# THE VIRTUE OF JUDICIAL RESTRAINT: *CITY OF BOERNE V. FLORES* AND CONGRESSIONAL POWER TO INTERPRET THE CONSTITUTION

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, in to the hands of that eminent tribunal.[1]

## I. INTRODUCTION

The constitutional doctrine of judicial review[2] has generated extensive scholarly research and inspired landmark books and articles.[3] The focus of such works usually centers upon the question of whether there is an adequate legal and historical foundation for the doctrine of judicial review. The facts and constitutional circumstances surrounding the Supreme Court's 1997 decision in *City of Boerne v. Flores*,[4] however, throw light on a related question that is far narrower and less fundamental but perhaps more immediately rewarding:[5] Does Congress have the authority to interpret the Constitution without being overruled by the Supreme Court's alternative interpretation where the text of the Constitution will bear either interpretation as well, or almost as well, as the other?

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1 Abraham Lincoln, First Inaugural Address (March 4, 1861) *in* Abraham Lincoln: Speeches and Writings, 1859-1865, at 215, 221 (1989).

2 Robert Clinton defines judicial review as "the constitutional power of a court to overturn statutes, regulations, and other governmental activities." ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 7 (1989). According to Clinton, the term "judicial review" itself did not come into usage until the twentieth century, and he suggests that Edwin Corwin may have coined the term in his 1910 law review article, *The Establishment of Judicial Review*. 9 MICH. L. REV. 102; *see* CLINTON, *supra* at 7.

3 *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893); CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912); Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL ACTIVISM (1986); CLINTON, *supra* note 2; ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

4 117 S. Ct. 2157 (1997).

5 In Gerald Gunther's estimation, even thirty-five years ago the field of judicial review, though not yet barren, had been heavily tilled by legal researchers. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 2 (1964). The hope is that this subissue, the question of congressional power to interpret the Constitution, may prove more fecund than the more worked out plots in the field.

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The primary purpose of this Note is to consider the possibility that the Court's interpretative function may not be exclusive and to explore whether Congress has a constitutionally valid role in interpreting the Constitution. Section II discusses the facts and background of *City of Boerne v. Flores*.[6] Section III analyzes the arguments of the parties in *Boerne* and the primary ground upon which the Supreme Court decided the case: the nature and scope of Congress's power under the Enforcement Clause of Section Five of the Fourteenth Amendment. Section IV reviews the Supreme Court's opinion in *Boerne* and focuses on the Court's analysis of Congress's power under the Enforcement Clause. Section V begins by examining the Court's assertion in *Boerne* of its own role in interpreting the Constitution vis-à-vis the role of Congress. This section goes on to examine an argument that may be made for limited congressional authority to interpret the Constitution in light of evidence from sources including Chief Justice John Marshall's opinion in *Marbury v. Madison*[7] and the text of the Constitution itself. Section VI concludes this Note by suggesting a constitutionally legitimate role for the Supreme Court that leaves room for Congress to exercise a limited interpretative authority.

## II. BACKGROUND

*Boerne* was the first (and only) case challenging the constitutionality of the Religious Freedom Restoration Act of 1993[8] to reach the Supreme Court. By enacting the Religious Freedom Restoration Act ("RFRA" or "the Act"), Congress had attempted to "restore" what its members perceived[9] to be greater protections for the free exercise of religion.[10] Prior to its 1990 decision in *Employment Division v. Smith*,[11] the Supreme Court had applied a compelling state interest test to some religious free exercise claims.[12] The Court's five-to-four holding in *Smith*,

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[6] 117 S. Ct. 2157 (1997).

[7] 5 U.S. (1 Cranch) 137 (1803).

[8] 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

[9] *See infra* note 15 and accompanying text.

[10] The Free Exercise Clause of the First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting *the free exercise* thereof . . . ." U.S. CONST. amend I (emphasis added). The Free Exercise Clause was incorporated and made binding upon the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Murdoch v. Pennsylvania, 319 U.S. 105, 108 (1943).

[11] 494 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990).

[12] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 409-10 (1963) (holding that South Carolina's application of its unemployment compensation laws violated the Free Exercise Clause where the state had denied benefits to a woman who was fired for refusing to accept work on her religion's prescribed day of worship); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972) (holding, in part on free exercise grounds, that Amish parents were exempted from complying with compulsory school attendance laws for their children who had passed the

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however, was "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'"[13] and the *Smith* majority limited the compelling interest test's applicability to, at most, free exercise claims that challenge a denial of unemployment compensation.[14] Many members of the public and of Congress, however, were convinced that the compelling state interest test was a necessary safeguard against free exercise infringements.[15] RFRA's statement of findings boldly declared that Congress intended to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*."[16]

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eighth grade); *see also Smith*, 494 U.S. at 883-85 (surveying cases where the Court applied or considered applying a compelling state interest test to religious free exercise claims). Congress cited *Sherbert* and *Yoder* in RFRA's Declaration of Purposes to support the contention that, prior to *Smith*, courts had generally applied the compelling state interest test to free exercise claims. *See infra* note 16 and accompanying text.

[13] 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[14] *See id.* at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* [compelling state interest] test except the denial of unemployment compensation.").

[15] In fact, RFRA had overwhelming popular and congressional support.

> The House version, which passed unanimously on a voice vote, had thirty-four sponsors including conservative Republicans like Newt Gingrich and liberal Democrats like Barney Frank. The Senate version, which was quickly approved by the House, passed by a vote of 97-3. 139 CONG. REC. S.14,470. One member of Congress said, "It is perhaps not too hyperbolic to suggest that in the history of the Republic, there has rarely been a bill which more closely approximates motherhood and apple pie . . . [i]n fact, I know, at least so far, of no one who opposes the legislation." Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 13 (1990) (Congressman Stephen J. Solarz).

Michael J. Frank, Note, Safeguarding the Consciences of Hospitals and Health Care Personnel: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation, 41 ST. LOUIS U. L.J. 311, 339 n.208 (1996) (alterations in original).

[16] 42 U.S.C. § 2000bb(b) (internal citations omitted). Further, RFRA's Congressional Findings and Declaration of Purposes, reproduced *infra*, included several straightforward expressions of Congress's concerns with the *Smith* decision and consequent intent to alter the law of religious free exercise:

> (a) Findings
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> The Congress finds that—
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> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

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In *City of Boerne v. Flores*,[17] the United States (which had been joined as a respondent) asserted that, in enacting RFRA, Congress had "expressly disavowed" any intent to interpret the First Amendment apart or independent from the Court.[18] Nevertheless, the Supreme Court reasoned that Congress had violated the Separation of Powers doctrine by impinging upon what the majority of the Court deemed its own exclusive authority to interpret the Constitution and to declare its meaning.[19] The Court determined that RFRA was not a valid exercise of Congress's Section Five power to enforce the Fourteenth Amendment and was, therefore, unconstitutional.[20]

The dispute in *Boerne* centered upon a Catholic parish's plans to expand its sanctuary.[21] St. Peter's Church in Boerne, Texas, has a membership of 2170, but the sanctuary can accommodate only 230 persons for Mass.[22] On a typical Sunday, 270 to 290 parishioners attempted to attend Mass, but forty to sixty had to be turned away because of the limited seating.[23]

Bishop P. F. Flores, the archbishop of the Catholic diocese in San Antonio, Texas, that includes the city of Boerne,[24] decided that to fulfill

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(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) *to restore the compelling interest test* as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) *and to guarantee its application in all cases where free exercise of religion is substantially burdened*; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb (emphasis added).

17 117 S. Ct. 2157 (1997).

