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WHY THE CONGRESS WAS WRONG AND THE COURT WAS RIGHT—REFLECTIONS ON *CITY OF BOERNE v. FLORES*

IRA C. LUPU*

Despite my occasional alliance with forces hostile to the Religious Freedom Restoration Act (RFRA or the "Act"),¹ *City of Boerne v. Flores*² provoked me to mixed feelings. True enough, I wagered a case of Montana beer on the outcome, and I thoroughly enjoyed my brewed reward.³ Moreover, I did not leave the decision in *Flores* entirely to chance and the exertions of others. I happily provided Marci Hamilton, counsel for the City of Boerne, with some suggestions along the way, and she in turn, was generous enough to moot her Supreme Court argument in front of a group of my colleagues and seminar students at George Washington. One's victory, however, is always another's defeat, and given my personal and professional connections to both sides, I quickly began to feel pangs of sweet sorrow. After all, sunset for RFRA meant darkness for religious liberty. Or did it? The more I concerned myself with that question, the more my mood gave way to genuine bemusement. As the spin accelerated in the aftermath of *Flores*,⁴ I developed a sense that I had been a bit

* Louis Harkey Mayo Research Professor of Law, The George Washington University School of Law. Thanks to Jerry Barron, Tom Dienes, Marci Hamilton, Renée Lettow, Mike Selmi, Jon Siegel, Bob Tuttle, and the participants in the GW Faculty Workshop for helpful comments on an earlier version of this manuscript and to Julia Morgan for excellent research assistance.

1. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

2. 117 S. Ct. 2157 (1997).

3. See *infra* note 17 for an account of the circumstances of the wager.

4. See, e.g., *Protecting Religious Freedom After Boerne v. Flores: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *Flores* Hearings] (witness statements) (visited Sept. 23, 1997) <<http://www.house.gov/judiciary/222307.htm>>. The witnesses, who included Professors Douglas Laycock of the University of Texas Law School and Thomas Berg of Cumberland School of Law at Samford University, adamantly criticized the *Flores* decision but offered few examples of any concrete accomplishments of RFRA that would be unachievable without it. See *id.* (testimony of Prof. Douglas Laycock); *id.*

player in, and active witness to, a contemporary constitutional pseudotragedy.

This Essay proceeds in three parts. The first part chronicles my place and that of others in commentary, prediction, and professional efforts concerning the constitutionality of RFRA. Contrary to what many of its proponents believed, RFRA was doomed from the start. The second part analyzes the reasons for my ambivalence about RFRA. In short, I believe that *Employment Division v. Smith*⁵ is a bad decision, but I also believe that Congress erred in trying to correct *Smith* by legislation. Moreover, this second part explains why I think that the presence or absence of RFRA, or some potential RFRA substitute, will have few practical consequences for religious liberty. Far more than its proponents are likely to admit, RFRA has been a failure. The third part turns to the grand and overarching question presented by application of RFRA to the states. Rarely does *Marbury v. Madison*⁶ come face-to-face with *McCulloch v. Maryland*,⁷ but this showdown occurred in *Flores*. Although *Marbury* and *McCulloch* are not ordinarily in explicit tension, exercise of congressional power under the Fourteenth Amendment offers the distinct possibility of such conflict. In *Flores*, the Court identified and resolved that struggle in a way that demonstrated fidelity to longstanding attributes of constitutional structure.

(testimony of Prof. Thomas Berg). For other commentaries on *Flores*, see Joan Biskupic, *Supreme Court Overturns Religious Freedom Statute*, WASH. POST, June 26, 1997, at A1 (quoting Rabbi David Saperstein, director of the Religious Action Center of Reform Judaism, that the decision would "go down in history . . . among the worst mistakes this court has ever made"); Nathan Lewin, *It's Time for a Religious Freedom Amendment*, WASH. POST, July 3, 1997, at A19 (calling for a constitutional amendment, with operative terms virtually identical to those in RFRA, to overturn *Flores*); Robert Marquand, *High Court Clips Protection for Religious Freedom in US*, CHRISTIAN SCI. MONITOR, June 26, 1997, at 1, 18 (quoting statement of the Baptist Joint Committee on Public Affairs that the Supreme Court "nullified . . . the most important piece of legislation affecting our religious liberty since the First Amendment itself Our 'First Freedom' is not only no longer first, it is barely a freedom at all.").

5. 494 U.S. 872 (1990).

6. 5 U.S. (1 Cranch) 137 (1803).

7. 17 U.S. (4 Wheat.) 316 (1819).

I. WE TOLD YOU SO

Much as I know about the fall that follows pride, I cannot resist claiming some credit for being out front on this one. I expressed doubt about the constitutionality of RFRA the way Chicagoans were once reputed to vote—early and often. Congressman Solarz originally proposed RFRA in 1990,⁸ in the immediate wake of *Smith*. In early 1992, while the Act was pending in Congress, I wrote an article asserting that RFRA, as applied to the states, was unlikely to survive Supreme Court review.⁹ I repeated that assertion in testimony on May 14, 1992, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.¹⁰

RFRA became law in the fall of 1993.¹¹ I must confess that by the time I prepared my submission to the *Montana Law Review* symposium on RFRA,¹² held in the fall of 1994, I had begun to hedge. A number of my friends in the community of religious liberty advocates were involved deeply in the passage of RFRA, and I was not entirely comfortable trashing their handiwork. Less personally and more substantively, I thought that the Court had decided *Smith* incorrectly and that the decision was a worthy candidate for prompt reconsideration. Consequent-

8. See H.R. 5377, 101st Cong. (1990).

9. See Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 52-62 (1993). At the time the article was prepared, Congress was considering the proposed Religious Freedom Restoration Act of 1991, H.R. 2797, 102d Cong. (1991). The text of that version of RFRA, which is not materially different for purposes of constitutional analysis from the version Congress enacted in 1993, is reprinted in an appendix to the article. See Lupu, *supra*, at 87-89.

10. See *The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 385-94 (1992) [hereinafter 1992 RFRA Hearings] (statement of Professor Ira C. Lupu). At the time I gave that testimony, I had the distinct sense that Subcommittee Chairman Don Edwards (D-Cal.) had not heard that side of the story, and the even deeper sense that the interest groups backing RFRA did not want that side aired.

