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OUR VULNERABLE CONSTITUTIONAL RIGHTS: THE SUPREME COURT'S RESTRICTION OF CONGRESS' ENFORCEMENT POWERS IN CITY OF BOERNE V. FLORES

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When the Supreme Court decided Shaw v. Reno, [FN1] a redistricting case in North Carolina, it expressly limited its holding to the facts of that particular case. [FN2] Nonetheless, Shaw has been used as a springboard to attack minority voting districts, eroding decades of voting rights and civil rights jurisprudence. [FN3]

Similarly, the Supreme Court's decision in United States v. Lopez [FN4] restricts Congress' ability to pass new civil rights legislation. The Court's narrow reading of the Commerce Clause in Lopez, requiring that an activity "substantially affect" interstate commerce, effectively raised the level of scrutiny applied to legislation ***552** enacted under the Commerce Clause. [FN5] As with Shaw, the Lopez decision threatens the constitutionality of civil rights legislation; at a minimum this strict interpretation circumscribes such civil liberties. As a result, "[t]he present Supreme Court has left Congress with little authority to enact new civil liberties legislation . . . ." [FN6]

The outcome of the Shaw case and the narrow interpretation of Congress' Commerce Clause power under Lopez raise questions regarding the impact of the Supreme Court's recent decision in City of Boerne v. Flores. [FN7] The Supreme Court, by holding the Religious Freedom Restoration Act ("RFRA") [FN8] unconstitutional as applied to the states, limited Congress' powers under Section 5 of the Fourteenth Amendment. [FN9] Given Congress' reliance on Section 5 to enact civil rights legislation, the Supreme Court may well have opened its doors to another round of attacks on civil rights legislation.

This Comment analyzes the potential impact of the Supreme Court's new "congruence and proportionality" test developed in Flores. Part I summarizes the historical development of Congress' enforcement powers under Section 5 of the Fourteenth Amendment. Part II analyzes the Supreme Court's decision in Flores and discusses its application to subsequent cases concerning Congress' enforcement powers. Part III summarizes the enactment of three pieces of civil rights legislation, the Violence Against Women Act, the Americans with Disabilities Act, and the Freedom of Access to Clinic Entrances Act, and discusses the implications of the Flores decision as a limitation on Congress' power to enact civil rights legislation.

***553** I

Historical Development of Congress' Enforcement Powers Under Section 5 of the Fourteenth Amendment

A. The Beginning: Ex Parte Virginia

The Civil War Amendments, enacted to end slavery and assure due process and equal protection of the law, were each enlargements of Congress' power toward the states. [FN10] In an early Fourteenth Amendment case, Ex parte Virginia, the Supreme Court held "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment." [FN11]

At issue in Ex parte Virginia was the Civil Rights Act of 1875, which made it a crime to exclude any citizen from jury selection on account of race, color, or previous condition of servitude. [FN12] Describing the Civil War Amendments, the Supreme Court stated "the amendments derive much of their force from [Congress' enforcement power] . . . . It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation." [FN13] Echoing McCulloch v. Maryland, [FN14] the Supreme Court explained that some legislation was contemplated to make the amendments effective:

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. [FN15]

Ex parte Virginia thus coined the three part test used in subsequent case law. Congressional actions under Section 5 of the Fourteenth Amendment were constitutional where they (1) enforced the provisions of the Fourteenth Amendment; (2) were plainly adapted to that end; and (3) were in keeping with the ***554** letter and spirit of the Constitution. [FN16] This three-part test was further refined in the Voting Rights cases. [FN17]

B. Katzenbach v. Morgan

The Supreme Court broadly interpreted Section 5 of the Fourteenth Amendment in Katzenbach v. Morgan, upholding section 4(e) of the Voting Rights Act of 1965 as a proper exercise of Congress' enforcement powers. [FN18] Section 4(e) provided that no person who had successfully completed sixth grade in a public or private school accredited by the Commonwealth of Puerto Rico, in which the language was other than English, could be denied the right to vote because of his or her inability to read or write in English. [FN19] Registered New York voters challenged the constitutionality of section 4(e) based on a New York state law that required the ability to read and write in English as a condition to vote. [FN20]

The Supreme Court reasoned that although the states have the power to establish voting qualifications, they have no power to create conditions forbidden by the Fourteenth Amendment. Furthermore, to "require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." [FN21] At a minimum, such "congressional resourcefulness" envisions congressional determination of Fourteenth Amendment violations with respect to Congress' superior "fact-finding" abilities. [FN22] The Supreme Court adopted the three-***555** part test laid out in Ex parte Virginia and defined Congress' enforcement powers under Section 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." [FN23]

The Supreme Court used two rationales to support its holding. First, the Court noted that Congress could have determined that the practical effect of the English reading and writing voting requirements was to deny Puerto Ricans the right to vote, thus denying the Puerto Rican community the political power to preserve its rights. [FN24] The Court held it was not only within the powers of Congress, but the particular province of Congress to weigh the factors leading to such a conclusion: "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." [FN25] Therefore, in passing the Voting Rights Act, Congress was guaranteeing the Puerto Rican community's access to due process and equal protection of the laws by assuring participation in the political process.

In an alternative holding, the Court found that Congress itself might have determined whether New York's voting laws were invidiously discriminatory, whether prejudice and discrimination played a role in the construction of the law, and whether the laws were therefore unconstitutional. [FN26] Under this second and broader rationale, Congress' actions also fall within Section 5 enforcement powers where the courts are able to perceive a basis on which Congress could have made its determination. Although this rationale was an alternative holding, it has been used to evince the breadth of Congress' enforcement powers and to support the theory that Congress possesses the power to define constitutional violations and rights. [FN27] An open question for many years, [FN28] the Supreme Court answered it in the negative in Flores.

***556** C. State of the Law pre- City of Boerne v. Flores

Prior to the Flores decision, courts applied the three-part Morgan test to analyze constitutional challenges to legislation enacted under Section 5 of the Fourteenth Amendment. [FN29] Under the Morgan test, a statute constituted "appropriate legislation" under Section 5 of the Fourteenth Amendment where the statute (1) was regarded as an enactment to enforce a provision of the Fourteenth Amendment; (2) was plainly adapted to that end; and (3) was not prohibited by, but rather consistent with, the letter and the spirit of the Constitution. [FN30] In determining whether a statute was "plainly adapted," the test required only that the court "perceive a basis" upon

which Congress had acted to enforce a provision of the Fourteenth Amendment. [FN31] Interpreted as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," [FN32] Section 5 granted Congress broad powers to eradicate discrimination based on class distinctions.

In fact, Oregon v. Mitchell [FN33] is the only voting rights case to be interpreted as a limitation on Congress' enforcement powers. In Mitchell, the Court upheld the ban on literacy tests in local, state, and federal elections, [FN34] the abolition of durational state residency requirements restricting the right to vote in presidential elections, [FN35] and the lowering of the voting age from twenty-one to eighteen in federal elections. [FN36] Stating that the power of Congress under Section 5 is not unlimited, the Court invalidated the statutory provision lowering the voting age to eighteen for state elections. [FN37] As a result of this invalidation, Mitchell is frequently interpreted as a limitation on Congress' authority to expand constitutional rights absent some definition by the Court. [FN38]

***557** The scope of Congress' enforcement powers under Section 5 led to the conclusion that "[b]ecause the [F]ourteenth [A]mendment's phrases are so open to interpretation, they invite not only remedial congressional legislation, but congressional definition of the very rights themselves." [FN39] This open interpretation raises fundamental questions about the parameters of Congress' Section 5 enforcement powers:

Does Congress possess a power to define constitutional rights unencumbered by judicial conceptions of those rights, at least insofar as the congressional definitions rationally relate to the language of the [F]ourteenth [A]mendment and violate none of the restrictions which the Bill of Rights imposes on Congress? Or do judicially defined rights instead fix the limits of the congressionally possible by serving as relatively detailed descriptions of the ends that congressional action protecting [F]ourteenth [A]mendment rights must further? [FN40]

In Flores, the Supreme Court answered this question, holding that Congress' actions under the Fourteenth Amendment must be remedial or preventative in nature and effect, not substantive or definitional. While the Court acknowledged that such a line can be difficult to discern, the Court drafted a new "congruence and proportionality" standard to assist in its determination. [FN41]

