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RFRA, CONGRESS, AND THE RATCHET

Douglas Laycock

This essay makes four points in light of the other articles in this symposium. Parts I, II, and III recapitulate and clarify things I have said elsewhere about the need for the Religious Freedom Restoration Act \(^1\) and the meaning of that Act. \(^2\)

Part IV is new. It extends the argument for the Act’s constitutionality, responding to the claim that the Act is somehow inconsistent with the Supreme Court’s unique power to interpret the Constitution and define our liberties. I think that claim fundamentally misreads separation of powers and the Fourteenth Amendment; it anachronistically imposes on the founders a view of the Court that is a product of our time.

I. THE REASON FOR THE ACT

The debate over RFRA is not about something abstruse. If it sometimes seems abstruse, that is the fault of those who are debating. RFRA is about human liberty and the alleviation of human suffering. It is about people who are told to abandon the mode of worship that they have experienced all their lives, and that their faith group has experienced through generations. Abandon your mode of worship or go to jail.

That was the artificially posed issue in *Employment Division v. Smith*; \(^3\) as the Court treated that case, it was about the criminal prohibition of a worship service. That was the issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, \(^4\) which was in fact about the criminal prohibition of a worship service. That was the issue in an unreported case called

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\(^3\) 494 U.S. 872 (1990). In fact, no prosecution was pending or threatened; the plaintiffs had merely been denied unemployment compensation.

\(^4\) 113 S. Ct. 2217 (1993).
McClellan v. Zavaris. McClellan was an Episcopalian in the Colorado prison system on a work release program. On Sunday mornings, prison authorities let him out to go to Mass. But they said that if he took Communion at the Mass, he would be put back in the general prison population. And, in an indirect way, that was the issue in Cornerstone Bible Church v. City of Hastings. There was no direct criminal prohibition on worship in Cornerstone, but the zoning laws left no place in town where that congregation could worship. Cornerstone was told to abandon its worship or leave town.

RFRA is also about government agencies that seek to limit the scope of the religious mission to a non-believer's understanding of religion. Most agencies will let believers sing and pray and preach sermons, although in Cornerstone, even that was at issue. But believers who want to do more than sing and pray and preach sermons are subject to regulation, and may even need government permission in advance. Zoning boards in particular claim power to decide what is a religious function. Some zoning boards do not think that feeding or housing the homeless is a religious function. Some do not think that running a day care center is a religious function. Some do not think that processing amnesty applications for aliens is a religious function. Bureaucrats forbid believers to do these and other things in their churches.

And finally, RFRA is about occasional outbreaks of real persecution that are based on or implemented through statutes that are facially neutral and generally applicable within the meaning of Smith. The Mormon persecution in the nineteenth century—in which hundreds of church leaders were imprisoned, the Church lost its legal existence, its corporate charter was revoked, and all its property was forfeited to the government—grew out of persistent efforts to enforce a facially neutral

6. 948 F.2d 464 (8th Cir. 1991).
7. Current examples include Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994), appeal pending, and First Assembly of God v. Collier County, 20 F.3d 419, modified, 27 F.3d 526 (11th Cir. 1994), cert. denied, 63 U.S.L.W. 3502 (U.S. Jan. 9, 1995). Cf. Matthew 25:35, 40 ("For I was an hungered, and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in .... In as much as ye have done it unto one of the least of these my brethren, ye have done it unto me.").
8. See City of Richmond Heights v. Richmond Heights Presbyterian Church, 764 S.W.2d 647 (Mo. 1989).
9. This was the issue in an unreported zoning dispute in Dallas, Texas. Conversation with Robert D. Dennis, attorney for the affected church (November 1993).
law against polygamy.10 The efforts to suppress Jehovah's Witness proselytizing in small towns all over America in the 1930s and 1940s were mostly based on facially neutral ordinances taxing or regulating solicitation.11 The Ku Klux Klan used a facially neutral statute in its attempt to shut down all the Catholic schools in Oregon.12 The current attempts by the Cult Awareness Network and others to suppress the Hare Krishnas, the Scientologists, the Unification Church, and other such groups are based on general principles of tort law—principles that at least the plaintiffs claim are facially neutral and generally applicable.13 If you want to think about bitter contemporary conflicts that pose the risk of future waves of persecutions if either side persuades a large majority that it is entirely right, consider the growing conflict between gay rights groups and conservative religious traditions.

Exemptions make it possible to compromise conflicts like these. Without the possibility of exemptions, then either you can not have a gay rights law, or the gay rights law has to apply to the appointment of the Catholic clergy and to everything else that goes on within conscientiously objecting churches. Exemptions make possible a world in which the gay citizens of America can live their life, and in which those who have conscientious objections to gay sex can have a private enclave in which they can live their faith and do not have to fully conform to the rules that have freed gays from discrimination in secular society.

Now, it is true that the Supreme Court did not announce an explicit constitutional right to such exemptions until 1963,14 but that does not mean that there was steady regulation of acts based on religious faith before 1963. In fact the issue rarely arose. In an era of much smaller government, much less regulation, and much greater willingness to defer to religious traditions, there was not much square conflict between government regulation and the consciences of various religious groups. All of that has changed. Regulation is much more pervasive, and regulators are much less willing to defer to religious claims.

11. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("The fact that the ordinance is 'nondiscriminatory' is immaterial.").
Therefore, RFRA is an important statute. It is not a technical statute or a minor adjustment to arcane constitutional doctrine. The central argument for the Act is that exemptions increase the scope of human liberty for believers and non-believers alike.