18 Brief for Respondent United States, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (No. 95-2074), *available in* 1997 WL 13201, at *8 [hereinafter Respondent United States' Brief].

19 *See* 117 S. Ct. at 2171-72.

20 *See id.*

21 *See id.* at 2160.

22 *See* Brief for Respondent Flores, *Boerne* (No. 95-2074), *available in* 1997 WL 10293, at *1 [hereinafter Respondent Flores' Brief].

23 *See id.*

24 *See* Respondent United States' Brief, *supra* note xx, at *5.

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its mission the sanctuary had to be expanded.[25] Otherwise, the church could not continue to operate as a parish.[26]

Unfortunately for the parish, in June 1991 the City of Boerne's Landmark Commission designated a portion of "downtown" Boerne as an historic landmark preservation district.[27] St. Peter's Church is located on the original border of this district.[28] The city passed this historic landmark preservation ordinance because it believed that "rapid change in population, economic functions and land use activities ha[d] threatened the distinctive historical character of its community."[29] Among other things, the ordinance designated procedures for "the evaluation of proposed exterior changes to structures within a historical district."[30]

The parish of St. Peter's original plans called for demolishing the existing structure and constructing an entirely new facility.[31] Considering that the dispute revolved around the legitimacy of the landmark preservation ordinance, it is not surprising that the parties differed in their characterization of the church's architectural significance. The City of Boerne praised the structure as "a striking example of mission revival architecture self-consciously referring back to the original Spanish missions in South Texas."[32] Bishop Flores characterized the building, constructed in 1923,[33] more prosaically, calling it "merely a modern imitation of a Spanish mission."[34]

The church submitted its first application for a permit to carry out this plan in December 1993.[35] The city denied the petition[36] even though at the time of this initial application the church had not yet been designated as an historic landmark.[37] In fact, the facade was the only portion of the church building that fell within the boundaries of the city's historic district.[38] Nevertheless, the church negotiated with the city's architect to develop revised plans that would allow the church to tear down

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25 *See id.*

26 *See id.*

27 *See* Brief for Petitioner Boerne, *Boerne* (No. 95-2074), *available in* 1996 WL 689630, at *2-*4 [hereinafter Petitioner Boerne's Brief].

28 *See id.*

29 *Id.* at *2.

30 *Id.* at *3-*4.

31 *See id.* at *4.

32 *See id.* at *2.

33 Petitioner Boerne's Brief, *supra* note 27, at *2.

34 Respondent Flores' Brief, *supra* note 22, at *1.

35 *See* Petitioner Boerne's Brief, *supra* note 27, at *4.

36 *See id.* at *5.

37 *See* Respondent United States' Brief, *supra* note 18, at *5.

38 *See id.*

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part of the structure while still preserving the facade.[39] The city again refused to issue a building permit.[40] Six months later, the city finally amended its ordinance and expanded the boundaries of its historic preservation district to encompass the entire structure of St. Peter's Church.[41]

The church named Bishop Flores as plaintiff and filed suit against the City of Boerne in the United States District Court for the Western District of Texas.[42] The church charged that the city's application of its zoning ordinance against St. Peter's Church violated the religious freedom protections of RFRA.[43]

The district court opened its opinion by averring that under normal circumstances, it would simply enforce the provisions of a congressional act such as RFRA.[44] The court could not do so in this case, however, because RFRA's purpose, expressly stated in the Act's findings, was to overturn the Supreme Court's decision in *Smith*.[45] Therefore, the court agreed to certify the question of RFRA's constitutionality to the United States Attorney General.[46] The United States and the two original parties briefed the constitutional question for the district court.[47]

The district court concluded that RFRA was unconstitutional.[48] In its brief opinion, the court reasoned that the judiciary's interpretative duty is exclusive and that Congress had violated the constitutional Separation of Powers Doctrine when it trespassed upon the Court's province of interpreting the Constitution.[49] The district court then issued an order for an interlocutory appeal[50] to the United States Court of Ap-

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39 *See id.*

40 *See id.*

41 *See id.*

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

43 *See id.* at 356.

44 *See id.* ("Such an Act under normal circumstances would be readily enforceable by this Court; however it has come to the Court's attention that this Act seeks to overturn an interpretation of the United States Constitution by the Supreme Court.").

45 *See id.*

46 *See id.*

47 *See id.*

48 *See* 877 F. Supp. at 357-58 ("RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof [in free exercise cases] as established under *Employment Division v. Smith*.").

49 *See id.* at 356-57.

50 *See id.* at 358. This order was made pursuant to 28 U.S.C. § 1292(b), which provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the

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peals for the Fifth Circuit and entered a partial final judgment pending the case's outcome on appeal.[51]

The Fifth Circuit reversed the district court, finding RFRA to be a constitutional exercise of Congress's power under the Enforcement Clause of the Fourteenth Amendment.[52] Although the district court had concluded that Congress never entered into an inquiry of its own constitutional authority to enact RFRA under the Enforcement Clause,[53] the Fifth Circuit specifically refuted that contention.[54] The Court of Appeals relied on the official House and Senate reports, which stated that Congress enacted RFRA because it fell "squarely within Congress' section 5 enforcement power."[55]

## III. *BOERNE V. FLORES* BEFORE THE SUPREME COURT: THE PARTIES' PERSPECTIVE

The United States did not assert that Congress has independent authority to interpret the Constitution. On the contrary, in its brief the United States disclaimed congressional intent "to overturn [the] Court's constitutional holdings."[56] But given the specific language of RFRA's findings,[57] this claim seems evasive if not baldly disingenuous. This Note

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> order may materially advance the ultimate termination of the litigation
> . . . .

28 U.S.C. § 1292(b).

51 877 F. Supp. at 358.

52 Flores v. Boerne, 73 F.3d 1352 (5th Cir. 1996).

53 *See* 877 F. Supp. at 357 n.1. The district court asserted that Congress had enumerated only "the First Amendment as the empowering provision to change the burden of proof standard" by passing RFRA. *Id.* The court supported that assertion with a quote from a law review article by Marci Hamilton, the eventual Counsel of Record for the City of Boerne in the Supreme Court. *See id.*; Brief for Petitioner Boerne at 50, *Boerne*, 117 S. Ct. 2157 (1997) (No. 95-2074). Ms. Hamilton's law review article asserted that

> typically, the Court looks to the language of an Act or its legislative history for guidance on which power Congress understood itself to be invoking, and for factual support of its legal determination as to whether the power was invoked properly. As applied to federal law, Congress simply did not enter into such an inquiry regarding RFRA.

Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 366 (1994).

54 *See Flores*, 73 F.3d at 1356 ("There is no question that Congress drew on its power under Section 5 in enacting RFRA. The district court's doubt that it did is without basis.").

55 *Id.* (quoting S. REP. NO. 103-111, at 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903) (internal quotation marks omitted); *see also* H.R. REP. NO. 103-88, at 9 (1993) (offering the House of Representatives' official rationale as to why it was within Congress's Section Five power to enact RFRA).

56 Respondent United States' Brief, *supra* note 18, at *8.

57 *See supra* note 16 and accompanying text.

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will, however, defer the issue of Congress's interpretative power until after an analysis of the major arguments of the parties and the primary rationale for the Supreme Court's holding that RFRA was unconstitutional.

