RFRA CAME, RFRA WENT; WHERE DOES THAT LEAVE THE FIRST AMENDMENT?: A CASE COMMENT ON *CITY OF BOERNE V. FLORES*

I. INTRODUCTION

Two thousand years ago, Roman soldiers crucified a man on a hill overlooking Jerusalem. Sixty years ago, on a hill overlooking Boerne, Texas, townspeople erected a building where they could gather to remember that death. But, their congregation grew too large for the 230 seats originally provided in the building, known as St. Peter Catholic Church. The Archbishop of San Antonio, Texas, approved plans to expand, but those plans ran afoul of a recent zoning law that declared the Texas mission-style building an historical landmark. The City of Boerne denied the church's request to raze the back of the building—leaving the prominent façade intact—and build a larger sanctuary. The church sued, claiming, among other things, that the city had impermissibly infringed its First Amendment right to the free exercise of religion.[1]

The U.S. Supreme Court established the current climate for interpreting Free Exercise Clause cases with its 1989 holding in *Employment Division v. Smith*.[2] *Smith* announced that laws that burden religious practice do not violate the Free Exercise Clause if they are laws of general application.[3] Under *Smith's* interpretation, only laws specifically intended to restrict religious practice violate the Free Exercise Clause.[4] Laws aimed at broader portions of the population, which only incidentally burden religious practice will not.[5] Under *Smith*, St. Peter could not win, because Boerne's zoning law applied to every landowner in the designated area.

Fortunately, though, St. Peter did not have to litigate under *Smith*. Unhappy with *Smith*, Congress drafted the Religious Freedom Restoration Act of 1993 (RFRA).[6] RFRA required government entities defending laws that burden free exercise of religion to show a compelling governmental interest in the contested law and demonstrate that they had selected the least restrictive means of

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1. Brief for Respondent, Flores, at 1, City of Boerne v. Flores, 117 S. Ct. 2157 (1997)(No. 95-2074).
2. Employment Division v. Smith, 110 S. Ct. 1595 (1989).
3. *Id.*
4. *Id.*
5. *Id.*
6. 42 U.S.C. § 2000bb(a)(3) & (4).

protecting that interest.[7] RFRA garnered virtually unanimous support in Congress, but only three votes in the Supreme Court.[8] Congress' stated purposes for passing RFRA were "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* [citations omitted] and *Wisconsin v. Yoder* [citations omitted] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government interference."[9] Under RFRA, St. Peter had a chance; however, on June 25, 1997, the Supreme Court struck RFRA down in *City of Boerne v. Flores*, denying the St. Peter its new building.[10]

Smith—and now *Boerne*—greatly enhance the ability of government to regulate in areas where churches and other religious groups historically have been left alone. For instance, many churches currently maintain gender restrictions for certain positions. Under *Boerne*, those personnel preferences are now vulnerable to attack. Likewise, some religious groups base their corporate worship experience on fellowship groups that meet in private homes. Groups of that nature that find themselves zoned out of suburban neighborhoods will now find no assistance in the Free Exercise Clause, so long as group meetings of all kinds are similarly restricted.

Boerne's impact on First Amendment jurisprudence should not be underestimated. Citizens who claim their religious beliefs require them to act contrary to generally applicable laws will find their freedom greatly curtailed under *Boerne*.

But the *Smith* and *Boerne* decisions have generated one significant benefit not derived from the holding. They have focused judicial attention on the thinking of the Founding Fathers regarding important First Amendment religious liberty issues in ways lacking in recent years. The mere fact that the original intent of the founding generation formed such a large part of the discussion is a small victory for legal scholars who favor that jurisprudential orientation. Justice Scalia's concurring and Justice O'Connor's dissenting opinions in *Boerne* represent the dominant opposing views in the debate over the proper interpretation of the First Amendment clause governing the establishment and free exercise of religion. Discussion

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7. Di Mari Ricker, *Courts Soul-Search in Religious Law Claims*, 26 STUDENT LAWYER 23 (1997).

8. RFRA won unanimous approval in the House of Representatives and won by 97-3 in the Senate. The vote was 6-3 in the U.S. Supreme Court. David O. Stewart, *Power Surge: Asserting Authority Over Congress in Religious Freedom Cases*, 83 A.B.A. J. 46 (1997).

9. 42 U.S.C. at § 2000bb(b)(1) & (2).

10. *Boerne*, 117 S. Ct. at 2172.

of their opinions forms a significant portion of this comment. The remainder of this will analyze and evaluate the majority opinion and making suggestions for improving Free Exercise Clause jurisprudence in the future.

Toward that end, Part II presents the factual and procedural history of *Boerne*. Part III discusses the rationale behind Justice Kennedy's majority opinion. Part IV looks at Justice O'Connor's dissent, which asserts that Free Exercise Clause review under *Smith* and *Boerne* is terribly askew. Part V presents Justice Scalia's concurring opinion, which accuses Justice O'Connor of misinterpreting the historical record. Finally, Part VI offers four proposals to address lingering problems not solved by *Boerne*.