II. THE MEANING OF THE ACT: COMPELLING INTEREST

What does RFRA restore? Ira Lupu lays out the chronology of the law with respect to religious liberty and especially with respect to the compelling interest test. To what point in that chronology has the statute restored us?

A. Balancing at the Margin

One issue is squarely addressed in the statutory text: Must the government have a compelling interest in its program or a compelling interest in refusing exemption? As Professor Lupu puts it, do you balance at the margin or do you balance in gross? The Act is clear that you balance at the margin: "[The application of the burden to the person] must serve a compelling government interest by the least restrictive means."

I agree that the number of potential claims is relevant to assessing the government's interest; it matters if we know that many claims are likely. Because the government must give equal treatment to similarly situated conscientious objectors, an exemption for one objector entails an exemption for all others who hold the same belief. Arbitrarily exempting some and prosecuting others similarly situated is not a less restrictive means of exempting some. So if the government has a compelling interest in denying exemption to the whole group of similarly situated objectors, it also has a compelling interest in denying exemption to each one of them.

William Marshall is therefore mistaken when he argues that the government's interest is underweighted by balancing at the margin. The government's interest is weighted exactly right—all the objectors who would likely claim exemptions count toward the government's interest, but the government's interest

16. Id. at 194.
in regulating others who do not object and who will be regulated in any event does not count as part of its interest in denying exemption to those whose religious exercise would be burdened. I would emphasize that only the number of reasonably anticipated claims is relevant, not speculation about what might be or could be or what if everybody converted to these religions.

Because the number of likely claims matters, it also matters if religious belief aligns with self interest. Cases like conscientious objection to paying taxes or serving in the military are special, because self interest creates incentives to large numbers of claims. Because tax cases are special for good reason, it is not clear to me that United States v. Lee marked any change in the general standard, although distinguished commentators so read it. Lee was a tax case, and it was reasonable for the Court to anticipate that if conscientious objection to taxes excused payment, millions of true and false claims would ensue. The general interest in collecting taxes thus tended to merge with the usually narrower interest in denying exemptions to objectors. The Court might have created a special exception for social security taxes, which are tied to identifiable benefits that can be forfeited as a condition of the tax exemption; but it chose not to take that route. Viewed as a general tax case, Lee seems to me consistent with balancing at the margin. But whatever Lee may have done to the constitutional standard, RFRA now requires balancing at the margin.

B. Identifying Compelling Interests

Apart from this issue of balancing at the margin or balancing in gross, it is my view that the Supreme Court did not water down the compelling interest test in the 1980s. It is true that the lower courts have watered it down. There are lower court compelling interest cases that say almost anything you can imagine. But the Supreme Court’s technique was not to water down the compelling interest test; it was to refuse to apply it. In case after case, the Court carved out exceptions in which no compelling interest was required, until finally in Smith it said that no compelling interest is ever required unless the claimant shows discrimination. I have reviewed these cases elsewhere, and I will

21. See Laycock & Thomas, supra note 2, at 222-28. Justice O'Connor's concur-
not do it case by case here. But I think that incorporation of the Supreme Court's compelling interest standard, with the clarification that it is the application of the burden to the person that must serve a compelling interest, greatly reduces the significance of the question whether we restore the compelling interest test to 1972 or to 1990.

To the extent that it remains an issue which cases were restored, I think purposes do trump findings. The stated congres-sional purpose of RFRA is to restore the test set forth in Sherbert v. Verner\(^{22}\) and Wisconsin v. Yoder.\(^{23}\) The minority report in the House Committee says that the Committee did not restore the law to the high water mark, but only to all previous federal cases.\(^{24}\) That is the minority report; the minority could not get that language into the majority report. Moreover, that report is describing a stage at which Sherbert and Yoder had dropped out of both the purpose clause and the findings clause, and the minority bases its claim only on the purpose clause. But the majority later restored Sherbert and Yoder to the statement of purpose. Consequently, I think that the statutory standard is the standard of Sherbert and Yoder, and that that is also the standard of the Supreme Court cases that actually apply the compelling interest test.

III. THE MEANING OF THE ACT: SUBSTANTIAL BURDEN

What counts as a burden on religion? The statutory text does not say much about that question, but the legislative history is reasonably clear on two points.

First, there was much debate about the level of religious motivation required to raise an issue under the RFRA. Professor Lupu says that in the burden cases under the Constitution, there was no clear standard, but that the courts were drifting towards requiring a square conflict between religious obligation and government obligation—that nonobligatory religious practices might not be protected.\(^{25}\) This issue was the subject of much debate in the legislative history of RFRA, and both the opponents and

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ring opinion in Smith would have dramatically watered down the compelling interest test. But that opinion attracted only her own vote. Smith, 494 U.S. at 903-07.


25. Lupu, supra note 15.
proponents of the original bill agreed that the standard is simply that religion be the principal motivation for the conduct. 26 This issue was principally argued out in the context of abortion.

The legislative history is clear that the conduct does not have to be compelled by religion. Stephen Solarz, the chief sponsor, offered examples of practices that all congressmen thought were religious even though these practices were not compelled by religion; I offered some additional examples. Prayer was the most obvious example. There is actually a Second Circuit case that says Muslim prayer is protected by the Free Exercise Clause because it is compelled at a specific time, but Christian prayer is not protected because Christians can pray any time they want, so no particular prayer is ever compelled. 27 Congress rejected the view that only religious compulsion is protected. In committee hearings, lobbyists offered amendments to change to a compulsion standard, but those amendments went nowhere.

There was also concern that "motivated" would slip into "religion had something to do with it." A claimant might say merely that exemption from a law is consistent with her religion, or that her religion does not forbid an abortion so her abortion is religiously motivated. Congress rejected that extreme as well. What comes through in the legislative history is that compulsion is not required and motivation is sufficient, but religion has to be the dominant or the principal motivation.