II

Current Developments

A. City of Boerne v. Flores

Against this backdrop of Congress' broad enforcement powers, the Supreme Court recently declared the Religious Freedom Restoration Act ("RFRA") unconstitutional [FN42] as the statute "exceeds Congress' power." [FN43] Enacted to overturn the Supreme ***558** Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith, [FN44] RFRA legislatively restored the compelling interest test. [FN45]

In Smith, the Supreme Court abandoned the compelling interest test for laws of general applicability incidentally burdening religion. [FN46] The Smith case involved two individuals fired from their jobs at a drug and alcohol rehabilitation center for the sacramental use of peyote during a ceremony at their Native American Church. [FN47] Subsequently, their unemployment benefits were denied by the State of Oregon on the basis that they were fired for work-related "misconduct." [FN48] Holding "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) [[,]" ' [FN49] the Court found the Oregon law criminalizing the use of peyote, even for religious purposes, constitutional. [FN50]

RFRA, enacted in reaction to the Smith decision, prohibited the government from substantially burdening a person's free exercise of religion, even if the statute was one of general applicability, unless the government could show the burden was "(1) . . . in furtherance of a compelling government interest; and (2) . . . the least restrictive means of furthering that compelling governmental interest." [FN51]

In Flores, the Archbishop of the Saint Peter Catholic Church, in Boerne, Texas, applied for a building permit to expand the building. The City of Boerne City Council had recently passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan, including the development of historic landmarks and districts. This plan required the Historic ***559** Landmark Commission to pre-approve any alterations or

construction affecting such historic landmarks or districts. [FN52]

The City of Boerne, relying on the historic preservation plan, denied the Archbishop's building permit because the church was located within a historic district. In response to the permit denial, the Archbishop brought suit claiming, among other things, that the denial infringed upon the free exercise of religion as prohibited by RFRA. [FN53]

Discussing Congress' enforcement powers, the Court acknowledged that Section 5 "is a 'positive grant of legislative power" ' to Congress but held that the text, history and case law of the Fourteenth Amendment indicate that Congress' enforcement power is limited to remedial actions. [FN54] Within this remedial framework, the Court noted that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States." ' [FN55] In spite of this broad sweep, however, "'the congressional enforcement power . . . is not unlimited." ' [FN56]

Interpreting the text of Section 5, the Court identified the first limitation on Congress' enforcement power:

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. [FN57]

In other words, while Congress may enact legislation enforcing a constitutional right, the power to do so is remedial, not substantive. The Court in recognizing that the line between preventative or remedial measures and actions that seek to make substantive changes is not easy to discern, nonetheless preserved the "line" and fashioned a new "congruence and proportionality" standard to distinguish the two actions. [FN58]

Announcing this new standard, the Court simply stated that ***560** "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." [FN59] Legislation lacking such a connection is constitutionally suspect as it "may become substantive in operation and effect." [FN60] Where the legislation is substantive, it exceeds the scope of Congress' powers under the Fourteenth Amendment.

In addition, the Court interpreted the legislative history of the Fourteenth Amendment to support the conclusion that Congress' enforcement powers are limited to remedial actions. Specifically, the Court pointed to the concern that the original draft of the Fourteenth Amendment gave Congress too much power. [FN61] In light of this concern, the Court found it significant that the revised and ratified Fourteenth Amendment did not raise such opposition. The Court interpreted this lack of opposition as a signal that the breadth of Congress' enforcement powers had been limited by the revision. This revision of the Fourteenth Amendment led the Court to its conclusion that the Amendment confers the same self-executing substantive rights against the states as the Bill of Rights amendments confer against the federal government, leaving the "power to interpret the Constitution in a case or controversy . . . in the Judiciary." [FN62]

Finally, the Court relied on Fourteenth Amendment case law to support the limitation of Congress' enforcement powers. Beginning with the Civil Rights Cases, [FN63] Section 5 jurisprudence did "not authorize Congress to pass 'general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . . . ." ' [FN64] In fact, the Court interpreted Mitchell as a rejection of the proposition that Section 5 gave Congress substantive power to establish the meaning of constitutional provisions. [FN65] Congress' power as remedial, not definitional, has never been questioned. [FN66]

***561** Furthermore, the Court rejected the interpretation that Morgan's "second rationale" gives Congress the power to enact legislation expanding upon the Fourteenth Amendment rights. [FN67] An alternative holding, Morgan's "second rationale," found a factual basis on which Congress could have concluded that New York's voting requirement itself "constituted an invidious discrimination in violation of the Equal Protection Clause." [FN68] Because the "second rationale" rested on unconstitutional discrimination by the State of New York, a congressional determination would have been within the remedial parameters of Congress' Section 5 power. Therefore, permitting Congress to determine whether New York's actions constituted a type of discrimination already defined by the Court did not amount to empowering Congress to define or interpret constitutional rights under the Fourteenth

Amendment. [FN69]

Through textual analysis, and review of legislative history and precedent, the Supreme Court found RFRA an unconstitutional and invalid exercise of Congress' enforcement powers as applied to state laws. Applying its new "congruence and proportionality" standard, the Court analyzed both RFRA's legislative record and its practical effect.

Under the Court's analysis, RFRA's legislative record lacked current examples of generally applicable laws passed "because of" religious discrimination. [FN70] Although the Court conceded that some preventative rules could be, in essence, remedial measures, it required that preventative rules maintain congruence between the means employed and the ends to be achieved. [FN71] Under this standard, the remedial or preventative action is measured against the evil to be prevented. [FN72] The greater the harm, the stronger the remedial action permitted. RFRA's record, however, did not provide adequate examples of religious bigotry for its preventative measure to constitute remedial legislation. [FN73] For example, ***562** the RFRA hearings did not mention any episodes of generally applicable laws passed because of religious discrimination within the past forty years. In fact, one witness testified, "deliberate persecution is not the usual problem in this country." [FN74] Other testimony centered on laws of general applicability that adversely burdened religious beliefs and practices. [FN75] Even acknowledging Congress' focus on the incidental burdens imposed by laws of general applicability, the Court found it "difficult to maintain that [such laws] 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." [FN76] Although not dispositive, the absence of discrimination in the legislative record evidenced a lack of congruence between the means employed and ends sought by RFRA.

This lack of congruence, however, was not RFRA's most serious shortcoming. Noting the deference given to Congress in such matters, the Court stated:

RFRA cannot be considered remedial, preventative legislation, if those terms are to have any meaning. 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. [FN77]

Preventative measures can be considered remedial and meet the proportionality requirement if "there is reason to believe many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." [FN78] Moreover, such remedial legislation "'should be adapted to the mischief and wrong the [Fourteenth] [A]mendment was intended to provide against." ' [FN79] Therefore, where a law instead employs measures not clearly directed at constitutional violations, it crosses over ***563** the "line" and is considered a substantive action outside Congress' enforcement powers.

Distinguishing Flores from other Section 5 Enforcement Clause cases, the Court noted RFRA's "sweep and intrusion" at every level of government. [FN80] RFRA's prohibitions apply to all state and federal laws, and to every agency and official of the federal, state and local governments. Further, RFRA does not contain a termination date or limit its geographic application as other legislation passed under Section 5. Under RFRA, any law is subject to constitutional challenge at any time, as long as the person is able to allege a "substantial burden" on his or her free exercise of religion. [FN81] Noting that challenges claiming a "substantial burden" are difficult to contest, the Court appears to suggest that the strict nature of the compelling interest test is a factor in measuring the proportionality of Congress' action. [FN82]

In contrast, South Carolina v. Katzenbach [FN83] dealt with flagrant voting discrimination and a discrete class of laws. In addition, the legislation at issue in Katzenbach terminated at the request of the states or political subdivisions and if the danger of voting discrimination had not materialized in the previous five years. Similarly, the Morgan and Mitchell cases concerned a particular type of voting qualification and a long history of voting discrimination. In City of Rome v. United States, [FN84] the legislation at issue imposed geographical limitations to areas with a history of intentional voting discrimination and lapsed, unless renewed, in seven years. Such termination dates, geographical limitations and egregious discrimination predicates, while not required by the Court, help to ensure Congress' means are proportionate to its ends. [FN85]

Moreover, the costs imposed on the states by RFRA, both in terms of litigation costs and in terms of restricting state regulatory powers, "exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause

as interpreted in Smith." [FN86] The Court conceded that certain laws, such as those ***564** motivated by religious bigotry or those having a disproportionate impact on a particular religion, would evidence an impermissible legislative motive. Under the Court's reasoning, it is the burden one bears in relation to other citizens, and whether that burden is borne because of a religious belief that determines whether the infringement is a "burden" in the sense of the Free Exercise Clause. [FN87] RFRA's substantial burden test, however, does not require a discriminatory effect or a disparate impact. As a result, RFRA exceeds the protections guaranteed by the Free Exercise Clause of the Fourteenth Amendment.

