

City of Boerne v. Flores, 521 U.S. 507 (1997)

Wikipedia: However, it continues to be applied to the federal government—for instance, in [*Gonzales v. O Centro Espírita Beneficente União do Vegetal*](#) (2006) and [*Burwell v. Hobby Lobby Stores, Inc.*](#) (2014). In response to *City of Boerne v. Flores* and other related RFR issues, twenty-one individual states have passed [State Religious Freedom Restoration Acts](#) that apply to state governments and local municipalities.^[4]

....The *Smith* decision outraged the public. Groups representing all points on the political spectrum (from the liberal [American Civil Liberties Union](#) to the conservative [Traditional Values Coalition](#)) and a wide variety of religions (i.e. the [Christian Legal Society](#), the [American Jewish Congress](#), the [Baptist Joint Committee for Religious Liberty](#), and the [National Association of Evangelicals](#)) agreed that the law required reform, and recommended reinstating the [Sherbert Test](#). In response, Congress passed the RFRA, unanimously in the [House](#) and 97-to-3 in the [Senate](#). The bill was then signed by [U.S. President Bill Clinton](#).^[11]

....According to a federal appeals court ruling on March 7, 2018, the RFRA does not justify discrimination against employees on the basis of their lesbian, gay, bisexual, or transgender identity.^[13] However, on October 15, 2019, federal judge [Reed O'Connor](#) said that, because of the RFRA, federally-funded healthcare insurers and providers must be allowed to deny medical treatment and coverage on the basis of the sex, gender identity or termination of pregnancy of the person who is requesting the services, even if the services are medically necessary. Transgender people may be turned down even if the healthcare service they need is not related to their being transgender.^[1]

....As of 1996, the year before the RFRA was found unconstitutional as applied to states, 337 cases had cited RFRA in its three-year time range.^[20] It was also found that Jewish, Muslim, and Native American religions, which make up only three percent of [religious membership in the U.S.](#), make up 18 percent of the cases involving the free exercise of religion

....n the case of *Adams v. Commissioner*, the [United States Tax Court](#) rejected the argument of Priscilla M. Lippincott Adams, who was a devout [Quaker](#). She tried to argue that under the Religious Freedom Restoration Act of 1993, she was exempt from [federal income taxes](#). The U.S. Tax Court rejected her argument and ruled that she was not exempt. The Court stated that "while petitioner's religious beliefs are substantially burdened by payment of taxes that fund military expenditures, the Supreme Court has established that uniform, mandatory participation in the Federal income tax system, irrespective of religious belief, is a compelling governmental interest."^[23] In the case of *Miller v. Commissioner*, the taxpayers objected to the use of social security numbers, arguing that such numbers related to the "[mark of the beast](#)" from the Bible. In its decision, the U.S. Court discussed the applicability of the Religious Freedom Restoration Act of 1993, but ruled against the taxpayers.^[24]

....The RFRA figured prominently in oral arguments in the case, [*Burwell v. Hobby Lobby*](#), heard by the Supreme Court on March 25, 2014.^[26] In a 5–4 decision, Justice Alito declared that nothing about the language of RFRA or the manner in which Congress passed it implied the statutory protections conferred therein were confined solely within the bounds of First Amendment case law as it existed pre-*Smith*.^[27]

https://en.wikipedia.org/wiki/Burwell_v._Hobby_Lobby_Stores,_Inc.

The United States Supreme Court ruled in *Employment Division v. Smith* (1990) that a person may not defy *neutral laws of general applicability*^[b] even as an expression of religious belief. "To permit this," wrote Justice Scalia, citing the 1878 *Reynolds v. United States* decision, "would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."^[7] "He wrote that generally applicable laws do not have to meet the standard of *strict scrutiny*, because such a requirement would create "a private right to ignore generally applicable laws". Strict scrutiny would require a law to be the least restrictive means of furthering a compelling government interest.

In 1993, the US Congress responded by passing the *Religious Freedom Restoration Act* (RFRA), requiring strict scrutiny when a neutral law of general applicability "substantially burden[s] a person's^[c] exercise of religion".^[8] The RFRA was amended in 2000 by the *Religious Land Use and Institutionalized Persons Act* (RLUIPA) to redefine *exercise of religion* as any exercise of religion, "whether or not compelled by, or central to, a system of religious belief", which is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution". The Supreme Court upheld the constitutionality of the RFRA as applied to federal statutes in *Gonzales v. O Centro Espirita* in 2006.

