

NOTES

INTRODUCTION

1. Anna Marie Davison, *A History of St. Peter's Catholic Church, Boerne, Texas* (Boerne, TX: St. Peter's Restoration and Preservation Society, 1987).
2. 521 U.S. 507 (1997).
3. Robert F. Drinan, "Reflections on the Demise of the Religious Freedom Restoration Act," *Georgetown Law Journal* 86 (1997): 101.
4. There were a few exceptions, where special institutions such as prisons and the military were involved. These cases are discussed in Chapter 1.
5. *Employment Division of Oregon, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).
6. Since this case dealt with a city ordinance passed under the authority of a state statute, the question of whether Congress could adopt a law tying its own hands was not considered. Later, the Supreme Court did uphold the applicability of RFRA to the federal government. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).
7. This position was confined to conflicts between Congress and the states, however. The Supreme Court began, especially during the Warren years, supervising many more areas of state law: civil rights, criminal procedure, and legislative apportionment, for example.
8. Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), especially Chapter 3.
9. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005), 56–65.

CHAPTER 1

1. 521 U.S. 507 (1997).
2. The background and development of the free exercise clause is discussed in Michael McConnell, "The Origins and Historical Understanding of the Free Exercise of Religion," *Harvard Law Review* 103 (1990): 1421–25, and Thomas Curry, *The First Freedom: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1987).
3. 494 U.S. 872 (1990).
4. 98 U.S. 145 (1879).

5. The story of the background of this case is ably told in Sarah B. Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002).
6. This term was included in the Republican Party platform of 1856. Its use in public discourse is discussed in Gordon, *Mormon Question*, Chapter 2.
7. Donald Drakeman covers Waite's handling of this case in detail in *Church, State, and Original Intent* (New York: Cambridge University Press, 2010), Chapter 2.
8. This statute and Thomas Jefferson's letter are both quoted in the opinion. Both are discussed at length in McConnell, "Origins and Historical Understanding."
9. 32 U.S. 243 (1833).
10. *Permol v. New Orleans*, 44 U.S. 589 (1845).
11. The arguments regarding incorporation are reviewed in Bryan Wildenthal, "Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67," *Ohio State Law Journal* 68 (2007): 1509–626, and George Thomas, "The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal," *Ohio State Law Journal* 68 (2007): 1627–57.
12. *Butchers' Benevolent Association v. Crescent City Livestock Landing and Slaughterhouse Co.*, 83 U.S. 36 (1873).
13. On this era, see Gerard N. Magliocca, "Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?" *Minnesota Law Review* 94 (2009): 102–39.
14. 259 U.S. 530 (1922).
15. *Gitlow v. People of the State of New York*, 268 U.S. 652 (1925).
16. *Near v. State of Minnesota ex. rel. Olson*, 283 U.S. 697 (1931).
17. 293 U.S. 245 (1934).
18. 310 U.S. 296 (1940).
19. 366 U.S. 599 (1961).
20. 374 U.S. 398 (1963).
21. 406 U.S. 208 (1972).
22. 475 U.S. 503 (1986).
23. 482 U.S. 342 (1987).
24. 476 U.S. 693 (1986).
25. 485 U.S. 439 (1988).
26. 450 U.S. 707 (1981).
27. 480 U.S. 136 (1987).
28. 489 U.S. 829 (1989).
29. 455 U.S. 252 (1982).
30. 461 U.S. 574 (1983).
31. 490 U.S. 680 (1989).
32. 494 U.S. 872 (1990).
33. There are two excellent book-length studies of this case, Carolyn Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith* (Lawrence: University Press of Kansas, 2000), and Garrett Epps, *To an Unknown God: Religious*

- Freedom on Trial* (New York: St. Martins, 2001), on which the following paragraphs draw heavily.
34. Quoted in Long, *Religious Freedom*, 197.
 35. 310 U.S. 587 (1940).
 36. 319 U.S. 624 (1943).
 37. These discussions are reported in Long, *Religious Freedom*, 204–12. The legislative history of the act can be found in Robert F. Drinan and Jennifer I. Huffman, “The Religious Freedom Restoration Act: A Legislative History,” *Journal of Law and Religion* 10 (1993): 531–41.
 38. House Subcommittee on Civil and Constitutional Rights, *Hearings on Religious Freedom Restoration Act of 1990*, 101st Cong., 2nd sess., September 27, 1990, 13.
 39. The first hearing is cited in the previous note. The other is House Subcommittee on Civil and Constitutional Rights, *Hearings on Religious Freedom Restoration Act of 1991*, 102nd Cong., 2nd sess., May 13 and 14, 1992.
 40. Senate Committee on the Judiciary, *Hearings on Religious Freedom Restoration Act of 1992*, 102nd Cong., 2nd sess., September 18, 1992.
 41. David M. Ackerman, Congressional Research Service Report for Congress, *The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis*, April 17, 1992.
 42. See the written statements of Mark Chopko, counsel for the U.S. Conference of Catholic Bishops, and James Bopp, representing the National Right-to-Life Committee in House, *Hearings*, 1992, 36–47 and 273–301.
 43. 500 U.S. 833 (1992).
 44. 410 U.S. 113 (1973).
 45. Quoted in House, *Hearings*, 1992, 7.
 46. See the statement of Robert Dugan of the National Association of Evangelicals, along with those of Douglas Laycock, Stephen Solarz, and other backers of the bill. House, *Hearings*, 1992, 20–138.
 47. Ackerman, CRS, *Legal Analysis*, 28.
 48. Statement by Representative Solarz to Representative Henry Hyde in House, *Hearings*, 1992, 138.
 49. Senate, *Hearings*, 43.
 50. House Committee on the Judiciary, *Report to Accompany H.R. 1308, The Religious Freedom Restoration Act of 1993*, Report 103–88, May 11, 1993, 8.
 51. Senate Judiciary Committee, *Report to Accompany S. 578, The Religious Freedom Restoration Act of 1993*, Report 103–11, July 27, 1993, Additional Views of Senator Simpson, 20.
 52. See Drinan and Huffman, “Legislative History,” 538–40 for more detail on Senator Reid’s efforts.
 53. Laycock’s letter is reprinted on pages 330–71 of the House, *Hearings*, 1992 (hereafter cited as Laycock statement). He also provided a letter to the earlier hearing that is reprinted in House, *Hearings*, 1990, 72–79.
 54. Lupu’s statement is reprinted on pages 375–95 of the House, *Hearings*, 1992 (hereafter cited as Lupu statement). Fein’s statement is in the same hearing, 120–28 (hereafter cited as Fein statement).

