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THE RELIGIOUS FREEDOM RESTORATION ACT:  
THE CONSTITUTIONAL SIGNIFICANCE OF AN  
UNCONSTITUTIONAL STATUTE  

Daniel O. Conkle*  

The Religious Freedom Restoration Act of 1993 (RFRA)1 is a remarkable statute. Based on Section 5 of the Fourteenth Amendment,2 the Act explicitly rejects the Supreme Court’s restrictive interpretation of the Free Exercise Clause, as expressed in Employment Division v. Smith,3 and offers in its place a standard that is far more protective of religious freedom. No less remarkable, RFRA was supported by a legion of divergent interest groups, and it garnered virtually unanimous support in both the House and the Senate. According to President Clinton, the Act “reaffirm[s] our solemn commitment to protect the first guarantee of our Bill of Rights. In the great tradition of our Nation’s founders, this legislation embraces the abiding principle that our laws and institutions must neither impede nor hinder, but rather preserve and promote, religious liberty.”4 One supporter of the Act called it “the most important religious liberty legislation in our nation’s history.”5 According to another, “Not since the adoption of the First Amendment [have] the Congress and the president done so much for religious freedom.”6

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This Article is based upon a paper that I presented on September 30, 1994, at the University of Montana School of Law’s James R. Browning Symposium for 1994. The symposium was a delightful experience, both professionally and personally, due largely to the efforts of Dean Rodney K. Smith and the editors and staff of the Montana Law Review. During the course of the symposium, I received helpful comments and questions concerning my paper, both from my fellow symposium participants and from members of the audience. My thanks go out to all these people. I also wish to thank Kathleen A. DeLaney for her research assistance, and Marci A. Hamilton and Scott C. Idleman for their valuable suggestions.

6. Id. (quoting Henry Siegman, Executive Director of the American Jewish Congress); see also Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. REV. 209, 243 (1994) (describing RFRA as “the most important congressional action with respect to religion since the First Congress
The First Amendment of the founders, however, was a duly enacted constitutional amendment, proposed by the Congress and ratified by the requisite number of states. RFRA, by contrast, purports to adopt a national standard of religious freedom—and, indeed, to categorically reject the Supreme Court’s constitutional standard—through the device of simple legislation. In so doing, RFRA circumvents the process of constitutional amendment, undermining the Supreme Court’s role in interpreting the Bill of Rights and in defining the boundary between national constitutional norms and the reserved powers of the states. Although its cause is noble, RFRA exceeds the power of Congress and should be declared unconstitutional in its application to state and local governmental practices.

If, as I suggest, RFRA is unconstitutional, its provisions are not binding on the Supreme Court. As a result, the Court should reject the statute’s vision of religious freedom if the Court continues to believe that its own interpretation of the Free Exercise Clause is sound. Even if unconstitutional, however, RFRA is hardly a constitutional irrelevancy. Our society’s contemporary values are an important source for the Court to consult as it determines the evolving meaning of the Constitution. And on the meaning of the Free Exercise Clause, RFRA provides compelling evidence that American societal values support a generous regime of religious freedom. Indeed, the political support for RFRA was so widespread as to indicate a national consensus. Coupled with other arguments, RFRA strongly suggests that the Supreme Court should reconsider Smith. On this view, the Act does not supersede the Court’s constitutional ruling, but the very fact of its enactment tends to confirm that the Court’s constitutional ruling was wrong. Even as the Supreme Court declares the statute unconstitutional, then, it properly could rely on RFRA as a reason for overruling Smith and for adopting a more generous interpretation of the Free Exercise Clause.

In Part I of this Article, I discuss the nature and limits of Congress’ power under Section 5 of the Fourteenth Amendment. Part II describes the enactment of RFRA, and Part III explains why the Act is unconstitutional. In Part IV, I develop my argument that the Act nonetheless is constitutionally significant and supports the overruling of Smith. Finally, in Part V, I offer some concluding observations, explaining the important difference between treating the Act as legally binding on the Supreme
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Court and treating it instead as relevant and important to the Court's own interpretation of the Constitution.

I. THE NATURE AND LIMITS OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

In Cooper v. Aaron, the Supreme Court wrote that Marbury v. Madison "declared the basic principle that 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." Although Cooper's interpretation of Marbury can properly be questioned, it seems clear that the modern Supreme Court is the primary interpreter of the Constitution, and that the task of constitutional interpretation is the Court's central and most important function. Most of the Court's constitutional cases, moreover, involve challenges to state and local governmental practices that are alleged to violate the Fourteenth Amendment, either of its own force or through its incorporation of Bill of Rights standards. In deciding these challenges to state and local practices, the Court defines the meaning of constitutionally protected individual freedom. At the same time, however, it also defines the constitutional boundary between national and state power, for to decide that the national Constitution protects an individual right is to remove the issue from state and local control.

Although the Supreme Court is the primary interpreter of the Fourteenth Amendment and of its Bill of Rights component, Congress has a significant role as well. In particular, Section 5 of the Fourteenth Amendment, like the final sections of the Thirteenth and Fifteenth Amendments, grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." The nature and limits of Congress' enforcement power are among the deepest questions of contemporary constitutional law, and they have been explored by the Supreme Court in a

8. 5 U.S. (1 Cranch) 137 (1803).
11. U.S. CONST. amend. XIV, § 5; see also id. amend. XIII, § 2; amend. XV, § 2.
series of modern decisions. Taken together, these decisions permit Congress to supplement and complement the Supreme Court's constitutional decisionmaking, but not to undermine the Court's substantive constitutional standards or its basic interpretive function.

A. Congress' Remedial Power

At the very least, the enforcement power permits Congress to create criminal and civil remedies for individual violations of the Civil War Amendments, as defined by the Supreme Court. Beyond this, however, the Court has clearly recognized a broader "remedial" power, one that permits Congress to modify or even eliminate the case-by-case process of adjudicating constitutional violations. Thus, Congress can adopt general statutory provisions that are designed either to ensure that prior violations of the Amendments are fully remedied or to guard against the risk of future violations. Under this remedial theory, however, the existence or risk of "constitutional violations" depends on the substantive constitutional interpretation of the Supreme Court. This theory does not permit Congress to modify the substantive content of constitutional rights.

In *South Carolina v. Katzenbach,* the Supreme Court applied the remedial theory of congressional power in upholding challenged provisions of the Voting Rights Act of 1965, including the Act's suspension of literacy tests in certain localities, mainly in the South. Although the Court had previously ruled that literacy tests, as such, were not necessarily unconstitutional, Congress had evidence that in the covered jurisdictions the tests not only had been the tool of unconstitutional racial discrimination in the past, but also were likely to be so misused in the future. Explaining the remedial theory of congressional power, the Court stated: "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in
voting." Citing *McCulloch v. Maryland* and *Ex parte Virginia*, the Court indicated that this power was no less broad than that available under the Necessary and Proper Clause.

Applying this approach, the Court concluded that the Act's suspension of literacy tests was fully justified:

Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered ...

The record shows that in most of the States covered by the Act, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years. Under these circumstances, the Fifteenth Amendment has clearly been violated.

This reasoning suggests that Congress' remedial power is quite substantial. As long as it acts "rationally," Congress can adopt generalized remedies not only to redress individual constitutional violations that might be difficult to prove, but also, it seems, simply to ensure that the congressional enactment can be implemented without undue administrative burden.

15. *South Carolina*, 383 U.S. at 324. "[I]n addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* at 326.


17. 100 U.S. 339, 345, 346 (1880).

18. *South Carolina*, 383 U.S. at 326 (referring to U.S. CONST. art. I, § 8, cl. 18); see also *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). The Court in *South Carolina* quoted with approval from *Ex parte Virginia*:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

*South Carolina*, 383 U.S. at 327 (quoting *Ex parte Virginia*, 100 U.S. at 345-46).


20. *Id.* at 333-34 (citations omitted).

21. The Supreme Court applied and extended the reasoning of *South Carolina* in *Oregon v. Mitchell*, 400 U.S. 112 (1970). Although the justices could not agree on a majority opinion, they unanimously upheld an amendment to the Voting Rights Act that suspended literacy tests throughout the United States. Justice Harlan explained his reasoning as follows:
City of Rome v. United States22 demonstrates the breadth of this remedial power. In Rome, the Supreme Court addressed the preclearance provision of the Voting Rights Act, which forbids covered jurisdictions from adopting certain electoral changes unless they can prove that such changes not only are racially nondiscriminatory in purpose, but also in effect.23 The city of Rome itself had a history of racial neutrality in its voting practices,24 but it was part of a covered jurisdiction, the State of Georgia, which did not. Noting that purposeful racial discrimination is required before a constitutional violation can be found, the city of Rome argued that at least as applied to it, the statute’s “effect” standard was beyond the power of Congress to adopt.25

The Supreme Court disagreed. The Court indicated that Congress has the power to ensure that prior constitutional violations are fully remedied, and that it accordingly can prohibit any state action that “perpetuates the effects” of such prior violations.26 Applying this reasoning, the Court found “no reason . . . to disturb Congress’ considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from ‘undo[ing] or defeat[ing] the rights recently won’ by Negroes.”27 In addition, the Court ruled that Congress can enact prophylactic measures to guard against the

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

Id. at 216 (Harlan, J., concurring in part and dissenting in part). Other justices noted that the suspension of literacy tests also could be seen to redress the effects of unconstitutional discrimination in public education (this in violation of the Fourteenth Amendment) and, in addition, that Congress could properly consider the interest in nationwide uniformity—an interest based in part on administrative convenience. See id. at 133-34 (opinion of Black, J.); id. at 147 (Douglas, J., concurring in the judgment in part and dissenting in part); id. at 233-36 (Brennan, J., joined by White and Marshall, JJ., concurring in the judgment in part and dissenting in part); id. at 283-84 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part).

22. 446 U.S. 156 (1980).
23. Id. at 172.
24. As Justice Powell noted in his dissenting opinion, “the District Court found, and no one denies, that for at least 17 years there has been no voting discrimination by the city of Rome.” Id. at 206 (Powell, J., dissenting).
25. Id. at 173 (majority opinion).
26. Id. at 176.
27. Id. at 178 (citations omitted).
risk of present or future constitutional violations. 28 This reasoning also supported the effect standard: "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." 29

In making these judgments, moreover, Congress was perfectly free to generalize on a statewide basis, without regard to the particular conditions or history of individual political subdivisions. 30

The Court's broad reading of Congress' remedial power has not been unanimously supported. In Rome, for example, three justices dissented, citing federalism concerns as well as the judiciary's ultimate responsibility in matters of constitutional interpretation. 31 Even as recognized by South Carolina and Rome, moreover, Congress' remedial power is not without limit. Justice Rehnquist accurately characterized this limit in his dissenting opinion in Rome, even though he differed from the majority concerning whether Congress had transgressed it in the case at hand. Congress' remedial power, he wrote, permits Congress only to "act remedially to enforce the judicially established substantive prohibitions of the Amendments." 32 This power does not permit Congress to modify the substantive protections of the Civil War Amendments, as defined by the Supreme Court, but only to exercise its discretion in formulating remedial measures to effectuate those protections.

28. Id. at 177.
29. Id. (citations omitted).
30. As Justice Stevens explained in his concurring opinion, "Congress has the constitutional power to regulate voting practices in Rome, so long as it has the power to regulate such practices in the entire State of Georgia." Id. at 193 (Stevens, J., concurring).
31. See id. at 206 (Powell, J., dissenting) ("The Court today continues federal rule over the most local decisions made by this small city in Georgia."); id. at 207 (Rehnquist, J., joined by Stewart, J., dissenting) ("The presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.") (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); United States v. Nixon, 418 U.S. 683 (1974)).
32. Rome, 446 U.S. at 210 (Rehnquist, J., dissenting); cf. id. at 213 ("In order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation.").
B. The Substantive Power Theory

To permit Congress to modify the judicially determined meaning of the Civil War Amendments would be to grant Congress a "substantive" power of constitutional interpretation. Under this theory, Congress could do more than remedy violations of the Amendments, as defined by the Supreme Court. Instead, Congress could actually determine for itself the substantive meaning of the Amendments, and its determination would be controlling on the Supreme Court as well as the states. Much more than Congress' remedial power, a substantive power could threaten the constitutional role of the Supreme Court, as well as federalistic values. Even so, the Court has suggested that Congress might possess such a power. The validity of this suggestion, however, is in serious question. And even if Congress does possess a substantive power, such power is confined to congressional decisionmaking that works to complement, not undermine, the Supreme Court's exposition of constitutional values.

