University of Richmond Law Review

Volume 32 | Issue 2 Article 6

1998

A Matter of Power: Structural Federalism and Separation Doctrine in the Present

Frances Howell Rudko

A MATTER OF POWER: STRUCTURAL FEDERALISM AND SEPARATION DOCTRINE IN THE PRESENT

*Frances Howell Rudko**

> *That gentleman [Senator Richard M. Johnson of Kentucky] . . . has moved a resolution requiring a concurrence of more than a majority of all the judges of the Supreme Court to decide that a case is repugnant to the constitution. . . .*
>
> . . . .
>
> *I will say then at once that it is among the most dangerous things in legislation to enact a general law of great and extensive influence to effect a particular object; or to legislate for a notion under a strong excitement which must be suspected to influence the judgement/[sic]. If the mental eye be directed to a single object, it is not easy for the legislator, intent only on that object, to look all around him, and to perceive and guard against the serious mischiefs with which his measure may brim. . . .*
>
> . . . .
>
> *What substantial difference is there between withdrawing a question from the court, and disabling a court from deciding that question? To require almost unanimity is to require what cannot often happen, and consequently to disable the court from deciding constitutional questions. . . .*
>
> . . . .
>
> *A majority of the court is according to . . . the common understanding of mankind, as much the court, as the majority of the legislature is the legislature: and it seems to me that a law requiring more than a majority to make a decision as much contradicts the views of the constitution as an act requiring more than a majority of the legislature to pass a law.*
>
> *John Marshall to Henry Clay, December 22, 1823*[1]

---

* Associate Professor of Law, Southern New England School of Law, North Dartmouth, Massachusetts. B.A., 1959, Southern Methodist University; J.D., 1973, M.A., 1983, Ph.D., History, 1990, University of Arkansas.

1. Letter from John Marshall, Chief Justice, United States Supreme Court, to

I. INTRODUCTION

Public reaction to the 1823 Supreme Court decision in *Green v. Biddle*[2] prompted John Marshall's letter to Henry Clay, who had argued the case as amicus curiae for the defendant.[3] The letter is significant because Marshall, who had been a legislator himself, candidly expresses not only his personal dissatisfaction with the congressional assault on the 1823 decision but also the constitutional basis for his opinion. The significance of Marshall's extrajudicial opinion becomes more apparent when it is considered in the aftermath of the recent tug-of-war between Congress and the Court which culminated in the decision in *City of Boerne v. Flores*[4] of last term. In *Boerne*, as in *Green v. Biddle*, congressional attacks were attempts to control the judicial decision making process, and in each instance Congress

---

Henry Clay, Counselor (Dec. 22, 1823) (on file with the Henry Wheaton Papers, Manuscript Division, the Gilder Lehrman Collection, on deposit at The Pierpont Morgan Library, New York, N.Y.) GLC 141 [hereinafter Marshall Letter]. The full text of the letter in its original script is reprinted in the appendix to this article, with special permission granted by the Pierpont Morgan Library.

2. 21 U.S. (8 Wheat.) 1 (1823). In *Green v. Biddle*, the Supreme Court found two Kentucky statutes unconstitutional because they conflicted with the 1789 Virginia-Kentucky compact creating Kentucky. The state statutes created rights for occupying land claimants against titled landowners whose rights were secured by the 1789 compact. Marshall recused himself from the case as he and his family owned over 400,000 acres of Kentucky land. For a discussion of the case, see G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES III-IV: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 641 (1988); *see also* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 144 n.80 (1990).

3. At the second hearing of the case, Clay, a Kentuckian, argued unsuccessfully for the validation of the Kentucky laws. When Congress convened in 1823, Senator Richard M. Johnson from Kentucky proposed that the justices of the Supreme Court be increased to ten, and that a supermajority of seven be required to decide on the constitutionality of legislative acts, national or state. *See* 1 ANNALS OF CONG. 28 (1823). During the previous session, Johnson had proposed a constitutional amendment requiring that appeals in cases involving the constitutionality of state laws be heard by the full Senate, not the Supreme Court. The Marshall Court was continuously criticized in the newspapers and in Congress. In 1819, the most controversial opinion was *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For a review of Marshall's editorial response to this criticism, see Gerald Gunther, *John Marshall, 'Friend of the Constitution': In Defense and Elaboration of* McCulloch v. Maryland, 21 STAN. L. REV. 449 (1969); *see also* 8 THE PAPERS OF JOHN MARSHALL 254-363 (Charles F. Hobson ed., 1995).

4. 117 S. Ct. 2157 (1997).

attacked not only the decision, but also the authority of the Court.[5]

The historical significance of the *Boerne* case is two-fold. In the larger context, the debate, which began with the Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[6] then escalated into the passage of the Religious Freedom Restoration Act of 1993,[7] and ended with the *Boerne* decision, represents a modern version of the eighteenth century debate which began with *Chisholm v. Georgia*[8] and resulted in the passage of the Eleventh Amendment.[9] The two episodes can be seen as the first and the latest statements in a continuing discussion of the distribution of power between the branches of government and between the state and national governments. In each episode, an unpopular court decision was targeted by Congress but by different procedures. Two hundred years ago in the 1790s, Congress overturned an unpopular constitutional decision by amending, *pursuant to Article V*, the Constitution.[10] In the 1990s, Congress overturned an unpopular constitutional decision by passing, *pursuant to section five of the Fourteenth Amendment*, a legislative act which the Court declared unconstitutional under the structural distribution of powers implicit in the Constitution.[11]

---

5. *See Green*, 21 U.S. (8 Wheat.) 1; *Boerne*, 117 S. Ct. 2157.