Comment: broad principles turned into laws of general applicability are one problem. The other problem is trying to make these principles work where the real offense is a law whose general effect violates a Biblical principle. Smoking Peyote for an ordinary Native American in a ceremony that is not associated with general use on Native American land is an issue with which Christians can sympathize; but there can be less sympathy when the smoker has a job as a drug counselor.

A Catholic church wanting an exemption to build in a historical area? No Biblical purpose for that that I know of; it is unfortunate for law that they pressed the issue. It was a legitimate law. Zoning boards consider exemptions which I presume the church exhausted.

No wait: are properties in "historical areas" barred from improving their properties? What rational consistent limit can there be? Can an air conditioner unit be installed on the roof or on the ground? Can a gravel driveway be paved? Parking lot expanded? Aren't government buildings continually improved and expanded? Aren't modern looking buildings added to historical government properties? Perhaps the key legal obstacle is not religious, but the

fundamental inconsistency of zoning laws.

A contraceptive mandate for a Christian business? Hobby Lobby shouldn't have had to go to court. There should never have been such a law.

Scalia's concern about people being laws unto themselves is more serious in cases where anti-Freedom religions like Islam and Satanism are seeking "accommodations". RFRA laws that treat all religions alike are already generating court cases that multiply powers of courts to set aside laws to accommodate religions of Hell, diluting the authority of legislatures to protect Freedom.

What if Scalia's objection to RFRA and his defense of Employment Division v. Smith would have been different had Congress founded its concern not on freedom of religious expression for Christians instead of on sympathy for pot smoking drug counselors in Smith and for the pagans appealed to in oral arguments?

A threat to Christianity in a state RFRA, and a solution

Syllabus

Syllabus

CITY OF BOERNE v. FLORES, ARCHBISHOP OF SAN ANTONIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 95-2074. Argued February 19, 1997-Decided June 25, 1997

Respondent, the Catholic Archbishop of San Antonio, applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which, they argued, included the church, the Archbishop brought this suit challenging the permit denial under, *inter alia*, the Religious Freedom Restoration Act of 1993 (RFRA). The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal, and the Fifth Circuit reversed, finding RFRA to be constitutional.

Held: RFRA exceeds Congress' power. pp. 512-536.

(a) Congress enacted RFRA in direct response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, [494 U. S. 872](#), in which the Court upheld against a free exercise challenge a state law of general applicability criminalizing peyote use, as applied to deny **unemployment benefits**

to Native American Church members who lost their jobs because of such use. In so ruling, the Court declined to apply the balancing test of *Sherbert v. Verner*, [374 U.S. 398](#), which asks whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling government interest. RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that ... interest." 42 U. S. C. § 2000bb-1. RFRA's mandate applies to any branch of Federal or State Government, to all officials, and to other persons acting under color of law. § 2000bb-2(1). Its universal coverage includes "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." § 2000bb-3(a). Pp. 512-516.

In imposing RFRA's requirements on the States, Congress relied on the Fourteenth Amendment, which, *inter alia*, guarantees that no State shall make or enforce any law depriving any person of "life, lib-

erty, or property, without due process of law," or denying any person the "equal protection of the laws," § 1, and empowers Congress "to enforce" those guarantees by "appropriate legislation," § 5. Respondent Archbishop and the United States contend that RFRA is permissible enforcement legislation under § 5. Although Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion, see, *e. g.*, *Cantwell v. Connecticut*, [310 U.S. 296](#), 303, its § 5 power "to enforce" is only preventive or "remedial," *South Carolina v. Katzenbach*, [383 U.S. 301](#), 326. The Amendment's design and § 5's text are inconsistent with any suggestion that Congress has the power to decree the substance of the Amendment's restrictions on the States. Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. 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. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. The need to distinguish between remedy and substance is supported by the Fourteenth Amendment's history and this Court's case law, see, *e. g.*, *Civil Rights Cases*, [109 U.S. 3](#), 13-14, 15; *Oregon v. Mitchell*, [400 U.S. 112](#), 209, 296. The Amendment's design has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary, depriving Congress of any power to interpret and elaborate on its meaning by conferring self-executing substantive rights against the States, cf. *id.*, at 325, and thereby leaving the interpretive power with the Judiciary. Pp. 516-529.