Rather than asserting a claim that was more consistent with the history and text of RFRA,[58] such as that Congress possesses some residual authority to interpret the Constitution, Bishop Flores argued that RFRA was a legitimate exercise of the enforcement power granted to Congress under Section Five of the Fourteenth Amendment.[59] Relying primarily on the voting rights cases,[60] the United States claimed that in order to redress violations of the Fourteenth Amendment, Congress has the power to enact both remedial and preventive measures.[61] Remedial measures are those adopted to override specific, existing State legislation that unconstitutionally frustrates the purposes of the Fourteenth Amendment.[62] Preventive measures are those which combat State regulations that, although they may not be contrary to the Fourteenth Amendment on their face or in their stated purpose, may nevertheless be used to achieve results that violate the amendment.[63]

In its brief, the United States echoed statements from RFRA's Congressional Findings[64] and asserted that "Congress's express purpose in

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58 *See supra* notes 10-16 and accompanying text.

59 *See* Respondent United States' Brief, *supra* note 18, at *9.

60 The term "voting rights cases" denotes a line of cases interpreting and upholding the constitutionality of the Voting Rights Act of 1965. *See generally*, Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79. This line of cases includes *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding several provisions of the Act); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding ban on literacy tests that restricted some Puerto Ricans from voting); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding a five-year nationwide ban on literacy tests and other requirements for registering to vote); and *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding a seven-year extension of a Voting Rights Act provision which required some locales with a history of voting discrimination to obtain approval from Congress before changing any requirement for voting or registering to vote).

61 Respondent United States' Brief, *supra* note 18, at *12.

62 *See Boerne*, 117 S. Ct. at 2166-67 (discussing and citing examples of legitimate remedial measures that Congress may employ to enforce the Fourteenth Amendment).

63 *See id.* As an example, State practices challenged in the Voting Rights Cases included laws requiring potential voters to pass a literacy test as a prerequisite to voting. *See id.* at 2167-68. Even though such laws may have been facially neutral, they were often used to prevent African-Americans and other racial minorities from exercising their constitutional right to vote. *See id* at 2166-68, 2170. According to the Court, "The provisions restricting and banning literacy tests . . . 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.'" *Id.* at 2170 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 355 (Black, J., concurring and dissenting)). Thus Congress could legitimately use its preventive power to forbid these literacy tests even absent a showing that they discriminated against racial minorities or that the enacting legislature's intent was discriminatory. *See* 2170-71.

64 *See* 42 U.S.C. § 2000bb, *supra* note 16, at § 2000bb(a).

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enacting RFRA was to protect and enforce th[e] free exercise guarantee" of the First Amendment.[65] The city argued[66] and the Court affirmed that Congress has limited power to enforce the provisions of the Fourteenth Amendment.[67] Any act of Congress creating greater protections for First Amendment rights than are required by the Court would, according to the city, be inconsistent with the Framers' intention that the Bill of Rights be a restraint primarily upon Congress itself.[68]

The United States further asserted that Congress had "found that existing law and governmental practices threatened unduly to obstruct or impede the free exercise of religion."[69] According to this view, RFRA was Congress's attempt to rectify such free exercise infringements by enacting a statutory safeguard providing more protection than the Court's standard in *Smith*.[70] In a similar manner[71] to the voting rights cases, RFRA would preclude the unconstitutional effects of apparently neutral State legislation by "reimposing" a higher standard for assessing free exercise claims.[72]

The City of Boerne vigorously disputed the respondents' assertion that RFRA was a legitimate exercise of Congress's enforcement power under Section Five of the Fourteenth Amendment.[73] In the city's conception of the nature and scope of the enforcement power,[74] Congress does

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65 Respondent United States' Brief, *supra* note 18, at *19.

66 *See* Petitioner Boerne's Brief, *supra* note 27, at *41 n.11.

67 *See Boerne*, 117 S. Ct. at 2163-64. "[T]he 'fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment.'" *Id.* at 2163 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)) (second alteration in original). The Court went on to affirm that not only have all the provisions of the First Amendment been incorporated, Congress has Section Five power to enforce them. *Id.* at 2164. "[T]here is 'no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.'" *Id.* (internal quotation marks and citation omitted in original) (quoting United States v. Price, 383 U.S. 787, 789 (1966)).

68 *See* Petitioner Boerne's Brief, *supra* note 27, at *41 n.11.

> [T]he *Morgan* decision and the other Voting Rights Act Cases speak only to Congress's power vis-à-vis the Equal Protection Clause. They say nothing of congressional power to "ratchet" rights incorporated into the Fourteenth Amendment from the Bill of Rights. The original purpose of the Fourteenth Amendment was to empower Congress and the courts to eliminate state-sponsored racial discrimination. The Bill of Rights, by contrast, was designed to limit Congress itself, making the argument for expansive congressional authority over such rights suspect.

*Id.*

69 Respondent United States' Brief, *supra* note 18, at *19.

70 *See* Respondent Flores' Brief, *supra* note 22, at *2-*7.

71 *See id.* at *6-*8, *11-*13.

72 *See* Respondent United States' Brief, *supra* note 18, at *26.

73 *See* Petitioner Boerne's Brief, *supra* note 27, at *26.

74 The city's brief relied heavily on this view. *See, e.g., id.* at *21-*41.

have a narrowly circumscribed power to pass preventive or prophylactic measures to enforce the Fourteenth Amendment.[75] However, Congress may only exercise this power while employing the constitutional standards announced by the Court, and only when such an enactment is based on Congress's superior fact-finding capabilities.[76]

The City of Boerne distinguished RFRA from the voting rights cases.[77] The latter involved acts of Congress designed to enforce Court-announced constitutional guarantees,[78] whereas RFRA was Congress's attempt to impose its own guarantees based on a constitutional interpretation the Court had already invalidated (in *Smith*).[79]

In the voting rights cases, the Court had allowed Congress to enact prophylactic measures to combat some States' resistance against extending equal protection to the voting rights of minorities.[80] For example, until the holding in *Katzenbach v. Morgan*,[81] the constitution of the State of New York required a voter to be literate in English.[82] Section 4(e) of the Voting Rights Act of 1965 included a provision that no person who had successfully completed the sixth grade in the schools of Puerto Rico could be denied the right to vote based on English illiteracy.[83] In several cases prior to *Morgan*, the Court had found that some states had a long history of using literacy tests to deny minorities the right to vote.[84] Because of this history, even though New York's literacy requirement did not, on its face, discriminate against minorities, the Court upheld Section 4 of the Voting Rights Act as a valid exercise of Congress's power to enforce the protections of the Fourteenth Amendment.[85]

The City of Boerne argued that Congress must demonstrate that a governmental body has a history of this type of resistance to Fourteenth Amendment protections before enacting preventive measures under its

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75 *See id.* at *33.

76 *See id.* at *35.

77 *See id.* at *33-*35.

78 *See id.* at *33.

79 *See* Petitioner Boerne's Brief, *supra* note 27, at *36-*38; *see also id.* at *12, *19 (asserting that Congress's sole purpose was to overturn *Smith* and that RFRA was therefore an overt and undisguised attempt to usurp the Court's authority).

80 *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2163, 2166-67 (1997).

81 384 U.S. 641 (1966).

82 *See* 117 S. Ct. at 2168.

83 *See id.*

84 *See id.* at 2170.

85 *See id.*; *see also* Petitioner Boerne's Brief, *supra* note 27, at *33-*35 (arguing that Congress has power to enact preventive measures to enforce the Fourteenth Amendment only where there has been a long and pervasive history of violative practices and where Congress has used its superior fact-finding abilities to document these practices).

