ARTICLES

THE RELIGIOUS FREEDOM RESTORATION ACT IS UNCONSTITUTIONAL, PERIOD

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I. INTRODUCTION

The Supreme Court's opinion in *Boerne v. Flores*[1] declared unequivocally that the Religious Freedom Restoration Act ("RFRA" or "the Act") is unconstitutional. Despite the Court's straightforward opinion, there are commentators and advocates who now assert that RFRA is constitutional as applied to federal law.[2] This Article responds that the message of *Boerne* is that RFRA is unconstitutional under any scenario, whether it is applied to state or federal law.[3]

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[1] 117 S. Ct. 2157, 2159 (1997).

[2] *See generally* Appellant's Opening Brief on Remand from the Supreme Court of the United States, Christians v. Crystal Evangelical Free Church, 89 F.3d 494 (8th Cir. 1997) (No. 93-2267) [hereinafter Appellant's Brief]; Brief for the Dep't of Justice as Intervenor, Christians v. Crystal Evangelical Free Church, 89 F.3d 494 (8th Cir. 1997) (No. 93-2267) [hereinafter D.O.J. Brief]; Brief for the Coalition for the Free Exercise of Religion as Amicus Curiae, Christians v. Crystal Evangelical Free Church, 89 F.3d 494 (No. 93-2267) (8th Cir. 1997) [hereinafter Coalition Brief]. *See also Steckler v. United States*, 1998 WL 28235 (E.D. La. 1998) ("Requirements of RFRA remain in effect with regard to federal law or regulation.") Proponents also assert that because RFRA is constitutional as applied to federal law the Act can be salvaged by severing its invalid portions, *i.e.*, those sections that apply only to state and local governments. D.O.J. Brief. at 15-17. The contention that invalid portions of RFRA are severable serves only as a red herring. RFRA's violation of separation of powers principles invalidates the Act in its entirety, whether it is argued that Congress acted under Section 5 of the Fourteenth Amendment, or pursuant to Article I.

[3] *See United States v. Tessier*, Nos. 96-35801, MT-95-02336-VRH, 1997 WL 650968 (9th Cir. Oct. 17, 1997) (after settlement amongst parties, the Ninth Circuit refused the government's request to vacate the published Bankruptcy Court opinion that held RFRA unconstitutional as applied to federal bankruptcy law, concluding that "[i]n light of *Boerne*... it will not spawn any unto-

The insurmountable fact of RFRA's enactment is that Congress, at the behest of a powerful group of organized religions, intended to displace the entirety of the Supreme Court's interpretation of the Free Exercise Clause. This is one instance where a statute's *obvious* faults are its most serious faults. RFRA is a straightforward violation of separation of powers and the Establishment Clause; it hits bedrock principles in both constitutional milieus. At a more subtle level, RFRA is also a violation of the due process required in lawmaking. Any one of these three theories is sufficient to invalidate RFRA as applied to federal law.

Before moving to the discussion, it is important to note that Congress does have a modicum of authority to accommodate religion. Through appropriate exercise of an enumerated power, Congress can provide exemptions for religious conduct.[4] Congress' hand, however, is not free. Federal laws effecting exemptions are subject to constitutional limitations —namely, the enumerated powers doctrine and the Establishment Clause. The Religious Freedom Restoration Act would have empowered Congress to act without restraint.

II. *BOERNE V. FLORES* HOLDS THAT RFRA VIOLATES SETTLED PRINCIPLES OF SEPARATION OF POWERS

In *Boerne*, the Supreme Court stated that RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance."[5] RFRA is *ultra vires* legislation which would have provided Congress the power to amend the Constitution unilaterally. In the Court's words, RFRA "appears . . . to attempt a substantive change in constitutional protections."[6] Congress' attempt to revise the constitutional balance is made transparent by RFRA's awesome scope, as well as the paucity of the legislative record. This Act, like no other law enacted before, mimics the scope of the Constitution. In the words of Justice Kennedy, RFRA's

> [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U.S.C. § 2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. § 2000bb-

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ward legal consequences nor have any precedential value") (slip op.); *United States v. Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (stating that *Boerne* "casts some doubt on the continued viability of that legislation in the federal context"); *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997) (refusing to apply RFRA to action involving federal bankruptcy law in light of *Boerne*). *See also Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir.) (recognizing that RFRA superseded *Smith*, "[b]ut the decision in *Boerne* restored the reasonableness test as the applicable standard in free exercise challenges").

[4] *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

[5] *Boerne*, 117 S. Ct. at 2172.

[6] *Boerne v. Flores*, 117 S. Ct. 2157, 2170 (1997).

> 3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.[7]

With this sweeping Act, Congress attempted to usurp both the courts' role and Article V's amendment procedure.

A. Through RFRA, Congress Has Expropriated the Supreme Court's Constitutional Duty to Interpret the First Amendment

The Court's decision in *Boerne* reaffirms that the Supreme Court is "supreme in the exposition of the law of the Constitution."[8] While it does not have the power to set the agenda when constitutional amendments are considered, a power which Congress holds, the Supreme Court does have the power to issue the final word on the meaning of the existing Constitution. In all of its applications, RFRA subverts this principle. RFRA is a blatant attempt by Congress to rewrite the meaning of the Free Exercise Clause in contravention of the Supreme Court's interpretation.[9] As such, it is an attempt by Congress to engage in a hostile takeover of the Court's constitutional role. In the words of one appellate court judge, RFRA's legislative history reveals Congress playing the role of

> a super-Supreme Court... In essence, Congress has instructed the Supreme Court how to interpret the Free Exercise Clause of the First Amendment... It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to the delicate balance of separation of power.[10]

When the Act is applied to federal law, RFRA's creators and proponents defend RFRA against separation of powers attacks on the ground that it is a simple matter of Congress "amend[ing] its laws to restrain itself."[11] RFRA, however, does not amend the text of any federal law. Rather, it changes the way in which the courts scrutinize federal law. The self-limitation defense of RFRA is a *post hoc* pretext for Congress' bold aggrandizement of its powers. "The enactment of

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[7] *Id.*

[8] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); *see also Hamilton v. Schriro*, 74 F.3d 1545, 1566-68 (8th Cir. 1996) (McMillian, J., dissenting).