Finally, RFRA imposes a "least restrictive means" requirement not used in pre-Smith jurisprudence. This standard requires that the methods used by the government to further a compelling government interest be the least restrictive available. [FN88] Under RFRA, the onus is on the government to prove this prong of the test. The development of this new standard served as another indicator to the Court that RFRA was broader than appropriate "if the goal is to prevent and remedy constitutional violations." [FN89]

B. City of Boerne v. Flores as Precedent

More than seventy cases, ranging from bankruptcy to Fourteenth Amendment claims, have cited Flores for the proposition that Congress' enforcement powers are not unlimited. [FN90] In In re Kish, the district court of New Jersey held "Congress' power . . . extends only to enforcing the provisions of the Fourteenth Amendment," ' noting that such enforcement only includes remedial ***565** or preventative actions. [FN91] Similarly, many decisions state that Congress' powers under Section 5 are not plenary and that Congress does not have any power to define constitutional violations or substantive rights. [FN92]

As the cases above indicate, Flores has been interpreted, almost exclusively, to restrict Congress' enforcement powers under Section 5 of the Fourteenth Amendment. Specifically, the "congruence and proportionality" test narrows the judicial review of constitutional challenges to Section 5 legislation. Prior to the Flores decision, under the standard enunciated in Morgan, Congress' actions were considered enforcement actions where the Court could "perceive a basis" on which Congress made its decision. [FN93] Not surprisingly, this standard granted Congress greater deference in its decision-making process. In Flores, while the Court did not entirely eradicate such deferential treatment, its close analysis of RFRA's legislative records suggests, at a minimum, greater judicial scrutiny in the future. Because it is the legislative record that provides the evidence of discrimination necessary to illustrate congruence between the means employed and the ends to be achieved, greater judicial scrutiny of congressional findings may make civil rights legislation more vulnerable to constitutional challenges.

Moreover, the Court's delineation of termination dates, geographic restrictions, and egregious predicates, as examples of proportionality, illustrates an attempt to restrain Congress' actions under Section 5. While the Court was clear in its expression that these limitations are not requirements, its description illustrates a desire to look for internal restraints to assure that legislation is narrowly tailored to meet its stated objectives. [FN94] The Court's comparison between the relative ease of alleging a "substantial burden" and the difficulty states face in demonstrating that the law is the least restrictive means, as part of its "proportionality" review, operates to restrict Congress' enforcement powers as well. No longer are congressional enforcement actions reviewed as to whether they are "plainly adapted" to their stated purpose. Instead, the Court's opinion suggests that the purpose ***566** or constitutional violation must be roughly the "same size as" the impact the congressional action will have on the states.

It is significant that the Court applied the Smith interpretation of the Free Exercise Clause in determining the constitutionality of RFRA. As a result, the Court was able to state, "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." [FN95] Under Smith, laws of general applicability incidentally burdening religion are not unconstitutional. Therefore, if the Smith interpretation applies, RFRA, through its inclusion of such laws, is intrinsically not designed to identify and counteract state laws likely to be unconstitutional. In essence, the Court did not accept Congress' attempt to overrule Smith. While the Court did not explicitly state that congressional attempts to overrule prior decisions are unconstitutional, its avoidance and refusal to decide the case based on pre-Smith jurisprudence suggests that where the authority of a statute is contested, the Court will rely on precedent instead. [FN96]

Finally, the Court concluded that the "least restrictive means" requirement, a requirement not found in pre-Smith jurisprudence, indicated RFRA was overbroad. The Court did not directly address the congressional effort to impose its own standard of review. The Court's view, however, that such action serves as an indicator of

congressional overreach, coupled with the Court's decision to apply the Smith and not the RFRA interpretation of the Free Exercise Clause, signals the constitutional vulnerability of congressional attempts to set a standard of judicial review.

As indicated by cases that have already interpreted Flores, the decision restricts Congress' enforcement powers under Section 5 of the Fourteenth Amendment. Imposing the "congruence and proportionality" standard in place of the Morgan "rational basis" standard, the Court diminished the deference it accords Congress in enacting legislation. Furthermore, the Court's delineation of termination dates, geographical restrictions and egregious predicates suggests the Court is looking for limitations within the legislation itself. Finally, the Court's conclusion that the "least restrictive means" requirement indicates that RFRA is broader ***567** than appropriate, because it created a new standard, indicates that the Court is unwilling to accept congressionally mandated standards of judicial review. [FN97] Taken together, these elements of the "congruence and proportionality standard" will likely operate as a restriction on Congress' enforcement powers.

III

Implications of The City of Boerne v. Flores on Civil Rights Legislation

The Flores decision has the potential to call into question the constitutionality of civil rights legislation enacted under Section 5 of the Fourteenth Amendment. This section first discusses the legislative findings of RFRA and its failure under the "congruence and proportionality" test. The section then turns to three pieces of legislation enacted under Congress' Section 5 enforcement powers including the Violence Against Women Act ("VAWA"), [FN98] Americans with Disabilities Act ("ADA"), [FN99] and Freedom of Access to Clinic Entrances Act ("FACE"), [FN100] and analyzes each against the Flores decision. Specifically, this section addresses each act with respect to the strength of its legislative findings and the "congruence and proportionality" test as a measure of remedial enforcement action. [FN101]

A. The Religious Freedom Restoration Act

Enacted in response to the Supreme Court's Smith decision, the stated purposes of RFRA were to restore the compelling interest test and to provide a claim or defense to persons whose exercise of religion has been substantially burdened by government action. [FN102] Congress passed RFRA under its Section 5 enforcement ***568** powers to protect the right to the free exercise of religion. [FN103]

In Flores, the Supreme Court explicitly criticized RFRA for its lack of empirical evidence. Supporting the enactment of RFRA, Congress "found" the following: (1) the free exercise of religion is an inalienable right; (2) neutral laws can be as burdensome on the free exercise of religion as those intended to interfere; (3) governments should not interfere with the free exercise of religion without a compelling justification; (4) the Supreme Court's decision in Smith eliminated the requirement that the government justify burdens by neutral laws; and (5) the compelling interest test is a workable test. [FN104] No showing was made that neutral laws were being passed "because of" religion or with the intent to limit the free exercise of religion; no evidence was offered to show a pervasive discrimination based on religious beliefs or practices. In fact, the congressional findings merely stated "throughout much of our history, facially neutral laws that operated to burden the free exercise of religion were often upheld by the courts, and severely undermined religious observance by many Americans." [FN105] The only support provided was the identification of several cases decided in the wake of Smith that stood to jeopardize the free exercise of religion. [FN106] In addition, Congress noted how "governments . . . have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. Jews have been subjected to autopsies in violation of their families' faith." [FN107] None of these findings, however, evidence the invidious discrimination necessary to prove a constitutional violation or a risk thereof. Therefore, the means ***569** employed by RFRA lacked the necessary congruent relationship to the evil sought to be prevented. [FN108]

The "congruence and proportionality" standard draws the line between remedial and preventative legislation and that legislation which defines or creates substantive rights. As the Court explained in Flores, where a statute lacks a congruent and proportional relationship to the evil to be prevented, its enactment results in a new definition of constitutional guarantees. Because Congress' power under Section 5 of the Fourteenth Amendment is not plenary, but rather remedial and preventative, such substantive actions exceed the scope of Congress' power and are thus unconstitutional.

Enacting RFRA, Congress concluded that "[b]ecause [RFRA] is clearly designed to implement the free exercise clause--to protect religious liberty and to eliminate laws 'prohibiting the free exercise' of religion--it falls squarely within Congress' section 5 enforcement power." [FN109] The Senate Report states that RFRA is "intended to enforce the right guaranteed by the free exercise clause of the first amendment [and not] . . . legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision." [FN110] The "Section by Section Analysis," however, boldly states that Section 2 of the Act restores the compelling interest test, presumably inapplicable after Smith, and Section 3 expressly codifies the compelling interest test as the Supreme Court had applied it prior to Smith. [FN111] Furthermore, RFRA imposed a "least restrictive means" standard not found in pre-Smith jurisprudence. This declaration of a judicial standard of review led to the Court's conclusion that Congress had overstepped the limitations of its enforcement power and attempted to define, as opposed to enforce, substantive protections.