6. 494 U.S. 872 (1990).

7. 42 U.S.C. § 2000bb (1994).

8. 2 U.S. (2 Dall.) 419 (1793). The Court held that an individual citizen of one state could sue a state. In other words, the judicial power of the federal courts extended under Article III, Section 2, of the Constitution to "controversies . . . between a State and Citizens of another state." *Id.* at 431. *See* BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 51 (1993) for an analysis of the case. Schwartz contends that the Eleventh Amendment may have overruled the holding in *Chisholm*, "but the rejection of state sovereignty in [Justice James] Wilson's *Chisholm* opinion has today become accepted doctrine." *Id.* at 53.

9. The amendment went into effect in 1798 and provides that the "Judicial power of the United States shall not . . . extend to any suit in law or equity, . . . against one of the United States by Citizens of another State . . . ." U.S. CONST. amend. XI. The Eleventh Amendment is the first of "four amendments . . . adopted to overrule the Court's interpretation of the Constitution." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 12 (1997). See also HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION 127, 128 (1990) (discussing the "constitutional substitute for legislative statutory revision" and reviewing the four amendments overturning Supreme Court decisions).

10. *See* U.S. CONST. amend. XI.

11. *See* 42 U.S.C. § 2000bb (1994).

In the narrower context of the current debate, the *Boerne* decision reflects the Rehnquist Court's respect for federalism and for the distribution of powers doctrine, addresses the scope of section five enforcement power, leaves for later consideration the merits of the *Smith* decision, and illustrates that the Supreme Court is not the isolated, elitist decision making body that critics assume.[12] A closer examination of the *Smith-Boerne* event confirms these observations and highlights the question posed by the event—why was the *Boerne* decision not unanimous?

The following discussion does not address the merits of the religious exercise debate or attempt to define the scope of religious exercise freedom except as it relates to the process by which the Supreme Court declared the Religious Freedom Restoration Act unconstitutional. The discussion is based on the assumption that the current debate is about power.

II. *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH*[13]

The individual opinions in *Smith* define the disagreement at the heart of the debate. The majority refused to apply the compelling state interest balancing test to determine whether Oregon's criminal statute constitutionally infringed upon religious expression.[14] Justice Antonin Scalia, writing for the majority, found the appropriate standard to be the rational basis test when the category being tested involved general neutral laws which have only incidental effects on religious practices.[15]

---

12. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

13. 494 U.S. 872 (1990).

14. *See id.* at 884-85.

15. *See id.* at 883-90 (examining the validity of Oregon's general statute proscribing drug use, which affected sacramental peyote use). See the penetrating and thorough analysis of the case and the Religious Freedom Reformation Act in Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996). The authors argue convincingly that RFRA should be overturned because it invades judicial territory and creates a dangerous precedent for congressional intermeddling. *See id.* at 139. They offer three suggestions for solving the *Smith* problem: specific religious exemptions by Congress and by the states, a congressional statute which would create a "true federal right of action to enforce and protect some specified aspects of religious exercise," and a proper case before the Supreme Court to reconsider and, perhaps, overrule *Smith*. *See id.* at 139-41.

Justice Sandra Day O'Connor concurred in the judgment, but strongly rejected the categorical test used by the majority. She reasoned that the compelling state interest test had been met.[16] Justices Harry Blackmun, William Brennan and Thurgood Marshall dissented.[17] They argued that the balancing test which favors broader protection for religious exercise should apply.[18]

Scalia, in renouncing the balancing test, reasoned that "[t]he 'compelling government interest' requirement seems benign" because it produces desirable results in some disputes.[19] In speech content cases, it produces "an unrestricted flow of contending speech."[20] In racial discrimination cases, it produces "equality of treatment."[21] In religious exercise cases, however, Scalia contended, "it would produce . . . a private right to ignore generally applicable laws," an anomaly—not a norm as in the other cases.[22] Balancing would involve the judges in the inappropriate and impossible task of assigning weight and value to religious beliefs in order to test the exercise right against the government's interest,[23] and would result in a "parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[24]

Scalia's opinion is consistent with the judicial restraint urged by Justice Felix Frankfurter and legal scholars James Bradley Thayer and Alexander Bickel,[25] and the *Smith* opinion did pro-

16. *See Smith*, 494 U.S. at 891-907 (O'Connor, J., concurring).
17. *See id.* at 907 (Blackmun, Brennen, & Marshall, JJ., dissenting).
18. *See id.* at 909-19.
19. *Id.* at 885.
20. *Id.* at 886.
21. *Id.*
22. *Id.*
23. *See id.* at 887.
24. *Id.* at 889 n.5.
25. Frankfurter supported his ideas on judicial restraint by his reading of James Bradley Thayer and Justices Louis Brandeis, Oliver Wendell Holmes and John Marshall. They shared the idea that the judiciary should defer to legislation as Thayer insisted unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational questioning." James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). For a discussion of Frankfurter's use of judicial restraint, see FRANCES HOWELL RUDKO, TRUMAN'S COURT: A STUDY IN JUDICIAL RESTRAINT 9-14 (1988). For Frankfurter's extrajudicial views,

duce the result envisioned by that approach. By deferring to Oregon's right to enact general criminal laws with or without religious practice exemptions,[26] the Court effectively "forced" or "allowed" Oregon to do what the Court would not do which was to provide an exemption.[27] Scalia invited the legislation by alluding to three states with sacramental peyote exemptions[28] and emphasizing that values "protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[29]