[9] *See generally* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995) (arguing that RFRA is unconstitutional because it violates separation of power principles); Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 NEXUS, A JOURNAL OF OPINION 33 (1998); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 143 (1996).

[10] *Hamilton v. Schriro*, 74 F.3d 1545, 1566 (8th. Cir. 1996) (McMillian, J., dissenting in part).

[11] Coalition Brief at 5.

RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress."[12]

The attempt by RFRA's supporters to recharacterize this act of hubris as a mild means of self-limitation is cause for some mirth. The language and history of RFRA are quite plain. By enacting RFRA, Congress intended to reject, to reverse, and to eviscerate the Supreme Court's recent decision under the Free Exercise Clause, *Employment Div., Dep't of Human Resources of Oregon v. Smith.*[13] "[P]oints of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning [in *Smith*], and this disagreement resulted in the passage of RFRA."[14] This action is, therefore, a direct attack on the Court's structural role within the constitutional scheme.[15] Indeed, the plain language of the Act reveals RFRA as a bald-faced attempt by Congress to alter the meaning of the Free Exercise Clause as interpreted in cases and controversies involving burdens on religious conduct.

In *Smith*, the Court stated that burdens resulting from generally applicable law do not violate the free exercise of religion under the First Amendment.[16] In RFRA, Congress says the opposite. The first clause of the statute reads: "The Congress finds that the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[17] Congress then proceeds to define the level of protection to be accorded free exercise of religion:

> In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless] . . . it is in furtherance of a compelling governmental interest;

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[12] *Keeler v. Mayor and City Counsel of Cumberland*, 928 F.Supp. 591, 603 (D. Md. 1996).

[13] 494 U.S. 872 (1990). *See, e.g., Boerne*, 117 S. Ct. at 2160 ("Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)."); *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., 2d Sess. 8, 9, 38, 41, 48 (1990); *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., 2d Sess. 7, 8, 19, 23, 32, 39, 45, 63, 160, 193, 201, 214, 249, 251, 271 (1992) [hereinafter House Hearings]; *Remarks on Signing the Religious Freedom Restoration Act of 1993*, II Pub. Papers 2000 (Nov. 16, 1993). The *Smith* decision was the singular focus of the hearings held in support of RFRA. RFRA's legislative history contains no less than 405 pages explicitly making reference to *Smith*.

[14] *Boerne v. Flores*, 117 S. Ct. 2157, 2161 (1997).

[15] *See* Gressman & Carmella, *supra* note 14 at 70. *See also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1310-11 (1994) (interpreting *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) to mean that "Congress cannot enlist the judiciary in a charade, requiring it to apply a given statutory standard in a manner when the charade implicates . . . religious liberty").

[16] *Smith*, 494 U.S. at 878-882.

[17] 42 U.S.C. § 2000bb(a)(1) (West 1997).

> and . . . is the least restrictive means of furthering that compelling governmental interest.[18]

The separation of powers violation inherent in RFRA is so evident that one is tempted to assume Congress meant something other than what it said. Such an assumption would be a mistake. With RFRA, Congress has acted out of manifest disrespect for the Supreme Court as an institution, and has done so in the most unsubtle fashion imaginable. Congress based its decision to alter the balance of power between church and state under every law in the land solely on its distaste for *Smith*.[19] Congress attempts to paper over this unconstitutional grab for power with a handful of anecdotes relating to isolated incidental burdens on religious practice.[20] The Act's legislative history, however, is replete with members of Congress castigating the Court for its interpretation of the Free Exercise Clause in *Smith*.[21] Indeed, the President fully understood and endorsed this usurpation of the courts' role in the federal system when he hailed RFRA on the ground that it "reverses the Supreme Court's decision [in] Employment Division against Smith."[22] In measured tones, the Supreme Court responded in *Boerne*:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the back-

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[18] 42 U.S.C. § 2000bb-1(a), (b) (West 1997).

[19] Congress was extraordinarily uninformed on the actual holding and implications of *Smith*. *Cf. Boerne*, 117 S. Ct. at 2171 ("[T]he Act imposes in every case a least restrictive means requirement — a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify . . . ."). *Smith* is not the attack on religious liberty depicted by its opponents. The Court adhered to its long-standing position that religious belief is afforded absolute protection. *See Smith*, 494 U.S. at 877; *Reynolds v. United States*, 98 U.S. 145, 166 (1879). While it held that incidental burdens on religious conduct arising from neutral, generally applicable laws are not subject to strict scrutiny, it opened the door to the application of strict scrutiny in certain circumstances. *See Smith*, 494 U.S. at 884 (where there is individualized determination); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (where there is a hybrid claim); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (where there is discrimination). *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Finally, the Court made it clear that carefully crafted exemptions for burdened religious conduct may well pass muster both in the legislature and in the courts. *Smith*, 494 U.S. at 884.

[20] *Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (using term "anecdotal").