Additionally, RFRA's protections are broader than those defined in pre-Smith case law. RFRA retracts the prisoner and military exceptions previously held to a different standard of review under the Free Exercise Clause. [FN112] Specifically, RFRA restores the traditional protections of the free exercise of religion ***570** weakened by O'Lone v. Estate of Shabazz [FN113] to prisoners and rescinds the military exception imposed by Goldman v. Weinberger. [FN114] Although Congress claimed it simply intended to restore a prior standard of review, not a more rigorous one, the Court found Congress' actions fundamentally altered the meaning of the Free Exercise Clause. [FN115] As a result, the enactment of RFRA defined a constitutional right. In so defining, Congress exceeded the scope of its power to enforce the provisions of theFourteenth Amendment.

The "congruence and proportionality" standard developed by the Supreme Court in Flores essentially replaces Morgan's rational basis standard. [FN116] Used to determine whether the legislation "enforces" the provisions of the Fourteenth Amendment and whether the means are "plainly adapted" to the ends, the "congruence and proportionality" standard narrows the judicial review of constitutional challenges to legislation enacted under the Fourteenth Amendment. Pre-Flores jurisprudence simply required a rational basis, the ability of the court to "perceive a basis" on which Congress made its determination. [FN117] In contrast, the "congruence and proportionality" standard requires a congruent and proportional relationship between the legislative means employed and the ends to be achieved. [FN118] Under Flores, examples of historical or current discrimination can illustrate a congruent relationship. [FN119] At a minimum, the standard requires some connection or relationship between the cited discrimination and the congressional action. [FN120]

Similarly, the "proportionality" requirement restricts Congress' ability under the "plainly adapted" prong of the Morgan test. Under the standard in Flores, the Court must understand Congress' action to be responsive to, or designed to prevent constitutional violations. [FN121] Significantly, the Flores Court noted that termination dates and geographical limitations to legislation ***571** enacted under Section 5 evidence "proportionality" between Congress' action and the possible constitutional violation. [FN122] The Court's reference to such legislative restrictions indicates a narrow interpretation of Congress' powers and thereby limits Congress' ability to pass remedial or preventative legislation on a national or long-term scale.

B. Violence Against Women Act

In 1994, Congress enacted VAWA using its powers under both the Commerce Clause and the Fourteenth Amendment. [FN123] VAWA protects the right to be free from crimes of violence motivated by gender. Its stated purposes are the protection of victims of gender-motivated violence and the promotion of public safety, health, and activities affecting interstate commerce, by creating a cause of action for victims of crimes of violence motivated by gender. [FN124] VAWA was enacted in "response to [Senate] [R]eports identifying widespread gender bias in the courts, particularly in cases of rape and domestic violence." [FN125]

The legislative findings supporting the enactment of VAWA are extensive. [FN126] The Senate Report estimated that five to ten billion dollars are spent each year on health care, criminal justice, and other social causes of domestic violence. [FN127] Researching violence toward women, Congress found:

1. Violence is the leading cause of injury to women ages 15-44, more common than automobile accidents, muggings and cancer deaths combined.

2. In 1991, at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults --***572** including aggravated assaults, rapes and murders--were committed against women in their homes

that year; unreported domestic crimes have been estimated to be more than three times this total.

3. Every week, during 1991, more than 2,000 women were raped and more than 90 women were murdered--9 out of 10 by men.

4. An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women. About 35% of women visiting hospital emergency rooms are due to injuries sustained as a result of domestic violence. One study of battered women found that 63 percent of the victims had been beaten while they were pregnant. [FN128]

The Senate Report identified those states which fail to recognize rape of a spouse as a criminal offense, and those states which require kidnapping or the use of a weapon, or define the rape of a spouse as a lesser crime, as evidence of the inadequate response of the legal system to crimes committed against women. [FN129] The Senate Report found that victims of rape are unable to find justice or protection, even outside family violence. [FN130] Congress based the need for VAWA's remedial legislation on the fact that (1) state remedies have proven inadequate; (2) studies indicate that crimes which disproportionately affect women are treated less seriously than comparable crimes affecting men; and (3) gender bias permeates the court system and women are most often its victims. [FN131]

Title III of VAWA allows the victims of gender-based crimes to bring civil action against their attacker in federal court. [FN132] Discussing Congress' enforcement power, the Senate Report stated "Congress has the power to recognize that violence motivated by gender bias 'is not merely an individual crime or personal injury, but is a form of discrimination." ' [FN133]

***573** The Senate Report concluded that Title III was "appropriate legislation" under Section 5 because it attacked gender-motivated crimes threatening women's equal protection of the laws and provided a necessary remedy to fill gaps in the legal system and rectify biases in state law. [FN134] In addition, Title III was a type of action sanctioned by the Supreme Court to remedy violent discrimination. [FN135] Finally, the Senate Report stated that Congress' enforcement powers under Section 5 extend to those circumstances where the states have failed to protect equal rights. [FN136]

Lower courts discussing VAWA are split on the Act's constitutionality. In Doe v. Doe, [FN137] the court determined VAWA was constitutional under the Commerce Clause and therefore did not analyze the Act's constitutionality under Section 5 of the Fourteenth Amendment. The court, however, did note that "VAWA, modelled after other traditional civil rights legislation[,] is narrowly tailored and reasonably adapted to accomplish a constitutionally permitted end." [FN138]

In contrast, the court in Brzonkala v. Virginia Polytechnic and State University [FN139] found VAWA unconstitutional both as an exercise of Congress' enforcement power and under the Commerce Clause. First, the court held that congressional enforcement actions may not regulate purely private conduct. [FN140] The court distinguished Morgan, noting that Morgan involved a state action, New York's voting rights statute, which violated the Equal Protection Clause of the Fourteenth Amendment. [FN141] Thus, the court limited Morgan's prophylactic regulation and proscription to situations involving state action, concluding that the "prophylactic rationale of cases like [Morgan], South Carolina v. Katzenbach, ***574** and Flores is simply inapplicable where, as here, Congress attempts to regulate purely private conduct, because such private conduct can never violate Section 1 of the Fourteenth Amendment." [FN142] Morgan does not permit Congress to act against purely private action incidentally giving rise to state action causing a denial of equal protection. [FN143]

The court concluded that in light of the Supreme Court's decision in Flores, "section 13981 is not 'appropriate legislation' to 'enforce' [the guarantees of the Fourteenth Amendment], because section 13981 is neither sufficiently aimed at safeguarding the Equal Protection rights guaranteed by that Amendment nor an appropriate means to protect those rights." [FN144] The court rejected the argument that Congress possesses such "exceptionally broad discretion" to legislate under Section 5 that it is for Congress to determine whether a statute is appropriate legislation to enforce a statute and instead noted that the Supreme Court has made it clear that courts cannot "simply defer to these congressional findings or conclusions; [but] rather, [the courts] must arrive at an independent judgment as to the constitutionality of [VAWA]." [FN145] As support, the court relied on the reasoning of Flores, concluding that the invalidation of RFRA

reaffirmed the principle that, in order to secure a federal government of limited and enumerated powers,

congressional legislation enacted pursuant to Section 5 must be carefully scrutinized by the courts to ensure that Congress is truly enforcing the provisions of the Fourteenth Amendment, rather than redefining the substance of those provisions under the guise of enforcement. [FN146]

Defining the Flores "congruence and proportionality" test as a test designed to measure whether a particular statute is "aimed at, and is a closely tailored means of, enforcing a provision of Section 1 [of the Fourteenth Amendment]," [FN147] the court went on to apply this test to VAWA.