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enforcement power.[86] Congress, the city said, provided an insufficient record to demonstrate that a history of purposeful religious discrimination warranted RFRA's preventive measures.[87]

Moreover, even though Congress did cite instances where State regulations[88] had infringed the religious free exercise of some individuals and groups, the city argued that RFRA's provisions were so broad in their scope that they could not possibly be justified by the Act's meager record of congressional fact finding.[89] RFRA applied to every governmental entity and to every law regardless of the law's date of origin.[90]

Finally, the city delineated a distinction between what it called a remedial power theory and a substantive power theory of Fourteenth Amendment enforcement.[91] The foregoing conception of Congress's enforcement power falls under the remedial power theory. However, some scholars have found a substantive power theory in a passage from *Katzenbach v. Morgan*:[92]

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.[93]

According to the City of Boerne, the substantive power theory holds that Congress has the power "to expand the substantive scope of constitutional guarantees."[94] Such a power would, in effect, allow Congress to do what the city claimed Congress had already done with RFRA: create its own version of the Free Exercise Clause with expanded protections for religious free exercise which were not contemplated by the Framers or by the Court.[95] As it turned out, the Court adopted much of the city's argument.

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86 *See id.* at *34.

87 *See id.* at *35-*38.

88 Bishop Flores asserted that the facts of the case did not call into question the constitutionality of RFRA as applied to federal law. Respondent Flores' Brief, *supra* note 22, at *4. The Court apparently agreed; it never explicitly addressed this question, and, of course, the City of Boerne challenged RFRA's constitutionality as applied to a local zoning ordinance, that is, state law. *Boerne*, 117 S. Ct. at 2160.

89 *See* Petitioner Boerne's Brief, *supra* note 27, at *35-*38.

90 *See id.* at *21.

91 *See id.* at *31-*43.

92 384 U.S. 641 (1966).

93 *Id.* at 651 n.10.

94 *See* Petitioner Boerne's Brief, *supra* note 27, at *32.

95 *Id.* at *22-*23, *27 & n.8, *28.

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## IV. *BOERNE V. FLORES* BEFORE THE SUPREME COURT: THE COURT'S OPINION

Justice Kennedy wrote for the Court.[96] Chief Justice Rehnquist, and Justices Thomas, Ginsburg, and Scalia (the author of *Smith*) joined Justice Kennedy's opinion. Justice O'Connor wrote a lengthy dissent, a three-part opinion in which Justice Breyer joined.[97]

The correctness or incorrectness of *Smith* was not a prominent feature of the *Boerne* majority's investigation. The Court qualified its treatment of *Smith* with the observation that it was not rearguing *Smith* but simply illustrating how RFRA attempted to substantively alter that decision's holding.[98] The Court did, however, recap portions of *Smith*'s rationale dealing with the compelling interest test's inapplicability to free exercise claims.[99] It reiterated *Smith*'s conclusion that although the Court had applied a compelling governmental interest test to religious free exercise claims in some cases,[100] those cases stood for "the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."[101] Thus, the Court carefully limited its discussion to *Smith*'s motivating influence upon Congress to "reinstate" the compelling governmental interest test.

The majority's decision turned on Congress's ability, granted by Section Five of the Fourteenth Amendment, to enforce the provisions of the amendment by appropriate legislation. *Boerne* was, of course, a challenge to RFRA's authority over the actions of state government; therefore, the Court's opinion dealt with RFRA in relation to the States.[102] In their briefs, Bishop Flores and the United States had argued that RFRA was a preventive measure designed to preclude federal, state, and local governments from infringing rights protected by the Free Exercise Clause.[103] The Court, however, framed the question of the Act's constitutionality in terms of the defined and limited nature of Congress's powers,

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

97 *See id.* at 2176. Justices Souter and Breyer both wrote short dissenting opinions, as well. *See id.* at 2185-86. *See infra* notes 202-207 and accompanying text.

98 *See id.* at 2171.

99 *See id.* at 2160-62.

100 *See supra* note 12 and accompanying text.

101 117 S. Ct. at 2161 (quoting Employment Division v. Smith, 494 U.S. 872, 884 (1990)) (internal quotation marks omitted).

102 *See id.* at 2160. Justice Kennedy noted that the provisions of RFRA that extended to the States were the Act's most far-reaching. *See id.*

103 *See generally, e.g.*, Respondent Flores' Brief, *supra* note 22, at *10-*22 (likening RFRA to preventive civil rights legislation Congress has passed to enforce the Fourteenth Amendment); Respondent United States' Brief, *supra* note 18, at *17-*35 (arguing that RFRA deterred governmental violations of religious free exercise).

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the presumption being that Congress could not enact RFRA unless the body of the Constitution or of an Amendment enumerated such a power.[104]

The Court did in fact affirm that the Enforcement Clause of the Fourteenth Amendment[105] was a "a positive grant of legislative power to Congress."[106] Further, it affirmed that Congress has power under this grant to enact preventive legislation against conduct that is not per se unconstitutional.[107] As examples, the Court cited legislation in which Congress had banned literacy test requirements for voting even though such tests were not facially discriminatory.[108] Congress required states to obtain permission from the federal government before making any changes in their voting practices, even changes that were apparently benign.[109]

The Court further asserted, however, that Congress's power to pass preventive legislation is limited and must be a remedy for a historical pattern of injurious effects of state action that is facially constitutional.[110] Congress is not free to decree the substance of the Fourteenth Amendment's restrictions on the states.[111] If it were free to do so, Congress would no longer be enforcing the Amendment, but altering it.[112]

The conclusion that the Fourteenth Amendment is not a grant of power to extend substantive rights is, according to the Court, supported both by the history of the Fourteenth Amendment's adoption and by the Court's earliest applications of the amendment's provisions.[113] The original draft of the Enforcement Clause met with staunch opposition precisely because it appeared to afford such power to Congress.[114] The re-

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[104] *See Boerne*, 117 S. Ct. at 2162.

[105] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[106] *Boerne*, 117 S. Ct. at 2163 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)) (internal quotation marks omitted).

[107] *See id.*

[108] *See id.* (setting forth *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970) as instances where literacy requirements for voting had been invalidated under the Voting Rights Act).

[109] *See id.* (providing the example of *City of Rome v. United States*, 446 U.S. 156 (1980), where the Court upheld a "7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a standard, practice, or procedure with respect to voting" (quoting *City of Rome*, 446 U.S. at 161 (internal quotation marks omitted))).

[110] *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2163-64 (1997).

[111] *See id.* at 2164.

[112] *See id.*

[113] *See id.* at 2164-67.

[114] *See id.* at 2164-65.

vised version, the version ultimately adopted, met with no such opposition.[115] According to the Court's earliest Fourteenth Amendment cases,

> [t]he Enforcement Clause . . . 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."[116]

The Court conceded that there was language in *Katzenbach v. Morgan*[117] which could be construed to grant Congress substantive power, but asserted that such was neither a necessary interpretation nor the best one.[118]

The Court further admitted that the line between enforcing the Fourteenth Amendment's protections and using it to extend substantive rights is difficult to draw, but further specified that the line may be discerned based on a congruence and proportionality between the injury and the remedy chosen to correct it.[119] The question of whether Congress was justified in passing a preventive measure "must be considered in light of the evil presented."[120] For instance, where Congress legitimately exercised its enforcement power in a preventive manner to forbid literacy tests for voting rights, there was a record of such tests' pervasive and discriminatory use.[121] Further, where the affected states had a 95-year history of pervasive voting discrimination, Congress was justified in extending the duration of the requirement that these states report to the federal government any proposed changes in voting procedures.[122]

RFRA lacks such proportionality, the Court said, between its means and the ends it seeks to achieve.[123] To start with, Congress did not build a record of contemporary discriminatory practices against religion.[124] Most of the "substantial burdens" which Congress presented to demonstrate systematic denial by government entities of the right to religious free exercise were anecdotes about incidental burdens placed on religious exercise by generally applicable laws.[125] The record resembled nothing like the history presented in the voting rights cases of systematic racial

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[115] *See id.* at 2165-66.