55. Laycock statement, 354.
56. House, *Hearings*, 1990, Laycock statement, 74.
57. Lupu statement, 375.
58. *Ibid.*, 388.
59. 384 U.S. 641 (1966).
60. Lupu statement, 389.
61. *Ibid.*, 391.
62. 508 U.S. 520 (1993).
63. Lupu statement, 394–95.
64. House, *Hearings*, 1992, 397.
65. *Ibid.*, 1992, 398.
66. *Ibid.*, 398–99.
67. Fein statement, 125.
68. Senate, *Hearings*, 50–58.
69. *Ibid.*, testimony of William Yang, 14–28. The quotation is from Judge Raymond Pettine in *Yang v. Sturmer*, 750 F. Supp. 558 (D.R.I. 1990).

CHAPTER 2

1. Garland A. Perry, *Historic Images of Boerne, Texas* (Boerne, TX: Perry Enterprises, 1982), vii. The information regarding the history of Boerne and Kendall County that follows is taken from this book and a volume published by the Kendall County Historical Commission, *A History of Kendall County* (Dallas, TX: Taylor Company, 1984). The February 23, 1994, edition of the *Boerne Star* also has a lengthy article detailing the history of Boerne. There were two weekly newspapers published in Boerne during these years, the *Star* and the *Hill Country Recorder*. I will henceforward merely cite them as the *Star* and *Recorder* respectively. They have since merged.
2. A bust of Herr Boerne stands today in the visitors' center.
3. A profile of Kendall was published in the *New Orleans Picayune*, March 12, 1922.
4. The information on Fr. Fleury and the history of St. Peter Church is taken from Anna Marie Davison, *A History of St. Peter's Catholic Church, Boerne, Texas* (Boerne, TX: St. Peter's Restoration and Preservation Society, 1987). The technical name of the church is St. Peter Apostolic Catholic Church. However, members and other locals use "St. Peter" and "St. Peter's" interchangeably. I will simply follow their form.
5. Reproduced in Davison, *History of St. Peter's*, 35–36.
6. "Boerne's New Church Solemnly Dedicated," *The Southern Messenger*, January 3, 1924.
7. *San Antonio Express*, December 23, 1923.
8. Interview with Kit Brenner, September 14, 2010.
9. This quotation and the next one are both from the *Star*, April 22, 1992.
10. The information and conclusions in this section come from interviews conducted with many people in Boerne and the extensive collection of documents

stored at the archives division of the Boerne Public Library (BLA). A smaller set of documents is housed at the Texas Collection at Baylor University (BU). The recordings and transcripts of the recorded interviews are available at the Institute for Oral History at Baylor University. For those that were not recorded (and there were a variety of reasons for this), I have deposited my handwritten notes in the Texas Collection archives. I will cite the public library documents as BLA and folder name if available. The BU documents are not categorized as yet and will simply be cited as BU file. Where a specific document is identified in the text, I will not add a superfluous footnote.

11. An undated typewritten document in BLA, Men's Club Folder discusses the background and conflict.
12. A copy of the bulletin is in the BLA Men's Club Folder.
13. A copy of the survey and the results can be found in the BLA Men's Club Folder.
14. Dub Smothers, a member of St. Peter's, proposed this in several letters and proposals. He put together an extensive work on the various architectural details in a document he called "The Battle for Truth." It is available at the BLA.
15. An original of the petition and the 552 signatures is available in the BU file.
16. *Recorder*, May 6, 1992.
17. A copy of the letter is in the BLA Men's Club Folder and the BU file.
18. Copies of the letters from Mrs. Davison and the Texas Historical Commission are in the BLA Men's Club Folder.
19. BLA Litigation 1989–95 Folder.
20. BLA Men's Club Folder.
21. Mrs. Davison's handwritten notes of these meetings are in the BLA Men's Club Folder.
22. *Recorder*, July 8, 1992.
23. BLA Men's Club Folder.
24. *Ibid.*
25. A copy of the letter is in the BLA Litigation 1989–95 Folder.
26. A copy of the letter is in the BLA Men's Club Folder.
27. Mrs. Davison's handwritten notes of this meeting are in the BLA Men's Club Folder.
28. A copy of the letter is in the BLA Litigation 1989–95 Folder.
29. See the photograph following Chapter 9. A detailed schematic is in the BLA Men's Club Folder.
30. *San Antonio Express-News*, August 8, 1993.
31. Copies of both these letters are in the BLA Litigation 1989–1995 Folder.
32. These were printed in the *Star*, August 11, 1993; August 11, 1993; August 18, 1993; October 6, 1993; September 1, 1993; and July 28, 1993 respectively.
33. Reprinted in the *Star*, August 25, 1993.
34. A copy of the flyer is in the BU file.