Second, the Act protects institutional free exercise. Laws that burden what the church as a body tries to do in carrying out its mission are burdens on religion within the meaning of RFRA. Institutional free exercise was not so clearly or explicitly debated; the principal evidence of it is the examples that congressmen and senators repeatedly used as horror stories that had to be fixed. They repeatedly used Cornerstone Bible Church, which was simply a zoning case. A city burdens religion when it says, "You can't locate your church here." Another example was a case in which the Boston Landmark Commission told the Jesuits they could not rearrange the altar in their chapel, because the altar was architecturally important to the building and architecture was more important than liturgy. 28 The Landmark Commission

26. See Laycock & Thomas, supra note 2, at 231-34.
27. Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980).
argued that there was no burden on religion because the Jesuits were not religiously compelled to have the altar in any particular place. They could move it and still worship at it. Representative Solarz, the lead sponsor, treated that as one of the bad examples to be fixed. Another case cited in the committee report is the St. Bart's case, where landmarking the exterior of a church seriously burdened the church. 29

What emerges from these examples is that religious exercise is substantially burdened if religious institutions or religiously motivated conduct is burdened, penalized, or discouraged. With respect to institutions, the principal motivation test applies to the institution as a whole. 30

IV. CONSTITUTIONALITY

Congress has the power to enact RFRA under Section 5 of the Fourteenth Amendment. Repeated majorities of the Supreme Court have acknowledged congressional power to go beyond judicial interpretation of the Reconstruction Amendments. 31 Much of the law of private racial discrimination depends on Congress' analogous powers under Section 2 of the Thirteenth Amendment. 32 The most familiar and most directly analogous exercises of this power are the various Voting Rights Acts, 33 in which Congress has forbidden practices with disparate impact on minority voters—practices that the Supreme Court had expressly upheld. 34

30. See Laycock & Thomas, supra note 2, at 234-36.
31. See, e.g., Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563-66 (1990) (holding that Section 5 authorizes Congress to mandate affirmative action programs that would be unconstitutional if mandated by states); id. at 605-08 (O'Connor, J., dissenting) (acknowledging Section 5 power, but finding it irrelevant to federal agencies). For more detailed analyses of the cases interpreting congressional power to enforce the Reconstruction Amendments, see Laycock, supra note 2, at 245-54; Rex E. Lee, The Religious Freedom Restoration Act: Legislative Choice and Judicial Review, 1993 B.Y.U. L. REV. 73, 90-95; Matt Pawa, 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 (1993).
The structure of RFRA is entirely parallel to the structure of the Voting Rights Acts. In each context, the Supreme Court requires plaintiffs to prove facial discrimination or actual discriminatory motive to show a constitutional violation. And in each context, Congress created a statutory right in which plaintiffs show a significant burden on their voting rights, but no bad motive and no facial discrimination, and this shifts the burden of justification back to the government. If Congress has power to dispense with proof of bad motive or facial discrimination in voting cases, I think it has power to do so in religion cases.

Despite these precedents, several of the contributors to this symposium find federalism and separation of powers problems with RFRA. In different formulations, they say that the Act cannot be justified under the remedial interpretation of Section 5, because it is not a prophylactic rule to improve enforcement of the Free Exercise Clause as the Supreme Court interprets it. Nor can it be justified under the substantive interpretation of Section 5, because that interpretation is wrong. They say that Congress cannot enforce its own understanding of the Free Exercise Clause because that would interfere with the Supreme Court's role as authoritative interpreter of the Constitution.

My own view is that RFRA can be justified under either the substantive or the remedial interpretation of Section 5, and indeed, that the distinction between these two theories has been overstated. But I particularly wish to address the attack on the existence of the substantive theory.

A. The Substantive Theory of Section 5

RFRA is based on the substantive theory in that Congress says that the definition of free exercise in Employment Division v. Smith is wrong and that RFRA protects a broader definition of

61-65 (1980) (upholding multi-member districts under the Constitution in absence of showing that districts were created for discriminatory purposes); compare Katzenbach v. Morgan, 384 U.S. 641, 649-58 (1966) (enforcing Voting Rights Act ban on literacy tests for voting) with Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-54 (1959) (upholding literacy tests for voting under the Constitution in absence of showing that tests were deliberately used to discriminate).

free exercise. The substantive theory is said to be unconstitutional because it violates the Supreme Court's role as exclusive interpreter of the Constitution.

The Supreme Court's interpretive role includes multiple functions that apply in many contexts; I wish to begin by making some distinctions. "It is emphatically the province and duty of the judicial department to say what the law is;"

in case of square conflict, the Supreme Court is the ultimate interpreter of the Constitution. I do not think that the Supreme Court is the exclusive interpreter of the Constitution, but that claim depends on definitional disputes about the meaning of interpretation, and it is not essential to my argument. What is necessary and sufficient to my argument is a less ambiguous formulation: the Court does not have exclusive power to protect our liberties or define their scope. In the absence of a court order or opinion expressly constraining the behavior of the other branches, they can act on their own view of liberty or the Constitution, and it matters little whether we think of such action as constitutional interpretation or as something else.

The claim that the judiciary is the exclusive or even dominant protector of our liberties is a very recent and mistaken idea, one that has arisen principally in the civil liberties community in the last generation. This view of constitutional structure comes from the experience of Brown v. Board of Education and the moral authority of that decision. It comes from the experience of defending the Court against attacks on its legitimacy, and from the debate over Brown and the debate over Roe v. Wade, from the debate over the legacy of the Warren Court.