III. RELIGIOUS FREEDOM RESTORATION ACT

Immediate public reaction to the *Smith* decision moved the debate about the scope of religious exercise freedom into Congress. In direct response to the furor caused by *Smith,* Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[30] The stated purposes of RFRA were "to provide a claim or defense to persons whose religious exercise is substantially burdened by government,"[31] to restore the pre-*Smith* compelling interest test enunciated in *Sherbert v. Verner*[32] and *Wisconsin v. Yoder*[33] to free exercise jurisprudence, and to guarantee application of that test in cases where free exercise

---

see FELIX FRANKFURTER, *The Zeitgeist and the Judiciary* (discussing proposals to recall judges and candidate Theodore Roosevelt's 1912 proposal to recall judicial decisions by popular vote) and *The Red Terror of Judicial Reform* (responding to candidate Robert M. La Follette's 1924 proposal for a constitutional amendment to empower Congress to override constitutional decisions invalidating legislation), *in* LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938 3, 10 (E. F. Prichard, Jr. & Archibald MacLeish eds., 1962).

26. The Court held that the state of Oregon under the Free Exercise Clause could prohibit sacramental use of peyote and, consequently, deny unemployment benefits to persons violating the law. *See Smith,* 494 U.S. at 890.

27. *See* William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment,* 46 DUKE L.J. 291, 304 n.35 (1996) (citing OR. REV. STAT. ANN. § 475.992(5) (Supp. 1996)).

28. The three states are Arizona, Colorado, and New Mexico. *See Smith,* 494 U.S. at 890.

29. *Id.*

30. 42 U.S.C. § 2000bb (1994). The vote was overwhelmingly in favor of passage. *See Senate Votes to Protect Religion,* WASH. POST, Oct. 28, 1993, at A8.

31. *Id.* § 2000bb (b)(2).

32. 374 U.S. 398 (1963).

33. 406 U.S. 205 (1972).

of religion is substantially burdened.[34] The Act required more, however:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . [when] Government . . . demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[35]

Grievances under the Act could be brought against any government entity or any person acting under color of law.

The supporters of broader exercise viewed the *Smith* decision as an expression of judicial abdication, not of judicial restraint. Nowhere is this more apparent than in the opinions expressed by law professor Douglas Laycock, a consistent advocate and supporter of the Religious Freedom Reformation Act. Stressing "the need for independent power . . . to enforce the Bill of Rights,"[36] Laycock noted that "the Court does not *want* final responsibility for applying the compelling interest test to religious conduct."[37] "[T]he institutional problem . . . inhibited the Court from acting independently."[38] He argued that because "the Court feared to invoke [judicial powers] on its own," Congress must act to empower the Court to act under a statute over which Congress would retain control.[39]

Laycock's support for the legislation was constant. Writing in 1991 when the fate of the proposed bill was in doubt,[40] Laycock noted his fear that RFRA, "liberty's only hope for the foreseeable future" with 160 bipartisan co-sponsors, was in "mortal danger, caught in a battle over deeply felt side issues"

---

34. *See* 42 U.S.C. § 2000bb(b)(1).

35. 42 U.S.C. § 2000bb-1(a)-(b).

36. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 252 (1993).

37. *Id.* at 252 (emphasis added).

38. *Id.* at 253.

39. *See id.* at 253-54.

40. For an excellent summary of the fragile and shifting coalition supporting RFRA and of the problems faced in negotiating the Act, see Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 12-17 (1994).

between competing interest groups.[41] In 1993, Laycock again reviewed the need for RFRA, now with hope of its passing, and noted with satisfaction: "The bill [with sixty-six religious and civil rights group sponsors] would erect a statutory version of the Free Exercise Clause . . . . [It] may finally be on the way to passage after three years of deadlock."[42]

At the same time, Laycock recognized problems inherent in a legislative scheme of fundamental rights:

> Making [free exercise rights] statutory necessarily subjects religious liberty to shifting political majorities. The great danger is that in some time of public excitement, Congress may amend RFRA to deny protection to an unpopular religious practice, or that some interest group may successfully demand an amendment denying protection to any religious practices that inconvenience or offend it.[43]

Such an amendment "may represent a wholly unprincipled expression of temporary political passion, a tactical victory by some interest group or bureaucracy"[44] or a "concession to such forces by legislators"[45] who expect the courts to save them by doing "the right thing . . . to protect the affected religious minorit[y]."[46] Laycock expressed concern whether, under RFRA, the Court would have an occasion to revisit and appropriately overrule *Smith*. "RFRA may eliminate whatever chance exists of correcting the constitutional law of free exercise."[47] Congress, however, overruled *Smith*, and replaced the Free Exercise Clause with a statute.

In the euphoria following passage of RFRA, Laycock proclaimed the Act to be the "most important congressional action with respect to religion since the First Congress proposed the First Amendment."[48] He praised the act as a "statute designed

---

41. Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 855 (1992).

42. Laycock, *supra* note 36, at 221-22.

43. *Id.* at 254.

44. *Id.* at 256.

45. *Id.* at 256-57.

46. *Id.* at 257.

47. *Id.* at 254.

48. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 243 (1994).

to perform a constitutional function," and "a replacement for the Free Exercise Clause . . . ."[49] Laycock concluded, "[s]o Congress in 1993 did what the First Congress had done in 1789. It enacted a general principle of religious liberty, saying nothing about individual cases, and it authorized enforcement by the judiciary, leaving application of the principle to case-by-case determinations."[50] The implication is obvious, but the parallel is historically incorrect because it ignores the process by which the Congresses operated. The 1993 Congress ignored the amendment process, the constitutionally prescribed method for adding general principles to the Constitution,[51] and relied, instead, on section five of the Fourteenth Amendment.