[21] *See The Religious Freedom Restoration Act: Hearings on S.2969 Before the Senate Comm. on the Judiciary*, 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) ("The [*Smith* decision] dealt a serious setback to this first amendment freedom.") (statement of Sen. Edward Kennedy); *id.* at S14353 (statement of Sen. Orrin Hatch) ("[I]n [S]mith, the Court departed from well established principles embodied in the [F]irst [A]mendment."); 137 Cong. Rec. E2422 (daily ed. June 27, 1991) (The Smith decision was "a dastardly and unprovoked attack on our first freedom.") (statement of Rep. Stephen Solarz).

[22] Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub. Papers 2000 (Nov. 16, 1993).

> ground of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but the provisions of the federal statutes here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.[23]

The Court further responded by discussing its most important separation of powers case, *Marbury v. Madison*, as follows:

> 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."[24]

According to *Marbury*, the Constitution is "superior paramount law, unchangeable by ordinary means."[25] It is not "on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it."[26]

Marbury was decided in the context of Article I, at a time when Section 5 of the Fourteenth Amendment was not yet conceived. From the beginning of the Republic, the Court has been charged with "say[ing] what the law is."[27] *Boerne* stands for the proposition that the Court's role in interpreting the Constitution was not undermined or lessened as a result of the enactment of the Fourteenth Amendment. There is certainly nothing in *Boerne* that would give support to the reasoning that *Marbury* is now a dead letter when Congress acts pursuant to Article I, though still good law under Section 5. Indeed, the *Boerne* opinion makes clear that the reasoning of *Marbury* is essential to the preservation of the Constitution's delicate balance of power in all circumstances. In *Boerne*, the Court warns of the consequences of abandoning the approach dictated by *Marbury* —consequences that result whether Congress is purportedly acting under Article I or Section 5 of the Fourteenth Amendment: "[s]hifting legislative majorities could change the Constitution. . . ."[28]

Through RFRA, Congress has attempted to insert itself in the Court's realm. The extent to which Congress overtakes the Court's role is evident in the fact that RFRA not only overturns the Court's

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[23] *Boerne*, 117 S. Ct. at 2172 (citation omitted).

[24] *Id.* at 2162 (citations omitted).

[25] *Marbury*, 1 Cranch at 177 *cited in* Boerne, 117 S. Ct. at 2168.

[26] *Id.*; *see* Appellant's Brief at 3; D.O.J. Brief at 9, 20; Coalition Brief. at 6-9. The discussion of *Marbury* in *Boerne* is relevant equally to RFRA's application to state law as to federal law. To view discussion otherwise would mean that *Marbury* has less force when read in the context of Article I's enumerated powers than when read under Section 5 of the Fourteenth Amendment.

[27] *Marbury*, 1 Cranch at 177.

[28] *Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).

decision in *Smith*, but also pre-*Smith* decisions that applied less than strict scrutiny. It eviscerates the Court's settled approach to free exercise claims by prisoners.[29] It overturns the Court's discretion to engage in deferential review of decisions by the military,[30] and it heightens the level of review to be applied in cases that involve government services and federal lands.[31] In the face of the Boerne Court's discussion of *Marbury*, any court that would uphold RFRA as applied to federal law poses for itself a seemingly insurmountable task.

B. Through RFRA, Congress Usurped Article V's Amendment Procedure

The Court explains its decision to invalidate RFRA by criticizing the Act as an attempt to amend the Constitution in the absence of Article V procedures.[32] That RFRA is an effort to amend the Constitution in the absence of Article V procedures is evidenced clearly on the face of the statute as well as from the legislative record. Insofar as RFRA applies in every circumstance in which religion could be burdened by society's laws, RFRA reproduces the Constitution's breadth.[33] RFRA applies to every law, passed by every government, at any time in the United States.[34] In the words of the Court, RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[35] RFRA is not a decision by Congress to provide measured relief to identified burdens on

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[29] *See Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (same principle). *See also Freeman v. Arpaio*, 125 F.3d at 736 ("RFRA not only superseded *Smith*, but it also replaced the standard used in prisoners' free exercise challenges.").

[30] *See Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (applying heightened scrutiny under *Sherbert*, but adjusting that level of scrutiny downward because "[c]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest").

[31] *See Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 451 (1988) (refusing to apply *Sherbert* analysis to government construction on Indian lands notwithstanding that such construction "could have devastating effects on traditional Indian religious practices"); *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986) (declining to apply compelling interest test to claim that Social Security regulations violated benefit applicant's free exercise of religion).

[32] *Boerne*, 117 S. Ct. 2157, 2168 (1997).

[33] The only way in which RFRA differs from the Constitution itself is in the fact that it can be repealed by Congress, a fact raised by the proponents of RFRA in its defense. Coalition Brief at 12. Yet, this quality of RFRA simply reveals the enormous power of constitutional revision that Congress has granted itself. If RFRA is good law, Congress can alter the constitutional balance between federal branches and between church and state whenever it summons a majority vote. For example, if it likes the compelling interest test on Monday, it can codify it, and then repeal it in favor of a different standard on Tuesday.

[34] 42 U.S.C. § 2000bb-3(a) (1997).

[35] *Boerne*, 117 S. Ct. at 2170.

religion, as the Court invited in *Smith*,[36] but rather an unapologetic grab for power and a gratuitous handout to religion.

If RFRA is deemed constitutional as applied to federal law, it would endow Congress with the authority to alter the constitutional balance between church and state through nothing more than a majority vote. Whenever Congress disagreed with the Court's interpretation of the Constitution, it would be able to alter unilaterally the balance of power embodied in the Constitution. There would be no need to debate the merits of a constitutional *amendment* regarding school prayer, or abortion, or equal rights for women. In the Court's words, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[37] To forestall the instability attendant upon changing constitutional requirements, Article V's onerous procedures stabilize the United States' system of representative democracy by delaying the rush to alter the constitutional equilibrium. The model suggested by RFRA invites destabilization and the unilateral adjustment of power by interest groups rather than by the citizens of this country.

