2001

How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution

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Recommended Citation

Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903 (2001).

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HOW TO APPLY THE RELIGIOUS FREEDOM RESTORATION ACT TO FEDERAL LAW WITHOUT VIOLATING THE CONSTITUTION

*Gregory P. Magarian**

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INTRODUCTION

Learned commentators have called the Religious Freedom Restoration Act of 1993 ("RFRA" or "the Act")¹ "perhaps the most unconstitutional statute in the history of the nation"² and "the most egregious violation of the separation of powers doctrine in American constitutional history."³ In the 1997 case of *City of Boerne v. Flores*,⁴ the Supreme Court struck down the Act in its applications to state and local governments, declaring that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."⁵ The Act's applications to federal law, however, survived *Boerne*, which means that plaintiffs with religious freedom claims against the federal government have a formidable legal tool at their disposal. RFRA raises fundamental questions about the relationship between legislative and judicial power. This Article aims to facilitate the operation of RFRA's surviving federal law applications, which I will call "Federal RFRA," by considering how this statute fits into the constitutional scheme of governmental power and how courts should proceed in construing it.

RFRA offers a novel structural model for legislation. In the Act's applications to federal law, Congress made a blanket precommitment to protect religious liberty against federal encroachment, beyond what the Supreme Court has held the Constitution to require. This form of legislation may become increasingly important to the extent the Court abjures enforcement of constitutional rights against the federal gov-

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

2. Lino A. Graglia, *City of Boerne v. Flores: An Essay on the Invalidation of the Religious Freedom Restoration Act*, 68 MISS. L.J. 675, 675 (1998).

3. Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507, 538 (1999) [hereinafter Gressman, *Comedy*].

4. 521 U.S. 507 (1997).

5. *Boerne*, 521 U.S. at 536.

ernment.⁶ The *Boerne* Court's elimination of RFRA's state law applications casts a clear spotlight on two inquiries the Court did not have to make. First, did Congress exceed its constitutional role by legislating a precommitment to enhance free exercise protection against federal authority? Second, assuming Federal RFRA survives the first inquiry, how can courts follow Congress's directive to administer a statutory regime of mandatory religious accommodation without countenancing violations of the Establishment Clause?

The answers to these questions have important implications for a broad range of litigants, from federal prisoners whose opportunities for religious exercise are constrained⁷ to members of minority religious groups whose practices violate federal regulations⁸ to unlicensed religious broadcasters⁹ and religion-motivated tax objectors.¹⁰ Analysis of Federal RFRA can also aid in assessing the constitutionality of subsequent religious freedom legislation prompted by *Boerne*, notably the Religious Land Use and Institutionalized Persons Act.¹¹ In addition, constitutional analysis of Federal RFRA is significant because the same Establishment Clause problems, and some variations on the same separation of powers problems, will confront the RFRA-like statutes many states are considering or have enacted in the wake of *Boerne*.¹²

6. For a discussion of legislative attempts to fill gaps the courts leave in protecting rights, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993) [hereinafter Lupu, *Statutes*].

7. See, e.g., *McNair-Bey v. Bledsoe*, 165 F.3d 32 (Table, Text in WESTLAW), Unpublished Disposition, No. 97-1701, 1998 WL 879503 (7th Cir. 1998) (holding that prison officials did not violate RFRA by punishing prisoner who refused to remove or cover religious pin worn on outside of clothing).

8. See, e.g., *United States v. Valrey*, No. CR96-5492, 2000 WL 692647 (W.D. Wash. Feb. 22, 2000) (stating that, under RFRA, government's restriction on use of marijuana by Rastafarian on supervised release from prison may be accomplished through less restrictive means and without burdening exercise of religion).

9. See, e.g., *United States v. Any and All Radio Station Transmission Equip.*, 1999 WL 718646 (E.D. Pa. Aug. 31, 1999) (holding that seizure of unlicensed religious radio station's equipment was not least restrictive means of furthering compelling government interest, thus violating RFRA).

10. See, e.g., *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999) (ruling that IRS penalties and interest levied for taxes withheld on grounds of religious opposition to war did not violate RFRA).

11. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000). Federal and state statutory protections for religious exercise are legion. See generally Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 4-6 (2000) (discussing religious accommodation statutes) [hereinafter McConnell, *Singling Out*].

12. See Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999); Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRA's Don't Work*, 31 LOY. U. CHI. L.J. 153 (2000) (arguing that Illinois RFRA violates federal and state Establishment Clauses and state separation of powers principles); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46

The few commentators who have paid more than passing attention to the question of Federal RFRA's constitutionality have tended to view both the separation of powers and Establishment Clause problems as amenable to unambiguous resolution, either clearing Federal RFRA of any constitutional deficiencies¹³ or condemning it across the board.¹⁴ Meanwhile, federal courts that have applied RFRA to federal law since *Boerne* have produced no consistent doctrine of accommodations under the Act.¹⁵ This Article examines whether and how courts can apply Federal RFRA in a manner consistent with the Constitution. It contends that courts have no basis for invalidating the Act's federal law applications; rather, courts should focus on the task of construing Federal RFRA to avoid Establishment Clause problems.

Part I of this Article briefly recounts the genesis of Federal RFRA. Part II explores the implications of the separation of powers for Federal RFRA's enhancement of religious freedom at the expense of the federal government. This Part first contends that Federal RFRA is best understood as a legislative precommitment to protecting religious exercise across the range of federal law, secured by the political inertia RFRA requires Congress to overcome should it want to repeal the Act or to exempt any given governmental function from the Act's protection. That understanding compels the conclusion, detailed in the remainder of Part II, that the Court has no business invalidating Federal RFRA on any separation of powers ground. First, I will demonstrate that Congress's apparent lack of constitutional authority in applying RFRA to federal law is irrelevant, because Federal RFRA —

UCLA L. REV. 1465 (1999) [hereinafter Volokh, *Common-Law Model*] (discussing state RFRA's in conjunction with Federal RFRA).

13. See Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 ARK.-LITTLE ROCK L.J. 715, 727-47 (1998) [hereinafter Berg, *Constitutional Future*]; Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 213 (1995) [hereinafter Laycock, *Ratchet*] (suggesting that Congress has power to protect religious freedom from federal encroachment); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995) (arguing that Congress's power should not be questioned with respect to RFRA's ability to trump federal laws); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 677-78 (1996) (approving of concessions that Federal RFRA is constitutional).

14. See Gressman, *Comedy*, *supra* note 3, at 525-29; Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998) [hereinafter Hamilton, *Unconstitutional*] (arguing that RFRA's federal applications violate separation of powers and Establishment Clause); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995) [hereinafter Marshall, *Concerns*] (suggesting RFRA violates establishment, equal protection, and free speech principles); Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410 (1998) (concluding that Federal RFRA violates Article V amendment provision).

15. See *infra* notes 266-271 and accompanying text (discussing judicial applications of Federal RFRA).

properly construed to prevent Establishment Clause violations — reflects no exercise of power at all. Next, I will contend that a congressional precommitment to overprotecting rights in the federal sphere neither usurps the judicial power to interpret the Constitution nor interferes with courts' function in deciding cases. Finally, I will explain that the mechanism Congress chose to enforce RFRA's precommitment in particular cases — heightened judicial scrutiny of federal religious accommodation claims — comports with the practical and constitutional determinants of judicial competence.

Properly focused judicial review of Federal RFRA entails two carefully balanced tasks. First, courts must give Federal RFRA meaningful effect. Second, they must determine whether and to what extent RFRA violates the Establishment Clause. Part III of this Article contends that, although the Act on its face does not violate that Clause, many of its conceivable applications do. I propose and evaluate two alternative approaches to statutory construction of Federal RFRA that would allow application of the Act to its constitutionally permissible extent. First, the Court could construe the Act to encompass nontheistic claims for conscientious exemptions from the operation of federal laws. I favor this libertarian approach to construction of Federal RFRA because it would give maximum effect to the will of the political branches. An alternative would be for the Court simply to assert the constitutional force of the Establishment Clause to constrain the scope of RFRA's statutory expansion of rights. This approach would dramatically reduce the Act's force, but I believe it would permit, at a minimum, accommodations to ensure equal treatment of similarly situated believers in different religions and idiosyncratic accommodations that are not generally desirable.¹⁶

I. FROM RFRA TO FEDERAL RFRA

The story of RFRA is the latest chapter in a longstanding debate over the idea of mandatory religious accommodations by government entities.¹⁷ In 1990, the Supreme Court in *Employment Division v.*

16. In addition to the constitutional problems, Federal RFRA raises the issue whether the Court may invalidate some subset of a statute's applications, without striking any of its substantive provisions, and then apply the statute in its valid applications. Courts to consider the question have found RFRA's federal applications severable from the applications struck down by *Boerne*. See *Kikumura v. Hurley*, 242 F.3d 950, 959-60 (10th Cir. 2001); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 833 n.3 (9th Cir. 1999); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 858-59 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998); see also Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Reach of City of Boerne v. Flores*, 39 WM. & MARY L. REV. 689, 693-94 (1998) [hereinafter Greenawalt, *Amendment*]. But see *Henderson v. Kennedy*, 2001 U.S. App. Lexis 14235 (D.C. Cir. June 26, 2001) at **8-9 (identifying severability of RFRA's federal applications as an open question).

17. A "religious accommodation" is an exemption from the effect of a neutral, generally applicable law where such effect would interfere with the claimant's religious exercise. The

*Smith*¹⁸ rejected a claim that the Free Exercise Clause precluded a state from denying unemployment benefits to members of the Native American Church who had lost their jobs due to their use of peyote in a religious sacrament. The Court reached beyond the facts of the case to hold broadly that the Free Exercise Clause does not entitle plaintiffs who challenge applications of neutral laws on religious grounds to have their claims examined under heightened constitutional scrutiny. In so holding, the Court dramatically limited its earlier decisions in *Sherbert v. Verner*¹⁹ and *Wisconsin v. Yoder*,²⁰ which had applied strict scrutiny to religious accommodation claims.²¹ Writing for the Court in

term "exemption" is often used interchangeably with "accommodation." A "mandatory" accommodation or exemption is one that is not specified in the particular regulatory scheme at issue but that a court holds to be required under a superior law. Mandatory accommodation claims prior to *Smith* invoked the Free Exercise Clause; Congress designed RFRA as a statutory directive of mandatory accommodation. In contrast, a "discretionary" or "permissive" accommodation or exemption is one the legislature chooses to provide as part of a regulatory scheme. For a detailed parsing of the different varieties of religious accommodation, see Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 749-54 (1992) [hereinafter Lupu, *Trouble*].

18. 494 U.S. 872 (1990).

19. 374 U.S. 398, 403 (1963) (holding, in sustaining free exercise challenge to denial of unemployment benefits where claimant had been fired for refusing to work on her Sabbath, that any incidental burden on the free exercise of religion must be justified by a compelling state interest). The Supreme Court followed *Sherbert* in three subsequent decisions that invoked the Free Exercise Clause to reject states' denials of unemployment benefits. See *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829 (1989) (holding unconstitutional state's denial of unemployment compensation to claimant who lost job because of religion-motivated refusal to work on Sunday); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987) (holding unconstitutional state's denial of unemployment compensation benefits to Seventh-Day Adventist terminated because religious beliefs forbade her from working from sundown Friday to sundown Saturday); *Thomas v. Review Bd.*, 450 U.S. 707, 719 (1981) (holding unconstitutional state's denial of unemployment compensation benefits to Jehovah's Witness who terminated his munitions job because his personal religious beliefs forbade participation in arms production).

20. 406 U.S. 205, 214 (1972) (holding that a state may not "compel school attendance beyond eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief" absent a state interest of "sufficient magnitude" to overcome right to free exercise of religion).

21. The *Smith* Court purported not to overrule *Yoder* or *Sherbert* but rather to distinguish both precedents. The Court distinguished *Yoder* as involving a claim of "hybrid rights," a free exercise claim combined with a due process claim of parents to direct their children's education. See *Smith*, 494 U.S. at 881-82 & n.1. The Court extended the "hybrid rights" umbrella to explain other successful free exercise challenges where the religious exercise at issue had an expressive component. See *id.* (distinguishing, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). Justice Scalia, writing for the *Smith* majority, did not explain how or why a free exercise claim became more potent when combined with an appeal to another constitutional provision, or why the free exercise claim was not mere surplusage under the "hybrid rights" analysis. The Court distinguished *Sherbert* and its progeny because "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884. Justice Scalia explained neither how this characteristic distinguished unemployment compensation from most or all other administrative regimes nor why *Smith*, which raised an unemployment benefits claim, did not fit within the distinction.

Smith, Justice Scalia asserted that heightened scrutiny of religious accommodation claims would produce "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."²² The *Smith* decision was the subject of voluminous and intense academic criticism.²³

The question of constitutionally mandated religious accommodation had produced inconsistent results in a series of decisions between *Sherbert* and *Smith*. As the *Smith* opinion acknowledged,²⁴ the Court in that period generally had accorded free exercise claimants less protection than a strong reading of *Sherbert* and *Yoder* would have required.²⁵ In the majority of free exercise cases, the Court rejected

The *Smith* Court's distinction of *Yoder* and *Sherbert* has failed to persuade many commentators. See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 37-38 [hereinafter Laycock, *Remnants*] (accusing *Smith* Court, as to distinction of *Yoder*, of preferring unenumerated to enumerated rights); *id.* at 48-51 (criticizing individualized consideration distinction of unemployment benefits cases); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121-24 (1990) [hereinafter McConnell, *Revisionism*] (criticizing *Smith* Court's distinctions of *Yoder* and the unemployment cases). But see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1289-90 (1994) [hereinafter Eisgruber & Sager, *Conscience*] (echoing "individualized consideration" distinction of unemployment benefits cases).