11. President Clinton signed RFRA into law on November 16, 1993. See Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 16, 1993, at A18.

12. The writings that emerged from the symposium can be found in *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 1 (1995).

ly, my symposium contribution restated my constitutional doubts about RFRA¹³ but suggested a narrowing construction that might save it. In particular, I argued that courts should construe the Act as having erased *Smith* and having returned free exercise law to where it stood on the eve of *Smith*, rather than to its high water mark of some twenty years before.¹⁴

In the course of presenting that piece in various settings, including the symposium itself, I realized that my diplomatic middle ground was of interest to very few people. Supporters of RFRA, including most prominently Professor Douglas Laycock, argued strenuously in Congress and in academic literature that Section 5 of the Fourteenth Amendment ("Section 5")¹⁵ fully supported congressional power to enact RFRA.¹⁶ For those individuals who were convinced of RFRA's constitutionality and who endorsed its policy, a narrowing construction was both unnecessary and undesirable.¹⁷

To opponents of RFRA, saving the Act in any form seemed ill-advised. Dan Conkle wrote the best and most persuasive piece on

13. See Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 212-18 (1995).

14. See *id.* at 219-25. The Act's language is far more consistent with a "high water mark" interpretation than with an "eve of *Smith*" interpretation.

15. U.S. CONST. amend. XIV, § 5.

16. See 1992 RFRA Hearings, *supra* note 10, at 353-59 (statement of Professor Douglas Laycock); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); see also Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996) (defending RFRA's constitutionality and arguing for a broad interpretation of Congress's authority to enforce the Civil War Amendments); Matt Pawa, Comment, *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, 1095-99 (1993) (arguing that Congress has broad power under Section 5 of the Fourteenth Amendment and that RFRA falls within that power).

17. Indeed, on the final morning of the symposium at Montana, Mike Paulsen found all of the anti-RFRA constitutional arguments so flawed that he declared a willingness to wager a case of Montana beer on the outcome of a Supreme Court test of RFRA. Although several others in the crowd shared my sentiments, I alone was sufficiently impulsive to take the bet. As it turned out, Mike could not find a case of any Montana brewed beer in or around the District of Columbia, so I graciously permitted him to substitute a collection of fine microbrewery products as a payoff. For the month of July, I alternated among Celis Pale Ale, Devil Mountain Five Malt Ale, Pete's Summer Brew, and Samuel Adam's Golden Pilsner while thinking about how wise the Supreme Court is.

why Congress's power under Section 5 could not sustain RFRA.¹⁸ Professor Conkle's work provides an analytical framework with which the Supreme Court opinion coincides considerably.¹⁹ Bill Marshall, concerned that RFRA unconstitutionally favored religion, comprehensively analyzed nonestablishment, equal protection and free speech issues presented by the Act.²⁰ Marci Hamilton, who so effectively represented the City of Boerne in the Supreme Court, also penned a powerful attack on the statute. Her arguments, all of which found their way into her presentation to the Court, included considerations of federalism, but went beyond those considerations to encompass pure separation of powers and nonestablishment principles.²¹ Joanne Brant authored the first anti-RFRA piece based on separation-of-powers principles alone,²² and Larry Sager and Chris Eisgruber followed with an article that expanded the separation-of-powers critique.¹⁸⁸ Jay Bybee analyzed questions, from a historical perspective, about the power of Congress to legislate under the Fourteenth Amendment in the field of religion,²⁴ and Scott Idleman raised significant Establishment Clause issues as well as Section 5 concerns in his commentary on RFRA.²⁵ Eugene Gressman and Angela Carmella

18. See Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995).

19. What distinguished Flores most significantly from the Conkle article was the opinion's thorough account of the history of Section 5. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164-66 (1997). Conkle's article focused more on precedent, the doctrine it generates, and the rigorous application of that doctrine to RFRA. See Conkle, *supra* note 18.

20. See William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection, and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995).

21. See Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994). The works of both Marci Hamilton and Douglas Laycock are stunning examples of how to effectively combine distinguished academic work and rigorous client advocacy.

22. See Joanne C. Brant, *Taking the Supreme Court At Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995).

23. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). Although the Eisgruber-Sager piece is dated 1994, it appeared in mid-1995, several months after the publication of the symposium at Montana.

24. See Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995).

25. See Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Lim-*

burnished these arguments with a thorough analysis of RFRA's constitutional problems.²⁶

Despite how surprised some of RFRA's supporters may have been by *Flores*,²⁷ plenty of RFRA opponents saw the handwriting on the wall in federalism cases beginning with *New York v. United States*,²⁸ and continuing through *United States v. Lopez*²⁹ and *Seminole Tribe v. Florida*.³⁰ Those signs culminated in a dramatic series of pro-state federalism decisions, *Flores* included, in the final days of the Court's 1996 term.³¹ Unless the Fourteenth Amendment or some other explicit prohibition withdraws state sovereignty to govern in a particular way, Congress faces limits on its power to conscript state government and its agents as instruments of federal policy. RFRA did that, and, for reasons elaborated more fully in Part III below, the Court would not allow it.

II. FLORES AS PSEUDO-TRAGEDY

Ever since the Supreme Court's 1990 decision in *Smith*, RFRA proponents have asserted much and demonstrated little about the threat to religious liberty in America. Douglas Laycock and others testified about religious persecution in America at the congressional hearings on RFRA, but they offered few examples of what strikes ordinary people as oppression by the government.³² True oppression is aimed by the oppressors at the oppressed; when government so behaves towards religion, covertly

its of Legislative Power, 73 TEX. L. REV. 247 (1994).

26. See Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996). By the time Professor William Van Alstyne published his piece about RFRA, *The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 1996 DUKE L.J. 291, there was little new to say.

27. See Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14 (commenting on liberal academic tendencies to discount considerations of federalism).

28. 505 U.S. 144 (1992).

29. 514 U.S. 549 (1995).

30. 517 U.S. 44 (1996).

31. In addition to *Flores*, see *Printz v. United States*, 117 S. Ct. 2365 (1997), and *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997).

32. The Court in *Flores* cites and summarizes this testimony in Part IIIB. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169-72 (1997).

or otherwise, the Free Exercise Clause forbids the action.³³

RFRA is aimed at the more diffuse and larger set of problems arising from the incidental impact of formally religion-neutral rules on religious practices or church activity. Such impacts may be the product of insensitivity, lack of information, or ethnocentrism;³⁴ alternatively, they may simply reflect the cost of doing religious business in a complex society.