Scalia concurrence:

Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*. The "provisos" in the enactments negate a license to act in a manner "unfaithfull to the Lord Proprietary" (Maryland Act Concerning Religion of 1649), or "behav[e]" in other than a "peaceabl[e] and quie[t]" manner (Rhode Island Charter of 1663), or "disturb the public peace" (New Hampshire Constitution), or interfere with the "peace [and] safety ofth[e] State" (New York, Maryland, and Georgia Constitutions), or "demea[n]" oneself in other than a "peaceable and orderly manner" (Northwest Ordinance of 1787). See *post*, at 551-554. At the time these provisos were enacted, keeping "peace" and "order" seems to have meant, precisely, obeying the laws. "[E]very breach of a law is against the peace." *Queen v. Lane*, 6 Mod. 128,87 Eng. Rep. 884,885 (Q. B. 1704). Even as late as 1828, when Noah Webster published his American Dictionary of the English Language, he gave as one of the meanings of "peace": "8. Public

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tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the *peace*; to break the *peace*." 2 An American Dictionary of the English Language 31 (1828).¹ This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (associated most prominently with John Locke), which regarded freedom as the right "to do only what was not lawfully prohibited," West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J. L., Ethics & Pub. Pol'y 591, 624 (1990). "Thus, the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions." Hamburger, *supra*, at 918-919.² And while, under this interpretation, these early "free exercise" enactments support the Court's judgment in *Smith*, I see no sensible interpretation that could cause them to support what I understand to be the position of JUSTICE O'CONNOR, or any of *Smith's* other critics. No one in that camp, to my knowledge, contends that their favored "compelling state interest" test conforms to any possible interpretation of "breach of peace and order"-i. e., that *only* violence or force, or any other category of action (more limited than "violation of law") which can possibly be conveyed by the phrase "peace and order," justifies state prohibition of religiously motivated conduct.

¹ The word "licentious," used in several of the early enactments, likewise meant "[e]xceeding the limits of law." 2 An American Dictionary of the English Language 6 (1828).

² The same explanation applies, of course, to George Mason's initial draft of Virginia's religious liberty clause, see *post*, at 555. When it said "unless, under colour of religion, any man disturb the peace ... of society," it probably meant "unless under color of religion any man break the law." Thus, it is not the case that "both Mason's and [James] Madison's formulations envisioned that, when there was a conflict [between religious exercise and generally applicable laws], a person's interest in freely practicing his religion was to be balanced against state interests," *post*, at 556-at least insofar as regulation of *conduct* was concerned.

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Apart from the early "free exercise" enactments of Colonies, States, and Territories, the dissent calls attention to those bodies', and the Continental Congress's, legislative accommodation of religious

practices prior to ratification of the Bill of Rights. *Post*, at 557-560. This accommodation-which took place both before and after enactment of the state constitutional protections of religious liberty-suggests (according to the dissent) that "the drafters and ratifiers of the First Amendment ... assumed courts would apply the Free Exercise Clause similarly." *Post*, at 560. **But that legislatures sometimes (though not always) found it "appropriate," *post*, at 559, to accommodate religious practices does not establish that accommodation was understood to be constitutionally mandated by the Free Exercise Clause.** As we explained in *Smith*, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." 494 U. S., at 890. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." *Ibid*.

The dissent's final source of claimed historical support consists of statements of certain of the Framers in the context of debates about proposed legislative enactments or debates over general principles (not in connection with the drafting of State or Federal Constitutions). Those statements are subject to the same objection as was the evidence about legislative accommodation: There is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable. Thus, for example, the pamphlet written by James Madison opposing Virginia's proposed general assessment for support of reli-

3 The dissent mentions, for example, that only 7 of the 13 Colonies had exempted Quakers from military service by the mid-1700's; and that "virtually all" of the States had enacted oath exemptions by 1789. *Post*, at 558 (emphasis added).

