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## THE FEDERALISM IMPLICATIONS OF *FLORES*

STEPHEN GARDBAUM\*

The Supreme Court's decision in *City of Boerne v. Flores*<sup>1</sup> that the Religious Freedom Restoration Act of 1993 (RFRA or the "Act")<sup>2</sup> is unconstitutional was not in itself particularly surprising.<sup>3</sup> Moreover, the Court's finding that Congress had exceeded its enforcement power under Section 5 of the Fourteenth Amendment ("Section 5")<sup>4</sup> is not unprecedented in modern times.<sup>5</sup> Nonetheless, in reaching this conclusion, the Court

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1. 117 S. Ct. 2157 (1997).

2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. The constitutionality of RFRA had been the subject of much debate. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 1996 DUKE L.J. 291. Moreover, insofar as RFRA was invalidated on federalism grounds, the Court was adding to the recent string of cases in which it has made clear that it considers the judicial enforcement of federalism an appropriate task for itself. See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (holding that Congress cannot require state officials to administer a federal statute); *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131-32 (1996) (holding that Congress cannot abrogate states' Eleventh Amendment immunity from suit in federal court pursuant to its Article I powers); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (limiting the scope of Congress's Commerce Clause power).

4. U.S. CONST. amend. XIV, § 5.

5. In *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (Black, J., announcing judgment of the Court), the Court held that Congress had exceeded its Section 5 enforcement power by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections. The majority's rationale was that when, as here, Congress legislates in an area otherwise reserved exclusively to the states, its enforcement power must be tied closely to the goal of eliminating racial discrimination. See *id.* at 130 (Black, J., announcing judgment of the Court). Additionally, in none of the handful of modern Section 5 cases has the stated purpose of the challenged legislation been to overrule the Supreme Court's interpretation of the Constitution as it was in RFRA; generally the target has been questionable state practices. Finally, whereas in previous cases there was often deep division among the Justices on the

placed new limits on the scope of Congress's enforcement power and thereby reset the federal-state balance in the symbolically charged context of the Civil War Amendments. In so doing, the Court confirmed in unambiguous terms just how serious it is about protecting federalism.

The Court's analysis, however, is flawed in a way that renders the decision's importance and implications for federalism uncertain. The Court held that RFRA violated both separation-of-powers and federalism principles,<sup>6</sup> but it failed to keep the two distinct,<sup>7</sup> unwittingly skipping from one to the other and often conflating them. More critically, these two grounds of the decision are in serious tension with each other and cannot both stand: The Court's separation-of-powers argument prohibits what its federalism argument permits. This seemingly fatal problem is, however, entirely of the Court's own making. Even though, if anything, its separation-of-powers argument was the more central of the two grounds in driving the Court's analysis, it was, in reality, a red herring in the case. Accordingly, the Court's unnecessary and irrelevant defense of judicial supremacy—and its implications for the states—may justifiably be severed from the opinion and ignored.

Once this threshold problem with the Court's analysis has been identified and dissolved in Part I of this Essay, the task of assessing the significance of the case from the perspective of federalism can begin. From this vantage point, *Flores* does not simply affirm *Employment Division v. Smith*<sup>8</sup> but adds to it, and the aim of Parts II and III is to explore what may prove to

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issue of the scope of the Section 5 power, in *Flores* none of the three dissenting Justices expressed disagreement with the majority's treatment of this issue; rather, they each questioned whether *Employment Div. v. Smith*, 494 U.S. 872 (1990), was a proper interpretation of the Free Exercise Clause. See *Flores*, 117 S. Ct. at 2176-78 (O'Connor, J., dissenting); *id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

6. See *Flores*, 117 S. Ct. at 2172 (stating that "RFRA contradicts vital principles necessary to maintain separation-of-powers and the federal balance").

7. The Court did distinguish and analyze the principles separately only two days later in a subsequent case. See *Printz*, 117 S. Ct. at 2376-78.

8. 494 U.S. 872 (1990) (holding that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest, contrary to the prevailing free exercise test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)).

be *Flores*'s two major implications. First, if not explicitly, then at least by implication, the Court placed new limits on Congress's Section 5 power. In so doing, of course, it provided a revised answer to the important question of whether, and to what extent, this congressional power potentially subjects the states to additional limitations on their sovereignty beyond the constitutional prohibitions contained in Section 1.<sup>9</sup> Second, both the opinion in *Flores* and the one announced two days later in *Printz v. United States*,<sup>10</sup> in which the Court held that Congress cannot require state officials to administer federal statutes, contain grounds for thinking that the Court will perhaps interpret the scope of Congress's powers under the Necessary and Proper Clause<sup>11</sup> more restrictively than previously.<sup>12</sup> Since, from a federalism perspective, this clause undoubtedly represents one of the most important of Congress's enumerated powers, such a change could have significant implications for the states.

### I. SEPARATION OF POWERS AND FEDERALISM

Justice Kennedy's opinion for the Court in *Flores* concluded that "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."<sup>13</sup> Although the precise chain of reasoning linking the main body of the Court's analysis to this conclusion at the very end of its opinion is left largely unstated, it is not difficult to fill in the gaps.

According to the Court, RFRA violated separation-of-powers principles because it could not be understood as an attempt by Congress to enforce the Free Exercise Clause,<sup>14</sup> which is all that Section 5 authorizes, but only as an attempt to change the clause's meaning. By seeking through RFRA to overrule *Smith* and restore the prior interpretation of the clause,<sup>15</sup> Congress

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9. U.S. CONST. amend. XIV, § 1.

10. 117 S. Ct. 2365 (1997).