22. *Smith*, 494 U.S. at 890.

23. See John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Laycock, *Remnants*, *supra* note 21; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J. L. & RELIGION 99 (1990); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259; McConnell, *Revisionism*, *supra* note 21; see also Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 937 (1998) (assailing the *Smith* approach to religious accommodations as "superficial and unconvincing" and urging the Court to "try again"). But see Eisgruber & Sager, *Conscience*, *supra* note 21, at 1288-91 (defending rejection of strict scrutiny in *Smith* while criticizing Court's understanding of Religion Clauses); Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 ARK.-LITTLE ROCK L.J. 619, 623-27 (1998) [hereinafter Hamilton, *Rhetoric*] (defending result and standard in *Smith*); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) [hereinafter Marshall, *Defense*] (purporting "to defend *Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself").

24. See *Smith*, 494 U.S. at 883-84.

25. Commentators have emphasized the Court's retreat from strict scrutiny prior to *Smith* as a factor that proves legislative action was needed to protect religious freedom, demonstrates that strict scrutiny is unworkable in this setting, or simply complicates analysis of RFRA. See Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 783 (1998) [hereinafter Greenawalt, *Religious Law*]; Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 231 [hereinafter Laycock, *Act*]; Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 182-85 (1995) [hereinafter Lupu, *Lawyer's Guide*]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 365-70 (1989-90) [hereinafter Marshall, *Exemption*]; Volokh, *Common-Law Model*, *supra* note 12, at 1495 (characterizing strict scrutiny under *Sherbert* as "a complex body of law,

mandatory accommodation claims.²⁶ Only a few decisions, factually similar to *Sherbert*, reflected the solicitude for free exercise that had characterized *Sherbert* and *Yoder*.²⁷ The Court between *Sherbert* and *Smith* also had decided a range of Establishment Clause cases that presented accommodation claims — though usually not framed as such — as to which it reached inconsistent results.²⁸ These decisions reveal considerable tension within and between free exercise doctrine, which commands the government to safeguard religious liberty, and Establishment Clause doctrine, which constrains the government to avoid aggrandizing or coopting religion. “The Court has struggled to find a neutral course between the two Religion Clauses, both of which

with not one but several tests”). But see Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 ARK.-LITTLE ROCK L.J. 633, 636 n.13 (1998) (“[T]he Court continued to endorse a relatively demanding standard of review until its decision in *Smith* . . .”); McConnell, *Revisionism*, *supra* note 21, at 1110 (calling pre-*Smith* strict scrutiny “a Potemkin doctrine” in the Supreme Court but arguing that it influenced decisions of lower courts and federal and state political decisionmakers); see also Robert M. O’Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 787-91 (1999) (noting that the Court between *Sherbert* and *Smith* generally weakened strict scrutiny of religious claims but intensified scrutiny in unemployment compensation cases).

26. Prior to *Smith* the Court employed three distinct methodologies to rule against religious claimants. See Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 10-12 (1994) [hereinafter Berg, *Congress*]; Lupu, *Lawyer’s Guide*, *supra* note 25, at 178-185; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 215-16 (1992). In some cases, the Court applied a restrictive notion of what constitutes a “substantial burden” on religion. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (finding desecration of a Native American burial site also used for “specific spiritual activities” not to constitute a substantial burden); *Bowen v. Roy*, 476 U.S. 693 (1986) (finding no substantial burden from requirement that government maintain a social security number for religious claimant); *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985) (finding no substantial burden on religious activity from imposition of Fair Labor Standards Act requirements on religious employer). In other cases, the Court carved out exceptions to the application of strict scrutiny. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (declining categorically to apply strict scrutiny to prisoners’ free exercise claims); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (deferring to military authorities in rejecting officer’s free exercise claim). In a handful of cases, the Court applied strict scrutiny but found the religious burden to be the least restrictive means for the government to accomplish a compelling interest. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that government’s interest in enforcing antidiscrimination laws outweighed burden placed on religious university by denial of tax exemption due to university’s ban on interracial dating); *United States v. Lee*, 455 U.S. 252 (1982) (holding that government’s interest in maintaining tax system outweighed burden on Amish employer who believed religious duty to provide for elderly rendered paying Social Security tax irreligious).

27. See *supra* note 19 (discussing unemployment benefit cases).

28. The decisions that most clearly drew the connection between accommodations and the Establishment Clause were *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating exemption of religious publications from sales tax); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption for religious employers from religious discrimination prohibitions), and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down state statute giving sabbatarians right not to work on Sabbath). The implications of the Establishment Clause for RFRA are discussed *infra* Part III.

are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”²⁹ Justice Scalia’s majority opinion in *Smith* made no mention of the Establishment Clause, addressing only the potential effects of strict scrutiny on the government’s regulatory prerogatives.

In 1993, Congress passed RFRA in an unabashed effort to reverse the *Smith* decision. The Act was supported by “one of the broadest coalitions in recent political history, including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations.”³⁰ It passed both Houses of Congress almost without opposition.³¹ RFRA provides that “[g]overnment shall not substantially burden a person’s exercise of religion” unless the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering” such interest.³² The text of the legislation includes “findings” that expressly criticize *Smith*³³ and declare that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior government interests.”³⁴ RFRA purported to “restore” the *Sherbert-Yoder* test for accommodation claims;³⁵ in fact, the Act’s express requirement of strict scrutiny for all free exercise challenges to

29. *Walz v. Tax Comm’n*, 397 U.S. 664, 668-69 (1970); see also *infra* notes 284-288 and accompanying text. Insightful discussions of the relationship between the two clauses include Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323; Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter Laycock, *Neutrality*]; Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) [hereinafter Lupu, *Burdens*]; William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); McConnell, *Singling Out*, *supra* note 11; Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123.

30. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994); see also *id.* at 210 n.9 (listing all organizations that formed coalition that sponsored RFRA); 139 CONG. REC. 26415 (daily ed. Oct. 27, 1993) (statement of Sen. Bradley) (“It is a testament to the importance of RFRA that virtually every religious group, spanning the entire spectrum, has voiced its support for this bill. It is a rare thing when such a diverse coalition joins in wholehearted agreement.”). But see Graglia, *supra* note 2, at 680 (“Few Americans were aware in 1993 that their religious freedom had deteriorated and was in need of restoration.”).

31. See 139 CONG. REC. 26416 (daily ed. Oct. 27, 1993) (reporting 97-3 Senate vote in favor of passage of RFRA); *id.* at 27239-41 (daily ed. Nov. 3, 1993) (reporting no objection to unanimous consent request in the House).

32. 42 U.S.C. §§ 2000bb-(1)(a), 2000bb-(1)(b)(2) (1994).

33. See 42 U.S.C. § 2000bb(a)(4) (1994) (stating that “in [*Smith*] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”).

34. 42 U.S.C. § 2000bb(a)(5) (1994).

35. 42 U.S.C. § 2000bb(b)(1) (1994).

general laws probably accords religious exercise more protection than it enjoyed before *Smith*, at least in theory.³⁶ RFRA as enacted applied both to the states, as an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment,³⁷ and to the federal government.

In 1997, the Supreme Court in *City of Boerne v. Flores*³⁸ declared RFRA unconstitutional as applied to state and local governments.³⁹ The *Boerne* case involved a church's challenge to application of a local government's zoning regulation; accordingly, the Court's opinion focused exclusively on problems with Congress's reliance on Section 5 to justify RFRA's applications to state and local governments.⁴⁰ Justice

36. See *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (noting that RFRA "imposes in every case a least restrictive means requirement — a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify"); Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 102-03 [hereinafter Eisgruber & Sager, *After Boerne*] (arguing that RFRA permitted more exemption claims than pre-*Smith* case law); Laycock & Thomas, *supra* note 30, at 224 (arguing, based on statement of purpose to restore *Sherbert-Yoder* standard, that RFRA is "highly protective"); Lupu, *Statutes*, *supra* note 6, at 55 & n.245 (arguing prior to enactment that RFRA "would provide far greater protection to religious freedom claims than has ever been the case"); Eugene Volokh, *Intermediate Questions of Religious Exemptions — a Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 598 (1999) [hereinafter Volokh, *Intermediate Questions*] (arguing that federal and state RFRA's "facially require strict scrutiny of all substantial burdens on religious practices, something the pre-*Smith* Free Exercise Clause jurisprudence did not do"). Others have emphasized that RFRA is unclear about what standard it meant to restore. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 451 (1994) [hereinafter Eisgruber & Sager, *Unconstitutional*] ("By 'restoring' the Court's pre-*Smith* jurisprudence, RFRA did not enact any specific standard. Instead, it endorsed a bevy of conflicting standards."). This uncertainty has left room for argument about how broadly the Court should or might construe RFRA's scope. Compare Berg, *Congress*, *supra* note 26, at 26-28 (arguing that inconsistencies in pre-*Smith* law require courts to read RFRA as adopting a stronger version of strict scrutiny than courts practiced at the time of *Smith*), with Eisgruber & Sager, *Unconstitutional*, *supra*, at 474-75 (suggesting Court might construe RFRA to incorporate *Smith* understanding of Free Exercise Clause).

37. U.S. CONST. amend. XIV, § 5; see H.R. Rep. No. 103-88, at 9 (1993) (stating that Congress has authority to enact RFRA pursuant to Section 5); S. Rep. No. 103-111, at 14 (1993) (same). No source of constitutional authority is cited in the text of RFRA itself.

38. 521 U.S. 507 (1997).

39. Congress subsequently amended RFRA to remove all references to the states, in conformity with *Boerne*. See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000).

40. *Boerne* is one in a line of decisions in which the Rehnquist Court has weakened the power of the federal government. See e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress's powers under Commerce Clause and Section 5 did not extend to providing civil remedies for victims of gender-based violent crimes under Violence Against Women Act of 1994); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Tenth Amendment bars Congress from "commandeering" state executive branch officers to enforce provisions of the Brady Act); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (holding that Eleventh Amendment bars Congress from abrogating state sovereign immunity under enumerated powers of Art. I, § 8); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that congressional attempt to criminalize possession of firearms near schools exceeded congressional authority under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3). See generally Symposium, *New Voices on the New Federalism*, 46 VILL. L. REV. (forthcoming 2001). The

Kennedy, writing for the Court, made clear that Congress under Section 5 had power only to remedy constitutional violations, not to define constitutional rights the Court previously had declined to recognize:

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restriction on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.⁴¹

Justice Kennedy found that Congress in RFRA had not merely enforced a constitutional right but had altered the Court's interpretation of the First Amendment as announced in *Smith*: "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. It appears, instead, to attempt a substantive change in constitutional protections."⁴² That substantive action encroached on "[s]tates' traditional prerogatives and general authority to regulate for the health and welfare of their citizens"⁴³ and thus exceeded Congress's constitutional authority.⁴⁴

fact that no Justice disputed the majority's Section 5 analysis in *Boerne*, while most of the other cited decisions have come on sharply contested 5-4 votes, suggests some of the Justices may have viewed *Boerne* more as a religious freedom case than a federalism case.

41. *Boerne*, 521 U.S. at 519. The Court proceeded to hold that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. For elaboration of the *Boerne* "congruence and proportionality" standard, see *Bd. of Trustees v. Garrett*, 531 U.S. 536 (2001) (finding application to states of Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq.* (1994), not congruent and proportional under *Boerne*); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (finding application to states of Age Discrimination in Employment Act, 29 U.S.C. § 621, not congruent and proportional under *Boerne*). The *Boerne* Court also defused the implication in *Katzenbach v. Morgan*, 384 U.S. 641, 654-56 (1966), that Section 5 gave Congress substantive authority to define constitutional rights, *see Boerne*, 521 U.S. at 527-28, and it distinguished a series of voting rights precedents that had approved broad congressional action pursuant to Section 5. *See id.* at 530-33 (distinguishing *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Morgan*, 384 U.S. 641; and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

42. *Boerne*, 521 U.S. at 532.

43. *Id.* at 534.

44. *Boerne* generated several separate opinions, although none disputed the Court's reasoning on the Section 5 issue. Justice Stevens, who joined the majority opinion, added a brief concurrence to state his view that RFRA violated the Establishment Clause. *See id.*, at 536-37 (Stevens, J., concurring). Justice O'Connor dissented, advancing historical arguments to press her view that the Court had incorrectly decided *Smith*, although she expressed agreement with the *Boerne* Court's Section 5 analysis. *See id.* at 549-64 (O'Connor, J., dissenting). Justice Scalia responded with a partial concurrence that attacked Justice O'Connor's historical evidence. *See id.* at 537-44 (Scalia, J., concurring in part). Justice Souter also dissented, maintaining that *Smith* had not been adequately briefed and that the Court therefore lacked a sufficiently firm legal basis for deciding the issue presented in *Boerne*. *See id.* at 565 (Souter, J., dissenting).