Perhaps more than anything, it comes from Cooper v. Aaron. Cooper was the Little Rock school desegregation case, in which the State of Arkansas attempted to interpose its sovereign authority between the people and the Supreme Court's allegedly unconstitutional decision in Brown v. Board of Education. The state said that Brown could not be enforced in Arkansas; the school board said that at least it could not be enforced until the threat of mob violence subsided. The Court rejected these arguments in an opinion signed by all nine Justices. The Court said that "the federal judiciary is supreme in the exposition of the law

of the Constitution." Quoting United States v. Peters, a very early but little known case, the Court said that if state legislatures could "annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery," The President sent federal troops to Little Rock to get a handful of black students into Central High School, ensuring that Cooper would not be soon forgotten.

Cooper and Peters are right on their facts. Judgments must be obeyed or constitutional rights become merely precatory. When the Supreme Court enforces a right that it finds in the Constitution, the states and the other branches must obey. In that context, the states and the other branches must comply with the Court's interpretation of the Constitution.

But the issue presented by RFRA is quite different from the issue in Cooper and Peters. Here the question is whether the powers of the other branches are limited by the Court's interpretation when the Court finds no constitutional right and issues no order against the other branches. Can the other branches then protect liberty on their own?

It seems to me clear that they can. This is the Supreme Court's ratchet theory in Katzenbach v. Morgan. Katzenbach says that Congress cannot in any way reduce the protection for civil liberties that is provided by the Court, but Congress can increase the protection provided by the Court. The Court again applied the ratchet theory in Mississippi University for Women v. Hogan, holding that although Congress has "broad power indeed" to enforce the Fourteenth Amendment, it has no power to authorize sex discrimination in single-sex universities. The Section 5 power goes in only one direction; Congress can add protection, but it can never take away protection. I think that a substantive understanding of the ratchet theory is squarely based in the historical context of the Fourteenth Amendment and separation of powers.

First consider the federal government, where the issues are much easier. Congress may legislate or refuse to legislate on grounds of its view of liberty or its view of the Constitution. For example, the Court may say that Congress has the power to ban

41. *Id.* at 18.
42. 9 U.S. (5 Cranch) 115 (1809).
44. 384 U.S. 641, 651 n.10 (1966).
obscene books from interstate commerce. Congress does not have to exercise that power; it can choose not to ban obscene books. Congress may think that banning books would be bad policy, or that it would unnecessarily restrict liberty, or that it would be unconstitutional. Congress may reject a book-banning bill based on its own judgment of the constitutional question presented, even if it knows the Supreme Court would uphold the bill if it were passed. Indeed, some commentators insist that a conscientious legislator must make an independent judgment about constitutional questions. 46

Similarly, the President may use his veto power and his executive order power on the basis of his judgment about what the Constitution requires. Thus, the President might veto a book-banning bill on the ground that he thinks it is unconstitutional. Presidents Madison and Jackson issued famous vetoes based on constitutional grounds; 47 Ronald Reagan vetoed a legislative re-enactment of the FCC's Fairness Doctrine on constitutional grounds. 48 President Truman integrated the military by executive order. 49 President Clinton tried to protect gays in the military by executive order, and wound up with “Don't ask, don't tell.” 50 Clinton was forced to this political compromise because Congress had countervailing power, 51 not because he was somehow violating the Supreme Court's constitutional judgment in Bowers v. Hardwick. 52

Holding Joanne Brant's claim of judicial incompetence for a moment, 53 there is just no separation of powers issue here. Congress can restrain the federal agencies if it wants, and that is what it has done.

46. See, e.g., Sanford Levinson, What Do Lawyers Know (and What Do They Do With Their Knowledge)? Comments on Schauer and Moore, 58 S. CAL. L. REV. 441, 453-54 (1985).
47. Veto Message (Feb. 21, 1811), 1 MESSAGES & PAPERS OF THE PRESIDENTS 489-90 (J. Richardson ed. 1897) (Madison's veto); Veto Message (July 10, 1832), 2 id. at 576-91 (Jackson's veto).
51. See U.S. CONST. art. I, § 8, cl. 14 (“The Congress shall have power ... To make Rules for the Government and Regulation of the land and naval Forces”).
52. 478 U.S. 186 (1986) (holding that homosexual sodomy is not within constitutional right to privacy).
53. Brant, supra note 35.
The only real issue about the validity of RFRA is a federalism issue. The federalism issue is whether Congress can restrain the states more than the Supreme Court says the states should be restrained. Federalism in the protection of liberty was what the Civil War and the Fourteenth Amendment were all about. And with respect to that period, our modern view of the Court as the dominant or sole protector of liberty and interpreter of the Constitution is wildly anachronistic. Congress in 1866 did not view the Supreme Court as a reliable protector of liberty. The paradigm cases of what the Supreme Court does in our time are *Brown v. Board* and *Roe v. Wade*. But the paradigm case in 1866 was *Dred Scott v. Sandford*.\(^{54}\)

We all know that *Dred Scott* somehow upheld slavery, but let me remind you of some of its more specific holdings. *Dred Scott* held that congressional power to regulate the territories did not apply to territories acquired after 1787,\(^{55}\) and that Congress was wholly without power to stop the spread of human slavery throughout the West.\(^{56}\) *Dred Scott* held that the right to buy, own, and sell another human being was a fundamental right of property and that Congress had no power to interfere.\(^{57}\) *Dred Scott* held that the right to carry that human being across state lines and into new territories, and there to create new state governments that would forever protect one's right to buy, own, and sell him, was part of the fundamental right with which Congress had no power to interfere.\(^{58}\) *Dred Scott* held that a black person could not be a citizen of the United States,\(^{59}\) and that he "had no rights which the white man was bound to respect."\(^{60}\) The plain implication was that Congress had no power to do anything about that either. *Dred Scott* invalidated the Missouri Compromise,\(^{61}\) and thus deprived Congress of any effective power to compromise the great issue that divided the nation and threatened civil war. Thus, *Dred Scott* was one of the proximate causes of a war in which 600,000 Americans died for their conflicting views of federalism and human liberty.