II. CASE HISTORY

A. Facts

P.F. Flores is the Archbishop of San Antonio, Texas.[11] One of the churches under his care, St. Peter Catholic Church in nearby Boerne, Texas, had a severe space problem.[12] Built in 1923, in the historic Texas mission style, St. Peter's sanctuary seated 230 parishioners.[13] With a membership of 2,170, 40-60 people who tried to attend Sunday morning mass each week could not be seated.[14] The Archbishop approved plans to enlarge the building, but before the church could begin construction, the Boerne City Council authorized the Historic Landmark Commission to prepare a preservation plan for the area.[15] St. Peter's plans ran aground when the city approved a historic district that included the front portion of the church building.[16]

First, the city denied St. Peter's request for a building permit that included demolition of the structure.[17] Then, it rejected a compromise plan negotiated with the city architect that would have preserved the facade.[18] Six months later, the city amended the original ordinance to include the entire church building.[19] The city also informed the

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11. *Id.*
12. *Id.*
13. *Id.*
14. Brief for Respondent, Flores at 1, *Boerne*, 117 S. Ct. 2157.
15. *Boerne*, 117 S. Ct. at 2160.
16. Authorized by Ord. 91-05 and created by Ord. 91-15. Brief for Respondent, Flores, at 1, *Boerne*, 117 S. Ct. 2157.
17. *Id.*
18. *Id.*
19. Ord. 94-17., Brief for Respondent, United States at 5, *Boerne*, 117 S. Ct.

church by letter that "any new plans shall not include demolition of the existing structure."[20]

The Archbishop filed suit, claiming that the city's "denial of the permit violated RFRA because denial of the permit substantially burdened his exercise of religion and was not justified by a narrowly tailored, compelling interest."[21] The city defended in part on the ground that RFRA was unconstitutional. The United States joined the suit to defend the constitutionality of RFRA.[22]

B. Procedural History

The City of Boerne ("City") challenged RFRA's constitutionality during a pretrial hearing before the United States District Court for the Western District of Texas.[23] The court requested briefs on that issue from both parties and the United States Attorney General.[24] In its decision, the court considered whether Congress properly exercised its authority under the Fourteenth Amendment § 5 enforcement power.[25] The court decided it had not, because the § 5 enforcement power does not permit Congress to substitute a different burden of proof for one adopted by the court in previous decisions.[26] The court considered this an impermissible intrusion into the power and duty of the judiciary.[27] Because the decision involved a controlling question of law on which there was substantial ground for difference of opinion, the court ordered an interlocutory appeal to the Fifth Circuit Court of Appeals.[28]

In the Fifth Circuit, the City argued that RFRA violated 1) Congress' Fourteenth Amendment § 5 authority, 2) the constitutional doctrine of separation of powers, 3) the Establishment Clause, and 4) the Tenth Amendment.[29] The Fifth Circuit reversed, holding that: 1) Congress acted within its Fourteenth Amendment § 5 power because

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2157.

20. Brief for Petitioner at 5, *Boerne*, 117 S. Ct. 2157.

21. Brief for Respondent, United States at 5-6, *Boerne*, 117 S. Ct. 2157.

22. *Id.* at 6.

23. Flores v. City of Boerne, 877 F. Supp. 355, 356 (W.D. Tex. 1995).

24. *Id.*

25. *Id.* The § 5 enforcement power allows Congress to make any laws appropriate to enforce the provisions of the First and Fourteenth Amendments. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

26. *Flores*, 877 F. Supp. at 357-58.

27. *Id.* at 357.

28. *Id.* at 358.

29. *Flores v. City of Boerne*, 73 F.3d 1352, 1356 (5th Cir. 1996). The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

RFRA was appropriate legislation plainly adapted to enforcing the First Amendment;[30] 2) Congress did not violate the separation of powers doctrine because it exercised valid remedial and preventive authority under § 5;[31] 3) RFRA did not violate the Establishment Clause by privileging religious persons;[32] and 4) RFRA did not violate the Tenth Amendment "on its face" because "RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation."[33] Specifically concerning the issue of whether RFRA was valid remedial legislation, the Fifth Circuit noted that "1) RFRA deters governmental violations of the Free Exercise Clause; 2) RFRA prohibits laws that have the effect of impeding religious exercise; and 3) RFRA protects the free exercise rights of minority religions."[34]

The City sought a writ of certiorari from the United States Supreme Court.[35]

III. JUSTICE KENNEDY'S MAJORITY OPINION

The raw tally (6-3) gives the impression of greater agreement among Supreme Court Justices than that which actually existed. In fact, there was sufficient diversity of opinion among the Justices to induce six of them to author independent opinions, joining and disagreeing variously with specific portions of each other's opinions.[36] Justice Kennedy wrote for the Court, joined by Chief Justice Rehnquist, and Justices Stevens, Thomas, and Ginsburg. Two Justices wrote separate concurring opinions, [37] and three wrote

30. *Id.* at 1358-60.
31. *Id.* at 1360.
32. *Id.* at 1364.
33. *Id.*
34. *Id.* at 1359.
35. *Boerne*, 117 S. Ct. at 2160.
36. *Id.*
37. *Id* at 2172 (Stevens, J. concurring). Justice Stevens filed a short concurring opinion expressing the concern that RFRA conferred special rights on people of faith not available to the general public. *Id.* at 2172. Stevens felt this law amounted to an impermissible establishment of religion. *Id.* Stevens' opinion reads:

> In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the First Amendment to the constitution.
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> If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinance that forbids an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has

separate dissenting opinions in which they strongly indicated that they wanted to reconsider *Smith* for the purpose of overturning that decision.[38]

The Supreme Court determined that RFRA exceeded Congress' power because it attempted to enforce a particular constitutional interpretation by congressional statute.[39] The Court worked through the following analysis to arrive at this conclusion. First, it identified the primary issue as whether RFRA fell within Congress' constitutional authority to enforce the Fourteenth Amendment under the § 5 enforcement clause.[40] The Court then asked whether RFRA enforced existing rights or effected a substantive change in the law.[41] To make that determination, the Court considered whether RFRA was remedial or preventive in effect.[42]

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provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." [citations omitted.]

Id. Stevens' position was that RFRA violated the First Amendment by establishing preferential rights for people who participate in religious activities. But this position can only be supported by viewing the First Amendment through a lens of secular egalitarianism. It cannot be squared with the text of the Amendment itself.

