

## ON SECTION 5 OF THE FOURTEENTH AMENDMENT

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It is an honor to publish with such a distinguished panel at the American Constitution Society's annual conference on the subject of Congress's power to enforce the Reconstruction Amendments. We agree with the panelists before us who have described the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments as being a Second Founding of the Republic. The Reconstruction Amendments fundamentally transformed our constitutional structure. One cannot begin to understand or appreciate American constitutional law without a theory of what happened during Reconstruction.

We have not previously written about Section 5 of the Fourteenth Amendment,<sup>1</sup> so we will offer here only some preliminary thoughts on that subject which we are open to revising if others show us to be wrong. Our thoughts on this are still tentative, especially because we find ourselves in disagreement with both a number of key Supreme Court decisions in this area and with some scholars who have studied the question for longer and in more detail than we have. With those caveats, we would like to make six points about Section 5 inspired by our reflections on the Supreme Court's decision in *City of Boerne v. Flores*, where the Court struck down Congress's effort to enforce the Fourteenth Amendment by passing the Religious Freedom Restoration Act ("RFRA").<sup>2</sup> That Act,<sup>3</sup> of course, sought to displace the Supreme Court's decision on the scope of the Free Exercise Clause as it applied to the States in *Employment Division v. Smith*.<sup>4</sup> Our thoughts on this grow out of Judge Michael McConnell's provocative essay cri-

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\* George C. Dix Professor of Constitutional Law, Northwestern University. Professor Calabresi's ideas on this topic have benefitted over the years from many conversations with John Harrison, Gary Lawson, and Tom Merrill—none of whom are to blame for what we say here.

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

2 521 U.S. 507 (1997).

3 42 U.S.C. §§ 2000bb–2000bb-4 (2000).

4 494 U.S. 872 (1990) (holding that states may prohibit sacramental peyote use).

tiquing *Boerne* in the *Harvard Law Review*.<sup>5</sup> We will address briefly *Boerne*'s progeny.

## I.

The first point we want to make about the Religious Freedom Restoration Act and *Boerne* is that we agree with McConnell that the Supreme Court's opinion is overly judge-centric and is wrong in so far as it seems to suggest that Congress cannot interpret and enforce the Constitution equally with the Court.<sup>6</sup> Our Constitution is unique among modern constitutions in that it does not empower a particular entity to interpret and enforce it. In this respect, the U.S. Constitution differs from, for example, the German Constitution, because it does not contain a judicial review clause assigning the power to enforce it to a Constitutional Court.<sup>7</sup> The power of judicial review is instead deduced, as every first year law student learns in *Marbury v. Madison*,<sup>8</sup> by a structural inference from the fact that the Supreme Court has the power to decide cases or controversies, that it has the obligation to decide them faithfully to the law, and that the Constitution is higher law than is a statute. From all these facts, Chief Justice Marshall quite rightly concluded that when the Court is deciding a case or controversy, it has the power and the duty to interpret the Constitution.<sup>9</sup>

Marshall's argument defends judicial review, but it does so on grounds that make it clear that the political branches of government also have the power and duty to enforce the Constitution.<sup>10</sup> After all, Congress has the legislative power, just as the Court has the power to decide cases or controversies. When Congress is legislating, we think it clear that it has the power and duty to interpret the Constitution. Early in American history, Congress often debated and decided constitutional issues, as David Currie has shown in a splendid series of

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5 See Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

6 See *id.* at 155–57.

7 “The Federal Constitutional Court shall rule . . . on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body.” GRUNDGESETZ [GG] [CONSTITUTION] art. 93, § 1 (F.R.G.).

8 5 (1 Cranch) U.S. 137 (1803).

9 *Id.* at 177.

10 *Id.* at 173–80.

books.<sup>11</sup> Congress played the same role during Reconstruction,<sup>12</sup> the New Deal,<sup>13</sup> and the Great Society<sup>14</sup> as well. Nothing in the text of the Constitution suggests that its interpretation is more the business of the Supreme Court than it is of Congress. And, while our practice has been to let the Court take the lead in this area, we have also long recognized that Congress and the President have a legitimate role to play as well.<sup>15</sup> Text and practice suggest that Congress, like the Court, has both the power and the duty to interpret and to enforce the Constitution. Any implication to the contrary in *City of Boerne v. Flores* and its progeny is just plain wrong.

Judge McConnell is thus right when he says that the opinion in that case falsely posited a dichotomy between Congress having the power to change the Fourteenth Amendment and the Constitution, as opposed to Congress having only a power to create remedies to enforce Section 1.<sup>16</sup> There is an intermediate option that the *Boerne* Court does not discuss: Congress has the power to interpret Section 1 of the Fourteenth Amendment when it is legislating to enforce it under Section 5. Congress's power to interpret Section 1 is not a power to rewrite it to mean anything it wants. But neither is it only a power to provide remedies for violations that the Court has already identified. Section 5 allows Congress to enforce Section 1 rights before the Supreme Court has identified them, so long as at the end of the day, the Court agrees that the rights in question are encompassed in the meaning of Section 1.

We thus agree in part with Michael Kent Curtis when he says that in the American tradition, the legislature is to some degree a guardian of our liberties.<sup>17</sup> We think this is true, especially with respect to

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11 See, e.g., DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801* (1999) (concluding that the original understanding of the Constitution was forged not so much in the courts as in the legislative and executive branches).