Congress proposed the Reconstruction Amendments and

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54. 60 U.S. (19 How.) 393 (1857).
55. *Id.* at 432-46.
56. *Id.* at 446-52.
57. *Id.*
58. *Id.*
59. *Id.* at 403-27.
60. *Id.* at 407.
61. *Id.* at 452.
coerced their ratification to secure the fruits of victory, or as Lincoln said at Gettysburg, "To the end that these honored dead shall not have died in vain." Taking no chances, Congress denied the seceded states representation in Congress until the Fourteenth Amendment was ratified.\(^{62}\) I do not believe that the Congress that lived through \textit{Dred Scott} and the War, and that used such extraordinary means to get the amendment ratified, would rely solely on the Court that decided \textit{Dred Scott} for the amendment's efficacy. To put it the other way, I do not believe that that Congress would give that Court a wholly unreviewable power to refuse to enforce the amendment or to interpret it into meaninglessness. In that historical context, it would make no sense for Congress to have intended that if the Supreme Court interpreted the majestic generalities of the Reconstruction Amendments in a narrow and hostile way that failed to accomplish their purpose, then the Congress would have no power to give more specific instructions, no power to attempt to say, "That is not what we meant; here is what you have to do to protect human liberty."

But the absence of any such power to give more specific instructions is the central premise of the argument that RFRA goes beyond Section 5. The argument is that once the Supreme Court says the amendment is to be interpreted in a minimalist way that provides very little protection, that is the end of federal power—that the other two branches are confined to the same minimalist interpretation in the exercise of their independent powers. If the Court says there is no protection for free exercise, there is nothing that any other branch can do about it. If the Court were to say that the Thirteenth Amendment does not reach debt peonage, let alone private discrimination in employment contracts, there would be nothing any other branch could do about it. Indeed, if the Court were to obliterate the entire text of the three Reconstruction Amendments as effectively as it obliterated the Privileges or Immunities Clause,\(^{63}\) Congress could do nothing about it. The Congress that had experienced \textit{Dred Scott} would have been very foolish to have intended that. \textit{Dred Scott} and the reaction to \textit{Dred Scott} are not the only


\(^{63}\) \textit{See} The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 73-80 (1873) (holding that the clause protects only those rights that were already protected before its adoption).
evidence of how Congress viewed the Supreme Court in that period. We also know that Congress repealed the Court's jurisdiction to review a constitutional challenge to Reconstruction. 64 Reconstruction was undoubtedly the most important federal program of the time, a congressional and military effort to protect the liberties of the freedmen. Congress did not trust the Supreme Court to pass on Reconstruction, for fear the Supreme Court might give the wrong answer.

We also know that Congress in that period added an extra Justice to the Court, expanding the Court to ten to give Lincoln an extra vote when he needed it. 65 We know that Congress then reduced the number of Justices to seven to make sure Andrew Johnson got no appointments, 66 and then expanded it back to nine to let Ulysses S. Grant fill the seats. 67 These were Congresses acutely aware of the risk that a president might be hostile to the congressional conception of human liberty, and that he might appoint Justices who were hostile to that conception and who would defeat the purposes of legislation and amendments designed to protect liberty. It is hard to imagine that a Congress with such views would leave itself without power to protect human liberty when the Court refused to do so.

Of course these same Congresses continued and expanded on the founders' practice of looking to an independent judiciary as one key protector of our liberties. 68 Congressional legislation in this period included creation of a federal cause of action for all violations of federal law under color of state law, 69 and four great grants of federal jurisdiction: original civil rights jurisdiction, 70 civil rights removal jurisdiction, 71 modern habeas corpus

64. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (upholding repeal of jurisdiction).
66. An Act to Fix the Number of Judges of the Supreme Court of the United States, and to Change Certain Judicial Circuits, ch. 210, 14 Stat. 209 (1866).
68. See, e.g., THE FEDERALIST No. 78 at 469 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("courts of justice are to be considered as bulwarks of a limited Constitution"); 1 ANNALS OF CONG. 457 (Joseph Gales ed. 1834) (remarks of James Madison, June 8, 1789) ("independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the legislative or executive").
71. An Act to Protect All Persons in the United States in Their Civil Rights,
jurisdiction,72 and finally, general federal question jurisdiction.73 These additions to judicial authority have been far more important in the long run than the jurisdictional exception for Reconstruction and the manipulation of the number of the justices. But they are not at odds with my thesis.