First, the court determined that reviewing courts cannot "simply defer wholesale to Congress' purely legal conclusion that 'bias and discrimination in the criminal justice system[s of the ***575** States] often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." ' [FN148] Reviewing the legislative history, the court noted that this "finding" was an almost verbatim recitation of Professor Sunstein's testimony to the House Subcommittee on Civil and Constitutional Rights, [FN149] that the legislative history did not demonstrate that Congress was concerned with purposeful discrimination, [FN150] and that many of the findings do not relate to burdens imposed by state action. [FN151] In addition to the content of VAWA, the court found the structure of the statute to "further confirm the lack of congruence between the statute and its asserted aim of addressing purposefully unequal law enforcement by the [s]tates." [FN152] In particular, the court pointed to the purely private remedy, [FN153] the vesting of concurrent jurisdiction in state courts over VAWA claims, [FN154] and subsidies to states to help eliminate the causes and effects of rape and domestic violence, [FN155] to conclude that Congress' true concerns were to deter individual and private acts of violence and to raise public consciousness. [FN156]

Second, the court found that the provisions of VAWA, like the provisions of RFRA, were "so out of proportion to any possible unconstitutional state action . . . as to exceed congressional power to 'enforce' the Fourteenth Amendment." [FN157] For example, the court noted that liability under VAWA attaches to "all felonious acts of violent crime motivated by gender" and to all jurisdictions whether or not there is evidence of chronic under-reporting and whether or not the jurisdiction has adopted a rape shield law and criminalized spousal rape. [FN158] Further, the court distinguished City of Rome v. United States [FN159] and South Carolina ***576** v. Katzenbach, [FN160] noting that VAWA did not contain any termination date or termination mechanism. [FN161] Finally, the court noted that VAWA's broad sweep might even operate to give a male victim a cause of action even though there were no "findings" regarding the unequal enforcement of laws against men. [FN162]

The court concluded its analysis, as had the Supreme Court in Flores, by observing that to uphold VAWA as a valid exercise of Congress' enforcement powers under Section 5 of the Fourteenth Amendment "would disrupt the 'vital' 'federal balance,' and essentially confer upon Congress a general police power . . . ." [FN163]

1. Flores Congruence and Proportionality Standard

The "congruence and proportionality" test established in Flores requires a congruence between the legislation and the evil presented, and a proportionality between the means employed and the possible constitutional violation. [FN164] Evidence of past and/or present discrimination can indicate the necessary congruence between the legislation and the constitutional violation. [FN165] The determination that the means employed by Congress are "responsive to" the possible constitutional violation indicates the act is proportional. [FN166] Termination dates, geographic limitations and egregious predicates also serve as indicators of proportionality. [FN167]

VAWA could fail under the new "congruence and proportionality" standard. Although the congressional record is replete with evidence of violence against women, in terms of both economic and social costs, [FN168] the findings could be challenged as to whether the prevalence of violence against women translates into discrimination against a particular class. The Court's analysis in Flores indicates such action must be "because of" the particular class characteristic, in this case women. [FN169] VAWA does limit its application to only those crimes based on gender, a fact that may ***577** garnish some support under the Flores opinion. [FN170] Claims that VAWA is both overbroad and underinclusive, [FN171] however, suggest a lack of congruency between the means employed and the evil to be prevented.

VAWA is particularly vulnerable under the "proportionality" prong of the Flores standard. Although the stated purpose of the statute is to remedy gender discrimination in the state court systems, the act reaches to the private conduct of individuals. As a result, not only does the VAWA open itself to constitutional attacks based on the state action requirement, but it also raises questions regarding the "sweep" of the statute. Given Flores' emphasis

on confining the impact of remedial legislation to those spheres facing discrimination, VAWA may be deemed too broad. VAWA's overbreadth is particularly evident with respect to its inclusion of women who do not suffer Fourteenth Amendment violations in the state criminal systems, but still have a VAWA claim. [FN172] Like those individuals whose free exercise of religion is incidentally burdened by laws of general applicability, these women are not victims of a constitutional violation. Therefore, to offer them a remedy is to stretch Congress' power beyond the confines of Section 5.

Furthermore, it is difficult to understand action against the individual perpetrator as "responsive to" gender discrimination in state courts. Simply put, Congress' action does not touch the constitutional violation of the Fourteenth Amendment. Instead, VAWA only punishes the perpetrator, perhaps assuming that additional prosecution will deter individuals from committing such gender-based violent crimes against women. This causal relationship is somewhat tenuous. Moreover, the Flores "congruent and proportionality" standard appears to require a closer relationship between the means employed and the ends to be achieved. Therefore, if VAWA is to prevail, there must be sufficient evidence that the states are unable or unwilling to protect women from gender-based violence.

***578** C. Americans with Disabilities Act

Enacted under Congress' Section 5 enforcement powers and the Commerce Clause, the purpose of the ADA is to provide a national mandate for the elimination of discrimination against persons with disabilities, to require the application of consistent standards, and to ensure the central role of the federal government.

The ADA cites many examples of pervasive discrimination. [FN173] When enacting the ADA, Congress found that over 43,000,000 Americans have one or more physical or mental disabilities. [FN174] This population has faced historical isolation and segregation, still persistent today. The disabled face discrimination in such "critical areas" as "housing, employment, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services." [FN175] Prior to the enactment of the ADA, no legal recourse was available to persons subject to discrimination because of their disability. As a group, the disabled occupy an inferior status and are severely disadvantaged socially, vocationally, economically, and educationally. The disabled are a discrete and insular minority subject to unequal treatment and in a position of political powerlessness. Continuance of discrimination against the disabled denies them both the opportunity to compete on an equal basis and the equal pursuit of opportunities. Finally, the findings conclude that the Nation's proper goals are to provide equality of opportunity. [FN176]

Surprisingly, the ADA has been upheld as a valid and constitutional exercise of Congress' enforcement power after the Flores decision. In Autio v. Minnesota, [FN177] the court sustained an equal protection claim brought under the ADA. The state argued, under Flores, that Congress' "positive grant of legislative power" under Section 5 "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment." [FN178] Determining the ADA was a constitutional exercise of Congress' Section 5 power, the court applied the Morgan test, inquiring whether (1) the legislation ***579** was enacted to enforce the Fourteenth Amendment; (2) was plainly adapted to that end; and (3) was not prohibited by, but rather in the spirit of, the United States Constitution. [FN179]

The Autio court held the ADA met each one of these requirements. First, Congress enacted the ADA to enforce the Equal Protection Clause, as evidenced by the Act's stated purpose to provide a national mandate for the elimination of discrimination against the disabled. [FN180] Second, the court determined the ADA was plainly adapted to eradicate discrimination. [FN181] The ADA ensures that the disabled are not subject to discriminatory state conduct and are afforded equal opportunities in employment and other areas. [FN182] In addition, the provisions of the act are tailored to remedy the identified class discrimination in the area of employment. [FN183] Finally, the court found the ADA to be consistent with the letter and spirit of the Constitution as it was a remedial, not substantive, legislative action. [FN184]

The Autio court set forth the distinction between a remedial enforcement action and a substantive determinative action. Relying on Flores for the proposition that the scope of Congress' authority to enact legislation under Section 5 of the Fourteenth Amendment "does not extend to decreeing 'the substance of the Fourteenth Amendment's restrictions on the [s]tates,' " the Autio court held Congress cannot enforce a constitutional right by changing what the right is. [FN185] Stated another way, Congress has remedial and preventative enforcement powers, not the power to "determine what constitutes a constitutional violation." [FN186] The court discussed the Supreme Court's analytical framework in Flores, noting that while such a distinction might be difficult to discern,

"[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." [FN187]

Finding that the means employed by the ADA were congruent ***580** and proportionate to the injury to be remedied, the court stated that while the reach of the ADA is broad, its effect is limited to protective actions against arbitrary discrimination based on a person's disability. [FN188] The court specifically distinguished RFRA, stating that RFRA altered the meaning of the Free Exercise Clause by imposing the compelling interest test. [FN189] In contrast, "the ADA's scope and purpose is narrowly tailored to meet its limited equal protection goals." [FN190]

Similarly, the court in Martin v. Kansas [FN191] found the ADA was a constitutional use of Congress' enforcement powers. [FN192] While acknowledging Congress' powers are not unlimited, the court emphasized that "Congress may properly prohibit constitutional as well as unconstitutional action in enforcing the Fourteenth Amendment." [FN193] Furthermore, Congress may impose affirmative requirements on the states where such requirements are necessary for the enforcement of the Equal Protection Clause. [FN194] Finding that the provisions under the ADA do not raise the rights of the disabled above others, but instead seek to eliminate the barriers to equal opportunities, the court concluded that the ADA is both congruent and proportionate to the disability discrimination it addresses. [FN195]

1. Application of the Congruent and Proportionality Standard

Although Autio and Martin both purport to adopt the "congruence and proportionality" standard established in Flores, neither court construes it in its strictest form. Therefore, while the ADA has been upheld under the Flores standard, its constitutionality could still be challenged.

The ADA's legislative record provides the evidence of historical and current discrimination necessary to establish a "congruent" relationship. However, its sweeping application places it on par with RFRA in terms of practical effect. Therefore, the real ***581** question under the Flores standard is whether the ADA is proportionate to the discrimination it seeks to eradicate.