12 See Michael Kent Curtis, *Congressional Enforcement of the Thirteenth, Fourteenth, and Fifteenth Amendment & the State Action Syllogism: An Historical Overview*, 11 U. PA. J. CONST. L. 1381 (2009).

13 See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941).

14 See, e.g., S. REP. NO 88-872 (1964) (debating the constitutionality of the Civil Rights Act of 1964); H.R. REP. NO 88-914 (1963) (debating the same); see also *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241, 252–78 (1964) (holding that Congress had the power under the Commerce Clause to enact the Civil Rights Act of 1964, even if the Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), held the Civil Rights Act of 1875 violated the Equal Protection Clause).

15 See WHO SPEAKS FOR THE CONSTITUTION? *THE DEBATE OVER INTERPRETIVE AUTHORITY* (The Federalist Society ed. 1992).

16 See McConnell, *supra* note 5, at 163–65.

17 Curtis, *supra* note 12.

Congress. More than twenty-five years ago, Professor Calabresi wrote his student note on how James Madison's *Federalist Ten* had turned out to be right in that the Congress of our extended federal republic has had a much better track record on civil liberties than have the state legislatures.<sup>18</sup> That assertion is still true today. A legislature in an extended republic is inherently more likely to protect minority factions and civil rights than are state legislatures. For that reason, the Supreme Court ought to review the work product of Congress with more deference than it accords to the work product of state legislatures.

## II.

This leads to our second point about *Boerne* and RFRA, regarding the degree of deference the Supreme Court ought to give to Congress in Section 5 cases. Judge McConnell argues for quite a bit of deference.<sup>19</sup> He analogizes the Section 5 context to *Chevron* and says we ought to give as much deference here as we do there.<sup>20</sup> At times, Judge McConnell comes close to saying that the Supreme Court ought to use a Thayerian rule of clear mistake<sup>21</sup> in Section 5 cases: only striking down Acts of Congress that are plainly, palpably, and in every respect unconstitutional as violations of Section 5. Judge McConnell thinks it is important to defend a congressional power to interpret the Fourteenth Amendment as being different from a power substantively to alter the Constitution, because he justifiably believes there are a lot of hard questions in constitutional law as to which reasonable people could come down in different ways. He thinks that as to those questions the Supreme Court ought to defer, *Chevron*-style, to any reasonable interpretation Congress might choose to enact.<sup>22</sup>

We disagree with Judge McConnell that the standard for Supreme Court invalidation of Section 5 legislation is a kind of "beyond a reasonable doubt" standard.<sup>23</sup> There is no textual warrant for that stan-

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18 Steven G. Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403 (1982).

19 See e.g., McConnell, *supra* note 5, at 173, 184–89.

20 See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (articulating a doctrine granting deference to administrative agencies in interpreting their own statutory mandates).

21 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

22 See McConnell, *supra* note 5, at 184–89.

23 McConnell, *supra* note 5, at 185–88.

dard. The text gives Congress the power “to enforce” the rights created by Section 1 by adopting “appropriate” legislation. It does not say that the Supreme Court must defer to Congress’s interpretations of Section 1 when deciding cases or controversies unless it thinks Congress is wrong beyond a reasonable doubt. The congressional supremacy view of Section 5 is just as wrong as is the judicial supremacy view taken by Justice Kennedy in *Boerne*.<sup>24</sup> The Supreme Court has the power and the duty to decide cases and controversies agreeably to the Constitution. It must make its own independent evaluation of whether a law “enforces” or changes the meaning of Section 1 of the Fourteenth Amendment.

In making an independent evaluation on this question, the Court ought to accord congressional statutes a presumption of constitutionality because our Constitution is enforced by a three branch process of checks and balances. By the time a case reaches the Supreme Court, two of the three branches charged with enforcing the Constitution, indeed sworn by oath to do so, will have made a decision that the action in question is permissible. The Court thus ought to presume that congressional enactments are constitutional unless a preponderance of the evidence suggests they are not.

As a practical matter, there are two distinct ways in which Section 5 legislation could be said to be unconstitutional under the text of Section 5, and the Court ought to follow different paths in those two different textual contexts. First, Section 5 legislation could be challenged on the ground that it does not really “enforce” Section 1 but rather redefines it, either by eliminating rights that Section 1 in fact protects or by adding new rights that go beyond what Section 1 provides. This question of whether a congressional enactment “enforces” rights actually in Section 1 or whether it “changes” them is one the Court is perfectly positioned to decide using a preponderance of the evidence standard. The Supreme Court has—for good or for ill—been the preeminent interpreter of Section 1 for the last 140 years, and it has both the right and the duty to form its own independent views on whether a law enforces Section 1 or goes beyond it. Judge McConnell makes a provocative argument as to why the Court ought to defer here to Congress, but we think his view is contrary to 140 years of practice.

There is, however, a second question that may arise in Section 5 cases: is a particular law “appropriate” as a remedy for a Section 1 violation? The question of appropriateness is one of degree, and here

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<sup>24</sup> *City of Boerne v. Flores*, 521 U.S. 507, 525–29 (1997).

more deference to Congress with its greater fact-finding resources both makes a lot of sense and seems contemplated by the text. Reasonable people can disagree on what remedies are “appropriate” to address particular rights violations. Holding hearings and gathering evidence are indispensable here, and it is also reasonable to conclude that the constitutional text delegates the question of degrees of “appropriateness” to Congress to decide. On the appropriateness question, we would apply something like *Chevron* deference. So long as the law really “enforces” Section 1, rather than changing it, Congress ought to have wide latitude in choosing among enforcement remedies.