CHAPTER 3

1. It is also a rather affluent town, which creates a more natural constituency for historic preservation than might be found elsewhere. In 2011, for example, the median household income in Texas was \$49,646; in the United States as a whole, \$51,914; and in Kendall County, \$66,655. U.S. Census Bureau, *2010 American Community Survey 5-Year Estimates*.
2. There are numerous architects' drawings and notes from these meetings in the files at the Boerne Public Library (BLA).
3. Beginning in 2009, the city changed to single member council districts, with a mayor elected at large.
4. Interview with Phillip Bell, May 3, 2010.
5. City of Boerne, Ordinance 91-05.
6. All city documents referred to in this chapter are on file at the City of Boerne archives.
7. In order to avoid a large number of repetitious footnotes, all the formal documents, correspondence, and church bulletins and newsletters referred to in this chapter, unless otherwise indicated, are available in the BLA, either in the Historic Landmark Commission Folder or the Litigation 1989–95 Folder.
8. A description of the meeting can be found in the *Recorder*, February 9, 1994.
9. A copy of this presentation is also in the BLA Litigation 1989–95 Folder.
10. Bell stressed in the 2010 interview the fact that he still felt his public duty trumped any personal feelings he had.
11. Available in Baylor University (BU) archives.
12. *Recorder*, April 20, 1994.
13. *Recorder*, April 20, 1994.
14. P. F. Flores, Archbishop of San Antonio v. The City of Boerne, Texas, Civil Action No. SA94CA0421, May 23, 1994.
15. A copy of the bulletin is in the BLA Litigation 1989–95 Folder.
16. "No human authority ought, in any case whatever, to control or to interfere with the rights of conscience in matters of religion." Texas Constitution, Article 1, Section 6.
17. No elaboration of this point was offered.
18. Bowman's comment is from the *Recorder*, June 1, 1994. Turk's thoughts were recorded in an interview August 7, 2012.
19. Reports of the meeting are in the *Recorder*, November 2, 1994, and the *Star*, November 9, 1994. The quotations are found in the *Recorder*.
20. *Flores v. City of Boerne*, 877 F. Supp. 355 (1995), Western District of Texas.
21. *Star*, March 15, 1995.
22. *Recorder*, March 15, 1995.
23. A copy of the bulletin is in the BU file.
24. *Recorder*, April 5, 1995.
25. *Star*, May 3, 1995.
26. The artist's sketch is available in a binder labeled "The Battle for Truth," in which Mr. Smothers collected many of his letters and papers. It is available at the BLA.

27. A copy of the bulletin is in the BLA Litigation 1989–95 Folder.
28. “Federal District Court Rejects Challenge to Preservation Ordinance under Religious Freedom Restoration Act,” *Preservation Law Reporter*, March 1995, 1045–48.
29. “Federal District Court Rejects,” 1048.
30. Thaddeus Herrick, “Preservation Law Pits Church vs. State,” *Houston Chronicle*, August 27, 1995.

CHAPTER 4

1. Louis Fisher, *Constitutional Dialogues: Interpretation as a Political Process* (Princeton, NJ: Princeton University Press, 1988), 5. Directly pertinent to our concerns, a few years ago, in fact, he argued that Congress had done as well as if not better than the court when it came to protecting religious liberty. *Religious Liberty in America: Political Safeguards* (Lawrence: University Press of Kansas, 2002).
2. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).
3. From a letter to Spencer Roane, September 6, 1819. Quoted in Kramer, *The People Themselves*, 106.
4. *McCulloch v. Maryland* 17 U.S. 316 (1819).
5. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (Washington: Bureau of National Literature and Art, 1908), 2:581–82.
6. 60 U.S. 393 (1857).
7. Richardson, *Messages and Papers*, vols. 6, 9.
8. 5 U.S. 137 (1803).
9. Kramer, *The People Themselves*, 125–26.
10. See Michael Kamen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: St. Martin's, 1994), Chapter 7, and Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910* (New York: Cambridge University Press, 2006).
11. This episode is covered in many sources. An especially thorough one is Marcia C. McKenna, *Roosevelt and the Great Constitutional War* (New York: Fordham University Press, 2002).
12. 317 U.S. 111 (1941).
13. 304 U.S. 144 (1938).
14. The origin and development of the jurisprudence surrounding the footnote are discussed in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 75–77.
15. 347 U.S. 483 (1954).
16. 358 U.S. 1 (1958).
17. Kramer, *The People Themselves*, 221.
18. Alexander Bickel's work remains the starting point. See his *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill,

- 1962) and *The Supreme Court and the Idea of Progress* (New Haven, CT: Yale University Press, 1978; originally given as the Holmes Lecture in 1969).
19. "The Law of the Constitution," *Tulane Law Review* 61 (1987): 983.
 20. Quoted in Kramer, *The People Themselves*, 228. The sentiment continues. More recently, President Obama and Attorney General Eric Holder had to reiterate their conviction that the Supreme Court was the authoritative interpreter of the Constitution. See Jerry Markon, "In Letter to Judge, Holder Defends Obama's Comments Urging Supreme Court to Uphold Health-Care Law," *Washington Post*, April 5, 2012.
 21. See, for instance, Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), and Stephen Macedo, *The New Right versus the Constitution* (Washington, DC: Cato Institute, 1986). Since then that view has become even more dominant in conservative circles. See Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004), and Clint Bollick, *David's Hammer: The Case for an Activist Judiciary* (Washington, DC: Cato Institute, 2007).
 22. Kramer, *The People Themselves*, 225.
 23. For an in-depth discussion of federalism and the founding, see Edward A. Purcell, *Originalism, Federalism, and the American Constitutional Enterprise* (New Haven, CT: Yale University Press, 2007).
 24. Purcell, *Originalism*, 7.
 25. This logic is not airtight. It could be maintained that the Supreme Court is best seen as an institution that is to protect national interests. Therefore, while it is legitimate for it to void state enactments that infringe on federal authority it should be left to Congress to decide where to draw the line when it comes to federal authority.
 26. The standard statement is Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 543–60. Wechsler's views have been subjected to a number of criticisms. A good review, with ample citations to both the critiques and rebuttals, can be found in Ernest A. Young, "The Rehnquist Court's Two Federalisms," *Texas Law Review* 83 (2004): 1–165. For an argument for what she calls "balanced federalism," see Erin Ryan's *Federalism and the Tug of War Within* (New York: Oxford University Press, 2011).
 27. In *The Federalist No. 45*, James Madison commented that "the State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former."
 28. There is a difference, of course, between the political communities that make up states and state governments. Just because the former are represented does not mean that the latter will be. Further, it is debatable whether state populations are really any longer (or whether many of them ever were) meaningful political communities. See Robert A. Schapiro, *Polyphonic Federalism* (Chicago:

University of Chicago Press, 2009) for an argument that federalism should be promoted today as a more effective way to organize a political system rather than as a mechanism for giving voice to (largely nonexistent, in his view) state political communities.

29. *Garcia v. San Antonio Metropolitan Transit Authority*, 460 U.S. 528 (1985).
30. 312 U.S. 100 (1941).
31. This case was decided at the same time as *Wickard v. Filburn*, discussed earlier.
32. For example, a statute barring racial discrimination in hotels and restaurants that served interstate travelers or that purchased a significant amount of their merchandise from out-of-state suppliers was upheld. *Heart of Atlanta Motel, Inc. v. United States*, 379 US 241 (1964) and *Katzenbach v. McClung*, 379 US 294 (1964). It is interesting that Justice William O. Douglas would have upheld these statutes on section 5 grounds rather than the commerce clause. Had his view prevailed, it might have created a different precedent set when *Boerne* was heard.
33. Schapiro, *Polyphonic Federalism*, 46.
34. William Riker went so far as to say that approving of federalism meant approving of racism: “if in the United States one disapproves of racism, one should disapprove of federalism.” William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), 155.
35. 421 U.S. 542 (1975).
36. Erwin Cherminsky, *Enhanced Government: Federalism for the 21st Century* (Palo Alto, CA: Stanford University Press, 2008), 48–54.
37. For a comprehensive analysis of federalism during the Rehnquist Court’s years, see Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court* (Lanham, MD: Rowman and Littlefield, 2012).
38. 379 U.S. 241 (1964).
39. 514 U.S. 549 (1995).
40. 505 U.S. 144 (1992).
41. 2 U.S. 419 (1793).
42. 517 U.S. 44 (1996).
43. The commerce clause grants the federal government the power “to regulate Commerce . . . with the Indian tribes.”
44. The internal quotation is from *Hans v. Louisiana*, 134 U.S. 1 (1890).
45. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).
46. 501 U.S. 452 (1991).
47. 469 U.S. 528 (1985).
48. It would be extending the equal protection clause of section 1.
49. *United States v. Morrison*, 529 U.S. 598 (2000) (commerce clause); *Printz v. United States*, 521 U.S. 898(1997) (noncommandeering of state officers); *Alden v. Maine*, 527 U.S. 706 (1999) (Eleventh Amendment); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (clear statement rule). However, there is some debate whether the Rehnquist court’s federalism legacy was a lasting one. See, for example,

Kathleen M. Sullivan, "From States' Rights Blues to Blue States' Rights: Federalism after the Rehnquist Court," *Fordham Law Review* 75 (2006): 799–813.

CHAPTER 5

1. Transcript of Oral Argument, *City of Boerne v. Flores*, Case No. 94-2074, 1.
2. *Belgard v. Hawaii*, No. 93-00961 (D. of Haw., February 3, 1995).
3. 28 U.S.C. Section 2403 (a).
4. Religious Freedom Restoration Act, Public Law No. 103-141; 42 USC 2000.
5. 80 U.S. 128 (1871). It is discussed in J. Richard Doidge, "Is Purely Retroactive Legislation Limited by the Separation of Powers? Rethinking *United States v. Klein*," *Cornell Law Review* 79 (1993): 910–74.
6. 100 U.S. 303 (1879) and 100 U.S. 339 (1879).
7. 109 U.S. 3 (1883).
8. It also rejected an argument that Congress was acting under the Thirteenth Amendment to remove the "badges and incidents" of slavery.
9. 384 U.S. 641 (1966).
10. 360 U.S. 45 (1959).
11. 383 U.S. 301 (1966).
12. 383 U.S. 347 (1966). The internal quotations are from *McCulloch v. Maryland*, 17 U.S. 421 (1819) and *Ex Parte Virginia*, 100 U.S. 345–46 (1879).
13. This was put in the act in order to keep Southern states from using literacy tests in a discriminatory fashion, as was common practice in many places.
14. 384 U.S. 651 (1966).
15. 384 U.S. 653 (1966).
16. New York made an argument that this provision would discriminate against people educated in languages other than English when that education was obtained outside the United States. This would violate the due process clause of the Fifth Amendment, the state said. The court held, though, that Congress need not enact perfect laws when it enhances rights.
17. For more detail, see Matt Pawa, "When the Supreme Court Restricts Constitutional Rights Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment," *University of Pennsylvania Law Review* 141 (1993): 1029–01, esp. 1062–70; and Douglas Laycock, "RFRA, Congress, and the Ratchet," *Montana Law Review* 56 (1995): 145–70.
18. *Belgard v. Hawaii*, No. 93-00961 (D. of Haw., February 3, 1995).
19. 437 U.S. 678 (1978).
20. 369 U.S. 186 (1962) and 418 U.S. 683 (1974).
21. The internal quotation is from Marci A. Hamilton, "The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment," *Cardozo Law Review* 16 (1994): 366. Note that Hamilton refers only to federal power.
22. Interview with Lowell Denton, September 18, 2012.
23. 73 F.3d 1352 (5th Cir. 1996).
24. 446 U.S. 179 (1980).