[116] *Boerne*, 117 S. Ct. at 2166 (quoting The Civil Rights Cases, 109 U.S. 3, 13-14 (1883)).

[117] 384 U.S. 641 (1966).

[118] *See Boerne*, 117 S. Ct. at 2168.

[119] *See id.* at 2164.

[120] *See id.* at 2169 (citing *South Carolina v. Katzenbach*, 383 U.S. at 308).

[121] *See id.* at 2167-68.

[122] *See id.* at 2167.

[123] *Boerne*, 117 S. Ct. at 2169.

[124] *See id.*

[125] *See id.*

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discrimination in the face of the Fourteenth Amendment's protections.[126] The Court concluded that RFRA's absence of such a record was due to the fact that deliberate persecution against religion or religious believers "is not the usual problem in this country."[127]

Not only did RFRA present a meager record documenting real injuries requiring preventive measures, the Court determined that the remedy was far out of proportion with the harm to be averted.[128] RFRA required a compelling state interest test to be applied in every case where a court found that a person's religious exercise was "substantially burdened."[129] In addition, the Act applied to every law and level of government, every agency and official in the nation.[130] RFRA's administrative costs alone were likely to be enormous.[131]

Finally, even if a governmental action substantially burdening a claimant's religion passed the compelling state interest test, RFRA additionally required that a least restrictive means test be applied.[132] This meant that a court must determine if there was any other way government could have accomplished its compelling state interest without substantially burdening the claimant's religious exercise.[133] Few, if any governmental actions could be expected to pass this test.[134] For this and the above reasons, the Court concluded that RFRA was not fashioned in proportion to the injury it was intended to correct.[135]

As a result, the Court determined that RFRA was not a legitimate exercise of Congress's Fourteenth Amendment enforcement power.[136] Because Congress offered no other enumerated power to justify its enactment of RFRA, the Court held it to be unconstitutional.[137]

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[126] *See id.*

[127] *See id.* (internal quotation marks and citation omitted).

[128] 117 S. Ct. at 2169.

[129] *See id.* at 2171.

[130] *See id.* at 2170.

[131] *See id.* at 2171.

[132] *See id.*

[133] *See id.*

[134] *See* 117 S. Ct. at 2171.

> 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 2171 (alterations in original) (quoting Employment Division v. Smith, 494 U.S. 872, 888 (1990)).

[135] *See id.*

[136] *See id.* at 2170, 2171.

[137] *See id.* at 2172.

## V. THE CASE FOR CONGRESSIONAL INTERPRETATIVE POWER

While keeping the foregoing discussion of the Court's analysis in *Boerne* in mind, this is an appropriate juncture at which to begin looking for signs that the Constitution awards hegemony over constitutional interpretation to the judicial branch. If those signs are not clear, it may be reasonable to infer that the Constitution does not prohibit Congress from exercising some interpretative power. In fact, this section argues that the evidence makes it difficult to conclude that Congress is precluded from engaging in some constitutional interpretation, particularly where a constitutional provision will bear Congress's interpretation nearly as well as the Court's, and where Congress is otherwise operating within the scope of its own constitutional powers. First, however, it may be illuminating to set the stage by taking note of how far, at times, the Court has reached in asserting the absolute authority of its interpretations over the meaning and force of the Constitution.

### *A. The Court's View of Its Constitutional Role*

What is perhaps the Court's most startling statement of its role in textual interpretations came in 1958 in the context of the State of Arkansas's resistance to school desegregation. The case was *Cooper v. Aaron*,[138] and it arose as a result of the governor and legislature of Arkansas' conclusion that there was no duty on state officials to obey federal court orders directed at others.[139] Therefore, these Arkansas officials asserted that they were not bound by the principles set forth in the Court's landmark school desegregation decision,[140] *Brown v. Board of Education*.[141] The Court apparently considered this a great enough challenge to its authority that, just one day after the parties presented oral arguments, it issued a per curiam opinion unanimously upholding the court of appeals' reaffirmation of *Brown*.[142]

Perhaps because of the gravity of the State of Arkansas's affront to the Court's authority, the Court itself engaged in overreaching. Chief Justice Warren wrote for the unanimous court.[143] He reasoned that because Article VI makes the Constitution the "supreme Law of the Land"[144] and because, according to Chief Justice Marshall's declaration

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138 358 U.S. 1 (1958).

139 *See id.* at 4.

140 *See id.*

141 347 U.S. 483 (1953).

142 *See Cooper*, 358 U.S. at 4-5. The Court did not issue its full opinion until two weeks later. *See id.* at 1.

143 *See id.* at 4.

144 U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).

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in *Marbury*,[145] "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[146] therefore

> the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that *the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land*, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[147]

The highlighted phrase, equating the authority of the Court's constitutional interpretations with the authority of the Constitution itself, may have been the high-water mark of the Court's explicit arrogation of power over the Constitution.[148] This view seems to leave little room for Congress to engage in independent constitutional interpretations. However, even though the opinion has had its supporters,[149] the Court has never incorporated *Cooper*'s dicta into a majority opinion.

In *Boerne*, the Court makes similar statements, albeit couched in the framework of the Court's analysis of Congress's authority under the Fourteenth Amendment's Enforcement Clause. For instance, the Court says that

> [i]f 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

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145 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

146 *Id.* at 177.

147 *Cooper*, 358 U.S. at 18 (emphasis added) (quoting U.S. CONST. art. VI, cl. 2).

148 Ironically, the Warren Court went on to accuse Arkansas's Governor (perhaps justly) of commandeering power at the expense of the Constitution.

> A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "*it is manifest that* the *fiat* of a state Governor, *and not the Constitution of the United States, would be the supreme law of the land*; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases."

*Id.* at 18-19 (emphasis added) (quoting Sterling v. Constantin, 287 U.S. 378, 397-98 (1932)). Apparently without recognizing the irony, the *Cooper* Court thus censured the Arkansas governor for attempting a very similar arrogation of power to the one which the Court had itself attempted just a few paragraphs earlier. *See id.* at 18.

149 *See, e.g.*, Daniel A. Farber, *The Supreme Court and the Rule of Law*: Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387 (1982); BICKEL, *supra* note 2, at 264-65. Professor Bickel apparently agrees with the *Cooper* Court's dicta. When he writes, "Whatever the Court lays down is right, even if wrong, because the Court and only the Court speaks in the name of the Constitution," he phrases it as though it were the opinion of others. *Id.* Perhaps even surpassing *Cooper*, however, Professor Bickel goes on to assert that, based on the equal authority of Court interpretations with the Constitution, even *the principle* announced in *Brown v. Board of Education*, for one instance, is the supreme law of the land. *See id.*

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level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it."[150]

This seems like a straightforward statement of the unremarkable and uncontroversial proposition that Congress has no power to amend the Constitution apart from the role it is assigned in Article V.[151] However, the Court is really after something else, but seems to be reluctant to state it plainly. The Court comes closer to speaking forthrightly when, in the context of analyzing Congress's power under the Enforcement Clause, it says "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[152] Here, the Court implies that this power is exclusive but still refrains from saying so explicitly.