The incidental impact of legal rules upon religion may occur in many contexts. Prior to *Flores*, RFRA's most widespread effects were in state prisons. The religious liberties of prisoners are regulated heavily, and prison inmates are notoriously litigious.³⁵ Not surprisingly, therefore, more than half of the reported cases under RFRA involve prison inmates.³⁶ Of course, even outside of prisons, religion-neutral rules of general applicability sometimes are applied to the detriment of churches or religiously motivated activities of individuals. Most applications of formally religion-neutral rules, however, simply make religion more expensive than it would otherwise be. For example, compliance by religious institutions with zoning codes and historic preservation ordinances³⁷ has economic consequences. Other

33. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-47 (1993). The Court decided *Lukumi*, in which Professor Laycock represented the church in the Supreme Court, shortly before Congress enacted RFRA. Its announced principle was hardly a surprise; every member of the Supreme Court concurred in finding the Hialeah ordinances to be an antireligious gerrymander in violation of the Constitution. See *id.* at 523, 547.

34. See *You Vang Yang v. Sturner*, 750 F. Supp. 558, 560 (D.R.I. 1990) (rejecting the claim that the Free Exercise Clause forbade an autopsy of young Hmong man whose family's religious values were offended by an autopsy conducted under state law).

35. See *Flores* Hearings, *supra* note 4 (statement of Jeffrey Sutton, Solicitor, State of Ohio).

36. According to the Solicitor for the State of Ohio, almost 60% of the RFRA suits in the LEXIS database involved prison inmates. See *id.* My own RFRA database, discussed *infra* notes 48-74 and accompanying text, confirms the view of Mr. Sutton, who presented the oral argument on behalf of the states in *Flores*.

37. *Flores* itself is an historic preservation case. See *Flores*, 117 S. Ct. at 2160; see also *Grosz v. City of Miami Beach*, 82 F.3d 1005, 1006 (11th Cir. 1996) (challenging zoning ordinance); *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591, 594-95 (D. Md. 1996) (challenging an historic preservation ordinance), *motion to vacate denied*, 951 F. Supp. 83 (D. Md. 1997); *C.L.U.B. v. City of Chicago*, No. 94-C-6151, 1996 U.S. Dist. LEXIS 2230, at *2-*6 (N.D. Ill. Feb. 26, 1996) (challenging zoning laws).

cases of the sort contemplated by RFRA involve genuine and difficult conflicts between religious values and other important social values, including most prominently nondiscrimination.³⁸

To be sure, a doctrine of religious exemptions can be justified even in a world in which most harms resulting from the collision of law and religion are not targeted at religion *per se*. In the exceptional case in which the impact of governmental action upon religious conscience or community is severe and the government interest in inflicting the harm is small, exemptions are highly attractive as a matter of constitutional policy. Moreover, cases involving this combination of severe impact upon religion and weak justification for it will frequently involve minority religions, less well-known and less popular than others. Elected politicians will rarely be insensitive to mainstream religions, but they may readily overlook the interests of other religious traditions.³⁹

The authentic case for exemptions may well not have been enough to persuade Congress to overturn the *Smith* decision by statute; hence RFRA's supporters were compelled to exaggerate the threat to religion presented by the regime of *Smith*. RFRA's supporters overstated the case for the Act in other ways as well. First, the *Smith* opinion had many seeds from which limiting principles with real potency might have emerged. *Smith* distinguished prior free exercise cases on grounds that, over time, might have ripened into reasonably religion-protective doctrines. *Smith's* treatment of *Wisconsin v. Yoder*⁴⁰ as a case involving a hybrid of religious rights and parental rights suggested a number of possibilities for creative lawyering on behalf of religion.

38. Several recent cases involve claims by religiously motivated landlords to be exempt by force of RFRA from fair housing code restrictions on discriminating against unmarried couples. See *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska) (per curiam), *cert. denied*, 513 U.S. 979 (1994); *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996), *cert. denied*, 117 S. Ct. 2531, *reh'g denied*, 118 S. Ct. 20 (1997); see also *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (involving a similar claim under the Massachusetts Constitution).

39. I develop the general case for a judicial doctrine of free exercise exemptions along the same lines as the paragraph above, but at greater length, in Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 375-84 (1996).

40. 406 U.S. 205 (1972); see also *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (discussing *Yoder*).

Most religious liberty claims involve religion plus some other value of constitutional importance, including association and speech. Further, *Smith's* discussion of administrative discretion and individualized assessment as the contextual explanation of *Sherbert v. Verner*⁴¹ and its progeny might have provided a platform for the reconstruction of a healthy set of religion-protective principles.⁴² The speedy introduction and relatively quick enactment of RFRA limited the possibilities of developing those lines of reasoning in the lower courts.

Second, the pre-*Smith* law of free exercise had not been very favorable to religion; nevertheless, RFRA's supporters acted as if *Smith* were a sudden and fierce blow to an established body of religion-favorable law. The Act's proponents persuaded Congress that RFRA was designed to put the law of religious liberty back to where it was immediately before *Smith*, but RFRA's provisions in many respects went cosmically beyond the pre-*Smith* law.⁴³ That body of free exercise law had diluted the compelling interest test and had refused to apply it to government-controlled enclaves, including prisons and the military.⁴⁴ RFRA purported to restore the compelling interest standard in its fullest and fiercest incarnation,⁴⁵ and the Act eliminated any notion that government enclaves were off-limits for religious liberty claims.⁴⁶

The only element of pre-*Smith* law that RFRA tracked was the requirement of a "substantial[] burden"⁴⁷ as the trigger of statutory protection. RFRA's supporters should have foreseen that this codification of judge-made law replicated a serious

41. 374 U.S. 398 (1963); see also *Smith*, 494 U.S. at 883-84 (discussing *Sherbert*).

42. Professors Eisgruber and Sager charted a connection from *Sherbert* to a full-blown and highly protective theory of "equal regard" for religion in Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1282-301 (1994).

43. I develop the argument that RFRA purported to protect religion at a level vastly increased over the legal status quo on *Smith's* eve in Lupu, *supra* note 13, at 191-98.

