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# CITY OF BOERNE V. FLORES: A LANDMARK FOR STRUCTURAL ANALYSIS

MARCI A. HAMILTON\*

## I. INTRODUCTION

As the representative of the City of Boerne, Texas in *City of Boerne v. Flores*,<sup>1</sup> the Supreme Court case invalidating the Religious Freedom Restoration Act of 1993 (RFRA or the "Act"),<sup>2</sup> I had the good fortune to discuss the Act with a wide range of individuals in our society, including: members of the clergy, the press, state and local politicians, a wide variety of legal and theological scholars, lobbyists for a significant cross-section of organizations, members of home-schooling, historical preservation, and Indian rights advocacy groups, and citizens acting individually and collectively in neighborhood associations. I also had the good fortune to argue the case before the U.S. Supreme Court and therefore to converse with the Justices about the Act—albeit in an undeniably brief period of time.

No matter how the particular individual felt about RFRA, and no matter the forum, one aspect of RFRA's enactment intrigued the speaker: RFRA was passed by an overwhelming majority in Congress<sup>3</sup> and was supported by an unprecedented and massive coalition of organized religions.<sup>4</sup> I was frequently asked, "Don't

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\* Professor of Law, Benjamin N. Cardozo School of Law. Copyright © 1997 Marci A. Hamilton. I would like to thank Hans Linde, Henry Monaghan, Chip Lupu, Elizabeth Garrett, and Rebecca Brown for their comments on earlier drafts and Erin McGahey for her research assistance.

1. 117 S. Ct. 2157 (1997).

2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. RFRA was passed by a unanimous House voice vote and a nearly unanimous Senate. See 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993); 139 CONG. REC. H2363 (daily ed. May 11, 1993). Only three Senators voted against it (Senators Byrd, Helms, and Mathews). See 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993).

4. The Coalition for the Free Exercise of Religion was formed for the purpose of drafting, lobbying for, and defending RFRA. Its members include American Baptist Churches USA, American Jewish Committee, American Muslim Council, Church of

the numbers bother you?" What they meant was, "Don't these numbers make any constitutional difference, and shouldn't they?" To varying degrees of success, I explained to my many interlocutors that the numbers were *not* relevant to the constitutional calculus and certainly not a good reason to suspend serious constitutional inquiry. The Constitution demands a representative system in which representatives are supposed to be independent of interest groups, no matter their stripe.<sup>5</sup> Political pressure, even when exercised by organized religion, is no palliative for Congress; it is still beholden to the people to judge what is in the country's best interest, and Congress is obligated to enact only constitutional measures.<sup>6</sup> I usually completed my explanation with a reference to lemmings, saying the numbers in Congress are surely more a testament to the power of Washington lobbyists for religion than to the conclusion that Congress has acted within its constitutionally circumscribed role. In fact, Congress transgressed constitutional boundaries because it failed to ask the most important constitutional questions.

Despite my certainty about the constitutional conclusions, which was vindicated by the Court's opinion in *Flores*, I must admit that the day I received twenty amicus briefs written in favor of my client's opponent Archbishop Flores,<sup>7</sup> many of which

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Jesus Christ of Latter-Day Saints, Church of Scientology International, Episcopal Church, Evangelical Lutheran Church in America, National Sikh Center, Native American Church of North America, and Presbyterian Church (USA) (Washington Office). See *Religious Freedom In the Dock*, 114 THE CHRISTIAN CENTURY 237, 237-38 (1997); *Responding to Constitutional Challenges, Diverse Coalition Launches Defense of the Religious Freedom Restoration Act*, U.S. NEWSWIRE, Aug. 19, 1994, available in LEXIS, News Library, USNWR File.

5. See Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 481, 521-24, 528-29, 537-38 (1994).

6. See *id.* at 480-81 (discussing the unacceptable effect of interest group politics on the representation of constituents).

7. See Brief of the National Committee for Amish Religious Freedom as Amicus Curiae in Support of Respondent, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (No. 95-2074); Brief of American Center for Law and Justice as Amicus Curiae in Support of Respondent, *Flores* (No. 95-2074); Brief of Senators Edward M. Kennedy, et al. as Amici Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of Defenders of Property Rights as Amicus Curiae in Support of Respondent, *Flores* (No. 95-2074); Brief of National Right to Work Legal Defense Foundation, Inc. as Amicus Curiae in Support of Respondent, *Flores* (No. 95-2074); Brief of the NAACP Legal

were penned by notable representatives of time-honored religions,<sup>8</sup> and the Catholic Church's brief by the eminent law professor and religious scholar Douglas Laycock, it occurred to me that perhaps I should *start* caring, or at least craft a more detailed apologetic of my view that the number of supporters in Congress or in the world of religion is not constitutionally significant. Hence, this Essay.

Principles of the Constitution's structure—the separation of congressional from judicial powers and federal from state law-making authority—felled RFRA.<sup>9</sup> Congress and its advisors missed these vital structural issues when they considered RFRA.<sup>10</sup> In fact, a reading of the Congressional Research Service's (CRS) reports to Congress or the majority of the testi-

Defense and Education Fund, Inc. as Amicus Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of the Minnesota Family Council, et al. as Amici Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of ABA as Amicus Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of the Becket Fund For Religious Liberty as Amicus Curiae in Support of Respondent, *Flores* (No. 95-2074); Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of the United States Catholic Conference, et al. as Amici Curiae in Support of the Respondent, *Flores* (No. 95-2074); Brief of the Knights of Columbus as Amicus Curiae in Support of the Respondent, *Flores* (No. 95-2074); Brief of the Prison Fellowship Ministries and the Aleph Institute as Amici Curiae in Support of the Respondents, *Flores* (No. 95-2074); Brief of Members of the Virginia House of Delegates and the Virginia Senate as Amici Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of the States Maryland, et al., as Amici Curiae in Support of Respondent, *Flores* (No. 95-2074); Brief of the Commonwealth of Virginia as Amici Curiae in Support of Respondent *Flores* (No. 95-2074); Brief of the Coalition for the Free Exercise of Religion as Amicus Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of the Church of Jesus Christ of Latter-Day Saints as Amicus Curiae in Support of Respondents, *Flores*, (No. 95-2074); Brief of U.S. Senators Orrin G. Hatch, et al., as Amici Curiae in Support of Respondents, *Flores* (No. 95-2074); Brief of The Rutherford Institute as Amicus Curiae in Support of Respondent, *Flores* (No. 95-2074).

8. See *supra* note 7.

9. See *Flores*, 117 S. Ct. at 2172 (holding that the statute is beyond congressional authority in reference to the balance of powers). The Court engaged in structural analysis whenever it asks the categorical question whether the entity that has exercised power has done so within the boundaries of its constitutionally circumscribed powers. See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2376, 2383 (1997) (citing *New York v. United States*, 505 U.S. 144, 187 (1992)); *Plant v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (“[T]he doctrine of separation of powers is a *structural safeguard* . . .”).