RFRA is an ingenious attempt by Congress to revise its role in the constitutional scheme. It is nothing less than a challenge to the very structure of the Constitution. Were RFRA good law, Congress could overtake the role of the Court and effect changes in the Constitution without satisfying the arduous requirements of Article V. RFRA is a means by which Congress could make the Court's interpretations of the Constitution superfluous. Whether applied to state or federal law, RFRA plainly violates the separation of powers and undermines Article V of the Constitution.

III. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE ESTABLISHMENT CLAUSE

In his concurrence in *Boerne*, Justice Stevens points out that RFRA is a rather straightforward violation of the Establishment Clause: "[Its] across-the-board" readjustment of church-state relations knows no precedent.[38] In every dispute religion could possibly have with government, RFRA has handed religious interests "a legal weapon that no atheist or agnostic can obtain."[39] If a philosophical bookstore conflicts with any law, it has no extra help under RFRA. If a club wants to avoid the application of environmental or bankruptcy law, it cannot do so unless it is religious. In Justice Stevens' words,

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[36] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

[37] *Boerne*, 117 S. Ct. at 2168.

[38] *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 294 (1994) (RFRA is "an across-the-board mandate of accommodation for all religious claimants in all governmental situations.").

[39] *Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring).

"[t]his governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."[40]

In its most recent Establishment Clause case, *Agostini v. Felton*,[41] the Court did not alter general principles used to evaluate Establishment Clause cases, but rather collapsed the three-part *Lemon v. Kurtzman*[42] test into a two-part test. The Court instructs that in an Establishment Clause case, courts must "ask whether the government acted with the purpose of advancing or inhibiting religion" and "whether the [law] has the 'effect' of advancing or inhibiting religion."[43] The *Agostini* Court identifies what had been a third inquiry under *Lemon* — the question whether the law induces an excessive entanglement between church and state — as an element of the "effects" test described above.[44] In addressing whether a law has the effect of advancing or inhibiting religion, the *Agostini* Court suggests that courts look to "the character and purposes of the institutions that are benefited [by the law], the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[45]

The application of the *Agostini* "effects" test to RFRA readily reveals RFRA's constitutional flaws. First, the institutions benefited by RFRA are purely religious in character.[46] The law is only triggered when *religious* conduct is burdened by a generally applicable and neutral law.[47] RFRA displaces the *Smith* standard of review in every case and controversy involving burdens on religious conduct,[48] and

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[40] *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)). *See also Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (Souter, J.).

Little can be drawn from the fact that Justice Stevens is the only member of the Court to address the Establishment Clause in *Boerne v. Flores*. He, along with five other Justices disposed of RFRA's constitutionality on separation of powers and federalism grounds while the three in dissent urged reargument and rebriefing on the vitality of *Smith*. Significantly, none of the Justices took issue with his concurrence. In fact, none of the Justices' opinions would preclude them from joining Justice Stevens' Establishment Clause reasoning if the issue of RFRA's application to federal law ever made it to the Supreme Court.

[41] 117 S. Ct. 1997 (1997).

[42] 403 U.S. 602, 612-13 (1971).

[43] *Agostini*, 117 S. Ct. 1997, 2010 (1997).

[44] *Id.* at 2015.

[45] *Id. quoting* Lemon, 403 U.S. at 615 (1971).

[46] *See e.g.*, Idleman, *supra* note 42, at 285-86 ("Most strikingly, [RFRA's] principal purpose is to advance religion, or at least to advance the free exercise thereof, relative to other conscientious conduct that is not deemed religious.").

[47] *See* 42 U.S.C. § 2000bb-1(a) (1997).

[48] This displacement is made obvious in *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), where a panel of the Eighth Circuit decided, without ever reaching First Amendment claims, that the relevant bankruptcy code provision violated RFRA by substantially burdening the debtor's tithing practice. *Id.* at 1416. "[E]mploying RFRA, as opposed to the analysis under *[Smith]*, 'caused' the reversal in the current case . . . Put another way, 'but for the passage of RFRA, the [church] could not have succeeded on [its] free exercise challenge.'" *Id.* at 1421 n.1 (Bogue, J., dissenting). Following its decision in *Boerne*, the Supreme Court vacated

replaces it with a standard that gives religion significantly more leverage against duly enacted federal laws. This is an obvious and direct benefit to religion.

Second, the nature of the aid provided is a drastic standard of review that applies in every circumstance in which religious conduct might be burdened by neutral, generally applicable laws. In Justice Stevens' words, it is a potent "legal weapon."[49]

Third, the resulting relationship between the government and religious authority is one of excessive entanglement. RFRA creates an incentive for Congress to ask whether a law will place unintended, incidental burdens on any religious conduct every time that it enacts a new law.[50] RFRA's enormous breadth means that Congress can only answer that question with massive oversight and study of all faiths practiced in this country. Under RFRA, the government must exercise special care for every religion if it is going to avoid costly litigation over every law. By contrast, the *Smith* scenario, which per-

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and remanded the panel's decision in *Christians* for reconsideration in view of *Boerne*. *Christians*, 117 S. Ct. 2502 (1997).