1. The Supreme Court's Treatment of the Substantive Power Theory

The strongest argument for a substantive power is derived from Katzenbach v. Morgan. As in South Carolina and Rome, the Supreme Court in Morgan upheld a provision of the Voting Rights Act. According to the challenged provision, no person who had successfully completed the sixth grade in an accredited Puerto Rican school, having been instructed in a language other than English, could be denied the right to vote because of an inability to read or write English. The effect of this measure, in the circumstances to which it applied, was to nullify New York's English literacy requirement. In an opinion authored by Justice Brennan, the Court upheld the congressional provision on two alternative theories.

First, the Court relied on a remedial theory of congressional power, holding, as in the later case of Rome, that Congress has broad discretion not only to redress prior constitutional viola-

34. Id. at 652-58.
35. Id. at 643 & n.1.
36. Id. at 644-45.
37. Id. at 649-58.
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tions, but also to prevent future ones.\(^\text{38}\) Thus, the Court wrote, the congressional statute “may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.”\(^\text{39}\) The “enhanced political power” resulting from the literacy test’s elimination, the Court continued, “will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.”\(^\text{40}\) Although a broad reading of Congress’ remedial power, this portion of the Court’s opinion apparently viewed the law as a rational congressional enactment designed to enforce and effectuate the judicially determined constitutional prohibition on racial discrimination by government.\(^\text{41}\)

In a second ground for its ruling, by contrast, the Court implied that Congress could itself determine the substantive meaning of the Equal Protection Clause of the Fourteenth Amendment.\(^\text{42}\) Although alluding to evidence present before Congress that New York’s literacy requirement might have been racially motivated,\(^\text{43}\) the Court suggested that Congress might properly have acted to invalidate the requirement on the basis of broader considerations:

Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. . . . Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the

\(^{38}\) Id. at 652-53.
\(^{39}\) Id. at 652.
\(^{40}\) Id.
\(^{41}\) The Court’s remedial rationale accorded great deference to Congress: It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

\(^{42}\) Id. at 653.
\(^{43}\) Id. at 653-56.

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context of a general appraisal of literacy requirements for voting, to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement... constituted an invidious discrimination in violation of the Equal Protection Clause. 44

This language suggests that Congress might properly have determined that literacy tests, as such, were unconstitutional, even though the Supreme Court had previously found to the contrary. 45 Indeed, the language could be read to suggest that just as the Court will defer to "rational" remedial measures, so too will it defer to "rational" congressional judgments concerning the substantive meaning of the Civil War Amendments. An overly broad interpretation of Morgan's substantive theory, however, would ignore the context of the Court's discussion.

To be sure, the Supreme Court had ruled previously, in Lassiter v. Northampton County Board of Elections, 46 that literacy tests were not necessarily unconstitutional. More recent decisions, however, had shed doubt on the reasoning and result in Lassiter. In these decisions, the Court had declared that the right to vote was "fundamental" and that, regardless of racial discrimination, the Equal Protection Clause demanded that any restrictions on this right "be carefully and meticulously scrutinized." 47 On the basis of these decisions, the Court in Morgan embraced "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights." 48

44. Id. at 654-56 (citation omitted).
45. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). In Morgan, the Court noted that "Lassiter did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?" Morgan, 384 U.S. at 649.
47. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); see also Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Harper, invalidating Virginia's poll tax, was decided less than three months before Morgan. In Harper, the Court attempted to distinguish Lassiter, arguing that, unlike a poll tax, a literacy test "has some relation to standards designed to promote intelligent use of the ballot." Id. at 666 (quoting Lassiter, 360 U.S. at 51).
48. Morgan, 384 U.S. at 657 (emphasis deleted). The Court noted this principle in discussing an argument that Congress itself had violated equal protection in not extending its relief from English literacy requirements to those who had been educated not in Puerto Rico, but beyond the territorial limits of the United States. The
Under this newly developed strict scrutiny standard, New York's literacy test would have been in serious jeopardy if the question of its constitutionality had been directly presented to the Court. In this context, the Court suggested that it would defer to a rational congressional judgment that the test was in fact unconstitutional. In effect, the Court was suggesting that it would permit Congress to apply the Court's standard of strict scrutiny. "[O]ur cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened," noted the Court, "and Congress is free to apply the same principle in the exercise of its powers." In applying the same strict scrutiny standard as would the Court, Congress properly could weigh the governmental interests alleged to support the literacy test, and it also could evaluate whether the test was a "necessary" means to their effectuation, given the "fundamental" interest in voting that was at stake.

Under this interpretation, Morgan's substantive theory implies that Congress has significant power to elaborate the meaning of the Civil War Amendments. Congress can apply judicially determined constitutional standards, such as strict scrutiny, to particular state and local practices, and if it determines that a state or local practice cannot satisfy the relevant standard, its determination that the practice is unconstitutional will be honored by the Supreme Court as long as the determination is ratio-

49. In sharp contrast to the majority, Justice Harlan, in his dissenting opinion in Morgan, would have evaluated New York's literacy test not under strict scrutiny, but rather under a highly deferential rational basis standard, according to which the question was "whether New York has shown that its English language literacy test is reasonably designed to serve a legitimate state interest." Morgan, 384 U.S. at 661 (Harlan, J., dissenting). Justice Harlan concluded that as in Lassiter, the literacy test could easily meet this "rationality" standard. Id. at 662.


Two points about Morgan, however, deserve special emphasis. First, Morgan's substantive theory was only an alternative ground of decision; the Court also relied, independently, on the less controversial remedial theory. Second, the Court did not permit Congress to repudiate or disregard the Court's basic standards of substantive constitutional law. In particular, the Court did not permit Congress to adopt a standard of constitutional scrutiny that differed from that which the Court itself would employ.  

Oregon v. Mitchell provides added reason to view Morgan's substantive theory with caution. In a split decision, the Supreme Court upheld congressional legislation lowering the voting age to eighteen in federal elections, but ruled that Congress lacked the power to impose the same standard for state elections. Four justices would have upheld the congressional action even as to state elections, relying on a theory of substantive congressional power that closely tracked the reasoning of Morgan. Thus, in the main opinion supporting this view, Justice Brennan argued that a state denial of voting rights to 18-year-olds, if challenged directly as a violation of equal protection, would trigger strict judicial scrutiny; that the Court itself might properly invalidate the denial under that standard; and...
that, in any event, Congress could properly declare the denial unconstitutional even if the Court might not.\textsuperscript{59}

Under Justice Brennan's opinion here, as under his reasoning for the Court in \textit{Morgan}, Congress would be permitted to judge the constitutionality of particular state practices. Once again, however, the opinion suggests only that the Court should defer to rational congressional judgments in the application of Court-determined standards of constitutional review. Thus, the question for Justice Brennan was whether "Congress could rationally have concluded that denial of the franchise to citizens between the ages of 18 and 21 was unnecessary to promote any legitimate interests of the States in insuring intelligent and responsible voting."\textsuperscript{60} Justice Brennan's opinion, in context, provides no authority for a broader congressional role that would allow Congress to select a constitutional standard of its own choosing.\textsuperscript{61}

More important than Justice Brennan's reasoning in \textit{Oregon} is the fact that this reasoning was rejected by a majority of the Court, which held that Congress did not possess the power to impose an 18-year-old voting age on the states. Indeed, four justices explicitly rejected the very notion of a substantive congressional power, even as confined to the application of judicially determined constitutional standards. Speaking for three justices, Justice Stewart strained to interpret \textit{Morgan} merely as an expansive application of the remedial theory of congressional power;\textsuperscript{62} he argued that the case should not be read to give Congress the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the [Equal Protection Clause], and what state interests are 'compelling.'"\textsuperscript{63} Justice Harlan read \textit{Morgan} more broadly, but only to forthright-

\begin{thebibliography}{9}
\bibitem{59} Id. at 246-50, 278-81.
\bibitem{60} Id. at 278.
\bibitem{61} See Choper, \textit{supra} note 52, at 315-21.
\bibitem{62} In its second ground for upholding Congress' invalidation of New York's English literacy requirement, according to Justice Stewart, the Court in \textit{Morgan} found "that Congress could conclude that the New York statute was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans," thereby rendering the New York statute racially discriminatory in violation of judicially determined constitutional doctrine. \textit{Oregon}, 400 U.S. at 295 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part). This interpretation of \textit{Morgan}'s second ground is difficult to square with some of the Court's language, but it would reduce \textit{Morgan}'s second ground, like its first, to a remedial theory of congressional power.
\bibitem{63} Id. at 296.
\end{thebibliography}
ly reject "the doctrine of deference to rational constitutional interpretation by Congress, espoused by the majority" in that case. A fifth justice, Justice Black, wrote a more narrow opinion. He rejected Brennan's reasoning in the case at hand, noting that the Constitution reserved to the states the power to determine voter qualifications for their own elections, and that racial discrimination, the core focus of the Civil War Amendments, was not at issue. But he added that "where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race."

Morgan's theory of substantive congressional power must be regarded as suspect. This theory was only an alternative ground of decision when the case was decided, and, as Justice Stewart's opinion in Oregon suggests, Morgan can be interpreted in a manner that eliminates its substantive power reasoning altogether. In more recent cases, the Court has largely avoided the issue, but there have been judicial statements that seem to doubt the existence of a substantive power. In any event, the Court has never embraced the substantive power theory as a determinative ground of decision. As a matter of precedent, then, whether Congress has any power of substantive constitutional interpretation remains in serious question. At the very least, there is sufficient evidence of judicial skepticism about a sub-

64. Id. at 204 n.86 (Harlan, J., concurring in part and dissenting in part) (suggesting that such a doctrine was inconsistent with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Cooper v. Aaron, 358 U.S. 1 (1958)).
66. Id. at 130.
68. In Pennhurst State Sch. v. Halderman, 451 U.S. 1 (1981), for example, the Court avoided the enforcement power issue by interpreting a federal disability statute's "bill of rights" provision not to create any substantive rights against the states, but the Court noted that "[t]here is of course a question whether Congress would have the power" to create any such rights beyond those declared by the Court itself. Id. at 16 n.12. The Court likewise avoided the issue in EEOC v. Wyoming, 460 U.S. 226 (1983), which upheld application of the federal Age Discrimination in Employment Act to state governments on the basis of the Commerce Clause. See id. at 243. But four dissenting justices did reach the enforcement power issue, and their opinion used strong language in rejecting the substantive power theory, at least as invoked in the case at hand. "Allowing Congress to protect constitutional rights statutorily that it has independently defined," they wrote, "fundamentally alters our scheme of government." Id. at 262 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, JJ., dissenting).
stantive congressional power to suggest that any such power will be interpreted narrowly.

2. Considerations of Constitutional Theory and Practice

More than precedent suggests the need for caution in granting Congress a substantive power of constitutional interpretation. The Supreme Court is the primary interpreter of the Constitution and, as such, plays a fundamental role in our constitutional system. In the exercise of this function, the Court determines the meaning of the various provisions of the Constitution, many of which relate and interact. In so doing, the Court considers all of the competing values that bear on a given issue, including the specific content of particular constitutional provisions as well as more general constitutional values, such as federalism. Although not always successful, the Court strives for constitutional standards that are logical and consistent, not only within each doctrinal area, but also between and among them. Indeed, the potential for constitutional coherence is one important reason for allowing the Court, and not some non-judicial institution, the primary role in constitutional interpretation.

Congressional exercise of a substantive power of constitutional interpretation does not necessarily undermine the Supreme Court's primary interpretive function. Rather, the question is whether any particular exercise of that power significantly frustrates the Court's role. This question is one of degree. Congressional action that merely supplements the Court's decisionmaking is not problematic. For example, as long as Congress accepts the Court's constitutional value judgments and its basic constitutional standards, Congress should be free to apply the Court's standards to particular state practices on the basis of empirical findings that Congress is well-suited to make. 69

Much more problematic is congressional action that purports to reject the Court's basic standards or that otherwise works to impair the Court's constitutional function. If Congress were permitted to interpret constitutional rights restrictively, for example, the congressional action would frustrate the Supreme

69. Congress' role as a fact finder was featured in Morgan and especially in Justice Brennan's opinion in Oregon. Morgan, 384 U.S. at 653-56; Oregon, 400 U.S. at 246-50, 278-81 (Brennan, J., concurring in the judgment in part and dissenting in part); see Archibald Cox, The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 106-07 (1966); Cox, supra note 50, at 226-39.
Court's constitutional obligation to protect those rights. Not surprisingly, the Court has made it clear that it will not countenance that type of congressional action, noting that whatever the meaning of Congress' enforcement power, such power does not permit Congress to "restrict, abrogate, or dilute" constitutional rights that the Court is required to protect. But other sorts of congressional action might also interfere with the Court's obligations. Thus, if Congress were permitted to interpret national constitutional rights in an overly expansive fashion, this might frustrate the Constitution's protection of federalism and the Supreme Court's responsibility to honor that value. Likewise, congressional action might interfere with the Court's function in providing constitutional coherence if Congress attempted to implement its understanding of one constitutional provision without addressing related fields of constitutional doctrine.