10. See *Flores*, 117 S. Ct. at 2172 (rejecting the statute because the faults in the structuring of the legislation).

mony before Congress would not have disclosed that these fundamental constitutional issues were relevant.<sup>11</sup>

The Court's decision invalidating the Act is a sterling example of the sturdiness of the Constitution's structure and, indeed, of the Court in the face of immense and impressive political pressure.<sup>12</sup> Without question, *Flores* is a landmark decision and grandly illustrates that the constitutional structure of representative democracy is not premised on the inevitability of interest group rule but rather exerts an independent force against interest group domination.<sup>13</sup> The Act's invalidation is the best historical example we have to refute the notion that interest group politics determine the outcome of policy debates in this society. Powerful and respectable lobbyists may have pushed for RFRA, but they did not prevail when the resulting law was an insult to the Constitution's design.<sup>14</sup> Because of the entrenched structure that the Constitution imposes on our republic, the Court was able to issue an opinion devoid of vitriol, even matter-of-fact in its tone, and to defeat with equanimity one of the most imposing organizations of religion in history.<sup>15</sup> That is good news for the Constitution, the Court, and the people.

Once the Constitution's Framers committed themselves to expanding the power of the national government in the wake of

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11. See *infra* notes 38, 44-46 and accompanying text.

12. See Ruth Marcus, *Reins on Religious Freedom?*, WASH. POST, Mar. 9, 1991, at A1; Gustav Niebuhr, *Disparate Groups Unite Behind Civil Rights Bill on Religious Freedom*, WASH. POST, Oct. 16, 1993, at A7; Gustav Niebuhr, *Forming Earthly Alliances to Defend God's Kingdom*, N.Y. TIMES, Aug. 28, 1994, § 4, at 5; Larry Witham, *Religious Freedom Bill Passed by Senate*, WASH. TIMES, Oct. 28, 1993, at A5.

13. See *supra* notes 7-8 and accompanying text; see also *Flores*, 117 S. Ct. at 2172 (holding the Act unconstitutional).

14. Cf. Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, NEXUS: A J. OF OPINION, Fall 1997, at 33, 36-38 [hereinafter Hamilton, *Pragmatic Balance of Power*] (discussing religious entities acting as interest groups); Marci A. Hamilton, *Religion's reach*, 114 THE CHRISTIAN CENTURY, 644, 644-45 (1997) [hereinafter Hamilton, *Religion's reach*] (discussing the same). See generally Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 685 (1993) (depicting amicus curiae participation in the area of religious rights).

15. See *Flores*, 117 S. Ct. at 2172 (holding the Act unconstitutional in reference to the Constitution's establishment of separation of powers and federal balance, and thereby creating a stable foundation behind a decision surrounding an emotionally laden issue).

the failure of the Articles of Confederation, they focused on the question of how to harness the federal government's newly created power to best serve the interests of the people and the states.<sup>16</sup> Providing meaningful power to the federal government occasioned the need for limits on that power, and the Framers concocted a wide variety of means to exercise, but also to rein in that power.<sup>17</sup>

The Supreme Court's decision in *Flores* reaffirms the Constitutional Convention's simultaneous faith in and distrust of national power. As such, it offers at least a partial blueprint for congressional accountability and a testimony to the strength of structural analysis at the end of the twentieth century.

The modern Supreme Court has made a public and self-conscious effort to distance itself from policy disputes both in national and in state issues.<sup>18</sup> Social policy is the bailiwick of legislatures and executives, not judges.<sup>19</sup> As the Court has distanced itself from judging legislative conclusions about policy disputes, it has become passionate about delineating structural limitations on the operation of Congress.<sup>20</sup>

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16. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 28-33 (Ohio Univ. Press 1966) (1840) (describing resolutions introduced by Edmund Randolph); *id.* at 163-64 (discussing statements of James Wilson regarding the balance of power between the general government and the states); *id.* at 187 (discussing the remarks of General Charles Pinckney concerning the general and state Governments); *id.* at 255 (quoting Gouverneur Morris's opinion that "[the new government] ought in the first quality to protect individuals; in the second, the States").

17. See generally U.S. CONST. (enumerating legislative, executive, and judicial powers). The concepts of bicameralism, federalism, and state sovereignty are all central to maintaining the checks and balances between the branches and between the federal and state sovereigns.

18. See *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) (citing *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934)); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 862 (1992) (referring to the constitutional principles announced by the Court in *West-Coast Hotel*).

19. See *Ferguson*, 372 U.S. at 731 ("We refuse to sit as a 'super legislature to weigh the wisdom of legislation.'") (quoting *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, 423 (1952)); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955); see also Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?* 28 VAL. U. L. REV. 821, 854 (1994) (quoting Justice Ginsburg's statement that "in a representative democracy important policy questions should be confronted, debated and resolved by elected officials.").

20. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding legislation un-

The federal courts' role policing the boundaries of legislative and executive power is essential to the scheme contrived by the Framers, which rests on the twin presuppositions that those holding power will abuse it and that the exercise of power can be stemmed by the exertion of countervailing power.<sup>21</sup> The courts' role within this structure is to interpret the lines drawn by the Constitution and to invalidate excessive exercises of power for the purpose of balancing power within the society.<sup>22</sup>

In *Flores*, which invalidated RFRA on the ground that "Congress . . . exceeded its authority under the Constitution,"<sup>23</sup> the Supreme Court identified crucial means to define and confine the power of Congress. The decision is not, as some would have us believe, an expression of an utterly new constitutional direction,<sup>24</sup> but rather a pointed reminder of the Framers' carefully crafted constitutional structure.

This Essay is an analytical exegesis of the Court's opinion from the perspective of the Constitution's structure of government, with special emphasis on the principles that encourage legislative responsibility and accountability. The following discussion delineates three characteristics of an accountable and responsible Congress that are central to the Framers' vision and that were reaffirmed in the *Flores* opinion. First, Congress is

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constitutional because it exceeded the power granted to Congress through the Commerce Clause).

21. See MADISON, *supra* note 16, at 63 (referring to Butler's concern regarding abuse of executive power); *id.* at 135-37 (discussing similar views by Alexander Hamilton); *id.* at 322-25 (referring to a statement of Gouverneur Morris that "[t]he Legislature will continually seek to aggrandize & perpetuate themselves" and that checks on power are the answer to this likely overreaching). The Court's eagerness to police constitutional boundaries should not be overstated. It has been extraordinarily cautious in reviewing congressional delegation of its power to the executive. See, e.g., *Loving v. United States*, 116 S. Ct. 1737 (1996); *Mistretta v. United States*, 488 U.S. 361 (1989).