The Court makes its view of the limitation upon Congress clearer when it says that interpreting *Katzenbach v. Morgan*[153] "to give Congress the power to interpret the Constitution 'would require an enormous extension of that decision's rationale.'"[154] In other words, unless the Enforcement Clause of the Fourteenth Amendment is construed to grant it, Congress has no interpretative power under any other provision of the Constitution. The Court concludes, however, that this would not be a plausible construction of *Morgan* or, therefore, of the Enforcement Clause.[155]

### *B. The Case for Congressional Interpretation: The Text*

An inspection of the text of the Constitution reveals no explicit evidence that the Framers assigned the authority or responsibility for interpretation to any one division or branch of the government. The oath clauses[156] are two of the few provisions directly addressing the respective branches' responsibility to the Constitution. Yet while neither clause mentions constitutional interpretation, they both imply some authority to interpret. As an example, for the President to "preserve, protect, and defend the Constitution,"[157] he must first know what the Constitution requires of him. If he were simply to accept the Court's interpretation of

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[150] City of Boerne v. Flores, 117 S. Ct. 2157, 2168 (1997) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

[151] *See* U.S. CONST. art. V (defining the process for amending the Constitution).

[152] 117 S. Ct. at 2166.

[153] 384 U.S. 641 (1966).

[154] 117 S. Ct. at 2168 (quoting Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, J.)).

[155] *See id.* at 2168.

[156] *See* U.S. CONST. art. VI, cl. 3 (mandating an oath of office for every member of Congress and every judicial or executive officer); U.S. CONST. art. II, § 1, cl. 8 (prescribing the President's required oath of office).

[157] *Id.*

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the Constitution, he could not defend the Constitution "to the best of [his] ability"[158] against a Court that had run amok. Very similar reasoning applies to a member of Congress who has bound himself "by Oath or Affirmation, to support th[e] Constitution."[159] His oath seems to require him to perform some measure of constitutional interpretation in order to perform the duties of his office.[160]

Neither does an examination of Article III's explicit enumeration of judicial powers[161] lead one to conclude that the Framers explicitly assigned the duty and authority to interpret the Constitution to one or more branches of government. Article III, Section 1 vests the federal judicial power in "one supreme Court, and in such inferior courts as the Congress may . . . establish."[162] The first clause of Article III, Section 2 extends this judicial power to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[163] The second clause of Article III, Section 3 simply apportions the judicial power between the Supreme Court's original and appellate jurisdictions.

Article III does not assign the Court the sole authority for constitutional interpretation. It does not even lay out the doctrine of judicial review. In fact, as Alexander Bickel writes:

> Article III does not purport to describe the function of the Court; it subsumes whatever questions may exist as to that in the phrase "the judicial Power." It does not purport to tell the Court how to decide cases; it only specifies which kinds of case the Court shall have juris-

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[158] *Id.*

[159] U.S. CONST. art. VI, cl. 3.

[160] Chief Justice Marshall used the oath of office as support for his enunciation of the doctrine of judicial review in *Marbury*. 5 U.S. (1 Cranch) 137, 180 (1803). However, Alexander Bickel refutes the idea that the oath provisions support even Marshall's argument for judicial review, much less that the Court's interpretative authority is exclusive.

> Far from supporting Marshall, the oath is perhaps the strongest textual argument against him. For it would seem to obligate each of these officers, in the performance of his own function, to support the Constitution. On one reading, the consequence might be utter chaos—everyone at every juncture interprets and applies the Constitution for himself. Or . . . *it may be deduced that everyone is to construe the Constitution with finality insofar as it addresses itself to the performance of his own peculiar function. Surely the language lends itself more readily to this interpretation than to Marshall's apparent conclusion*, that everyone's oath to support the Constitution is qualified by the judiciary's oath to do the same, and that every official in government is sworn to support the Constitution as the judges, in pursuance of the same oath, have construed it, rather than as his own conscience may dictate.

BICKEL, *supra* note 3, at 8 (emphasis added).

[161] *See* U.S. CONST. art. III.

[162] U.S. CONST. art. III, § 1.

[163] U.S. CONST. art. III, § 2.

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> diction to deal with at all. Thus, in giving jurisdiction in cases "arising under . . . the Laws" or "under . . . Treaties," the clause is not read as prescribing the process of decision to be followed. The process varies.[164]

The text of the Constitution itself provides very little evidence of the Framers' intended method of constitutional adjudication.

It has, however, been well argued elsewhere[165] that the doctrine of judicial review is a fair inference from the text of the Constitution and the original understanding of the Framers. It may even be a fair textual inference to assign paramount authority for constitutional interpretation to the Court. But given the dearth of supporting constitutional text, it seems to be a stretch at best to attribute to the Constitution a complete proscription against congressional interpretation. Nevertheless, as with any exposition of the doctrine of judicial review, the Constitution can hardly be considered apart from the light shed upon it by *Marbury*.[166]

### *C. The Case for Congressional Interpretation:* Marbury v. Madison

The constitutional doctrine of judicial review as first declared by Chief Justice John Marshall in *Marbury v. Madison*,[167] while granting the *ultimate* authority to interpret the Constitution to the Court, does not grant the Court the *exclusive* power to do so. One would expect that if the Court's power is exclusive, and if this exclusivity is derived from the doctrine of judicial review, *Marbury* would provide some rationale for or statement of this exclusivity.

On the contrary, the framework of Marshall's argument for judicial review applies in an analogous manner to the Court itself. The argument begins by affirming that Congress is a body of limited and defined powers.[168] The powers of Congress are created and thus controlled by the

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[164] BICKEL, *supra* note 3, at 5.

[165] See generally, e.g., BEARD, supra note 2.

[166] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.).

[167] *Id.* According to Alexander Bickel whereas "Congress was created nearly full blown by the Constitution," and the "vast possibilities of the presidency were relatively easy to perceive,"

> the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did. If any social process can be said to have been "done" at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.

BICKEL, *supra* note 3, at 1. Robert Bork holds that *Marbury* was the "decision that rationalized, though it was not the first to assume, the Court's power of judicial review." BORK, *supra* note 3, at 22.

[168] *See* 5 U.S. (1 Cranch) at 176-77.

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Constitution.[169] Congress cannot alter the Constitution by use of its ordinary powers; amendments may be effected only by the process laid out in Article V.[170] Thus, Congress cannot modify or expand its own power by the exercise of its ordinary powers, that is, by enacting legislation.[171]

Thus far, Marshall's argument applies equally well to the Court, other than the fact that the Court's ordinary powers lie in adjudication, not legislation. The Court, like Congress, is also created by the Constitution.[172] It, too, is a body of enumerated and, thus, limited and defined powers.[173] Although Marshall himself did not draw the analogy, it follows that since the Court, just like Congress, is a creature of the Constitution, the Court may not alter the Constitution by use of its ordinary powers.

Marshall derived the Court's power of judicial review from the Court's normal, constitutionally-defined function of adjudicating cases and controversies;[174] he does not posit some sort of elite role for the Court among the co-equal branches of government. He acknowledges only that in carrying out its ordinary duties, the Court will have occasion to decide on cases where the law brought in question conflicts or appears to conflict with the Constitution: "Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each."[175] In such cases where a law is

> in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[176]

It is in the midst of these surroundings, the context of the essential, routine duties of the judiciary, that Marshall makes his famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[177] The context makes it clear that his statement is not advocating "judge-made law," but is simply positing that in order to apply the law rightly to cases, judges must interpret the law so that they can declare, or say, what the law is.

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169 *See id.*

170 *See id.* at 177.

171 *See id.*

172 *See id.* at 173.

173 *See id.* at 175.

174 *See* 5 U.S. (1 Cranch) at 173-74.

175 *Id.* at 177.

176 *Id.* at 178.

177 *Id.* at 177.