When arguing for the constitutionality of RFRA before the Supreme Court on February 19, 1997, Laycock insisted that the statute was "not such a dramatic power grab,"[52] pointing out that the Court "still get[s] the final word on what the statute means . . . ."[53] He agreed, however, with Chief Justice William Rehnquist that such a final word was "not nearly the same thing as having, as *Marbury* said, the final word on what the Constitution means."[54]

IV. *CITY OF BOERNE V. FLORES*[55]

Justice Anthony Kennedy wrote the majority opinion[56] in the *Boerne* case which found that the enforcement power of section five of the Fourteenth Amendment does not give Congress a substantive, non-remedial power to legislate.[57] He recognized

---

49. *Id.* at 219.

50. *Id.* at 221.

51. *See* U.S. CONST., art. V.

52. Official Transcript, City of Boerne v. Flores, No. 95-2074, 1997 WL 87109, at *42 (U.S. Sup. Ct., Feb. 19, 1997).

53. *Id.* at *41.

54. *Id.*

55. 117 S. Ct. 2157 (1997).

56. He was joined by Chief Justice Rehnquist and Justices John Paul Stevens, Clarence Thomas and Ruth Bader Ginsburg. Justice Antonin Scalia joined in all but Part III-A-1, the historical analysis of the Fourteenth Amendment. Justice Stevens joined the majority, but expressed the view that RFRA, by providing preference for religion, violated the Establishment Clause of the First Amendment. Justices Sandra Day O'Connor, Stephen Breyer, and David Souter filed dissenting opinions. *See id.*

57. Kennedy compares RFRA to other statutes declared constitutional under the

the "ratchet" theory[58] expressed in *Katzenbach v. Morgan*[59] and discredited it.[60] "There is language in our opinion in *Katzenbach v. Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in section 1 of the Fourteenth Amendment."[61] He explained the holding in *Morgan* and put it in context by adopting Justice Stewart's explanation in *Oregon v. Mitchell*,[62] "interpreting *Morgan* to give Congress the power to interpret the Constitution 'would require an enormous extension of that decision's rationale.'"[63] Emphasizing the importance of disavowing such a power, Kennedy continued, quoting from *Marbury v. Madison*:[64]

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.[65]

---

enforcement sections of the Fourteenth and Fifteenth Amendments to conclude that the enforcement power has been "corrective or preventative, not definitional." *Id.* at 2166.

58. For a discussion of the controversy surrounding the scope of congressional authority under section five of the Fourteenth Amendment, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 341 (2d ed. 1988). Tribe notes that Justice Brennan, who wrote the opinion in *Katzenbach v. Morgan*, fixed a "ratchet-like restraint on the power of Congress to interpret the fourteenth amendment substantively," meaning that Congress could only add to the rights, not derogate from them. *Id.* at 343. *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 216 (1997). Douglas Laycock develops arguments in favor of the theory in Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995).

59. 384 U.S. 641 (1966).

60. *See Boerne*, 117 S. Ct. at 2168.

61. *Id.* (citation omitted).

62. 400 U.S. 112 (1970).

63. *Boerne*, 117 S. Ct. at 2168 (quoting Oregon v. Mitchell, 400 U.S. at 296 (Stewart, J., concurring in part and dissenting in part).

64. 5 U.S. (1 Cranch) 137 (1803).

65. 117 S. Ct. at 2168 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) at 177 (other citations omitted)).

Having determined that section five power is limited to remedial and preventive legislation, the Court established that RFRA is not valid preventive legislation entitled to judicial deference, which requires "due regard for the decision of the body *constitutionally appointed* to decide."[66] The Court concludes that RFRA's "sweeping coverage" 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."[67]

Kennedy added that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[68] However, he concludes that "[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch . . . [and 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 the Court will follow precedent.[69]

Justice O'Connor dissented and called for a rehearing, after full review, of *Smith* (an issue not before the Court) in order to "allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty."[70] RFRA had virtually written O'Connor's *Smith* opinion into law,[71] and, although she expressed agreement with the

66. *Id.* at 2170 (quoting Oregon v. Mitchell, 400 U.S. at 207 (Harlan, J., concurring in part and dissenting in part)) (emphasis added).

67. *Id.*

68. *Id.* at 2171.

69. *Id.* at 2172 (citation omitted).

70. *Id.* at 2176 (O'Connor, J., dissenting). The reasoning presents an inappropriate basis for review which may explain why the majority of the Court refused to rehear *Smith*, why Souter called for a denial of certiorari, and why Scalia remarked, "[t]he dissent's approach has, of course, great popular attraction. Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice?" *Id.* (Scalia, J., concurring).

71. In an attempt to forecast the votes in *Boerne*, law professor Michael Paulsen counted three "solid votes" for RFRA, Justices O'Connor, Souter and Kennedy. *See* Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMMENTARY 7, 9 (1997). He was, of course, wrong about one. He predicted that for O'Connor, who

majority's reading of section five,[72] she refused to join the majority.[73] To explain this refusal, she insisted that the Court's determination that RFRA is not constitutional is "premised on the assumption that *Smith* correctly interprets the Free Exercise Clause."[74] She wrote, "[a]s a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in [*Smith*]."[75] Kennedy, however, explained that observations relating to *Smith* were made "not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA."[76] The thrust of the majority opinion is not that *Smith* was right, but that *Smith* was precedent, not to be overturned by legislative act.[77]

---

wrote the argument for the compelling state interest test in *Smith*, "to find RFRA unconstitutional would be almost inconceivable, as she would have to conclude that it is unconstitutional for Congress to adopt, by statute, under section five, the same substantive rule that she thinks is required by section one properly construed." *Id.* at 10.

