The Act provides that laws of general applicability—federal, state, and local—may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[352] But this legislative effort was partially frustrated in 1997 when the Court in *City of Boerne v. Flores*[353] held the Act unconstitutional as applied to the states.

In applying RFRA to the states, Congress had exercised its power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the Due Process Clause. But the Court held that RFRA exceeded Congress's power under § 5, because the measure did not simply enforce a constitutional right but substantively altered that right. "Congress," the Court said, "does not enforce a constitutional right by changing what the right is."[354] Moreover, it said, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved . . . [and] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[355] "RFRA," the Court concluded, "contradicts vital principles necessary to maintain separation of powers and the federal balance."[356]

Boerne did not close the books on *Smith*, however, or even on RFRA. Although *Boerne* held that RFRA was not a valid exercise of Fourteenth Amendment enforcement power as applied to restrict states, it remained an open issue whether RFRA may be applied to the Federal Government, and whether its requirements could be imposed pursuant to other powers. Several lower courts answered these questions affirmatively,[357] and the Supreme Court has applied RFRA to the Federal Government without addressing any constitutional questions.[358]

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[352] Pub. L. 103–141, § 2(b)(1) (citations omitted). Congress also avowed a purpose of providing "a claim or defense to persons whose religious exercise is substantially burdened by government." § 2(b)(2).

[353] 521 U.S. 507 (1997).

[354] 521 U.S. at 519.

[355] 521 U.S. at 533–34.

[356] 521 U.S. at 536.

[357] *See*, *e.g.*, *In re* Young, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress's bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v.