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gion, *post*, at 560-561, does not argue that the assessment would violate the "free exercise" provision in the Virginia Declaration of Rights, although that provision had been enacted into law only eight years earlier, *post*, at 556; rather the pamphlet argues that the assessment wrongly placed civil society ahead of personal religious belief and, thus, should not be approved by the legislators, *post*, at 560-561. Likewise, **the letter from George Washington to the Quakers, *post*, at 562, by its own terms refers to Washington's "wish and desire" that religion be accommodated, not his belief that existing constitutional provisions required accommodation.** These and other examples offered by the dissent reflect the speakers' views of the "proper" relationship between government and religion, *post*, at 563, but not their views (at least insofar as the content or context of the material suggests) of the constitutionally required relationship. The one exception is the statement by Thomas Jefferson that he considered "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises," *post*, at 562 (internal quotation marks omitted); but it is quite clear that Jefferson did not in fact espouse the broad principle of affirmative accommodation advocated by the dissent, see McConnell, 103 Harv. L. Rev., at 1449-1452.

Comment: I think this argument supports the granting of "accommodations" only by legislatures, not by courts.

It seems to me that the most telling point made by the dissent is to be found, not in what it says, but in

what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none-and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, see, *e. g.*, *id.*, at 1504, 1506-1511 (discussing early

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cases), none exists. The closest one can come in the period prior to 1850 is the decision of a New York City municipal court in 1813, holding that the New York Constitution of 1777, quoted *post*, at 553, required acknowledgment of a priest-penitent privilege, to protect a Catholic priest from being compelled to testify as to the contents of a confession. *People v. Phillips*, Court of General Sessions, City of New York (June 14, 1813), excerpted in *Privileged Communications to Clergymen*, 1 Cath. Law. 199 (1955). Even this lone case is weak authority, not only because it comes from a minor court,⁴ but also because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege. On the other side of the ledger, moreover, there are two cases, from the Supreme Court of Pennsylvania, flatly rejecting the dissent's view. In *Simon's Executors v. Gratz*, 2 Pen. & W. 412 (Pa. 1831), **the court held that a litigant was not entitled to a continuance of trial on the ground that appearing on his Sabbath would violate his religious principles. And in *Stansbury v. Marks*, 2 Dall. 213 (Pa. 1793), decided just two years after the ratification of the Bill of Rights, the court imposed a fine on a witness who "refused to be sworn, because it was his Sabbath."** 5

I have limited this response to the new items of "historical evidence" brought forward by today's dissent. (The dis-

⁴ The Court of General Sessions was a mayor's court, and the ruling in *Phillips* was made by DeWitt Clinton, the last mayor to preside over that court, which was subsequently reconstituted as the Court of Common Pleas. Clinton had never been a jurist, and indeed had never practiced law. Some years before *Phillips*, he was instrumental in removing the political disabilities of Catholics in New York. See 4 Dictionary of American Biography 221-222, 224 (1943).

⁵ Indeed, the author of *Simon's Executors* could well have written *Smith*: "[C]onsiderations of policy address themselves with propriety to the legislature, and not to a magistrate whose course is prescribed not by discretion, but rules already established." 2 Pen. & W., at 417.

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sent's claim that "[b]efore *Smith*, our free exercise cases were generally in keeping" with the dissent's view, *post*, at 546, is adequately answered in *Smith* itself.) The historical evidence marshalled by the dissent cannot fairly be said to demonstrate the correctness of *Smith*; but it is more supportive of that conclusion than destructive of it. And, to return to a point I made earlier, that evidence is not compatible with any theory I am familiar with that has been proposed as an alternative to *Smith*. The dissent's approach has, of course, great popular attraction. Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented by *Smith* is, quite simply, whether the

people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes, *post*, at 547) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.

Main ruling:

....The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power. In February, Republican Representative John Bingham of Ohio reported the following draft Amendment to the House of Representatives on behalf of the Joint Committee:

"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." Congo Globe, 39th Cong., 1st Sess., 1034 (1866).