Under this context-specific analysis, the Supreme Court's divergent results in Morgan and Oregon are not difficult to reconcile. The congressional action at issue in Morgan, construed as the congressional application of a judicially determined standard of review, certainly did not go much beyond the Supreme Court's own interpretation of the constitutional right at issue. Congress essentially followed the Court's lead, in part on the basis of congressional fact-finding, and it made a narrowly focused decision that did no more than nullify a particular practice of the State of New York. As a result, Congress did not intrude on any federalistic or other constitutional values that the Court felt obliged to protect.

In Oregon, by contrast, Congress attempted to impose an 18-year-old voting age on every state. In the view of a majority of the justices, this action was based on normative constitutional judgments that were in no way justified by the Court's equal protection doctrine; relatedly, the congressional action was unduly intrusive on the states. Congress' interpretation of the Fourteenth Amendment thus conflicted in a serious way with the justices' own understanding of what the Constitution required. Unlike in Morgan, Congress was not following the Court's lead.

70. Morgan, 384 U.S. at 651 n.10; Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982); see also Oregon, 400 U.S. at 249 n.31 (Brennan, J., concurring in the judgment in part and dissenting in part).

71. But see William Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975) (arguing that the Supreme Court generally should not consider federalistic values in interpreting the scope of congressional power under § 5).
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Instead, it was attempting to lead the Court in a new and different direction.\(^72\) Such a fundamental change in the judicially determined meaning of the Constitution, however, especially with its implications for states' rights, could not be accomplished by congressional legislation. It would require a constitutional amendment.\(^73\)

II. THE RELIGIOUS FREEDOM RESTORATION ACT

A. The Judicial Backdrop

Under the Supreme Court's 1878 decision in *Reynolds v. United States*,\(^74\) the Free Exercise Clause provided very little protection for religiously motivated conduct. In more recent decades, however, the Supreme Court's doctrine evolved to provide significant protection for such conduct, even from laws of general application. Under *Sherbert v. Verner*\(^75\) and *Wisconsin v. Yoder*,\(^76\) general laws that had the effect of burdening religious practices were tested by a standard of strict judicial scrutiny. Thus, the Court stated in *Sherbert* that only a "compelling state interest" could justify a burden on religious practices.\(^77\) To the same effect, the Court in *Yoder* wrote that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."\(^78\) Under *Sherbert* and *Yoder*, if the government could not satisfy strict scrutiny in justifying the application of a law to religiously motivated conduct, an exemption from the law was constitutionally required.

Although the Court's test was strict in formulation, its application suggested a somewhat more lenient standard of review.\(^79\)

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72. *Cf. EEOC v. Wyoming*, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) (arguing that Congress cannot "define rights wholly independently of our case law"); *Cox*, *supra* note 50, at 254 ("No one suggests that the Congress can read into the Constitution new general rules of law that have been rejected by the Court, regardless of whether they expand or dilute constitutional rights.").

73. Shortly after *Oregon* was decided, Congress in fact proposed, and the states ratified, the Twenty-Sixth Amendment to the Constitution. This amendment grants 18-year-olds the right to vote in state as well as federal elections. U.S. CONST. amend. XXVI.

74. 98 U.S. 145 (1878).
77. *Sherbert*, 374 U.S. at 403.
In addition, the Court adopted explicit exceptions to strict scrutiny for military and prison regulations, which it evaluated under a reasonableness or rational basis standard.80 Outside these exceptional areas, however, the Court continued to endorse a relatively demanding standard of review until its 1990 decision in Employment Division v. Smith.81 Smith marked a dramatic and surprising turn in judicial doctrine. Although the Court purported to distinguish and preserve its particular rulings in Sherbert and closely similar cases,82 as well as in Yoder,83 the Court essentially renounced the basic free exercise framework that it had been following and reverted to the prior doctrine of Reynolds,84 holding that general laws affecting religious practices do not require any form of heightened judicial review.85

Interpreting the text of the Free Exercise Clause, the Court rejected the argument "that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."86 The Court continued: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting

82. Prior to Smith, the Court had reaffirmed and relied upon Sherbert in several factually similar contexts. Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989). The Court in Smith attempted to narrowly limit these decisions, stating that "w[e have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation." Smith, 494 U.S. at 883.
83. The Court in Smith explained Yoder as a case involving a hybrid constitutional claim, based not only on the Free Exercise Clause, but also on the constitutional right of parents to control the education of their children. See Smith, 494 U.S. at 881.
84. 98 U.S. 145 (1878).
85. Smith, 494 U.S. at 876-90.
86. Id. at 878 (bracketed language provided by the Court). In so ruling, the Court did not deny that the "exercise of religion" includes religiously motivated practices. See id. at 877. But it concluded that general laws are not laws "prohibiting the free exercise [of religion]," and therefore do not violate the Free Exercise Clause. See id., at 877-79.
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him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." According to the Court, "a private right to ignore generally applicable laws" was not a "constitutional norm," but was rather "a constitutional anomaly." The Court especially objected to the prospect of balancing religious claims against competing state interests in a wide variety of possible contexts, a task for which, according to the Court, judges are not well-suited. "The First Amendment's protection of religious liberty," the Court concluded, "does not require this." In effect, Smith held that general laws burdening religious practices do not implicate the Free Exercise Clause at all, and accordingly do not require any type of special constitutional scrutiny.

Attempting to mitigate the harshness of its ruling, the Court suggested that legislatures remained free to adopt religion-based exemptions, and that they might very well choose to do so. On the particular issue in Smith, for example, the Court noted that "a number of States have made an exception to their drug laws for sacramental peyote use." "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable," the Court continued, "is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." The Court recognized that "leaving accommodation to the political process" might place minority religious practices "at a relative disadvantage," but it argued that "that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."

B. The Enactment of RFRA

Although the Smith Court contemplated specific legislative accommodations, adopted on a state-by-state basis in the context of particular laws, Congress had a different idea: undoing the effect of Smith altogether. Introduced soon after the case was
decided, the Religious Freedom Restoration Act was enacted some three years later. In RFRA's formal statement of findings and purposes, Congress referred to the First Amendment's protection of religious free exercise; declared that "governments should not substantially burden religious exercise without compelling justification," and noted that "in Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."

Asserting that "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," Congress declared that the purpose of the Act was "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened." To effectuate this purpose, RFRA's primary substantive provision states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can "demonstrate[ ] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." In extending the application of RFRA to state and local laws and practices, Congress relied on its enforcement power under Section 5 of the Fourteenth Amendment. Although the statute, on its face, does not cite Section 5 or any other source of

102. The Act applies to federal, as well as state and local, laws and practices. See 42 U.S.C. §§ 2000bb-2(1) to (2), 2000bb-3(a) to (b). My focus here, however, is on the Act's state and local applications, which raise the most fundamental constitutional questions.
congressional power, both the House and Senate Reports explicitly rely on Section 5. These reports, however, do little to address the difficult issues that this reliance entails. Much to the contrary, the reports give only cursory attention to the problem, declaring in summary fashion an extraordinarily broad view of Congress' power. Disposing of the issue in a single paragraph, the House Report declares that Congress has "the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority." Although the report concedes that Congress could not take action that was "prohibited by" or "inconsistent with" any other constitutional provision or objective, it concludes, without explanation, that the Act "is well within these limits." The Senate Report is equally superficial, offering general quotations from Katzenbach v. Morgan and Ex parte Virginia as support for the Act.

It is hard to imagine any plausible source of congressional power other than § 5. Even under expansive interpretations such as Wickard v. Filburn, 317 U.S. 111 (1942), and Perez v. United States, 402 U.S. 146 (1971), for example, the Commerce Clause is a dubious source of power for this enactment, especially in the absence of any relevant congressional findings. Any Commerce Clause argument, moreover, would seem to run headlong into New York v. United States, 112 S. Ct. 2408 (1992). See Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 56-58 (1993); see also infra notes and accompanying text.

When coupled with the Act's statement of findings and purposes, the reports' reliance on § 5 is plainly sufficient to indicate Congress' intention to use that source of power. See Pennhurst State Sch. v. Halderman, 451 U.S. 1, 15-17 (1981) (suggesting that Congress must indicate its intention to rely on § 5, but noting, based on Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that Congress satisfies this requirement when its intention is expressly stated in both the House and Senate Reports on the legislation in question); EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (interpreting Pennhurst as a rule of statutory construction for statutes of ambiguous substantive meaning and stating that as a matter of constitutional power, Congress need not expressly recite its reliance on § 5, as long as there is "some legislative purpose or factual predicate that supports the exercise of that power"); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) ("Pennhurst established a rule of statutory construction to be applied where statutory intent is ambiguous.").
for the assertion that RFRA "falls squarely within Congress' Section 5 enforcement power."\(^{110}\)

At the hearings on RFRA, there was testimony on the issue of congressional power, and some witnesses, including Professor Ira C. Lupu, suggested that the Act might be unconstitutional.\(^{111}\) But Congress apparently was persuaded by other testimony, notably that of Professor Douglas Laycock.\(^{112}\) More generally, it seems that Congress was far more concerned with repudiating Smith than with the question of whether it had the power to do so. The question of congressional power, however, is a separate and preliminary question of no less constitutional magnitude than the merits of the Supreme Court's free exercise doctrine. On careful examination, moreover, it can be seen that RFRA exceeds the scope of Congress' Section 5 power. As a result, the Act should be declared unconstitutional in its application to state and local governmental practices.

### III. RFRA: An Unconstitutional Statute

As discussed above, Congress has a broad remedial power under Section 5 of the Fourteenth Amendment,\(^{113}\) and it may have a substantive power as well.\(^{114}\) Furthermore, there is no reason to preclude Congress from exercising its power to protect

\(^{110}\) Senate Report, supra note 104, at 14.


\(^{113}\) See supra part I.A.

\(^{114}\) See supra part I.B.
First Amendment rights, which, having been incorporated, 115 are effectively part of the Fourteenth Amendment. 116 But RFRA cannot be defended on a remedial theory, either as I have described it or as expanded to include a broader set of institutional considerations. And, on close examination, a theory of substantive power is equally unavailing.

A. Congress' Remedial Power

Under such cases as South Carolina117 and Rome,118 Congress can act to ensure that prior constitutional violations are fully remedied or to guard against the risk of future violations. Under this remedial theory of congressional power, however, the definition of constitutional violations depends on the Supreme Court's interpretation of the relevant constitutional provision.119 In Smith,120 the Court held quite clearly that general laws affecting religious practices do not violate the Free Exercise Clause.121 Instead, the Court suggested, religious practices are constitutionally protected only from laws that target religion for special disadvantage.122

In its findings in RFRA, Congress directly contested the Supreme Court's belief that general laws do not implicate the Free Exercise Clause, stating that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."123 Congress made no claim that RFRA was designed merely to remedy past or future viola-

115. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment").

116. See Hutto v. Finney, 437 U.S. 678, 693-99 (1978) (relying on § 5 of the Fourteenth Amendment as a source of congressional power to adopt remedial legislation for violations of the Eighth Amendment); see also House Committee Hearings, supra note 111, at 354 (testimony of Professor Douglas Laycock); Senate Committee Hearing, supra note 111, at 92 (testimony of Professor Douglas Laycock); Laycock, The Religious Freedom Restoration Act, supra note 112, at 246; Matt Pawa, Comment, When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment, 141 U. PA. L. REV. 1029, 1095-97 (1993).


119. See supra part I.A.


121. See supra notes 82-93 and accompanying text.

122. In its attempt to explain prior precedents, the Court treated unemployment cases and hybrid claims as special situations. See supra notes 82-83 and accompanying text.

tions of free exercise rights, as defined in *Smith*.