The *Boerne* Court nowhere expressly limited its holding to RFRA's applications to state and local governments, and it referred obliquely to the Act's federal applications.⁴⁵ Near the close of his majority opinion, Justice Kennedy forcefully asserted the judicial prerogative to interpret the Constitution in language that might be understood to implicate the Act's applications to federal as well as state law:

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 background 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.⁴⁶

In the next sentence, however, the opinion states that "RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control."⁴⁷ The emphasis on the particular case before the Court and especially on the provisions of RFRA "here invoked" implies an awareness that only RFRA's state law applications were presented in *Boerne*. Indeed, after a lengthy discussion of the history of the Fourteenth Amendment, Justice Kennedy situated the Court's judicial supremacy concerns squarely in the context of the Fourteenth Amendment and state sovereignty:

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. . . . As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. The power to interpret the Constitution in a case or controversy remains in the Judiciary.⁴⁸

45. See *id.* at 516 (quoting statutory language that applies RFRA to federal government); *id.* (singling out RFRA's applications to states as "the most far reaching and substantial of RFRA's provisions"); *id.* at 532 ("RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments.").

46. *Boerne*, 521 U.S. at 535-36 (citation omitted).

47. *Id.* at 536.

48. *Id.* at 523-24 (citation omitted); see also *id.* at 519 ("The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states."); *id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amend-

These passages indicate that *Boerne* did not strike down the Act's federal law applications. The Court's subsequent actions⁴⁹ and scholarly commentary⁵⁰ bear this reading out.

Several federal Courts of Appeals since *Boerne* have held that the Supreme Court did not invalidate RFRA as to federal law,⁵¹ and the Eighth Circuit in *In re Young*⁵² has declared the Act constitutional as

ment's meaning . . . it is difficult to conceive of a principle that would limit congressional power."').

49. After deciding *Boerne*, the Supreme Court vacated and remanded to the Eighth Circuit a case that implicated the constitutionality of RFRA as applied to the Bankruptcy Code. See *In re Young*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997). The Court's decision to remand *Christians* rather than summarily reverse it suggests that RFRA's federal applications survived *Boerne*. See Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right: Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 808 n.77 (1998) [hereinafter Lupu, *Reflections*]. But see Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 718 n.104 (1998) [hereinafter Hamilton, *Landmark*] (suggesting that remand of *Christians* indicated that the holding of *Boerne* applied to RFRA's federal applications). The federal government itself has vigorously asserted the continuing vitality of RFRA's applications to federal law. See Eric J. Rothschild, Opinion & Commentary: *Testing for Freedom*, 149 N.J. L.J. 1064, 1068 (1997).

50. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 959 & n.169 (3d ed. 2000); Berg, *Constitutional Future*, *supra* note 13, at 745-46 (arguing that *Boerne's* comments on separation of powers should be read in conjunction with the Court's emphasis on federalism); Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM. & MARY L. REV. 665, 667-72 (1998) (arguing that separation of powers language in *Boerne* is "a red herring," because holding on judicial supremacy grounds that Congress may not alter constitutional protection of religious liberty would undermine *Boerne's* federalism holding that the states — equally subject to judicial supremacy — may do so); Greenawalt, *Amendment*, *supra* note 16, at 691 ("Flores does not tell us whether Congress can qualify past and future federal legislation by RFRA-like language."); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 745 (1998) [hereinafter Laycock, *Conceptual Gulfs*]; Lupu, *Reflections*, *supra* note 49, at 808 & n.77; Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 162 n.68 (1997) [hereinafter McConnell, *Institutions*]; see also Robin-Vergeer, *supra* note 13, at 677-79 (arguing pre-*Boerne* that RFRA presents federalism but not separation of powers concerns); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 294 n.12 (1996) (same); but see Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 80 n.8 (2000) [hereinafter Gedicks, *Normalized*] ("Language in [*Boerne*] suggests that the Court might view RFRA's limitations on federal government action infirm on separation of powers grounds."); Steven D. Ginsburg & Natalie J. Carlos, *Zoning in Florida Under the Religious Freedom Restoration Acts: What City Officials Should Watch Out for in Defending Their Ordinances Against Freedom of Religion Claims*, 12 ST. THOMAS L. REV. 157, 160-62 (1999) (arguing that *Boerne* struck down RFRA's federal applications as violating the separation of powers); Hamilton, *Landmark*, *supra* note 49, at 718 (arguing that "the vast majority of the *Flores* decision, as a matter of rhetoric and logic, applies as persuasively to federal as to state law; Smolla, *supra* note 23, at 925 n.3 (calling effect of *Boerne* on RFRA's applications to federal law "unclear").

51. See *Kikumura v. Hurley*, 242 F.3d 950, 957-61 (10th Cir. 2001); *Sutton v. Providence St. Joseph Med. Center*, 192 F.3d 826 (9th Cir. 1999); *Caldwell v. Caesar*, No. 98-1857, 2001 U.S. Dist. LEXIS 6914 (D.D.C. May 22, 2001) (holding RFRA valid as to District of Columbia); see also *Magic Valley Evangelical Free Church v. Fitzgerald (In re Hodge)*, 220 B.R. 386 (D. Idaho 1998). One federal appellate court upheld RFRA against constitutional challenges prior to *Boerne*. See *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996).

52. 141 F.3d 854 (8th Cir. 1996).

applied to federal law. *Young* reaffirmed the Eighth Circuit's pre-*Boerne* decision⁵³ that RFRA barred a bankruptcy trustee from recovering tithes debtors had made to their church, even though the tithes met the criteria for avoidable transactions under the Bankruptcy Code.⁵⁴ As to the Act's constitutionality, the court first held that *Boerne* had not decided RFRA's viability as applied to federal law.⁵⁵ The court proceeded to reject the argument that RFRA violated the separation of powers, holding that Congress in RFRA had properly amended federal law pursuant to its Article I, section 8 powers.⁵⁶ Finally, the court rejected a facial argument that RFRA violated the Establishment Clause, holding that the Act had the requisite secular purpose and effect to avoid invalidation under the Supreme Court's *Lemon*⁵⁷ test.⁵⁸

Most federal courts confronted with RFRA claims simply have assumed the Act remains valid as to federal law.⁵⁹ On the other hand,

53. See *In re Young*, 141 F.3d 854 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997).

54. See *In re Young*, 141 F.3d at 857. Following the decision in *Young*, Congress amended the Bankruptcy Code to exempt tithes up to fifteen percent of a debtor's gross income from being treated as avoidable transactions, unless the debtor actually intended to defraud creditors. See 11 U.S.C. § 548(a)(2)(A) (Supp. IV 1998). See generally Julianne Belaga, Note, *Now You See It, Now You Don't: The Impact of RFRA's Invalidation on Religious Tithes in Bankruptcy*, 14 BANKR. DEV. J. 343, 353-54 (1998) (describing how courts have applied RFRA to permit debtors' tithes to their churches to supersede fraudulent conveyance law).

55. See *In re Young*, 141 F.3d at 858; see also *Kikumura*, 242 F.3d at 958-59; *Sutton*, 192 F.3d at 831-33.

56. See *In re Young*, 141 F.3d at 859-61. Senior District Judge Bogue dissented in *Young* based on his view that RFRA "attempts to impose upon the judiciary, a standard of review for interpreting constitutional rights which it believes is a better standard than that crafted by the Court itself." *Id.* at 864 (Bogue, J., dissenting). The majority did not analyze this argument, an aspect of what I call the structural objection to RFRA, which I discuss *infra* Section II.C. The majority also did not confront any argument that RFRA improperly countermanded the *Smith* Court's judgment that courts lack institutional competence to apply strict scrutiny. I consider such institutional competence-based objections to RFRA *infra* Section II.D. For criticism of the Eighth Circuit's separation of powers analysis, see Michael K. Sabers, Note, *Well, It Depends on What Your Definition of "Unconstitutional" Is: The Eighth Circuit's Misinterpretation of Flores in Christians v. Crystal Evangelical Free Church*, 44 S.D. L. REV. 432 (1999).

57. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). For a description of the *Lemon* test, see *infra* notes 275-277 and accompanying text.

58. See *In re Young*, 141 F.3d at 861-63. The Eighth Circuit did not consider the possibility that RFRA violated the Establishment Clause as applied. I maintain that *Young* was incorrectly decided because the result in that case violated the Establishment Clause. See *infra* notes 386-388 and accompanying text; see also Arnold H. Loewy, *Rethinking Free Exercise of Religion After Smith and Boerne: Charting a Middle Course*, 68 MISS. L.J. 105, 153-55 (1998) (contending that the claim in *Young* clashed with the Establishment Clause); Caitlin Garvey, Note, *Through Amos-Colored Glass: The Eighth Circuit Fails to See the RFRA's Real Meaning in Young v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998), 24 DAYTON L. REV. 491 (1999) (criticizing Eighth Circuit's Establishment Clause analysis).

59. See generally cases cited *infra* notes 267-268.

several federal courts have held or assumed, usually with little analysis, that RFRA is invalid as applied to the federal government.⁶⁰

II. RFRA, LEGISLATIVE PRECOMMITMENT, AND THE SEPARATION OF POWERS

Federal RFRA makes heightened protection for religious freedom the default position in the application of all present and future federal legislation. In creating this default, Congress did not draw on constitutional authority or affect the constitutional structure of government in any way. Rather, Congress simply relinquished a measure of its own authority to the people in order to advance religious freedom.⁶¹ The discussion that follows will begin by explaining the precommitment

60. See *La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313, 319 (6th Cir. 2000) (expressing "doubt" that RFRA is constitutional as applied to federal law); *Carpa v. Smith*, No. CIV96-1435, 1998 U.S. Dist. LEXIS 11625 *14 (D. Ariz. July 20, 1998) (dismissing claims against federal employees on ground that *Boerne* invalidated RFRA); *Waguespack v. Rodriguez*, 220 B.R. 31, 36-37 (W.D. La. 1998) (holding that *Boerne* declared RFRA unconstitutional in its entirety); *In re Andrade*, 213 B.R. 765, 772 (Bankr. E.D. Cal. 1997) (holding that *Boerne* declared RFRA unconstitutional in its entirety); *In re Gates Comm. Chapel*, 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997) (same); *In re Saunders*, 215 B.R. 800, 803-06 (Bankr. D. Mass. 1997) (holding that application of RFRA in bankruptcy cases violates the Establishment and Free Exercise Clauses); *Saleem v. Helman*, No. 96-2502, 1997 U.S. App. LEXIS 22572 *4 (7th Cir. Aug. 21, 1997) (same), *cert. denied*, 522 U.S. 1096 (1998); *Monet v. United States*, No. 97-00281 DAE, 1997 U.S. Dist. LEXIS 15269 *5-*6 (D. Haw. Sept. 15, 1997) (same); *Patel v. United States*, No. 97-1083, 1997 U.S. App. LEXIS 34067 *5 (10th Cir. Dec. 4, 1997) (dismissing federal prisoner's RFRA claim on ground that *Boerne* invalidated RFRA); *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591, 595-600 (D. Md. 1996) (holding, prior to *Boerne*, that RFRA violated separation of powers).

61. See 1 *TRIBE*, *supra* note 50, § 5-16 at 959 ("Congress certainly may choose to exercise less than all of its legislative power"); Berg, *Constitutional Future*, *supra* note 13, at 729 ("[T]he application of RFRA to federal law does not expand congressional power, but makes it possible for Congress to limit its own power, its own laws, so as not to infringe on religious freedom . . ."); Robert A. Destro, "By What Right?": *The Sources and Limits of Federal Court and Congressional Jurisdiction over Matters "Touching Religion"*, 29 *IND. L. REV.* 1, 91 (1995) ("As long as congressional action does not amount to a law 'respecting an establishment of religion,' it is for Congress to define how solicitous of religious freedom the executive branch shall be as it goes about the task of seeing that the laws 'be faithfully executed.'"); Laycock, *Ratchet*, *supra* note 13, at 156 ("Congress can restrain the federal agencies if it wants, and that is what it has done [in RFRA]."); Loewy, *supra* note 58, at 153 n.215 ("Separation of powers . . . does not preclude the Congress from voluntarily limiting the reach of its own statutes."); see also William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 *STAN. L. REV.* 603, 603 (1975) ("Congress can limit the exercise of federal governmental power, creating individual rights that the courts have declared not to be compelled by the Constitution.").

The authority of which Congress relinquished a part subsumes the authority of instrumentalities over which the Constitution gives Congress plenary power. See U.S. CONST. art. I, § 8, cl. 17 (empowering Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States"); U.S. CONST. art. IV, § 3, cl. 2 (giving Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). These grants of plenary authority ensure that no constitutional issue akin to the federalism concerns aired in *Boerne* arises from RFRA's application to the District of Columbia or to the Territories.

methodology of Federal RFRA. With that explanation in place, Federal RFRA transcends the numerous separation of powers objections that have been lodged against it. First, Congress did not need any source of constitutional authority to restrain the effect of its own enactments on religious freedom. Second, congressional precommitment to heightened religious freedom does not force courts to accept or apply a congressional interpretation of the Constitution and thus does not undercut judicial authority. Finally, the Court may not refuse to effectuate Federal RFRA on the belief that the Act forces courts to analyze cases in a manner outside the institutional competence of the judiciary.