22. See Hamilton, *Pragmatic Balance of Power*, *supra* note 14, at 39.

23. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

24. See *Protecting Religious Freedom After Boerne v. Flores: Hearings Before the Subcomm. on the Constitution of the House of Representatives Comm. on the Judiciary*, 105th Cong. (1997) (visited Nov. 1, 1997) <<http://www.house.gov/judiciary> [hereinafter *Flores Hearings*] (testimony of Professor Douglas Laycock) ("Constitutional law is changing, and what Congress has power to do based on past precedent it may not have power to do after the Court's next decision."); *id.* at 7-13 (testimony of Mark D. Stern, American Jewish Congress).

given enumerated, limited powers. This simultaneous provision and limitation of power is intended to ensure a separation of powers among the federal branches<sup>25</sup> and a system of dual sovereignty between the states and the federal government.<sup>26</sup> This is the enumerated powers doctrine.<sup>27</sup> Second, Congress must perform those tasks assigned to it reasonably well in order to avoid other constitutional pitfalls. This is the proportionality or means-end fit requirement.<sup>28</sup> Third, Congress cannot unilaterally define its constitutional role. This is the principle of popular sovereignty, wherein government power is derived from the people rather than inherent in any institution.<sup>29</sup>

I conclude that *Flores* turns on fundamentally structural issues and that the decision should have come as no surprise. Those for whom it did seem to have been wearing structural blinders.

## II. THE FEDERAL GOVERNMENT IS A GOVERNMENT OF ENUMERATED AND LIMITED POWERS

From many perspectives, the legislative process employed in RFRA is a prescription for constitutional disaster. Congress rubber-stamped the views of a powerful interest group, rather than engage its independent judgment;<sup>30</sup> it addressed an asserted social problem without ascertaining whether the problem in fact existed;<sup>31</sup> it imposed a legalistic formula to be applied to the

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25. See generally LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 5-1, at 297 (2d ed. 1988) (discussing the limited powers of Congress granted by the Constitution).

26. See generally Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 BYU L. REV. 351, 356 (discussing the tension between the powers granted to the federal government and those reserved by the states).

27. See generally TRIBE, *supra* note 25, § 5-2, at 298-300 (detailing constitutional provisions that simultaneously grant and limit congressional power).

28. See generally *id.* § 14-13, at 251-75 (discussing the means-end fit requirement when government regulation inhibits the free exercise of religion).

29. See generally Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 680-82 (1997) (asserting that the energy of the people "becomes governmental authority by passing through the constitutional structure").

30. See Hamilton, *Pragmatic Balance of Power*, *supra* note 14, at 38. See generally Hamilton, *supra* note 5, at 527-39 (discussing the duty of an elected representative to exercise independent judgment while remaining loyal to his constituency).

31. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (discussing the lack



imagined problem without serious inquiry into the impact of such a formula;<sup>32</sup> it attempted to redress the imagined problem in every forum and arena imaginable;<sup>33</sup> and it failed to inquire adequately into the constitutionality of its own actions.<sup>34</sup> *Flores* teaches that Congress is obligated to examine the constitutionality of its enactments, and when it does not, "the presumption of validity its enactments now enjoy," is brought into question.<sup>35</sup>

One message of the *Flores* decision is that Congress should treat structural constitutional issues as threshold issues. Moreover, it ought to take the utmost care when it considers the constitutionality of its actions when it is tempted, as it was with RFRA, to abdicate its constitutional obligation to exercise its independent decision-making authority and to simply follow the lead of a powerful interest group. The near unanimous vote in Congress, combined with the strength of the Coalition for the Free Exercise of Religion, which drafted and lobbied for RFRA,<sup>36</sup> are no excuse to attenuate constitutional examination, but to the contrary should have sent constitutional warning bells

of information before Congress on the contemporary state of religious liberty).

32. RFRA provides in part:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a) to (b) (1994).

33. See 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]."); *Flores*, 117 S. Ct. at 2170 ("Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

34. See *infra* note 45 and accompanying text.

35. *Flores*, 117 S. Ct. at 2172.

36. See David E. Anderson, *Disparate Groups Seek to Protect Landmark Liberty Law*, SAN DIEGO UNION-TRIB., June 2, 1995, at E-5, available in LEXIS, News Library, SDUT File.

peeling through Congress. Especially when a bill touches upon central First Amendment values and when the people cannot grasp its content because it is written in legalese, members of Congress are obligated to investigate with care their motivations in the context of independent consideration of the Constitution's requirement and the public's interest.<sup>37</sup>

The advice rendered to Congress on the constitutionality of RFRA was fleeting and incomplete, leaving the structural questions all but unanswered. The CRS rendered its verdict on Congress's power under Section 5 of the Fourteenth Amendment ("Section 5") in a mere paragraph, with the most erroneous clause being: "[T]he Supreme Court has repeatedly held that Congress may use [Section 5] power to define and protect rights that are more expansive than what the Court has held to be constitutionally protected."<sup>38</sup> Despite the separation-of-powers and federalism issues raised by this sentence, the CRS did not consider these issues important. It is not as though there was no legal precedent that might have prompted such concerns. The very sources cited in a footnote to the quoted sentence should have sent a signal to delve more deeply into the structural issues presented.<sup>39</sup> For example, Justice Harlan's powerful dissent in *Katzenbach v. Morgan*<sup>40</sup> should have raised some concern, as should the immensely long set of opinions issued by a deeply divided Court in *Oregon v.*

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37. While the Constitution directs Congress to consider the constitutionality of its own actions, it does not prescribe particular procedures to that end. How to structure congressional deliberation to ensure more active and careful constitutional review is an issue that deserves close attention. Cf. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1183 (1997) (discussing procedural frameworks for congressional deliberation for the purpose of "vitalizing democratic decisionmaking").

38. This paragraph appears in two separate versions of the report. DAVID M. ACKERMAN, CRS REPORT FOR CONGRESS: THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993: A LEGAL ANALYSIS 34 (1993) [hereinafter ACKERMAN, RFRA 1993]; David M. Ackerman, CRS REPORT FOR CONGRESS: THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS 30 (1992) [hereinafter ACKERMAN, RFRA 1992].

39. Both Reports cite *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); and *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See ACKERMAN, RFRA 1993, *supra* note 38, at 34 n.142; ACKERMAN, RFRA 1992, *supra* note 38, at 30 n.129.

40. 384 U.S. 641, 659-71 (1966) (Harlan, J., dissenting) (discussing the federal government's limited powers).

*Mitchell*.<sup>41</sup> The voluminous opinions in *Oregon v. Mitchell* should have made it clear that important constitutional issues regarding Section 5 remained in flux. Moreover, what happened to the opinion in *EEOC v. Wyoming*,<sup>42</sup> wherein four members of a more contemporary Court cast doubt on the expandable rights dictum of *Morgan* in an impassionate dissent that was not answered by the majority?<sup>43</sup> It is not mentioned.