A unifying principle underlies both Section 5 and the grants of federal jurisdiction. The principle was to multiply the institutions capable of protecting federal rights because it was not safe to rely exclusively on any single institution. Congress certainly did not trust the state courts of the time to enforce federal rights, and it expected the federal courts to do better. But it left the state courts open to federal claims; plaintiffs were given an option of either state or federal court, and in our time some civil liberties litigants have come to prefer state courts and state constitutions to the federal judiciary. Similarly, the federal courts were charged with interpreting and enforcing the new constitutional rights, but the amendments also conferred on Congress alternate powers of enforcement: "They preferred to allow both Congress and the federal courts maximum flexibility in implementing the Amendment's provisions and combating the multitude of injustices that confronted blacks in many parts of the South."74

I have been discussing the historical context of the amendment; what about the constitutional text? The Thirteenth Amendment abolishes slavery both in the states and in the territories, and thus overrules the most obvious evil in Dred Scott.75 The Citizenship Clause of the Fourteenth Amendment expressly overrules the citizenship holding in Dred Scott.76 And the final section of each amendment corrects Dred Scott's holdings about

74. ERIC FONER, RECONSTRUCTION 258 (1988).
75. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.").
76. Id. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

https://scholarship.law.umt.edu/mlr/vol56/iss1/7
congressional power. *Dred Scott* rested in part on lack of congressional power to protect human liberty; the enforcement sections of the three amendments supplied that power.\textsuperscript{77}

Indeed, early drafts of the Fourteenth Amendment were merely a grant of power to Congress;\textsuperscript{78} judicially enforceable substantive provisions were added later. Substantive constitutional provisions were necessary to avoid the risk that a subsequent Congress controlled by readmitted Southerners and Northern Democrats would repeal enforcement legislation. But many participants in the debate seem to have assumed that the congressional role would be dominant and that the judicial role would be much more modest.\textsuperscript{79} History has not worked out that way; the judicial role has been quite large and generally quite beneficial. The judicial role has been so large that we in our time have come to think of the judiciary as the principal (or the only) protector of our liberties. But that was not how Congress thought of it in 1866.

So far as I am aware, the notoriously vague legislative history of the Fourteenth Amendment contains no clear statement either affirming or rejecting the ratchet theory. My argument is as much structural as intentionalist; multiple levels and branches of government authorized to protect liberty is of the essence of our form of government, and the ratchet theory is a specific case of that structure.

The intention that I impute to the framers of the Fourteenth Amendment is consistent with the assumptions about congressional power reflected in the debates, but mostly it is inferred from historical context and from the problem Congress was attempting to solve. The question debated in this symposium was not squarely posed to the leaders of the Thirty-Ninth Congress, but suppose it had been. "Senator, what if the Supreme Court interprets Section 1 in a way that nullifies the amendment or minimizes its effect. Is it your intention that as a direct consequence,
Congressional power under Section 5 be similarly nullified or minimized? I have no doubt what the answer would have been. In the wake of Dred Scott, in the midst of deep conflict over constitutional principles between Congress and the President (who, of course, appoints Supreme Court justices), and against the background of debates over the limits of congressional power, Congress could not have intended exclusive reliance on the judiciary. Congress therefore must have assumed a substantive interpretation of Section 5.

This inferred congressional understanding fits squarely with the theory of separation of powers adopted by the first generation of founders. We have separation of powers because no human being can be trusted with all the powers of government.80 We have separation of powers so that if one branch tries to abuse our liberties, there are two other branches that might step in to do something about it.81 Separation of powers makes it difficult to sustain a campaign of repressing liberty unless all three branches at least acquiesce. So when the Court fails to protect our liberties, it is perfectly consistent with the original theory of separation of powers that Congress can step in. It is not inconsistent; it is not odd; it is not an anomaly; it is why powers are separated. The ratchet theory is a simple function of the Constitution's bias in favor of protecting liberty against the abuses of government.

At times in the past—Reconstruction and the Civil War being the most dramatic examples—the Executive and the Congress were the active, aggressive, and dominant protectors of liberty, and the Court was dragging its feet. At other times, it has been Congress or the Executive that was hostile to liberty, and the Court that was doing something about it. Both patterns are right. Both patterns are how separation of powers is supposed to work.82

The ratchet theory breaks down when constitutional rights

80. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If angels were to govern men, neither external nor internal controls on government would be necessary.").

81. See id. at 321-22 (separation of powers is “essential to the preservation of liberty,” and it is necessary to give “those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others”).

82. I did not come to these views only out of a desire to rationalize RFRA. For a pre-RFRA formulation, see Douglas Laycock, Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights, 99 YALE L.J. 1711, 1728-29 (1990).
conflict. Congress has power to expand the Court's definition of constitutional rights into what the Court says is the discretionary authority of the states, but Congress does not have power to expand one constitutional right into space that the Court says is protected by a different constitutional right. For example, if the Court says that affirmative action violates a white worker's right to equal protection of the laws, then Congress cannot require affirmative action as a means of enforcing the equal protection of the laws. Such a law would be unconstitutional, not because it attempted to ratchet up protection for minorities, but because it violated the judicially determined rights of non-minorities. Similarly, so long as the Court adheres to Roe v. Wade, Congress does not have Section 5 power to declare that fetuses are persons entitled to due process protection for their lives—not because Congress lacks power to protect fetuses as such, but because it lacks power to violate the judicially-determined rights of mothers.

In Dred Scott itself, a Section 5 power would have solved only part of the problem. The Court said Congress lacked power to regulate in the territories, even to protect liberty; Section 5 fixed that. But the Court also found a countervailing constitutional right to own slaves and carry them into the territories; Section 5 would not have fixed that. Eliminating the substantive constitutional rights of slave owners required a substantive constitutional amendment.

If the Court were willing to say that RFRA violates the Establishment Clause in some of its applications, then those applications would be unconstitutional and Congress would be bound by the Court's judgment. Whenever the Court is willing to find a violation of a countervailing constitutional right, the Court wins. That is a necessary corollary of judicial review. The ratchet theory works only when the Court says the Constitution does not control the action of the other branches or the states. But that is a large portion of all the cases. More often than not, those who oppose the constitutional rights of others have only a political or statutory argument, not a constitutional claim of their own.