[49] *Boerne*, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring). The Act requires government to prove "a compelling interest" and that the law challenged is the "least restrictive means." 42 U.S.C. § 2000bb-1. While the Court has employed the compelling interest test in a handful of free exercise cases, it has not used the least restrictive means test. *Boerne*, 117 S. Ct. at 2171.

[50] The relationship between religion and government during the enactment of RFRA is also troubling although it does not fit into one of the Court's Establishment Clause pigeonholes. RFRA was drafted by, lobbied for, and continues to be supported by a group of individuals who represent organized religions. This group united for the sole purpose of overturning the Court's decision in *Smith*. When they lost in the Supreme Court in *Boerne*, they continued their crusade by imploring Congress to do "something else" to help them, *see Hearings on "Protecting Religious Freedom After Boerne v. Flores" Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 105th Cong., 1st Sess. (July 14, 1997), and by going to the states to obtain preferential legislation in each state. Congress passed the language handed to them by organized religious groups without evidencing any independent judgment. It did not investigate the few empirical claims made by the Coalition and certainly engaged in no independent inquiry to determine if the Coalition's proposals were needed, justified, or sound. The relationship between religion and the government during RFRA's passage was the very union of power feared most by the Framers and especially James Madison. *See* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 76 (Adrienne Koch ed., Ohio Univ. Press 1966). Although the full quotation is long, it is worthy of reprinting here:

> All civilized Societies would be divided into different Sects, Factions, & interests, as they happened to consist of rich & poor, debtors & creditors, the landed, the manufacturing, the commercial interests, the inhabitants of this district or that district, the disciples of this religious Sect or that religious Sect. In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. What motives are to restrain them? A prudent regard to the maxim that honesty is the best policy is found by experience to be as little regarded by bodies of men as by individuals. Respect for character is always diminished in proportion to the number among whom the blame or praise is to be divided. Conscience, the only remaining tie, is known to be inadequate in individuals: In large numbers, little is to be expected from it. *Besides, Religion itself may become a motive to persecution & oppression.* These observations are verified by the Histories of every Country ancient & modern.

Id. at 428 (emphasis added) (referring to abuses by British Parliament prompted by "Religious parties").

mits legislative exemptions urged by those religions actually burdened, contains no such incentive.[51]

The Coalition for the Free Exercise of Religion (hereinafter "the Coalition"),[52] has made the argument that if "Congress cannot [pass RFRA], then all exemptions for religious conduct throughout federal law are unconstitutional unless they are required by the Free Exercise Clause — a position that the Court has unanimously rejected."[53] The Coalition simply misunderstands the constitutional error at the heart of RFRA: while exemptions may pass constitutional muster if carefully crafted to meet the requirements of the Free Exercise and Establishment Clauses,[54] they cannot be effected blindly and *en masse*.

Religious liberty is not nearly as simplistic as RFRA's supporters imply. They argue that the Constitution sets the floor for religious liberty, and that Congress may then add to that floor as it sees fit. This view of religion as an unlimited benefit to society is a view that would have been alien to the Framers. The records of the Constitutional Convention illustrate that there *can* be too much liberty for religion. The Framers crafted a constitutional scheme intended to achieve a pragmatic balance of power between church and state.[55] Religion is protected from the state under the Free Exercise Clause, while the state is protected from religion under the Establishment Clause.[56] Thus, Congress does not have a free hand to supplement liberty.[57] The Establishment Clause provides a ceiling that does not permit the government significant room within which to expand religious liberties.

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[51] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

[52] Members of the Coalition include, among others: American Baptist Church USA, American Jewish Congress, Church of the Jesus Christ of Latter Day Saints, Church of Scientology International, Episcopal Church, Evangelical Lutheran Church in America, Native American Church of North America, Presbyterian Church, and United Methodist Church. The Catholic Church has not joined the Coalition because they had some initial objections to RFRA. As *Boerne* makes clear, however, the Church has taken the lead in funding litigation aimed at vindicating RFRA in the courts.

[53] Coalition Brief at 3.

[54] *See, e.g., Smith*, 494 U.S. at 890; *Texas Monthly, Inc., v. Bullock*, 489 U.S. 1, 17 (1989) (striking down Texas statute that exempted religious periodicals from a sales and use tax, because the exemption "lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious employers from Title VII's requirement that employers refrain from discriminating on the basis of religion); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding property tax exemption for religious organizations).

[55] *See* Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 NEXUS, A JOURNAL OF OPINION 33 (1998).

[56] *See* 60 *Madison, supra* note 58, at 76-77 (statement of James Madison discussing the tyranny of factions including "religious Sects").

[57] *See* D.O.J Brief at 18-20; Appellant's Brief at 17; Coalition Brief at 14.

Whenever faced with Free Exercise or Establishment Clause arguments, the courts are, and should be, acutely aware that they are piloting a boat that must maneuver its way between Scylla and Charybdis. Whether a law accommodates appropriately a religious practice or breaches the Establishment Clause is almost always a close question.[58] Indeed, the Court monitors its religion clause jurisprudence to ensure that the lines it has drawn pursuant to the Establishment Clause result in an appropriate and pragmatic balance of power between church and state.[59]

Thus, accommodation of the free exercise of religion requires close attention and careful lawmaking. RFRA attempts to undercut this balance by granting Congress greater latitude to determine the scope of religious freedom. RFRA's one-size-fits-all formula does not show Congress acting pursuant to the suggestion for exemptions found in *Smith*. Rather, it illustrates Congress at its worst: acting at the behest of a group of organized religions, giving more to religion than religion has ever received in American history,[60] and shrugging off the careful weighing which the accommodation of religious practices requires.