The First Amendment says "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. It specifically protects religiously motivated conduct–not irreligious conduct. But Stevens would turn it on its head to invalidate laws protecting the free exercise of religion, leaving unanswered the question what meaningful content the First Amendment has if it does not grant certain rights to people who practice religion.

38. *Id.* at 2172 (Souter, J. dissenting). Justice Souter filed a dissenting opinion in which he questioned *Smith*'s correctness and applauded Justice O'Connor's historical analysis. Justice Souter wrote that "I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence . . .. These doubts are intensified today by the historical arguments going to the original understanding of the Free Exercise Clause presented in Justice O'Connor's opinion . . . which raises very substantial issues about the soundness of the *Smith* rule." *Id.* Souter also noted that *Smith* was neither briefed nor argued before the Court. *Id.* He concluded, "our free-exercise law remains marked by an "intolerable tension . . . and the constitutionality of the Act of Congress to enforce the free-exercise right cannot now be soundly decided." *Id.*

39. *Id.*

40. *Id.* at 2162-64.

41. *Id.* at 2164.

42. *See id.* at 2168-69. Remedial legislation looks backward, seeking to redress wrongs already perpetrated. Preventive legislation is designed to prevent potential constitutional violations from materializing. Both remedial and preventive legislation may even prohibit conduct itself that is unconstitutional so long as there is a proportional fit between the harm addressed and the means used to avoid it. Lacking such a rational connection, legislation becomes substantive, ceasing to be an appropriate expression of Congress' § 5 enforcement power. *Id.*

A. RFRA Is Constitutional Interpretation By Congressional Statute

Three circumstances triggered the Court's conclusion that RFRA represented an impermissible abuse of federal power. First, RFRA explicitly targeted a recent Supreme Court decision, *Employment Division v. Smith*, for its elimination.[43] Second, RFRA displaced *Smith's* interpretation of the Free Exercise Clause with the compelling interest test of *Sherbert v. Verner*.[44] Finally, RFRA relied on an impermissible method invalidated under *Marbury v. Madison*: pre-empting Supreme Court precedent by statute.[45]

In the text of the statute itself, Congress unhappily noted that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[46] Perhaps RFRA would not have drawn the Court's disfavor if it had not attacked the *Smith* decision so directly. Specifically targeting *Smith* practically assured the territorial clash that culminated in *Boerne*.

Congress vigorously debated constitutional interpretation under *Smith* and preceding decisions during the adoption process.[47] In *Smith*, the Supreme Court declined to apply the balancing test of *Sherbert v. Verner*.[48] RFRA re-imposed that test by congressional statute.[49] The Court regarded this tactic as a legislative attempt to usurp the judicial branch's responsibility to interpret the law.[50] The *Boerne* Court warned Congress in not-so-subtle terms that

> [w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare

43. *Id.* at 2162. *See also* 42 U.S.C. § 2000bb(a).
44. 83 S. Ct. 1790 (1963).
45. *Marbury v. Madison*, 1 Cranch 137 (1803).
46. 42 U.S.C. § 2000bb(a).
47. *Boerne*, 117 S. Ct. at 2161.
48. *Smith*, 110 S. Ct. at 1603. Congress' stated purposes for passing RFRA were "(1) to restore the compelling interest test as set forth in Sherbert v. Verner [citations omitted] and Wisconsin v. Yoder [citations omitted] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government interference." *Boerne*, 117 S. Ct. at 2161. The *Sherbert* test was two-part. First, it asked whether the law substantially burdened the free exercise of religion, and, secondly, whether the government had shown a compelling interest in sustaining the law. *Sherbert*, 83 S. Ct. at 1797.
49. 42 U.S.C. § 2000bb(b).
50. *Boerne*, 117 S. Ct. at 2172.

> decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.[51]

B. The Fourteenth Amendment Does Not Grant Congress the Power to Make Substantive Changes in the Law

The United States joined the Archbishop to defend RFRA as a legitimate exercise of Congress' enforcement power under § 5 of the Fourteenth Amendment.[52] The Fourteenth Amendment § 5 enforcement power allows Congress to pass any legislation appropriate to enforce the provisions of the Fourteenth Amendment. [53] Under this doctrine, the Court has permitted Congress to prohibit conduct not itself unconstitutional, so long as it deters or remedies constitutional violations.[54] However, Congress' § 5 power is limited to remedial, preventive measures; when it strays beyond enforcement of the First and Fourteenth Amendments, it becomes substantive.

The Court found support for its position that RFRA was substantive legislation in the legislative history behind the January 1866 adoption of the Fourteenth Amendment.[55] It noted that a defeated proposal by Representative John Bingham of Ohio would have granted Congress the right to pass substantive legislation to enforce

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51. *Id.*

52. §§ 1 and 5 of the Fourteenth Amendment provide:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.
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> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. CONST. amend. XIV, § 5.

53. The Court spelled out this doctrine in *Ex parte Virginia*:

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

Ex parte Virginia, 100 U.S. 339, 346 (1879).

54. *See Boerne*, 117 S. Ct. at 2163.