11. U.S. CONST. art. I, § 8, cl. 18.

12. See *Printz*, 117 S. Ct. at 2379.

13. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

14. U.S. CONST. amend. I.

15. Under this prior interpretation, if a measure substantially burdened a religious

overstepped the constitutionally mandated boundary between legislative and judicial functions and challenged the Court's role as final interpreter of the Constitution's meaning: "The power to interpret the Constitution in a case or controversy remains in the Judiciary."<sup>16</sup> RFRA also violated federalism principles because in going beyond "enforcement" of the Fourteenth Amendment, it exceeded Congress's enumerated power under Section 5 and therefore impermissibly intruded "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."<sup>17</sup>

The problem with this analysis is as follows: If RFRA violates separation-of-powers principles because it amounts to a "substantive change in constitutional protections"<sup>18</sup> or "[l]egislation which alters the meaning of the Free Exercise Clause"<sup>19</sup> and therefore impermissibly intrudes on the Court's interpretive authority, then presumably the states cannot enact RFRA either because if they did so, it would surely amount to the same thing. No more than Congress can the states define their own powers by altering the meaning of the Fourteenth Amendment. And yet, if RFRA violates federalism principles because it usurps the general authority to regulate life, liberty, and property that the Constitution reserves to the states—and that Section 1 of the Fourteenth Amendment limits but does not oust—then presumably the states may exercise this authority to enact their own versions of RFRA (or any version between the *Smith* and *Sherbert* tests).<sup>20</sup> In other words, if the problem with RFRA is that only the states have the general authority to enact "substantive" measures protecting free exercise beyond what is constitutionally necessary under *Smith*, then such measures cannot violate the principle of judicial supremacy that applies equally to the states. Accordingly, and contrary to the Court's argument in *Flores*, RFRA may violate either separation of powers—in which

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practice, then it would be justified only if supported by a compelling governmental interest. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

16. *Flores*, 117 S. Ct. at 2166.

17. *Id.* at 2171.

18. *Id.* at 2170.

19. *Id.* at 2164.

20. See *supra* notes 8, 15.

case neither Congress nor the states could enact it—or federalism—in which case the states may enact it—but it cannot violate both.

This conundrum resulting from the Court's analysis is, however, entirely of its own making. The solution is quite simply that far from violating the separation-of-powers principle that the Court identifies and relies upon, RFRA does not even raise or implicate it. Given RFRA's history both inside and outside Congress and the sharp criticism of *Smith* in the legislative text,<sup>21</sup> it is perhaps understandable that the Court was provoked into looking at the case through the lens of judicial supremacy and felt compelled to put down what it saw as a congressional rebellion. Nonetheless, RFRA did not change the meaning of the Free Exercise Clause and its constitutionality depended only on the scope of Congress's legislative power under Section 5. Congressional desire to "overrule" *Smith* notwithstanding, the technical question at issue was the validity of Congress's *statutory* scheme supplementing the constitutional right of free exercise as interpreted in *Smith*. If valid, then this scheme would displace otherwise permissible state authority to regulate for the general health and welfare of their citizens in a manner that affords them only the lesser constitutionally guaranteed right of free exercise.

Let me expand a little on this important point. It is undoubtedly the case that RFRA was informed and motivated by a congressional interpretation of the Free Exercise Clause differing from that of the Court. Nonetheless, in enacting RFRA, Congress was not declaring that an individual has a constitutional right of free exercise greater than that announced in *Smith*, but a federal legislative right—and one that on its face is not inconsistent with, or prohibited by, *Smith*. Whether one characterizes this legislative act as an attempt to supplement the constitutional right set out in *Smith* or to enforce Congress's different interpretation of it, in itself RFRA does not alter or establish the

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21. The Act's stated purposes were: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* 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(b) (1994).

meaning of the Free Exercise Clause and so does not intrude on the judicial function, although in expanding federal restrictions on the states it does raise obvious federalism issues. Whether Congress can enact such a legislative scheme depends on the scope of its enumerated powers and not on the division between judicial and legislative functions.<sup>22</sup> If it can, then RFRA will trump any conflicting state laws and may, depending on express or implied congressional intent, preempt all state authority in the field, including state authority to supplement the federal scheme itself. If it cannot, then Congress has exceeded its enumerated powers and thereby also impermissibly intruded on the constitutionally reserved authority of the states to regulate for the health and welfare of their citizens.

Accordingly, the Court's argument that RFRA exceeded Congress's Section 5 power because it "attempt[s] a substantive change in constitutional protections"<sup>23</sup> rather than enforcement of the existing ones is misdirected; it responds to a red herring. If RFRA exceeded Congress's Section 5 power, it can only have been because in attempting to enact an additional legislative right, Congress went beyond "enforcement" of the constitutional one. Absent some other enumerated power that does provide congressional authorization,<sup>24</sup> the Constitution leaves it up to the states whether to supplement the minimum federal constitutional guarantee of free exercise in this way.

Not only did the Court employ its separation-of-powers argument to mischaracterize what RFRA did (alter the meaning of the Constitution), but it also derived from this argument a patently invalid one against a "substantive" interpretation of the Section 5 power. In effect, this latter argument—which conflates

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22. It also depends of course on whether the legislation violates other independent constitutional rights, such as the Establishment Clause. Perhaps surprisingly, the Court did not mention that clause in its opinion, although Justice Stevens did rely upon the clause in his concurrence. See *Flores*, 117 U.S. 2172 (Stevens, J., concurring).

23. *Id.* at 2170.