RFRA's introduction of a new and imposing standard of review is an unalloyed benefit for religion. There is no vacuum of power between the government and religion. By shouldering the least restrictive means test in all circumstances, Congress has eased the path of religion in all scenarios touched by federal law. Some have sug-

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[58] *See, e.g., Texas Monthly*, 489 U.S. at 5-25 (Brennan, J.); *id.* at 25-26 (White, J., concurring); *id.* at 26-29 (Blackmun, O'Connor, JJ., concurring); *id.* at 29-45 (Scalia, Kennedy, JJ., and Rehnquist, C.J., dissenting).

[59] *See Agostini v.* , 117 S. Ct. 1997, 2010 (1997). *See also, Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994) (holding that statute that created special school district to follow village lines of religious organization violates Establishment Clause); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (Deaf student attending Catholic high school entitled to be provided with interpreter under government program); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (state program to assist blind student in pursuing degree at Christian college did not violate Establishment Clause); *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that City's Board of Education program sending public school teachers into parochial schools to provide remedial education to disadvantaged children violated Establishment Clause) *overruled by* Agostini, 117 S. Ct. 1997.

[60] The name, *"Religious Freedom Restoration Act"* is a euphemism. *See Boerne*, 117 S.Ct. 2157, 2172 (1997). The Act does not "restore" the law of the Free Exercise Clause to the standards applied before the *Smith* decision, but rather institutes an across-the-board, extraordinarily high standard virtually unprecedented before *Smith*. *Id.* at 2171. Congress was well aware of the harsh new standard instituted by RFRA. *See* David M. Ackerman, *CRS Report for Congress, The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis* at 22 (Apr. 23, 1993) (stating that RFRA would give more protection for religious liberty in cases involving "military regulations, prison regulations, and government's management of its internal affairs. The RFRA . . . contain[s] no such exceptions: strict scrutiny would be applicable to all government action burdening religious exercise"). Moreover, the Act requires government to prove the law is the "least restrictive means," a tailoring requirement never embraced by the Supreme Court. *Boerne*, 117 S. Ct. at 2171.

gested that Congress is simply monitoring its own enactments through RFRA and that Congress should be permitted to place hardships on the enforcement of its own laws.[61] This approach mistakes the substantive character of RFRA for a mere procedural nicety.

Those defending RFRA as an amendment to federal law ask that courts take a leap of faith when a facial challenge to the Act arises. RFRA's proponents do not deny that the enumerated power upon which RFRA is based cannot be discerned on the face of the statute. However, they argue that an appropriate enumerated power will surface each time the courts apply RFRA to a federal law. This construction argument cleverly immunizes RFRA from a facial attack on the grounds that Congress has inadequate power to enact such a law. In effect, the more broadly and generally Congress acts, the more likely that it can avoid having its laws invalidated by the courts at the facial stage. Thus, the benefit to religion is accomplished not only through the introduction of strict scrutiny in all cases, but also through delayed judicial review of RFRA's constitutionality.

RFRA directs the courts to impose an extraordinary burden of proof on the federal government for the sake of religion.[62] Thus, Congress has provided, in one grand gesture, a powerful tool to leverage the accommodation of all religious conduct — regardless of the federal interest at stake. There may be constitutional authority for Congress to limit the scope of its enactments through a single amendment. However, no such authority exists to provide unimagined benefits to religion in every circumstance in which religion is burdened by generally applicable, neutral law. Having chosen a standard of review that draws a boundary between church and state, and that has the inevitable effect of benefiting religion in every instance, Congress has seated religion in a throne of power.

Corporation of the Presiding Bishop v. Amos,[63] the case relied upon most heavily by RFRA's supporters, illustrates the close attention to detail necessary to justify and craft constitutional exemptions. In *Amos*, the federal government exempted religious employers from Title VII's requirement proscribing discrimination on the basis of religion by employers.[64] The Court upheld the exemption, stating that without it, the government would become entangled with religion. In other words, the exemption was *necessary* to avoid an Establishment Clause violation.[65]

Comparing RFRA to *Amos* is like comparing apples to oranges. RFRA, unlike *Amos*, does not exempt religion from regulation for the purpose of avoiding an Establishment Clause violation. Rather,

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[61] *Id.*
[62] *See Boerne*, 117 S. Ct. at 2171.
[63] 483 U.S. 327 (1987).
[64] *See id.* at 329 n.1.
[65] *See Id.* at 338-39.

RFRA institutes a standard of judicial review in every case which implicates religious conduct. In turn, this standard of review creates incentives for government to monitor, watch and keep track of the theological tenets of every religion in society. If government is to avoid the costly litigation attendant upon a multiplicity of RFRA claims, it must scrutinize every law that it passes with the interests of every religion in mind. It is not enough to be neutral. Government must also be vigilant for religion. By instituting an extremely demanding standard of judicial review applicable in every case which implicates religious conduct, RFRA creates incentives for government to become a theological overseer.

RFRA *induces* the very sort of entanglement that the law in *Amos* avoided. *Amos* did not involve a law that exempted religion from every law in the country. Rather, it permitted the exemption of religious employers from a particular requirement in prescribed circumstances.[66] The law in *Amos* lacked RFRA's vast scope; therefore, *Amos* cannot dictate how RFRA fares under the Establishment Clause.

In sum, RFRA engineers a society in which religion is preferred over irreligion and advocates a system that encourages the government to monitor and study religion. Both evils violate the Establishment Clause.