Advocates of congressional power under Section 5 point out that those who ratified it analogized congressional power in this context to congressional power under the Necessary and Proper Clause.<sup>25</sup> The questions of what is “appropriate” and what is “proper” or “necessary” in the sense of “convenient to” or “useful to” seem to be the same.<sup>26</sup> Thus, it is often claimed that Congress ought to get as much deference when legislating under Section 5 as it gets when legislating under the Necessary and Proper Clause as construed in *McCulloch v. Maryland*. Several proponents of the Fourteenth Amendment in Congress clearly said as much. Unless Congress is using a pretext to justify Section 5 legislation, as pretext is discussed in *McCulloch*, Congress ought to have its way in the Supreme Court.

There is a difference, however, between Congress’s power under Section 5 and its power under the Necessary and Proper Clause as discussed in *McCulloch v. Maryland*. Section 5 legislation must not only be “appropriate”; it must also be legislation “to enforce” Section 1. The Necessary and Proper Clause contains a similar but never discussed constraint giving Congress the power to make all laws which shall be necessary and proper “for carrying into execution” the foregoing enumerated powers. Marshall did not construe this language in *McCulloch*. Instead, the case turned primarily on the meaning of the word “necessary”, and secondarily on the deference Congress should receive as to what was “proper.”<sup>27</sup> But *McCulloch* never addressed the meaning of the verb “to enforce” because those words

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25 See, e.g., McConnell, *supra* note 5; Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999).

26 “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. 1, § 8.

27 *McCulloch v. Maryland*, 17 (1 Cranch) U.S. 316, 411–15 (1819).

were not present in the Necessary and Proper Clause just as it did not address the requirement that laws enacted under the Necessary and Proper Clause “carry into execution” the enumerated powers. Perhaps the Court overlooked this language.

In any event, *McCulloch* was not followed. Andrew Jackson rejected it and successfully killed the Bank of the United States<sup>28</sup> until Woodrow Wilson became president. His successors took a similarly narrow view on issues like congressional power to make internal improvements and therefore on the scope of the Necessary and Proper Clause.<sup>29</sup> Thus, even if the Section 5 power is as broad as congressional power under the Necessary and Proper Clause, it is not clear that there was widespread agreement in the years between *McCulloch* and 1868 that Marshall’s reading of the Necessary and Proper Clause was correct.<sup>30</sup> There was certainly no agreement on whether Marshall had been right about the meaning of words like to “carry into execution” or to “enforce” since Marshall never even addressed this issue.

As the *Boerne* Court realized, the verb “to enforce” is at the very heart of the Section 5 power,<sup>31</sup> and it is for that reason we think that Court got the Section 5 issue essentially right. (Though, as we shall presently explain, we disagree with the Court as to the Free Exercise Clause.) What was the original public meaning of “to enforce” in 1868? Consider the following definitions offered in Noah Webster’s 1828 authoritative edition of the English language: “1. To give strength to; to strengthen; to invigorate. . . . 6. To compel; to constrain; to force; 7. To put in execution; to cause to take effect; as to enforce the laws.”<sup>32</sup> It is clear from these that the power “to enforce” Section 1 is not a power “to rewrite it.” This sense is confirmed in *The Barnhart Dictionary of Etymology* where enforce is said to come from the Latin roots “in” meaning “make” and “fortis” meaning strong.<sup>33</sup> To enforce something is thus literally to make it stronger, not to change its meaning!

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28 Veto Message of July 10, 1832, 3 COMP. MESSAGES & PAPERS PRES. 1139 (1897).

29 See, e.g., PAUL H. BERGERON, THE PRESIDENCY OF JAMES K. POLK 193–200 (1987) (noting President Polk’s opposition to internal improvement bills); J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 112 n.135, 123–24 (2005) (noting President Tyler’s veto of internal improvement bills).

30 See PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 292–97 (HarperCollins Publishers, Inc. 1997) (1997) (explaining congressional impact on American expansion in the mid-nineteenth century).

31 *City of Boerne v. Flores*, 521 U.S. 507, 516–20 (1997).

32 Noah Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

33 BARNHART DICTIONARY OF ETYMOLOGY (Robert Barnhart ed. 1988).

It is for this reason that we agree with Justice Harlan's dissent in *Katzenbach v. Morgan*, in so far as it criticizes Justice Brennan's majority opinion in that case and the ratchet theory of footnote ten.<sup>34</sup> You do not enforce or make stronger Section 5 of the Fourteenth Amendment by changing its meaning. The correctness of *City of Boerne v. Flores* thus depends on whether RFRA was a law that enforced the Free Exercise Clause as incorporated by Section 1 of the Fourteenth Amendment because *Employment Division v. Smith* was wrongly decided.

