact did not violate the Constitution absent proof of discriminatory intent.<sup>159</sup> Congress then, by statute, provided that discriminatory impact was sufficient to violate the law. The Court's explicit affirmance of these precedents in *Flores* shows that Congress can provide greater protection of rights than that accorded by the Court so long as the law is proportional to the problem. RFRA could be reenacted and should be upheld by the Court as long as there is sufficient congressional fact-finding that neutral laws of general applicability are a serious threat to the free exercise of religion.

Second, Congress could use its Commerce Clause authority to reenact RFRA. In light of *United States v. Lopez*,<sup>160</sup> Congress would need to make findings that neutral laws of general applicability impose a substantial burden on interstate commerce.

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153. See *Employment Div. v. Smith*, 494 U.S. 872, 879-82 (1990).

154. 384 U.S. 641 (1966).

155. 446 U.S. 156 (1980); see also, *Flores*, 117 S. Ct. at 2163-68 (discussing *City of Rome* and *Morgan*).

156. 42 U.S.C. § 1973b (1994).

157. See *Morgan*, 384 U.S. at 649 (citing *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959)).

158. See 42 U.S.C. § 1973b (1994).

159. See *Lassiter*, 360 U.S. at 50-54.

160. 514 U.S. 549 (1995) (declaring unconstitutional the Gun-Free School Zone Act as exceeding the scope of Congress's commerce power).

Congress might point, for example, to the burden that zoning laws place on religious practices and the economic consequences of these laws. The use of the Commerce Clause as the authority for the Civil Rights Act of 1964 provides ample precedent for using this constitutional provision to increase the protection of rights.<sup>161</sup>

For Congress to use its commerce power to reenact RFRA no more reduces religion to commercial matters than Congress's use of the Commerce Clause to enact civil rights laws reduced equality to a commercial matter. Rather, as with discrimination, Congress would find that laws burdening religion have substantial cumulative impact. For instance, in *Flores*, additional church construction that would have employed workers and contributed to the local economy was thwarted. Congress could find that such situations, multiplied across the country and in countless contexts, have a substantial effect on interstate commerce.

Third, state governments can enact their own religious freedom restoration acts in order to have state courts apply strict scrutiny to state government actions or laws that burden religion. States, of course, pursuant to police power, may adopt any law not prohibited by the Constitution.<sup>162</sup> Nothing in the Court's decision in *Flores* precludes a state from deciding that it will tolerate state actions and laws that burden religion only if they meet strict scrutiny.

There is no doubt that people have less protection for their religious practices after *Flores* than they did before. Hopefully though, this will be only temporary as legislatures find other ways to protect individuals from neutral laws of general applicability that burden religion. Hopefully, too, the Supreme Court will uphold these laws and recognize that more is not less; legislatures may protect rights greater than those found in the Constitution by the Supreme Court.

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161. See, for example, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), that upheld Title II of the Civil Rights Act of 1964, prohibiting racial discrimination in places of public accommodation.

162. See U.S. CONST. amend. X.