IV. RFRA REPRESENTS *ULTRA VIRES* CONGRESSIONAL ACTION

"Under our Constitution, the Federal Government is one of enumerated powers."[67] RFRA is fascinating precisely because it fails to indicate which Article I power justifies its application to federal law. Nothing on the face of the Act states which enumerated provision Congress used as the source of its power to direct the courts' application of strict scrutiny whenever a law substantially burdens religious conduct. The only constitutional provisions to which RFRA refers are the Free Exercise Clause and the Establishment Clause.[68] Neither, of course, is an enumerated power. They are, rather, limitations on the exercise of Congress's enumerated powers.

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[66] The law at issue in *Amos*, section 702 of the Civil Rights Act of 1964, 78 Stat. 255, *as amended*, 42 U.S.C. § 2000e-1 (West 1997), exempts religious organizations only from the requirements of that subtitle, Title VII of the Civil Rights Act of 1964, and only from its requirement that employers refrain from discriminating on the basis of religion. *See Amos*, 483 U.S. at 329 n.1.

[67] *Boerne*, 117 S. Ct. 2157, 2162 (1997) *citing* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[68] 42 U.S.C. § 2000bb (West 1997).

A. Congress' Threadbare Consideration of RFRA's Constitutionality, as Applied to Federal Law, Leaves the Constitutional Basis for RFRA Unclear and Undeserving of Deference

Though replete with criticism of *Smith*, the legislative history of RFRA does not address the issue of Congressional authority to alter the balance of power between church and state by providing religion with "a legal weapon that no atheist or agnostic can obtain."[69] As support for Congressional authority, the legislative history invokes Section 5 of the Fourteenth Amendment. Section 5 is not, however, available to the federal government as a vehicle to regulate federal law.[70]

In the following paragraph, the Congressional Research Service disposed of the question of Congress' power to enact RFRA as applied to federal law:

> With respect to the Federal government, Congressional power to enact RFRA would seem to derive from the necessary and proper clause of Article I, Section 8, of the Constitution. The First Amendment, like the due process clause of the Fourteenth Amendment, imposes a limitation on governmental power with respect to religion by providing that Congress shall make no law . . . prohibiting the free exercise (of religion) . . . Just as Section 5 of the Fourteenth Amendment gives Congress broad authority to implement the provisions of that Amendment, the necessary and proper clause gives Congress broad authority to formulate and adopt measures it deems necessary to carry out the other mandates of the Constitution. Chief Justice Marshall described the broad scope of the power conferred by the necessary and proper clause in *M'Culloch v. Maryland*:
>
> > 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.[71]

The Congressional Research Service seems to imply that the Necessary and Proper Clause modifies the First Amendment, as though the First Amendment is an enumerated power. Such a view turns the Constitution on its head, because it engrafts Article I's enabling clause onto an explicit limitation, and thus transforms limitations into powers.[72]

Article I contains no enumerated power that permits, much less directs, Congress to enforce the Bill of Rights against itself. Congress

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[69] *Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring).

[70] *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, 370, 378-79 (1994) [hereinafter *Henhouse*].

[71] David M. Ackerman, *CRS Report for Congress: The Religious Freedom Restoration Act of 1993: A Legal Analysis* 35 (Doc. 93-446A) (April 23, 1993); *see also* David M. Ackerman, *CRS Report for Congress: The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* 30-31 (Doc. 92-366A) (April 17, 1992) (identical language).

[72] *See Henhouse*, *supra* note 72, at 362-65.

can only address rights indirectly through the appropriate exercise of a particular enumerated power.[73] For example, in *Heart of Atlanta Motel*,[74] the Court upheld Congress' solution to the problem of discrimination in places of public accommodation as a valid exercise of its power under the Commerce Clause because the discrimination adversely affected interstate commerce. In contrast, Section 5 of the Fourteenth Amendment permits Congress to enforce constitutional obligations directly, and reflects the shared conclusion that another tool was required to bring the states within constitutional boundaries.[75] If there were any basis in the Constitution for Congress to attempt "a substantive change in constitutional protections," it would have been under Section 5 of the Fourteenth Amendment.[76] Since *Boerne* rejected such a power under Section 5,[77] it is inconceivable that such a power would exist under Article I.

Congress seems to believe that the Necessary and Proper Clause was sufficient unto itself to support to RFRA.[78] Yet, the Necessary and Proper Clause cannot, by itself, justify congressional action. Two days after the *Boerne* decision was announced, the Supreme Court tellingly characterized the Necessary and Proper Clause as the "last, best hope of those who defend *ultra vires* congressional action."[79] By this, the Court meant to reinforce the notion that the Necessary and Proper Clause must be linked to a specific enumerated power. By referring only to the Necessary and Proper Clause and no other enumerated power, Congress left the basis for RFRA unclear. Where Congress' power to enact a particular act is not "visible to the naked eye," congressional findings "enable [the courts] to evaluate the legislative judgment" that the legislature was acting within constitutional boundaries.[80] The findings in this instance evidence Congress's purpose to overturn *Smith* and nothing more.

Congress simply did not consider meaningfully the difficult question of its power to enact RFRA as applied to federal law. The record accords the courts nothing on which to peg a theory of constitutional power. This procedural failure should doom RFRA. As a structural, constitutional principle, the courts should not create arguments to justify such legislation after the fact, but rather should

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[73] *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964); *Henhouse, supra* note 72, at 366-67.

[74] *Id.*

[75] *See Boerne*, 117 S. Ct. at 2170.

[76] *Id.*

[77] *See Id.*

[78] *See* H.R. Rep. No. 88, 103d Cong. 1st Sess. 10 (1993) ("[T]he Committee believes that Congress has the constitutional authority to enact [RFRA] . . . [p]ursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution.").

[79] *Printz v. U.S.*, Nos. 95-1478, 95-1503, 1997 U.S. LEXIS 4044, 41.