But, it might be objected that the weight we give to original public meaning of the verb "to enforce" is not supported by the legislative history of the Fourteenth Amendment referred to above, which approvingly cites Marshall's opinion in *McCulloch*; however, that opinion never discusses the words "to enforce," and in any event, we agree with Justice Scalia in believing that it is the original public meaning of the text which ought to count in constitutional interpretation. It is the text which was presented to the States and through them, the people for ratification, and it is the words of the text that are supreme law. The people who ratified the Fourteenth Amendment never had a chance to debate or amend or vote up and down on the legislative history and probably did not know what it said. Thus, it is the original public meaning of the text of Section 5 which controls and not the legislative history.

### III.

The third main point we want to make in this essay is that Congress does have the power to enforce the individual rights protected in Section 1 of the Fourteenth Amendment, as Michael Kent Curtis argues on this panel.<sup>35</sup> Simply put, we think the Privileges or Immunities Clause does protect the individual rights in the Bill of Rights from state abridgment, as well as those unenumerated individual rights described as being privileges or immunities by Justice Bushrod Washington in *Corfield v. Coryell*.<sup>36</sup> Such unenumerated rights are, as Professor Calabresi argued in the *Michigan Law Review* and the *Ohio State Law Journal*, rights that are deeply rooted in American history and tradition and that can be overcome by the police power when the

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<sup>34</sup> 384 U.S. 641, 660–61, 665–71 (1966) (Harlan, J., dissenting).

<sup>35</sup> Curtis, *supra* note 12.

<sup>36</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).



State enacts general laws for the good of the whole people.<sup>37</sup> As we just indicated, we think individual rights are protected by the Privileges or Immunities Clause rather than by substantive due process as the Supreme Court has held, but either way Congress plainly has power “to enforce” individual rights by enacting “appropriate” legislation under Section 5. We do not see how this question could be answered in any other way. There is no principled way in which the Supreme Court could say that something is a right for Section 1 purposes, but Congress lacks power to enforce it under Section 5. Section 5 gives Congress the power to enforce Section 1. Section 1, either through the Privileges or Immunities Clause or through substantive due process, creates individual rights. It follows *a fortiori* that Congress has the power to enforce or make stronger the rights protected by Section 1.

This, at long last, raises the question of whether Section 1 protects the free exercise of religion, not only from laws that on their face discriminate on the basis of religion, but also from laws that disparately burden religious groups even though those laws are neutral on their face. The historic preservation law at issue in *Boerne*, which was preventing the church there from building an addition, did not on its face discriminate on the basis of religion, but it certainly did burden the church by preventing it from expanding. Are such facially neutral burdensome laws violations of the Free Exercise Clause?

To answer that question, one must ask what the plain language of the Free Exercise Clause protects. It protects more than freedom of conscience or religious belief, because it protects the free *exercise* of religion. It does not protect religion per se, which might be a forbidden establishment, instead and to emphasize again, it protects the “exercise” of religion. What is the “exercise” of religion? The word clearly and self-evidently includes some action as well as belief. Sarah Agudo and Professor Calabresi note in an article forthcoming in the *Texas Law Review* that almost all of the State free exercise clauses in 1868, thirty-five out of thirty-seven, protected “freedom of worship” rather than the free exercise of religion.<sup>38</sup> This may indicate that the Free Exercise Clause would likely have been understood as a protec-

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37 Steven G. Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

38 Steven G. Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions in 1868: What Rights Are Deeply Rooted in History and Tradition?*, 87 TEX. L. REV. 7 (2008).

tion for freedom of religious worship in 1868, when the Privileges or Immunities Clause became supreme law.

This is interesting because one can imagine a range of religious freedoms that the Free Exercise Clause might protect. At its narrowest, the Clause would protect freedom of conscience or belief. A slightly broader reading would protect freedom to profess one's faith in private. Slightly broader than that would be freedom to hold religious ceremonies of worship in private with other people. Broader yet again would be a freedom to profess one's faith publicly, to worship publicly, and to proselytize—perhaps as persistently as Jehovah's Witnesses are wont to do. Broader still would be a freedom to raise and to educate, or not to educate, one's children in one's faith. And finally, perhaps the broadest understanding of free exercise is the one encompassed in RFRA itself, which protects all action from facially neutral government laws that disparately burden religious belief and that are not supported by a compelling governmental interest.

If the framers of the Fourteenth Amendment's Privileges or Immunities Clause understood the free exercise of religion as encompassing freedom of worship, how broad is that freedom? Is the religious freedom encompassed by RFRA a freedom of worship? It seems pretty clear to us that RFRA goes somewhat beyond what we would ordinarily describe as the protection of "worship."<sup>39</sup> But that is not necessarily fatal to the law because three-quarters of the States in 1868, in addition to protecting freedom of worship, also protected either unenumerated "natural and inalienable" rights to "liberty"<sup>40</sup> or recognized that the enumeration in state constitutions of certain rights should not be construed to deny or disparage others retained by the people. One minimal way to give force to these "baby" Ninth Amendments<sup>41</sup> and "natural and inalienable" rights clauses in an Article V three-quarters consensus of the States is to read enumerated rights—like freedom of worship—broadly. Arguably that is all that RFRA does. In any event, the activity at issue in *City of Boerne v. Flores* was directly related to the freedom of worship because the church sought to add onto its building to accommodate a growing congregation for ceremonies of worship.<sup>42</sup> Freedom of worship was thus absolutely central to the *Boerne* case. Freedom of worship was also central

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<sup>39</sup> 42 U.S.C. §§ 2000bb(a)(2)–2000bb(a)(3) (2000).