55. *See id.* at 2165-66.

the Fourteenth Amendment. The Court believed the proposal failed because Congress recognized that by doing so, it would have used its statute-writing authority to reach beyond its enumerated powers.[56]

The government cited the Civil Rights cases of the 1960s for examples of how the Court upheld aggressive remedial congressional legislation based on the § 5 enforcement power.[57] The Court distinguished those cases, though, finding that RFRA lacked "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." [58] The Court said that if legislation lacks such a connection, then it becomes substantive in operation and effect.[59]

The Court further asserted that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."[60] It conceded that "[t]here is language in our opinion in *Katzenbach v. Morgan*, [citations omitted] which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment."[61] However, the Court decided that was neither a necessary nor even preferred interpretation of that language.[62]

Thus, the Court found that Congress exceeded its power under § 5 of the Fourteenth Amendment to enact laws to enforce the provisions of the Amendment.[63] It held that generally applicable laws that incidentally burden religion do not violate the Free Exercise Clause.[64] This means that only laws that specifically target religious practice violate the Free Exercise Clause.[65]

C. RFRA Is Substantive, Not Remedial Or Preventive Legislation

Legislation may be deemed remedial or preventive if there is "congruence between the means used and the ends to be achieved."[66] The appropriateness of the measures adopted must be evaluated against the evils sought to be deterred.[67] Both remedial and prevent-

56. *See id.* at 2166.
57. *See e.g.* City of Rome v. United States, 446 U.S. 156 (1980), Katzenbach v. Morgan, 384 U.S. 641 (1966), South Carolina v. Katzenbach, 383 U.S. 301 (1966).
58. *Boerne*, 117 S. Ct. at 2164.
59. *See id.*
60. *Id.* at 2167.
61. *Id.* at 2168.
62. *See id.*
63. *Id.* at 2166-67.
64. *See Boerne*, 117 S. Ct. at 2171.
65. *See id.* at 2176.
66. *Id.* at 2169.
67. *See id.* at 2168-69.

ive legislation should be tailored to address substantial, identifiable harms in society.[68]

To analyze whether RFRA met these requirements, the Court compared it to the Voting Rights Act of 1965, finding several significant differences.[69] The Voting Rights Act affected only state voting rights laws, while RFRA reached all laws passed by governmental bodies of every kind.[70] The Voting Rights Act was geographically limited to jurisdictions where the most egregious voting rights abuses occurred, whereas RFRA's impact was nationwide.[71] Regarding examples of religious discrimination presented during congressional hearings on RFRA, the Court wrote, "[i]t is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country."[72] Finally, the Voting Rights Act provided for automatic self-termination without legislative renewal.[73] RFRA had neither a termination date nor a mechanism for periodic review and renewal.[74]

Thus, the Court concluded that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[75]

IV. JUSTICE O'CONNOR'S DISSENTING OPINION

Justice O'Connor mustered a considerable amount of historical evidence to assert that First Amendment jurisprudence went dramatically off-course with *Smith*.[76] She believed *Boerne* drastically de-

68. *See id.* at 2164.
69. *See id.* at 2166-71.
70. *See id.* at 2170. The Court wrote "RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and Local Governments." *Id.*
71. *See id.*
72. *Id.* at 2169. "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of religious persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Id.*
73. *See id.*
74. *See id.* at 2170.
75. *Id.* at 2169.
76. *Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting). O'Connor claimed that "Our Nation's Founders conceived of a Republic receptive to voluntary religious

graded the level of review that Free Exercise Clause cases would receive in the future, effectively guaranteeing that generally applicable laws that genuinely burden religion henceforth will not be found to violate the Free Exercise Clause.[77]

Justice O'Connor agreed with the result of *Boerne* and with the reasoning that RFRA failed because it exceeded the § 5 power of the Fourteenth Amendment.[78] She understandably agreed with the majority on the issue of judicial supremacy, acknowledging that "[C]ongress lacks the ability independently to define or expand the scope of constitutional rights by statute."[79]

Justice O'Connor had two main points of disagreement with the majority opinion: 1) it drastically degraded the level of review that Free Exercise Clause cases would receive in the future, and, consequently, 2) it guaranteed that in future court challenges, generally applicable laws that burdened religion would not be found to violate the Free Exercise Clause.[80]

A. Free Exercise Clause Review Under Boerne Is Less Than "Mere Rationality"

Justice O'Connor argued that prior to *Smith*, Free Exercise Clause violations enjoyed strict scrutiny review, and that RFRA, though unconstitutional in its method, was nevertheless correct in its goal to restore the two-pronged strict scrutiny test (compelling state interest and least restrictive means) to Free Exercise Clause analysis. She wrote:

> I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims. In *Smith*, five Members of this Court—without briefing or argument on the issue[81]—interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition is generally applicable. Contrary to the Court's holding in that case, however, the Free Exercise Clause is not simply an

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expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law." *Id.* at 2185.

77. *See id.*

78. *See id.*

79. *Id.*

80. *See id.* at 2176-77.

81. *See supra,* n.38 for more on Justice Souter's criticism that *Smith* effected a substantial change in Free Exercise Clause interpretation without briefing or argument before the Court. *Boerne*, 117 S. Ct. at 2186.

> anti-discrimination principle that protects only against those laws that single out religious practice for unfavorable treatment (citations omitted) . . . . Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law.[82]

Under *Boerne*, only plaintiffs who can show that an offending statute specifically targets their religious practice will be able to bring a successful suit. *Boerne* thus renders Free Exercise Clause scrutiny below "mere rationality" review, because plaintiffs will henceforth have no opportunity to challenge generally applicable statutes that only incidentally affect their religious practice.

B. Generally Applicable Laws Can Impermissibly Burden Religion

Justice O'Connor noted four examples where facially neutral laws that burden religious practice were challenged and upheld in lower courts under *Smith*. Each would have been rightly struck down under RFRA, but would now survive challenge under *Boerne*. In one case, coroners performed an autopsy on the son of Hmong natives, despite the religious objections of the parents.[83] In another, the Eighth Circuit Court of Appeals held that a church could not hold religious services in an area zoned commercial, even though secular not-for-profit organizations were permitted in the same area.[84] In New York, in a case similar to *Boerne*, an historical landmark designation was also upheld, even though it "drastically restricted the Church's ability to raise revenue to carry out its various charitable and ministerial programs."[85] Lastly, in Minnesota, a state district court required an Amish farmer to display a bright orange triangle on his buggy over his religiously-motivated objection, despite the fact that less restrictive means were available to accomplish the goal of ensuring safety on the public highways.[86] O'Connor ruefully concluded that "lower courts applying *Smith* no longer find necessary a