44. See *id.* at 180-85.

45. See 42 U.S.C. § 2000bb(b)(1) (1994).

46. See *id.*; see also Lupu, *supra* note 13, at 191-93 (noting that RFRA applies to government enclaves).

47. 42 U.S.C. § 2000bb-1(a).

weakness in the extant doctrine on the subject. Indeed, RFRA's dramatic overrestoration of the pre-*Smith* standard of review, coupled with its adoption of the pre-*Smith* constraint that only a substantial burden would trigger that heightened standard, were among the factors contributing to RFRA's evisceration in the lower courts.

The actual experience in those courts prior to *Flores* reveals a most illuminating tale,⁴⁸ although it is not one that RFRA's strongest supporters appear to be in a hurry to tell. They are probably embarrassed by how little RFRA accomplished, by some of the claims made in its name, and by the costs RFRA imposed on government, particularly in the administration of prisons. For its principal drafters and congressional sponsors, RFRA involved symbolic politics; they could be champions of religious liberty from a safe distance, while others had to confront the competing values and interests case-by-case.

As of June 25, 1997, the date of the *Flores* decision, the state and federal courts combined had granted or denied relief on the merits of RFRA complaints in 168 cases.⁴⁹ The federal courts had decided 144 cases; the state courts had addressed twenty-four.⁵⁰ In cases in federal court challenging state prison policies, RFRA claimants were granted relief nine times and denied relief eighty-five times. In nonprison cases tried in federal courts, RFRA claimants were granted relief nine times and de-

48. I tell only a truncated version here. For a more elaborate presentation and analysis of RFRA results in the lower courts, federal agencies, and state attorney general opinions, see Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. J. (forthcoming 1998) (manuscript at 19-26, on file with author). As that piece explains, the numbers that follow are based on a search of all decisions in the Westlaw and LEXIS databases, between November 1993, and the date of the *Flores* decision in June 1997, containing the search term "Religious Freedom Restoration Act."

49. See *id.* at app. In a significant number (30-40) of other cases, the great majority of which involve suits in federal court against state prison officials, appellate courts remanded claims to trial courts for initial consideration or reconsideration of RFRA claims. See, e.g., *Hicks v. Garner*, 69 F.3d 22 (5th Cir. 1995); *Hinkle v. Arizona Dep't of Corrections*, 50 F.3d 14 (9th Cir. 1995). RFRA claimants therefore might have prevailed in some of these cases. Their RFRA claims will now be dismissed in light of *Flores*.

50. See Lupu, *supra* note 48 (manuscript at 24). All the information in the next few paragraphs of this Essay is documented in the appendix of citations attached to Lupu, *supra* note 48.

nied relief forty-one times. In state courts, RFRA claimants were granted relief in no cases and denied relief in five cases involving prisoner liberties, and were granted relief in seven cases and denied relief in twelve nonprison cases. Together, these reported decisions produced twenty-five grants of relief and 143 denials of relief, for a RFRA win percentage of about fifteen percent.

To be sure, numbers can tell only a very partial story, and I do not purport to analyze the data comprehensively in this space. Nevertheless, the following qualitative comments seem fitting.

Although the bulk of RFRA litigation involved prisoner claims, RFRA accomplished very little inside or outside of the prison context. In the important category of land use decisions, RFRA claims tended to prevail only in those cases involving churches engaged in providing food or shelter for the poor.⁵¹ In cases not involving land use, RFRA victories include:

(1) *In re Young*,⁵² in which the Eighth Circuit held that tithing to churches was insulated by RFRA from federal bankruptcy law provisions that restrict transfers by insolvent debtors;

(2) *Cheema v. Thompson*,⁵³ in which the Ninth Circuit upheld a limited version of a right of Sikh Khalsa children to wear daggers, required by their religious tradition, while in attendance at public schools;

(3) *United States v. Gonzalez*,⁵⁴ in which a district court held

51. See *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1234-41 (E.D. Va. 1996); *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 547 (D.D.C. 1994) (granting permanent injunction); *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77, 79 (D.D.C. 1994) (granting preliminary injunction); *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 703-05 (Mich. Ct. App. 1996).

52. 82 F.3d 1407 (8th Cir.), *reh'g denied*, 89 F.3d 494 (8th Cir. 1996), *vacated sub nom.*, *Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997); see also *In re Hodge*, 200 B.R. 884, 894-99 (Bankr. D. Idaho 1996) (holding that avoidance powers under the Bankruptcy Code did not comply with strict scrutiny required by RFRA, but holding also that RFRA is unconstitutional).

53. 67 F.3d 883 (9th Cir. 1995); see also *State v. Singh*, No. C-950777, 1996 WL 741995, at *2-*4 (Ohio Ct. App. Dec. 31, 1996) (holding that the trial court erred by failing to allow the defendant, a Sikh, to assert a violation of RFRA as a defense to charges of carrying a concealed dagger).

54. 957 F. Supp. 1225 (D.N.M. 1997); see also *Horen v. Commonwealth*, 479

that a Native American who killed a bald eagle was insulated by RFRA from federal criminal conviction under endangered species law;

(4) *Hunt v. Hunt*,⁵⁵ in which the Vermont Supreme Court held that RFRA insulated a father from a contempt citation for refusing on religious grounds to make child support payments to his child; and

(5) *State v. Miller*,⁵⁶ in which the Wisconsin Supreme Court held that RFRA exempted members of the Old Order Amish from a requirement that they display a red and orange triangular emblem on their horse-drawn buggies.

The decisions involving bankruptcy, as well as those protecting the desires of religious institutions to care for the poor, are unpopular with chambers of commerce, but they are normatively attractive to many who care about the well-being of churches.⁵⁷ For obvious reasons, however, RFRA supporters do not trumpet the results in *Cheema*, *Gonzalez*, and *Hunt*; weapons-packing schoolchildren, eagle killers, and recalcitrant child-support payers do not make attractive RFRA poster figures. *Miller* involved everyone's favorite Old Order, but hardly presented matters of deep religious magnitude.

Even more significantly, RFRA has not proven necessary to protect religious freedom in a number of cases. *Miller* rests in part on the Wisconsin Constitution.⁵⁸ In several cases, RFRA claims prevailed, but so did federal constitutional claims made on the same facts.⁵⁹ In other cases, state and federal constitu-

S.E.2d 553, 557-60 (Va. Ct. App. 1997) (reversing convictions of a Native American couple for possession of owl feathers after holding that application of the criminal statute failed the strict scrutiny test required by RFRA).