24. For an extremely interesting and incisive discussion of whether RFRA is authorized under Congress's power to implement the treaty obligations of the United States (in this case The International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, S. EXEC. DOC. E, 95-2, at 23, 28 (1978), 999 U.N.T.S. 171, 178, ratified by the Senate, 138 CONG. REC. S4183 (daily ed. Apr. 2, 1992), see Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 41-54 (1997).

two different types or sources of law (constitutional and legislative)—is that since separation-of-powers principles prevent Congress from changing the meaning of the Constitution, they prevent it from making any substantive change in the law. Thus, Justice Kennedy began his analysis by making the uncontroversial textual point that Congress's power under Section 5 extends only to enforcing the Fourteenth Amendment.<sup>25</sup> He then sought to specify the limits of this power by distinguishing legislation that "enforces" the Free Exercise Clause from "legislation which alters the meaning of the Free Exercise Clause" or measures that "determine what constitutes a constitutional violation."<sup>26</sup> This distinction obviously raises the separation-of-powers issue and was employed to affirm the Court's established position as final interpreter of the Constitution.

Justice Kennedy then immediately drew a second distinction, although he appeared to understand it as simply a restatement of this first one: "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 . . . the distinction exists and must be observed."<sup>27</sup> And in the next two sentences, he refers to the difference between legislation enforcing the Fourteenth Amendment and legislation that is "substantive in operation and effect."<sup>28</sup> But only a conflation of constitutional and legislative rights, or an equation of "constitutional law" with "law," renders these two distinctions equivalent. While separation-of-powers principles, as well as Article V,<sup>29</sup> may prevent Congress from making a "substantive change in constitutional protections,"<sup>30</sup> they do not in themselves prevent it from enacting "measures that make a substantive change in the governing law."<sup>31</sup> Rather, this second distinction raises the federalism issue of the allocation of legislative powers between Congress and the states concerning life, liberty, and property.

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

26. *Id.*

27. *Id.*

28. *Id.*

29. U.S. CONST. art. V.

30. *Flores*, 117 S. Ct. at 2170 (emphasis added).

31. *Id.* at 2164 (emphasis added).



Throughout its opinion, the Court uses these two distinctions interchangeably, sliding from measures that change the Constitution to measures that change the law without acknowledgment.<sup>32</sup> In this way, the Court repeatedly skipped from a separation-of-powers to a federalism analysis and back again in a manner that, save for its being unwitting, is reminiscent of Cardozo's famous opinion in the *Allegheny College* case.<sup>33</sup>

Although, as I have argued, the separation-of-powers issue raised and relied upon by the Court was a red herring in the case, there is a *different* separation-of-powers issue that could plausibly and appropriately have been part of the Court's analysis, but was not considered at all in its opinion. Rather than the issue of whether RFRA changed the meaning of the Free Exercise Clause, which it clearly did not, this issue is whether Section 5 authorizes Congress to enforce by legislation its own reasonable interpretation of the Fourteenth Amendment, even if this interpretation differs from the authoritative one given by the Court in the context of a case or controversy.<sup>34</sup> Moreover, this different separation-of-powers issue, unlike the one on which the Court relied, would not be in tension with the federalism ground of the decision since it relates exclusively to the scope and proper interpretation of the Section 5 power and so only applies to Congress and not the states.

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32. At one point, the Court referred to the issue of whether Congress has the power to "enact legislation that expands the rights contained in § 1," *id.* at 2168, which could be referring to either distinction. More often, the Court's opinion simply jumped from measures that make a substantive change in the law to measures that change the meaning of the Free Exercise Clause with no indication that it acknowledged a difference between the two.

33. *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927) (discussing enforceability of a charitable pledge on both consideration and promissory estoppel grounds); see also Leon S. Lipson, *The Allegheny College Case*, YALE L. REP., Spring 1977, at 8, 10-11 (discussing *Allegheny College*).

34. Professor Michael McConnell has recently presented an interesting and forceful argument for the constitutionality of RFRA based on this "interpretive" conception of Congress's Section 5 power. See 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). Although evaluating the merits of this position is beyond the scope of this Essay, I suggest two concerns that it raises in *infra* note 36.

## II. THE SCOPE OF CONGRESSIONAL POWER UNDER SECTION 5

With this threshold flaw in the Court's analysis identified and addressed, it is now possible to look more closely at the significance of its opinion from the perspective of federalism. Bearing in mind that invalidating a federal statute because it exceeds Congress's Section 5 power is not unprecedented in modern times, the major interpretive question is the following: Did the *Flores* majority place new and additional limits on Congress's power under this clause or simply apply the existing limits to a new context—namely, one of the incorporated provisions of the Bill of Rights as distinct from the Equal Protection Clause? This question requires consideration of the Court's second distinction, the all-important one between legislation that enforces and supplements constitutional rights.

Yet here again, much of the Court's analysis was frustratingly redundant, unnecessarily delaying discussion of the essential point—whether RFRA can properly be considered enforcement legislation or not. Just as in reality, no one debating the scope of the Section 5 power suggests that it endows Congress “with the power to establish the meaning of constitutional provisions”<sup>35</sup> in the sense of having the final say and displacing the Court,<sup>36</sup>

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35. *Flores*, 117 S. Ct. at 2168.

36. As noted above, Professor Michael McConnell has recently proposed that under Section 5, Congress should be understood to have “some degree of authority to determine for itself what the provisions of the Fourteenth Amendment mean, and to pass enforcement legislation pursuant to those determinations.” See McConnell, *supra* note 34, at 171. He emphasizes though that this “interpretive” (versus remedial and substantive) view of the Section 5 power “does not mean that Congress has the last word.” *Id.* The Court must still review the congressional interpretation in determining whether the legislation in question falls within the scope of Congress's enumerated powers. Professor McConnell argues that this understanding of Section 5 was affirmed by the Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See McConnell, *supra* note 34, at 172. But in suggesting that Congress could prohibit enforcement of New York's English literacy requirement statute by legislation under Section 5 “[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's [statute],” *Morgan*, 384 U.S. at 649, the *Morgan* majority was, I believe, making the different point—reaffirmed in *Flores*—that Congress may prohibit state actions, not in themselves violations of Section 1 of the Fourteenth Amendment. The majority was not suggesting that Congress could determine what constitutes a violation of Section 1.