72. *See* 117 S. Ct. at 2176 (O'Connor, J., dissenting). "I agree with much of the reasoning . . . . Congress lacks the 'power to decree the *substance* of the Fourteenth Amendment's restrictions on the States.' . . . Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment." *Id.*

73. Given its harshest characterization, O'Connor's position, under the circumstances, is akin, if not tantamount, to proclaiming that a Supreme Court opinion with which one disagrees does not have legitimacy in the scheme of constitutional law. A more generous conclusion is that O'Connor's resistance to the disposition of the case is part of her political agenda to have the *Smith* decision overturned. An interesting, and somewhat unrealistic, characterization is that advanced by law professor Michael McConnell of the University of Utah College of Law. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* Boerne v. Flores, 111 HARV. L. REV. 153 (1997). Justice O'Connor, in his view, was engaging in a "dialogic" approach to section five power, which "assumes that Congress and the Court are engaged in a mutually productive dialogue over the meaning of the Constitution." *Id.* at 172. Continuing the arguments developed in a brief filed in the case on behalf of the United States Catholic Conference, the Evangelical Lutheran Church in America, the Orthodox Church in America, and the Evangelical Covenant Church, McConnell reasons that the Court should view congressional legislation as an invitation to dialogue—supposedly in an open forum manner without the restrictions of stare decisis and the requirements of case and controversy. He does not recognize that the majority, in fact, responded in a "dialogue" appropriate to the structure under which the court operates. *See id.* at 194-95.

74. 117 S. Ct. at 2176 (O'Connor, J., dissenting).

75. *Id.*

76. *Id.* at 2171.

77. *See id.* at 2160-62, 2171-72. *See generally* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457 (1991) (discussing the concept of finality in Supreme Court jurisprudence).

O'Connor recited an historical review of the status of free exercise existing at the time the First Amendment was adopted.[78] She accessed the history to support her argument that the *Smith* opinion is wrong and to emphasize her insistence that the Court reconsider the holding and "to do so in this very case" by ordering briefs and setting the case for reargument.[79]

O'Connor's opinion, considered with the two dissents by Justices David Souter and Stephen Breyer, signals that the jurisprudence of free exercise is still evolving, although RFRA's solution to the problem is unacceptable.[80] Reasoning that the "intolerable tension" in free exercise jurisprudence prevented the constitutionality of RFRA from being "soundly decided,"[81] Justice Souter would not have heard the *Boerne* case. Justice Breyer refused to consider the case and joined the portion of O'Connor's opinion revisiting *Smith*.[82]

V. CONCLUSION

Law professor Marci A. Hamilton, arguing for the City of Boerne before the Supreme Court, captured the essence of the debate surrounding the *Smith-Boerne* event with the words, "[t]his is not a case about religious liberty. It is a case about [f]ederal power."[83] Unfortunately, three of the justices refused

78. *See* 117 S. Ct. at 2178-86 (O'Connor, J., dissenting). Scalia recounts historical data to dispute O'Connor's conclusion "that historical materials support a result contrary" to *Smith*. *Id* at 2172 (Scalia, J., concurring).

79. *See id.* at 2176 (O'Connor, J., dissenting).

80. Sentiment for reconsideration of *Smith* continues. See particularly Justice Souter's dissent in which he refuses to either endorse or reject *Smith* and repeats his doubts, previously expressed in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), "about the precedential value of the *Smith* rule." *Id.* at 2186 (Souter, J., dissenting).

81. *Id.* "I would therefore dismiss the writ of certiorari as improvidently granted, and I accordingly dissent from the Court's disposition of this case." *Id.*

82. *Id.* (Bryer, J., dissenting).

83. Oral Argument of Marci A. Hamilton on Behalf of Petitioner, City of Boerne v. Flores, No. 95-2074, 1997 WL 87109 at *5 (U.S. Sup. Ct., Feb. 19, 1997). Hamilton's opening words were forceful:

> [T]he Religious Freedom Restoration Act, which was passed in an emotional and heated response to this Court's determination in . . . *Smith* is a brazen attempt to reinterpret the Free Exercise Clause and to impose that reinterpretation on the courts, on the State . . . . This is the worst of overreaching, which violates the fundamental structural constitutional

to decide the important issue presented by the *Boerne* case.[84] Ostensibly, those three justices reasoned that *Smith* should be overturned. That, however, should not have obscured the issue before the Court.[85] When John Marshall explained to Henry Clay his concern about Senator Johnson's attack on the *Green* decision, he admitted, "I am perhaps more alive to what concerns the judicial department, and attach more importance to its organization, than my fellow citizens in the legislature or executive. . . . "[86] In the *Boerne* case, the majority enunciated a proper insistence that the judiciary maintain its allotted place within the scheme of government. Justice Kennedy expressed the need for operating within the constitutional framework: "[o]ur national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches."[87]

Recognizing that the Court, although not directly responsible to the electorate, provides a vital democratic function, informed opinion should be unapologetic about the role of judicial review. Neither the Congressional action proposed in 1823 nor RFRA survived, but the "strong excitement" propelling the opposition to *Green* and to *Smith* continued unabated.[88] Although the Kentucky occupying claimant laws were declared unconstitu-

---

guarantees, the separation of powers, Federalism, and separation between church and State.

Id. at *5.

84. One notes with dismay that the Justices participated in an irrelevant, for purposes of the decision, and unbriefed discussion about the history of the Free Exercise Clause. This discussion consumed more space than the opinions discussing the merits of the case. *See Boerne*, 117 S. Ct. 2157.