A. *RFRA as a Legislative Precommitment to Protect Religious Freedom*

A “precommitment” is a binding constraint that forecloses the possibility of future impulsive behavior.⁶² Jon Elster defines a decision as a precommitment when its effect is to trigger an extrinsic causal process that makes the undesired later behavior less likely than it would be without the precommitment.⁶³ The paradigm of a precommitment is the frequently recounted story of Ulysses’ command to his crew to bind him to the mast of his ship to avoid being drawn overboard by the songs of the sirens.⁶⁴ In the same way Ulysses predicted he would need outside intervention to prevent him from succumbing to the sirens, a governmental precommitment can entrench a long-term policy decision reached during a time of perceived rational deliberation, in preparation for the future danger that short-term interests might overwhelm the long-term goal.⁶⁵

62. See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: an Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123 (1993); see also Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985) (defining a system for setting up anticipatory self-commands).

63. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36-47 (1979). Professor Elster lists five specific criteria for precommitment. First, the precommitment must “bind oneself . . . to carry out a certain decision at time t1 in order to increase the probability that one will carry out another decision at time t2.” Second, “[i]f the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one.” Third, “[t]he effect of carrying out the decision at t1 must be to set up some causal process in the external world.” Fourth, “[t]he resistance against carrying out the decision in t1 must be smaller than the resistance that would have opposed the carrying out of the decision at t2 had the decision at t1 not intervened.” Finally, “[t]he act of binding oneself must be an act of commission, not of omission.” *Id.* at 39-46.

64. See *id.* at 36-37; see also Boudreaux & Pritchard, *supra* note 62, at 123; Jeremy Waldron, *Banking Constitutional Rights: Who Controls Withdrawals?*, 52 ARK. L. REV. 533, 539-41 (1999).

65. For a discussion of the potential utility of precommitment strategies by candidates or voters as means to enhance leverage in the electoral process, see Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996).

As a methodology for protecting high-priority societal values, precommitment has several advantages. First, by definition, precommitment increases the likelihood that a normative preference expressed at *t*1 will be honored at *t*2. Second, precommitment reduces the unpredictability and instability of legal rules and regimes, because it gives the people some assurance that the entrenched policy goal will survive some measure of variation in other governing priorities.⁶⁶ Third, precommitment decreases the costs of legislative decisionmaking by answering in one motion a question that might recur in a variety of societal controversies.⁶⁷ Of course, the precommitment methodology has precisely countervailing disadvantages. First, again by definition, it increases “dead hand” control over future decisions, binding future generations of governors and governed to an increasingly distant past. Second, the importance of the entrenched policy goal may be difficult to balance against unpredictable future priorities.⁶⁸ Third, precommitment decreases the extent to which decisionmakers debate and consider the consequences of the entrenched decision in the variety of circumstances it will affect over time, many of which are unpredictable at the time of precommitment.⁶⁹

Jeremy Waldron has suggested a distinction between two varieties of precommitment that helps place the advantages and disadvantages of the methodology into perspective. In what may be called a *strong*

66. Boudreaux & Pritchard, *supra* note 62, at 126. Even an unenforceable legislative precommitment might provide this advantage through its persuasive force. See Akhil Reed Amar, *Presidents, Vice-Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 227 (1995) (suggesting general legislation that set rules for presidential succession in contingencies for which Constitution does not provide would “serve as a precommitment and focal point” and that “deviation from this clear focal point will obviously smack of changing the rules in the middle of the game — indeed, after the game has ended”).

67. Discussing constitutionalism as a limit on majoritarian decisionmaking, Cass Sunstein observes that

the decision to take certain questions off the political agenda might be understood as a means not of disabling but of protecting politics, by reducing the power of highly controversial questions to create factionalism, instability, impulsiveness, chaos, stalemate, collective action problems, myopia, strategic behavior, or hostilities so serious and fundamental as to endanger the governmental process itself.

Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 642 (1991); see also Boudreaux & Pritchard, *supra* note 62, at 126 (“[S]tabilizing governance rules encourages investment and avoids the deadweight losses that accrue from continual attempts to manipulate the decision-making rules.”).

68. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 504-07 (1997) (noting absence of readily available normative baseline to indicate how much present interests should weigh against future interests); Waldron, *supra* note 64, at 550-51 (describing constitutional precommitment as “the artificially sustained ascendancy of one view in the polity over other views whilst the complex issues between them remain unresolved”).

69. This disadvantage gives rise to concerns about the due process of lawmaking. See *infra* notes 115-124 and accompanying text.

precommitment, the decisionmaker renders the constraint on its future behavior inexorable. This form of precommitment provides the maximum assurance of constraint while also assuring that the effects of the precommitment will flow completely from the decisionmaker's autonomous will.⁷⁰ Strong precommitment, with its concentration of control in the decisionmaker and its inexorable consequences, maximizes both the advantages and the countervailing disadvantages of precommitment. In contrast, what may be called a *third-party precommitment* gives a trusted extrinsic actor responsibility for assuring the behavioral constraint.⁷¹ A third-party precommitment provides a less certain assurance of behavioral constraint, because the third party may weaken the constraint, and the effects of the precommitment will reflect inputs other than the original decisionmaker's autonomous will.⁷² Professor Waldron characterizes the Constitution as this latter variety of precommitment, because the Framers depended on courts to interpret and effectuate the constraints they placed on the government's behavior.⁷³

Precommitment is most familiar as a constitutional methodology.⁷⁴ Federal RFRA is a relatively unusual example of legislative precommitment. The Act precommits the federal government to a heightened degree of solicitude for religious freedom by providing that courts in religious freedom cases shall allow any present or future federal law or rule to interfere with religious exercise only where the challenged federal action satisfies strict scrutiny. In recent years, the closest parallel to Federal RFRA's legislative methodology has been the federal Line Item Veto Act.⁷⁵ That statute, which precommitted the federal gov-

70. See Waldron, *supra* note 64, at 553 (discussing ELSTER, *supra* note 63, at 42).

71. Professor Waldron's example of this sort of precommitment is "the drinker giving his car keys to a friend at the beginning of a party with strict instructions not to return them when they are requested at midnight." Waldron, *supra* note 64, at 553.

72. See *id.* at 554-55.

73. Because the Constitution requires judicial application, Professor Waldron rejects the precommitment model as an explanation for how constitutional judicial review can be consistent with democratic self-government, even by a "People" defined as retaining its identity across generations. See *id.* at 555-59.

74. See Boudreaux & Pritchard, *supra* note 62, at 124-26; Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 353 (1990-91); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 655 (2000) (discussing benefits of constitutional precommitment); Klarman, *supra* note 68, at 496-97 (discussing objections to constitutional precommitment); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992) (discussing precommitment and constitutional amendments); Levmore, *supra* note 65, at 593-94 (discussing case law relating to constitutional precommitment politics); Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105 (1998) (discussing idea of constitutional precommitment to balanced budget); Sunstein, *supra* note 67, at 639; Waldron, *supra* note 64.

75. 2 U.S.C. § 691-691d (Supp. II 1996).

ernment to perceived fiscal prudence by authorizing the president to cancel certain specified types of spending enactments subject to congressional disapproval, was struck down because it empowered the president to encroach on the Article I legislative power.⁷⁶ Legislative precommitments such as Federal RFRA and the line-item veto use procedural approaches to effectuate substantive policy choices over a range of cases.⁷⁷

Closer analysis, however, reveals an important difference between the line-item veto and Federal RFRA. The line-item veto entrenched a policy of cutting federal spending in appropriate cases by a single precommitment to oversight of budgetary decisions, enforced by the president. Federal RFRA, in contrast, includes two distinct levels of precommitment. At the first level, Federal RFRA binds Congress to heightened judicial scrutiny of religious freedom claims against the government in particular cases. This is a third-party precommitment because it depends on a presumptively trustworthy third party — courts — to effectuate the policy choice. At that first level, Federal RFRA is only marginally unusual. Every statute depends on some combination of courts and executive officials for effectuation, interpretation, and enforcement.⁷⁸ Federal RFRA's first-level precommitment is distinct from other statutes, and similar to the line-item veto, only because it governs an unusually broad range of as-yet unspecified circumstances.⁷⁹

At the second level, however, Federal RFRA binds Congress to include heightened protection for religious freedom as a component of all present and future legislation. Congress has denied itself the option of legislating burdens on religious exercise unless it can overcome the extrinsic political inertia imposed by RFRA (distinct from the intrinsic

76. See *Clinton v. New York*, 524 U.S. 417 (1998).

77. See Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807, 828 (1996) (identifying line-item veto and single-subject rule as legislative procedural precommitments); see also David Currie, *RFRA*, 39 WM. & MARY L. REV. 637, 643 (1998) (comparing RFRA and the Line Item Veto Act as instances where "Congress . . . has . . . succumbed to the temptation to respond to perceived defects in the Constitution, or in the Courts understanding of it, by enacting simple legislation").

78. RFRA is hardly unique in "overprotecting" constitutionally inscribed rights, including the right to free exercise of religion, against federal encroachment. For example, after the Court held in *Goldman v. Weinberger*, 475 U.S. 503 (1986), that the Free Exercise Clause did not obligate the military to permit the wearing of religious headgear, Congress imposed such an obligation by statute. See 10 U.S.C. § 774 (1987). Similarly, Congress responded to *Smith* by amending the American Indian Religious Freedom Act to protect Native Americans' sacramental use of peyote against federal and state discrimination. See 42 U.S.C. § 1996a(b)(1) (1994).

79. Federal RFRA's third-party precommitment feature, like the line-item veto, is formally subject to challenge on the ground that the legislative directive to the third party requires some unconstitutional action. In the case of Federal RFRA, however, the challenge is unavailing. See *infra* Section III.D (discussing institutional competence objection to Federal RFRA).

political inertia that Congress must overcome whenever it seeks to amend or pass a law). This is a strong precommitment because the entrenched substantive policy choice is secured not by a congressional instruction to courts or the Executive Branch but by the political inertia that affects Congress itself — the fact that Congress has to muster exceptional political will to alter it.⁸⁰ Federal RFRA is distinctive in placing this self-executing political constraint on the entire output of the legislative process.⁸¹

Federal RFRA's strong precommitment to require heightened protection for religious exercise makes it a distinctly potent statute. The Act, however, does not exactly lash Ulysses to the mast. Congress has two ways around Federal RFRA — repeal of the Act itself or exemption of a particular action from the Act's effects — either of which it can achieve by a simple majority vote. Thus, Federal RFRA is far easier to abrogate than a constitutional provision. The Act's strong precommitment places the firmest constitutionally permissible limit on legislative discretion by creating a default preference for protecting religious freedom. However, the constitutional rule that Congress may not bind future congresses,⁸² and the attendant unavailability of a stronger security mechanism akin to the Article V procedure for constitutional amendment, ensure that legislative discretion remains broad. Although Federal RFRA's legislative methodology is novel,

80. See Volokh, *Common-Law Model*, *supra* note 12, at 1481-82 (describing decrease under RFRA's of legislative burden faced by advocates of any given religious accommodation). The vastly more formidable constitutional analog is the amendment procedure, which requires Congress and/or state legislatures to muster supermajority support. See U.S. CONST. art. V.

81. The closest analogy to Federal RFRA's strong precommitment feature is public property, such as federal parkland, public waterways, or the Social Security trust fund, that the government holds in trust. The trust can be viewed as a politically secured promise or precommitment to future generations that the government will maintain and protect the property despite competing priorities that may arise in the future. See, e.g., William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461 (1996) (discussing importance of preserving the financial trust funds for Social Security and Medicare); Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623 (1998) (discussing definition of a public trust regarding waterfront land).

82. See, e.g., Amar, *supra* note 66, at 227; John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 505-06 (1995) (noting Blackstone's principle and Constitutional indications that one legislature may not bind a future legislature). Some have argued that contract law may provide exceptions to this rule. See Daniel S. Goldberg, *Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar Corp. on Retroactive Tax Legislation*, 14 AM. J. TAX POL'Y 1 (1997) (discussing implications of *Winstar* case for legislative precommitment through government contracts); Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1183 (1996) (suggesting use of contract law to force government to provide previously promised tax subsidies).

nothing about that methodology steps outside any boundary the Constitution draws for Congress.⁸³

The balance of this Part will proceed from this precommitment analysis to explain why the various separation of powers objections to Federal RFRA should be dismissed. The disadvantages of precommitment — dead hand control, the indeterminate importance of the entrenched policy goal, and decreased debate about applications — remain in the background. Nothing in the Constitution forbids legislative precommitment on any of these grounds, and the relative ease with which Congress can sidestep the strong precommitment in Federal RFRA ameliorates all of them. The problems of the precommitment methodology, however, underscore the danger that a statute like Federal RFRA might encroach on constitutionally protected rights in particular circumstances. Strategies for dealing with that danger will be the subject of Part III.

B. *No Power Required: Federal RFRA and the Enumerated Powers Doctrine*

The most fundamental separation of powers objection to Federal RFRA, advanced vigorously by both Eugene Gressman⁸⁴ and Marci Hamilton,⁸⁵ is that no provision of the Constitution gives Congress authority to enact RFRA and apply it to federal law.⁸⁶ The enumer-

83. Laurence Tribe suggests Federal RFRA might violate the Constitution to the extent it "add[s] to art. I's requirements for the enactment of legislation by a subsequent Congress." 1 TRIBE, *supra* note 50, § 5-16 at 959 n.169. He concludes, however, that the only consequence of such a violation would be that any future federal statute whose plain meaning connoted exemption from RFRA would have to be deemed to include such an exemption. *See id.* Thus, the effect on Federal RFRA's strong precommitment feature would be marginal. In a different vein, Ira Lupu suggests Federal RFRA's presumption in favor of heightened statutory protection for religious freedom raises constitutional concerns because subsequent legislative adjustments to the reach of the statutory protection might favor particular sects. *See* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 584-86 (1999) [hereinafter Lupu, *Codification*]. That objection proves too much. All statutes are subject to amendment, and any statutory scheme of benefits carries a risk that subsequent amendments may allocate its benefits in violation of constitutional nondiscrimination norms. Courts must deal with any such violations as they arise. *See infra* Part III.