More generally, it is unclear why, under Professor McConnell's interpretive view of the Section 5 power, Congress would not effectively have the last word on the

so too no one proposes that Congress has a "substantive, non-remedial power"<sup>37</sup> in the Court's stated sense of an independent, plenary power to legislate on the issue of life, liberty, or property that is entirely unrelated to previous or potential state conduct. The real issue, both in *Flores* and in the precedents that the Court considered, was how broadly or narrowly to understand the concept of enforcement legislation.

Although Justice Kennedy's opinion did not state clearly and expressly whether or how its answer to the question of the permissible scope of Congress's Section 5 power differed from those given in the leading precedents that it discussed and universally endorsed, ultimately it did depart from them. In effect, *Flores* establishes what from a federalism perspective may be thought of as a middle or intermediate position: It rejected both the strong antifederalist and strong nationalist positions advanced in those cases.

The antifederalist conception is most closely associated with Justice Harlan in the course of his dissent in *Katzenbach v. Morgan*<sup>38</sup> and his concurrence and dissent in *Oregon v. Mitchell*,<sup>39</sup> although its origin lies in the *Civil Rights Cases* of 1883.<sup>40</sup> Under this view, Section 5 is exclusively remedial and not preventive. The occurrence of a recognized constitutional violation on the part of a state is a necessary prerequisite for the triggering of the Section 5 enforcement power.<sup>41</sup> As to the scope of this

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meaning of the Fourteenth Amendment in most Section 5 cases. If Section 5 grants Congress the power to enforce its own reasonable interpretation of the Fourteenth Amendment, then presumably the Court can only review for reasonableness not "rightness" and would be obliged to defer to Congress's reasonable interpretation despite its own different interpretation of the relevant constitutional provision. Moreover, in addition to the related principle of judicial supremacy, this would also undermine the principle of legal uniformity as there would be two or more legally enforced interpretations of a single constitutional provision.

37. *Flores*, 117 S. Ct. at 2167.

38. 384 U.S. 641, 659 (1966) (Harlan, J., dissenting). The majority opinion upheld section 4(e) of the Voting Rights Act of 1965 as appropriate legislation to enforce the Equal Protection Clause pursuant to Section 5 of the Fourteenth Amendment. See *id.* at 651-58.

39. 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part); see also *supra* note 5 (discussing *Oregon v. Mitchell*).

40. 109 U.S. 3 (1883) (holding that Congress had no power to regulate private acts of racial discrimination under Section 5).

41. See *Mitchell*, 400 U.S. at 153-54 (Harlan, J., concurring in part and dissent-

power once triggered, it seems likely (though not certain) that Justice Harlan believed that the legislative remedy for a recognized violation may not impose congressional limitations on state power beyond the constitutional prohibitions contained in Section 1 of the Amendment. In other words—and this would be a coherent position whether Justice Harlan actually held it—Congress cannot by statute expand or reduce the prohibitions that the Fourteenth Amendment imposes on the states. Rather, Section 5 simply permits Congress to create remedies for state violations or to employ legislation as an alternative remedial tool to litigation.

The *Flores* majority rejected both parts of this “Harlanesque” position, although not without some minor equivocation. First, it repeatedly stated that enforcement includes remedial or *preventive* measures and cited with approval the voting rights decisions of the 1960s and 1970s from which Justice Harlan was mainly dissenting.<sup>42</sup> In these decisions, the Court upheld Congress’s suspension of state literacy tests and other voting requirements even though such tests themselves had previously been held not to violate the Equal Protection Clause.<sup>43</sup> Second, the Court stated: “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>44</sup> In other words, valid

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ing in part).

42. See *Flores*, 117 S. Ct. at 2163.

43. See *id.* The equivocation consisted of the Court’s somewhat forced characterization of the ban on literacy tests at issue in *Morgan* as responding to “unconstitutional” discrimination by New York. See *id.* at 2168. This begs the major question that divided the Court in *Morgan* because *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45 (1959), had held that such tests pass constitutional muster. Nonetheless, elsewhere in his opinion in *Flores*, Justice Kennedy stated that “[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” *Flores*, 117 S. Ct. at 2170. This statement affirmed that Section 5 is not limited to addressing recognized constitutional violations.

44. *Flores*, 117 S. Ct. at 2163 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). Despite this statement, the Court insisted throughout its opinion that Congress does not have the power to enact legislation that expands the rights contained

exercises of the Section 5 power may result in the trumping of otherwise constitutional state laws or the preemption of constitutionally granted state authority.

On the other hand, in holding that RFRA exceeded congressional power, the majority also implicitly rejected the strong nationalist position on the scope of Section 5 that was expressed in these same voting rights cases.<sup>45</sup> In *Morgan*, the majority stated that Section 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."<sup>46</sup> Further, the Court held that Section 5's textual requirement of "appropriate legislation" to enforce the Equal Protection Clause is satisfied by the finding of a rational basis for Congress's judgment that the measure in question is necessary for securing the Fourteenth Amendment's right to nondiscriminatory treatment by government.<sup>47</sup> Writing for the Court, Justice Brennan stated that:

It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services . . . and the nature and significance of the state interests . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.<sup>48</sup>

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in Section 1 of the Fourteenth Amendment. See, e.g., *id.* at 2166, 2168. This insistence is an example of the Court's conflation of the distinction between constitutional and legislative rights. Clearly if, counter to Justice Harlan's view, Congress can prohibit state action that is not itself unconstitutional, it is expanding federal legislative rights against the states beyond those contained in Section 1.

45. In addition to *Morgan*, these cases include *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding several provisions of the Voting Rights Act of 1965) and *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding a seven-year extension of the Voting Rights Act's preclearance requirements).

46. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

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

48. *Id.* at 653.

The *Flores* majority agreed that the various provisions of the Voting Rights Act examined in these cases were valid as necessary enforcement—that is, remedial or preventive—measures.<sup>49</sup> Although arguably the Court's interpretation of Section 5 in *Morgan* as authorizing any measure that Congress reasonably believes will secure the guarantees of the Fourteenth Amendment does not limit the enforcement power to remedial or preventive measures, there is no doubt that in passing the various provisions of the Voting Rights Act, Congress was focusing on and anticipating at least questionably constitutional state measures. Moreover, since the majority in *Flores* characterized the statutory provision at issue in *Morgan*<sup>50</sup> as a valid "remedial measure,"<sup>51</sup> the scope of any substantive, rather than semantic, disagreement is unclear. Far clearer is that the test of "necessity" that *Flores* incorporated as the measure of "appropriate legislation" under Section 5 is more rigorous than the test set out in *Morgan*. *Flores* introduced a proportionality test between Congress's chosen means and the constitutional violation to be remedied or prevented.<sup>52</sup> The Court stated that "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"<sup>53</sup> and "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."<sup>54</sup>

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49. See *Flores*, 117 S. Ct. at 2163, 2166-67.

50. Section 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e) (1994).

51. *Flores*, 117 S. Ct. at 2163.

52. See *id.* at 2164, 2169. One might be tempted to read the Court's proportionality test as not addressing the same issue—of the required relationship between means and legitimate end—as the rational basis test of *Morgan*, but rather as addressing the issue of whether a congressional measure has a legitimate (i.e., remedial or preventive) end in the first place. If this reading were correct, then it would not be a revision. The *Flores* majority, however, presumed for the purpose of its analysis in Part III.B that Congress enacted RFRA with the legitimate aim of enforcing the Free Exercise Clause as interpreted in *Smith* and employed the proportionality test to determine whether the means—imposing the compelling interest standard on the states—were properly related to it. See *id.* at 2169-71.

53. *Id.* at 2164.

54. *Id.* at 2169.

According to the Court, RFRA failed this test because even assuming a rational basis for Congress's judgment that the statute would promote the legitimate object of free exercise of religion, it did not promote that object proportionately—that is, taking into account both the likelihood and severity of the harm and the costs it imposed first and foremost on the states.<sup>55</sup> Given its broad scope, which would have resulted in the widespread nullification of state laws without regard to their constitutional validity, the Court held that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."<sup>56</sup> In short, the *Flores* majority interpreted Section 5 as permitting Congress to limit otherwise constitutional state regulatory authority only if it has a proportionate justification for so doing and not merely a rational one as had the *Morgan* majority.

Accordingly, regardless of the merits of *Smith* as an interpretation of the Free Exercise Clause, *Flores* suggests the following underlying structure of the Fourteenth Amendment with respect to federal and state authority in the area of individual rights—at least once the Court's mistaken separation-of-powers ground is severed. First, neither Congress nor the states may reduce or subtract from the substantive constitutional rights of the individual contained in Section 1. Such action on the part of the states would conflict directly with Section 1. Congressional action either would conflict with some part of the Bill of Rights<sup>57</sup> or would exceed Congress's Section 5 enforcement power, since legislative reduction of a constitutional right is no more, and presumably less, an "enforcement" of that right than legislative supplementation.<sup>58</sup>

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55. See *id.* at 2171.

56. *Id.* at 2170.

57. For example, after Congress enacted the Flag Protection Act of 1989, 18 U.S.C. § 700 (1994), in an attempt to reduce free speech rights as interpreted by the Court in *Texas v. Johnson*, 491 U.S. 397 (1989), the Court held in *United States v. Eichman*, 496 U.S. 310 (1990), that the statute violated the First Amendment. Presumably, a congressional antiabortion statute that reduced a woman's right to an abortion below the "core" constitutional minimum recognized in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), would violate the Fifth Amendment's Due Process Clause.

58. In *Morgan*, Justice Brennan made this point, at least with respect to reduc-

Second, absent independent constitutional authority, Congress may not expand by statute the rights contained in Section 1. It may, however, "enforce" those rights by taking proportionate measures designed to remedy or prevent unconstitutional state conduct—even if in the process of properly enforcing those rights, it prohibits some state conduct that is not in itself unconstitutional.<sup>59</sup> One important implication of this position is that it puts even more seriously in question Congress's power under Section 5 to regulate private conduct, including private acts of religious, racial, or sex discrimination.<sup>60</sup> By contrast, since the Constitution otherwise leaves the issue up to them, the states may add to the rights contained in Section 1 through their constitutions, legislation, or common law. Although this was generally understood to be the case pre-*Flores*, the ability of the states to add to the minimum guarantees contained in the federal Constitution is, of course, subject to the proviso that such state action is not in conflict with enacted federal law.<sup>61</sup> Because *Flores*'s more rigorous proportionality test reduces the previously understood authority of Congress to enact such trumping or preempting law in the areas covered by the Fourteenth Amendment, the result is to enhance state authority. Accordingly, a state would be free to pass RFRA or to enshrine it in its constitution. Indeed, one imagines that this will become part of a new legislative strategy on the part of RFRA proponents.<sup>62</sup>

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tions, while responding to Justice Harlan's dissent. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). Justice Harlan argued that if Congress, under its Section 5 enforcement power, may prohibit state action that was not unconstitutional, then it presumably could also exercise its discretion to permit state action that was unconstitutional. See *id.* at 668 (Harlan, J., dissenting).

59. Of course, some other provision of the Constitution apart from Section 5 may authorize independent congressional expansion.