What I have proposed is not a sweeping addition to congressional power. It is limited by the Court's power to enforce coun-

84. 410 U.S. 113 (1973).
tervailing constitutional rights. It is effectively limited to rules that Congress is willing to impose on itself, because if Congress violates the rule it enacts for the states, that is almost conclusive evidence that Congress does not really think its enacted rule is constitutionally required.85

As a practical matter, the Section 5 power is necessary only to protect liberties that do not affect interstate commerce even under modern interpretations. Most obviously, Section 5 is not needed to protect property rights or economic liberties; the commerce power is entirely adequate to support any views that Congress might adopt on those issues. Much speech and religion affects commerce. Every abortion affects the supply and demand for medical services and supplies—at least as much as feeding hogs affects the supply and demand for wheat—86—and local restrictions on abortion cause women to travel interstate to obtain abortions. Distinguished scholars have thus argued,87 the Senate Judiciary Committee has found,88 and the Bush Justice Department89 reluctantly conceded, that the commerce power authorizes Congress to legislate on the right to abortion. It is a modest but important addition to say that Congress can protect liberty even when doing so does not affect commerce, and that Congress need not pretend to be concerned about commerce when it is really concerned about human liberty.

The ratchet theory comes from Katzenbach v. Morgan,90 and the substantive theory of Section 5 is conventionally attributed to what is said to be an alternative holding in that case.91 As I explain below, I think this may be too narrow a reading of Katzenbach. But in any event clear it is that Katzenbach is not the sole authority for the substantive theory.

The most unambiguous statement of substantive congressional authority is in the holding in Jones v. Alfred H. Mayer Co.:92

91. Id. at 652-53.
"Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."\textsuperscript{93} A large body of discrimination law under 42 U.S.C. §§ 1981, 1981(b) and 1982 is based on this power. And there is no reason to believe that congressional power to enforce the Thirteenth Amendment is different in kind from congressional power to enforce the Fourteenth—that one is substantive and the other merely remedial. Indeed, the Court has always cited the enforcement provisions interchangeably.\textsuperscript{94}

The substantive theory of Section 5 is settled in the Supreme Court's cases. It is an integral part of our constitutional structure, rooted in the historical context of the Fourteenth Amendment. It is an ample basis for RFRA.

B. The Remedial Theory of Section 5

RFRA is also based on the remedial theory of Section 5. The word "remedial" suggests that Congress must accept the Supreme Court's definition of a violation, but that Congress can provide additional remedies for such violations. But it is settled that these additional "remedies" can consist of redefining the substantive violation. Thus, in the case that gave rise to this distinction, Congress barred English-language literacy tests for voters educated in Puerto Rico.\textsuperscript{95} Congress did not provide additional remedies that would be available only after plaintiffs had proved a violation under the Supreme Court's definition. Rather, the Court suggested that Congress might make its own judgment that the state retained its English literacy requirement for discriminatory reasons.\textsuperscript{96}

In the same paragraph, the Court also suggested that "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."\textsuperscript{97} Or Congress might have decided that "as a means

\textsuperscript{93.} Id. at 440.  
\textsuperscript{94.} See Fullilove v. Klutznick, 448 U.S. 448, 477 (1980) (plurality opinion); id. at 500 (Powell, J., concurring); City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting).  
\textsuperscript{95.} Katzenbach v. Morgan, 384 U.S. 641 (1966).  
\textsuperscript{96.} Id. at 654.  
\textsuperscript{97.} Id.
of furthering the intelligent exercise of the franchise,” Spanish literacy would be “as effective” as English literacy.\(^98\)

The Court did not use the word remedial; subsequent commentators have called this paragraph the “remedial” theory. But as a teacher of Remedies, I frankly do not understand what is remedial about these rationales, or how they are different from Congress deciding that the free exercise of religion is also a right “so precious and fundamental in our society” that it should not be forfeited as a mere means to a legislative end unless the end be compelling and no less restrictive means be available.

But assume that “remedial” means that the defense of RFRA must assume the correctness of the Supreme Court’s narrow definition of a free exercise violation. RFRA dispenses with proof of motive, and thus provides remedies for hard-to-prove violations of that right, just as the Voting Rights Acts dispense with proof of motive and thus provide remedies for hard-to-prove violations of voting rights.

Many facially neutral, generally applicable laws are in fact based on hostility to a particular religion or to religion in general. By no means do all the cases have facts that suggest bad motive, but many do. Congress was told about this problem, and examples were offered. Congress found in the committee reports that neutral laws have been used to suppress religion,\(^99\) that litigating motive is not a reliable way to protect religious liberty,\(^100\) and that therefore we need RFRA.

At this symposium, one oral response to congressional findings on the remedial theory was that the findings were not plausible. But with respect to some cases, the evidence of bad motive is overwhelming; the examples emphasized to Congress were the persecutions of Mormons and Jehovah’s Witnesses and the Klan-led effort to close Catholic schools in Oregon.\(^101\) There is nothing implausible about the claim of bad motive in these violations. To say that the congressional findings are implausible can only mean that the percentage of RFRA violations resulting from religious hostility seems smaller than the percentage of Voting

\(^{98}\) Id. at 654-55.


\(^{100}\) House Report, supra note 24, at 6.

Rights Act violations resulting from racial hostility. And that claim can only be a guess.

Even if the guess were true, so what? If Congress has power to legislate a prophylactic rule to deal with unproven cases of deliberately imposed burdens on religion, then it is surely a question for congressional judgment to balance the costs and benefits of such a prophylactic rule. Congress need not find that ninety, fifty, or ten percent of the cases involve violations under the Supreme Court's definition. Even under a purely remedial theory, Congress need find only that there are enough such violations to justify congressional action.