The proposal encountered immediate opposition, which continued through three days of debate. Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. E. g., *id.*, at 1063-1065 (statement of Rep. Hale); *id.*, at 1082

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(statement of Sen. Stewart); *id.*, at 1095 (statement of Rep. Hotchkiss); *id.*, at App. 133-135 (statement of Rep. Rogers). Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. Typifying these views, Republican Representative Robert Hale of New York labeled the Amendment "an utter departure from every principle ever dreamed of by the men who framed our Constitution," *id.*, at 1063, and warned that under it "all State legislation, in its codes of civil and criminal jurisprudence and procedure ... may be overridden, may be repealed or abolished, and the law of Congress established instead." *Ibid.* Senator William Stewart of Nevada likewise stated the Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property," such that "there would not be much left for the State Legislatures," and would thereby "work an entire change in our form of government." *Id.*, at 1082; accord, *id.*, at 1087 (statement of Rep. Davis); *id.*, at App. 133 (statement of Rep. Rogers). Some radicals, like their brethren "unwilling that Congress shall have any such power ... to establish uniform laws throughout the United States upon ... the protection of life, liberty, and property," *id.*, at 1095 (statement of Rep. Hotchkiss), also objected that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities, *ibid.* See generally Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 57 (1955); Graham, Our

"Declaratory" Fourteenth Amendment, 7 Stan. L. Rev. 3, 21 (1954).

As a result of these objections having been expressed from so many different quarters, the House voted to table the proposal until April. See, e. g., B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 215, 217 (1914); Congo Globe, 42d Cong., 1st Sess., App. 115 (1871) (statement

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of Rep. Farnsworth). The congressional action was seen as marking the defeat of the proposal. See The Nation, Mar. 8, 1866, p. 291 ("The postponement of the amendment ... is conclusive against the passage of [it]"); New York Times, Mar. 1, 1866, p. 4 ("It is doubtful if this ever comes before the House again ... "); see also Congo Globe, 42d Cong., 1st Sess., at App. 115 (statement of Rep. Farnsworth) (The Amendment was "given its quietus by a postponement for two months, where it slept the sleep that knows no waking"). The measure was defeated "chiefly because many members of the legal profession s[aw] in [it] ... a dangerous centralization of power," The Nation, *supra*, at 291, and "many leading Republicans of thee] House [of Representatives] would not consent to so radical a change in the Constitution," Congo Globe, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield). The Amendment in its early form was not again considered. Instead, the Joint Committee began drafting a new article of Amendment, which it reported to Congress on April 30, 1866.

Section 1 of the new draft Amendment imposed selfexecuting limits on the States. Section 5 prescribed that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See Congo Globe, 39th Cong., 1st Sess., at 2286. Under the revised Amendment, Congress' power was no longer plenary but remedial.

Comment: "Self executing" means clear enough without clarification or application by federal laws for courts to be able to decide violations of the Amendment even where no law is passed. By calling the Amendment "self executing", SCOTUS arrogates to itself
[To take or claim for oneself without right; appropriate: *synonym*: verb **appropriate**. To ascribe on behalf of another in an unwarranted manner. To assume, or claim as one's own, unduly, proudly, or presumptuously; to make undue claims to, from vanity or baseless pretensions to right or merit.] **full authority over states to define and apply rights, which SCOTUS' following sentence denies to Congress.**

Congress was granted the power to make the substantive constitutional prohibitions against the States effective. Representative Bingham said the new draft 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." *Id.*, at 2542. Representative Stevens described the new draft Amendment as "allow[ing] Congress to correct the unjust legislation of the States." *Id.*, at 2459. See also *id.*, at 2768 (statement of Sen. Howard) (§ 5 "enables Congress, in case the States shall enact

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laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment"). See generally H. Brannon, *The Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States* 387 (1901) (Congress' "powers are only prohibitive, corrective, vetoing, aimed only at undue process of law"); *id.*, at 420, 452-455 (same); T. Cooley, *Constitutional Limitations* 294, n. 1 (2d ed. 1871) ("This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States' "). The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property. See, e. g., *Congo Globe*, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield) ("The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State[s]"). After revisions not relevant here, the new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment.

The significance of the defeat of the Bingham proposal was apparent even then. During the debates over the Ku Klux Klan Act only a few years after the Amendment's ratification, Representative James Garfield argued there were limits on Congress' enforcement power, saying "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to [§ 5] ... the force and effect of the rejected [Bingham] clause." *Ibid.*; see also *id.*, at App. 115-116 (statement of Rep. Farnsworth). Scholars of successive generations have agreed with this assessment. See H. Flack, *The Adoption of the Fourteenth Amendment* 64 (1908); Bickel, *The Voting Rights Cases*, 1966