55. 648 A.2d 843 (Vt. 1994).

56. 538 N.W.2d 573 (Wis. Ct. App. 1995), *aff'd*, 549 N.W.2d 239 (Wis. 1996).

57. RFRA's most strident opponents are reluctant to discuss these decisions. My experience has been that neither supporters nor opponents are entirely comfortable with the RFRA record, and they all tend to ignore it.

58. *See Miller*, 538 N.W.2d at 578 (citing *State v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990) (upholding a similar claim by the Amish under the Minnesota Constitution)).

59. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994).

tional claims prevailed when RFRA claims did not.⁶⁰

RFRA did portend a substantial change in the law governing religious liberty in prisons. The pre-RFRA law was extremely deferential to prison administrators,⁶¹ and RFRA signaled some change in that posture.⁶² Prison administration can be extremely harsh on religious practice, and RFRA suits resulted in abandonment of some of the more weakly justified restrictions. In particular, RFRA was instrumental in protecting prisoners' rights to wear religious symbols⁶³ and to wear their hair in a particular way for religious reasons.⁶⁴ Nevertheless, prisoners lost far more RFRA cases than they won, and state authorities are on record as claiming that the costs of defending against RFRA claims are prohibitive.⁶⁵

A chasm exists between the promise of RFRA and what it managed to deliver. This gap arose from the interaction among RFRA's elastic terms, the judicial discretion those terms create, and the subject of religious exemptions generally. For some of the reasons expressed in *Smith*—risks of anarchy, unprincipled distinctions, religious favoritism, and comparing incommensurables—courts

60. For decisions upholding free exercise claims while rejecting RFRA claims, see *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996), *motion to vacate denied*, 951 F. Supp. 83 (D. Md. 1997); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996); see also *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that the state constitution may protect a landlord who wishes for religious reasons to discriminate against unmarried cohabitants).

61. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (holding that prison regulations that conflict with prisoners' religious practices are enforceable so long as regulations are "reasonably related to legitimate penological interests") (citation omitted).

62. Precisely how much change is unclear. See the discussion of RFRA's legislative history on the point in *Lupu*, *supra* note 13, at 191-93. A recent Note argues that RFRA made little difference in prisons because most courts systematically undervalued prisoner claims and overvalued prison officials' responses. See Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 474-86 (1996).

63. See, e.g., *Sasnett v. Sullivan*, 91 F.3d 1018, 1022-23 (7th Cir. 1996), *vacated*, 117 S. Ct. 2502 (1997); *Campos v. Coughlin*, 854 F. Supp. 194, 204-07 (S.D.N.Y. 1994).

64. See, e.g., *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996); *Lewis v. Scott*, 910 F. Supp. 282, 291 (E.D. Tex. 1995); *Luckette v. Lewis*, 883 F. Supp. 471, 479-83 (D. Ariz. 1995).

65. See *Flores* Hearings, *supra* note 4 (statement of Jeffrey Sutton, Solicitor, State of Ohio).

have long been deeply skeptical concerning such exemptions. Quite rightly, judges see the warrant to grant such special treatment as fraught with perils on both sides. Underprotecting religion presents free exercise problems; overprotecting it suggests Establishment Clause concerns. Every move raises the danger of discrimination among sects.

RFRA's terms maximized the possibilities for judicial manipulation that a doctrine of free exercise exemptions inevitably invites. RFRA had a seemingly high threshold for claims—the Act's requirement of substantial burden on religious exercise⁶⁶—and a still more stringent standard by which the state had to justify those practices that substantially burden religion.⁶⁷ Knowing the difficulty the state would face under that strict standard, judges quickly realized that RFRA claims would almost always prevail unless the burden threshold was set very high.

A quick tour of the RFRA case law reveals just how effectively judges used the burden requirement to screen out RFRA claims. A number of circuits adopted a requirement that RFRA protected only religious practices compelled by religious faith—i.e., RFRA was limited to matters of religious duty.⁶⁸ Other courts, quite correctly in my view, rejected this notion as too crabbed and as inconsistent with the case law that Congress appeared to incorporate by reference.⁶⁹ These courts, however, also needed a structure of limiting principles for what counted as a substantial burden, lest every impact of every law on every aspect of human behavior that might be motivated by religious conviction be subject to RFRA's stringent burden of justification. These limiting

66. See 42 U.S.C. § 2000bb-1(a) (1994).

67. See *id.* § 2000bb-1(b) (imposing tests of compelling interests and least restrictive means on state actions that substantially burden religion).

68. See, e.g., *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 706 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995). The Ninth Circuit was even more restrictive, requiring a showing of religious compulsion upon a practice central to the claimant's belief system. See *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). For a discussion of the range of interpretations given to RFRA's substantial burden requirement, see Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472 (1997).

69. See, e.g., *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1443-44 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated*, 117 S. Ct. 2502 (1997).

principles took a variety of forms, including a focus on 1) whether the practice motivated by religion was central to the claimant's religious beliefs,⁷⁰ 2) the degree of coercion involved in the state's policy,⁷¹ and 3) whether the claimant had nonreligious means for avoiding the burden.⁷²

Even under the most generous and flexible approaches, courts retained substantial discretion to reject claims as involving insufficient burdens on religion.⁷³ Perhaps the Supreme Court would eventually have unified the prevailing understanding of this question under a coherent and uniform standard capable of consistent and principled application. Unless and until that happened, however, the disposition of RFRA claims would continue to be anything but predictable. Given the conventional judicial bias against exemptions, the pattern of judicial decision unsurprisingly reveals that RFRA victories were scarce indeed.

What, then, is lost by the invalidation of RFRA? Occasionally a sympathetic religious exemption claim that might have prevailed under RFRA will be rejected when advanced under other legal theories. This loss is a cause for concern, but not for the wailing that followed the decision in *Flores*. *Flores* eliminates the costs of defending RFRA claims against state and local government, and the antireligious resentment and skepticism that such claims may have fueled. In the meantime, religious liberty remains safeguarded by current constitutional law, with its immanent—and perhaps imminent—possibilities for improve-

70. See *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996). Attempting to synthesize the law of burdens, Judge Posner wrote in *Mack*:

[A] substantial burden on the free exercise of religion, within the meaning of the Act, is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Id.