84. *See* Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 NEXUS 73, 81-84 (Fall 1997) [hereinafter Gressman, *Downfall*]; Gressman, *Comedy*, *supra* note 3; Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 119-38 (1996).

85. *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) [hereinafter Hamilton, *Section 5*]; Hamilton, *Unconstitutional*, *supra* note 14, at 14-19; Hamilton, *Landmark*, *supra* note 49, at 718-22.

86. For additional statements of the enumerated powers objection to RFRA, see Aurora R. Bearse, Note, *RFRA: Is It Necessary? Is It Proper?*, 50 RUTGERS L. REV. 1045, 1060-66 (1998) (questioning Congress's power to enact federal component of RFRA); J. Jeffrey Patterson, Note, *The Long Road Towards Restoration of Religious Freedom: Con-*

ated powers objection proceeds from the premise that RFRA has the coercive effect of "enforc[ing] the Free Exercise Clause . . . when endangered by action of the federal government,"⁸⁷ just as, prior to *Boerne*, the Act enforced the incorporated Free Exercise Clause against state and local governments. This premise, in turn, draws on the *Boerne* Court's statement that RFRA "at every level of government" has the effect of "displacing laws and prohibiting official actions of almost every description and regardless of subject matter."⁸⁸ The enumerated powers critics posit that, if Congress is to impose its will on the federal government through RFRA, it requires some source of constitutional authority.

As Professor Hamilton points out, Congress could not have enacted RFRA as to the federal government pursuant to Section 5 of the Fourteenth Amendment because that provision only authorizes legislation affecting the states.⁸⁹ No other constitutional provision, including the First Amendment, gives Congress authority to enforce constitutional guarantees against the federal government in the manner that Section 5 authorizes such enforcement against the states.⁹⁰ The subject matter of the Act does not fall within any of the congressional powers enumerated in Article I.⁹¹ The enumerated powers critics also reject the suggestion that Congress applied RFRA to the federal government pursuant to the Necessary and Proper Clause of Article I, section 8.⁹² RFRA might be necessary and proper to effectuate either (1) the religious freedom guarantee of the First Amendment or (2) all the federal statutes passed pursuant to Congress's enumerated powers. Professor Hamilton and Professor Gressman both dismiss the first formulation on the view that Congress lacks power to enforce consti-

gressional Options in Light of *City of Boerne v. Flores*, 87 KY. L.J. 253, 264-71 (1998-99) (expressing doubt about possibility of using any Art. I, § 8 power to restore RFRA's applications to state and local law). For responses to this objection, see Berg, *Constitutional Future*, *supra* note 13, at 730-38 (arguing against enumerated powers critique); Lupu, *Lawyer's Guide*, *supra* note 25, at 213 (dismissing enumerated powers critique); Ira C. Lupu, *The Failure of RFRA*, 20 ARK.-LITTLE ROCK L.J. 575, 578 (1998) [hereinafter Lupu, *Failure*] (same); Paulsen, *supra* note 13, at 253 (same).

87. Gressman, *Downfall*, *supra* note 84, at 81.

88. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (quoted in Gressman, *Downfall*, *supra* note 84, at 77; Hamilton, *Unconstitutional*, *supra* note 14, at 7).

89. See Hamilton, *Section 5*, *supra* note 85, at 370-78; Hamilton, *Unconstitutional*, *supra* note 14, at 15.

90. Hamilton, *Section 5*, *supra* note 85, at 362-63; Hamilton, *Unconstitutional*, *supra* note 14, at 14; see also Gressman, *Downfall*, *supra* note 84, at 81.

91. See U.S. CONST. art. I, § 8.

92. U.S. CONST. art. I, § 8, cl. 18. The most substantial hint RFRA's legislative history offers as to the constitutional grounding of the Act's federal applications relies on the Necessary and Proper Clause. See H.R. REP. NO. 103-88, at 9 (1993) (declaring congressional authority to enact RFRA to provide statutory protection for a constitutional value pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause).

tutional rights against the federal government.⁹³ As for the second formulation, both maintain that Federal RFRA fails the standards Chief Justice Marshall in *McCulloch v. Maryland*⁹⁴ set for necessary and proper legislation⁹⁵ because the Act lacks a legitimate purpose and does not actually pertain to any action taken by Congress pursuant to one of its enumerated powers.⁹⁶

The fundamental problem with the enumerated powers objection lies in its premise that Congress needed to draw on any constitutional authorization at all in order to apply RFRA to the federal government. Federal RFRA's precommitment to minimize the federal government's encroachments on religious freedom is simply a method of enforcing voluntary self-restraint. If the population consists of three groups — A, B, and C — and Congress passes a statute whose text states that it applies to groups A and B, Congress has not exercised power by exempting group C. The same result follows if Congress affirmatively states that the statute shall not apply to group C. Nothing about this analysis changes if courts that apply the statute necessarily must ensure that the statute is not applied against members of group C. Neither Professor Gressman nor Professor Hamilton can identify any previous instance when a federal statute that merely withdrew federal regulatory authority has been struck down, or even challenged, for exceeding Congress's enumerated powers.⁹⁷ RFRA, as applied to

93. See Gressman, *Downfall*, *supra* note 84, at 81 & n.52; Hamilton, *Landmark*, *supra* note 49, at 720; Hamilton, *Section 5*, *supra* note 85, at 365; Hamilton, *Unconstitutional*, *supra* note 14, at 14-15; see also Blatnik, *supra* note 14, at 1427-29.

94. 17 U.S. (4 Wheat.) 316 (1819).

95. "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. at 421.

96. See Gressman, *Downfall*, *supra* note 84, at 81-84; Gressman, *Comedy*, *supra* note 3, at 519-25, 527-29; Gressman & Carmella, *supra* note 84, at 133-34, 137-38; Hamilton, *Landmark*, *supra* note 49, at 718-20; Hamilton, *Unconstitutional*, *supra* note 14, at 18-19. But see McConnell, *Institutions*, *supra* note 50, at 162 n.68 (arguing that Necessary and Proper Clause authorizes RFRA's applications to federal law); Robin-Vergeer, *supra* note 13, at 677-78 & n.358 (same). Professor Gressman's articulation of the "necessary and proper" argument suggests the objection is circular. As part of his argument that RFRA lacks any constitutional authorization, he asserts that RFRA lacks a constitutionally legitimate end, in violation of the first *McCulloch* principle. His reason for concluding RFRA has no constitutionally legitimate end is that "[b]oth the language of RFRA and the expressed intent of its framers loudly proclaim that the purposes of the statute are to restore the pre-*Smith* free exercise jurisprudence and to create an expanded version of the Free Exercise Clause . . ." Gressman, *Downfall*, *supra* note 84, at 82; see also Gressman & Carmella, *supra* note 84, at 133-34. Those purposes are not legitimate because they are "saturated. . . with separation of powers problems." Gressman, *Downfall*, *supra* note 84, at 82; see also Gressman & Carmella, *supra* note 84, at 134-36. This boils down to an argument that RFRA lacks constitutional authorization because RFRA lacks constitutional authorization.

97. Professor Gressman argues, by analogy to the Section 5 context, that "the Necessary and Proper Clause, by its own terms and purposes, imposes limitations on Congress's authority to regulate its own instrumentalities and on limiting the reach of its own stat-

the federal government, disadvantages no one but the federal government.⁹⁸ Congress needed a proper source of constitutional authority to apply RFRA to the states, because that application precommitted not Congress itself but independent sovereigns to cede some measure of power. When it ceded a measure of its own authority to the People, Congress renounced power rather than exercising it.⁹⁹

Defenders of RFRA's federal applications generally have argued or presumed that Congress had power to apply RFRA to the federal government commensurate with the various instances of Article I, section 8 authority it employed and will employ to enact all the affected legislation in the first instance.¹⁰⁰ On this view, Federal RFRA is a sort

utes . . . if, in so doing, Congress violates the separation of powers." Gressman, *Comedy, supra* note 3, at 534 n.103 (internal quotation marks and citations omitted). My argument is that, because Congress exercises no power when it does nothing more than "limit[] the reach of its own statutes," it cannot possibly violate the separation of powers.

98. My conclusion that Federal RFRA need not partake of any constitutional grant of power to Congress necessarily rests on the premise that the Act's federal applications do not violate any other provision of the Constitution. If Federal RFRA encroached on judicial authority in some other way, or if it abridged any rights-bearing provision of the Constitution (i.e., the Establishment Clause), then the Act's federal law applications would represent an exercise of constitutional power, just as the applications of RFRA struck down in *Boerne* represented an exercise of power over state and local governments. I contend *infra* Part III that the Court properly may construe Federal RFRA as avoiding Establishment Clause violations.

99. Two provisions of RFRA might appear to require exercises of power. First, the Act provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1. As to RFRA's state law applications this provision certainly required constitutional authorization, because Congress exposed states to a new cause of action just as it imposed new obligations on them. As to RFRA's federal law applications, however, the provision is essentially surplusage. RFRA simply withdraws federal regulatory authority in certain cases. Claiming a RFRA exemption from regulation is no different from claiming exemption because a statute provides a discrete safe harbor or because a statute simply does not reach a given person or situation. Second, RFRA's stated application to federal law "unless such law explicitly excludes such application by reference to this [Act]," 42 U.S.C. § 2000bb-3(b), might be characterized as empowering Congress to regulate behavior if it chooses to abrogate RFRA's protection. Such an abrogation would involve an exercise of power, but not any power created by RFRA. Rather, any abrogation of RFRA in a future statute simply will define part of that statute's coverage pursuant to whatever enumerated power authorizes the statute.

100. See *In re Young*, 141 F.3d at 860 (invoking Art. I, § 8 bankruptcy power to justify application of RFRA in bankruptcy case); Berg, *Constitutional Future, supra* note 13, at 731-33; William G. Buss, *Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 412-13 (1998); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1625 n.401 (1995) (suggesting that Necessary and Proper Clause, in conjunction with Art. I, § 8 powers, authorizes Federal RFRA); Greenawalt, *Amendment, supra* note 16, at 695 ("Congress does not need any independent constitutional base to excuse people from conformity with ordinary federal standards"); Laycock, *Conceptual Gulfs, supra* note 50, at 745 ("RFRA's application to federal law . . . is based on Congress's Article I powers. . ."); Laycock & Thomas, *supra* note 30, at 211 (describing Federal RFRA as "both a rule of interpretation for future federal legislation and an exercise of general legislative supervision over federal agencies"); Lupu, *Lawyer's Guide, supra* note 25, at 213 ("With respect to [federal applications of RFRA], Congress presumably has affirmative power to

of “super-amendment” to the entire U.S. Code, and the source of constitutional authority for Federal RFRA varies with each application of the Act, tracking the sources of authority underlying each affected statute. For Thomas Berg,

[Congress in RFRA] is respecting the limits placed on it by the First Amendment, by amending its own laws to conform to its own conscientious understanding of what the free exercise of religion requires. Congress has the power to amend its own laws in this way because it had power to enact the laws in the first place.¹⁰¹

The “no power” explanation of Federal RFRA has rhetorical advantages over the “super-amendment” explanation. First, it is truer to the idea that the government has limited power over the sovereign people than is any account that equates exemption from regulation with an exercise of power. When Congress amends a duly enacted statute to exempt some class of persons or situations from the statute’s reach, the enhanced freedom of the newly exempt class is not a product of congressional power. Rather, their freedom predated congressional power, and Congress simply has revoked a prior decision to limit it in a manner authorized by the Constitution.¹⁰² Second, the “no power” explanation deflates a key premise of the enumerated powers objection: that a “wholesale” statute like RFRA differs in kind from an amendment that restrains congressional authority in a single statute.¹⁰³ The “no power” explanation makes clear that Congress, whether revoking a measure of its own authority in one statute or in ten thousand, is not exercising power at all.¹⁰⁴

Three objections advanced against the “super amendment” explanation of congressional power also might have relevance for the “no power” explanation. First, the enumerated powers critics posit that

protect religious freedom; whatever power authorizes the underlying legislation will support an accommodation of religious liberty as part of the legislative scheme.”); Paulsen, *supra* note 13, at 253 (“Congress possesses the same power to pass RFRA, as RFRA concerns federal statutes, as it had to pass those other federal statutes in the first place.”); Robin-Vergeer, *supra* note 13, at 677 n.358; *see also* Blatnik, *supra* note 14, at 1436-42 (suggesting that Congress would have to rely on all its enumerated powers as authority for RFRA’s federal applications); Eisgruber & Sager, *After Boerne*, *supra* note 36, at 131 (same).

101. Berg, *Constitutional Future*, *supra* note 13, at 731.

102. *See* U.S. CONST., amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 106 (1960) (“We are not . . . a subject people begging or fighting for such limited privileges and powers as may be grudgingly granted to us by a sovereign legislature. We are the sovereign and the legislature is our agent.”).

103. *See infra* notes 114-123 and accompanying text (discussing legislative process objection to Federal RFRA).

