FOURTEENTH AMENDMENT-CONGRESSIONAL ENFORCEMENT POWER—CONGRESS LACKS THE AUTHORITY UNDER THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT TO PASS THE RELIGIOUS FREEDOM RESTORATION ACT—*City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

The Supreme Court of the United States recently held that Congress exceeded its authority under the Enforcement Clause of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act ("RFRA"). *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). In so holding, the Supreme Court ruled that while Congress has the power to enforce the provisions of the Fourteenth Amendment, Congress' power does not extend to defining the substance of the restrictions of the Fourteenth Amendment. *See id.* at 2160.

St. Peter Catholic Church, located in Boerne, Texas, seats 230 worshippers. *See id.* Due to an ever increasing congregation, church leaders sought to expand the seating capacity by remodeling the building. *See id.* The Archbishop of San Antonio granted permission for the proposed construction and applied to the city for the necessary building permits. *See id.* Relying on a recently passed ordinance governing alterations to historic landmarks, the city denied the request. *See id.* The ordinance gave the Historic Landmark Commission authority to regulate any construction affecting historic landmarks or buildings found within a historic district. *See id.* Because the front portion of the Church is located within a historical district, the ordinance empowered the commission to deny the request. *See id.*

The Archbishop sought relief in the United States District Court for the Western District of Texas challenging Congress' ability to constitutionally enact RFRA. *See id.* The district court agreed with the Archbishop and held that passing RFRA had exceeded the scope of Congress' power under Section 5 of the Fourteenth Amendment *See id.*

The United States Court of Appeals for the Fifth Circuit reversed the district court's decision and upheld the constitutionality of RFRA. *See id.* The United States Supreme Court granted *certiorari* to consider whether Congress had the authority under the Fourteenth Amendment to pass RFRA. *See id.*

Writing for the majority and joined in part by Justice Scalia, Justice Kennedy explained that RFRA was passed by Congress in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See id.* The *Smith* decision, Justice Kennedy continued, held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *Id.* at 2161. The Court recognized that RFRA legislatively required the use of the compelling interest test enunciated in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in any situation where the free exercise of religion was substantially burdened.

See id. at 2162.

The majority next provided a lengthy discussion of the enforcement power granted to Congress under Section Five of the Fourteenth Amendment. *See id.* at 2162-68. The Enforcement Clause, Justice Kennedy admitted, was "'a positive grant of legislative power' to Congress." *Id.* at 2163 (quoting *Katzenbach v. Morgan,* 384 U.S. 641 (1966) However, Justice Kennedy viewed Section Five as granting a "remedial" power, not a "substantive" power to Congress. *See id.* at 2164. The Justice contended that RFRA could not be viewed as remedial legislation. *See id.* at 2170. Instead, the majority insisted that RFRA sought a substantive change in the protections found in the Constitution. *See id.*

Addressing the broad application and scope of RFRA, the majority explained that "remedial" legislation under Section Five should be tailored to the "mischief" which the Fourteenth Amendment was designed to protect against. *See id.* at 2170. (citing *Civil Rights Cases*, 109 U.S. 3 (1883)). Contrary to this limited view, Justice Kennedy reminded that RFRA applies to all agencies at every level of government. *See id.* The far reach of RFRA, Justice Kennedy explained, distinguished the law from other measures passed under the authority of the Enforcement Clause. *See id.* For example, the majority noted that in the voting-rights case of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the challenged law was confined to a specific region of the country and contained a termination date and mechanism. *See id.* In opposite, the Court emphasized that RFRA contained no limitation of any sort. *See id.*

The majority next turned to a discussion of RFRA in terms of the *Smith* definition of the Free Exercise Clause. *See id.* at 2171. Justice Kennedy emphasized that RFRA was not aimed at identifying or counteracting state laws likely to be unconstitutional as a result of their "treatment of religion." *Id.* The Justice also illustrated the extent that RFRA modified the *Smith* holding. *See id.* For example, the majority asserted that laws found to pass the *Smith* analysis would nevertheless fall within the purview of RFRA regardless of whether they stifled or punished the free exercise of religion. *See id.*

Justice Kennedy admitted that the Enforcement Clause gave Congress a great deal of power. *See id.* at 2172. However, the majority explained, courts have the power to determine if Congress has overstepped its authority under the Constitution. *See id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Thus, Justice Kennedy held, RFRA violates the Constitution and upsets the principles of separation of powers. *See id.*

Justice Stevens authored a concurring opinion which agreed that RFRA was unconstitutional. *See id.* at 2172. (Stevens, J., concurring). The Justice explained that "governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38 (1985)). The Justice pointed out that if the structure in the *City of Boerne* had been an art gallery owned by an atheist instead of a church, it would not be

eligible for an exemption from the city ordinance. *See id.* Justice Stevens continued by opining that RFRA unfairly provided the church with a legal weapon "that no atheist or agnostic can obtain." *Id.*

Justice Scalia also concurred with the majority, writing a separate opinion chiefly addressing the historical section of Justice O'Connor's interpretation of the *Smith* decision. *See id.* at 2172 (Scalia, J., concurring). Justice Scalia disagreed with Justice O'Connor's conclusion that history and precedent indicated that the *Smith* case was wrongly decided. *See id.* at 2172-73 (Scalia, J., concurring). Justice Scalia pointed to Justice O'Connor's failure to find a single case, decided on the state or federal level, which refused to enforce a generally applicable statute as a result of the statute's failure to make an accommodation. *See id.* at 2175 (Scalia, J., concurring). The Justice agreed with the abstract proposition posited by the dissent that government should not under any circumstances, place burdens upon the practice of religion. *See id.* at 2176 (Scalia, J., concurring). However, Justice Scalia noted the dispositive issue remains "whether the people, through their elected representatives, or rather this [C]ourt" should have the power to determine the outcome of situations involving burdens upon religious practices. *Id.* The Justice answered that it "shall be the people." *Id.*