85. Writing in 1994, Hamilton, not distracted while arguing against the validity of RFRA, discussed the "crabbed reading of the Free Exercise Clause" and expressed her opinion that *Smith* was "wrongly decided because it . . . [left] claimants of religious liberty with a less than effective forum for their claims." Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 397 (1994).

86. Marshall Letter, *supra* note 1.

87. 117 S. Ct. at 2172.

88. *See, e.g.*, R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY (1968). Historian Newmyer describes the *Green* case as an example of "successful state resistance to the Court's decisions." *Id.* at 88. Newmyer notes that the Court "did not have the last word, however. The squatters were not persuaded by judicial sincerity and they refused to obey the decision. . . . [M]ore effective claimant laws were passed and enforced . . . ." *Id.* at 70.

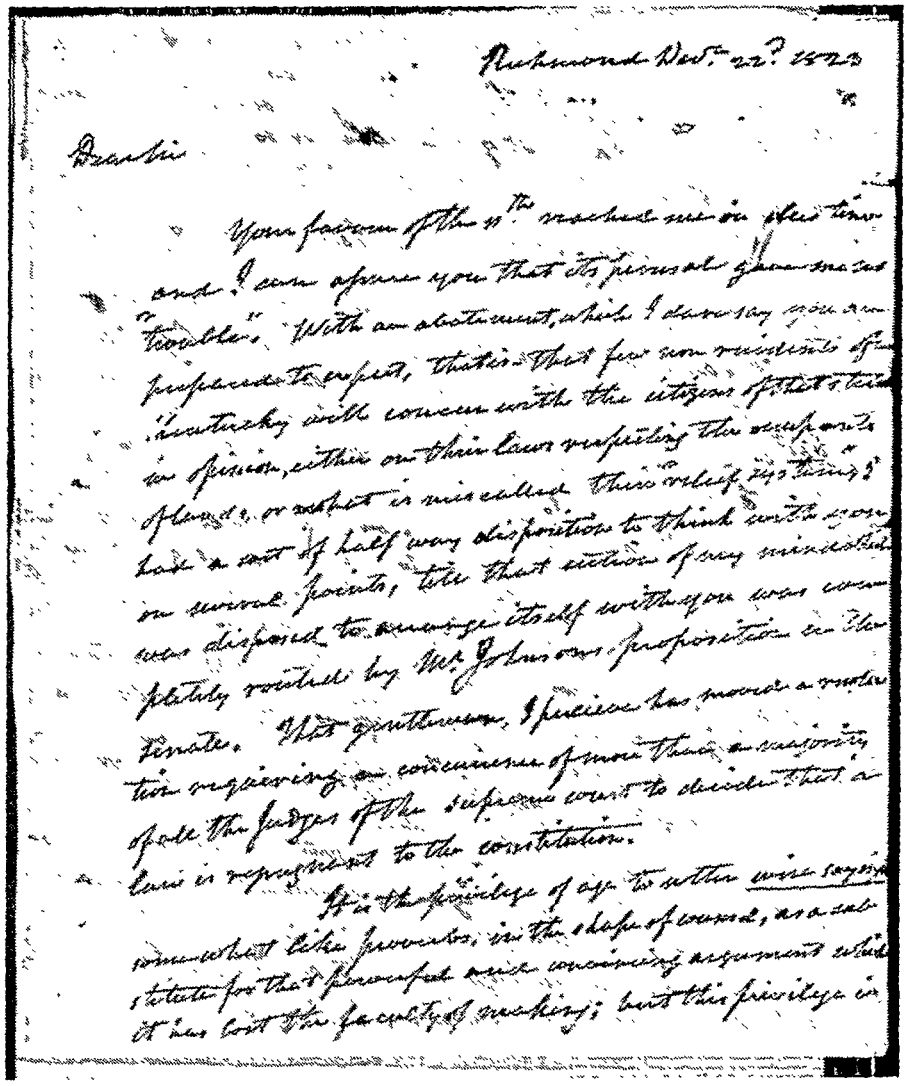
tional in the *Green* case, Kentucky laws protecting claimant rights were upheld eight years later.[89] Public sentiment against the *Smith* decision is still strong, and future free exercise jurisprudence will undoubtedly reflect this pressure. The *Smith-Boerne* event, in perspective, reveals a "picture of judicial review that is part of the rich fabric of American political life . . . [and the reality that] there is often less finality in a constitutional decision than meets the eye."[90]

89. *See* Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831). Justice William Johnson wrote the opinion in *Hawkins*, noting that the majority in *Green* thought that the occupying claimant laws were "like a disease planted in the vitals of men's estate, and a disease against which no human prudence could have guarded . . . ." *Id.* at 465. Although Johnson concurred in the result in *Green*, he faulted the majority for reaching the constitutional issue. *See id.* at 464-66.

90. HARRY J. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 30 (1990). Wellington discusses four traditional restraints—based on textual, historical, functional and structural claims—on the Court's interpretive duty and concludes that "constitutional interpretation by the Court endures only when it is proved by struggle to be politically digestible." *Id.* at 158.

Appendix

The Gilder Lehrman Collection on deposit at The Peirpont Morgan Library, New York. GLC 141.