104. For the same reason, the “no power” explanation obviates Professor Hamilton’s complaint that “RFRA poses a new phenomenon. . . . requiring even further expansion of the enumerated powers’ boundaries: a statute that reveals its enumerated powers basis only upon application in each particular case.” Hamilton, *Section 5*, *supra* note 85, at 366.

RFRA does not amend substantive law at all, but rather impermissibly imposes on courts a standard of review for constitutional free exercise claims: "RFRA creates no new substantive religious rights, privileges or entitlements. Nor does it add to or supplement any such rights. . . . The statute confers the right to have one's free exercise claim adjudicated under a balancing approach."¹⁰⁵ The problem with this objection is that the distinction between an amendment to a law and the direction of a judicial standard is very elusive. Virtually any statute that creates legal rights can be characterized as implicitly or explicitly directing courts to enforce or apply a legal standard. Indeed, the Supreme Court has construed even a statute that directed outcomes in specific pending litigation as amending substantive law.¹⁰⁶

Second, Professor Hamilton argues that Federal RFRA makes an end run around the Article V procedure for amending the Constitution.¹⁰⁷ "As applied to federal law," she argues, RFRA "is a constitutional amendment. It permits Congress to act on First Amendment freedoms without the constitutional restraints crafted by the Framers in the enumerated powers requirement."¹⁰⁸ This notion that RFRA amounts to a back-door constitutional amendment fails to take account of how constitutional amendments differ from statutes. The defining characteristic of a constitutional amendment is that it alters the supreme law of the land by changing the Constitution.¹⁰⁹ As others have noted, Federal RFRA is only a statute, and it occupies the same, inferior position to the Constitution that every other federal statute occupies.¹¹⁰ Federal RFRA resembles a constitutional provision only

105. Gressman & Carmella, *supra* note 84, at 107-08; *see also* Dolan, *supra* note 12, at 166-67 (suggesting that legislatures may not "alter the judiciary's standard of review for a previously existing constitutional claim"); Hamilton, *Section 5*, *supra* note 85, at 364 ("RFRA is a bare standard of review yoked to no particular substantive policy arena within which Congress is constitutionally empowered to act."); Hamilton, *Unconstitutional*, *supra* note 14, at 3-4. This assertion resembles the argument that RFRA violates the separation of powers by directing outcomes in particular cases. *See infra* Section II.C.2.

106. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437 (1992) (holding that challenged statute compelled changes in the law because, in operation, it merely modified the existing law by adding two new provisions under which a claim could fail).

107. U.S. CONST. art. V.; *see* Hamilton, *Rhetoric*, *supra* note 23, at 629 (characterizing RFRA as "an amendment to the Constitution without the involvement of the people, a stealth amendment, if you will"); Hamilton, *Landmark*, *supra* note 49, at 721-22; Hamilton, *Section 5*, *supra* note 85, at 386; Blatnik, *supra* note 14, at 1443-60.

108. Hamilton, *Section 5*, *supra* note 85, at 386 (footnote omitted).

109. Thus, for example, pre-existing provisions of the Constitution must be read in light of the amendment. *See, e.g.,* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (affirming congressional authority to abrogate states' Eleventh Amendment immunity when legislating pursuant to the later-enacted Fourteenth Amendment); *United States v. Chambers*, 291 U.S. 217, 222 (1934) (noting that the Eighteenth Amendment immediately became inoperative upon ratification of Twenty-First Amendment).

110. *See* Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 446-48 (1999) [hereinafter Berg, *New Attacks*] (arguing that RFRA's create new statutory rights rather than directing outcomes of constitu-

in that its methodology of precommitment to protect minority interests is more characteristic of constitutions than of statutes.¹¹¹ Unlike in the case of a constitutional provision, the Court may use its judicial review power to strike down Federal RFRA to whatever extent it finds the Act to violate any substantive constitutional provision,¹¹² and Congress may revoke or amend the Act through legislation.¹¹³

tional cases); Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 605-06 (1998) [hereinafter Chemerinsky, *Constitutional Expansion*] ("the Court's interpretive judgment that a particular right is not constitutionally protected is in no way incompatible with a legislature's statutory recognition and safeguarding of the liberty"); Laycock & Thomas, *supra* note 30, at 243 ("RFRA creates a statutory cause of action — nothing more."); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2543 (1998) (characterizing RFRA "as a statute, pure and simple . . . not as a constitutional imposition masquerading as a legislative enactment"); Robin-Vergeer, *supra* note 13, at 614 ("[T]he First Amendment guarantee of free exercise is enduring, while RFRA, a mere statute, is subject to repeal or amendment . . ."); Volokh, *Common-Law Model*, *supra* note 12, at 1474 ("state RFRAs, being state statutes, can be modified by the legislatures that enacted them").

With respect to RFRA's applications to state law, it is possible to argue that Congress *did* effectively amend the Constitution, because it altered the authoritative understanding of the First Amendment that bound the states. See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

111. For a discussion of the Constitution as a precommitment strategy, see Waldron, *supra* note 64.

112. Professor Hamilton asserts that "[i]f 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." Hamilton, *Unconstitutional*, *supra* note 14, at 8. That statement ignores the Establishment Clause, which necessarily trumps any congressional enactment, including RFRA. See *infra* Section III.D.1. The *Boerne* Court also expressed the concern that under RFRA "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." *Boerne*, 521 U.S. at 529. But the Court identified that concern as a consequence "[i]f Congress could define its own powers by altering the *Fourteenth Amendment's* meaning." *Id.* (emphasis added). As to federal law, RFRA is simply one vehicle, along with discretionary accommodations, see *supra* note 17, by which Congress may alter the balance between religious freedom and governmental authority. Given that Professor Hamilton believes RFRA violates the Establishment Clause, see Hamilton, *Unconstitutional*, *supra* note 14, at 8-14, she appears to believe courts cannot constrain RFRA within Establishment Clause norms. I describe two methods by which courts can do so *infra* Part III.

113. See Lupu, *Codification*, *supra* note 83, at 589 ("It is the relative imperviousness of constitutional provisions to change by ordinary lawmaking mechanisms, rather than the substantive content of such provisions, that makes them legally unique."); Rodney K. Smith, *Converting the Religious Equality Amendment Into a Statute with a Little "Conscience"*, 1996 BYU L. REV. 645, 685 ("If a court errs in interpreting a statute, the harm is far more negligible than an error in constitutional interpretation because it can easily be corrected through conventional legal processes without having to resort to onerous amendment procedures."). Professor Hamilton includes Congress's option to exempt any given federal law from RFRA's coverage among "policy reasons" to hold the Act unconstitutional, on the ground that Congress's reservation of a safety valve demonstrates its weak commitment to religious liberty. See Hamilton, *Section 5*, *supra* note 85, at 380; see also Hamilton, *Unconstitutional*, *supra* note 14, at 7 n.33. Aside from the fact that Congress's retention of authority to alter its precommitment to overprotect any right is a constitutional given, see *supra* note 82 and accompanying text, the argument that the retention more than negates the precommitment strains credulity. But even if Professor Hamilton's argument refutes the thesis that RFRA is

Finally, Professor Hamilton asserts that RFRA's protection of religious freedom across the entire range of federal law warps the legislative process.¹¹⁴ She would require Congress to act in discrete statutory increments, such that "money and power interests enter the picture . . . [and] more publicity and more active factions with real incentives to question the sincerity and necessity of Congress's foray into religious liberty will likely arise."¹¹⁵ Whether or not discrete enactments would be a preferable legislative approach, Professor Hamilton does not and cannot point to any explicit constitutional requirement for the legislative process that Federal RFRA violates.¹¹⁶ Rather, her argument appeals to the idea that the Constitution requires some quantum of due process in legislative methodology. This is a salutary goal, and a reasonable argument exists that Congress should take more time and care when legislating with the breadth of RFRA. But Professor Hamilton's insistence on individually contextualized deliberations about religious freedom exceeds even the most vigorous calls for judicial enforcement of "due process of lawmaking." One account of due process requirements for statutes urges judicial enforcement of the explicit constitutional and statutory rules that govern the legislative process.¹¹⁷ That account does not support the sort of

good for religious freedom, the fact that Congress may exempt legislation from RFRA undermines her assertion that RFRA operates in the manner of a constitutional amendment.

114. Professor Hamilton argues in part that, at least in the area of First Amendment freedoms, Congress may overprotect rights on a statute-by-statute basis but may not do so wholesale, because wholesale overprotection of rights entails a flawed legislative process. See Hamilton, *Section 5*, *supra* note 85, at 386 ("If Congress is so devoted to religious liberty, let it publicly pledge to abide by higher standards than the Court has set by rising to such standards in every law it passes."); cf. Berg, *Constitutional Future*, *supra* note 13, at 735-36 ("The arguments offered as to why RFRA does not fall within Congress's enumerated powers all boil down to criticisms of the wisdom of Congress in choosing to legislate by a general standard rather than case-by-case rules.").

115. Hamilton, *Section 5*, *supra* note 85, at 382-83 (advocating judicial inquiry into "due process of lawmaking defects"); see Hamilton, *Rhetoric*, *supra* note 23, at 628 ("No government should be able to adjust the balance of power between church and state across the board in one fell sweep. Such adjustments require ratification by the people."); Hamilton, *Unconstitutional*, *supra* note 14, at 17 ("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."); see also Gressman, *Downfall*, *supra* note 84, at 82 (dismissing "super-amendment" explanation for RFRA on the ground that Congress failed to make specific findings that established the need to amend every federal statute to protect religious exercise); cf. Lupu, *Statutes*, *supra* note 6, at 23 (arguing that statutory adoption of "judge-made constitutional terminology" may "repress[] . . . debate and careful consideration of alternatives").

116. See *Clinton v. New York*, 524 U.S. 417 (1998) (striking down statute that authorized president to veto portions of appropriations bills because partial veto violated Art. I, § 7 requirements for enactment of legislation by Congress); *INS v. Chadha*, 462 U.S. 919 (1986) (striking down one-house legislative veto provision of Immigration and Nationality Act because Art. I, § 7 requires bicameral passage and presentment to president for legislative action).

117. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 240-42 (1976); see also Waldron, *supra* note 64, at 535-36 (discussing constitutional constraints on

subjective, politically charged judicial critique of the representative quality of deliberation Professor Hamilton advocates. A second account would require "a deliberate and broadly based political judgment" in situations where "governmental action trenches upon values that may reasonably be regarded as fundamental."¹¹⁸ That approach does not implicate Federal RFRA, which neither undermines specially protected values or classes nor reflects any lack of legislative attention.¹¹⁹ Professor Hamilton's approach would cut to the heart of Congress's political discretion.¹²⁰ Perhaps congressional precommitment to a high level of protection for religious liberty is a bad idea,¹²¹ but the Constitution nowhere prohibits such legislative self-restraint.¹²² Professor Hamilton's assertion that forbidding the sort of process that led to RFRA would "encourage more searching and creative public

legislative process); cf. Peter M. Shane, *Back to the Future of the American State: Overruling Buckley v. Valeo and Other Madisonian Steps*, 57 U. PITT. L. REV. 443, 454-59 (1996) (advocating recognition that Constitution places procedural requirements on congressional deliberation but suggesting that such requirements should not be judicially enforceable).

118. Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977); see also *Fullilove v. Klutznick*, 448 U.S. 448, 548-49 (1980) (Stevens, J., dissenting) (arguing for enhanced judicial review of legislative process where statute draws a suspect classification).

119. Violation of the Establishment Clause would implicate a specially protected value; that issue is discussed *infra* Section III.A. Legislative inattention was the subject of Justice Stevens's objection in *Fullilove*. See *Fullilove*, 448 U.S. at 554 (Stevens, J., dissenting) (arguing that Congress, by giving only perfunctory consideration to the consequences of a racial set-aside program, "failed to discharge its duty to govern impartially" as required by due process).

120. Thomas Berg objects to Professor Hamilton's argument from legislative methodology on the more general ground that judicial pronouncements on the "wisdom" of congressional actions would encroach on the congressional power recognized in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See Berg, *Constitutional Future*, *supra* note 13, at 737. This strikes me as the converse of Professor Gressman's circular error in arguing from *McCulloch* that RFRA exceeds congressional authority. See *supra* note 96. Professor Berg invokes the presumed legitimacy of RFRA's ends to discredit Professor Hamilton's attack on the means by which Congress legislated the Act. But her argument, in *McCulloch* terms, is that the end of "heightening protection for religious freedom in all federal statutes" is *not* legitimate.

121. But cf. *Clinton v. New York*, 524 U.S. at 469-97 (Breyer, J., dissenting) (defending legislative technique of altering effects of previously enacted statutes *en masse* on grounds of practicality).

122. Professor Gressman, in a related argument, would extend the *Boerne* Court's holding under Section 5 that RFRA was "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," *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), to strike down the Act's federal applications as well. See Gressman, *Comedy*, *supra* note 3, at 526-27 & n.77. No basis for this argument is apparent. As to RFRA's applications to state law, the *Boerne* Court saw a need to protect the states from RFRA's "disproportionate" sweep. *Boerne*, 521 U.S. at 533-35. The federal applications, in contrast, present no problem of dueling sovereigns. If Congress decides to protect an interest against federal regulatory authority, the Court has no separation of powers basis for declaring that any degree of protection is too much. For a description and refutation of a similar objection to Federal RFRA in the Establishment Clause context, see *infra* notes 305-310 and accompanying text.

debate”¹²³ rings especially hollow given that her approach would place courts in charge of the form and extent of legislative deliberation.