60. This power was originally denied to Congress in the *Civil Rights Cases*, 109 U.S. 3 (1883), but this holding was generally thought to have been superseded in modern times. Moreover, combined with what may be closer judicial scrutiny of its commerce powers in the light of *United States v. Lopez*, 514 U.S. 549 (1995), Congress's overall power to regulate private conduct is perhaps less now than at any time since 1937.

61. Or with any other provision of the Constitution. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

62. Again, this assumes that the separation-of-powers ground is severed. In practice, the ability of states to enact RFRA would depend also on passing muster under



One remaining question is whether Congress may prohibit state supplementation of federal constitutional rights. In other words, although Congress can neither subtract from nor add to the rights contained in Section 1, can it choose to make such rights maximum or minimum guarantees by preempting state authority to supplement their constitutions? Because such a power would have essentially the same prohibitive effect on otherwise constitutionally reserved state authority as a congressional power to supplement, presumably the same test of proportionate justification would apply, although in this case it is not easy to see how the congressional measure could possibly satisfy it. Simply preventing the states from granting additional protection to a constitutional right beyond the federal minimum does not obviously promote that right, let alone proportionately.

### III. SECTION 5 AND THE NECESSARY AND PROPER CLAUSE

An interesting feature of the *Flores* decision is that there is no mention whatsoever in any of the six opinions of the Necessary and Proper Clause and its relationship to the powers granted by Section 5.<sup>63</sup> This omission is interesting because in the various voting rights cases that the Court discusses in its opinion, from *South Carolina v. Katzenbach*<sup>64</sup> (decided in 1966) to *City of Rome v. United States*<sup>65</sup> (decided in 1980), the scope of Congress's power to pass appropriate enforcement legislation under Section 5 was stated to be identical to the scope of its general power under the Necessary and Proper Clause.<sup>66</sup> Indeed, it was from this clause, and in particular Chief Justice Marshall's famous interpretation of it in *McCulloch v. Maryland*,<sup>67</sup> that the earlier decisions claimed to derive the rational

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an Establishment Clause challenge. For present purposes, however, this is extraneous to my structural analysis of the Fourteenth Amendment.

63. In addition to Justice Kennedy's opinion for the Court, there were concurring opinions by Justices Stevens and Scalia and dissenting opinions by Justices O'Connor, Souter, and Breyer.

64. 383 U.S. 301 (1966).

65. 446 U.S. 156 (1980).

66. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997).

67. 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

basis test for valid exercises of the Section 5 power.<sup>68</sup> Since in *Flores*, as we have seen, the Court applied a more stringent standard than the rational basis test to determine if legislation is authorized by Section 5,<sup>69</sup> only two conclusions are possible: Either Section 5 is no longer equivalent to the Necessary and Proper Clause or the latter now should also be expected to contain the more stringent standard. As the Necessary and Proper Clause is such an important enumerated power from the perspective of federalism—in that it operates on the boundaries between federal and reserved state power—either of these two conclusions is potentially a development of major significance.

In *Katzenbach v. Morgan*, the majority opinion stated that Congress's Section 5 enforcement power is a specific version applicable to the Fourteenth Amendment of the general congressional power contained in the Necessary and Proper Clause.<sup>70</sup> Section 5 constitutes an authorization for Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,"<sup>71</sup> just as the Necessary and Proper Clause authorizes the exercise of discretion to promote any legitimate congressional objective.<sup>72</sup> Accordingly, as the Court explained in *Morgan*, Chief Justice Marshall's test for valid exercises of the necessary and proper power set out in *McCulloch* is also the measure of "appropriate legislation" under Section 5.<sup>73</sup> This test translates into the following division of labor: Congress is to "assess and weigh"<sup>74</sup> the various conflicting considerations involved in a decision to displace state law and authority, including the nature and significance of state interests affected; the Court is to

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plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

68. See *Oregon v. Mitchell*, 400 U.S. 112, 142-44 (1970) (separate opinion of Douglas, J.); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

69. See *supra* notes 49-56 and accompanying text.

70. See *Morgan*, 384 U.S. at 650.

71. *Id.* at 641.

72. See *id.* at 650 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421).

73. *Id.* at 651 ("Thus the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment.").

74. *Id.* at 653.

determine whether it "perceive[s] a basis"<sup>75</sup> upon which Congress might decide that such action on its part is necessary to secure the goals of the amendment. In his opinion in *Mitchell*, Justice Douglas made the same point, describing Section 5 and the Necessary and Proper Clause as "parallel."<sup>76</sup>

As we have seen in *Flores*, the Court rejected the rational basis test as insufficient for determining whether legislation was "appropriate" under Section 5 and replaced it with the more rigorous proportionality test between means and ends.<sup>77</sup> Because the Court did not mention the Necessary and Proper Clause, however, we do not know if the majority still believes that the tests under the two enumerated powers are identical; if so, presumably the new proportionality test would apply to both. Such a strengthening of the requirements under the Necessary and Proper Clause clearly would be significant from the perspective of federalism, for in an obvious sense, it operates at the boundaries of federal and reserved state power, authorizing actions that are not provided for expressly and specifically in the body of Article I.<sup>78</sup> It is uncontroversial that many exercises of congressional power implicate the Necessary and Proper Clause in combination with an express Article I power. I have argued elsewhere, however, that both Congress's power to regulate intrastate activities affecting interstate commerce and its general power to preempt state authority—powers that trigger federalism concerns in the most direct way possible—should be understood to have their source in this clause.<sup>79</sup> If I am right, then the implications of *Flores* would be even greater.