It is not surprising that Congress did not advance a remedial argument in support of the Act, because such an argument would be difficult to maintain. To be sure, a state might target religion in violation of the *Smith* standard through a general law that disguised the legislature's underlying purpose, or a prosecutor might use a general law to persecute religious believers on a selective basis. In such a situation, RFRA would eliminate the challenger's difficulties of proof in a manner analogous to other congressional legislation that the Court has approved on a remedial theory. But only a small fraction of RFRA's applications could be justified on this basis. In the vast majority of situations, general laws are enacted with no thought of their possible application to religious practices, and prosecutors are engaged in good faith efforts to enforce the general policies that these laws are designed to promote. If RFRA had been limited to laws having a disproportionate effect on religious practices, a remedial theory might have been more realistic, but the Act contains no such limitation. Although the remedial theory permits Congress to formulate administratively convenient remedies, an argument of administrative convenience—even under a standard of "rationality"—simply cannot explain the Act's broad application to general laws of all sorts. Especially in the absence of relevant congressional findings or other persuasive evidence that Congress actually relied on a remedial theory, RFRA cannot be justified on that basis.


125. Professor Laycock urged Congress to make specific findings that might have made a remedial theory more plausible. See House Committee Hearings, supra note 111, at 357-58, 398 (urging Congress to find, *inter alia*, that facially neutral laws have been used as instruments of active religious persecution and that judicial review of legislative motive is insufficient to protect against this possibility); Senate Committee Hearing, supra note 111, at 95-96, 129 (making the same recommendation). But Congress made no such findings. See 42 U.S.C. § 2000bb(a) (Supp. V 1993) (statement of congressional findings).

In arguing that the *Smith* approach offered too little protection to religious exercise, the House Report did comment that "legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators." *House Report*, supra note 104, at 6. But this language was omitted from the Senate Report, and neither report made any effort to elaborate a remedial theory.
B. The Institutional Argument for RFRA’s Constitutional Validity

Professor Laycock has offered an “institutional” argument in support of RFRA’s constitutional validity, an argument characterizing the Act as an exercise of congressional power that goes beyond the remedial theory, at least as I have described it, but that falls short of substantive constitutional interpretation. According to Laycock, “the statute would not overrule the Court; rather, it would create a statutory right where the Court declined to create a constitutional right.”126 “The opinion [in Smith] is quite clear,” he writes, “that the Court does not want final responsibility for applying the compelling interest test to religious conduct.”127 But he claims that this concern does not apply to RFRA, precisely because it is a statute: “Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.”128 In a similar but somewhat different vein, Professor Lupu has suggested that RFRA might be viewed as a congressional attempt to declare the justiciability of claims for free exercise exemptions, and that it might properly be upheld on this type of institutional theory.129 These institutional theories are intriguing, but they depend on problematic interpretations both of Smith and of the Act.

In Smith, the Court did rely heavily on institutional reasoning, but this reasoning was not concerned merely, or even primarily, about the finality of judicial balancing. Rather, the Court objected to the very nature of judicial balancing in this context. As the Court wrote in Smith, “it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”130 Needless
to say, RFRA in no way resolves or accommodates this concern, because the Act requires the very same balancing that the Court opposes.\textsuperscript{131}

Furthermore, the Court in \textit{Smith} relied not only on institutional reasoning, but also on a substantive analysis of the proper meaning of the Free Exercise Clause. In particular, the Court rejected what it described as the "constitutional anomaly" of "a private right to ignore generally applicable laws,"\textsuperscript{132} the right of an individual, "by virtue of his beliefs, 'to become a law unto himself.'\textsuperscript{133} The Court did not suggest that this asserted right was an "underenforced constitutional norm,"\textsuperscript{134} but instead declared that it was not a "constitutional norm" at all.\textsuperscript{135} It is difficult to explain this language in terms of institutional reasoning.\textsuperscript{136}

This language in \textit{Smith} actually reflects a substantive constitutional value, the value of religious equality. Indeed, the Court's institutional reasoning was directly linked to this substantive value, in that the Court was concerned that religious equality could not be adequately protected by the process of judicial balancing. In this connection, it is important to note that Justice Stevens provided a critical fifth vote for the majority opinion in \textit{Smith}. In joining the Court's renunciation of judicial balancing, Stevens clearly was influenced by the requirement of religious equality, a constitutional value on which he has consistently relied in arguing against free exercise exemptions. In \textit{United States v. Lee}, for example, Stevens declared that "the

\begin{footnotes}
\footnotetext[131]{Idleman, \textit{The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power}, 73 TEX. L. REV. 247, 275 (1994) ("The Court suggested that the fundamental enterprise of examining and weighing the individual importance of religious claims should not be part of the judicial decisionmaking process \textit{at all}." ).}

\footnotetext[132]{\textit{Smith}, 494 U.S. at 886.}

\footnotetext[133]{\textit{Id.} at 885 (citing \textit{Reynolds v. United States}, 98 U.S. 145, 167 (1878)); see \textit{supra} notes 82-93 and accompanying text.}

\footnotetext[134]{\textit{Cf.} Sager, \textit{supra} note 129, at 1239 (arguing that \textsection 5 authorizes Congress to enforce "underenforced constitutional norms").}

\footnotetext[135]{\textit{Smith}, 494 U.S. at 886.}

\footnotetext[136]{\textit{Cf.} Idleman, \textit{supra} note 130, at 317 (arguing that "\textit{Smith} is not truly an instance of judicial underenforcement," but rather "represents the Court's best judgment of what the Free Exercise Clause requires").}
\end{footnotes}
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principal reason for adopting a strong presumption against [claims for free exercise exemptions] . . . is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims," which can create the appearance of "favoring one religion over another."\(^{137}\) In the course of rejecting the propriety of judicial balancing in *Smith*, moreover, the Court included an approving reference to Stevens' reasoning in *Lee*.\(^{138}\)

In mandating the very process of balancing to which the Supreme Court so strongly objected, RFRA can hardly be said to address the Court's concerns. To the contrary, the statute rejects the Court's institutional reasoning no less than it rejects the Court's substantive understanding of religious freedom. As such, RFRA is best understood as an attempt to directly repudiate *Smith's* interpretation of the Free Exercise Clause. This understanding of the statute is fully supported not only by the Act's substantive provisions, but also by its legislative history and its formal statement of findings and purposes.\(^{139}\)

More generally, if an institutional argument could be used to support the enactment of RFRA, such an argument would be broadly available to support other congressional attempts to impose strict scrutiny or other forms of heightened constitutional review in the face of contrary Supreme Court decisions. *Smith* is not unique in its reliance on institutional reasoning. Indeed, an institutional concern about the difficulties of judicial balancing, coupled with a concern about the intrusiveness of this process on the states, is part and parcel of virtually every judicial decision that declines to adopt heightened review. Whenever the Court rejects heightened review, it is deciding, in effect, that the advocated individual right is not sufficiently important under the Constitution to justify the balancing process that such review entails. Under *Smith*, for example, heightened review is not justified when the Court is asked to protect religiously motivated

\(^{137}\) United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment); *see also* Goldman v. Weinberger, 475 U.S. 503, 512 (1986) (Stevens, J., concurring) (reiterating the discriminatory potential of free exercise exemptions and noting "the interest in uniform treatment for the members of all religious faiths").

\(^{138}\) "Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims." *Smith*, 494 U.S. at 887 (citing *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring in the judgment)).

\(^{139}\) *See supra* text accompanying notes 95-99, 123, 125.
conduct from laws of general application. At the same time, the Court sees a higher constitutional value in protecting individuals from religiously discriminatory laws, and it therefore is willing to apply heightened review in that context, even though the process of judicial balancing is similar to that which the Court rejected in *Smith*.

As this discussion suggests, judicial decisions rejecting heightened constitutional scrutiny typically involve a complex interplay of substantive and institutional considerations. As a result, it is misleading to claim that congressional action renouncing this type of judicial decision does not involve substantive constitutional interpretation. In any event, the institutional argument in support of RFRA misreads the Supreme Court's institutional reasoning in *Smith*, and it seriously underestimates the importance of substantive considerations in the Court's decision. This argument also misreads the Act itself, which clearly reflects a substantive disagreement with the Court. A more forthright evaluation of RFRA requires that it be characterized as an act of substantive constitutional interpretation.

C. The Substantive Power Theory

The ultimate question, then, is whether RFRA can be defended on a substantive power theory. As I have explained, *Morgan*'s substantive theory is suspect as a matter of precedent, and it has never been employed as the determinative basis for upholding a congressional enactment. Rather than reject a substantive power altogether, however, the Supreme Court should permit Congress to exercise such a power as long as the congressional action does not frustrate the Court's essential function as the primary interpreter of the Constitution. Unfortunately, RFRA frustrates this function in a very serious way, and it therefore should be declared unconstitutional.

1. RFRA's Direct Repudiation of the Supreme Court's Basic Constitutional Doctrine

The congressional action in *Morgan*, even if viewed as an

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142. See supra part I.B.1.
143. See supra part I.B.2.
exercise in substantive constitutional interpretation, served merely to supplement the Supreme Court's basic approach to voting rights, with the Court, in effect, permitting Congress to apply the judicially determined standard of strict constitutional scrutiny. As a result, the congressional action did little if anything to upset the Court's articulation of constitutional values, including the value of equal protection and, relatedly, the competing value of federalism.¹⁴⁴

In RFRA, by contrast, Congress has directly rejected the basic constitutional reasoning of Smith. The Act is based not on legislative fact-finding, but rather on a congressional understanding of constitutional values that differs from the Supreme Court's.¹⁴⁵ The Act does not apply a judicially determined standard of review. To the contrary, it purports to mandate a standard of review that the Supreme Court has explicitly rejected.¹⁴⁶ For Congress simply to repudiate the Supreme Court's basic constitutional doctrine is entirely unprecedented. By its very nature, such action is constitutionally suspect, for it challenges a basic principle of the proper separation of powers.¹⁴⁷

¹⁴⁴. See supra notes 42-54 and accompanying text.
¹⁴⁵. As Professor Lupu noted in his congressional testimony concerning RFRA: Congress would not be going in the same direction as the Court. The Congress would be going very far in the opposite direction. And the judgment would be based on constitutional values, commendable ones, but not the values that the Supreme Court has expressed.

... [T]he Act does not rest on any claim, general or particular, of legislative superiority in fact-finding, and thus cannot draw upon that line of reasoning.

House Committee Hearings, supra note 111, at 374, 391 (testimony of Professor Ira C. Lupu).

¹⁴⁶. In a final footnote to its brief discussion of congressional power, the Senate Report on RFRA seemingly recognized that this might be problematic:

While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion, except where such action is the least restrictive means of furthering a compelling governmental interest.

Senate Report, supra note 104, at 14 n.43. Standing alone, this formalistic statement does nothing to support the constitutionality of the Act. Of course the statute's standard is statutory. What else could it be?

However unartfully, perhaps this footnote was alluding to Professor Laycock's institutional argument in support of RFRA's constitutional validity. See supra notes 126-28 and accompanying text.

¹⁴⁷. Professor Rex E. Lee has described the question of RFRA's constitutionality as follows:

Rather patently, Congress proposes a very different standard of review
More specifically, it threatens the Court's role as the primary interpreter of the Constitution, as symbolized by *Marbury v. Madison*.\(^{148}\)

If this type of congressional action is ever acceptable, it is certainly not in the case of RFRA, because there are additional reasons, beyond the basic separation-of-powers problem, for finding the Act unconstitutional. In particular, RFRA is well removed from the core historical meaning of Section 5, it frustrates the Court's protection of federalistic values, and it impairs the Court's role in providing coherent constitutional doctrine.\(^{149}\)

2. Congress' Reliance on Section 5 in a Nonracial Context

Although Congress' enforcement power properly extends to incorporated rights,\(^{150}\) this extension goes beyond the core historical meaning of the Civil War Amendments. These Amendments, including the Fourteenth Amendment and its enforcement provision, were designed primarily to address the problems of slavery and racial discrimination. When Congress acts to address these problems, its enforcement power is at its zenith, and the Supreme Court is and should be especially inclined to defer to congressional decisionmaking.\(^{151}\) As Justice O'Connor wrote

[than that of the Supreme Court in *Smith*], and therefore a very different rule of constitutional law. Can the Congress of the United States simply lay down a completely different rule of constitutional law, and if so, has the core function of a coordinate branch of government been completely eviscerated?

Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73, 90; cf. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1309 (1994) (arguing that RFRA "directs the Court to . . . act as though it had changed its mind about the constitutional status of religious exemptions, or as though it were obliged to accept Congress's judgment about the meaning of the Constitution as decisive").

148. 5 U.S. (1 Cranch) 137 (1803).