<sup>40</sup> Calabresi & Agudo, *supra* note 38, at 66–67.

<sup>41</sup> John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993) (arguing that the Ninth Amendment is the most dynamic and open-ended of all the Constitutional amendments); Calabresi & Agudo, *supra* note 38, at 87–90.

<sup>42</sup> *City of Boerne v. Flores*, 521 U.S. 507, 511–12 (1997).

to the *Smith* case, because in that case, Native Americans were denied the right to ingest controlled substances in a ceremony of worship.<sup>43</sup>

The argument for the Government in *Boerne* and *Smith* is that the historic preservation and drug laws in question did not on their face prohibit freedom of worship. Thus, they do not violate the Free Exercise Clause for the reasons Justice Scalia explained in *Smith*.<sup>44</sup> Our difficulty with this, however, is that the Privileges or Immunities Clause protects rights absolutely from “abridgment,” whether the abridgement comes in the form of a facially neutral law or not. The Constitution protects religious “exercise” or, at a minimum, “worship.” The question for a formalist judge like Scalia is thus simply: whether a law “abridges”—not discriminates against but “abridges”—freedom of religious worship. “Abridges” here means “to make shorter” or “to lessen.”<sup>45</sup> In the First Amendment context, laws are widely recognized “to abridge” freedom of speech or of the press if they are overbroad.<sup>46</sup> Laws that heavily burden core religious worship and that are not supported by a compelling government interest would seem to abridge, or make shorter, rights of freedom of worship at least by being overbroad.

At a minimum, one could say that the question of whether facially neutral laws with disparate impacts on worship are “abridgments” or not is a question that goes to the standard of proof. We have appropriately recognized, in the context of racial discrimination, that Congress can legislate a presumption of discrimination or of discriminatory intent from disparate impacts that are unexplained by business necessity.<sup>47</sup> That is all that Congress has done here with RFRA. Congress has fleshed out the concept of abridgements of the freedom to worship by explaining that they are present where a facially neutral law that is not justified by a compelling governmental interest burdens an activity that is central to a religious group.<sup>48</sup> Presumably Congress has, at a minimum, the remedial power to define how a

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43 *Employment Div. v. Smith*, 494 U.S. 872, 874–76 (1990).

44 *Id.* at 883–91 (asserting that States are not required to accommodate otherwise illegal acts done in the pursuit of religious beliefs).

45 WEBSTER, *supra* note 29.

46 *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (“When the statutes also have an overbroad sweep . . . the hazard of loss or substantial impairment of those precious rights may be critical.”).

47 *See, e.g., Griggs v. Duke Power*, 401 U.S. 424 (1971) (holding that while employment practices of discriminating against employees because of race is unlawful, it is lawful to use a professionally developed ability test that is not designed or intended to discriminate).

48 *See, e.g., S. REP. NO. 103-111*, at 5 (1993); *H.R. REP. NO. 103-88* (1993).

Fourteenth Amendment litigant should go about proving whether or not there has been an abridgement.

It is absolutely true, as the Court said in *Boerne*, that there is not in the Free Exercise area the same sordid history that Americans have endured with respect to race discrimination.<sup>49</sup> Measures that might be “appropriate” or “proportionate” or “congruent” to eradicating race discrimination could thus be said to be too broad when Congress is first enforcing the Free Exercise Clause of the Bill of Rights. The difficulty with this argument is that the *Boerne* Court offers no reason why Congress cannot legislate prophylactically against new evils that it anticipates may soon arise.

There is reason for Congress to fear that the big expansion in the role of government we have seen in the last fifty years may undesirably burden the free exercise or freedom of worship rights of individual citizens. Congress does not need to wait until after this has happened to legislate against it. The Court can point to no textual source for its conclusion that prophylactic legislation is not congruent and proportional other than its own opinion about what measures are “appropriate” to enforce Section 1. We agree with the court that the test here is one of congruence and proportionality, but we think the Court applied the test incorrectly in *Boerne*. RFRA seems to us to have been an appropriate remedial measure to define what constitutes an abridgment of the freedom to worship, given the huge growth we have experienced in the role of government and the impact that might have in the future on the individual right of religious freedom.

As we said above, the Court ought to be more deferential to Congress on questions on what Section 5 laws are “appropriate” even if it considers de novo whether those laws “enforce” rights created by Section 1. *Boerne* is thus mostly right as to Congress’s power under Section 5 but wrong as to *Smith* and RFRA. Importantly, the Court reaches the wrong result in the case before it, and it wrongly declares unconstitutional a major act of Congress. What about *Boerne*’s progeny striking down federal laws forbidding the States from discriminating against the disabled or the elderly?

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<sup>49</sup> City of Boerne v. Flores, 521 U.S. 507, 508 (1997) (“In contrast to the record of widespread and persisting racial discrimination which confronted Congress and the Judiciary in those cases, RFRA’s legislative record lacks examples of any instances of generally applicable laws passed because of religious bigotry in the past 40 years”).

## IV.

This leads us to our fourth point: we do not think Congress has the power under Section 5 to create new suspect classes, be they classifications that burden the disabled, the elderly, or the religious. Note that it is vital to our argument here that we be correct that Congress can protect the individual rights secured by the Privileges or Immunities Clause, like the right to freedom of worship, because we do not think RFRA is justifiable on a theory that Congress can make discrimination on the basis of religion a forbidden classification.