The ADA does not impose any geographical restrictions, time limitations or other actions limiting the breadth or length of its application. In fact, the number of affirmative actions required under the ADA, could be used to support the argument that the ADA proceeds beyond the reaches of remedial or preventative actions. Moreover, the ADA's finding that the disabled constitute a "discrete and insular minority" arguably raises the level of scrutiny afforded to the disabled, thereby altering the rights of the disabled. [FN196] As held in Flores such alterations create a substantive right and therefore exceed Congress' powers under Section 5.

Therefore, while the ADA could prevail under the congruent and proportionality standard, its foundation is not impenetrable. Its vulnerability under this standard raises the question of whether the Flores decision, like Shaw v. Reno, [FN197] will be used by activist attorneys seeking to curtail civil rights legislation as a stepping stone to a narrower application of the Morgan test.

D. Freedom of Access to Clinic Entrances

Enacted under Section 5 of the Fourteenth Amendment and the Commerce Clause, FACE prohibits the use of force, threat of force or intimidation against a person or class of persons obtaining or providing reproductive services; prohibits interfering with a persons seeking to exercise their right of religion at a place of worship; prohibits the damage or destruction of property where reproductive services are offered or at a place of worship; and, imposes both a criminal and civil cause of action. [FN198] The purpose of the Act is to "protect and promote the public safety and health and activities affecting interstate commerce by establishing federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is ***582** intended to injure, intimidate or interfere with persons seeking or providing reproductive health services." [FN199]

The Fifth Circuit recently upheld the constitutionality of FACE in United States v. Bird. [FN200] Similar to the Autio case, however, Bird was decided on Commerce Clause grounds and expressly avoided reviewing the constitutionality of FACE under Congress' Section 5 enforcement powers. [FN201] Importantly, the court stated "we pretermit the substantially more questionable assertion of congressional authority to criminalize purely private conduct (not directed at state property or facilities) under Section [5] of the Fourteenth Amendment." [FN202] As

the Flores decision runs through the legal system, it is likely that an increasing number of attorneys and courts will use the case as a limitation with which to restrain Congress' "broad grant of legislative power" to enforce the provisions of the Fourteenth Amendment.

Judge DeMoss' dissenting opinion in Bird provides some insight into the use and precedential value of the Flores decision. [FN203] Because Judge DeMoss did not agree that FACE is within Congress' power under the Commerce Clause, he went on to discuss the Act under the Fourteenth Amendment, concluding that "in light of well-established principles which were recently reaffirmed by the Supreme Court's decision in [Flores], . . . Section [5] of the Fourteenth Amendment does not empower Congress to enact FACE." [FN204] Judge DeMoss, emphasizing that Congress' power is limited to the enforcement of the provisions of the Fourteenth Amendment, held that such actions must be directed toward the states, not private conduct:

Section [5] of the Fourteenth Amendment "did not authorize Congress to 'pass general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing." ' [FN205]

The intent of Section 5 was not to grant the federal government police powers over the individual rights contained in the Fourteenth ***583** Amendment. Furthermore, "[a]fter [Flores], it is clear that acts passed pursuant to Section [5] must be remedial in nature." [FN206] Under Judge DeMoss' analysis and application of the Flores standard, FACE was not remedial legislation, but rather vindicative legislation which failed to provide a remedy for the states' constitutional violations. [FN207]

Interestingly, Judge DeMoss noted that the same Congress which enacted RFRA enacted FACE. [FN208] His opinion points to the fact that both pieces of legislation sought to change the legislation of a prior Supreme Court opinion: in RFRA the Smith decision; and in FACE, the Bray v. Alexandria Women's Health Clinic [FN209] decision. [FN210] More importantly, however, Judge DeMoss likens the Court's limitations on the Commerce Clause as defined in United States v. Lopez [FN211] to the limitations of Congress' Section 5 enforcement powers in Flores, heralding a "renewed consciousness of the fundamental principles of our Constitution, that is, that our federal government is a government of limited powers, federalism has a significant place in constitutional analysis, and the separation of powers between the branches of the federal government must be respected." [FN212]

In United States v. McMillan, [FN213] FACE was upheld as a valid enactment under both the Commerce Clause and the Fourteenth Amendment. Holding that "Section 5 of the Fourteenth Amendment to the United States Constitution empowers Congress to enact FACE insomuch as this section gives Congress the power 'to enforce by appropriate legislation, the provisions' of the Fourteenth Amendment," [FN214] the court found that FACE "seeks to protect the right to terminate a pregnancy, a right that falls squarely within the rights guaranteed by the Fourteenth Amendment." [FN215]

***584** 1. Application of the Congruence and Proportionality Standard

At present no case has applied the "congruence and proportionality" standard to FACE. While not immune to constitutional challenges, FACE would likely pass the "congruence and proportionality" standard enunciated in Flores. Enacting FACE, Congress found (1) an interstate campaign of violent conduct aimed at abortion providers which is beyond the state's ability to control; (2) such conduct infringes upon the exercise of right secured under the constitution and other laws; (3) such conduct burdens interstate commerce; (4) no legal redress available after the Bray decision; and (5) such violent conduct directed against abortion providers may be prohibited without infringing on the constitution. [FN216] A primary difficulty in analyzing FACE under the "congruent" prong of the Flores test is that the findings do not allege historical discrimination. Given the magnitude of the current violence, however, it is likely that FACE's findings can overcome this hurdle.

FACE can be understood to be responding to a constitutional violation: the constitutionally protected right to reproductive services including abortions. [FN217] Although the statute does not impose geographical or time limitations, the narrowly tailored focus to violence directed at abortion providers, clinic staff, and patients seeking family planning services, gives some indication that the statute is proportional. Furthermore, the actions prohibited by FACE involve actions that deny women the constitutionally protected right to abortions. Therefore, FACE is distinguishable from Flores where the Court found RFRA to act against constitutional as well as unconstitutional violations. Finally, FACE does not create or impose a new level of judicial review. Instead, the Act only seeks to

protect the constitutional right to abortions by prohibiting unlawful conduct which the states are unable to adequately defend. [FN218]

Conclusion

The number of cases already citing Flores foreshadows the ***585** broad implications of the decision. The Court's new "congruence and proportionality" standard, at least as defined in the Flores decision, narrows Congress' enforcement powers under Section 5 of the Fourteenth Amendment. In addition, the Court's emphasis, throughout the opinion, on the restrictions and confines of Section 5, signals an effort to limit Congress' enforcement powers. Such limitations threaten Congress' authority to enact civil rights legislation, as illustrated by the review of VAWA, ADA, and FACE. In the wake of the Court's Lopez decision, such additional restrictions could be devastating.

[FN1]. 509 U.S. 630 (1993).

[FN2]. The Court expressly withheld judgement as to
> whether appellants successfully could have challenged [a reasonably compact second majority-minority district] under the Fourteenth Amendment. We also do not decide whether appellants' complaint stated a claim under constitutional provisions other than the Fourteenth Amendment. Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.

Id. at 657-58 (emphasis added).

[FN3]. See, e.g., Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno, 92 Mich. L. Rev. 588 (1993); Jeanmarie K. Grubert, The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights, 65 Fordham L. Rev. 1819 (1997).

[FN4]. 514 U.S. 549, 559 (1995).

[FN5]. Id.

[FN6]. Anna Kampourakis & Robin C. Tarr, About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez, 11 St. John's J. Legal Comment. 191, 219 (1995).

[FN7]. 521 U.S. 507 (1997).

[FN8]. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

[FN9]. The relevant portions of the Fourteenth Amendment provide:
> Section 1. ... No State shall ... 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.
>
> ....
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5.

[FN10]. Ex parte Virginia, 100 U.S. 339, 345 (1879).

[FN11]. Id. at 347-48.

[FN12]. Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (current version at 18 U.S.C. § 243 (1994)).

[FN13]. Ex Parte Virginia, 100 U.S. at 345.

[FN14]. 17 U.S. (4 Wheat) 316, 421 (1819).

[FN15]. Ex Parte Virginia, 100 U.S. at 345-46.