*C. The Structural Objection: Confusing Federal RFRA's
Constitution-Like Methodology with the Judiciary's Power to Interpret
and Apply the Constitution*

Precommitments to protect rights are much more familiar in the constitutional setting than in statutes.¹²⁴ Federal RFRA's distinctive use of a characteristically constitutional methodology to “overprotect” a constitutional right may help to account for the structural objection to Federal RFRA, which insists that, notwithstanding the federalism problem addressed in *Boerne*, even the Act's federal applications usurp the judiciary's constitutional power. The structural objectors find fatal fault with Congress's unapologetic intent to overrule *Smith*¹²⁵ and its decision to phrase RFRA in the constitutional nomenclature of “substantial[] burden,” “compelling governmental interest,” and “least restrictive means.”¹²⁶ These, writes Professor Gressman, are “terms that clearly assert a congressional takeover of free exercise jurisprudence.”¹²⁷ Christopher Eisgruber and Lawrence Sager elaborate:

Congress was moved to enact RFRA by a reading of the Constitution deeply antagonistic to the Court's reading in *Smith*. RFRA's mandate is couched in exquisitely constitutional terms, and, like many constitutional precepts, it sweeps across virtually the whole domain of state and federal governmental activity. And RFRA insists that the Court return to the compelling state interest test, which was specifically rejected by the Court. In all, RFRA is a congressional attempt to subvert rather than to supplement the constitutional judgment of the Supreme Court.¹²⁸

The structural objection takes two distinct forms: that RFRA usurps the Court's power to interpret the Constitution, and that RFRA improperly tells courts how to decide religious freedom cases.

123. Hamilton, *Section 5*, *supra* note 85, at 382.

124. *See supra* notes 74-77 and accompanying text.

125. *See supra* notes 30-35 and accompanying text.

126. 42 U.S.C. § 2000bb-1 (1994).

127. Gressman, *Downfall*, *supra* note 84, at 76; *see also* Neal Devins, *How Not To Challenge the Court*, 39 WM. & MARY L. REV. 645, 654 (1998) (arguing that “RFRA's embrace of strict scrutiny review effectively limited the judicial role to the application of the statutory compelling justification test”). *But see* Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849, 858 (1998) (“Congress utilized judicial language because members of Congress share the widespread public belief that responsibility for interpreting the Constitution is primarily judicial. [RFRA was] expressing an opinion about *which* Court was right in interpreting the First Amendment, not claiming a fully independent legislative prerogative of interpretation.”).

128. Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 443.

1. *Usurping the Power to Interpret: The Argument from Marbury v. Madison*

The more straightforward version of the structural objection holds that Congress redefined the free exercise guarantee of the First Amendment, thereby encroaching on the Court's interpretive prerogative under *Marbury v. Madison*.¹²⁹ Several commentators have argued that RFRA's constitutional rhetoric invades the judicial domain, a contention independent of the federalism concerns that animated *Boerne*.¹³⁰ According to Professor Devins:

Flores's chief, if not only, complaint with RFRA was that the statute operated as a naked power grab, transferring from the Court to Congress the power to define constitutional standards of review. In this way, *Boerne* does little more than reaffirm the core holding of *Marbury v. Madison*, that is, judicial review is necessary to ensure that the Constitution not be "on a level with ordinary legislative acts . . . alterable when the legislature shall please to alter it."¹³¹

The Act's quasi-judicial language strikes Professor Devins as especially inappropriate in light of the excoriation of *Smith* in RFRA's legislative history, which, he writes, "smelled, looked, and tasted like a

129. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to [s]ay what the law is."); *see also* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring that Supreme Court is "supreme in the exposition of the law of the Constitution" and that its interpretation of the Constitution is "the supreme [l]aw of the [l]and").

130. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 78 (1995) [hereinafter Conkle, *Constitutional Significance*] ("RFRA directly repudiates the Supreme Court's basic constitutional reasoning. As such, it represents an unprecedented congressional challenge to the Court's well-established role as the primary interpreter of the Constitution."); Devins, *supra* note 127; Gressman, *Comedy*, *supra* note 3, at 511-14; Gressman & Carmella, *supra* note 84, at 120 ("Congress [in RFRA] has interfered with the 'province and duty' of the judiciary 'to say what the law is' in free exercise cases and controversies"); Hamilton, *Landmark*, *supra* note 49, at 718 ("RFRA exhibits its structural weaknesses even when one looks at its application to federal law. The law is a slap in the face of the Court, crossing separation of powers boundaries in an unapologetic fashion."); Hamilton, *Unconstitutional*, *supra* note 14, at 3-7; Jonathan Mallamud, *Religion, Federalism and Congressional Power: A Comment on City of Boerne v. Flores*, 26 CAP. U. L. REV. 45, 58 (1997) (concluding, in discussion of RFRA's federal applications, that "Congress appears to have provided a basis on the face of [RFRA] for a finding that Congress intended to change the Court's interpretation of the Constitution"); Steven D. Smith, *Mother, May We?*, 21 CARDOZO L. REV. 501, 506 (1999); *see also* Currie, *supra* note 77, at 640 ("Congress cannot tell the Court what the Constitution means."). Because some of these arguments were made prior to the Court's decision in *Boerne*, the extent of their intended reach to RFRA's federal applications is not entirely clear. *See, e.g.*, Devins, *supra* note 127 at 664 n.113 (expressing uncertainty about the status of RFRA's federal applications after *Boerne*). The logic of the argument from *Marbury*, however, encompasses the Act in all its applications, at least to the extent the argument emphasizes the Act's appropriation of constitutional rhetoric. *Cf.* Robin-Vergeer, *supra* note 13, at 678 (arguing that if RFRA is unconstitutional as "an impermissible repudiation of Supreme Court constitutional doctrine, then it should not matter whether the statute is applied to the federal government or the states").

131. Devins, *supra* note 127, at 646 (quoting *Marbury*, 5 U.S. at 177).

populist abrogation of the judicial function.”¹³² He concludes that, because “RFRA supporters invested no energy in casting their handiwork as anything but the de jure nullification of the Supreme Court’s voice in religious liberty decision making,”¹³³ the Court “had no choice but to view RFRA as a frontal assault on its authority.”¹³⁴ Professor Hamilton concurs: “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.”¹³⁵

The argument from *Marbury* cannot and does not maintain that Federal RFRA invades the judicial domain in the way *ultra vires* acts of the political branches usually do, by altering substantive outcomes the Constitution entrusts to another branch.¹³⁶ Leaving Establishment Clause concerns aside for the moment, the only power shift Federal RFRA effects is Congress’s blanket surrender in a class of controversies that might arise between the federal government and the people.¹³⁷ Rather, the *Marbury*-based critique emphasizes legislative rhetoric. Professor Devins explains that “[m]ore than anything, my point is about the message that Congress sent the Court.”¹³⁸ The *Marbury*-based objection posits that Federal RFRA’s “outright repudiation of the judicial function”¹³⁹ undercuts the judiciary’s “institu-

132. *Id.* at 655; *see also id.* at 652-54 (recounting “highly personal, highly incendiary rhetoric [that] typified much of Congress’s consideration of RFRA”).

133. *Id.* at 650.

134. *Id.* at 654; *see also* Gardbaum, *supra* note 50, at 669 (suggesting that “RFRA’s history both inside and outside Congress and the sharp criticism of *Smith* in the legislative text” led the Court to treat *Boerne* incorrectly as a case about judicial supremacy).

135. Hamilton, *Unconstitutional*, *supra* note 14, at 5.

136. *Cf.* *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down provision that allowed Congress to remove executive branch official); *INS v. Chadha*, 462 U.S. 919 (1983) (striking down statute that permitted Congress to overrule deportation decisions); *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting President’s attempt to resist subpoena based on his own interpretation of constitutional executive privilege); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting President’s nationalizing of steel mills). Defenders of RFRA argued prior to *Boerne* that the Court should permit Congress to define the scope within which free exercise rights should be protected. *See, e.g.*, Chemerinsky, *Constitutional Expansion*, *supra* note 110, at 628-29 (rejecting *Marbury* critique of RFRA in context of Act’s application to states); Laycock, *Act*, *supra* note 25, at 245-48. Rejection of that position, which would have accorded Congress significant power to affect substantive outcomes of constitutional disputes, was the central thrust of *Boerne*. *See supra* notes 38-48 and accompanying text. My contention here is distinct from, and narrower than, the position that Congress and the Court should share responsibility for constitutional interpretations that affect outcomes of constitutional disputes. For pre-*Boerne* consideration of that issue, *see, e.g.*, Stephen L. Carter, *The Morgan “Power” and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Cohen, *supra* note 61; Archibald Cox, *The Role of Congress In Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

137. *See supra* Section II.B.

138. Devins, *supra* note 127, at 651 n.43.

139. *Id.* at 658.

tional integrity,”¹⁴⁰ its command over an analytic lexicon and a body of evolving doctrine. “For practical purposes,” argues Professor Gressman, “RFRA constitutes a congressional seizure and reformation by Congress of the entire free exercise jurisprudence developed by the Supreme Court.”¹⁴¹ Congress has broken into the Court’s house, and even if nothing has been stolen, the Court must protect its interests.

For Professor Berg, the *Marbury* critique of RFRA “is just another way of asserting that Congress cannot protect religious freedom through a general standard.”¹⁴² That response misapprehends the argument from *Marbury*. Professor Devins and Professor Gressman presumably would concede that Congress is free to pass a law that constrains federal authority with respect to a single statute. But they would not countenance that law any more than they countenance RFRA if, like RFRA, it spoke in constitutional terms, and especially if it expressed open contempt for the Court’s leading decision in the corresponding constitutional area. The *Marbury* critics are concerned with RFRA’s constitutional rhetoric, not with its practical consequences.

The flaw in the *Marbury*-based critique lies in its presumption that the congressional view of the Free Exercise Clause underlying RFRA will have any force in the Act’s applications to federal law. The *Boerne* Court objected to RFRA’s deployment of free exercise principles not because Congress had “reinterpreted” the Free Exercise Clause in some abstract sense, but because Congress had imposed a substantive burden on the states.¹⁴³ In its applications to federal law, the Act cannot possibly interfere with the Court’s development of free exercise doctrine, let alone “make the Court’s interpretations of the Constitution superfluous,”¹⁴⁴ because Congress’s view of what the First Amendment should mean will have no consequences. Indeed, Federal RFRA cannot even generate a justiciable challenge to the Court’s authoritative interpretation of the Free Exercise Clause. The Court’s

140. Gressman, *Comedy*, *supra* note 3, at 519.

141. *Id.* at 518; *cf.* Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 460 n.79 (distinguishing RFRA from Title VII on the ground that “Title VII offers the judiciary the opportunity to develop a coherent jurisprudence consistent with its own understanding of constitutional justice”).

142. Berg, *Constitutional Future*, *supra* note 13, at 738; *see also id.* at 740-44.

143. *City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997):

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.

144. Hamilton, *Unconstitutional*, *supra* note 14, at 8.

power "to say what the law is" extends only to justiciable cases.¹⁴⁵ Challenges to federal action under RFRA will give rise to disputes and precedent about the mechanics of strict scrutiny under the Act, but not claims about the meaning of the constitutional term "free exercise of religion."¹⁴⁶ RFRA challengers of federal action will not need to dispute the Court's interpretation of the Free Exercise Clause: either RFRA applies and overprotects the challenger or it does not. Likewise, government defendants obviously will have no occasion to assert the Act's broad conception of religious liberty against the *Smith* Court's narrow account of governmental obligations under the Free Exercise Clause.¹⁴⁷

Federal RFRA employs the Constitution-like methodology of precommitment in order to protect rights ordinarily enforced by the Constitution. Congress guaranteed Federal RFRA's precommitment not by any appeal to constitutional authority but only with the weight of political inertia.¹⁴⁸ Perhaps Congress fully intended for RFRA to revise the constitutional understanding of free exercise. But the Act, at least in its federal applications, neither had the capacity to change the Constitution¹⁴⁹ nor needed to do so in order to effectuate

145. See, e.g., *United States v. Raines*, 362 U.S. 17, 21 (1960) (stating that a federal court may not evaluate the constitutionality of state or federal statutes unless and until "it is called upon to adjudge the legal rights of litigants in actual controversies"); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947) ("The power of courts, and ultimately [the Supreme Court], to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference.").

146. Again, I defer discussion of the obvious caveat to this statement, the possibility that overprotection in some circumstances may violate the Establishment Clause, until Part III.

147. Professor Gressman insists that RFRA's critical error is its invasion of Congress's Article III power to decide cases or controversies:

In essence, Congress has created a statutory "case or controversy," replete with congressional standards of review, for use whenever a neutral law has allegedly burdened some religious exercise. In that situation, RFRA becomes a congressional or statutory substitute for a First Amendment "case or controversy" wherein the legislature — not the judiciary — sets the review standards.

Gressman, *Comedy*, *supra* note 3, at 517; see also Gressman, *Downfall*, *supra* note 84, at 73 (objecting to RFRA on the ground that "[n]ever before had Congress sought to dictate to the judiciary how to interpret some provision of the Constitution in the course of performing the core judicial function of resolving cases and controversies"); *id.* at 74. The problem with this argument is that Congress's blanket precommitment in Federal RFRA to protect religious freedom has nothing to do with the Court's authority to interpret the Constitution, and thus Federal RFRA cannot generate any disputes about constitutional interpretation. Professor Gressman is exactly right to state that "if Congress wants to dictate to the courts how best to interpret the Constitution . . . it necessarily must cross over into the case-or-controversy realm of the judiciary." *Id.* at 77. RFRA, however, does not do so.