In testimony before the House of Representatives and the Senate on RFRA, a small number of individuals expressed some concerns about potential separation-of-powers problems inevitably raised by Congress's decision to overturn a Supreme Court decision,<sup>44</sup> but neither the CRS nor any member of Congress pursued this line of inquiry.<sup>45</sup> Professor Douglas Laycock was

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41. 400 U.S. at 152-213 (1970) (Harlan, J., concurring in part and dissenting in part); *id.* at 135-44 (separate opinion of Douglas, J.); *id.* at 118, 124-34 (Black, J., announcing the judgment of the Court); *id.* at 236-81 (Brennan, White, & Marshall, JJ., dissenting in part and concurring in part); *id.* at 293-96 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., and Blackmun, J.).

42. 460 U.S. 226 (1983).

43. *See id.* at 251-65 (Burger, C.J., dissenting, joined by Powell, Rehnquist, & O'Connor, JJ.).

44. *See The Religious Freedom Restoration Act: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 380-86 (1992) [hereinafter 1992 House Hearings] (testimony of Professor Ira C. Lupu expressing concern about separation of powers); *The Religious Freedom Restoration Act: Hearing on S.2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 124 (1992) [hereinafter 1992 Senate Hearings] (testimony of Bruce Fein). RFRA was passed in response to the Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and for the express purpose of overruling it. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997).

45. Only two scholars addressed the issue of Congress's power to enact such a statute. *See 1992 House Hearings, supra* note 44, at 372-94 (testimony of Professor Ira Lupu) (arguing that RFRA may be unconstitutional as applied to the states); *id.* at 116, 124 (testimony of Bruce Fein) (suggesting that Congress may not have the constitutional authority to enact RFRA); *The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 72-79 (1990) [hereinafter 1990 House Hearings] (letter from Professor Douglas Laycock) (arguing for the constitutionality of RFRA as applied to the states under the Fourteenth Amendment); *id.* at 51-52 (statement of Reverend John H. Buchanan, Jr., Chairman, People for the American Way Action Fund) (concluding that Congress had the power to pass RFRA in order to preserve the guarantees of the Free Exercise Clause); *see also id.* at 56 (remarks of Reverend Dean M. Kelley) (responding to Representative Edwards' question "Do any of the witnesses have a problem with Congress' right to enact this legislation?" by stating "I have not been aware of anyone making that claim."); *cf.*

the most prominent legal academic asked to comment on the propriety of enacting RFRA pursuant to Section 5. Like the CRS, his letter to Congress on the issue failed to take seriously either the separation-of-powers or the federalism issue.<sup>46</sup>

The enumerated powers doctrine has been at the heart of the Court's structural jurisprudence. A line of modern Supreme Court cases has emphasized the central importance of the enumerated powers doctrine, that is, the rule that the "Constitution creates a Federal Government of enumerated powers. As James Madison wrote, '[t]he powers delegated by the proposed Constitution to the federal government are few and defined.'<sup>47</sup> Most recently, in *Printz v. United States*,<sup>48</sup> issued two days after the *Flores* decision, the Court reaffirmed that the Constitution confers "upon Congress . . . not all governmental powers, but only discrete, enumerated ones."<sup>49</sup>

The enumerated powers doctrine is crucial to keeping in equipoise the various societal powers set in motion by the Constitution—the federal branches, the states, and the people. When Congress fails to abide by its enumerated powers, it transgresses important boundaries between the federal branches and between the federal government and the states.<sup>50</sup> There is no vacuum of power outside Congress's limited powers. Rather, when it exceeds its limited powers, it strays into domains reserved for other branches, the states, or the people.<sup>51</sup>

With RFRA, Congress misjudged the scope of its power under Section 5 and therefore simultaneously "contradict[ed] vital prin-

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139 CONG. REC. S14470 (1993) (colloquy between Senator Hatch and Senator Grassley). In addressing Senator Grassley's concern regarding congressional power to enact RFRA, Senator Hatch responded that "Congress has power to regulate state action under section 5 of the 14th Amendment." *Id.*

46. See 1990 House Hearings, *supra* note 45, at 78 (letter of Professor Laycock).

47. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citations omitted).

48. 117 S. Ct. 2365 (1997).

49. *Id.* at 2376.

50. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

51. See *id.* at 2162, 2167, 2172; see also U.S. CONST. art. I (enumerating the powers of Congress); *id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

principles necessary to maintain separation of powers and the federal balance.<sup>52</sup> In other words, by failing to hew to its demarcated enumerated powers, Congress overtook federal duties more properly reposed in the Court and transgressed the line that separates federal from state power. The *Flores* decision is yet one decision among many in which the Court held that Congress cannot act unless the Constitution permits such action by designating discrete powers and tasks.<sup>53</sup> Because only defined, and therefore limited, powers are granted, the task of constitutional interpretation ineluctably requires not only defining what a branch can do, but also what a branch cannot do.<sup>54</sup> Some exercises of power, such as the enactment of RFRA, are simply out-of-bounds.<sup>55</sup>

The enumerated powers concept is not a modern construct, but rather was central to the consensus reached at the Constitutional Convention.<sup>56</sup> The resulting enumerated powers doctrine undergirds the majority opinion in *Flores*.<sup>57</sup> The opening paragraph of the substance of the majority opinion began:

Under our Constitution, the Federal Government is one of enumerated powers. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."<sup>58</sup>

52. *Flores*, 117 S. Ct. at 2172.

53. See, e.g., *Printz*, 117 S. Ct. at 2380-84; *United States v. Lopez*, 514 U.S. 549, 552, 566 (1995); *New York v. United States*, 505 U.S. 144, 181-82, 187-88 (1992).

54. See generally *Flores*, 117 S. Ct. at 2166-68 (discussing instances where Congress has exceeded its constitutionally granted powers).

55. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112 (1970) (invalidating Congress's legislation lowering the minimum age of voters as an infringement on powers reserved to the States); *The Civil Rights Cases*, 109 U.S. 3 (1883) (concluding that sections of the Civil Rights Act of 1875 were unconstitutional because they sought to regulate private conduct).

56. See MADISON, *supra* note 16, at 44 (stating that Madison "had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature"); *id.* at 302 (referring to Gouverneur Morris's statement: "Let us know how the [Government] is to be modelled, and then we can determine what powers can be properly given to it.").

57. See *Flores*, 117 S. Ct. at 2162 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)); *id.* at 2163 (citing *Oregon*, 400 U.S. at 128); *id.* at 2166 (citing *The Civil Rights Cases*, 109 U.S. at 13-14).

58. *Id.* at 2162 (quoting *Marbury*, 5 U.S. (1 Cranch) at 176) (citations omitted).

In response to those defenders of RFRA who claimed that Section 5 permitted Congress to alter constitutional rights, the Court frankly acknowledged that congressional authority under Section 5 is broad, but “[a]s broad as the congressional enforcement power is, it is not unlimited.”<sup>59</sup> This statement is not qualified by an exception for near unanimous votes in Congress or legislation urged by respectable and powerful groups. Rather, even when both houses of Congress act in unison in response to a legitimate and respected group, limits on federal power remain firm.