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82. *See id.* at 2176-77.
83. *See generally Yang v. Sturner*, 750 F.Supp 558 (D.R.I. 1990).
84. Cornerstone Bible Church v. Hastings, 948 F.2d 464 (8th Cir. 1991).
85. Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990).
86. State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990). The Minnesota Supreme Court overturned this decision later on the ground that application of the pertinent statute violated freedom of conscience rights protected by the Minnesota Constitution. *Id.* at 399.

searching judicial inquiry into the possibility of reasonably accommodating religious practice."[87]

C. *"Free Exercise of Religion" Is Difficult to Define*

Justice O'Connor admitted that scholars disagree as to exactly what "free exercise of religion" means.[88] She conceded that "[i]t would be disingenuous to say that the Framers neglected to define precisely the scope of the Free Exercise Clause because the words 'free exercise' had a precise meaning."[89] But, she argued that while the precise legal meaning of "free exercise of religion" might not be as clear as some might wish, the phrase is not without substantive content.

Justice O'Connor also marshaled a substantial amount of historical evidence to demonstrate that the Free Exercise Clause drafters viewed it as a "guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence."[90] She offered historical evidence from five sources to support her contention. They were: 1) the legislative history surrounding the adoption of the Free Exercise Clause, 2) appearances of the term "free exercise" prior to the adoption of the Bill of Rights,[91] 3) various state constitutions contemporaneous with the adoption of the Bill of Rights,[92] 4) various

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87. *Boerne*, 117 S. Ct. at 2177.

88. Justice O'Connor wrote, paraphrasing Leonard Levy, "it is not exactly clear what the Framers thought the phrase signified." *Id.* at 2179.

89. *Id.*

90. *Id.* at 2178.

91. In 1648, Maryland's new governor made a promise to Lord Baltimore not to disturb Christians, particularly Roman Catholics in the "free exercise" of their religion. In 1649, Maryland enacted the first free exercise clause in the Act Concerning Religion. The Act said, "[N]oe person . . . professing to beleive [sic] in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof." Rhode Island's Charter of 1663 used the term "liberty of conscience" to express the same idea "liberty of conscience . . . in matters of religion and do not disturb the civil peace of our said colony." *Boerne*, 117 S. Ct. at 2179.

There were also agreements between settlers and proprietors of Carolina, New York, and New Jersey that suggested that, "these colonies appeared to recognize that government should interfere in religious matters only when necessary to protect the civil peace or to prevent 'licentiousness.'" *Id.* at 2180.

O'Connor claimed that pre-*Smith* cases followed the same policy: "government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest." *Id.*

92. Relevant portions of documents cited in O'Connor's opinion follow, *infra*.

The New York Constitution of 1777: "[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That liberty of conscience,

practices of the colonies and early states,[93] and 5) writings of early leaders of the newly formed United States.[94]

The scope of the Free Exercise Clause exclusion for religious conduct is the heart of the disagreement between Justices O'Connor and Scalia. Their opinions focus on various limiting provisos in early legislative and political documents, which provide for religious freedom that does not interfere with the "peace or safety of the state." O'Connor singled out the New York Constitution of 1777 to illustrate her contention that those provisos proved that early leaders viewed the free exercise of religion as a right generally superior to ordinary legislation, to be restricted only when it significantly conflicted with a compelling state interest.[95] O'Connor viewed the provisos as

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hereby granted, *shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State*." (Citation omitted).

The New Hampshire Constitution of 1784: "Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience and reason . . . *provided he doth not disturb the public peace, or disturb others, in their religious worship*." (Citation omitted).

The Maryland Declaration of Rights of 1776: "[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, *any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others*, in their natural, civil, or religious rights." (Citation omitted).

The Georgia Constitution of 1777: "All persons whatever shall have the free exercise of their religion; *provided it be not repugnant to the peace and safety of the State*." (Citation omitted).

The Northwest Ordinance of 1787: "No person, *demeaning himself in a peaceable and orderly manner*, shall ever be molested on account of his worship or religious sentiments. . .." (Citation omitted). *Id.* at 2180-81.

93. Conflicts over exemption from military service and exemption from religious taxes were the primary point of tension between religious practitioners and the government in the new republic. Some sects, such as the Quakers, also refused on Biblical grounds to take oaths or "swear" allegiance to governmental authority. Colonial governments commonly granted such groups religious exemptions from military service and religious taxes. *See id.* at 2182-83.

94. Cited writers were James Madison (Memorial and Remonstrance Against Religious Assessments), Patrick Henry, Thomas Jefferson (Virginia's Bill for Establishing Religious Freedom), George Washington, Oliver Ellsworth, and Isaac Backus, a Massachusetts delegate and Baptist minister. *See generally id.* at 2183-84.

95. Justice O'Connor wrote:

> [I]t was generally accepted that the right to "free exercise" required, where possible, accommodation of religious practice. If not—and if the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience—there would have been no need for these documents to specify, as the New York Constitution did, that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] state." Such a proviso would have been superfluous. Instead, these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes.

necessary to restrict what was otherwise considered an unlimited right.[96]

After looking at all the evidence, Justice O'Connor concluded that

> [b]efore *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.[97]

V. JUSTICE SCALIA'S CONCURRING OPINION

A. The Historical Record Permits An Alternative Interpretation

Justice Scalia joined in the majority opinion, except for the point that RFRA exceeded Congress' power because the Act was substantive rather than remedial. He also authored a separate concurring opinion specifically to challenge Justice O'Connor's understanding of the original meaning of the Free Exercise Clause. [98] Scalia wrote to address O'Connor's contention that historical materials support a result contrary to *Smith*.[99] He charged that, "[t]he material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause."[100]

Scalia focused on the early free exercise provisos, claiming that they buttressed, rather than undermined, *Smith*.[101] His interpretation was that they protected the free exercise of religion only when it did not conflict with generally applicable laws.[102] To arrive at that conclusion, Scalia claimed that such phrases as "keeping the peace" and "keeping order" are properly equated with the phrase, "keeping the laws."[103] He claimed that this view accords with the then-

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Id. at 2181.