25. The quotation is from Morgan, 384 U.S. 651 (1966).
26. This approach had been used in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), a case involving affirmative action.
27. The test is from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It will be discussed in more depth in Chapter 7.
28. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 337 (1987).

CHAPTER 6

1. Supporting the archdiocese and the United States were the state of Maryland (joined by the states of Connecticut, Massachusetts, and New York); the Virginia legislature; Senator Orrin Hatch (joined by six other senators and two representatives); Senator Edward Kennedy (joined by nine other senators and twenty representatives); the American Bar Association; the American Center for Law and Justice; the Beckett Fund for Religious Liberty; the Church of Jesus Christ of Latter-Day Saints; the Coalition for the Free Exercise of Religion (joined by eight religious and civil rights groups); Defenders of Property Rights (joined by a number of similarly named organizations); the Minnesota Family Council (joined by other state affiliates); the NAACP Legal Defense and Educational Fund; the National Committee for Amish Religious Freedom; the National Jewish Commission on Law and Public Affairs; the Prison Fellowship Ministries and the Aleph Institute; the United States Catholic Conference (joined by the Evangelical Lutheran Church in America, the Orthodox Church in America, and the Evangelical Covenant Church); the Knights of Columbus; the state of Texas; the American Jewish Congress; the Rutherford Institute; and the Northstar Legal Center. Supporting the city, in addition to Ohio and the other states mentioned, were the state of Virginia; the Clarendon Foundation; the National Right to Work Legal Defense Foundation; the San Antonio Conservation Society (joined by the Municipal Art Society and the National Alliance of Preservation Commissions); the National Trust for Historic Preservation; the Texas Municipal League and the International Municipal Lawyers Association; Children's Healthcare is a Legal Duty, Inc.; the Center for Community Interest; and the American Professional Society on the Abuse of Children. The brief for neither side was from Thurston Greene (who argued that care should be devoted to the terms *religion* and *conscience* whichever side won).

The decision of the state of Texas to support the archdiocese caused a bit of ill feeling in Boerne.

2. Interview with Patricia Millett, August 17, 2012.
3. Interview with Douglas Laycock, February 24, 2009.
4. Interview with Lowell Denton, September 18, 2012.
5. Brief for Petitioner, Lowell F. Denton, Gordon L. Hollon, and Marci A. Hamilton (Counsel of Record). 1995 US Briefs 2074. November 29, 1996.
6. *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981).

7. A footnote adds another dimension of congressional imperialism. Congress is trying to usurp the peoples' role in amending the constitution, since RFRA is changing an established constitutional doctrine.
8. 508 U.S. 520 (1993). The city of Hialeah had enacted a thinly veiled ordinance aimed at preventing animal sacrifice rituals performed by the church. Thus, in this instance, any reasonable person could see the motive behind the law. The court decision supporting the church was unanimous.
9. The cases and their implications are discussed in Daniel O. Conkle, "The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute," *Montana Law Review* 56 (1995): 39–93.
10. Brief of amici curiae for the states of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania and the territories of American Samoa, Guam, and the Virgin Islands. Betty D. Montgomery, Attorney General of Ohio, Jeffrey S. Sutton, State Solicitor of Ohio (Counsel of Record), and Robert C. Maier and Todd Marti, Assistant Attorneys General of Ohio. 1995 US Briefs 2074. November 29, 1996.
11. Of course, there is a logical fallacy here: just because they used the term *regulate* when they gave Congress broad authority does not mean that the framers meant to restrict it when they used another term.
12. Brief for Respondent, Douglas Laycock (Counsel of Record), Thomas Drought, and Patricia Schofield. 1995 US Briefs 2074, January 13, 1997.
13. These cases are listed in footnote 2 of the brief. Further discussion can be found in Douglas Laycock, "Conceptual Gulfs in *City of Boerne v. Flores*," *William and Mary Law Review* 39 (1998): 743–44.
14. Again, I will discuss some of the problems here in more detail later.
15. This ignores the distinction between a legislative body stipulating exemptions for itself (clearly endorsed by *Smith*) and the imposing of standards on another level of government as RFRA was attempting.
16. Brief for the United States. Walter Dellinger, Acting Solicitor General, Frank W. Hunger, Assistant Attorney General, Seth P. Waxman, Deputy Solicitor General, Patricia A. Millett, Assistant to the Solicitor General, Michael Jay Sinder, Matthew Collette, Attorneys, Department of Justice. 1995 Briefs 2074. January 10, 1997.
17. This is parallel to the framework announced in *McCulloch v. Maryland* to measure Article I powers.
18. See Kurt T. Lash, "The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment," *Northwestern Law Review* 88 (1994): 1106–54 for an extended discussion.
19. 501 U.S. 452 (1991).
20. 460 U.S. 226 (1983).
21. Charles E. Hughes, *The Supreme Court of the United States* (New York: Garden City Publishing, 1936): 58. On oral argument in general see Timothy Johnson, *Oral Arguments and Decision Making on the U.S. Supreme Court* (Albany: State University of New York Press, 2004).