Federalism operates as a barrier to the congressional temptation to wander into general—unenumerated—lawmaking authority. Echoing the Supreme Court’s earlier statement in *United States v. Lopez*<sup>60</sup> that “the Constitution . . . [withholds] from Congress a plenary police power that would authorize enactment of every type of legislation,”<sup>61</sup> the *Flores* decision stated that the Fourteenth Amendment does not grant Congress the authority to “legislate generally upon life, liberty, and property,”<sup>62</sup> but rather limits Congress’s power to remedying “offensive state action, [that is] ‘repugnant’ to the Constitution.”<sup>63</sup> The Religious Freedom Restoration Act offends federalism because it “is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>64</sup> In other words, the enumerated powers doctrine is intended to prevent incursions on federalism and to force Congress to account for its actions in the text and design of the Constitution.<sup>65</sup>

The decision in *Flores* proves that limitation of power is a constitutional touchstone for the exercise of congressional authority in every circumstance. Even when Congress acts pursuant to the entreaties of powerful religious entities,<sup>66</sup> the Constitution’s cir-

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59. *Id.* at 2163 (quoting *Mitchell*, 400 U.S. at 128 (Black, J., announcing judgment of the Court and expressing his own opinion)).

60. 514 U.S. 549 (1995).

61. *Id.* at 566.

62. *Flores*, 117 S. Ct. at 2166 (quoting *The Civil Rights Cases*, 109 U.S. at 15).

63. *Id.*

64. *Id.* at 2171.

65. *See id.* at 2164-66.

66. *See* Brief of the Coalition for the Free Exercise of Religion as Amicus Curiae

cumscription of congressional power to a sphere of discrete tasks still applies with force.

The majority opinion's final and summarizing paragraph reinforced the theme of meaningful limits on congressional power with the observation that deference is due Congress, especially when it engages its Section 5 powers, but its "discretion is not unlimited, . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."<sup>67</sup>

### III. CONGRESS'S ASSIGNED TASKS MUST BE PERFORMED REASONABLY WELL

Under the Court's structural examination of Congress's exercises of power, Congress is not only constrained to act within an identified, enumerated power, but also must enact law that is reasonably well suited to its ends.<sup>68</sup> This proportionality requirement is especially important when Congress is not in fact remedying an existing constitutional violation, but rather attempting to prevent a nascent constitutional violation. The Court stated, "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."<sup>69</sup> RFRA was dramatically out of proportion to its alleged justifications. As the Court noted, this wholesale alteration in free exercise jurisprudence, which applied to every law passed at any time, was erected on the flimsiest of foundations: a hand-

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in Support of Respondents at 1, *City of Boerne v. Flores*, 73 F.3d 1352 (5th Cir. 1996) (No. 95-2074) ("[The Coalition] drafted, lobbied for, and ultimately secured the passage of, the Religious Freedom Restoration Act."). There were six amicus curiae briefs filed on behalf of traditional religious groups before the Supreme Court, gathering support from over sixty religious and civil liberties organizations. *See supra* note 7.

67. *Flores*, 117 S. Ct. at 2172.

68. *See generally id.* at 2164 (distinguishing between the Congress's ability under Section 5 to remedy unconstitutional actions and to make substantive changes in governing law).

69. *Id.* at 2169. For further discussion of the proportionality requirement, see Marci A. Hamilton and David Schoenbrod, *The Unsurprising Proportionality Requirement in Boerne v. Flores* (on file with author).

ful of anecdotes and dated stories of religious persecution.<sup>70</sup> This disproportion signified that Congress had passed beyond its constitutional boundaries.

Although the Court made clear that Congress was not required to conduct certain hearings or to make certain findings,<sup>71</sup> the legislative record taken together with the Act revealed that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."<sup>72</sup> Thus, it is not enough under Section 5 for Congress to *assert* that there is a problem and that it has a solution.<sup>73</sup> Congress bears a responsibility to show to a reasonable degree that its solution is in fact aimed at an existing problem.<sup>74</sup> When Congress fails to embrace this responsibility, it offends the states and the courts. This constrict keeps Congress moored to its highest institutional competence and its most fundamental constitutional obligation, the solution of social policy problems by making hard policy choices.<sup>75</sup>

The means-end requirement is a mechanism that operates to keep an overeager Congress from transgressing the lines of power drawn by the Constitution<sup>76</sup> and is especially important in the Section 5 context. As the *Flores* case illustrates, the Fourteenth Amendment invites Congress to *enforce* constitutionally protected liberties, but that invitation creates tremendous temptation to *define* those liberties.<sup>77</sup> When Congress reaches beyond its power

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70. See *Flores*, 117 S. Ct. at 2164.

71. See *Fullilove v. Klutznick*, 448 U.S. 448, 497-500 (1980) (Powell, J., concurring in judgment). In *Fullilove*, Justice Powell noted: "Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process." *Id.* at 503.

72. *Flores*, 117 S. Ct. at 2170.

73. See generally *United States v. Lopez*, 514 U.S. 549, 563 (1995) (holding that mere knowledge of a problem is insufficient to support legislative enactment of fire-arm restriction laws).

74. See *id.*; *Ex Parte Virginia*, 100 U.S. 339, 345 (1879).

75. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 10-12, 58-59, 72-75 (1993); Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 MICH. L. REV. 1539, 1542-47 (1995) (reviewing David Schoenbrod's book *Power Without Responsibility: How Congress Abuses the People Through Delegation*).

76. See *Flores*, 117 S. Ct. at 2169.

77. See Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox*



to enforce and, instead, embraces the power to define, it collides with both the federalism and separation-of-powers limitations on the congressional exercise of power. The proportionality requirement brings Congress back down to earth and its essential institutional competence, directing it to examine *real* social problems and to construct "appropriate" solutions.<sup>78</sup>

#### IV. CONGRESS IS NOT PERMITTED TO ENGAGE IN SELF-DEFINITION

The Constitution is the source of each federal branch's parameters, which is to say that the branches may not independently define their powers.<sup>79</sup> In *Flores*, the Court stated this principle, drawing upon its holding in *Marbury v. Madison*, parts of which I quoted in my opening statement before the Court: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'"<sup>80</sup> The Court illustrated this point with the statement that Congress's attempt to redefine the meaning of the Free Exercise Clause in RFRA was aimed at "circumvent[ing] the difficult and detailed amendment process contained in Article V."<sup>81</sup>

Before *Flores*, many in the legal world overread the Court's Section 5 jurisprudence to permit Congress to revise the meaning of the Constitution,<sup>82</sup> effectively giving itself the power to define its powers vis-a-vis the states on an ad hoc basis.<sup>83</sup> As the Court

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*Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 370-78, 386 (1994).

78. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

79. See *INS v. Chadha*, 462 U.S. 919, 945 (1983).

80. *Flores*, 117 S. Ct. at 2168 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

81. *Id.* at 2168.