96. *See id.* at 2181-82.
97. *Boerne*, 117 S. Ct. at 2177.
98. *See id.* at 2172.
99. *See id.*
100. *Id.*
101. *See supra*, n.57, for examples of some free exercise enactment provisos.
102. *Boerne*, 117 S. Ct. at 2173.
103. *Id.* at 2174.

influential views of John Locke, who defined "freedom as the right 'to do only what was not lawfully prohibited.'"[104]

Scalia agreed with law professor Philip Hamburger that "the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."[105] Requiring the government, defending a burdensome law, to show that the complaining citizen had committed some kind of violence or force would be equivalent to requiring the government to demonstrate a compelling state interest. Allowing the government to show merely that the citizen had performed some action proscribed by law is a significantly lower standard, arguably lower than even mere rationality review.

Scalia also endorsed *Smith* critic Michael McConnell's opinion that "constitutionally compelled exemptions [from generally applicable laws regulating conduct] were within the contemplation of the Framers and Ratifiers as a possible interpretation of the Free Exercise Clause."[106] However, Scalia dismissed the statements of the Framers as indicating nothing more than the preference that religious practice should be legislatively accommodated where possible.[107] He suggested that the Framers did not necessarily expect that their preferences would be elevated to the level of constitutional requirements.

B. The Dissent Offers No Supporting Cases

Scalia considered, "the most telling point made by the dissent . . . to be found, not in what it says, but in what it fails to say."[108] He charged that O'Connor cited no cases that struck down generally applicable statutes because they did not accommodate religious practice. Prior to 1850, Scalia himself could identify only one, *People v. Philips*,[109] an 1813 New York City municipal court decision that required acknowledgement of the priest-penitent privilege. However,

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104. *Id.* (Citing West, *The Case Against A Right to Religion-based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990).

105. *Id.* (Citing Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 918-19 (1992)).

106. *Boerne*, 117 S. Ct. at 2173 (Citing Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, HARV. L. REV. 1409, 1415 (1990) (Brackets in original).

107. *Id.* at 2175.

108. *Id.*

109. *People v. Philips*, Court of General Sessions, City of New York (June 14, 1813), *quoted in Privileged Communications to Clergymen*, 1 CATH. LAWYER 199 (1955).

Scalia discounted *Philips* as weak authority because it was in a minor court and did not involve a statute.[110]

Scalia cited two cases in support of his proposition that early courts did not find it necessary to make exceptions for objections based on religious beliefs. In *Simon's Executors v. Gratz*,[111] a litigant requested a continuance because his appearance on the Sabbath would have violated his religious principles. The court denied it.[112] In *Stansbury v. Marks*,[113] the court imposed a fine on a witness who "refused to be sworn, because it was his Sabbath."[114]

Scalia's reasoning here is interesting, but problematic. It may be that no decisions exist regarding religious exemptions to generally applicable laws simply because none were brought to the courts during that time. Also, the cases that Justice Scalia relies upon are weak reeds on which to stand. The *Stansbury* opinion is only fifty-six words long, and gives no insight into its underdlying reasoning.[115] The *Gratz* case is on firmer ground because it clearly held that a person's religious obligations are inferior to a citizens' civil obligations in secular courts. But, this case also has difficulties. First, it was litigated under Pennsylvania state law, not the First Amendment. Secondly, the judge who wrote the opinion vigorously urged that persons with religious scruples involved in litigation should "receive all the indulgence that is compatible with the business of government."[116] But perhaps a more serious problem with both cases is that the burdened persons were Jews ordered to violate their Sabbath observance. It is possible these cases say more about discrimination against adherents of minority religions than First Amendment jurisprudence.

Scalia conceded that the "historical evidence marshaled by the dissent cannot fairly be said to demonstrate the correctness of *Smith*; but it is more supportive than destructive of it."[117] But Scalia appeared to leave the door open to other theories of Free Exercise Clause interpretation, saying the Clause is "not compatible with any theory . . . that has been proposed as an alternative to *Smith*."[118]

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110. *Boerne*, 117 S. Ct. at 2173.
111. 2 Pen. & W. 33, 34 (Pa. 1831).
112. *Id.* at 35.
113. 1 L. Ed. 353 (Pa. 1793).
114. *Id.*
115. *See id.*
116. *Gratz*, 2 Pen. & W. at 34.
117. *Boerne*, 117 S. Ct. at 2175.
118. *Id.* at 2175-76.

VI. SOME PROPOSALS TO ADDRESS LINGERING PROBLEMS

Time is more likely than not to demonstrate that *Boerne* has further complicated, rather than simplified, First Amendment jurisprudence. In particular, *Boerne* has effectively denied access to the courts to persons legitimately seeking relief from generally applicable laws that significantly burden their religious practices. Courts wishing to extend protection to such individuals will be sorely tempted to carve out significant exceptions to the *Smith/Boerne* rule. But seeking judicial exceptions is only one possible option available to those who wish to protect Free Exercise rights. Several others are presented below.