I also doubt the empirical hunch that bad motive is more common in the voting rights cases. Bad motive was very widespread in the first generation of voting rights cases, which largely ended deliberate exclusion of black voters. But contemporary voting rights cases typically involve claims that district boundaries could have been drawn in a way that would have produced more minority controlled districts. There are all sorts of good and bad reasons for drawing district boundaries; only by subordinating all other considerations to minority representation will mapmakers consistently maximize the number of minority-controlled districts. Actual hostility to minority voters is a continuing problem, but I doubt that it affects more cases than actual hostility to unusual or outspoken religions.

Because RFRA will remedy many cases of deliberate but hard-to-prove burdens on religion, it is amply supported by the remedial theory of Section 5. Either the remedial or the substantive theory is independently sufficient.

C. The Claim of Institutional Incompetence

Most of what I said about the substantive theory of Section 5 is equally applicable to Joanne Brant's theory of self-declared judicial incompetence. It matters little whether the Court withholds enforcement because it does not like a clause or because it doubts its competence to enforce the clause. If the Court refuses to enforce the Fourteenth Amendment for whatever reason, Congress is empowered to act.

103. Brant, supra note 35.
In fact, the Court offered both kinds of reasons in *Smith*. Justice Scalia first made clear that he does not like the right to free exercise exemptions.\textsuperscript{104} Then he said that the Court is incompetent to limit such a right to manageable bounds.\textsuperscript{105} Cause and effect are circular here; his conception of the judicial role contributed to his hostility to the claimed right, and his hostility to the claimed right contributed to his exaggeration of the difficulties of judicial administration. The two themes came together in his conclusion: To "place at a relative disadvantage those religious practices that are not widely engaged in"—e.g., to criminally prohibit the sacraments of minority faiths—"must be preferred to a system . . . in which judges weigh the social importance of all laws against the centrality of all religious beliefs."\textsuperscript{106}

The institutional competence holding is so implausible that it cannot be understood apart from hostility to the claim of substantive right. The institutional competence of the federal judiciary is defined by Article III of the Constitution. It is to decide cases and controversies that arise under the laws of the United States. Congress writes the laws of the United States. Cases or controversies will arise under RFRA, and by definition the Court is competent to decide them. Congressional powers to legislate are not limited to only those statutes that will give rise to easy questions that the Court feels comfortable deciding. The Supreme Court is not Bartleby; when Congress legislates new rights, the Court cannot just say it "would prefer not to."\textsuperscript{107}

I also think that the balancing questions that arise under RFRA are no more difficult than the balancing questions that arise in many other contexts. The federal judiciary decides how much money has to be spent, how fast, to produce how much improvement in state prisons.\textsuperscript{108} It decides how much money should be spent for how long to improve student test scores by

\begin{itemize}
\item \textsuperscript{104} See, e.g., 494 U.S. at 885 (right to exemption "contradicts both constitutional tradition and common sense;" compelling interest test only "seems benign," but in fact would create "constitutional anomaly" of "a private right to ignore generally applicable laws").
\item \textsuperscript{105} See id. at 886-87 (arguing that in administering the compelling interest test, courts could not consider importance of the burdened practice to the claimant's religious belief).
\item \textsuperscript{106} Id. at 890.
\item \textsuperscript{107} Cf. Herman Melville, *Bartleby*, in EUGENE CURRENT-GARCIA & WALTON PATRICK, AMERICAN SHORT STORIES 111, 118 (1964). Bartleby repeatedly refused assignments from his employer with the bare statement that he "would prefer not to."
\item \textsuperscript{108} See, e.g., Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748 (1992); Hutto v. Finney, 437 U.S. 678 (1978).
\end{itemize}
how much in historically segregated school districts.\textsuperscript{109} It decides how much each class of creditors must give up to preserve how many jobs for workers and how much service for customers in the reorganization of bankrupt railroads.\textsuperscript{110} Balancing government interests against constitutional interests is the pervasive methodology of constitutional law in our time,\textsuperscript{111} and I do not see that RFRA presents any unique problem. The courts can balance government interests against religious interests under the compelling interest test.

Here, too, the Court has trump cards, if it is willing to invoke constitutional limitations on congressional power. The doctrines that Professor Brant offers as examples of institutional competence holdings are in fact a quite eclectic lot. I think the cases on deference to church dispute resolution are free exercise holdings that Congress could perhaps tinker with at the margins but could not overrule.\textsuperscript{112} I think the abstention doctrines are all based on statutory interpretation or federal common law; they could all be overruled by Congress. Of course, Congress cannot grant jurisdiction over things that are not cases or controversies,\textsuperscript{113} but by changing substantive law, it can create new grounds for cases and controversies. My claim is simply that the Court cannot refuse to enforce a statutory right that Congress creates pursuant to one of its constitutional powers.

V. CONCLUSION

Whether we look at competing theories in recent interpretations of Section 5, or whether we look at the big picture of what separation of powers and Section 5 were designed to accomplish, I do not see a constitutional problem with RFRA. I worry that the same judges who brought us \textit{Smith} will construe RFRA in a


\textsuperscript{110} See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

\textsuperscript{111} See, e.g., Laycock, supra note 82, at 1743-47 (arguing that "the structure of constitutional provisions leads directly to a certain kind of balancing"); Alex Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 YALE L.J. 943 (1987) (lamenting that balancing is pervasive in constitutional law).


\textsuperscript{113} See, e.g., U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 389 (1994) ("Of course no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy.").
narrow, hostile, and ineffective way. I do not worry that it is unconstitutional.