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Accordingly, Marshall's hypothetical examples of acts of Congress that would conflict with the Constitution and would, therefore, be nullities and not law include only concrete violations of express constitutional provisions. If Congress lays "a duty on the export of cotton, of tobacco, or of flour"[178] this would directly violate Article I, Section 9's prohibition against duties on exports from any state.[179] If Congress made the testimony of one witness, or a confession out of court, sufficient to sustain a conviction for treason,[180] it would directly violate the requirement of Article III, Section 3 that all convictions for treason be based on the testimony of at least two witnesses or on confessions made in open court.[181] Marshall's third and final example—of Congress passing a bill of attainder or ex post facto law[182] in contravention of Article I, Section 9's explicit proscription of such acts[183]—is once again a concrete violation of an express constitutional provision.

Marshall's examples illustrate that *Marbury* is primarily concerned with direct congressional violation of the Constitution, rather than with competing interpretations that are equally or nearly equally consistent with the document. As distinguished from the Warren Court's opinion in *Cooper v. Aaron*,[184] nowhere in *Marbury* does Marshall equate the authority of the Court's interpretations with the text of the Constitution. Even more to the point, Marshall never expressly states that the one branch's interpretation of the Constitution must *always* be granted precedence over that of any other branch.

Marshall's opinion and arguments by Madison, *infra*,[185] at least leave room for the other branches to exercise independent interpretative power. The modern Court holds to a somewhat double-minded view of this question. As in *Boerne*, the Court theorizes that Congress may interpret and even has a duty to interpret.[186] But also as in *Boerne*,[187] the

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[178] *Id.* at 179.

[179] *See* U.S. CONST. art. I, § 9.

[180] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803) (Marshall, C.J.).

[181] *See* U.S. CONST. art. III, § 3.

[182] *See* 5 U.S. (1 Cranch) at 179.

[183] *See* U.S. CONST. art. I, § 9.

[184] *See supra* notes 138-155 and accompanying text.

[185] *See infra* notes 189-201 and accompanying text.

[186] City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997) ("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." (emphasis added)).

[187] *See id.* at 2172.

> 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

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Court dismisses Congress's constitutional interpretations even when it is doubtful whether such interpretations are less consistent with the text of the Constitution than those of the Court.

By contrast, nothing in the text of *Marbury* should lead a reasonable person to believe Marshall is asserting that where two interpretations of the Constitution are equally plausible, the Court's interpretation must always prevail. Instead, the opinion contains some evidence that Marshall considered it Congress's duty as well to interpret the Constitution. Marshall's closing statement in *Marbury* serves as an example: "[T]he particular phraseology of the constitution . . . confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, *as well as other departments, are bound by that instrument*."[188] The phrase "as well as" suggests an equality between the other two departments and the courts; it certainly does not imply judicial superiority. If one of Marshall's premises in *Marbury* was that exclusive authority to interpret the Constitution belongs to the judicial branch, it seems highly unlikely that he would have ended his opinion with a statement that so clearly undercuts this premise.

### *D. The Case for Congressional Interpretation: James Madison*

In Federalist No. 48, James Madison casts additional doubt on the idea that the Court should have a power to control acts of Congress where Congress does not have some reciprocal right or power.[189] Consistent with the Separation of Powers doctrine, Madison says,

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that *none of them ought to possess, directly or indirectly, an overruling influence over the others* in the administration of their respective powers.[190]

This being true, why should the Court have power to nullify "an act of the legislature repugnant to the constitution,"[191] while Congress must submit to Court decisions which may themselves be repugnant to the Constitution? For the Separation of Powers Doctrine to be efficacious, Congress must reserve some measure of authority to interpret the Con-

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> precedents with the respect due them . . . and contrary expectations must be disappointed.

*Id.*

[188] *Marbury*, 5 U.S. (1 Cranch) at 180 (emphasis added).

[189] THE FEDERALIST No. 48 (James Madison).

[190] THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[191] *Marbury*, 5 U.S. (1 Cranch) at 177.

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stitution independently of the Court. Otherwise, Congress has no way even of recognizing when the Court has overstepped its constitutional authority and has begun to exert "an overruling influence"[192] upon Congress's exercise of legislative powers.

Madison made another argument on the floor of the House of Representatives supporting the premise that the Constitution does not preclude Congress from exercising some authority to interpret the document's meaning. The argument arose while Congress was fashioning an act to create the Department of Foreign Affairs.[193] The House was debating whether to apply the clause, "to be removable from office by the President," to the new office of the Secretary of Foreign Affairs.[194] The clause was controversial because some members of the House held that since the Constitution requires Presidential nominees to obtain the "Advice and Consent of the Senate" before taking office,[195] the President should have to obtain Senate approval before removing those officers.[196] Representative William L. Smith[197] from South Carolina objected that the debate had no place in the House because the issue touched only the Executive and the Senate and did not directly implicate the constitutionally enumerated powers of the House of Representatives.[198]

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[192] THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

[193] *See* 1 Annals of Cong. 455.

[194] *Id.*

[195] U.S. CONST. art. II, § 2, cl. 2. This provision, in pertinent part, states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for.

*Id.*

[196] *See generally* 1 ANNALS OF CONG. 455-500 (setting forth the bulk of the debate, up to and including each of Madison's statements quoted in the text).

[197] As an historical sidenote, Mr. Smith went to New York, the site of both sessions of the First Congress, and took his seat in the House of Representatives on April 13, 1789. *See* U.S. CONGRESS, JOINT COMMITTEE ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989 50, 52 n.27 (Kathryn A. Jacob & Bruce Ragsdale eds., 1989). Two days later, he found the legitimacy of his seat being challenged on the ground that at the time of his election he had not been a United States citizen for the minimum seven years required by the Constitution. *See id.* at 52 n.27; U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . ."). After referring the matter to the Committee on Elections, the House eventually adopted a resolution declaring that Mr. Smith was indeed eligible for Congress at the time of his election. U.S. CONGRESS, JOINT COMMITTEE ON PRINTING, *supra*, at 52 n.27.

[198] *See* 1 ANNALS OF CONG. 456, 458-59, 470-71. Representative Smith made an argument that presaged the Court's view in the twentieth century of its interpretative role and authority. *Compare, e.g., id.* at 470 ("Gentlemen have said that it is proper to give a legislative construction of the Constitution. . . . I think it an infringement of the powers of

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Madison framed Representative Smith's position as a contention that it was no business of the House to, in Madison's words, "expound the Constitution, so far as it relates to the division of power between the President and Senate."[199] Madison heartily disagreed:

> [I]t 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, so far as it depends upon us, to take care that the powers of the Constitution be preserved entire to every department of Government; the breach of the Constitution in one point, will facilitate the breach in another; a breach in this point may destroy that equilibrum [sic] by which the House retains its consequence and share of power; therefore we are not chargeable with an officious interference.[200]

Madison unambiguously asserts that each branch of government has a duty to the entire Constitution.[201] The preeminent Framer of the Constitution apparently did not consider the oath of office he took before assuming his seat in the House as a promise simply to apply and carry out the Constitution as he would be directed by the Supreme Court. Nor did he limit Congress's authority by time, restricting it solely to the First Congress; the duty to debate, comprehend, and defend the Constitution was unequivocal and applied without exception to each branch of the new government.

## VI. AN APPLICATION OF CONGRESSIONAL INTERPRETATIVE POWER

Part of what makes *Boerne* an interesting context within which to investigate constitutional interpretation is the evidence that the "correct" interpretation of the Free Exercise Clause could just as easily compel the application of a compelling state interest test as not. The Court divided sharply over the very issue that motivated Congress to pass RFRA: the correct standard of review to apply to free exercise claims against facially neutral and generally applicable government regulations.[202] The Court divided five to four in *Boerne*, and the dissenters' dispute with the majority centered upon the compelling state interest

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the judiciary. . . What authority has this House to explain the law?"), *with supra* notes 138-155 and accompanying text.