A congressional power to create new suspect classes would go well beyond enforcing of Section 1 and would venture into the realm of changing its meaning. Congress could only validly enact such a law if the Court were to agree with Congress after the fact that, in its own independent judgment, the creation of the new suspect classification was a correct one. We agree that Section 1 bans not only racial caste systems, but all systems of caste or of class-like discrimination. The fact that the Amendment does not mention the word race, unlike the Fifteenth Amendment, suggests it does have a broader application. We think that if the framers of the Fourteenth Amendment had been asked whether European medieval feudalism, with its class system of nobles and serfs, was consistent with the Fourteenth Amendment, they would have said it was not. We likewise think that they would have thought the Fourteenth Amendment banned the importation of the Hindu caste system with its division of the people into classes of Brahmins and Untouchables with different civil rights. We do agree that the no class-based discrimination rule of the Fourteenth Amendment applies to all systems of caste or of class-based legislation. It is thus possible that new suspect classes beyond race could come to be recognized, but it does not follow that Congress ought simply to be able to create them on its own say so.

The most famous extension of the Fourteenth Amendment's ban on class-based laws is its extension to sex discrimination.<sup>50</sup> This extension seems to us to be easily justified notwithstanding all the angst it has raised over the last forty years. Section 1 is premised on the idea that all citizens enjoy equal civil rights which it calls "privileges" or

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<sup>50</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that parties who seek to defend gender-based government action demonstrate an exceedingly persuasive justification for that action); *Craig v. Boren*, 429 U.S. 190 (1976) (finding that Oklahoma's gender-based differential constitutes an invidious discrimination); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that unequal spousal benefits denied due process rights); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that a statutory preference for men over women violated the Equal Protection Clause).

“immunities.” The Fifteenth Amendment establishes that a subset of citizens with equal civil rights, which is to say white and African-American men, enjoy equal political rights like the right to vote in addition to equal civil rights.<sup>51</sup> Political rights are thus established as being harder to get than civil rights. After the Reconstruction Amendments, men, women, and children all have equal civil rights, but only men have political rights. This remained the status quo for a half century until the ratification of the Nineteenth Amendment.<sup>52</sup>

The Nineteenth Amendment, then, critically alters the legal landscape by giving women equal political rights to men. Is it really plausible, in the wake of the Nineteenth Amendment, to say that women have equal political rights to men and African Americans but that only race, and not sex, is a suspect classification for discrimination as to civil rights under the Fourteenth Amendment? It seems unlikely. If it is forbidden “discrimination” under the Nineteenth Amendment to deny a woman the political right to vote because of her sex, is it not likely that state action that discriminates on the basis of sex as to civil rights violates the “no systems of caste” rule of Section 1 of the Fourteenth Amendment? Here it is not the Justices and not Congress that have recognized sex as a suspect class. It is the American people themselves . . . in a constitutional amendment, no less! The extension of the Fourteenth Amendment to ban sex discrimination is thus a logical consequence of the light shed back on the Fourteenth Amendment by the Nineteenth.

What about other extensions of the Fourteenth Amendment beyond sex discrimination, such as its extension to sexual orientation discrimination in *Romer v. Evans*<sup>53</sup> or in Justice O’Connor’s concurrence in *Lawrence v. Texas*?<sup>54</sup> As Professor Andrew Koppelman has pointed out, sexual orientation discrimination may just be a form of sex discrimination.<sup>55</sup> Laws that forbid men who have sex with men from talking about it while in the military, but which do not impose

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51 “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

52 “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. CONST. amend. XIX.

53 517 U.S. 620 (1996) (holding that a state constitutional amendment, which precludes all governmental action designed to protect homosexuals, violated the Equal Protection Clause).

54 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (arguing that a law making only same-sex sodomy illegal was unconstitutional because it violated the Equal Protection Clause).

55 See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

the same ban on men who have sex with women, arguably make a classification on the basis of sex. On the other hand, it is fair to point out that sexual orientation discrimination has not been generally understood as being sex discrimination and that gays have won no big political victory, like the adoption of the Nineteenth Amendment, that would warrant the creation of a new suspect class. In fact, the matter is the subject of hot debate among the American people, and so arguably the courts should hold off on recognizing sexual orientation as a suspect class until the American people are at rest on the subject.

What about suspect class status for the disabled or the elderly? Can Congress—simply by legislating—declare these two to be forbidden forms of caste-like discrimination? We do not think Congress can, simply by passing a Section 5 statute, recognize a new suspect class; only the American people, by consensus over a sustained period of time, can do that. That process has not yet happened with respect to the disabled or the elderly, although eventually it may. We therefore think that the Supreme Court was right to say in its Section 5 case law that Congress over-reached when it passed these laws.<sup>56</sup> These were not laws to “enforce” Section 1, but they were laws that changed its meaning. This is not because Congress identified a violation of Section 1 before the Supreme Court did. That is perfectly permissible. Congress need not wait for the court to find a suspect class to legislate to protect it. At the end of the day, however, the Court in a case or controversy has to be persuaded that Congress was right that something is a new suspect classification, a decision which is momentous and far-reaching. We think the Rehnquist Court acted plausibly in saying that Congress had exceeded its powers when it found disability or age discrimination to be violations of Section 1 at least as it stands today. Whether those decisions will stand the test of time remains to be seen.