A. Apply a Standard of Review to Free Exercise Clause Cases Consistent With Other First Amendment Jurisprudence

One of the most difficult problems with both *Smith* and *Boerne* is that the standard of review the Supreme Court has deemed appropriate for Free Exercise Clause cases is significantly out of step with other First Amendment jurisprudence. As Justice O'Connor wrote:

> it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. For example, it has long been the Court's position that freedom of speech—a right enumerated only a few words after the right to free exercise—has special constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect.[119]

O'Connor's criticism here is targeted at a reference in the majority opinion to *Smith*'s assertion that application of the *Sherbert* test would have produced an anomaly in the law.[120] However, the greater anomaly is that free speech cases enjoy the heightened pro-tection of strict scrutiny review, while many free exercise controversies will receive no judicial protection at all. There remains no justifiable reason for this disparity; the Court's denial of Congress' attempt to secure the same level of review only perpetuates this First Amendment disparity. Despite *Boerne*, the Court should revisit this

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119. *Id.* at 2185 (O'Connor, J. dissenting).

120. *Boerne*, 117 S. Ct. at 2161. The Court identified that anomaly as a "constitutional right to ignore neutral laws of general applicability." *Id.*

issue to restore an appropriate level of review to Free Exercise Clause cases.

B. Use An Indicia Test To Determine What Constitutes Religious Conduct Deserving Constitutional Protection

Justice O'Connor's approach is difficult to apply evenhandedly in a religiously heterogeneous society such as that of the United States. The current cultural climate is dramatically different than the one in which the First Amendment was adopted.[121] But, regardless of what the Founding Fathers considered "religion" to be in 1789, several recent cases demonstrate that courts are uncomfortable extending Free Exercise Clause protections to persons like practitioners of the Wiccan religion,[122] Indian smokers of peyote,[123] and prisoners wishing to practice animal sacrifice in jail.[124] Despite this reluctance, courts will continue to face plaintiffs representing non-traditional religions who do not accept the assertion that the First Amendment contains no protections for them. [125]

The problem of even-handed application of Free Exercise Clause protections is also related to two other factors that the *Boerne* decision barely mentioned, but that were probably more determinative than was indicated by the amount of space they were granted. If the Court is to re-think its First Amendment jurisprudence, then it must address these factors, as well: the expectation of a "heavy litigation bur-den

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121. Justice O'Connor wrote, "Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law." *Boerne*, 117 S. Ct. at 2185.

122. *See generally* Church of Iron Oak, Inc. v. Palm Bay, 868 F. Supp. 1361 (M.D. Fla. 1994), Rust v. Clarke, 883 F. Supp. 1293 (D. Neb. 1995), Carpenter v. Wilkinson, 946 F. Supp. 522 (N.D. Ohio 1996), and Rouser v. White, 944 F. Supp. 1447 (E.D. Cal. 1996).

123. *Smith*, 110 S. Ct. at 1595.

124. *See* Howard v. United States, 864 F. Supp. 1019 (D. Colo. 1994).

125. A recent article noted that:

> courts have been asked to do some serious soul searching about such issues since the 1970s, when offbeat religious freedom filings began to grow. Typical of a long line of such cases was one filed in February (and still pending in by two inmate Satanists serving life sentences at Louisiana State Penitentiary in Angola. Prison officials, they alleged, had violated their right to practice their religion by denying them use of the prison's interfaith chapel. The inmates sought to have satanic practices recognized as a religion and accorded the same rights and privileges of [sic] other religions at the prison.

Di Mary Ricker, *supra* note 7 at 25.

on the States"[126] under RFRA, and the necessity of evaluating the sincerity and validity of religious adherents' beliefs in order to weigh them against opposing governmental interests.[127]

The Court's reluctance to address issues of religious doctrine should not be underestimated.[128] In *Smith*, the Court flatly stated that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[129] The Court's reticence to take on "the difficulty of determining whether a particular practice was central to an individual's religion"[130] probably helped motivate it to base its decision on the separation of powers issue.

The Court's hesitancy is understandable. One of the more vexing problems with Free Exercise Clause issues has been the difficulty of defining religion in the courts. That is probably the most serious flaw in RFRA's compelling interest test: it requires judges in secular courts to evaluate the importance of doctrinal issues in order to balance religious objections against competing state interests. Both people of faith and judges are reticent to invite secular officials to make such judgments.

In *Frazee v. Illinois Dept. of Employment Security*,[131] the Supreme Court addressed the problem of defining religion by adopting the rule that any person's sincere assertion that their particular practice is religiously motivated should be taken at face value.[132] Thus, First Amendment cases do not ask whether a person's belief is part of a commonly accepted religion.[133] There need not be large numbers of adherents to a particular religion to gain First Amendment protection. Indeed, for First Amendment purposes there need be no more than one, and that person need merely claim a sincere religious belief.[134] Judges must then weigh that belief or practice against the state's compelling interest.[135]

Despite the Supreme Court's reluctance to sail into ecclesiastical waters, some lower courts have found themselves in the position of having to decide whether to revoke the tax-exempt status of particular

126. *Boerne*, 117 S. Ct. at 2171.
127. *Id.* at 2161.
128. In the *Smith* decision, the Court wrote that "The anomaly [of recognizing a constitutional right to ignore neutral laws of general applicability] would have been accentuated . . . by the difficulty of determining whether a particular practice was central to an individual's religion." *Id.* at 2161.
129. *Smith*, 110 S. Ct. at 1604.
130. *Boerne*, 117 S. Ct. at 2173.
131. 489 U.S. 829 (1989).
132. *Id.*
133. *See* U.S. v. Ballard, 322 U.S. 78 (1944).
134. *See Frazee*, 489 U.S. at 834.
135. *Id.*

churches based on whether their members are indeed practicing a bona fide religion. These courts have discovered reliable ways of distinguishing between religious beliefs that are genuinely held and those that have been invented merely for the sake of avoiding objectionable civic duties.