149. These considerations also provide additional reasons for rejecting attempts to defend RFRA on the basis of unduly expansive remedial or institutional arguments. See *supra* parts III.A. & III.B.

150. See *supra* note 116 and accompanying text.

151. As discussed previously, South Carolina v. Katzenbach, 383 U.S. 301 (1966), and City of Rome v. United States, 446 U.S. 156 (1980), each granted Congress broad remedial power to deal with racial discrimination. See *supra* notes 12-30 and accompanying text. Similar reasoning informed that portion of the Court's decision in Oregon v. Mitchell, 400 U.S. 112 (1970), that upheld Congress' nationwide suspension of literacy tests. See *supra* note 21. It also was the basis for at least the first ground of decision in Katzenbach v. Morgan, 384 U.S. 641 (1966). See *supra* notes 38-41 and accompanying text.

Other cases confirm that the Supreme Court is especially inclined to uphold
in *Richmond v. J.A. Croson Co.*, "The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race."\(^{152}\) To the same effect is Justice Black's opinion in *Oregon v. Mitchell*, in which he suggested that Congress' enforcement power may be broadest when it is tied "to the goal of eliminating discrimination on account of race."\(^{153}\)

RFRA, of course, does not address slavery or racial discrimination. Instead, it represents an attempt by Congress to protect incorporated rights. As a result, the core historical meaning of the Civil War Amendments is not implicated, and there is less reason for the Court to defer to congressional decisionmaking.\(^{154}\)

Indeed, to sanction a congressional repudiation of the Supreme Court's substantive standards in the context of incorporated rights could create a broad precedent, suggesting that Congress could reject the Court's constitutional views in a wide variety of areas. It might imply, for example, that Congress could declare the death penalty invalid under the Eighth Amendment. Likewise, it might suggest that Congress, interpreting the Takings Clause of Fifth Amendment, could mandate greater protection for property rights than the Supreme Court has afforded in its decisions under that clause. Thus, for the Court to uphold

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154. Needless to say, the full historical meaning of the Civil War Amendments, including especially the Fourteenth Amendment, is a matter of continuing debate, and there are plausible historical arguments that support the incorporation of free exercise values. Cf. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) (arguing that the history of the Fourteenth Amendment, viewed in part as a reaction to the Southern suppression of slave religion, can be read to include protection for religious free exercise). But my argument depends only on my description of the core historical meaning of the Amendments, a description that I think is uncontroversial.
RFRA could have far-reaching implications for the Court's interpretive role—implications extending far beyond the particular context of religious freedom.\textsuperscript{155}

3. The Constitutional Policy of Federalism

Federalism is an additional factor that weighs against the constitutionality of RFRA. As compared to Smith, the Act is far more intrusive on the constitutionally reserved powers of the states. Indeed, one of the Court's concerns in Smith was to limit the role of "federal judges" in second-guessing the decisions of the states in balancing the value of religious freedom against competing governmental interests.\textsuperscript{156} Under Smith, there is no national constitutional norm that limits state discretion in this fashion. Rather, the states remain free (subject to the Establishment Clause)\textsuperscript{157} to grant or to refuse religion-based exemptions, either as a matter of legislation or as a matter of state-court decisionmaking on the basis of state constitutional law.\textsuperscript{158}

By its very nature, moreover, RFRA cuts to the heart of state sovereignty. As the Court explained in New York v. United States, it is one thing for Congress to extend private-sector regulations to the comparable activities of state and local governments; it is something altogether different, and more troubling, for Congress to address its legislation to government alone, effectively requiring state and local bodies to govern in a particular way.\textsuperscript{159} "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the

\textsuperscript{155} Professor Robert A. Burt has suggested that for the Supreme Court to recognize "that Congress has, to whatever degree, an 'independent' role in interpreting the Constitution . . . is likely to remove an important restraint on Congress which has, in the past, usually counseled great wariness in trespassing on the Court's prerogatives." Robert A. Burt, Miranda and Title II: A Morganatic Marriage, 1969 SUP. CT. REV. 81, 133. Although Burt believes that this danger "may be overstated," see id. at 134, there certainly would be serious grounds for concern if the Court were to recognize a broad congressional power of constitutional interpretation in the context of incorporated rights. See generally Idleman, supra note 130, at 306-26 (arguing that the nature of incorporated rights, as well as the judicial reasoning process through which they were incorporated, may imply limitations on Congress' § 5 power to enforce these rights).

\textsuperscript{156} The Court stated that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." Employment Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

\textsuperscript{157} See infra notes 185-87 and accompanying text.

\textsuperscript{158} For an extensive discussion of the potential role of state constitutional law in this context, see Angela C. Carmella, State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence, 1993 B.Y.U. L. REV. 275.

States,” the Court wrote, “the Constitution has never been understood to confer on Congress the ability to require the States to govern according to Congress’ instructions.” 160 Although RFRA does not directly mandate state lawmaking, it would appear to be at odds with the reasoning of New York. The Act is targeted at state and local governments, 161 and, in effect, it mandates that state and local laws include religion-based exemptions according to the Act’s criteria.

To be sure, New York was primarily addressed to Congress’ power under the Commerce Clause, a power that typically is used for regulating the private sphere. Legislation under Section 5 of the Fourteenth Amendment, by contrast, inevitably targets state and local governments. As a result, the reasoning of New York plainly cannot be extended to this setting. Even so, the Court’s federalistic vision is not irrelevant. To the contrary, it suggests that legislation under Section 5 is exceptional in our constitutional scheme of federalism, and that Section 5 should be interpreted within the context of this general scheme. Like other legislation under Section 5, RFRA tends to undermine federalistic values, and this is a factor that must be considered in determining the constitutionality of the Act. 162

4. The Supreme Court’s Role in Developing Coherent Constitutional Doctrine

Beyond its intrusion on the value of federalism, RFRA frus-

160. Id. at 2421.

161. The Act applies to federal, as well as state and local, laws and practices. See 42 U.S.C. §§ 2000bb-2(1) to (2), 2000bb-3(a) to (b) (Supp. V 1993). But it does not apply to the private sector, and therefore it does not “govern the Nation directly.” New York, 112 S. Ct. at 2421.

162. The Supreme Court has ruled that principles of state sovereignty that might limit congressional power under Article I do not apply when Congress properly invokes its enforcement power under the Civil War Amendments. City of Rome v. United States, 446 U.S. 156, 178-80 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). This doctrine is sound. My point is simply that the policy of federalism should bear on the question of whether Congress in fact has “properly invoked” its enforcement power. Cf. Gregory v. Ashcroft, 501 U.S. 452, 467-70 (1991) (holding that absent a plain statement, congressional legislation under § 5 will not be interpreted to reach certain state political functions); id. at 469 (“The Fourteenth Amendment does not override all principles of federalism.”); Pennhurst State Sch. v. Halderman, 451 U.S. 1, 16 (1981) (“Because [legislation under § 5] imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.”); EEOC v. Wyoming, 460 U.S. 226, 259 (1983) (Burger, C.J., dissenting) (“The Tenth Amendment was not, after all, repealed when the Fourteenth Amendment was ratified: it was merely limited.”).
trates the Supreme Court’s development of coherent constitutional doctrine. In several respects, the Act undermines the development of logical, consistent, and harmonious constitutional law not only under the Free Exercise Clause, but also under the Establishment Clause and other constitutional provisions.

First, RFRA creates a significant doctrinal inconsistency in the treatment of prisoners’ rights. Thus, even as it repudiated Smith, the Act also renounced the Court’s pre-Smith ruling in O’Lone v. Estate of Shabazz,163 which held that the free exercise claims of prisoners would be tested under a standard of reasonableness, rather than strict scrutiny.164 O’Lone, however, was not simply a free exercise case; rather, it was part of a broader doctrine concerning the constitutional rights of prisoners. Quoting Turner v. Safley,165 the Court in O’Lone stated the constitutional standard in general terms: “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”166 In Turner, for example, the Court applied this test in rejecting a freedom of expression claim.167 RFRA undermines the Court’s development of consistent doctrine concerning the rights of prisoners by speaking selectively to the issue of free exercise.168

Second, RFRA’s interaction with freedom of expression could create more general doctrinal confusion. In particular, if the Act is deemed to apply to religiously motivated speech, such speech presumably would be protected, under the statute’s strict scrutiny standard, even from content-neutral time, place, and manner

164. See Senate Report, supra note 104, at 9-11 (indicating that RFRA would repudiate O’Lone, but suggesting that the Act’s strict scrutiny could be applied with appropriate sensitivity to prison needs); accord House Report, supra note 104, at 7-8. The Senate considered but rejected an amendment that would have excluded prisoners’ claims from the reach of the Act. See 139 Cong. Rec. S14353-68 (daily ed. Oct. 26, 1993); id. at S14461-68 (daily ed. Oct. 27, 1993); see also infra note 257.
166. O’Lone, 482 U.S. at 349 (quoting Turner, 482 U.S. at 89).
167. Turner, 482 U.S. at 91-93. Even under the reasonableness standard, the Court in Turner invalidated a prison regulation that generally prohibited inmates from marrying. Id. at 94-99.
168. In its application to federal laws, RFRA creates a similar inconsistency in the treatment of military claims. By extending strict scrutiny to the free exercise claims of service personnel, RFRA renounces the Supreme Court’s decision in Goldman v. Weinberger, 475 U.S. 503 (1986). See House Report, supra note 104, at 7-8; Senate Report, supra note 104, at 11-12. Here again, however, Goldman was not simply a free exercise case, but was part of the Court’s more general elaboration of individual rights in the military context. See Goldman, 475 U.S. at 507-08.
regulations. But the Supreme Court does not apply strict scrutiny to such laws, regardless of whether the affected speech is religious or nonreligious.\(^{169}\) Recognizing this potential problem, the House and Senate Reports on RFRA each state that "where religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place and manner restrictions are permissible consistent with First Amendment jurisprudence."\(^{170}\) The face of the statute, however, suggests no such exception, and it may be difficult to construe the Act in the manner that the reports suggest.\(^{171}\)

Third, RFRA complicates the development of coherent judicial doctrine in those free exercise cases that the Act does not address. For example, the Court has ruled that the Free Exercise Clause does not limit the government's internal operations, even if those operations have an adverse effect on religious practices.\(^{172}\) These rulings, however, were part of a general judicial trend to interpret the Free Exercise Clause narrowly, a trend that culminated in Smith. Indeed, the Court in Smith relied upon these decisions as support for its ruling.\(^{173}\) RFRA repudiates Smith, but it appears to leave the internal operations cases unaffected.\(^{174}\) Although these cases were entirely consistent

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Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Id.* at 293.


171. To reach the interpretation suggested by the reports, the Court might construe the "exercise of religion" to exclude religious speech, or, more plausibly, it might determine that content-neutral time, place, and manner regulations do not "substantially" burden the exercise of religion. *See* 42 U.S.C. §§ 2000bb-1(a), 2000bb-2(4) (Supp. V 1993).


174. These cases were decided on the theory that internal governmental operations do not directly or indirectly coerce individuals to take action that their religion forbids, and therefore do not impose a legally cognizable "burden" on free exercise. RFRA applies only to laws that "substantially burden" the exercise of religion, and the Act says nothing to suggest that Congress' understanding of "burden" is any different from the Supreme Court's. *See* 42 U.S.C. § 2000bb-1(a) (Supp. V 1993); *see also* *Senate Report*, *supra* note 104, at 9 & n.19 (expressing "neither approval nor disapproval" of the Supreme Court's internal operations decisions, which found no
with the direction of Smith, they are arguably in tension with the direction of RFRA, creating a possible incongruity in the law of free exercise.\(^{175}\)

RFRA likewise leaves unimpaired (as it must) the constitutional strict scrutiny of laws that discriminate against religion, a scrutiny that survived the Court's decision in Smith.\(^{176}\) At the same time, however, RFRA adds a preliminary layer of statutory strict scrutiny for such laws, because RFRA applies without distinction to discriminatory as well as general laws.\(^{177}\) If the strict scrutiny standard of the Act is identical to the constitutional standard, this is not problematic. But the standards in fact may differ. Although its basic substantive provision adopts a strongly worded description of strict scrutiny,\(^{178}\) RFRA could be read to embrace a more lenient version of this test.\(^{179}\) In the

\(^{175}\) In Smith, the Court indicated that it did not believe that the government's internal operations should be treated differently, for free exercise purposes, than other governmental laws and practices: "[I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands or its administration of welfare programs." Smith, 494 U.S. at 885 n.2 (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439; Bowen v. Roy, 476 U.S. 693).