## V.

This brings us to our fifth point about Congress’s Section 5 power, which is: what about laws which Congress has passed, like the Violence Against Women Act,<sup>57</sup> which penalized private violent conduct against women? The Supreme Court struck down this Act in *Morrison*

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<sup>56</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (developmentally disabled); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (age).

<sup>57</sup> 42 U.S.C. § 13981 (2006).

*v. United States* by a 5-4 vote.<sup>58</sup> We must say that we are quite skeptical about *Morrison* for several reasons. First, there is no doubt in our minds about Congress's power to legislate to deal with sex discrimination. We think Section 1 forbids sex discrimination as a form of caste to essentially the same degree as it forbids race discrimination.<sup>59</sup> As we said above, that is the fair implication of the Nineteenth Amendment.

Second, we think Congress can legislate prophylactically under Section 5 as we argued above, and we also think there was an enormous amount of evidence on the record in *Morrison* that violence against women was and is a huge problem that the States have not dealt with adequately.

Third, we are not persuaded by the Supreme Court's view in *Morrison* that there was no State action in that case.<sup>60</sup> The Court essentially held that because Morrison, the assailant, was a private person who had attacked Brzonkala, a private victim, and because Virginia outlawed violence against women as a matter of its formal criminal and tort law,<sup>61</sup> therefore there was no way in which the State of Virginia was violating the no discrimination command of the Equal Protection Clause.<sup>62</sup> We think the Court just goofed here, because it does not understand how the language of Section 1 of the Fourteenth Amendment works.

We think Section 1 bans discrimination in the making of laws when it says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>63</sup> This Clause does protect individual rights against abridgment, as Michael Kent Curtis has argued,<sup>64</sup> but it also protects against class-based systems of law. The word "abridge" is used in the Fifteenth Amendment in an anti-discrimination sense and in the First Amendment in the sense of burdens on individual rights. Both systems of caste *and*

<sup>58</sup> 529 U.S. 598 (2000).

<sup>59</sup> There may, for example, be forms of sex discrimination, like sex segregated bathrooms, that are unobjectionable but would be objectionable if they were segregated on the basis of race. Undoubtedly, there are other examples like this but not many. We think Justice Ginsburg's opinion in the VMI case is essentially right. See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that VMI's categorical exclusion of women violates the Equal Protection Clause but discussing unobjectionable forms of segregation).

<sup>60</sup> *Morrison*, 529 U.S. at 619-27.

<sup>61</sup> See, e.g., VA. CODE ANN. § 18.2-61 (2004) (rape); VA. CODE ANN. § 18.2-67.3 (2004) (aggravated sexual battery); *Parsons v. Parker*, 170 S.E. 1 (1933) (holding that Virginia law recognizes the civil action for rape).

<sup>62</sup> See *Morrison*, 529 U.S. 598.

<sup>63</sup> U.S. CONST. amend. XIV, §1.

<sup>64</sup> Curtis, *supra* note 12.



laws depriving individuals of rights are fairly described in the ban on “abridgments” of privileges or immunities.

If the Privileges or Immunities Clause bans discrimination in the making of laws, what then does the Equal Protection Clause do? Here, as in part with the Privileges or Immunities Clause, we follow Professor John Harrison’s view.<sup>65</sup> The Equal Protection Clause is a clause that is about “the Protection” of the laws and not the making of them. It says in essence that the States must neither discriminate on the basis of a suspect classification, nor discriminate in “the Protection” of the laws by enforcing facially adequate and neutral laws in a discriminatory way. It is inadequate to have laws that ban violence against African Americans or women on the books if those laws go unenforced. It is quite clear, as Michael Kent Curtis points out in his essay for this symposium, that the framers of the Equal Protection Clause saw it as protecting African Americans and white Republicans from private violence like lynchings and assaults that were going unpunished by the Southern States even though the law on the books forbade them.<sup>66</sup> Congress could and did create supplementary federal remedies to deal with situations like that.<sup>67</sup>

This is precisely what Congress did in passing the Violence Against Women Act. Congress was concerned about a well-documented problem of women being denied “the Protection” of laws against violence.<sup>68</sup> It responded by creating a supplementary federal remedy for the private victims of that violence. It is true that the state action here was inaction in enforcing laws against violence for the benefit of women, but the States are under an affirmative obligation to provide women and African Americans with the equal “protection” of the laws. The American Constitution is, for the most part, a charter of negative liberties, but it is not exclusively so. The Equal Protection Clause does impose some enforceable affirmative obligations on the States. Ironically, the Rehnquist Court missed this point, because its members were so used to thinking wrongly that the Equal Protection Clause was the main equality guarantee in the Fourteenth Amendment, when in fact the Privileges or Immunities Clause plays that role, that they missed that the noun in the Equal Protection Clause is

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65 John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385 (1992) (arguing that the Privileges or Immunities Clause is an equality-based protection, as opposed to a substantive protection).

66 Curtis, *supra* note 12.

67 *Id.*

68 *See, e.g.*, H.R. REP. NO. 103-711, at 385–86 (1994) (Conf. Rep.); S. REP. NO. 103-138, at 39–55 (1993); S. REP. NO. 102-197, at 33–35, 41, 43–47 (1991).

“protection” while “equal” is only the adjective. The Equal Protection Clause is about the affirmative obligation of the States to provide the “protection” of the laws already on the books. *Morrison v. United States* is thus wrongly decided on the Fourteenth Amendment question.