82. See 1990 House Hearings, *supra* note 45, at 72-79 (letter of Professor Laycock); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1053 (1993).

83. See *Flores*, 117 S. Ct. at 2162-63, 2168 (discussing Supreme Court cases inter-

stated quite clearly in *Flores*,<sup>84</sup> this is a principle that pits the Fourteenth Amendment squarely against *Marbury v. Madison*.<sup>85</sup> Indeed, Justice Harlan more than once had warned that Section 5 was on a collision course with settled separation-of-powers concepts.<sup>86</sup> As it turns out, the expandable rights theory of Section 5 did not have nearly the head of steam attributed to it. With its decision in *Flores*, the Court elucidated the suppressed issue in Section 5 discussions—whether the Fourteenth Amendment vitiates or attenuates *Marbury v. Madison* when Congress acts pursuant to its Section 5 authority.<sup>87</sup> The Court rightly concluded that *Marbury* was *not* trumped by the Fourteenth Amendment.<sup>88</sup> *Flores* bore out Harlan's reading of the relationship between Section 5 and the separation of powers and fully vindicated his vision of the Fourteenth Amendment as providing ample remedial power, but not amendment power.<sup>89</sup>

That this was an inevitable conclusion is made clear by the Court's seven-to-nothing vote on the Section 5 issue.<sup>90</sup> The ma-

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preting the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1 (1994).

84. See *id.* at 2168.

85. See Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, NEXUS: A J. OF OPINION, Fall 1997, at 73, 78-81; William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 1996 DUKE L.J. 291, 292-303.

86. See *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part) ("From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable 'Stop' sign."); *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting) ("I do not see how [such legislation] can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority."); see also *EEOC v. Wyoming*, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting). In his dissent, Chief Justice Burger stated: "I have always read *Oregon v. 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.'" *Id.* (Burger, C.J., dissenting) (citing *Mitchell*, 400 U.S. at 209).

87. See *Flores*, 117 S. Ct. at 2168.

88. See *id.* at 2172.

89. See *id.* at 2167 (finding that the Section 5 text does not give Congress the power to decree the substance of an Amendment); see also *Mitchell*, 400 U.S. at 212-13 (limiting congressional authority to legislate against actual invidious discrimination, not hypothetical situations); *Katzenbach*, 384 U.S. at 666-69 (Harlan, J., dissenting) (arguing that section 4 of the Voting Rights Act was not authorized by the Fourteenth Amendment because it was not sufficiently remedial in nature).

90. See *Flores*, 117 S. Ct. at 2162-68; *id.* at 2176 (O'Connor, J., dissenting). Justic-

jority opinion on Section 5 was written by Justice Kennedy and joined by a broad spectrum of Justices: Chief Justice Rehnquist and Justices Stevens, Thomas, Scalia, and Ginsburg.<sup>91</sup> Its reasoning also was joined by Justice O'Connor, although she dissented from the Court's determination of the constitutional issue in the absence of briefing and reargument of the vitality of *Smith*.<sup>92</sup> Given the confidence with which many assumed that *Katzenbach* offered Congress the power to define its own powers,<sup>93</sup> one might have thought that any holding in this case would result in a fractured set of opinions characterized by vitriol. To the contrary, the Court's majority opinion, which stated in no uncertain terms that "enforce" in the Fourteenth Amendment means "enforce" and not "create," occasioned no swan songs, no "liberty or die" dissents. One of the most remarkable things about the decision is its calm tone and the brevity of both the majority, the concurrences, and the dissents.<sup>94</sup> In fact, the majority opinion is quite matter-of-fact in tone and not overly long. Although Justices Scalia and O'Connor disagreed over the historical record underlying the appropriate standard for free exercise cases,<sup>95</sup> the rhetoric of their exchange is nowhere near the heated rhetoric to be found in the abortion cases or even the Commerce Clause cases.<sup>96</sup>

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es Breyer and Souter did not address the Section 5 issue. *See id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

91. *See id.* at 2160 (majority opinion); *id.* at 2172 (Stevens, J., concurring); *id.* at 2172 (Scalia, J., concurring in part); *id.* at 2176 (O'Connor, J., dissenting).

92. *See id.* at 2176-85 (O'Connor, J., dissenting).

93. *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 155 (1995); Pawa, *supra* note 82, at 1032, 1060-62; *see also* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 245-48; Rex E. Lee, *The Religious Freedom Restoration Act: Legislation Choice and Judicial Review*, 1993 BYU L. REV. 73, 92-94.

94. *See Flores*, 117 S. Ct. at 2160-72; *id.* at 2172 (Stevens, J., concurring); *id.* at 2172-76 (Scalia, J., concurring in part); *id.* at 2176-85 (O'Connor, J., dissenting); *id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

95. *See id.* at 2172-76 (Scalia, J., concurring in part) (arguing that *Employment Div. v. Smith*, 494 U.S. 872 (1990), was decided correctly and was a valid interpretation of the Free Exercise Clause); *id.* at 2176-85 (O'Connor, J., dissenting) (arguing that *Smith* adopted "an improper standard for deciding free exercise claims.").

96. *See* *Printz v. United States*, 117 S. Ct. 2365, 2373 nn.4-7 (1997) (Scalia, J., for the Court); *id.* at 2402-03 nn.1-2 (Souter, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 564-66 (1995); *id.* at 603-12 (Souter, J., dissenting); *id.* at 615-18 (Breyer,

Interestingly, the Court, in its analysis of a law that implicated both separation-of-powers and federalism principles simultaneously, did not fall into the contentious 5-4 split that has characterized its federalism decisions in the Commerce Clause arena.<sup>97</sup> When federalism concerns were joined to the sort of blatant separation-of-powers problem posed by RFRA, the Justices joined forces in a no-nonsense way. In other words, one structural problem engenders more soul-searching and closer votes,<sup>98</sup> but two structural problems engender certitude and confidence in a decision to invalidate an act of Congress.<sup>99</sup>

The proponents of broad federal power under Section 5 have been wearing structural blinders in the RFRA debate. Even after *Flores* taught us that *Marbury* remained good law despite the enactment of the Fourteenth Amendment,<sup>100</sup> many argued that *Marbury* did not provide a stronghold against congressional exercise of power under the enumerated powers doctrine, and therefore RFRA is likely still constitutional when applied to federal law.<sup>101</sup> This contention was and remains unsupported.<sup>102</sup>

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J., dissenting); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 527-31 (1989) (O'Connor, J., concurring in part and concurring in the judgment). In *Webster*, Justice Scalia opined that Justice O'Connor would have held restrictions on abortion unconstitutional if they imposed an "undue burden on a woman's abortion decision." *Id.* at 536-37 n.x (Scalia, J., concurring in part and concurring in the judgment) (arguing in favor of overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

97. See *Printz*, 117 S. Ct. at 2365; *Lopez*, 514 U.S. at 549-50; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 529 (1995); *New York v. United States*, 505 U.S. 144 (1992) (six to three decision).