For instance, the Seventh Circuit Court of Appeals found it necessary to evaluate the legitimacy of the respondents' religion in *United States v. Dykema*.[136] In *Dykema*, the IRS challenged the tax-exempt status of the Christian Liberty Church and its pastor under 26 U.S.C.A. § 501(c)(3).[137] The court applied an indicia test[138] to evaluate whether the church qualified for tax-exempt status. The Seventh Circuit found relevant the existence of 1) corporate worship services that include administration of sacraments and observance of liturgical rituals, as well as preaching and evangelical outreach; 2) pastoral counseling and comfort; 3) clergy who perform customary ceremonies, such as baptism, marriage, and burial; and 4) a system of nurture of the young and education in the doctrine and discipline of the church, including the existence and availability of advanced training for future ministers.[139]

The Third Circuit Court of Appeals has also adopted an indicia test to guide future decisions concerning whether a particular litigant's avowed beliefs are sufficiently religious in nature to warrant legal recognition. In *Africa v. Commonwealth of Pennsylvania*,[140] the Third Circuit applied this three-part test to determine whether a party's beliefs were sincerely held religious beliefs. The *Africa* test asked 1) whether the beliefs address fundamental and ultimate questions having to do with deep and imponderable matters; 2) whether the beliefs are comprehensive in nature or merely isolated teachings; and 3) whether the beliefs are manifested in certain formal and external signs, such as history, literature, ceremonies, and membership and educational requirements.[141] A Minnesota federal district court testing whether a particular religious corporation qualified for tax-

136. 666 F.2d 1096 (7th Cir. 1981).
137. *Id.* at 1098.
138. In an indicia test, the court looks for a particular set of signs or indications that circumstances are present which make the existence of a given fact probable, even if not certain. To apply such a test, the court first identifies the criteria it deems relevant, then asks whether they are present in the case at bar. Partial, or even complete failure on any particular point is not determinative. Rather, the court evaluates whether, in total, the party in question substantially meets more of the criteria than less. If the answer is yes, then that particular element is deemed to have been fulfilled. BLACK'S LAW DICTIONARY 772 (6th ed. 1990).
139. *Dykema*, 666 F.2d at 1100.
140. 662 F.2d 1025 (3rd Cir. 1981).
141. *Id.* At 1032.

exempt status under U.S.C.A. § 501(c)(3) also used the *Africa* test in *Church of the Chosen People v. United States.*[142]

Screening claimants seeking special legal protections based on their religious beliefs with an indicia test would allow the Supreme Court to accomplish two worthy goals. First, the Court could restore strict scrutiny to Free Exercise cases, thereby providing a judicial haven for sincere claimants whose religious practices have been unduly burdened by generally applicable laws. Second, the Court could deny judicial protection to those who have less than pure motives by requiring them to demonstrate the sincerity of their beliefs to the tribunal.

C. Preserve Free Exercise of Religion in the Legislative Arena

The courts are not the only place where changes in this area should be pursued. Persons dedicated to preserving religious liberties should also seek to guard them in the political arena. One of the possible reasons why the Court demonstrated so little sympathy for St. Peter Catholic Church is that its membership of 2,170 represents about forty percent of the city's population of about 5,500.[143] The city believed those numbers indicated the church must have a correspondingly large voice in civic affairs.[144] The Court would have therefore been justified in thinking that the church would have an adequate opportunity for redress in the local political system, and would not be left unprotected if a judicial remedy was denied.[145]

D. Depend on the State Courts to Protect Religious Liberties

State courts are a possible forum for protecting First Amendment rights. Many states already have constitutional provisions that are at least as strong as the federal First Amendment; many are more so.[146] Persons seeking relief for abuse of their religious liberties should start by exploring their state constitution.

While the Supreme Court has proven somewhat hostile to religious liberties defended under the First Amendment, in *Pruneyard Shopping Center v. Robins*,[147] the Court signaled a willingness to

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142. 548 F. Supp. 1247, 1252-53 (D. Minn. 1982).
143. Petitioner's Reply Brief at 9, *Boerne*, 117 S. Ct. 2157.
144. *Id.*
145. *Id.*
146. *See e.g.* VA CONST Art. 1, § 16; ME CONST Art. 1, § 3; OR CONST Art. 1, § 3.
147. 100 S. Ct. 2035 (1980).

uphold individual liberty provisions in state constitutions even more protective than those of the Federal Constitution. In *Pruneyard*, the Court upheld the free speech rights of high school students to solicit signatures on a political petition in a shopping mall.[148] The Court wrote that, "our reasoning . . . does not *ex proprio vigore*[149] limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[150]

VII. CONCLUSION

Justice Scalia concluded his opinion with a powerful statement. Focusing on the federalism issue, he stated that the

> issue present in *Smith*, is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes . . .) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.[151]

On that point, Justice Scalia is correct. The Supreme Court should protect the will of the people as expressed in the Constitution from statutory overthrow by Congress. But, Congress is not the sole threat to the Constitution. The distance between the bare text of the Free Exercise Clause and *Boerne's* interpretation of it demonstrates the judicial branch's equal ability to subvert that document's original intent. The *Boerne* decision provides a fresh example of how far judicial decisions can carry the Constitution away from the Founding Fathers' original formulation.

Arguably, the *Boerne* case is not really a First Amendment case at all. After all, the majority focused on Fourteenth Amendment issues of federalism, leaving the issues of religious freedom to concurring and dissenting opinions, which do not carry precedential weight. But *Boerne* did re-affirm the right of government to pass

148. *See id.*

149. *Ex proprio vigore* literally translated means "by its own force." BLACK'S LAW DICTIONARY 582 (6th ed. 1990).

150. *Pruneyard*, 100 S. Ct. at 2040.

151. *Boerne*, 117 S. Ct. at 2176.

laws that substantially burden the free exercise of religion, so long as they are laws of general applicability. Thus, the Free Exercise Clause remains an innocent victim of this line of Supreme Court cases.

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