[FN16]. Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

[FN17]. See City of Rome v. United States, 446 U.S. 156 (1980) (holding that Congress could prohibit legislation with discriminatory effects, even if the legislation itself does not violate the Fifteenth Amendment); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding a national five year ban on literacy tests and other voting registration requirements); Morgan, 384 U.S. 641 (upholding section4(e) of the Voting Rights Act of 1965 that invalidated a portion of New York's literacy test for voting eligibility); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding various provisions of the Voting Rights Act of 1965 as within Congress' enforcement power under Section2 of the Fifteenth Amendment).

[FN18]. 384 U.S. at 646.

[FN19]. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 438 (current version at 42 U.S.C. § 1973b(e) (1994)).

[FN20]. See N.Y. Elec. Law § 168 (repealed 1971).

[FN21]. Morgan, 384 U.S. at 648.

[FN22]. See id. at 658.

[FN23]. Id. at 651.

[FN24]. See id. at 652.

[FN25]. Id. at 653.

[FN26]. Id. at 655-56.

[FN27]. See Jonathan Kieffer, A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act, 44 U. Kan. L. Rev. 601, 614-19 (1996).

[FN28]. Laurence H. Tribe, American Constitutional Law § 5-14, at 341 (2d ed. 1988).

[FN29]. See Ex parte Virginia, 100 U.S. 339, 359 (1879); Morgan, 384 U.S. at 651.

[FN30]. 384 U.S. at 651.

[FN31]. Id. at 653.

[FN32]. Id. at 651.

[FN33]. 400 U.S. 112, 118 (1970).

[FN34]. Id. at 118.

[FN35]. Id. at 119.

[FN36]. Id. at 118.

[FN37]. Id.

[FN38]. See, e.g., EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) ("I have always read [Mitchell] as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter' ...."); Daniel O. Conkle, The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute, 56 Mont. L. Rev. 39, 50 (1995) ("[Mitchell] provides added reason to view Morgan's substantive theory with caution"). But see Bonnie I.

Robin-Vergeer, Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act, 69 S. Cal. L. Rev. 589, 719 (1996) (Mitchell's "splintered opinions do not detract from the breadth of Congress' Section 5 power").

[FN39]. Tribe, supra note 28, § 5-14, at 340.

[FN40]. Id. at 341.

[FN41]. City of Boerne v. Flores, 521 U.S. 507, 520-21 (1997).

[FN42]. Flores declares RFRA unconstitutional only as applied to state laws. Although there are separation of powers and establishment clause challenges to the federal application of RFRA, the RFRA still applies to federal laws, including federal laws touching Indian reservations.

[FN43]. Flores, 521 U.S. at 511.

[FN44]. 494 U.S. 872 (1990).

[FN45]. 42 U.S.C. § 2000bb (1994).

[FN46]. 494 U.S. at 878.

[FN47]. Oregon law made it a felony to knowingly or intentionally possess peyote. See id. at 874.

[FN48]. Id.

[FN49]. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

[FN50]. Ingestion of peyote during some ceremonies is a practice of the Native American Church and other American Indian tribes. Therefore, the criminalization of the use of peyote infringes upon the free exercise of religion. American Indian use of peyote for religious purposes is now protected through the American Indian Freedom of Religion Act. See 42 U.S.C. § 1996a (1994).

[FN51]. 42 U.S.C. § 2000bb-1 (1994).

[FN52]. City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[FN53]. Id.

[FN54]. Id. at 517 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

[FN55]. Id. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[FN56]. Id. (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).

[FN57]. Id. at 519.

[FN58]. Id. at 520.

[FN59]. Id.

[FN60]. Id.

[FN61]. Id. at 520-24.

[FN62]. Id. at 524.

[FN63]. 109 U.S. 3 (1883).

[FN64]. Flores, 521 U.S. at 525 (quoting The Civil Rights Cases, 109 U.S. at 13-14).

[FN65]. Id. at 527 (noting that four of the five justices voting in the majority held that Congress had no such power).

[FN66]. Id.

[FN67]. Id. at 527-28.

[FN68]. 384 U.S. 641, 656 (1966).

[FN69]. See Flores, 521 U.S. at 528-29 (noting that to interpret Morgan to stand for the proposition that Congress has "the power to interpret the Constitution 'would require an enormous extension of that decision's rationale" ' (quoting Oregon v. Mitchell, 400 U.S. 112, 296 (1970))).

[FN70]. Id. at 530.

[FN71]. Id.

[FN72]. Id.

[FN73]. Id. RFRA's preventative measure is its prohibition of passing generally applicable laws which incidentally burden religion without (1) a compelling government reason; and (2) assuring that the method is the least restrictive means available. 42 U.S.C. § 2000bb-1 (1994).

[FN74]. Flores, 521 U.S. at 530.

[FN75]. Id. (examples included autopsies performed on Jewish and Hmong individuals in violation of their beliefs, and zoning regulations that adversely affect churches and synagogues).

[FN76]. Id.

[FN77]. Id. at 532 (emphasis added).

[FN78]. Id.

[FN79]. Id. (quoting The Civil Rights Cases, 109 U.S. 3, 13 (1883)).

[FN80]. Id.

[FN81]. 42 U.S.C. § 2000bb-1 (1994).

[FN82]. Flores, 521 U.S. at 533-34.

[FN83]. 383 U.S. 301 (1966).

[FN84]. 446 U.S. 156 (1980).

[FN85]. Flores, 521 U.S. at 532-33.

[FN86]. Id. at 534. It is important to note that the Court still applies the Smith interpretation of the Free Exercise Clause. As a result, it is easy for the Court to conclude that "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." Id. at 534-35. Because Smith held that laws of general application, which incidentally burden the free exercise of religion, are constitutional, much of RFRA's application will necessarily not be against laws "likely to be unconstitutional." Id. at 532. It was the intent of RFRA, however, to overrule the Smith decision and reinstitute the compelling interest test, in which case,

some of the laws could "likely ... be unconstitutional." Id.

[FN87]. Id. at 532-35.

[FN88]. 42 U.S.C. § 2000bb-1(b) (1994).

[FN89]. Flores, 521 U.S. at 535.

[FN90]. See, e.g., Clark v. California, 123 F.3d 1267 (9th Cir. 1997); Creative Goldsmiths of Washington, D.C., Inc. v. Maryland, 119 F.3d 1140 (4th Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Goshtasby v. Board of Trustees of the Univ. of Illinois, 123 F.3d 427 (7th Cir. 1997); Mills v. Maine, 118 F.3d 37 (1st Cir. 1997); Autio v. Minnesota, 968 F. Supp. 1366 (D. Minn. 1997); Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elem. Sch., 696 A.2d 709 (N.J. Sup. Ct. 1997); In re Kish, 212 B.R. 808 (D.N.J. 1997).

[FN91]. 212 B.R. at 816 (emphasis added) (quoting Flores, 521 U.S. at 519).

[FN92]. See, e.g., Creative Goldsmiths, 119 F.3d at 1146 ("[A]s the Supreme Court's recent pronouncement in [Flores] indicates, [Section]5 of the Fourteenth Amendment does not grant Congress a plenary power.").

[FN93]. 384 U.S. 641, 653 (1966).

[FN94]. Flores, 521 U.S. at 533-35.

[FN95]. Id.

[FN96]. Id. at 536 ("[A]s the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").

[FN97]. Cf. Bartlett v. New York Bd. of Law Exam'rs, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997) ("[A]t the very least, [Flores] tells us that Congress may not ... directly alter the level of scrutiny ....").

[FN98]. 42 U.S.C. § 13981 (1994).

[FN99]. 42 U.S.C. §§ 12101 to 12213 (1994 & Supp. III 1997).

[FN100]. 18 U.S.C. § 248 (1994).

[FN101]. Although RFRA raises other constitutional questions, this discussion is limited to its affect on the interpretation of Congress' powers under Section 5 of the Fourteenth Amendment. Arguably, RFRA raises separation of powers and the Establishment Clause questions as well. Nevertheless, as the Supreme Court's decision rested on the power of Congress to enact remedial legislation under Section 5, the Flores case is applied to the VAWA, ADA and FACE as a potential limitation to Congress' authority to enact preventative civil rights legislation.

[FN102]. RFRA
> responds to the Supreme Court's decision in [Smith] by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest.

S. Rep. No. 103-111, at 2 (1993).

[FN103]. Id. at 13-14.

[FN104]. 42 U.S.C. § 2000bb (1994).

[FN105]. S. Rep. No. 103-111, at 4 (1993).