71. See *id.*

72. See *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 923-29 (Cal. 1996) (holding that the owner of a small apartment building is not substantially burdened within the meaning of RFRA by a requirement to rent to an unmarried couple because the landlord is free to move capital from the ownership of residential apartments to some other enterprise), *cert. denied*, 117 S. Ct. 2531, *reh'g denied*, 118 S. Ct. 20 (1997).

73. See *supra* notes 69-72.

ment. Moreover, in cases in which the equities on religion's side are strong, state constitutional law of religious liberty may become reinvigorated.⁷⁴ Over time, I expect that RFRA's disappearance will leave religious liberty in no worse, and perhaps better, condition than RFRA would have produced.

III. *FLORES* AND CONSTITUTIONAL FUNDAMENTALS

As Marci Hamilton said in the opening sentence of her oral argument to the Supreme Court in *Flores*,⁷⁵ the case was about federal power rather than religious liberty. The dispositive issue in the dispute concerned congressional power to impose upon the states what is, under current law, a nonconstitutionally mandated version of religious liberty. The case was not centrally about the two other major threads of Professor Hamilton's argument—pure separation of powers and nonestablishment. The Court in *Flores* did not reach either of those questions.⁷⁶ Consequently, RFRA remains in effect against the federal government unless and until the courts decide at least one of these issues unfavorably to the United States.⁷⁷

74. This reinvigoration began in the wake of *Smith*, see Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, but the enactment of RFRA tended to short-circuit that process.

75. See Oral Argument of Marci A. Hamilton on Behalf of the Petitioner, 1997 WL 87109, at *3 (Feb. 19, 1997) (No. 95-2074), *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

76. Concurring in *Flores* with a brief opinion, Justice Stevens advanced the view that RFRA violated the Establishment Clause because it preferred religion and religious institutions to their secular counterparts. See *Flores*, 117 S. Ct. at 2172 (Stevens, J., concurring). No other Justice addressed that question. The Court's opinion alluded to separation-of-powers concerns in its analysis of Section 5, but did not directly confront the question. See *id.* at 2162-68. Professor Hamilton firmly believes that RFRA is unconstitutional as applied to the federal government. See Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period* 1 U. PA. J. CONST. L. (forthcoming 1998).

77. Immediately after the *Flores* decision, the Court vacated and remanded the Eighth Circuit's decision in *In re Young*, 82 F.3d 1407 (8th Cir. 1996). See *Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997). In *Young*, the Eighth Circuit held RFRA to operate as a limitation on the ability of creditors to have contributions to churches by insolvent debtors set aside under federal bankruptcy law. See *Young*, 82 F.3d at 1409-10. The Supreme Court's disposition suggests that the validity of RFRA against the federal government remains an open question.

I will explore briefly those two questions prior to turning to the matter of Section 5. To my mind, the nonestablishment argument poses the more serious of the two unresolved objections to RFRA. Accommodations of religion and religion alone have not fared well in the Supreme Court. They have been upheld only in *Zorach v. Clauson*,⁷⁸ decided over forty years ago and inconsistent with much that has been decided thereafter, and *Corporation of the Presiding Bishop v. Amos*,⁷⁹ involving an exemption of religious organizations from the federal ban on religious discrimination in employment. The accommodation upheld in *Amos* was at least in part required by the Free Exercise Clause (as then construed) and arguably served to equalize religious entities with nonreligious entities that face no comparable statutory impediment to hiring those with ideological loyalty. In contrast, the Supreme Court has struck down a sect-specific accommodation in *Board of Education v. Grumet*,⁸⁰ a Sabbatarian-specific accommodation in *Estate of Thornton v. Caldor, Inc.*,⁸¹ and, most damning for RFRA, a generic accommodation for religion in *Texas Monthly, Inc. v. Bullock*,⁸² in which the Court invalidated an exemption for religious materials from a state's sales tax.

Whether RFRA, as applied to the federal government, will fall on the *Amos* side or the *Texas Monthly* side of current accommodation doctrine is a close question. RFRA does not discriminate among religions—but it most certainly favors religion over its secular analogues. Moreover, the burdens it relieves cannot be viewed, under current law, as constitutionally onerous or as more severe than those faced by secular causes or institutions. My own view is that RFRA, as applied to the federal government, should be saved by limiting it to matters of personal conscience and by extending its protection to concerns of secular conscience as well.⁸³

78. 343 U.S. 306 (1952) (upholding program of released time from public school day for religious instruction and no other purpose).

79. 483 U.S. 327 (1987).

80. 512 U.S. 687 (1994).

81. 472 U.S. 703 (1985).

82. 489 U.S. 1 (1989).

83. The Court has taken this route before when analogous Establishment Clause

Of course, the nonestablishment problem is of no concern if RFRA is unconstitutional on the ground that the Act involved Congress and the President in a forbidden overruling of a Supreme Court decision on a question of constitutional law.⁸⁴ Able commentators have taken this view,⁸⁵ but I find it ultimately unpersuasive. RFRA as applied to the federal government does not rest on Section 5 of the Fourteenth Amendment. Rather, it rests in each possible application to federal law on whatever power authorizes Congress to act in that context. If Congress is empowered to create prisons, as surely it is, then Congress may accommodate religion in those prisons beyond what the Free Exercise Clause requires—up to the limit of what the Establishment Clause forbids. Congress may regulate the federal government more broadly than it regulates state government—in this context, more broadly than the substantive rights protected by the First Amendment. RFRA as applied to the federal government, therefore, does not threaten the Court's *Marbury* function in the manner suggested by RFRA as applied to the states through the Fourteenth Amendment's enforcement power.

All of this analysis concerns matters as yet undecided. The issue that *Flores* did resolve, however, warrants its own intense focus. For the past thirty years, scholars have argued about the scope of congressional power to enforce the Fourteenth Amendment. In particular, the decision in *Katzenbach v. Morgan*⁸⁶

questions about federal statutory law have arisen. See *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (extending conscientious objector provision to a claimant with nonreligious objections to war). Justice Harlan's concurring opinion, necessary to the outcome, argued explicitly that the Establishment Clause forbade a legislative preference for religious over nonreligious conscience. See *id.* at 356 (Harlan, J., concurring). For a thorough discussion of the relevance of *Welsh* to RFRA, see Marshall, *supra* note 20, at 229-35.