[199] 1 ANNALS OF CONG. 499.

[200] *Id.* (emphasis added).

[201] Madison asserted that it is particularly proper for Congress to choose to exercise this duty where the constitutional clause or power at issue admits of more than one interpretation: "[I]f it relates to a doubtful part of the Constitution, . . . an exposition of the Constitution may come with as much propriety from the Legislature [Congress], as any other department of the Government." *Id.* at 461.

[202] *Compare* City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997), *with id.* at 2176-78 (O'Connor, J., dissenting).

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test.[203] The Court also divided five to four in *Smith* and primarily for the same reason.[204] In addition, three justices in *Boerne*, Justices O'Connor,[205] Souter,[206] and Breyer[207] wrote separate opinions arguing that the Court should have directed the parties to have briefed *Smith* and argued the correctness of that decision. Although probably not unheard of, it is certainly not the norm for three Justices to call for a prior decision to be reargued. This illustrates the closeness of the constitutional question. Moreover, even Justice Scalia, the author and presumably chief advocate of *Smith*, and Justice O'Connor, *Smith*'s chief critic, have both admitted of the question's closeness.[208]

The text itself of the First Amendment does not require the application of a compelling state interest test to free exercise claims. Conversely, neither does it refute the proposition that one should be applied. The Religion Clauses state simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[209] Neither the view of the majority in *Smith* nor that of the dissent is compelled by the text of the Free Exercise Clause.

The purpose of reciting these facts is not to demonstrate that *Smith* was wrongly decided; the opposite is just as likely. However, these facts indicate that whether the Constitution proscribes, permits, or prescribes a compelling governmental interest test for religious free exercise claims is a legitimate *and unresolved* constitutional question. The situation is inapposite to the examples Chief Justice Marshall gave in *Marbury* of hypothetical congressional enactments that directly violate concrete provisions of the Constitution.[210] In scenarios similar to those Marshall presented, the Court clearly would be bound to follow the Constitution and not the Congress. But why should the Court impose its constitutional interpretations in *Boerne* when 1) the Court itself has applied the standard that Congress is advocating to other free exercise claims,[211] 2) Congress and the national electorate clearly prefer one standard over the other,[212] 3) the Court is sharply divided over the correct standard of re-

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[203] *See* 117 S. Ct. at 2176, 2177 (O'Connor, J., dissenting); *id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

[204] *Compare* Employment Division v. Smith, 494 U.S. 872, 884-85 (1990), *with id.* at 891-93 (O'Connor, J., concurring in the judgment).

[205] *Id.* at 2176 (O'Connor, J., dissenting).

[206] *Id.* at 2185 (Souter, J., dissenting).

[207] *Id.* at 2186 (Breyer, J., dissenting).

[208] *Compare Boerne*, 117 S. Ct. at 2175-76 (Scalia, J., concurring in part), *with* 494 U.S. at 892 (O'Connor, J., concurring in the judgment).

[209] U.S. CONST. amend. I.

[210] *See supra* notes 178-183 and accompanying text.

[211] *See supra* note 12 and accompanying text.

[212] *See supra* note 15 and accompanying text.

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view to apply to the issue,[213] and 4) the text of the Constitution does not require one interpretation rather than the other?[214]

In light of the overwhelming popular support for RFRA both within Congress and in the citizenry,[215] this would have been an excellent opportunity for the court to exercise judicial restraint and defer to Congress's interpretation of the Free Exercise Clause. The Court often exercises judicial restraint in the form of raising questions of mootness, ripeness, justiciability, and jurisdiction.[216] Even denial of certiorari is an act of judicial restraint. Therefore, it seems likely that the Court could develop a constitutional doctrine that permitted it to defer to Congress's interpretation pending further analytical or empirical revelations which would make it apparent which interpretation was better—or "more constitutional."

There can be no doubt that the Court should refuse to apply "an act of the legislature repugnant to the constitution."[217] This is the central tenet of *Marbury*. But to be repugnant means to be contradictory or inconsistent.[218] *Marbury* is not, therefore, about the supremacy of the Supreme Court's constitutional interpretations over those of another coequal branch where both branch's interpretations are equally consistent with the text of the Constitution, or nearly so.

## VII. CONCLUSION

The Supreme Court has repeatedly asserted a view of the federal structure that restricts constitutional interpretation to itself. Nevertheless, the Court seems to find it difficult to state this principle frankly. If the Court believes that the Constitution restricts interpretative authority solely to the Court, it should make plain the supporting constitutional doctrine. If the Court does not—or will not—explicitly espouse this doctrine, it should clearly and explicitly disavow it. To do anything less, while yet continuing to exercise hegemony over the Constitution and, thereby, over Congress, would be to surreptitiously fix "the policy of the government, upon vital questions, affecting the whole people, . . . by de-

213 *See, e.g.*, *Smith*, 494 U.S. at 894-901 (O'Connor, J., concurring in the judgment).

214 *See supra* notes 156-166 and accompanying text.

215 *See supra* note 15 and accompanying text.

216 *See generally* BICKEL, *supra* note 3, at 111-198 (discussing the legitimacy and application of the doctrines the Court uses to grant it greater discretion in determining which cases it will hear). Bickel refers to these doctrines fostering judicial restraint as "the passive virtues." *See id.* at 111-113.

217 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

218 *See* AM. HERITAGE DICTIONARY 1105 (1980).

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cisions of the Supreme Court, the instant they are made, in ordinary litigation between parties."[219]

In *Marbury v. Madison*,[220] Chief Justice John Marshall found in the Case and Controversy requirement of Article III a duty upon the Supreme Court to interpret the Constitution when an act of Congress is inconsistent or conflicts with the document.[221] Nevertheless, James Madison made it clear that in defining a government whose powers are both limited and separated, the Constitution does not countenance any branch exercising absolute dominion over another.[222] In fact, the notion that the Court's constitutional interpretations are exclusive and not subject to review by Congress, even when the Constitution will bear other interpretations equally well is supported neither by Madison, nor by *Marbury*, nor by the text of the Constitution itself.[223]

The Court has, at times, expressed itself in language that, if taken seriously, would effectively arrogate to itself hegemony over the Constitution.[224] Although the Constitution is, *per se*, simply a document consisting of words, it has force to the extent that those words have meaning and are applied in a manner consistent with their meaning. Because the document defines our federal government, *any* institution that asserts sole, supreme, and unreviewable power to decide what those words mean, lays claim to the ultimate authority to define that government.

The legislative power of the federal government was designed to represent the power and sovereignty of the States and of the people. Congress's power is a counterweight to the power of the other branches, and the Supreme Court's precedents provide no persuasive argument that Congress should submit its authority to enforce and protect the Constitution to the judgment of the Court. If Congress does surrender its authority and abdicate its duty to safeguard the Constitution, the weight of federal power shifts to the Court, the intended balance is lost, and, as Lincoln warned, "the people will have ceased to be their own rulers, having, to that extent, practically resigned their government in to the hands of that eminent tribunal."[225]

*Brian W. Walsh*[*]

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[219] Abraham Lincoln, *supra* note 1, at 221.

[220] 5 U.S. (1 Cranch) 137 (1803).

[221] *See supra* notes 167-188 and accompanying text.

[222] *See supra* notes 189-201 and accompanying text.

[223] *See supra* notes 155-166 and accompanying text.

[224] *See supra* notes 138-155 and accompanying text.

[225] Abraham Lincoln, *supra* note 1, at 221.

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