\(^{176}\) See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

\(^{177}\) 42 U.S.C. § 2000bb-l(a) (Supp. V 1993) (stating that the Act applies "even if the burden [on religious exercise] results from a rule of general applicability") (emphasis added).


\(^{179}\) In its statement of purposes, the Act refers to "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)." 42 U.S.C. § 2000bb(b)(1). In its statement of findings, however, it refers more generally to "sensible balances" that were reached under "the compelling interest test as set forth in prior Federal court rulings [i.e., prior to Smith]." 42 U.S.C. § 2000bb(a)(6). Some of the "Federal court rulings" prior to Smith, although following Sherbert and Yoder in form, applied a rather lenient version of strict scrutiny. See supra note 79 and accompanying text. The Act provides protection, moreover, only from laws that "substantially" burden the exercise of religion, arguably confirming the need for "sensible balancing" by the courts. See 42 U.S.C. § 2000bb-1(a); see
constitutional evaluation of discriminatory laws, by contrast, the Court's scrutiny is unquestionably demanding, so much so that it can rarely be satisfied. The possible disparity between these two "strict scrutiny" standards adds an interpretive complication that did not previously exist.

Fourth, and perhaps more important, RFRA could inhibit the judicial reconsideration of Smith's interpretation of the Free Exercise Clause. RFRA, if valid, provides religion-based exemptions as a matter of statute, potentially making it unnecessary or inappropriate for the Supreme Court to reconsider Smith on its constitutional merits. Smith has been harshly criticized from the day it was decided, however, and, absent RFRA, the Court certainly would be asked to revisit the ruling. Furthermore, there is a real possibility that the Court, on reconsideration, might abandon Smith in favor of a more generous approach.

also HOUSE REPORT, supra note 104, at 7 (stating that "the test [under RFRA] generally should not be construed more stringently or more leniently than it was prior to Smith"); SENATE REPORT, supra note 104, at 9 (following the language of the House Report in repeating that "the test [under RFRA] generally should not be construed more stringently or more leniently than it was prior to Smith").

For discussions of this and related interpretive issues, see Laycock & Thomas, supra note 6, at 221-36 (arguing that RFRA should be construed to require a stringent version of strict scrutiny); Michael S. Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 MONT. L. REV. 249 (1995) (arguing that RFRA should be construed to require a stringent version of strict scrutiny, at least insofar as the Act applies to the federal government); Berg, supra note 124, at 18-62 (arguing that RFRA should be construed to require a form of heightened scrutiny that provides moderately strong protection for religious practices); Idleman, supra note 130, at 266-86 (arguing that RFRA might be interpreted to provide very little protection for religious practices); Lupu, supra note 103, at 62-66 (describing various interpretive possibilities); Ira C. Lupu, The Lingering Death of Separation, 62 GEO. WASH. L. REV. 230, 273-76 (1994) (arguing that amendments incorporated into the final version of RFRA tend to weaken the Act's strict scrutiny standard); Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 MONT. L. REV. 171 (1995) [hereinafter Lupu, A Lawyer's Guide] (discussing various interpretive issues and suggesting that RFRA could be construed narrowly to help protect its constitutional validity).

180. As the Court explained in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993):

The compelling interest standard that we apply once a law fails to meet the Smith requirements is not "water[ed] . . . down" but "really means what it says." A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. Id. at 2233 (quoting Employment Div. v. Smith, 494 U.S. 872, 888 (1990)).

181. If RFRA is interpreted to embrace a lenient version of strict scrutiny, this might also have a complicating and adverse effect on the meaning of constitutional strict scrutiny in nonreligious contexts. See Lupu, supra note 103, at 66.


183. The rule of Smith was adopted over the vigorous opposition of four justices.
Even as it repudiates the basic reasoning of Smith, the Act could have the effect of freezing an unsettled and controversial interpretation of the Free Exercise Clause.\textsuperscript{184}

Finally, RFRA may adversely affect the Court's elaboration of the Establishment Clause, the First Amendment's counterpart to the Free Exercise Clause. These two provisions are closely related. Taken together, they decree a type of religious neutrality, such that government can neither favor nor hinder the exercise of religion. The meaning of this neutrality and the relationship between the two clauses have long been a matter for judicial consideration and decision. Although the Court's Establishment Clause doctrine forbids the government to promote religion, for example, it has been construed to permit religion-based exemptions from governmentally imposed burdens.\textsuperscript{185} The limits of this permissible accommodation, however, remain a matter of dispute and contention.\textsuperscript{186} Moreover, these Establishment Clause limits depend in part on the extent to which the Free Exercise Clause itself requires accommodations. Thus, the

\textsuperscript{184} See Smith, 494 U.S. at 891-907 (O'Connor, J., concurring in the judgment); id. at 907-21 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). The Court reaffirmed Smith in Hialeah, see 113 S. Ct. at 2226, but that case involved a statute that discriminated against religion, and the Court therefore could and did invalidate the statute without revisiting the Smith approach. See id. at 2234; see also id. at 2241-43 (Souter, J., concurring in part and concurring in the judgment) (explaining why the Court's discussion of the rule of Smith was dicta). Even so, three justices suggested that they would be inclined to reject the rule of Smith in a case that properly presented the issue. See id. at 2243-50 (Souter, J., concurring in part and concurring in the judgment); id. at 2250-51 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). But cf. Laycock, The Religious Freedom Restoration Act, supra note 112, at 255 (arguing that "there is little near-term prospect that the Court will reconsider Smith").

\textsuperscript{185} See, e.g., Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding a statutory exemption for religious organizations from a ban on religious discrimination in employment); id. at 338 ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.").

\textsuperscript{186} See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating a Texas sales tax exemption that was granted to religious literature, but not to other literature).
meaning of the Establishment Clause depends in part—perhaps in significant part—on the meaning of the Free Exercise Clause. To the extent that RFRA freezes the Court's interpretation of the Free Exercise Clause, then, the Act may also impair the Court's Establishment Clause decisionmaking.187

187. If an accommodation required by RFRA were determined to exceed the limits of the Establishment Clause, of course, the Court would be required to reject the accommodation, for Congress clearly has no power to "restrict, abrogate, or dilute" the meaning of any provision in the Bill of Rights. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982); see supra note 70 and accompanying text. Indeed, one could argue that RFRA's scheme of religious accommodations promotes religion to the point that the Act on its face violates the Establishment Clause, and that it therefore should be declared unconstitutional on that ground alone. Cf. Idleman, supra note 130, at 286-306 (arguing that RFRA might be vulnerable to such a challenge and that its validity under the Establishment Clause is an open question). Because the Act does no more than protect religion from governmentally imposed burdens, however, this facial argument would be difficult to maintain. See Amos, 483 U.S. at 334 ("There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.") (citation omitted).

The Court's most recent Establishment Clause case suggests that RFRA's generalized scheme of accommodations might actually mitigate one Establishment Clause concern, the risk of selective accommodations that discriminate among similar religious claims. See Board of Educ. v. Grumet, 114 S. Ct. 2481, 2491-93 (1994) (rejecting an accommodation argument, in part because of a concern that the state's preferential treatment for a particular religious group would not be extended to similar groups); id. at 2493 ("[W]hatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.") (citations omitted).


In any event, my claim here is not that RFRA violates the Establishment Clause, but only that it hinders the judicial development of Establishment Clause doctrine. See generally Idleman, supra note 130, at 323-26 (discussing the potential interplay between RFRA and the Establishment Clause).
At least in the aggregate, these various ramifications of RFRA seriously frustrate the Supreme Court's development of coherent constitutional doctrine. The Act adversely affects the Court's elaboration of constitutional values not only under the Free Exercise Clause, but also under the Establishment Clause and other constitutional provisions. It touches a variety of constitutional policies that relate and interact in complex ways. This is a far cry from the discrete and narrow congressional action that the Court approved in Morgan.

* * * *

To recapitulate, RFRA directly repudiates the Supreme Court's basic constitutional reasoning. As such, it represents an unprecedented congressional challenge to the Court's well-established role as the primary interpreter of the Constitution. The Act addresses a matter other than racial discrimination, and it therefore moves beyond the core historical purpose of Section 5. It impairs federalistic values and undermines the Court's development of coherent constitutional doctrine. This kind of dramatic change in our judicially determined constitutional landscape could be accomplished by a constitutional amendment, but it cannot be done by statute. Accordingly, RFRA should be

188. Cf. Grumet, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment) (noting the relationship of "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion"); Raul F. Yanes & Mary Ann Glendon, FIRST THINGS, Apr. 1992, at 46, 48 (contribution to How To Restore Religious Freedom: A Debate) (arguing that "RFRA would be a substantial impediment to the comprehensive reexamination of religion clause case law that the Court now seems prepared to undertake"); House Committee Hearings, supra note 111, at 303 (testimony of Professor Robert A. Destro) (noting that RFRA does not address "the connection between free exercise, freedom of speech, equal protection, due process, and all the other constitutional rights we hold dear").

189. Katzenbach v. Morgan, 384 U.S. 641 (1966); see supra notes 42-54 and accompanying text.

190. All of these problems are exacerbated if RFRA is read to adopt a form of strict scrutiny that is even more protective of religious free exercise than pre-Smith judicial doctrine, thereby moving the Act even further from the constitutional values of the Supreme Court. See House Committee Hearings, supra note 111, at 377-85 (testimony of Professor Ira C. Lupu).

Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the
declared unconstitutional in its application to state and local governmental practices. 192

IV. RFRA: A CONSTITUTIONALLY SIGNIFICANT STATUTE

To conclude that RFRA is unconstitutional is not to suggest that the Act is constitutionally irrelevant. Much to the contrary, the Act is a powerful statement that Congress rejects the Supreme Court's interpretation of the Free Exercise Clause, as announced in Employment Division v. Smith, 193 and favors a considerably broader interpretation. Furthermore, the Act was adopted with overwhelming political support, so powerful as to suggest a national consensus. Because the Act is unconstitutional, the Act's vision of religious freedom is not binding on the Supreme Court, and the Court should decline to embrace it if the Court continues to adhere to the competing vision of Smith. But the Court should not lightly dismiss RFRA, viewed as a political declaration concerning the proper meaning of the Free Exercise Clause.

From this perspective, the Act's particular provisions are less important than its essential statement of constitutional policy. So understood, the Act provides compelling evidence that our contemporary national values support a generous regime of religious freedom—one that provides protection even from laws of general application—and this evidence should properly inform the Court's interpretation of the Constitution. Indeed, when coupled with other constitutional arguments, the enactment of RFRA strongly suggests that the Supreme Court should reconsider Smith and, on reconsideration, overrule it.

A. Determining the Meaning of the Free Exercise Clause

Whether Smith should be overruled, of course, depends upon the meaning of the Free Exercise Clause. A determination of this

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192. After completing this Article, I learned that Professor Marci A. Hamilton—working independently from me and advancing a rather different set of arguments—also has concluded that RFRA exceeds the power of Congress under § 5. Hamilton claims that the Act is unconstitutional not only in its state and local applications, but also as applied to federal governmental practices. See 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. (1995) (forthcoming).

meaning in turn requires an evaluation of various considerations. As with the interpretation of any constitutional provision, the constitutional text is the obvious starting point, followed by an examination of the original understanding of the framers and ratifiers. Other factors are also relevant, including judicial precedents that have interpreted the provision in the past, as well as considerations of institutional competence and political theory.

Based on these sorts of factors, Professor Michael W. McConnell has strongly criticized the Smith decision. He contends that the Court "gave insufficient weight to the text" of the Free Exercise Clause and ignored the history of its adoption—a history that McConnell had documented in a major article that was awaiting publication when the Court announced its decision. Smith's treatment of precedent, according to McConnell, was "troubling, bordering on the shocking." And Smith's rejection of the Court's pre-Smith doctrine of free exercise exemptions abandoned a valuable and appropriate judicial role in our democratic system.

McConnell's critique of Smith is powerful. Others also have criticized Smith, arguing that the Court's interpretation of the Free Exercise Clause was wrong. These various commentators have fully canvassed a range of arguments based on text, history, and precedent, as well as institutional considerations and political theory. These arguments are telling, and they may themselves provide reason enough to overrule Smith. Rather than rehearse these arguments further, however, I wish to elaborate an additional factor that also should inform the Supreme Court's interpretation of the Free Exercise Clause: our society's contemporary understanding of what the clause should mean.