Apart perhaps from reasons of strategy, given the Court's broad understanding of Congress's powers under *McCulloch*, why might

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75. *Id.*

76. *Oregon v. Mitchell*, 400 U.S. 112, 142-43 (1970) (separate opinion of Douglas, J.). In *South Carolina v. Katzenbach*, 383 U.S. 301, 325-27 (1966), the Court first implied that the enforcement clauses of the Civil War Amendments granted Congress similar power to that under the Necessary and Proper Clause. And in *City of Rome*, the Court cited with approval *Morgan's* references to *McCulloch*. See *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

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

78. U.S. CONST. art. I.

79. See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 803-11 (1996).

the Court in *Morgan* have viewed Section 5 as a specific version of the Necessary and Proper Clause?<sup>80</sup> Moreover, why should the Court now take the second option and continue viewing it this way? A number of parallels present themselves. First, both provisions appear to import similar qualitative conditions on the exercise of the relevant power: Under Section 5, Congress may enforce Section 1 only by means of "appropriate legislation";<sup>81</sup> under the final clause of Article I, Section 8, Congress may make its express powers effective only by means of "Laws which shall be necessary and proper."<sup>82</sup> Second, both provisions concern measures that Congress enacts as means to promote a legitimate and given end: enforcing Section 1 and effectuating Article I powers.<sup>83</sup> Third, in that both authorize measures that are not specified as to content but only as to function, they empower Congress to exercise discretion.<sup>84</sup> Finally, particularly if I am right about the source of its preemption and intrastate powers, both provisions raise the same federalism considerations about congressional intrusion on areas that are primarily regulated by the states.

Given *Flores*, however, probably the most compelling reason that the Court should continue to view the two powers as at least parallel stems from the different contexts in which they became part of the Constitution. If anything, one would expect the federalism constraints on the Necessary and Proper Clause to be *greater* than those on Section 5, since the former is part of the original Constitution and the latter is part of the Fourteenth Amendment that was aimed specifically at the states and designed to limit their jurisdiction.<sup>85</sup> Interpreting Section 5 as imposing more rig-

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80. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

81. U.S. CONST. amend. XIV, § 5.

82. *Id.* art. I, § 8, cl. 18.

83. Although the Court did not mention the Necessary and Proper Clause in *Flores*, it confirmed that under Section 5, "Congress was granted the power to make the substantive constitutional prohibitions against the States effective." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2165 (1997). This confirmation is typically how the Necessary and Proper Clause is viewed with respect to Congress's express Article I powers.

84. See *Oregon v. Mitchell*, 400 U.S. 112, 143 (1970) (separate opinion of Douglas, J.).

85. The Court notes in *Flores* that the Fourteenth Amendment "limited but did not oust the jurisdiction of the State[s]." *Flores*, 117 S. Ct. at 2165 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 151 (1871) (statement of Rep. Garfield)).

orous federalism constraints on Congress than does the Necessary and Proper Clause would appear historically and contextually anomalous, and, accordingly, it is hard to argue that such constraints should not be at least as strict.

Such a strengthening of the federalism limitations on exercises of the necessary and proper power would not come completely out of the blue, however, as a purely unintended and unthought of by-product of enforced contextual consistency with *Flores*. To the contrary, there has been a recent flurry of scholarly interest in the Necessary and Proper Clause that independently argues for such strengthening. Gary Lawson and Patricia Granger have argued that the original understanding of an independent requirement that a law be "proper" as well as "necessary" has been ignored entirely in interpreting the scope of congressional power under the clause and that a law is not "proper" if it violates the principle of state sovereignty reflected in various constitutional provisions.<sup>86</sup> I have argued elsewhere that whether the Tenth Amendment—or any other provision—carves out areas of jurisdiction reserved exclusively to the states, the Necessary and Proper Clause should be understood to incorporate certain federalism constraints on the exercise of *concurrent* federal powers.<sup>87</sup> To the extent that Congress's concurrent powers are generally subsidiary to those of the states, they should be exercised only when functionally justified, and I have proposed that the states should accordingly be entitled to have their interests considered seriously and genuinely by Congress before it employs the Necessary and Proper Clause to preempt their otherwise concurrent legislative authority.<sup>88</sup> In addition, I have suggested that a rational basis test between preemptive means and a legitimate congressional end is insufficiently protective of federalism, so that state interests should be afforded greater constitutionally specified weight.<sup>89</sup>

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86. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of the Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271-72, 289-97 (1993); see also Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 773-77 (1997) (discussing Lawson and Granger's theory about "proper" laws and focusing on "improper" laws that violate rights retained by the people).

87. See Gardbaum, *supra* note 79, at 836.

88. See *id.* at 823-26.

89. See *id.* at 826-28.

The Court appeared to accept Lawson and Granger's argument as a correct interpretation of the Necessary and Proper Clause in *Printz v. United States*,<sup>90</sup> last term's most heralded federalism case.<sup>91</sup> In response to the dissent's secondary argument that the Necessary and Proper Clause authorized the challenged provisions of the Brady Act,<sup>92</sup> the Court cited to Lawson and Granger's article as support for its argument that when a federal law violates the principle of state sovereignty, it is not a proper law for carrying into effect the Commerce Clause.<sup>93</sup>

Unlike *Printz*, *Flores* does not contain an explicit challenge to the prevailing understanding of the Necessary and Proper Clause. Nonetheless, it may, in the way I have suggested, bear the seeds of a broader and equally important reinterpretation of the clause by strengthening the required connection between congressional means and a legitimate end beyond the current rational basis test of "necessity." Again, if Section 5 imports such heightened protection for federalism as expressed in the more rigorous proportionality test, it is not easy to understand why the Necessary and Proper Clause would not. In the context where federal law threatens to displace primary state authority, affording state interests such increased weight in Congress's decision-making process seems a reasonable interpretation of the federalism principle that, at least as part of the "spirit" of the Constitution, constrains the exercise of the power according to *McCulloch*.

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90. 117 S. Ct. 2365 (1997).

91. Indeed, unlike *Printz*, *Flores* was not even treated as a federalism case in U.S. Law Week's review of the Supreme Court's term but was included in a separate article reviewing individual rights cases, as a free exercise case. *See Review of Supreme Court's Term: Individual Rights*, 66 U.S.L.W. 3073, 3078 (July 22, 1997).

92. Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921(a)(29), 922(s), 922(t) (1994). The petitioners in *Printz* challenged the constitutionality of the interim provisions of the Brady Act, i.e., 18 U.S.C. § 922(s). *See Printz*, 117 S. Ct. at 2369.

93. *See Printz*, 117 S. Ct. at 2379. By implication, Justice Black made a similar argument with respect to Section 5 in *Oregon v. Mitchell*, 400 U.S. 112 (1970), because five Justices argued that the congressional legislation in question intruded into an area (setting voting requirements for state elections) that the Constitution reserved to the states. *See id.* at 124-26 (Black, J., announcing judgment of the Court); *id.* at 201-02 (Harlan, J., concurring in part and dissenting in part); *id.* at 293-94 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J. and Blackmun, J.).

Moreover, although as I have shown, the Court clearly rejected Justice Harlan's narrowly remedial interpretation of the scope of Congress's Section 5 power, his dissent in *Morgan* also contained an interesting discussion on congressional procedures. He suggested that primary state authority should be displaced under Section 5, if at all, only after serious and genuine consideration—and not mere pronouncement—of its necessity by Congress.<sup>94</sup> As we have seen, in describing the respective legislative and judicial functions, the majority in *Morgan* assigned to Congress the task of assessing and weighing relative state and federal interests.<sup>95</sup> It did not, however, suggest that this task could or should be fulfilled in a purely formal or nominal manner, and yet there is little evidence that genuine consideration routinely takes place—at least in preemption and intrastate commerce contexts. As in a number of other recent cases,<sup>96</sup> the *Flores* majority drew attention to the issue of the sufficiency of the congressional record and findings, although their fundamental objections to RFRA were independent of the state of the legislative record.<sup>97</sup> Nonetheless, at least in the context of the Necessary and Proper Clause,<sup>98</sup> it seems desirable from both a constitutional and a public policy perspective that the principle of federalism—no less than that of deliberative democracy—should entitle the states to serious and genuine congressional consideration before their primary authority is abolished.

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94. See *Katzenbach v. Morgan*, 384 U.S. 641, 669-71 (1966) (Harlan, J., dissenting).

95. See *id.* at 653; *supra* notes 70-76 and accompanying text.

96. See, e.g., *United States v. Lopez*, 514 U.S. 549, 614 (1995) (discussing the effect additional findings might have had on the outcome); see also Philip Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996) (providing an overview of Supreme Court treatment of congressional findings when reviewing legislation adopted under Congress's Commerce Clause power). The Court has not yet suggested, however, that by itself the state of the congressional findings will be conclusive as to constitutionality; it has always managed to find independent grounds for its decisions invalidating legislation.

97. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997) (pointing out the lack of support in the legislative record for claiming that many generally applicable laws are passed because of religious bigotry).

98. I leave open the possibility that the Necessary and Proper Clause might have stronger federalism constraints than Section 5.

## IV. CONCLUSION

As I have argued, the Court's misguided invocation of separation of powers to justify invalidating RFRA conflicts with its federalism arguments. If separation-of-powers principles prevent Congress from making such a "substantive change in constitutional protections," then they also prevent the states from doing so. In other words, this rationale for the Court's decision would have the effect of taking the issue of supplementing *Smith* off the legislative agendas of both Congress and the states, thereby transforming *Smith* from a minimum constitutional guarantee into a maximum one as well.<sup>99</sup> I repeat this point here not to restate part of my argument, but because it suggests a more general point concerning the larger question of the change brought about in the federal structure of the Constitution by the Civil War Amendments. This is a question that Justice Kennedy took the opportunity to address directly in *Flores*, suggesting perhaps that not only 1937, but also 1868 may be occupying the majority's thoughts and agenda.<sup>100</sup>

It is generally believed that both the Civil War Amendments and the New Deal constitutional revolution reallocated powers from the states to the national government. It is of fundamental importance, however, to appreciate that when the powers of the states or the nation are either reduced or increased, it is not necessarily the case that they are reallocated to or from the other. Another possibility is that they are reallocated to or from the Constitution. As Madison actually pointed out in this context, there are three divisions of political power under the Constitution and not only the two for which Federalist No. 51<sup>101</sup> is justly famous. The first, and arguably the most distinctive American contribution to constitutionalism, is the initial determination of which powers are and are not within the scope of governmental power per se. Only after this initial allocation does federalism come into play, to divide the total powers of government between nation and states, and then finally separation of powers,

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99. So too, of course, would an Establishment Clause ground for invalidating RFRA.

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

101. THE FEDERALIST NO. 51 (James Madison).



to distribute the share of the national government among its three constituent branches.

I have argued elsewhere that during the New Deal period, by far the most important reallocation of power was from the Constitution to government and not from the states to Congress.<sup>102</sup> During this period of "deconstitutionalization" of political power, the authority of *both* Congress and the states was enhanced because the overall scope of constitutional restrictions on governmental power was significantly decreased; the zero-sum game of federalism did not apply.

With this example in mind, it cannot simply be assumed that if the Civil War Amendments reduced the powers of the states, then they also reallocated this power to Congress. To the contrary, the Civil War Amendments represented first and foremost the opposite phenomenon from the New Deal era: a reconstitutionalization of political power from government—in this instance state governments—to the Constitution. That the Fourteenth Amendment nationalized certain rights means that these rights were incorporated and enshrined in the Constitution. In itself, this incorporation did not necessarily mean that any of this reduced state power was reallocated to Congress. The only possible mechanism for such a reallocation was Section 5; hence its importance. This is the most fundamental federalism issue raised in *Flores*.

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102. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 486-87, 564-66 (1997).