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of pow-

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ers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. Under it, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States." Flack, *supra*, at 64. While this separation-of-powers aspect did not occasion the widespread resistance which was caused by the proposal's threat to the federal balance, it nonetheless attracted the attention of various Members. See *Congo Globe*, 39th Cong., 1st Sess., at 1064 (statement of Rep. Hale) (noting that Bill of Rights, unlike the Bingham proposal, "provide[s] safeguards to be enforced by the courts, and not to be exercised by the Legislature"); *id.*, at App. 133 (statement of Rep. Rogers) (prior to Bingham proposal it "was left entirely for the courts ... to enforce the privileges and immunities of the citizens"). As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. Cf. *South Carolina v. Katzenbach*, 383 U. S., at 325 (discussing Fifteenth Amendment). The power to interpret the Constitution in a case or controversy remains in the Judiciary.

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The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the *Civil Rights Cases*, [109 U. S. 3](#) (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power

by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing" *Id.*, at 13-14. The power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, was "repugnant" to the Constitution. *Id.*, at 15. See also *United States v. Reese*, [92 U. S. 214](#), 218 (1876); *United States v. Harris*, [106 U. S. 629](#), 639 (1883); *James v. Bowman*, [190 U. S. 127](#), 139 (1903). Although the specific holdings of these early cases might have been superseded or modified, see, e. g., *Heart of Atlanta Motel, Inc. v. United States*, [379 U. S. 241](#) (1964); *United States v. Guest*, [383 U. S. 745](#) (1966), their treatment of Congress' §5 power as corrective or preventive, not definitional, has not been questioned.

Recent cases have continued to revolve around the question whether § 5 legislation can be considered remedial. In *South Carolina v. Katzenbach*, *supra*, we emphasized that "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience ... it reflects." 383 U. S., at 308. There we upheld various provisions of the Voting Rights Act of 1965, finding them to be "remedies aimed at areas where voting discrimination has been most flagrant," *id.*, at 315, and necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," *id.*, at 308. We noted evidence in the record reflecting the subsisting and pervasive discriminatory-and therefore unconstitutional-use of literacy tests. *Id.*, at 333-334. The Act's new remedies, which used the administrative resources of the Federal Government, included the suspension of both literacy tests and,

pending federal review, all new voting regulations in covered jurisdictions, as well as the assignment of federal examiners to list qualified applicants enabling those listed to vote. The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, see *id.*, at 313-315, and the slow, costly character of case-by-case litigation, *id.*, at 328.

After *South Carolina v. Katzenbach*, the Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination. See *Oregon v. Mitchell*, 400 U. S., at 132 ("In enacting the literacy test ban ... Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race") (opinion of Black, J.); *id.*, at 147 (Literacy tests "have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians") (opinion of Douglas, J.); *id.*, at 216 ("Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious") (opinion of Harlan, J.); *id.*, at 235 ("[T]here is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education") (opinion of Brennan, J.); *id.*, at 284 ("[N]ationwide [suspension of literacy tests] may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country") (opinion of Stewart, J.); *City of Rome*, 446 U. S., at 182 ("Congress' considered determination that at least another 7 years of statutory remedies were

necessary to counter the

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perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable"); *Morgan*, 384 U. S., at 656 (Congress had a factual basis to conclude that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause").

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Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law. In *Oregon v. Mitchell*, *supra*, at 112, a majority of the Court concluded Congress had exceeded its enforcement powers by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections. The five Members of the Court who reached this conclusion explained that the legislation intruded into an area reserved by the Constitution to the States. See 400 U. S., at 125 (concluding that the legislation was unconstitutional because the Constitution "reserves to the States the power to set voter qualifications in state and local elections") (opinion of Black, J.); *id.*, at 154 (explaining that the "Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit") (opinion of Harlan, J.); *id.*, at 294 (concluding that States, not Congress, have the power "to establish a qualification for voting based on age") (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.). Four of these five were explicit in rejecting the position that § 5 endowed Congress with the power to establish the meaning of constitutional provisions. See *id.*, at 209 (opinion of Harlan, J.); *id.*, at 296 (opinion of Stewart, J.). Justice Black's rejection of this position might be inferred from his disagreement with Congress' interpretation of the Equal Protection Clause. See *id.*, at 125.