22. This is not an unusual problem. The first semester I taught the case I mispronounced the city's name and was quickly corrected by a student from Texas. At a recent academic conference, a panelist made the same mistake. A transcript of the oral argument is available at the Supreme Court's website.
23. 384 U.S. 436 (1966).
24. 521 U.S. 507 (1997).
25. The internal quotation is from *Marbury v. Madison*.
26. The internal quotation is from *Katzenbach v. Morgan*.
27. The internal quotation is from *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).
28. The internal quotation is from *Oregon v. Mitchell*, 400 U.S. 112 (1970).
29. There are a number of excellent works on the history of the Fourteenth Amendment. Among the most highly regarded are William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986); Earl Maltz, *Civil Rights, The Constitution, and Congress, 1863–1869* (Lawrence: University Press of Kansas, 1990); Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* (New York: Henry Holt, 2006); and Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal* 103 (1993): 57–104. With the exception of Epps's book, all would have been available to Kennedy. However, he chose to rely solely on a much older work, Horace E. Flack, *The Adoption of the Fourteenth Amendment* (Baltimore, MD: Johns Hopkins University Press, 1908).
30. Schurz's report was printed as *Senate Executive Document No. 2*, 39th Cong., 1st sess. (December 19, 1865).
31. There were three possible ways to circumvent this. First, all people, especially public officials, who had participated in the rebellion could be deprived of the vote. Second, state representation could be based on the number of registered voters, which would reduce Southern power in the House since the three-fifths clause would no longer apply. Third, blacks could be given the right to vote. Sections 2 and 3 of the Fourteenth Amendment were a compromise attempt to address this problem. Ultimately, of course, the Fifteenth Amendment was adopted to guarantee the right of African Americans to vote.
32. Epps, *Democracy Reborn*, 166.
33. Curtis, *No State Shall Abridge*, and Aynes, "Misreading John Bingham" cover this topic thoroughly.
34. Some of them even thought that the Bill of Rights applied to the states before the Civil War and that *Barron v. Baltimore* had been wrongly decided. Further, some contended that the due process clause of the Fifth Amendment and the "guaranty clause" (Article IV, Section 4) gave Congress power to enact legislation to carry out this objective.
35. Epps, *Democracy Reborn*, Chapter 8 has the most extended discussion of Owen's role. He visited many of the Radical Republicans in Washington in March of 1866 and presented his five-section amendment. The first section barred state

and federal governments from any discrimination against “the civil rights of persons, because of race, color, or previous condition of servitude.” The second gave blacks the right to vote after a ten-year period. His thinking was that would allow time for education to take hold. The third allowed Southern states to restrict voting to whites during that time if they chose, but if they did so the former slaves could not be counted for representation in the House or the Electoral College. The fourth prohibited the payment of the Confederate debt or any “loss of involuntary service or labor.” The fifth, as all proposals, gave Congress power to enforce the amendment “by appropriate legislation.”

36. Epps, *Democracy Reborn*, 71.
37. Nelson, *The Fourteenth Amendment*, 55.
38. Maltz, *Civil Rights*, 56.
39. 383 U.S. 745 (1966).
40. On Kennedy’s jurisprudence, see Frank Colucci, *Justice Kennedy’s Jurisprudence: The Full and Necessary Meaning of Liberty* (Lawrence: University Press of Kansas, 2009), and Helen J. Knowles, *The Tie Goes to Freedom* (Lanham, MD: Rowman and Littlefield, 2009).

CHAPTER 7

1. *New York Times*, June 26, 1997.
2. *Christian Science Monitor*, June 26, 1997.
3. *Washington Times*, June 26, 1997.
4. *Jerusalem Post*, June 26, 1997.
5. *Washington Post*, June 26, 1997.
6. *Washington Times*, June 26, 1997.
7. Available at www.aclu.org.
8. Editorial, *New York Times*, June 27, 1997. Not all major papers’ editorial opinions were critical. See “Editorial,” *Washington Post*, June 26, 1997. It offered only lukewarm endorsement, saying merely that the court’s opinion was “not unreasonable.”
9. On state RFRAs see David Claborn, “Effects of Judicial and Legislative Attempts to Increase Religious Freedom in U.S. State Courts,” *Journal of Church and State* 53 (2011): 615–34. For an analysis of the factors leading states to adopt RFRAs, see David Bridge, “Religious Freedom or Libertarianism: What Explains State Enactment of RFRA Laws?” *Journal of Church and State*, forthcoming.
10. Christopher Lund, “Religious Liberty after *Gonzales*: A Look at State RFRAs,” *South Dakota Law Review* 55 (2010): 466–97.
11. Tony Mauro and Lori Sharn, “Court Ruling Bodes Ill for All Faiths, Critics Claim,” *USA Today*, June 26, 1997.
12. House Subcommittee on the Constitution, *Hearings on Protecting Religious Freedom after Boerne v. Flores*, 105th Cong., 1st sess., July 14, 1997, 2. We will discuss the first matter Rep. Canady raised at the end of this chapter.
13. House, *Hearings*, July 14, 1997, 21.