84. This theory, sounding in separation of powers, is narrower than the Establishment Clause ground for invalidating RFRA as applied to the federal government, because the Establishment Clause ground would have consequences for state legislation as well. Cf. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 217 (1995) (stating that separation of powers is a narrower ground than due process, because the latter, unlike the former, "might dictate a similar result in a challenge to state legislation under the Fourteenth Amendment").

85. See, e.g., Brant, *supra* note 22; Eisgruber & Sager, *supra* note 23; Gressman & Carmella, *supra* note 26; Hamilton, *supra* note 76.

86. 384 U.S. 641 (1966).

suggested the possibility of virtually unlimited legislative power to revise and expand judge-made constitutional law. Many of the voices raised against that view addressed the risk that Congress would roll back constitutional rights rather than expand them.⁸⁷ In the immediate wake of *Katzenbach*, the threat to the states associated with rights expansion pursuant to Section 5 received scant attention.

Times and concerns have changed. Rights dilution is less a worry than it once was, and encroachment on the states has become a dominant theme in constitutional law. I believe this latter concern represents a restoration of fundamentals as well as a reaction to the singularity of the rights paradigm that centrally occupied the Warren Court.

Of our earliest constitutional decisions, *Marbury v. Madison*⁸⁸ and *McCulloch v. Maryland*⁸⁹ established the most durable and significant building blocks of the constitutional law to follow. Indeed, these germinal and sweeping opinions of Chief Justice Marshall remain firmly and deeply entrenched in the constitutional discourse and opinion writing fashions of our own time. To the Court, *Marbury* continues to represent judicial supremacy in interpretation of the Constitution,⁹⁰ and the Court repeatedly invokes *McCulloch*'s expansive methodology⁹¹ for determining the contemporary scope of implied congressional power.⁹² For most of the life of the Republic, *McCulloch* has been

87. See *Oregon v. Mitchell*, 400 U.S. 112, 204-05 (1970) (Harlan, J., concurring in part and dissenting in part). For examples of commentary, see Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333 (1982).

88. 5 U.S. (1 Cranch) 137 (1803).

89. 17 U.S. (4 Wheat.) 316 (1819).

90. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997); *United States v. Nixon*, 418 U.S. 683, 705 (1974) ("We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case.") (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

91. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

92. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 175-78 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 649-51 (1966).

the official translation of the Necessary and Proper Clause.⁹³

Although both reinforce strong national institutions, the *Marbury* function and the *McCulloch* standards have always been in quiet tension with one another. *Marbury* declares that the Court has the power to determine the meaning of the Constitution as law. *McCulloch* declares that the Congress, not the Court, possesses enormous discretion to choose the means necessary to bring about the ends entrusted to the Congress by the Constitution. *Marbury* licenses the Court; *McCulloch* charters the Congress. *McCulloch* deference softens the Court's *Marbury* grip.

From 1937 until the recent explosion of pro-state federalism decisions, most scholars accepted the supremacy of the *McCulloch* principle in questions concerning the scope of congressional power. Only congressional authority to enforce the Fourteenth Amendment has given these commentators pause.⁹⁴ Ever since the resurrection of substantive due process and the Supreme Court's expansion of the constitutional idea of equality, there has lurked the possibility that Congress could become what the Court has refused to be—a "perpetual censor upon all legislation of the States."⁹⁵ The amendment is sufficiently broad in its language and historical meaning that it puts virtually no subject off legislative limits for Congress. Even if the enforcement power were a one-way ratchet, permitting only the expansion of rights, a power so broad would end the concept of a Congress limited in its coercive authority to textually designated subjects of national significance—commerce, intellectual property, bankruptcy, national defense, etc.

Moreover, a broad reading of Section 5—the type of reading suggested by *McCulloch*, representing maximum elasticity of implied power—is in stark tension with the Court's *Marbury* function. When Congress legislates broadly to prevent what it perceives as violations of Section 1 of the Fourteenth Amendment, it strikes at the Court's dominance in law declaration as

93. U.S. CONST. art. I, § 8, cl. 18 (vesting Congress with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

94. See *supra* notes 86-87 and accompanying text.

95. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872).

well as at autonomy of state operations.⁹⁶

Flores illustrates strikingly a synthesis of *Marbury* and *McCulloch* that preserves the Court's own institutional position as well as state authority. *Marbury* represents the thesis of judicial power over the Constitution; the Court declares the meaning of the fundamental law. *McCulloch* represents the antithesis of judicial power; Congress selects the means for achieving the ends entrusted to it, and the "degree of . . . necessity" of those means is for Congress to decide.⁹⁷ In the context of Section 5, the antithesis threatens to overwhelm the thesis of judicial supremacy in law declaration announced by *Marbury*. Hence, the synthesis that controls Section 5 cases melds the *Marbury* function of law declaration with the means-selecting authority in Congress ratified by *McCulloch*. Implicit in *Flores* is a general test for the validity of exercises of Section 5 power—whether, *given judicially developed norms for what constitutes a state violation of Section 1 of the Fourteenth Amendment, Congress's choice of a scheme to prevent or remedy such violations is a reasonable one.*

This institutionally synthetic approach explains the voting rights cases, in which Congress built upon judicially articulated norms in fashioning remedial schemes that courts refused to create out of the Constitution alone.⁹⁸ These schemes, grounded upon and made reasonable by congressional fact-finding, represent legislatively approved ways of achieving judicially identified constitutional ends—in particular, racial equality in the distribution of access to political power and protection of racial minorities in the distribution of government services.

From the outset, RFRA clearly could not satisfy such a review standard. *Employment Division v. Smith*⁹⁹ stated, and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*¹⁰⁰ restated, the judicially developed norms for measuring violations of the Free Exercise Clause that are incorporated into the Fourteenth

96. See *supra* notes 90-95 and accompanying text.

97. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 422 (1819).

98. For the fullest and best explication of this point, see Conkle, *supra* note 18, at 42-55.

99. 494 U.S. 872 (1990).

100. 508 U.S. 520 (1993).