There is language in our opinion in *Katzenbach v. Morgan*, [384 U. S. 641](#) (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands

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the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one. In *Morgan*, the Court considered the constitutionality of §4(e) of the Voting Rights Act of 1965, which provided that no person who had successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote because of an inability to read or write English. New York's Constitution, on the other hand, required voters to be able to read and write English. The Court provided two related rationales for its conclusion that § 4(e) could "be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.*, at 652. Under the first rationale, Congress could prohibit New York from denying the right to vote to large segments of its Puerto Rican community, in order to give Puerto Ricans "enhanced political power" that would be "helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Ibid.* Section 4(e) thus could be justified as a remedial measure to deal with "discrimination in governmental services." *Id.*, at 653. The second rationale, an alternative holding, did not address discrimination in the provision of public services but "discrimination in establishing voter qualifications." *Id.*, at 654. The Court perceived a factual basis on which Congress could have concluded that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause." *Id.*, at 656. Both rationales for upholding §4(e) rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it. As Justice Stewart explained in *Oregon v. Mitchell*, *supra*, at

296, interpreting *Morgan* to give Congress the power to interpret the Constitution "would require an enormous extension of that decision's rationale."

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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." *Marbury v. Madison*, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. See Van Alstyne, The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment, 46 Duke L. J. 291, 292-303 (1996). Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment.

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, [508 U. S. 520](#), 533 (1993) ("[A] law targeting religious beliefs as such is never permissible"). To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, see *Fullilove v. Klutznick*, [448 U. S. 448](#), 477 (1980) (plurality opinion); *City of Rome*, 446 U. S., at 177, then it can do the same, respondent argues, to promote religious liberty.

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While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. See *South Carolina v. Katzenbach*, 383 U. S., at 308. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. *Id.*, at 334.

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. See, e. g., Religious Freedom Restoration Act of 1991, Hearings on H. R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess., 331-334 (1993) (statement of Douglas Laycock) (House Hearings); The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 30-31 (1993) (statement of DaHin H. Oaks) (Senate Hearing); *id.*, at 68-76 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H. R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess., 49 (1991) (statement of John H. Buchanan, Jr.) (1990 House Hearing). The absence of

more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ("[L]aws directly targeting religious practices have become increasingly rare"). Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion cen-

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tered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, see, e. g., House Hearings 81 (statement of Nadine Strossen); id., at 107-110 (statement of William Yang); id., at 118 (statement of Rep. Stephen J. Solarz); id., at 336 (statement of Douglas Laycock); Senate Hearing 5-6, 14-26 (statement of William Yang); id., at 27-28 (statement of Hmong-Lao Unity Assn., Inc.); id., at 50 (statement of Baptist Joint Committee); see also Senate Report 8; House Report 5-6, and n. 14, and on zoning regulations and historic preservation laws (like the one at issue here), which, as an incident of their normal operation, have adverse effects on churches and synagogues. See, e. g., House Hearings 17, 57 (statement of Robert P. Dugan, Jr.); id., at 81 (statement of Nadine Strossen); id., at 122-123 (statement of Rep. Stephen J. Solarz); id., at 157 (statement of Edward M. Gaffney, Jr.); id., at 327 (statement of Douglas Laycock); Senate Hearing 143-144 (statement of Forest D. Montgomery); 1990 House Hearing 39 (statement of Robert P. Dugan, Jr.); see also Senate Report 8; House Report 5-6, and n. 14. It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation. See House Report 2; Senate Report 4-5; House Hearings 64 (statement of Nadine Strossen); id., at 117-118 (statement of Rep. Stephen J. Solarz); 1990 House Hearing 14 (statement of Rep. Stephen J. Solarz). This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." *Oregon v. Mitchell*, 400 U. S., at 207 (opinion of Harlan, J.). As a gen-

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eral matter, it is for Congress to determine the method by which it will reach a decision.