195. Id. at 1116.
196. Id. at 1116-19.
198. McConnell, supra note 194, at 1120.
199. Id. at 1141-52.
B. The Relevance of Contemporary Societal Values in Constitutional Interpretation

The determination of constitutional rights is not, and should not be, an entirely backward-looking process. Rather, constitutional decisionmaking properly includes an evolutionary component, according to which the Supreme Court considers not merely the values of the past, but also those of the present. Contemporary societal thinking represents a cultural fact that the Court cannot ignore. No less important, it may reflect a progression of political-moral opinion that accords enhanced protection to individual rights and that, on its merits, invites judicial emulation. Indeed, on many issues of individual rights, our history reveals changes in societal thinking that are widely accepted as positive developments. In such cases, the evolution of societal values may properly suggest the growth of a constitutional principle beyond its original meaning.

201. As Professor Paul W. Kahn has demonstrated, the theme of constitutional evolution or growth—in one form or another—has long been a part of the American constitutional tradition. See Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory 65-133 (1992).

202. Elsewhere I have elaborated and defended an understanding of constitutional interpretation that includes this evolutionary component. See, e.g., Daniel O. Conkle, The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry’s Constitutional Theory and Beyond, 69 Minn. L. Rev. 587, 625-64 (1985). Portions of the following discussion draw upon this earlier work.

203. Consider, for example, America’s historical progress in protecting the individual rights of Blacks, ethnic minorities, and women. As Professor Robert N. Bellah has noted:

[Simultaneous with widespread evidence of corruption has been continuous pressure for higher standards of moral behavior. Eighteenth-century Americans with a few notable exceptions tolerated slavery; we do not. Nineteenth-century Americans tolerated violence and discrimination against immigrants and ethnic minorities; we do not. The early 20th century tolerated the notion that women were basically inferior to men, even while giving them the right to vote; we do not. In the treatment of blacks, ethnic minorities, and women we still have far to go, but it would be hard to argue that we were better in these respects at any earlier period in our history.]


In various contexts, the Supreme Court and individual justices have indicated that the Constitution's meaning is not static. Interpreting the Due Process Clause, for example, the Court in *Rochin v. California* explained that the meaning of individual rights provisions often is not fixed by "the deposit of history," but rather may depend on "a continuing process of application," resulting in judgments that are "bound to fall differently at different times." This exercise of judgment, the Court continued, cannot "be avoided by freezing 'due process of law' at some fixed stage of time or thought;" rather, judges must be "duly mindful of reconciling the needs both of continuity and of change in a progressive society." To the same effect was Justice Harlan's eloquent opinion in *Poe v. Ullman*:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

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Policymaking by the Judiciary 99 (1982) (arguing that America's self-understanding includes a commitment "to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding"); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L.J.* 221 (1973) (defending the constitutionalization of America's "contemporary morality").

205. *Rochin v. California*, 342 U.S. 165, 169-70 (1952). In *Rochin*, the Court held that California police had violated a criminal suspect's due process rights when they administered a stomach pump against his will to obtain evidence of illicit narcotics. *Id.* at 174.

206. *Id.* at 171.

207. *Id.* at 172.

208. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *see also id.* at 518 n.9 (Douglas, J., dissenting) (noting that "due process follows the advancing standards of a free society"). *Poe* involved a substantive due process challenge to a Connecticut statute criminalizing the use of contraceptives, even by married persons. A majority of the Court dismissed the challenge without reaching the merits, concluding that the appeal did not present a justiciable "case or controversy." *Id.* at 508-09 (plurality opinion); *id.* at 509 (Brennan, J., concurring in the judgment). Justices Harlan and Douglas dissented from this dismissal and would have found the contraceptive ban unconstitutional. *See id.* at 522-55 (Harlan, J., dissenting); *id.* at 509-22 (Douglas, J., dissenting). In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court later reached the merits of the Connecticut law and agreed that it was invalid.

At his confirmation hearings, Justice Breyer referred with approval to Justice
The Court has utilized similar reasoning in its equal protection decisions. In *Harper v. Virginia Board of Elections*, for example, the Court explained that the meaning of equal protection evolves over time:

In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.\(^{209}\)

Citing the Court's rejection in *Brown v. Board of Education*\(^{210}\) of the "separate-but-equal" doctrine previously endorsed in *Plessy v. Ferguson*,\(^ {211} \) the Court in *Harper* asserted that equal protection claims must be heard with "a contemporary ear."\(^ {212}\)

Likewise, the Supreme Court's Eighth Amendment decisions have been guided in part by a consideration of "the evolving standards of decency that mark the progress of a maturing society."\(^ {213}\) As far back as *Weems v. United States*, the Court wrote that the Amendment's prohibition on cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."\(^ {214}\) The Court explained: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."\(^ {215}\)

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Harlan's approach, stating that the meaning of constitutionally protected "liberty" depends not only on text, history, tradition, and precedent, but also on "the conditions of life in the past, the present, and a little bit of projection into the future." *Excerpts from Hearing on Breyer Nomination to High Court*, N.Y. TIMES, July 14, 1994, at D22. According to Justice Breyer, this "is what the Court has done, and virtually every Justice." *Id.*

209. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) (citation omitted). In *Harper*, the Court invalidated Virginia's poll tax as a violation of equal protection, noting that "[o]nly a handful of States" continued to employ such taxes at the time of the Court's decision. *Id.* at 666 n.4.


211. 163 U.S. 537 (1896).

212. *Harper*, 383 U.S. at 669; cf. *Brown*, 347 U.S. at 492 ("[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.").


215. *Id.* at 373.
C. The Role of Objective Indicators of Contemporary Societal Values, Including Congressional Legislation

Although judicial references to the evolving meaning of the Constitution tend to be general in nature, some include more specific statements concerning the relevance of contemporary societal values and how the Supreme Court might determine what those values are. Under the Eighth Amendment, for example, the Court has looked to objective indicators of contemporary values, including legislative policymaking as well as the sentencing decisions of juries. "In determining what standards have 'evolved,'" the Court wrote in Stanford v. Kentucky, "we have looked not to our own conceptions of decency, but to those of modern American society as a whole." Accordingly, the Court's analysis has included a comparison of the penalty under review with penalties imposed for similar crimes within the same jurisdiction and in other American jurisdictions as well.

Utilizing this approach, the Court in Coker v. Georgia ruled that the death penalty for rape was unconstitutional, in part because this punishment had all but disappeared from the American legal system. The Court relied on a similar analysis in Enmund v. Florida. In Enmund, the Court refused to allow the death penalty to be imposed "solely because the defendant somehow participated in a robbery in the course of which a murder was committed." In support of its ruling, the Court noted that only eight states authorized such a punishment and that juries rarely imposed it. To the same effect, the Court in Thompson v. Oklahoma relied on a review of relevant legisla-

219. Id. at 792.
220. Id.
221. Id. at 794-96. The reach of Enmund was limited in Tison v. Arizona, 481 U.S. 137 (1987), which held that the death penalty could be imposed on a felony participant who neither killed nor intended to kill, as long as he had major personal involvement in the felony and showed a reckless indifference to human life. Id. at 158. The Court relied on a survey of state felony-murder laws and judicial decisions after Enmund, which indicated to the Court's satisfaction a societal consensus that permitted the death penalty in these circumstances. Id. at 152-55.
tive enactments and jury determinations to support its conclusion that the Eighth Amendment imposes limitations on the execution of juveniles. According to the plurality, these "indicators of contemporary standards of decency" revealed that "the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."

The Supreme Court's Eighth Amendment decisions are unusually direct in their reliance on societal values as a source of constitutional judgment. But even in other areas, there have been suggestions that contemporary American values should inform the Court's constitutional decisionmaking, and that objective indicators, such as legislation, may be the best evidence of what those values are.

In Griffin v. Illinois, for instance, the Court ruled that indigent criminal defendants were constitutionally entitled to publicly provided transcripts for purposes of appeal, in part because the denial of such transcripts was out of step with the contemporary practice of most states. As the plurality opinion noted:

[T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants.

223. Id. at 823 (plurality opinion).

224. Id. at 832. Concurring in the judgment, Justice O'Connor believed that the case could be decided on narrower grounds. But she endorsed the plurality's objective inquiry concerning "the relevant social consensus," and she agreed that "a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist." Id. at 848-49 (O'Connor, J., concurring in the judgment). The dissenters conducted the same type of analysis, but concluded, in their judgment, that no such consensus was present. See id. at 859-78 (Scalia, J., dissenting). The Court used a similar analysis in Stanford v. Kentucky, 492 U.S. 361 (1989), but there a majority determined that there was no national consensus forbidding the death penalty for juveniles who were 16 or older at the time of their offense. See id. at 368-74.

In Solem v. Helm, 463 U.S. 277 (1983), the Court extended its comparative analysis to noncapital cases, invalidating a life sentence for a nonviolent recidivist when the defendant apparently had been "treated more severely than he would have been in any other State." Id. at 300. The precise role of Solem's comparative analysis for noncapital cases, however, has been placed in question by the Court's fractured decision in Harmelin v. Michigan, 501 U.S. 957 (1991).

225. This may reflect the particular nature of the Eighth Amendment inquiry. As the plurality wrote in Thompson: "Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance." 487 U.S. at 822 n.7.

who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.\textsuperscript{227}

Likewise, in \textit{Tennessee v. Garner}, the Court construed the Fourth Amendment to depart from the common law rule concerning police use of deadly force when "the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and [when] that remains the rule in less than half the states."\textsuperscript{228}

Speaking for three justices in \textit{City of Cleburne v. Cleburne Living Center}, Justice Marshall explained the relevance of legislation as an indicator of contemporary values under the Equal Protection Clause as well as other constitutional provisions:

\begin{quote}
Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.\textsuperscript{229}
\end{quote}

\textsuperscript{227} \textit{Id.} at 19 (plurality opinion) (footnotes omitted).
\textsuperscript{228} \textit{Tennessee v. Garner}, 471 U.S. 1, 18 (1985).
\textsuperscript{229} \textit{City of Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 466 (1985) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (citations omitted).

The Supreme Court's consideration of contemporary legislative action can be encompassed within a constitutional theory that focuses on tradition, at least in the sense described by Justice Harlan in \textit{Poe}. See supra note 208 and accompanying text. As Professor Robert F. Nagel has explained:

\begin{quote}
[I]t is an obvious oversimplification to conceive of tradition as unchanging. Experience accumulates by way of experimentation and adaptation. Contemporary political behavior, including official recalcitrance, is a part of our collective life and is relevant to understanding our underlying traditions. Presumably, this is why Justices as different as Brennan, Blackmun, and Scalia have all examined patterns of modern statutory change when depicting legal traditions.
\end{quote}
As Justice Marshall makes clear, the relevant values are not those of a particular state or geographic region, but rather of "American society" in general. These values may be demonstrated by a broad pattern of state legislation or, better still, by Acts of Congress, which speak for the American people as a whole.230

Frontiero v. Richardson231 demonstrates the importance of congressional legislation as an indicator of contemporary national values and therefore as a source of constitutional meaning. In Frontiero, four justices argued that sex-based classifications should be found constitutionally "suspect" under the Fourteenth Amendment's Equal Protection Clause.232 They relied in part on recent congressional action "manifest[ing] an increasing sensitivity to sex-based classifications,"233 including not only Congress' adoption of statutory prohibitions on sex-based discrimination in employment, but also its passage of the proposed Equal Rights Amendment.234 "Congress itself has concluded that classifications based upon sex are inherently invidious," wrote the four-justice plurality, "and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."235 Although the plurality's argument for strict scrutiny did not prevail in Frontiero, the Supreme Court eventually did adopt an elevated constitutional standard for sex-based classifications.236 This standard plainly reflects the evolution of societal thinking on sexual equality, an evolution that is amply documented by the congressional action on which the Frontiero plurality relied.