14. House Subcommittee on the Constitution, *Hearings Regarding the Need for Federal Protection of Religious Freedom after Boerne v. Flores*, 105th Cong., 2nd sess., February 26, 1998; *Hearings Regarding the Need for Federal Protection of Religious Freedom after Boerne v. Flores II*, 105th Cong., 2nd sess., March 26, 1998; *Hearings on the Religious Liberty Protection Act of 1998 (H.R. 4019)*, 105th Cong., 2d sess., June 16, 1998; *Hearings on the Religious Liberty Protection Act of 1998 (H.R. 4019)*, July 14, 1998; *Hearings on the Religious Liberty Protection Act of 1999 (H.R. 1691)*, 106th Cong., 1st sess., May 12, 1999; Senate Committee on the Judiciary, *Hearings on the Religious Liberty Protection Act of 1998 (S. 1248)*, 105th Cong., 2nd sess., June 23, 1998; *Hearings on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong., 1st sess., September 9, 1999. Hearings cited hereafter by body and date.
15. I have analyzed the passage of this statute in more detail elsewhere. Jerold Waltman, *Religious Free Exercise and Contemporary American Politics: The Saga of the Religious Land Use and Institutionalized Persons Act of 2000* (New York: Continuum, 2011).
16. House, *Hearings*, July 14, 1997, 54.
17. 252 U.S. 416 (1920).
18. The details of the covenant and how it could be applied in the United States can be found in Gerald L. Newman, "The Global Dimension of RFRA," *Constitutional Commentary* 14 (1997): 33–54.
19. House, *Hearings*, July 14, 1997, 105. Emphasis in original.
20. Justice Kennedy, for example, was roundly criticized for citing foreign sources in his opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003).
21. *E. C. Knight Co. v. United States*, 156 U.S. 1 (1895).
22. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
23. The two important cases are *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937) and *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).
24. 317 U.S. 111 (1942).
25. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). In a concurring opinion, Justice William O. Douglas said that he would have preferred to uphold the act on section 5 grounds.
26. 514 U.S. 549 (1995).
27. See especially the testimony of Marc Stern in House, *Hearings*, June 16, 1998, 125–41.
28. 483 U.S. 203 (1987).
29. The internal quotation is from *Massachusetts v. United States*, 435 U.S. 461 (1978).
30. House, *Hearings*, July 14, 1998, 405.
31. The study is reprinted in House, *Hearings*, June 16, 1998, 234–60. The study was inspired by a paper written by Rebecca Benyon for a seminar at the University of Texas.

32. House, *Hearings*, July 14, 1997, 124.
33. Senate, *Hearings*, September 9, 1999, 177.
34. *Ibid.*, 67.
35. Quoted in Senate, *Hearings*, June 23, 1998, 17–18.
36. Cited in House, *Hearings*, March 26, 1998, 86.
37. Daniel J. Solove, “The Religious Freedom Restoration Act and Religion in the Prisons,” *Yale Law Journal* 106 (1996): 459–91.
38. The organization’s head also railed against federal use of the commerce power to enact a variety of regulatory statutes. It was, he felt, a menace to liberty.
39. Hamilton’s testimony can be found in House, *Hearings*, June 16, 1998, 94–99, and Senate, *Hearings*, September 9, 1999, 188–92.
40. House, *Hearings*, June 16, 1998, 164.
41. *Ibid.*, 80–91. A more complete elaboration of their views can be found in their article “Unthinking Religious Freedom,” *Texas Law Review* 61 (1994): 1245–315.
42. *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143 (1996).
43. *Thomas v. Municipality of Anchorage*, 165 F. 3d 692 (9th Cir. 1999).
44. Senate, *Hearings*, June 23, 1999, 21.
45. ACLU Press Release, May 5, 1999.
46. House Judiciary Committee, *Religious Liberty Protection Act of 1999*, House Report 106–219 to Accompany H.R. 1691, 106th Cong., 1st sess., July 1, 1999, 13.
47. The debate and vote can be found in *Congressional Record*, July 15, 1999.
48. Details can be found in Louis Jacobson, “A Coalition with a Liberal-Leave Policy,” *National Journal*, October 30, 1999, 3154.
49. Both quotes are from *Congressional Record*, July 27, 2000, H7191.
50. *Ibid.*, S7774.
51. 544 U.S. 709 (2005). Prior to this decision, several district courts and courts of appeals had reached varying conclusions regarding RLUIPA’s constitutionality. *Charles v. Verhagen*, 314 F. 3d (7th Cir. 2003); *Mayweathers v. Newland*, 314 F. 3d 1062 (9th Cir. 2002); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003); and *Kilaab Al Ghashiyah (Khan) v. Department of Corrections*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003).
52. Memorandum of Terrence P. Kemp, magistrate judge for the Southern District of Ohio, Eastern Division, 221 F. Supp. 2d 827, 834.
53. For a discussion of the court’s Eleventh Amendment jurisprudence, see John T. Noonan, *Narrowing the Nation’s Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002).
54. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
55. 483 U.S. 327 (1987).
56. *Cutter v. Wilkinson*, 349 F. 3d 257 (6th Cir. 2003).
57. 397 U.S. 664 (1970).
58. 544 U.S. 719.

59. 544 U.S. 726.
60. *Midrash Sephardic, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004); *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F. 3d 895 (7th Cir. 2005); and *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F. 3d 978 (9th Cir. 2006).
61. See, for example, Tyson Tamashiro, “RLUIPA and the Individualized Assessment: Special Use Permits and Variances under Congressional Strict Scrutiny,” *University of Hawai’i Law Review* 31 (2008): 257–90; Susan C. Galvan, “Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions Auxiliary Uses,” *Tulane Environmental Law Journal* 21 (2008): 207–39; and Alan C. Weinstein, “The Effect of RLUIPA’s Land Use Provisions on Local Governments,” *Fordham Urban Law Journal* 39 (2012): 1221–47.
62. 546 U.S. 418 (2006).

CHAPTER 8

1. *San Antonio Express-News*, January 25, 1996.
2. *Star*, January 31, 1996.
3. *Recorder*, January 31, 1996.
4. *San Antonio Express-News*, February 7, 1996.
5. *San Antonio Express-News*, February 7, 1996.
6. *Star*, February 7, 1996.
7. The minutes of all city council and Historic Landmark Commission meetings are available from the archives of the City of Boerne. Unless there is some specific reason for a footnote, I will allow the date in the text to suffice for a reference.
8. *Star*, February 14, 1996.
9. The parish bulletins and newsletters are available at the Boerne Public Library archives (BLA), in litigation folders for the specific years. Many of these were gifted by Dub Smothers. Again, unless there is some reason to give a detailed reference, I will not provide repetitious footnotes.
10. *Star*, September 6, 1996.
11. *Star*, September 27, 1996.
12. *Star*, September 27, 1996.
13. *Star*, October 9, 1996.
14. BLA Litigation 1996 Folder.
15. *Star*, October 25, 1996.
16. See the *RichmondTimes-Dispatch*, June 15, 1997, for a survey of local sentiment. Richmond had a similar dispute pending with a local church and sent a reporter to Boerne.
17. *Austin American-Statesman*, February 16, 1997.
18. *Star*, February 21, 1997.
19. *New York Times*, April 20, 1997.
20. Interview with Patrick Heath, August 16, 2010.