Amendment and applied to the states.¹⁰¹ These norms explicitly require a demonstration of intent to harm religion, rather than simple impact on religion, to make out a violation of the Constitution.¹⁰² Because RFRA went so far beyond the constitutional norm, its substantive standard was grossly unreasonable as a method of preventing violations of the norm. Congress made no findings that might have rendered RFRA reasonable in light of that norm, and findings of that sort would have been virtually incredible. Only on extremely rare occasions will religion-neutral, generally applicable laws be covertly aimed at religious practice, because the requirements of neutrality and generality will require lawmakers to burden others—politically popular religion and its secular counterparts—in the effort to burden the covertly targeted religion.

This synthesis of the competing principles of *Marbury* and *McCulloch* is at the heart of *Flores*'s requirements of congruence and proportionality between the means employed by Congress in RFRA and the ends entrusted to Congress by Section 5 of the Fourteenth Amendment. Time and again the *Flores* opinion returns to this theme:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.¹⁰³

....

... 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.¹⁰⁴

....

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means

101. See *id.* at 531-33.

102. See *id.* at 532-33; *Smith*, 494 U.S. at 876-82.

103. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997).

104. *Id.* at 2170.

adopted and the legitimate end to be achieved.¹⁰⁵

....

It is for Congress in the first instance to 'determin[e] . . . what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. [*Katzenbach v. Morgan*]. . . . [Nevertheless,] the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.¹⁰⁶

Of course, a rigorous requirement of congruence, if applied to all grants of congressional power, would be truly revolutionary. Proportionality is a matter of degree, while congruence is a matter of one-to-one correspondence. A national bank presumably was not congruent with the federal ends *McCulloch* says it might help attain because the bank may have engaged in business disconnected from federal objectives. Similarly, forbidding all loansharking is not congruent with federal ends of protecting interstate commerce from organized crime because some loan sharks may have no connection to organized crime or any other phenomenon of interstate significance.¹⁰⁷ *McCulloch* itself says that once a measure is viewed as necessary, the degree of its necessity is to be measured "in another place"¹⁰⁸—i.e., Congress. Does *Flores*'s invocation of congruence therefore suggest a constriction on the vastness of implied federal power?

Although such a radical cutback in federal legislative power (and corresponding radical expansion of federal judicial power) is possible, surely much narrower readings of *Flores* exist and involve less tension with our developed constitutional tradition. First, Section 5 power can be and is measured against a judicially developed baseline of Section 1 rights. Judicial measurement

105. *Id.* at 2171.

106. *Id.* at 2172 (quoting *Katzenbach v. Morgan* 384 U.S. 641, 651 (1966)).

107. See *Perez v. United States*, 402 U.S. 146, 154-55 (1971) (upholding, under the Commerce Clause, a federal prohibition of all extortionate credit transactions).

108. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

ment of the degree of nonproportionality in Section 5 cases is institutionally more appropriate than comparable measurement under the Article I powers of Congress,¹⁰⁹ such as the Commerce Clause. Although Section 5 cases include an empirical component—what is reasonably necessary to prevent or remedy violations of Section 1—Commerce Clause cases far more frequently require measurement against an empirical standard of substantial effects on interstate commerce. Accordingly, one would expect courts to be more assertive in determining the scope of Section 5 power than in ascertaining the scope of the Commerce Clause. Judgments of reasonableness, conducted against a purely legal baseline of judicial norms, strain the Court's institutional competence far less than calculations of interstate economic consequences of legislative policies.¹¹⁰

A final glance at *McCulloch* suggests yet another way to characterize *Flores* as representing a rich return to constitutional fundamentals. Recall that Chief Justice Marshall in *McCulloch* asserted that

[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a deci-

109. When states are the regulatory target, congressional power to enforce federal norms is *greater* under Section 5 than the Commerce Power or other Article I powers. Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress may abrogate state sovereign immunity pursuant to Section 5), with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate state sovereign immunity pursuant to its Article I powers). If *Seminole Tribe* is to have any bite, there must be real limits imposed on the Section 5 power.

110. Moreover, when one recalls that Section 5 power exercises are aimed typically at states qua states in their governance activities, it is not difficult to see *Flores* as a first cousin of the state sovereignty principle of *New York v. United States*, 505 U.S. 144 (1992) (declaring unconstitutional the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to claim ownership and liability for in-state radioactive waste if the state missed statutory deadlines for implementing disposal plans), a principle recently reaffirmed in *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding that the Brady Handgun Violence Prevention Act provision requiring states to conduct background checks on gun purchasers until a national system is operative exceeds Congress's authority under the Necessary and Proper Clause of the Constitution). *New York* and *Printz* remain an obstacle to any attempt to reframe and relegislate RFRA as an exercise of the commerce power.

sion come before it, to say, that such an act was not the law of the land.¹¹¹

The pretext dictum of *McCulloch* has long been ignored, primarily because of the institutional difficulties of enforcing it. How is it to be demonstrated, for example, that the civil rights acts or the federal labor laws are pretextual exercises of the commerce power?

In Section 5 cases, by contrast, the Court's own opinions provide the controlling measure of what objects are entrusted to Congress. RFRA quite evidently manifested discontent with those decisions, rather than any desire to remedy or prevent substantive violations of the Constitution as the Court understood it. Congress thus designed RFRA to accomplish an object, which, in the Court's view, the Constitution did not entrust to the federal government in its regulation of the states.¹¹² The claim that RFRA rested on Section 5 was a transparent pretext, and the Court, understandably bent on protecting its own prerogatives¹¹³ as well as those of the states, treated it accordingly.¹¹⁴ This judicial handling of RFRA represents institutional self-interest, zealous exercise of authority in deciding the meaning of the Constitution in justiciable matters, and institutional ambition counteracting the same.¹¹⁵ Constitutional dynamics more fundamental than these are, like good men and women, hard to find.

111. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

112. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168-72 (1997).

113. I offer this as an institutional observation, not as a defense of judicial supremacy in interpretation of the Constitution. For the latter, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); for sharply opposing views, see Michael W. McConnell, *The Supreme Court 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). I expect all three branches to aggressively assert their own view of the Constitution, as their institutional interests dictate. Because courts had to interpret and apply RFRA, the Act implicated judicial branch interests most sharply.

114. See *Flores*, 117 S. Ct. at 2172.

115. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (arguing that power separation will protect constitutional values because the institutional ambition of one branch will counteract the ambition of others).