D. RFRA as an Indicator of Contemporary Societal Values

Like other individual rights provisions, the Free Exercise Clause can be informed by contemporary societal values. And as in Frontiero, recent congressional legislation—in this case,
RFRA—provides strong evidence of what those values are. Under this argument, RFRA is tremendously important, not because the statute does or could supersede the Supreme Court’s constitutional ruling in Smith,237 but rather because it provides compelling evidence of contemporary national values—values that should help inform the Court’s own judgment. The fact that the Act is unconstitutional and therefore not binding by its terms does not defeat this argument.238 Like the unratified Equal Rights Amendment, RFRA represents a formal and strongly supported statement of congressional opinion that is not legally controlling, but that warrants substantial judicial consideration.239

In an attempt to determine contemporary societal values, the nature and degree of support for congressional legislation are as relevant as the fact of its enactment. In this respect, it is notable that although Congress, in adopting RFRA, gave little consideration to the issue of its power under Section 5 of the Fourteenth Amendment,240 it carefully evaluated the merits of Smith.241 Based on this evaluation, Congress formally stated its opinion that the decision was wrong, and it formally stated the reasons for its position.242 No less important, the congressional support for RFRA was almost unanimous. In the House, the Act was passed by voice vote without objection;243 in the Senate, it was adopted by a vote of 97 to 3.244

Furthermore, the Act was promoted by what Representative

239. In an argument that is sympathetic with mine, Professor Lupu has suggested that RFRA and other "[s]tatutes revolving in substantive constitutional orbits" are part of the process of constitutional change and are potential sources of constitutional meaning. See Lupu, supra note 103, at 76-82. Lupu seems not to recognize, however, that the Supreme Court could utilize a statute such as RFRA for this purpose even as it declares the statute unconstitutional.
240. See supra notes 102-12 and accompanying text.
241. See, e.g., HOUSE REPORT, supra note 104; SENATE REPORT, supra note 104.
242. See supra text accompanying notes 95-99, 123, 125 (discussing RFRA’s formal statement of findings and purposes).
244. 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993); cf. Laycock & Thomas, supra note 6, at 244 ("The lopsided votes in both houses should send a strong message to all levels and branches of government that accommodating religious exercise is important."
Brooks called an "unprecedented coalition," one that included a wide and diverse array of groups—secular and religious, liberal and conservative. This "Coalition for the Free Exercise of Religion" ultimately included well over fifty organizations. Its membership "spanned the theological and ideological spectrum from the Southern Baptist Convention to the National Council of Churches, from the Christian Legal Society to the ACLU, from the Traditional Values Coalition to People for the American Way." According to Senator Hatch, it was "one of the broadest coalitions ever assembled to support a bill before Congress." Given the breadth of support for RFRA both within and outside of Congress, it would be difficult to imagine a piece of congressional legislation that could more powerfully demonstrate a societal consensus concerning the meaning of a constitutional provision.

As noted above, there are various reasons to believe that Smith was wrongly decided—reasons based on text, history, precedent, institutional considerations, and political theory. Even if these reasons are insufficient in themselves, however, RFRA provides an additional argument for overruling Smith and returning to pre-Smith doctrine. According to this argument, the Free Exercise Clause should be construed in light of the values embraced by the contemporary society that it governs. This does not mean that contemporary societal values should be a determinative factor in constitutional interpretation, either here or in other contexts. But such values are relevant and important to the interpretive enterprise, at least when they point toward the enhancement of individual rights. As RFRA convincingly

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246. See id. ("I am proud of how such marvelous diversity was united by a shared view of the place and role of religion in our society.").
250. See supra part IV.A.
251. Societal values reflect majoritarian opinion, and they may therefore conflict with constitutional values, drawn from other sources, that call for the protection of individual rights and the resistance of competing, majoritarian norms. In such cases, societal values may be a dubious source of constitutional meaning. In United States v. Eichman, 496 U.S. 310 (1990), for instance, the Supreme Court rejected an argument that newly adopted congressional legislation prohibiting flag burning required the Court to reassess its decision in Texas v. Johnson, 491 U.S. 397 (1989), which had held that flag burning was protected expression under the First Amendment.
shows, moreover, contemporary American values include a commitment to religious freedom that goes beyond the protection afforded under Smith. Unlike Smith, the societal commitment embodied in RFRA includes significant protection for religiously motivated conduct even from laws of general application. 252

V. CONCLUSION

Understood as an embodiment of contemporary values, RFRA is relevant to the Supreme Court's interpretation of the Free Exercise Clause, but it is not binding on the Court. 253 Viewing the statute in this fashion avoids the constitutional problems that would be created if the statute were held to be constitutionally valid and therefore enforceable by its terms. 254 On this view, the Supreme Court remains the primary interpreter of the Constitution, for it, not Congress, makes the ultimate decision concerning the meaning of the Free Exercise Clause. Accordingly, the Court can consider the full range of relevant considerations in deciding whether Smith should be reaffirmed or rejected, and its judgment on these matters might differ from that of Congress. More generally, the Court remains free to de-

The Court explained:

We decline the Government's invitation to reassess Johnson in light of Congress' recent recognition of a purported national consensus favoring a prohibition on flag burning. Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. Eichman, 496 U.S. at 318 (citation omitted); cf. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2815 (1992) (resisting "political pressure" to overrule Roe v. Wade, 410 U.S. 113 (1973), and refusing "to overrule under fire" the essential holding of that decision).

In the context of RFRA, by contrast, the majority's impulse is not to impose majoritarian norms at the expense of individual rights, but rather to enhance the protection of individual rights by restricting the scope of majoritarian power. As the Supreme Court cases that I have discussed suggest, it is in this rights-enhancing context that arguments based on national societal values are likely to play a significant role in the interpretive process. See supra parts IV.B. & IV.C.

252. As a broadly worded statute, RFRA does not reflect a societal consensus about the appropriate resolution of particular claims of religious freedom. Rather, it reflects a societal consensus only at the level of general principle. Even so, to identify the general principle of RFRA is sufficient to identify a contemporary societal value that rejects the approach of Smith.

253. As Justice Harlan recognized, this is a critical distinction. Although he maintained that "a legislative announcement that Congress believes a state law [to be unconstitutional]" could not bind the Supreme Court, he also understood that "this kind of declaration is of course entitled to the most respectful consideration ..." Katzenbach v. Morgan, 384 U.S. 641, 669-70 (1966) (Harlan, J., dissenting).

254. See supra part III.
velop its constitutional doctrine under the Free Exercise Clause, the Establishment Clause, and related constitutional provisions. *Marbury v. Madison*\(^{255}\) is in no way threatened.

Although the Court remains free to act as it will, RFRA demonstrates that contemporary American values support the protection of religiously motivated conduct even from laws of general application. Coupled with other constitutional arguments, the Act therefore suggests that *Smith* should be overruled. Given the Court's own constitutional obligations, the Court might well ignore particular aspects of the statute. If the Court places a higher value than Congress on the importance of federalistic values, it might wish to reject the Act's stringent formulation of strict scrutiny and instead adopt a less demanding version of heightened review.\(^{256}\) For reasons of federalism as well as constitutional coherency, the Court likewise might not extend its heightened scrutiny to the free exercise claims of prisoners.\(^{257}\) No matter how the Supreme Court addresses the par-

\(^{255}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{256}\) If so, this might return the Court to the actual substance of pre-*Smith* doctrine, which appeared to embrace a relatively lenient version of strict scrutiny. See *supra* note 79 and accompanying text; see also McConnell, *supra* note 194, at 1127 (arguing that "the Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test," and that the Court's actual "more relaxed standard" was constitutionally correct).

\(^{257}\) Notably, the application of RFRA to prisoners' claims was contested in the Senate, which considered an amendment that would have removed such claims from the scope of the Act. Although the amendment was defeated, the debate was vigorous and the vote was reasonably close, 58-41, indicating that the congressional support for including prisoners' claims was not nearly as broad as the support for RFRA in general. See 139 CONG. REC. S14353-68 (daily ed. Oct. 26, 1993); id. at S14461-68 (daily ed. Oct. 27, 1993). Under the approach I have suggested, this lesser support for prisoners' claims is relevant to the Court's evaluation of contemporary values, for it suggests that such values do not so strongly support the protection of prisoners' claims.

The Senators who opposed the Act's inclusion of prisoners' claims, moreover, relied heavily on federalistic arguments. In stating his views as a member of the Senate Judiciary Committee, for example, Senator Simpson emphasized the burden that RFRA's application to prisons would impose upon the states:

> In conclusion, I remain troubled by the prospect of Congress forcing the states to commit even more of their law enforcement budgets to inmate litigation. The Federal Bureau of Prisons has slightly over 87,000 inmates in its care. The states, by contrast, are responsible for nearly 900,000 inmates. Should we pass [RFRA] unamended, the lion's share of the bill's burden will fall directly on the states. At the Committee hearings, there was not a single witness called to speak on the issue on behalf of the state Attorneys General or the correctional administrators.

*SENATE REPORT, supra* note 104, at 23-24 (additional views of Senator Simpson); see also, e.g., 139 CONG. REC. S14354-57 (daily ed. Oct. 26, 1993) (statement of Sen. Reid) (arguing that the application of the Act to prisons would impose financial and
ticular issues that Congress confronted in RFRA, however, the Court should not ignore the basic message of the Act: that Smith was wrong and that general laws should not be immune from serious judicial scrutiny under the Free Exercise Clause.\textsuperscript{258}

As the Supreme Court recently explained in Planned Parenthood \textit{v.} Casey, "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession . . . [that] embod[ies] ideas and aspirations that must survive more ages than one."\textsuperscript{259} As this language suggests, a proper interpretation of the Constitution must mediate past and present. The founding generation wrote the Free Exercise Clause, but our generation necessarily must decide its present-day meaning. In the Religious Freedom Restoration Act, Congress has expressed its understanding of the present-day meaning of the clause. To protect its constitutionally appointed role, the Supreme Court should rule that as applied to state and local governmental practices, the Act is unconstitutional and therefore not binding on the Court. At the same time, however, the Court's constitutional role requires its best judgment concerning the meaning of the Constitution, and, as I have indicated, contemporary societal values are relevant to this decision.\textsuperscript{260}

\textsuperscript{258} Other hardships on the states and noting that the proposed amendment excluding prisoners' claims was supported by "all 50 state prison directors," "a majority of the State attorneys general," and "many, many Governors"). In conducting its own constitutional evaluation, the Court might conclude that the congressional majority gave too little weight to these federalistic concerns.

\textsuperscript{259} As President Clinton stated when he signed RFRA into law: "What this law basically says is that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion. This judgment is shared by the people of the United States as well as by the Congress." Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377, 2378 (Nov. 16, 1993); cf. Frederick M. Gedicks, \textit{RFRA} and the Possibility of Justice, 56 MONT. L. REV. 95, 117 (1995) ("There is no formal apparatus that will require the Court to listen to what the country is telling it in RFRA, but having been sent, the message may be hard to ignore.").

\textsuperscript{260} In the exercise of its own interpretive decisionmaking, the Court conceivably might act not only to overrule Smith, but also to embrace substantive constitutional standards that are essentially the same as the statutory provisions of RFRA, including the Act's formulation of strict scrutiny and its treatment of prisoners' claims. If this were to occur, RFRA might be "constitutional" after all, but only in the sense that it would not conflict with the then-controlling constitutional doctrine of the Supreme Court. If my argument in this Article is sound, the Act still would be unconstitutional in the sense that it would not be legally binding on the Court, which would remain free to revise and develop its constitutional doctrine in ways that might conflict with the Act's provisions. More specifically, the Act would not preclude a future Supreme Court decision reverting to the doctrine of Smith.
RFRA forcefully testifies to a contemporary societal commitment to religious freedom, even in the context of laws of general application. Combined with other arguments, the enactment of RFRA therefore suggests that Smith's interpretation of the Free Exercise Clause was wrong. However ironic it may seem, then, it would be altogether fitting for the Supreme Court to rely upon RFRA as a reason for overruling Smith, even as it declares the Act unconstitutional.

261. In his contribution to this symposium, Professor Lupu addresses the issue of Congress' power to enact RFRA, and he echoes several of the concerns that I have discussed. See Lupu, A Lawyer's Guide, supra note 179, at 212-19. But Lupu contends that the Act could be construed narrowly in order to protect its constitutional validity, and therefore its quality as a legally binding statute. This narrowing construction apparently would extend to RFRA's application to federal laws and practices, even though the constitutional concerns about RFRA would not readily support a narrowing construction at that level. See id. at 219-25. Lupu further suggests that the Act might be treated as a quasi-constitutional enactment, and that it might ultimately be read to afford a more generous version of religious freedom. Id. at 224-25.

Contrary to Professor Lupu, I do not believe that the Act can or should be saved from constitutional invalidation in its application to state and local governmental practices. See supra part III. Further, I think it highly unlikely that saving the Act by a narrowing construction, as Lupu proposes, would serve to advance the development of meaningful religious freedom. A more promising path in this direction would begin with a Supreme Court decision invalidating RFRA in its state and local applications, but also overruling Smith. At the same time, RFRA might remain in full force at the federal level, potentially providing enhanced religious freedom in that context.