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. 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. It appears, instead, to attempt a substantive change in constitutional protections. Preventive 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. See *City of Rome*, 446 U. S., at 177 (since "jurisdictions with a demonstrable history of intentional racial discrimination ... create the risk of purposeful discrimination," Congress could "prohibit changes that have a discriminatory impact" in those jurisdictions). Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *Civil Rights Cases*, 109 U. S., at 13.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U. S. C. § 2000bb-2(1). RFRA applies to all federal and state law, statutory or

otherwise, whether adopted before or after its enactment. § 2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. In *South Carolina v. Katzenbach*, the challenged provisions were confined to those re-

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gions of the country where voting discrimination had been most flagrant, see 383 U. S., at 315, and affected a discrete class of state laws, i. e., state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." *Id.*, at 331. The provisions restricting and banning literacy tests, upheld in *Katzenbach v. Morgan*, [384 U. S. 641](#) (1966), and *Oregon v. Mitchell*, *supra*, attacked a particular type of voting qualification, one with a long history as a "notorious means to deny and abridge voting rights on racial grounds." *South Carolina v. Katzenbach*, 383 U. S., at 355 (Black, J., concurring and dissenting). In *City of Rome*, *supra*, the Court rejected a challenge to the constitutionality of a Voting Rights Act provision which required certain jurisdictions to submit changes in electoral practices to the Department of Justice for preimplementation review. The requirement was placed only on jurisdictions with a history of intentional racial discrimination in voting. *Id.*, at 177. Like the provisions at issue in *South Carolina v. Katzenbach*, this provision permitted a covered jurisdiction to avoid preclearance requirements under certain conditions and, moreover, lapsed in seven years. This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the

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State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. See *Smith*, 494 U. S., at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); *id.*, at 907 ("The distinction between questions of centrality and questions of sincerity and burden is admittedly fine ... ") (O'CONNOR, J., concurring in judgment). Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If " 'compelling interest' really means what it says ... , many laws will not meet the test [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.*, at 888. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of

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their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. Cf. *Washington v. Davis*, [426 U. S. 229](#), 241 (1976). RFRA's substantial-burden test, however, is not even a discriminatory-effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the *pre-Smith* jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." 1 Annals of Congress 500 (1789). Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

Our national experience teaches that the Constitution is preserved best when each part of the Government respects

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both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. *Katzenbach v. Morgan*, 384 U. S., at 651. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad 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. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

It is so ordered.

<https://www.law.cornell.edu/supct/html/99-5.ZS.html>

UNITED STATES v. MORRISON et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99—5. Argued January 11, 2000—Decided May 15, 2000

b) Section 5 of the [Fourteenth Amendment](#), which permits Congress to enforce by appropriate legislation the constitutional guarantee that no State shall deprive any person of life, liberty, or property, without due process or deny any person equal protection of the laws, *City of Boerne v. Flores*, [521 U.S. 507](#), 517, also does not give Congress the authority to enact §13981. [“which provides a federal civil remedy for the victims of gender-motivated violence”] Petitioners’ assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record. However, the [Fourteenth Amendment](#) places

limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States v. Harris*, [106 U.S. 629](#), and the *Civil Rights Cases*, [109 U.S. 3](#), which were both decided shortly after the Amendment’s adoption. The force of the doctrine of *stare decisis* behind these decisions

stems not only from the length of time they have been on the books, but also from the **insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment’s adoption.**

Comment: That “intimate knowledge” wasn’t tapped very well, though, according to Senator Bingham.

Neither *United States v. Guest*, [383 U.S. 745](#), nor *District of Columbia v. Carter*, [409 U.S. 418](#), casts any doubt on the enduring vitality of the *Civil Rights Cases* and *Harris*. Assuming that there has been gender-based disparate treatment by state authorities in this case, it would not be enough to save §13981’s civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias. Section 13981 visits no consequence on any Virginia public official involved in investigating or prosecuting Brzonkala’s assault, and it is thus unlike any of the §5 remedies this Court has previously upheld. See e.g., *South Carolina v. Katzenbach*, [383 U.S. 301](#). Section 13981 is also different from previously upheld remedies in that it applies uniformly throughout the Nation, even though Congress’ findings indicate that the problem addressed does not exist in all, or even most, States. In contrast, the §5 remedy in *Katzenbach* was directed only to those States in which Congress found that there had been discrimination. Pp. 19—27. 169 F.3d 820, affirmed.

Thomas concurrence

<https://www.law.cornell.edu/supct/html/99-5.ZC.html>

Justice Thomas, concurring.

The majority opinion correctly applies our decision in *United States v. Lopez*, [514 U.S. 549](#) (1995), and I join it in full. **I write separately only to express my view that the very notion of a “substantial effects” test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of**

regulating commerce.