How far does the States’ affirmative obligation go to provide “protection” of the laws? That is a huge subject, which we will not even attempt addressing here. It suffices to say that the Clause imposes some affirmative obligations on the States and that state inaction in living up to those affirmative obligations is state action in violation of Section 1. Congress can and should legislate as to such state inaction under Section 5.

## VI.

Our sixth and final point raises tentative questions about Michael Kent Curtis’s provocative paper for this panel insofar as it contends that Congress can legislate directly on private citizens in its enforcement of the Fourteenth Amendment.<sup>69</sup> The strongest argument in our view that Curtis is right is the Citizenship Clause with which Section 1 begins.<sup>70</sup> As Justice Harlan argued in the Civil Rights Cases,<sup>71</sup> Section 1 in conferring citizenship on all who are born and naturalized in the United States overturned the *Dred Scott* case.<sup>72</sup> It made African Americans citizens of the United States and gave them equal civil rights, which are citizens’ rights, with white citizens. The words “civil” and “citizen” come from the same Latin root and mean the same thing.<sup>73</sup> *Dred Scott* had explicitly said that a reason why the Court could not imagine that African Americans were citizens was because if they were, they would enjoy the civil right or citizens’ right to keep and bear arms!<sup>74</sup> Since the Court could not imagine that to have been the case, it reached the absurd conclusion that African-Americans were not citizens.<sup>75</sup> The Citizenship Clause overrules all of this; it contains no state action requirement, and it is of course enforceable under Section 5. All of this supports Michael Kent Curtis’s views.

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69 Curtis, *supra* note 12.

70 “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.” U.S. CONST. amend. XIV, § 1.

71 Civil Rights Cases, 109 U.S. 3, 27–62 (1883) (Harlan, J., dissenting).

72 *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

73 BARNHART DICTIONARY OF ETYMOLOGY, *supra* note 33, at 174.

74 *Dred Scott*, 60 U.S. at 450.

75 *Id.*

The strongest argument against Curtis is that civil rights or citizens' rights are at least as much a synonym with privileges or immunities as they are derivative of citizenship. Privileges or immunities, or civil rights, are very explicitly only protected from hostile state action and not from private action. The use of the "No State shall" language, with its echoes in *Barron v. Baltimore*<sup>76</sup> and in the choice of words in Article I, Section 10, seems very deliberate and calculated,<sup>77</sup> as "No State shall" is a clear term of art. Thus, the second sentence of Section 1 fills in any ambiguity about the scope of civil rights of citizens raised by the first sentence by making it clear that privileges or immunities are only protected from State abridgement and not abridgement by private parties. The specific language of the second sentence controls the vague, general language of the first. It is for reasons of this kind that the Supreme Court early on found a state action requirement of some kind to be implicit in Section 1. It is true, as Curtis points out, that the Court in *Prigg v. Pennsylvania* deduced a congressional power to reach private conduct from the Fugitive Slave Clause,<sup>78</sup> but that Clause did not use the "Simon-Says" magic words "no State shall."<sup>79</sup> Those words specifically qualify the privileges or immunities protected by Section 1 and make clear that they are protected only from state action and not from private action.

We find this to be a genuinely hard question as a matter of figuring out the original understanding—harder in fact than all the very hard questions raised by the Fourteenth Amendment that we have discussed so far. Happily, it is a question that practice has settled for us. We do have a state action doctrine,<sup>80</sup> and the Court ought not and will not reconsider it anytime soon. If Congress were to legislate against private action in a context not involving the State's affirmative obligation to provide the equal "protection" of the laws, then the Court ought to consider Curtis's evidence on the original understanding of the text along with subsequent precedent. When Congress legislates based on its understanding of the Constitution, the

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76 32 U.S. (7 Pet.) 243 (1833) (discussing the Fifth Amendment).

77 See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163–65 (1998).

78 41 U.S. 539 (1842).

79 "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due." U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

80 See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883).

Court cannot simply rest on its precedents, like *Employment Division v. Smith*, as a complete response.

Congressional initiation of a dialogue with the Supreme Court<sup>81</sup> about a question of constitutional meaning imposes on the Court an obligation to do more than just fall back on its precedents. The decision to follow *stare decisis* is, at bottom, a prudential one in which the Court concludes that the costs of abandoning a precedent, around which expectations have formed, exceed the benefits to be gained.<sup>82</sup> This judgment is quintessentially political, and it involves a weighing of incommensurable harms and benefits.<sup>83</sup> Such political questions, as Judge McConnell notes in his critique of *Boerne*, are best weighed in Congress.<sup>84</sup> If the democratically elected Congress or President disagrees with the Supreme Court's *stare decisis* cost-benefit analysis on an issue, the Court ought to drop precedent and answer the question based on its own view of the original meaning of the words in the constitutional text. Congress cannot, in our view, force the Court to defer to its interpretation of the Fourteenth Amendment unless it is clearly mistaken, but it can reset the clock and force the Court to revisit the original meaning of a clause unencumbered by judicial case law. The Court's failure to do so in *Boerne* is that decision's greatest weakness.

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81 On the subject of dialogues between the courts and legislatures, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

82 See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311 (2005).

83 *Id.*

84 McConnell, *supra* note 5, at 156.