21. BLA Litigation 1997 Folder.
22. *San Antonio Express-News*, June 26, 1997.
23. *Dallas Morning News*, June 26, 1997.
24. *San Antonio Express-News*, June 26, 1997.
25. *Houston Chronicle*, June 26, 1997.
26. Reprinted in an "Update on Status of Church Building" from Fr. Cummins to members of St. Peters. BLA Litigation 1997 Folder.
27. *San Antonio Express-News*, June 29, 1997.
28. BLA Litigation 1997 Folder.
29. *Recorder*, July 2, 1997.
30. Both this press release and the one from the church are in the BLA 1997 Litigation Folder.
31. Bell took serious exception to this characterization of his remarks, quoted in the article cited in note 23. He sent a note to the city council with copies of this press release and the newspaper article with his comment circled, pointing out the inaccuracy. BLA Litigation 1997 Folder. He also spoke out on this matter at the July 22 city council meeting.
32. *San Antonio Express-News*, July 12, 1997.
33. Both the Memorandum of Understanding and the subsequent Memorandum of Agreement are in the BLA Litigation 1997 Folder.
34. *San Antonio Express-News*, August 13, 1997.
35. *Recorder*, August 20, 1997.
36. *Recorder*, August 20, 1997.
37. Interview with Phillip Bell, May 3, 2010.
38. BLA Litigation 1997 Folder.
39. BLA Litigation 1997 Folder.
40. BLA Litigation 1997 Folder.
41. *San Antonio Express-News*, December 17, 1997.
42. BLA Litigation 1997 Folder.
43. *Recorder*, December 25, 1997.
44. *Star*, October 15, 1999.
45. BLA Dub Smothers papers.
46. *San Antonio Express-News*, October 18, 1999. The following quotations from Fr. Cummins and David Boerner are from the same article.
47. *San Antonio Express-News*, September 26, 2000.

CHAPTER 9

1. Interview with Kit Brenner, September 14, 2010.
2. *Star*, June 8, 1994.
3. *San Antonio Express-News*, January 30, 1996.
4. Department of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act*, September 22, 2010.

5. Although it focuses on only one aspect of land use, Kelli Stout, "Tent Cities and RLUIPA: How a New Religious Land Use Issue Aggravates RLUIPA," *Seton Hall Law Review* 41 (2011): 465–99, contains a good summary of the case law.
6. A good source on prisoner rights cases is the site maintained by Professor Howard Friedman: <http://religionclause.blogspot.com/2012/11/recent-prisoner-free-exercise-cases.html>.
7. See Taylor G. Stout, "The Costs of Religious Accommodation in Prisons," *Virginia Law Review* 96 (2010), 1201–39.
8. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999).
9. 531 U.S. 356 (2001).
10. "Minutes from a Convention of the Federalist Society: The Roberts Court and Federalism," *New York University Journal of Law and Liberty* 4 (2009): 347.
11. 538 U.S. 721 (2003).
12. 541 U.S. 509 (2004).
13. 546 U.S. 151 (2006).
14. 546 U.S. 356 (2006).
15. 552 U.S. 491 (2008).
16. 567 U.S. ____ (2012).
17. Christopher P. Banks and John Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court* (Lanham, MD: Rowman and Littlefield, 2012), Chapter 6.
18. A comprehensive discussion can be found in Franita Tolson, "Reinventing Sovereignty? Federalism as a Constraint on the Voting Rights Act," *Vanderbilt Law Review* 65 (2012): 1195–259.
19. Victor Andres Rodriguez, "Section 5 of the Voting Rights Act after *Boerne*: The Beginning of the End of Preclearance," *California Law Review* 91 (2003): 769–826.
20. 557 U.S. 193 (2009).
21. Glenn Kunkes, "The Times, They are Changing: The VRA is No Longer Constitutional," *Journal of Law and Politics* 27 (2012): 357–85.
22. 358 U.S. 1 (1958).
23. 539 U.S. 306 (2003).
24. *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 3025 (2010).
25. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

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BOERNE PUBLIC LIBRARY

The Boerne Public Library has an extensive collection of documents; personal papers; local, regional, and national press clippings; correspondence; and so forth. It has been ably arranged into folders, which are cited by name in the notes. In addition, Mr. Dub Smothers donated thirty additional boxes of papers to the library as I neared completion of the manuscript for this book. I have gone through this material, but it is not yet been sorted into thematic or chronological folders.

BOERNE STAR

During the time of the case, Boerne had two weekly newspapers, the *Boerne Star* and the *Hill Country Recorder*. They have since merged and now publish under the name of the *Star*. Back issues of both papers are available in the *Star* archives. They are open to the public with an appointment.

TEXAS COLLECTION, BAYLOR UNIVERSITY ARCHIVES

The Texas Collection at Baylor University has a more limited cache of material that has been donated.

CITY OF BOERNE

The city of Boerne has retained minutes of official meetings along with related correspondence. The Texas Public Information Act provides all citizens with access to public documents with adequate notice.

INTERVIEWS

I conducted personal interviews with many of the participants in the case. A good number of these were recorded for the Institute of Oral History

at Baylor University and are on file there. For the others, I have deposited my handwritten notes at the Texas Collection at Baylor University

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Brief for Respondent City of Boerne. United States Court of Appeals for the Fifth Circuit.

Brief for Petitioner City of Boerne. United States Supreme Court.

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