Justice O'Connor authored a dissenting opinion joined in part by Justice Breyer. *See id.* at 2176 (O'Connor, J., dissenting). The Justice argued that the *Smith* Court "adopted an improper standard for deciding free exercise claims." *Id.* Justice O'Connor refused to assume, as the majority had, that the *Smith* Court correctly interpreted the Free Exercise Clause. *See id.* The Justice opined that the Free Exercise Clause should be viewed as protecting a citizen's right to engage in religious practices without governmental interference. *See id.* at 2177 (O'Connor, J., dissenting). The *Smith* Court, Justice O'Connor insisted, incorrectly rejected precedent and history in ruling that the Free Exercise Clause is merely an anti-discrimination device protecting only "against those laws that single out religious practice for unfavorable treatment." *Id.* (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 892-903 (1990)). The dissent argued that the *Smith* decision has resulted in lower courts refusing to seek the possibility of accommodating religious practices in their holdings. *See id.*

Justice O'Connor noted that the majority correctly interpreted the Enforcement Clause as limiting Congress to only enforcing the Fourteenth Amendment's provisions. *See id.* at 2176 (O'Connor, J., dissenting). The Enforcement Clause does not, Justice O'Connor continued, grant Congress authority to "define or expand the constitutional rights by statute." *Id.*

The dissent next turned to a discussion of *stare decisis* and the need in this instance to depart from precedent. *See id.* at 2177-78 (O'Connor, J., dissenting). Justice O'Connor explained the history of the term "free exercise" and the earlier interpretation by the legislature and courts. *See id.* at 2178-85

(O'Connor, J., dissenting).

Justice O'Connor's dissent concluded by opining that the Court should return to the pre-*Smith* interpretation of the Free Exercise Clause. *See id.* at 2185 (O'Connor, J., dissenting). The dissent argued that freedom of religion should be afforded a special constitutional status, similar to the level given to the protection of free speech. *See id.* The Justice suggested that the *Smith* Court had failed to faithfully adhere to the Constitution, and that the majority incorrectly declined to reconsider the issue in the present case. *See id.*

Joining Justice O'Connor in dissent, Justice Breyer reiterated Justice O'Connor's call for the parties to brief the issue of whether the *Smith* decision was correct. *See id.*(Breyer, J., dissenting in part). However, Justice Breyer refused to join Justice O'Conner in discussing whether the Enforcement Clause gave Congress the authority to pass RFRA. *See id.*

Justice Souter wrote a brief dissenting opinion questioning the precedential value of the *Smith* decision. *See id.* (Souter, J., dissenting). This dissent noted that Justice O'Connor's criticism of the *Smith* rule raised doubts about the value of its precedent. *See id.* Justice Souter insisted that, as a result, free-exercise law "remains marked by an 'intolerable tension.'" *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 574 (1993)). Thus, the Justice declared that the *writ of certiorari* was "improvidently granted" and the case should have been reargued. *See id.* Similar to Justice Breyer's dissent, Justice Souter declined to discuss the Section Five issue. *See id.*

Analysis

The decision in *Flores* addresses two separate issues. The first concerns the free exercise of religion in the United States. The second centers on Congress' and the Supreme Court's individual interpretations of the Constitution.

Underlying the decision in *Flores* is the assumption that the 1990 Supreme Court decision in *Smith* was correct. Thus, the majority centered it's decision on the scope of the Enforcement Clause of the Fourteenth Amendment. In holding that Congress in passing RFRA had exceeded the authority granted by the Constitution, Justice Kennedy avoided interpreting the Free Exercise Clause.

Justice Scalia's concurrence is at first blush very confusing. The Justice appears to support portions of Justice O'Connor's comprehensive dissent. Justice Scalia's concurrence calls for the "will of the people" to be determinative in deciding the role and the scope of the Free Exercise Clause. Justice Scalia's interpretation gives rise to the inference that the "people" had exercised their rights through the Congress in passing RFRA. However, this conclusion does not fit with Justice Scalia's concurrence with the majority's opinion that RFRA is unconstitutional. Justice Scalia, known as a staunch defender of states

rights, may have been voicing his displeasure over the national character of RFRA.

Devoting the bulk of the dissent to discussing the history of the Free Exercise Clause Justice O'Connor refused to accept the *Smith* decision and called for a return to pre-*Smith* analysis of the Free Exercise Clause. In fact, Justice O'Connor believed that the Court should have used the *Flores* decision to overrule the *Smith* case, returning to the use of the compelling interest test. Predictably, Justice O'Connor contended that precedent alone should not dictate the outcome of *Flores* and that further argument by the parties was necessary.

The *Flores* decision marks the beginning of a new relationship between Congress and the Supreme Court. Justice Kennedy was unswerving in his view of the role of the judiciary in reviewing the acts of Congress. The Justice emphasized that Congress lacks the power to interpret the Fourteenth Amendment. Interpretive power, Justice Kennedy concluded, is thereby left to the judiciary. Thus, with the *Flores* decision, the Justice moved the Supreme Court toward a more active national policymaking rule through judicial review.

Aaron H. Galileo