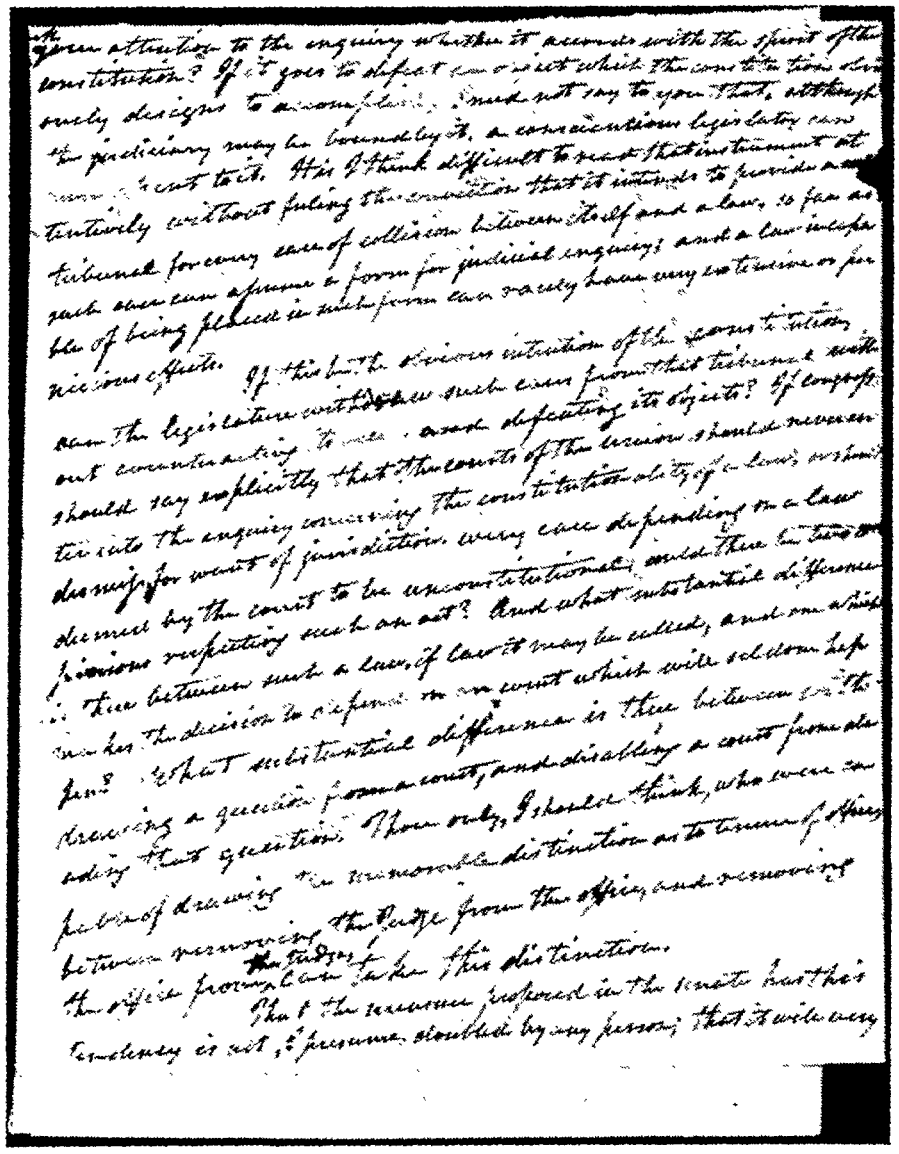


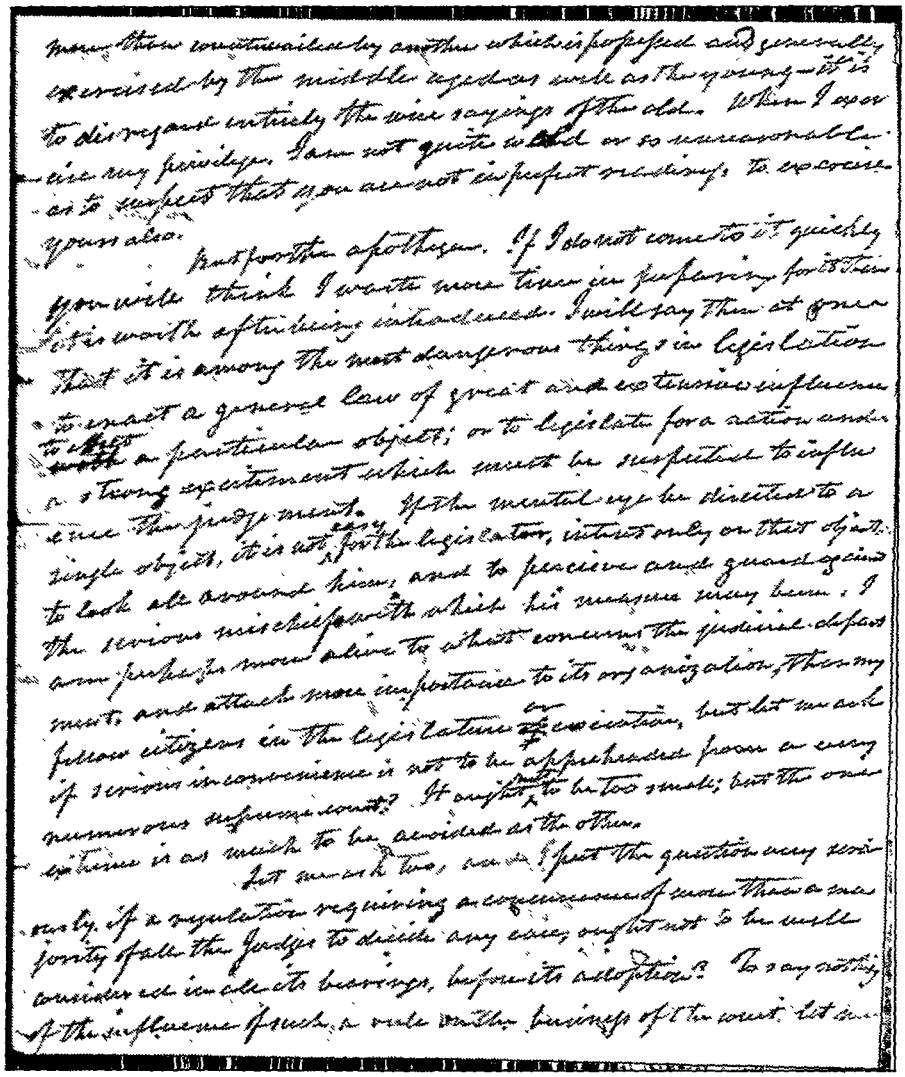
Richmond Dec.r 22? 1823

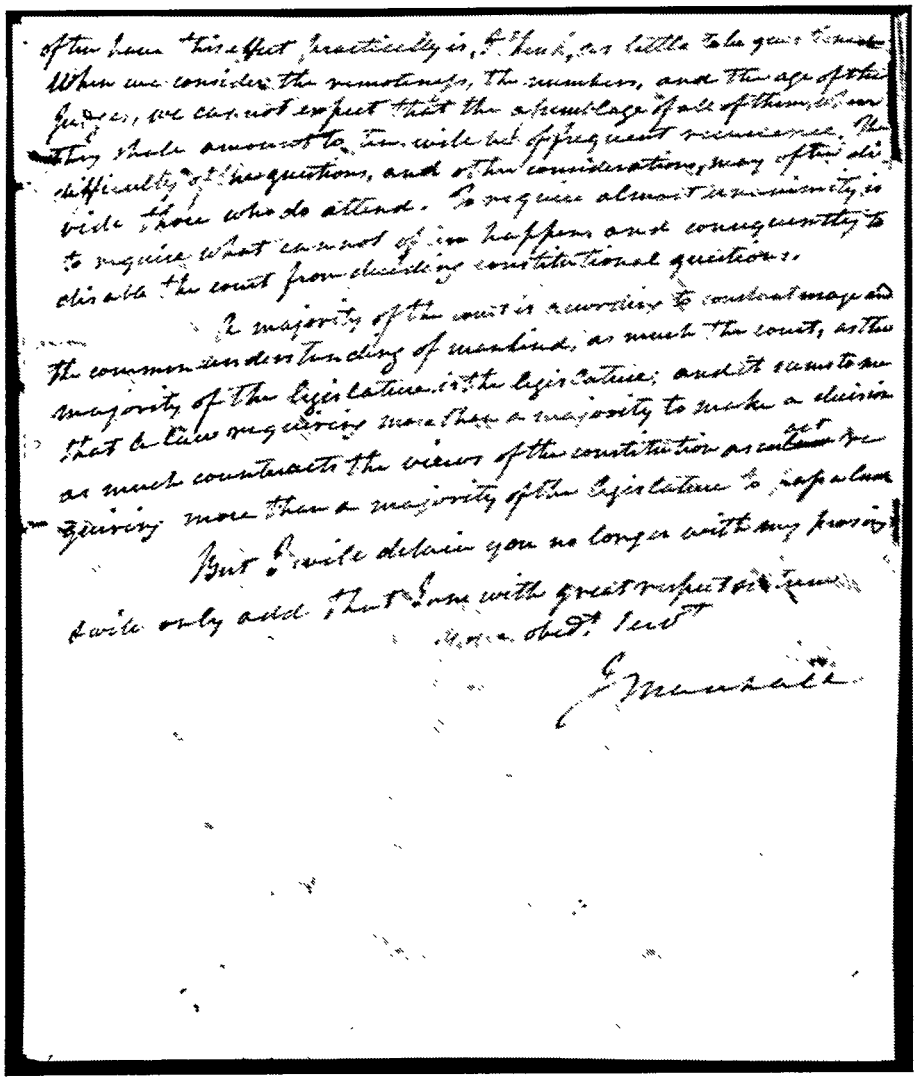
Dear Sir

Your favour of the 11th reached me in due time and I can assure you that its perusal gave me no "trouble". With an abatement, which I dare say you can prepare to expect, that is that few non residents of Kentucky will concur with the citizens of that State in opinion, either on their laws respecting the assignments of lands, or what is miscalled their relief system. I had a sort of half way disposition to think with you on several points, but that section of my mind which was disposed to amalgamate itself with you was completely routed by Mr. Johnson's proposition in the Senate. That gentleman, I believe has moved a resolution requiring a concurrence of more than a majority of the Judges of the supreme court to declare that a Law is repugnant to the constitution.

It is the privilege of age to utter wise sayings somewhat like proverbs, in the shape of counsel, as a substitute for that powerful and convincing argument which it has lost the faculty of making; but this privilege is







often been this effect practically is, that little to the general
When we consider the remoteness, the numbers, and the age of the
Judges, we can not expect that the assemblage of all of them will ever
take place, which amounts to a virtual but frequent recurrence. The
difficulty of the questions, and of the considerations, many of the di-
vide those who do attend. To require almost unanimity is
to require what can not often happen and consequently to
disable the court from deciding constitutional questions.

A majority of the court is according to constant maxim and
the common understanding of mankind, as much the court, as the
majority of the Legislature is the Legislature; and it seems to me
that to give majorities more than a majority to make a decision
as much counteracts the views of the constitution as to require
forty more than a majority of the Legislature to make a law.

But I write to detain you no longer with my fancies. I
write only to add that I am with great respect Your
Hon.r obed.t Serv.t

E Marshall