[80] *United States v. Lopez*, 514 U.S. 549, 563 (1995).

send the law back to Congress so that it can engage in the deliberation necessary to make its laws both apparently and actually constitutional. As the Supreme Court explained in *Boerne*:

> When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution . . . James Madison explained that 'it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.' Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.[81]

In other words, the jurisprudential presumption of constitutionality rests on the empirical assumption that Congress embraces its duty to examine the constitutional basis of its actions. This check on Congress' power is grounded in common sense. In fact, it is essential to preserving a system of shared and coordinate power among the federal branches. The federal source of power for RFRA is puzzling and troubling. The courts should not defer to Congress for the following reasons:

First, in circumstances where Congress is attempting to police fundamental rights, the rule that congressional action must be limited to enumerated powers should be observed with the greatest care. The First Amendment is a limitation on congressional authority, not a sphere of power.[82] Just as *Lopez* protected federalism concerns by refusing to uphold a statute whose constitutional basis was "not visible to the naked eye,"[83] the courts should protect First Amendment interests by refusing to uphold statutes, the basis of which are opaque.

Second, the courts should not articulate independently an enumerated power for a statute where there is strong evidence that Congress has failed in its constitutionally-appointed role to be the independent policy decisionmaker for the national polity.[84] To the extent that Congress has rubber stamped the actions of particular interest groups without consideration of the polity's concerns, the courts should read the enumerated powers requirement strictly.

Third, the enumerated powers doctrine should be read with increased vigor when Congress develops an utterly new form of law, like RFRA, and provides no explanation of its source of power. In this arena, the courts should not fill in the blank left by Congress. It is Congress' obligation to elucidate the basis of new law.[85]

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[81] *Boerne v. Flores*, 117 S. Ct. 2157, 2171-72 (1997) *citing* James Madison, 1 Annals of Congress 500 (1789).

[82] *See Henhouse*, *supra* note 72, at 362.

[83] *United States v. Lopez*, 514 U.S. 549, 563 (1995).

[84] 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, 522 (1994); *see also* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

[85] *See Boerne*, 117 S. Ct. at 2164.

B. RFRA Does Not Satisfy the Requirements of McCulloch v. Maryland

The doctrinal question is whether a law satisfies the requirements of *M'Culloch v. Maryland*.[86] As described by Chief Justice Marshall, the test for determining whether Congress has acted within its power is as follows:

> [l]et 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 consistent with the letter and spirit of the constitution, are constitutional.[87]

The discussion of separation of powers and the Establishment Clause in this Article makes clear that RFRA does not meet this standard. First, the language and history of the Act reveal two ends that are far from legitimate: (1) reversal of the Supreme Court's decision in *Smith*;[88] and (2) privileging religion by affording it *per se* more power against government than any other entity. Neither is legitimate. The former violates the separation of powers doctrine, and the latter violates the Establishment Clause.

Second, Congress' unilateral decision to alter the effect of the Free Exercise Clause through a simple majority vote is not "within the scope of the constitution."[89] That job, if assumed at all, is best left to Article V and supermajorities of Congress and the states.[90] The Coalition's defense of RFRA as a simple amendment to every federal law is a pretext for what is, in reality, a constitutional amendment.

Third, RFRA's "means" are not "appropriate."[91] They constitute a directive to the lower courts to ignore the Supreme Court's standard of review. In its stead, they adopt Congress' preferred standard in cases and controversies raising free exercise claims.[92] Rather than providing for exemptions in circumstances where religious conduct is in fact burdened by a generally applicable law,[93] Congress decided to invade the courts' domain. RFRA is nothing more than a bald-faced attempt to commandeer the Court's interpretation of the Constitution. It is not the legitimate exercise of a power granted to Congress by the Constitution.

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[86] 17 U.S. (4 Wheat.) 316, 421 (1819).

[87] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

[88] *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990) (compelling religious bodies to comply with generally applicable laws).

[89] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

[90] U.S. CONST. art. V.

[91] *M'Culloch*, 17 U.S. at 421.

[92] *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 66, 98-102 (1996; *see also*, Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6, 13-19 (1995).

[93] *See Smith*, 494 U.S. at 890.

Finally, RFRA is not "consist[ent] with the letter and spirit of the constitution."[94] It is a unilateral attempt to revise the meaning of the Constitution; it transforms the First Amendment into an enumerated power and it elevates religion above all other interests in society. Moreover, it boldly invades the courts' terrain. Any one of these characteristics alone would undermine the structural integrity of the Constitution. Taken together, they are a frontal assault. RFRA is *ultra vires.*

V. CONCLUSION

The Supreme Court's decision in *Boerne* left RFRA proponents little room to maneuver. Like all important constitutional law decisions, the case was about power. RFRA, in fact, prompted a primer on constitutional power. In *Boerne*, the Court declared that Congress *lacks* the power to reverse the Supreme Court's interpretation of the Constitution.[95] Further, the Court stated that Congress may not readjust the balance of power between church and state unilaterally.[96]

When the Court reaches the question of RFRA's constitutionality as applied to federal law, it may have the opportunity to address RFRA's Establishment Clause and due process of lawmaking defects. It could point out that Congress must articulate the constitutional basis upon which it acts when it attempts to regulate First Amendment freedoms *in gross*, when it responds reflexively to a powerful interest group, and when it devises a new statutory form. This is a fair burden if Congress's enactments are to be accorded deference. The Religious Freedom Restoration Act is unconstitutional, period.

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[94] *M'Culloch*, 17 U.S. at 421.
[95] *Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).
[96] *Id.* at 2171.