[FN106]. Id. at 8 n.13 (citing You Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (reversing an earlier decision upholding Hmong religious objection to autopsy, in light of Smith)); and Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (after Smith, the Supreme Court of Minnesota, relied on state instead of federal constitutional grounds to uphold the Amish's free exercise right not to display fluorescent emblems on their horse-drawn buggies))).

[FN107]. Id.

[FN108]. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

[FN109]. S. Rep. No. 103-111, at 14 (1993).

[FN110]. Id. at 14 n.43.

[FN111]. Id. at 14.

[FN112]. Id. at 9-11.

[FN113]. 482 U.S. 342 (1987).

[FN114]. 475 U.S. 503 (1986).

[FN115]. City of Boerne v. Flores, 521 U.S. 507, 534-35 (1997).

[FN116]. In Morgan, 384 U.S. 641, 653 (1966), the Court declared "[i]t is not for us to review the congressional resolution .... It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."

[FN117]. Id.

[FN118]. Flores, 521 U.S. at 520.

[FN119]. Id. at 530-31.

[FN120]. Id.

[FN121]. Id. at 532.

[FN122]. Id. at 533.

[FN123]. 42 U.S.C. § 13981(a) (1994).

[FN124]. Id.

[FN125]. S. Rep. No. 103-138, at 41 (1993). Regarding gender bias, the Senate Report identifies reports documenting the following: (1) "widespread gender bias in the courts, particularly in cases of rape and domestic violence," id. at 44; (2) "no significant increase in either the percentage of rape complaints that result in conviction, or in rape arrest rates," despite decades of legal reform, id. at 45; (3) a "pervasive suspicion of rape victims' credibility," id.; and (4) that "investigators hold victims to a higher standard of behavior than the law requires," id. at 46. Furthermore, "in some [[s]tates the law itself continues to discriminate directly against some classes of victims. Two [s]tates still do not recognize rape of a spouse as a crime." Id. at 47.

[FN126]. See Doe v. Doe, 929 F. Supp. 608, 611 (D. Conn. 1996) ("Congress held numerous hearings over a four-year period and amassed substantial documentation on how gender-based violence impacts interstate commerce and interferes with women's ability to enjoy equal protection of the laws.").

[FN127]. S. Rep. No. 103-138, at 41.

[FN128]. Doe, 929 F. Supp. at 611 (internal citations omitted) (internal quotations omitted).

[FN129]. S. Rep. No. 103-138, at 41.

[FN130]. Id. (noting that over 60% of rape reports do not result in arrests; a rape case is more than twice as likely to be dismissed as a murder case and nearly 40% more likely to be dismissed than a robbery case; and less than half those arrested for rape are convicted of rape).

[FN131]. Id. at 49.

[FN132]. VAWA contains several sections. This Comment concerns Title II of the Act which provides a civil rights remedy for violence motivated by gender. 42 U.S.C. § 13981 (1994).

[FN133]. S. Rep. No. 103-138, at 48 (quoting Women and Violence: Hearings Before the Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (written testimony of Helen Newborne)).

[FN134]. Id. at 55.

[FN135]. Id.

[FN136]. Id. ("The criminal justice system is not providing equal protection of the laws of women in the classic sense" (quoting Women and Violence: Hearings Before the Comm. on the Judiciary, 102d Cong., 1st Sess. (1991) (testimony of Professor Cass Sunstein))).

[FN137]. 929 F. Supp. 608, 609 (D. Conn. 1996).

[FN138]. Id. at 610.

[FN139]. 169 F.3d 820 (4th Cir. 1999), cert. granted sub nom. United States v. Morrison, 120 S. Ct. 11 (1999).

[FN140]. Id. at 869 (noting that liability under VAWA "is not limited to the [s]tates, to their officials, to those who act under color of state law, or even to those who actively conspire with state officials").

[FN141]. Id. at 874-75.

[FN142]. Id. at 874.

[FN143]. Id.

[FN144]. Id. at 881.

[FN145]. Id.

[FN146]. Id. at 882 (citations omitted).

[FN147]. Id.

[FN148]. Id. at 883 (quoting H.R. Conf. Rep. No. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. at 1853).

[FN149]. Id.

[FN150]. Id. at 884.

[FN151]. Id. (citing congressional reports noting that even if the legal rules and practices were eradicated tomorrow, it was unlikely that prosecution and reporting rates for rape would increase and the low percentage of recoveries in civil rape cases).

[FN152]. Id. at 885.

[FN153]. Id.

[FN154]. Id. at 885-86.

[FN155]. Id. at 886.

[FN156]. Id.

[FN157]. Id. at 886-87.

[FN158]. Id. at 887.

[FN159]. 446 U.S. 156 (1980).

[FN160]. 383 U.S. 301 (1966).

[FN161]. Brzonkala, 169 F.3d at 887.

[FN162]. Id.

[FN163]. Id. at 888.

[FN164]. 521 U.S. 507, 529-31 (1997).

[FN165]. Id.

[FN166]. Id. at 532.

[FN167]. Id. at 533.

[FN168]. See S. Rep. No. 103-138 (1993).

[FN169]. 521 U.S. at 530.

[FN170]. See id. at 532-33 (noting that in South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966), the legislation affected a discrete class of state laws).

[FN171]. Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 800 (W.D. Va. 1996).

[FN172]. Id.

[FN173]. 42 U.S.C. § 12101(a) (1994 & Supp. 1999).

[FN174]. Id. § 12101(a)(1).

[FN175]. Id. § 12101(a)(3).

[FN176]. Id. § 12101(a)(8).

[FN177]. 768 F. Supp. 1366 (D. Minn. 1997), aff'd, 157 F.3d 1141 (8th Cir. 1998).

[FN178]. Id. at 1369 (quoting City of Boerne v. Flores, 521 U.S. 507, 520-21 (1997)).

[FN179]. Id.

[FN180]. Id. at 1369-70.

[FN181]. Id.

[FN182]. Id.

[FN183]. Id.

[FN184]. Id.

[FN185]. Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 508 (1997)).

[FN186]. Id. at 1370.

[FN187]. Id.

[FN188]. Id.

[FN189]. Id. at 1371.

[FN190]. Id.

[FN191]. 978 F. Supp. 992 (D. Kan. 1997).

[FN192]. Cf. Kilcullen v. New York State Dep't of Transp., 33 F. Supp. 2d 133, 137-38 (N.D.N.Y. 1999) (noting the majority of federal appellate courts and district courts have concluded the ADA is a valid Fourteenth Amendment enforcement, but reaching the opposite conclusion).

[FN193]. Martin, 978 F. Supp. at 996.

[FN194]. Id. at 997.

[FN195]. Id.

[FN196]. See Bartlett v. New York Bd. of Law Exam'ers, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997) ("Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause."); James B. Miller, The Disabled, The ADA, & Strict Scrutiny, 6 St. Thomas L. Rev. 393, 420 (1994) (although most courts continue to use the rational basis test in analyzing disability discrimination, the ADA is at least an attempt to encourage courts to raise the standard of review).

[FN197]. 509 U.S. 630 (1993).

[FN198]. 18 U.S.C. § 248 (1994).

[FN199]. Id.

[FN200]. 124 F.3d 667 (5th Cir. 1997).

[FN201]. Id. at 682.

[FN202]. Id. (emphasis added).

[FN203]. Judge DeMoss concurs in part and dissents in part.

[FN204]. Id. at 691 (DeMoss, dissenting in part, concurring in part) (emphasis added) (citations omitted).

[FN205]. Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 525 (1997)).

[FN206]. Id.

[FN207]. Id.

[FN208]. Id.

[FN209]. 506 U.S. 263 (1993) (reducing the availability of protection for women seeking abortions by holding that courts could not use the conspiracy section of the Ku Klux Klan Act, 42 U.S.C. § 1985(3) (1993), to restrict the obstructive actions of anti-abortion protestors blocking access to abortion clinics).

[FN210]. Bird, 124 F.3d at 691.

[FN211]. 514 U.S. 549 (1995).

[FN212]. Bird, 124 F.3d at 691.

[FN213]. 946 F. Supp. 1254 (1995).

[FN214]. Id. at 1262.

[FN215]. Id.

[FN216]. H.R. Rep. 103-306, at 6 (1994).

[FN217]. See Planned Parenthood v. Casey, 505 U.S. 833, 856-58 (1992) (affirming the constitutional right to an abortion); Roe v. Wade, 410 U.S. 113, 154 (1973) (finding a constitutional right to abortion).

[FN218]. See Laurence H. Tribe, The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993, 1 Va. J. Soc. Pol'y & L. 291, 298 (1994).

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