98. See *Printz*, 117 S. Ct. at 2402 (Souter, J., dissenting) ("I have found [these cases] closer than I had anticipated.").

99. See, e.g., *Flores*, 117 S. Ct. at 2172 (concluding that RFRA contradicts principles essential to maintaining separation of powers and the federal balance).

100. See *id.* (emphasizing that courts retain the power to ascertain whether Congress has exceeded its authority under the Constitution); see also *United States v. Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (suggesting that *Flores* "arguably casts some doubt on the continued viability" of RFRA as applied to federal law); *Steckler v. United States*, 1998 WL 28235, at \*2 (E.D. La. 1998) ("[R]equirements of RFRA remain in effect with regard to federal law and regulations"); *Rivera v. Crossroads Tabernacle (In re Rivera)*, 214 B.R. 101, 106 (Bankr. S.D.N.Y. 1997) (holding that a federal RFRA was moot following *Flores*); *In re Saunders*, 214 B.R. 524, 526 (Bankr. D. Mass. 1997) (dismissing a Chapter Thirteen petition regarding tithing granted in light of *Flores*); *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997) (holding that a federal RFRA claim was moot following *Flores*).

101. See *Flores Hearings*, *supra* note 24 (testimony of Professor Douglas Laycock);

RFRA exhibits its structural weaknesses even when one looks at its application to federal law. The law is a slap in the face of the Court, crossing separation-of-powers boundaries in an unapologetic fashion.<sup>103</sup> Indeed, the vast majority of the *Flores* decision, as a matter of rhetoric and logic, applies as persuasively to federal as to state law.<sup>104</sup>

Section 5 was the constitutional hook on which Congress and its advisors hung the Act.<sup>105</sup> Congressional interpretation of Section 5 transformed it into a general lawmaking power so vast that it would have permitted Congress, in effect, to define and implement its unilateral interpretation of the Constitution.<sup>106</sup> The same tactic has been attempted with respect to RFRA's application to federal law. In answer to the question of RFRA's validity as applied to federal law, some have claimed that it is

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*id.* (testimony of Rev. Oliver Thomas); *id.* (testimony of Marc D. Stern, American Jewish Congress); *id.* (testimony of Charles Canady, Chairman of the House Judiciary Subcommittee on the Constitution); *id.* (testimony of Jeffrey Sutton, Solicitor, State of Ohio).

102. See Gressman, *supra* note 85, at 81-84.

103. See generally Gressman, *supra* note 85, at 73; Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 67, 120-21, 125-27 (1996) (noting the indignation and unjustified interference of Congress in passing RFRA); Van Alstyne, *supra* note 85, at 292-303 (interpreting Congressional understanding of Section 5 as misplaced, classifying RFRA as legislation Congress may encourage, but not mandate).

104. See *Flores*, 117 S. Ct. at 2162. Writing for the majority, Justice Kennedy noted that "the 'powers of the legislature are defined and limited.'" *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). He further noted, "as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control." *Id.* at 2172. Interestingly, the Court granted, vacated, and remanded without consideration of the merits *Christians v. Crystal Evangelical Free Church (In re Young)*, 89 F.3d 494 (8th Cir. 1996), which addressed the application of RFRA to federal law. Presumably, if *Flores* was limited solely to state law questions, the Court would have denied *Crystal*. Instead, it remanded in light of *Flores*. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 117 S. Ct. 2502 (1997), *rev'g and remanding* 89 F.3d 494 (8th Cir. 1996); see also Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. CONST. L.J. 1 (1998).

105. See Hamilton, *supra* note 77, at 368.

106. This point was made most clearly in the Respondent's Brief submitted on behalf of the church, in which Professor Laycock argued that the proper test under Section 5 is that any law passed pursuant to Section 5 authority must have only a "similarly reasonable nexus" to the constitutional concern at issue. Brief of Respondent at 25, *Flores* (No. 95-2074). As the City responded, this test knows of no limits on congressional power. Reply Brief of Petitioner at 15, *Flores* (No. 95-2074).

“obviously” an application of the Necessary and Proper Clause as though that clause gives Congress unnamed powers in addition to its enumerated powers.<sup>107</sup> There is nothing obvious about it.<sup>108</sup> As the Court stated in *Printz*, a decision that rests explicitly on structural principles and the precept that the enumerated powers doctrine is central to structural analysis, the Necessary and Proper Clause is the “last[] best hope of those who defend *ultra vires* congressional action.”<sup>109</sup>

The text of the Constitution makes clear that the Necessary and Proper Clause is not an independent power inserted for the purpose of vitiating the enumerated powers doctrine.<sup>110</sup> Rather, it is a clause that limits Congress to its enumerated powers<sup>111</sup> and elaborates on that enumeration by explaining that Congress should have a fair amount of latitude to execute those enumerated powers.<sup>112</sup> RFRA’s breathtaking scope—its application to every law, every government, and every time period in American

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107. See *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996) (upholding RFRA as applied to federal law); Bonnie I. Robin-Vergeer, *Disposing of the Red Herings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 677-78 n.358, 688, 714 (1996) (discussing the use of the Necessary and Proper Clause standard to determine which federal legislation was appropriate to enforce the Civil War Amendments); see also Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 62 n.274 (1994) (“Congress has power under the Necessary and Proper Clause (art. I, § 8, cl. 18) to take steps to ensure that free exercise values are respected in any Federal program.”); Timothy E. Flanigan, *Smith and Lemon: Carried About with Every Wind of Doctrine*, 1994 PUB. INT. L. REV. 75, 85 n.69. *But see*, Hamilton, *supra* note 77, at 364-70 (arguing that the Necessary and Proper Clause could not provide support for RFRA because without an enumerated power, Congress lacked authority).

108. See Hamilton, *supra* note 77, at 365.

109. *Printz v. United States*, 117 S. Ct. 1365, 2378 (1997).

110. See U.S. CONST., art. I, § 8, cl. 18 (“The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”) (emphasis added); see also Gressman & Carmella, *supra* note 103, at 137-38 (“The Necessary and Proper Clause is not an enumerated grant of substantive power to Congress.”).

111. See Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 792 (1997) (“For the Necessary and Proper Clause can and should be viewed as creating a textual limit on congressional power that served to protect these enumerated rights from infringements.”).

112. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 197-206; Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7, 38-41 (1995).

history—precludes straightfaced arguments that it could have been grounded in any specific enumerated power, such as the commerce, tax, or spending power.<sup>113</sup> If Congress is going to enact a law regulating religious liberty, then it cannot act in this essentially abstract, across-the-board manner, but rather must ground the regulation in one of the existing enumerated powers.<sup>114</sup> The structure, text, and history of the First Amendment teaches that *it* is not an enumerated power, and thus the Necessary and Proper Clause cannot be linked to the First Amendment to justify congressional power to enact RFRA.<sup>115</sup>

If RFRA's record supporting its Section 5 authority was weak,<sup>116</sup> then its record applying RFRA to federal law is virtually blank.<sup>117</sup> As applied to federal law, RFRA should not be upheld, if for no other reason than to send a message to Congress that when a law is unusual and the enumerated power issue is opaque, Congress is constitutionally obligated to provide at least a modicum of explanation of what power it believed itself to be engaging.<sup>118</sup> "Congress normally is not required to

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113. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997) ("Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

114. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers.").

115. See Hamilton, *supra* note 77, at 363. Incredibly, the only advice offered Congress by the CRS on RFRA's application to federal law followed the cockeyed reasoning that congressional power to enact RFRA derived from the Necessary and Proper Clause because it effected the enumerated power of the First Amendment. This reasoning was presented in a conclusory manner with no support. See ACKERMAN, RFRA 1993, *supra* note 38, at 35; ACKERMAN, RFRA 1992, *supra* note 38, at 30-31. That this was the only legal research advice rendered to Congress on the question of the constitutionality of its realignment of church-federal relations and its decision to overturn a Supreme Court decision is, in a word, scandalous. For further discussion of this issue, see Hamilton, *supra* note 104, at 37-38.

116. See *supra* note 38 and accompanying text.

117. The only time the issue surfaced before the Senate was on the day RFRA was passed. Senator Helms expressed concern that RFRA would invite litigation from those attacking state and federal laws on religious grounds. See 139 CONG. REC. S14516 (daily ed. Oct. 27, 1993). Concern was similarly expressed in the CRS report prepared for Congress. See ACKERMAN, RFRA 1993, *supra* note 38, at 34; ACKERMAN, RFRA 1992, *supra* note 38, at 30. For further discussion of this issue, see Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

118. See *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

make formal findings<sup>119</sup> regarding the basis on which it has taken action, but such findings “would enable [the Court] to evaluate the legislative judgment<sup>120</sup> regarding the basis for action when no such basis is “visible to the naked eye.”<sup>121</sup>

*Flores* affirmed the structural soundness of the Constitution. Congress cannot singlehandedly amend the Constitution, avoid Article V procedures, or transform remedial power into the power of self-definition. One earmark of amendment is the attempt to alter the balance of power between critical social entities across the board.<sup>122</sup> That is in fact the job of the Constitution.<sup>123</sup> RFRA’s reach reveals its deep inadequacies on this score.

In effect, *Marbury* and *Flores*, taken together, constrain Congress to solve social problems within the parameters set by the Constitution, to treat discrete problems discretely, and not to paint with the big brush the Framers wielded in their efforts to redraft the structure of government and society. The institutional competence of Congress demands focus on concrete problems and concrete solutions,<sup>124</sup> something sorely lacking in RFRA.<sup>125</sup>

As the decision in *Flores* pointed out: Article V precludes Congress from singlehandedly amending the Constitution.<sup>126</sup> Congress, which has no constitutional obligation to include everyone—or anyone—in its deliberative processes,<sup>127</sup> is prohibited from amending the Constitution by itself.<sup>128</sup> The amendment procedures are structured to alert the people and to slow the pace of amendment.<sup>129</sup> The crucial constitutional value of ac-

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119. *Id.* at 562.

120. *Id.* at 563.

121. *Id.*

122. See MADISON, *supra* note 16, at 33 (reporting resolutions proposed by Edmund Randolph); *id.* at 339 (quoting Gouverneur Morris’s statement, “Some check being necessary on the Legislature, the question is in what hands it should be lodged.”).

123. See *id.* at 341 (quoting Madison’s statement, “We erected effectual barriers for keeping [the separate branches of government] separate.”).

124. See SCHOENBROD, *supra* note 75, at 153-91; Hamilton, *supra* note 75, at 1544-47.

125. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (“RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.”).

126. See *id.* at 2167-68.

127. See Hamilton, *supra* note 5, at 481-82, 521-22.

128. See U.S. CONST., art. V.

129. See MADISON, *supra* note 16, at 351 (quoting Gouverneur Morris’s statement,



countability is exercised through the tandem operation of Article V and the First Amendment's speech and press clauses.<sup>130</sup> If the dramatic change in the law signaled by RFRA is to be accomplished, then it cannot happen in the backroom of a legislature but rather must survive the crucible of public and press scrutiny.<sup>131</sup> RFRA was not subjected to ratification procedures, and its legalistic formulation was impenetrable to all but an elite group.<sup>132</sup> The Constitution's formalistic structure prevents Congress from shifting the balance of power between church and state in every circumstance, in the absence of public awareness and debate.<sup>133</sup> For that reason, RFRA's invalidation is a victory for the people.

The *Flores* decision is a strong message to Congress to act with responsibility, accountability, and independent judgment.

#### IV. CONCLUSION

When asked whether the large number of votes for RFRA in the Congress and its deep support among organized religions should make a constitutional difference, my answer is "No." When asked, "What went wrong?," my answer is, "Structural blinders." Congress, and RFRA's supporters, seem to have asked the question, "Wouldn't RFRA be a good thing for religion?" without asking the question, "Does the Constitution permit us to benefit religion *in this way*?"<sup>134</sup> Had RFRA been upheld, Con-

"Legislative alterations not conformable to the federal compact, would clearly not be valid."); *id.* at 352 (quoting Madison's statement, "[I]t would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence."); *id.* at 626 (proposal for Article V).

130. *Cf.* Hamilton, *supra* note 5, at 523-24, 540-43 (discussing obligation of two-way communication between the legislature and the people).

131. *See supra* notes 79-89 and accompanying text.

132. *See* Hamilton, *Religion's reach*, *supra* note 14, at 647-48 (responding to Oliver Thomas, *Liberty Lost*, 114 THE CHRISTIAN CENTURY 646 (1997)).

133. *See Flores*, 117 S. Ct. at 2168 ("Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.").

134. Of course, the notion of intentionally benefitting religion is another of RFRA's constitutional infirmities. *See id.* at 2172 (Stevens, J., concurring) (stating that RFRA violates the Establishment Clause because it favors religion over irreligion). The Court did not need to reach the Establishment Clause implications in *Flores* because the Act was invalidated on structural grounds. If the Court finds it necessary to

gress would have discovered that it had granted itself untold new powers to define constitutional rights against the states and to legislate on any issue involving the due process clause's "life, liberty, or property."<sup>135</sup>

RFRA was the single most expansive exercise of congressional power yet to be devised. It lacked any meaningful limitation on its application to religion. Its logic, as opposed to its goal, could never have been distinguished from any of a number of arenas where religion is irrelevant. The structure of the Constitution saved us.

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address a case involving RFRA as applied to federal law in the future, then the Establishment Clause issue is surely to be a central part of that case.

135. U.S. CONST. amend. XIV, § 1.