148. See *supra* notes 82-83 and accompanying text.

149. Cf. 1 *TRIBE*, *supra* note 50, at 949 n.121 (arguing that *Boerne* Court could not have struck down RFRA's application to the states had it found Congress's interpretation of the First Amendment consistent with Court's prior holdings, even if Congress had intended to deviate from those holdings); see also Buss, *supra* note 100, at 413 (noting that Congress's

Congress's will.¹⁵⁰ If Congress really had designs on the Court's interpretive authority, the only rebuke the Court needs is the echo of RFRA's constitutional rhetoric in empty courtrooms. The delicate construct of tripartite government is no place to punish futile attempts to break the rules.

The *Marbury*-based critique of Federal RFRA also proves too much. Its misplaced emphasis on protecting judicial authority from ineffectual congressional rhetoric threatens to undermine the proper and important role Congress plays in interpreting the Constitution. Scholars have argued persuasively that the working relationship between the Court and the political branches is dialogic.¹⁵¹ On this view, congressional engagement with the Court and the Constitution is essential to the health of the nation.¹⁵² Interbranch dialogue, at least out-

intent to override Court's constitutional judgment has no bearing on constitutionality of RFRA's federal applications).

150. Professor Hamilton argues that Congress's inattention to the constitutional authority for RFRA's federal applications should render those applications unconstitutional:

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 send the law back to Congress so that it can engage in the deliberation necessary to make its laws both apparently and actually constitutional.

Hamilton, *Unconstitutional*, *supra* note 14, at 16-17; *see also* Hamilton, *Landmark*, *supra* note 49, at 720 (RFRA's federal applications "should not be upheld, if for no other reason than to send a message to Congress that when a law is unusual and the enumerated power issue is opaque, Congress is constitutionally obligated to provide at least a modicum of explanation of what power it believed itself to be engaging."); *id.* at 706, 720. Such a rule may have a place where the predicate for a source of constitutional power needed to animate a statute requires joint legislative and judicial attention. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996) (advocating requirement of explicit congressional findings to support exercise of commerce power); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 761-71 (1996) (elaborating Frickey's notion as a "sense of the record" canon of constitutional interpretation). It is irrelevant to Federal RFRA, which required and used no constitutional power. *See supra* Section II.B.

151. *See* ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); *see also* Carter, *supra* note 136, at 851-62 (advocating interbranch dialogue in lieu of debates about substantive power under Section 5 of Fourteenth Amendment); Devins, *supra* note 127, at 648, 661; William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 76-95 (1994) (discussing role of institutional interests in division of labor between Court and Congress).

152. Indeed, commentators have argued that, notwithstanding the separation of powers, legislators have an obligation to evaluate the constitutionality of their actions. *See* 1 TRIBE, *supra* note 50, § 3-4 at 262 ("Congress and the President must thus be recognized as having the power and the duty to interpret the [Constitution] in a way that may command the respect of others."); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Sanford Levinson, *What Do Lawyers Know (and What Do They Do with Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 453-54 (1985) ("[I]f legal texts have meanings, then they speak to all participants in the legal system, of whom judges are only one set and not necessarily the most important. . . . I think it absolutely vital that all public officials, including citizens, confront the

side the ramparts of federalism erected by *Boerne*, is essential in a context as politically and emotionally charged as religious freedom.¹⁵³ Such dialogue is especially important if one has a normative commitment to rights,¹⁵⁴ because for long stretches of its history the Court has shown little interest in expanding rights.¹⁵⁵ Professor Devins makes the instructive observation that, in *Boerne*, both Congress and the Court violated the principle of dialogue. Congress erred because “[r]ather than encourage dialogue over the meaning of the Constitution’s religious liberty protection, RFRA sought to silence the Supreme Court.”¹⁵⁶ The *Boerne* Court, however, “never acknowledged that disagreement with its rulings by lawmakers, government officials, and interest groups often plays a pivotal and salutary role in defining constitutional values.”¹⁵⁷ The subconstitutional character of RFRA’s federal applications, which obviates the first problem Professor Devins identifies, should deter the Court from repeating the second.

2. *Usurping the Power to Decide: The Argument from United States v. Klein*

A second form of structural objection that encompasses Federal RFRA posits that Congress employed an unconstitutionally heavy

question of what it might mean to take the Constitution seriously as a source of guidance.”); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 485-501 (1987).

153. See, e.g., Smith, *supra* note 113, at 650-57 (urging deliberative dialogue over religion between Court and Congress in context of proposal for religious equality statute).

154. See, e.g., Chemerinsky, *Constitutional Expansion*, *supra* note 110, at 617 (“the protection of additional rights is inherently desirable under the Constitution”); Eskridge & Frickey, *supra* note 151, at 77 (advocating more aggressive judicial review of congressional enactments that limit personal rights).

155. RFRA’s advocates and critics alike have made this point. Compare Berg, *Congress*, *supra* note 26, at 28-29 & n.123 (citing scholarly commentary for the position “that legislative action usually provides a firmer foundation for protection of civil liberties than do judicial decisions”), and Laycock, *Act*, *supra* note 25, at 257 (arguing that “part of the genius of separation of powers is that all three branches can protect liberty when motivated to do so”), with Devins, *supra* note 127, at 660 (“Ever since Thomas Jefferson declared the Alien and Sedition Act . . . a constitutional ‘nullity’ . . . the executive and legislative branches have limited the effects of court rulings, more often than not by providing for greater individual rights protection than the judiciary.”). The concern, of course, is not a remote one. See Eskridge & Frickey, *supra* note 151, at 27 (describing 1990s as “a decade of downscaling in American public law” characterized by “the Rehnquist Court’s comparative reluctance to expand, or in some cases even to protect, established constitutional rights of individuals”); Laycock, *Act*, *supra* note 25 at 257 (noting that in recent years “Congress has been more interested in protecting liberty than the Court has been”).

156. Devins, *supra* note 127, at 647; see also *id.* at 658 (“RFRA’s slash and burn approach to dialogues between the Court and elected government promotes acrimony between the branches and little else.”).

157. *Id.* at 647; see also *id.* at 662 (criticizing *Boerne* for “formalistic rhetoric” that “suggests an institutional compartmentalization that is overly parochial, ultimately shortsighted, and factually inaccurate”).

hand to dictate federal courts' decisions in free exercise cases. This argument, pressed by Professors Eisgruber and Sager¹⁵⁸ and also raised by Professor Gressman,¹⁵⁹ maintains that RFRA's mandate of strict scrutiny for religious freedom claims "insists that the Court adopt a legal test that the Court has repudiated,"¹⁶⁰ thereby "conscript[ing] . . . the Court . . . to play a role in a charade — a charade in which the Court is obliged to act as though its own judgment about a matter of consequence is different than it actually is."¹⁶¹ Where the *Marbury* objection focuses on the Court's interpretive authority, this second version of the structural objection posits that Congress in RFRA interfered with courts' decisional authority. Professor Gressman charges that "RFRA represents an unprecedented effort by Congress to execute one of the core functions of the Court, the delicate function of in-

158. See Eisgruber & Sager, *Conscience*, *supra* note 21, at 1309-11; Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 469-73; Christopher L. Eisgruber & Lawrence G. Sager, *Protecting Without Favoring Religiously Motivated Conduct*, 2 NEXUS 103, 107-08 (Fall 1997) [hereinafter Eisgruber & Sager, *Protecting*]; Eisgruber & Sager, *After Boerne*, *supra* note 36, at 135-36; see also Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2532-35 (1998). Professor Sager has expressly invoked *Klein* as a basis for striking down the federal law applications of RFRA. See *id.* at 2533 (arguing that "*Klein* remains a good and sufficient reason to invalidate RFRA in [its] second, federal, life"). The structural argument advanced by Professors Eisgruber and Sager is closely linked to their objections to RFRA based on both what I label "substantive institutional competence" and the Establishment Clause. See *infra* notes 245-246, 321-328 and accompanying text; cf. Eisgruber & Sager, *After Boerne*, *supra* note 36, at 136 (arguing that RFRA violates *Klein* because "Congress simply told the judiciary to do something it knew the judiciary had declared to be impossible"); Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 472 (equating "charade" imposed by RFRA in violation of *Klein* with "a false endorsement of religion as especially privileged by the Constitution"); see also Meltzer, *supra* note 110, at 2549 (posing question whether Sager's articulation of *Klein*-based objection to RFRA depends on an underlying appeal to the Establishment Clause); Sager, *supra* note 158, at 2533 (maintaining that "RFRA could violate *Klein* whether or not it violated the Establishment Clause as well").

159. See Gressman, *Downfall*, *supra* note 84, at 83-84 (arguing that *Klein* "supplies another precedential nail in RFRA's constitutional coffin"); Gressman, *Comedy*, *supra* note 3, at 517 & n.36; Gressman & Carnella, *supra* note 84, at 134-37; see also Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 390-91 (1998) (favorably discussing *Boerne* at outset of article that accuses Congress of frequently violating *Klein*); Mallamud, *supra* note 130, at 55-56 (suggesting that RFRA resembles the statute struck down in *Klein*); Van Alstyne, *supra* note 50, at 309-14 (discussing *Klein* in argument that RFRA exceeded congressional authority under Section 5); cf. J. Richard Broughton, *Boerne Down the House: The Religious Liberty Protection Act and the Separation of Powers*, 2000 DET. C.L. REV. 317, 350 (arguing that Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999), violated separation of powers by "requiring courts to prefer Congress's view of the Free Exercise Clause to the view that the Supreme Court has already expressed in a final judgment on the matter and one in which it expressly rejects the congressional view").

160. Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 443.

161. *Id.* at 471; see also Eisgruber & Sager, *Conscience*, *supra* note 21, at 1310; Eisgruber & Sager, *Protecting*, *supra* note 158, at 108 (maintaining that RFRA violates separation of powers because "to enforce RFRA, the Court had to behave as though it were applying a constitutional test which was, in its judgment, unworkable") (emphasis added); Eisgruber & Sager, *After Boerne*, *supra* note 36, at 136.

terpreting the Constitution *and applying that interpretation to specific cases and controversies*.”¹⁶² The answer to the *Marbury* objection — that Congress in RFRA did not invade the Court’s interpretive domain¹⁶³ — does not suffice to answer this second form of structural objection, because Federal RFRA certainly will require courts to decide cases differently than they would have absent the statute. Rather, the problem with this objection is that it condemns Congress for doing exactly what Congress is supposed to do.

The second version of the structural objection invokes the Court’s repudiation, in the 1871 case of *United States v. Klein*,¹⁶⁴ of a blatant congressional attempt to countermand the Court’s constitutional judgment. Prior to *Klein*, the Supreme Court had held that a presidential pardon was sufficient proof of loyalty for former Confederate sympathizers who, pursuant to a federal statute, sought to recover property the federal government had seized from them during the Civil War.¹⁶⁵ Congress, unhappy with the Court’s holding, passed a new statute that made a pardon a conclusive presumption of disloyalty and that relieved the Court of Claims and Supreme Court of appellate jurisdiction in any case where the granting of a pardon was proved.¹⁶⁶ In *Klein*, the Court struck down the statute as contrary to the separation of powers. The Court gave two reasons for its decision. First, the Court found that Congress impermissibly had “prescribe[d] a rule in conformity with which the court must deny to itself the jurisdiction [previously] conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor.”¹⁶⁷ Second, the statute “impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive.”¹⁶⁸

Reliance on *Klein* by RFRA’s critics reflects a misapprehension of that case. Granting the first *Klein* principle sufficient independent force to undermine RFRA would lead to results the *Klein* Court cannot have intended. If *Klein* meant Congress may not change a rule of decision previously applied by courts, then numerous federal statutes would be invalid.¹⁶⁹ If *Klein* meant Congress may not attempt to influ-

162. Gressman, *Downfall*, *supra* note 84, at 74 (emphasis added).

163. See *supra* notes 143-150 and accompanying text.

164. 80 U.S. (13 Wall.) 128 (1871).

165. See *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

166. Appropriation Act of July 12, 1870, ch. 251, 16 Stat. 235 (1870).

167. *Klein*, 80 U.S. at 147.

168. *Id.*

169. See Meltzer, *supra* note 110, at 2540-43, 2545-48 (discussing statutes that alter previously announced judicial rules of decision and therefore would be threatened under broad reading of first *Klein* principle). One interesting, as-yet unadjudicated instance of congressional alteration of a rule of decision is the Prison Litigation Reform Act (“PLRA”),

ence substantive outcomes by limiting the Court's appellate jurisdiction, then the principle of *Ex Parte McCordle*¹⁷⁰ would be cast into doubt. If *Klein* meant Congress may not tell courts how to decide cases involving statutory rights, then legislative discretion to define the substance of statutory rights would be severely compromised.¹⁷¹ The Supreme Court, which in recent years has had two opportunities to apply the first *Klein* principle, instead has gone out of its way to distinguish the case.¹⁷² Likewise, the leading Federal Courts treatise suggests that *Klein* "hold[s] no more than that an unconstitutional invasion of the judicial function occurs when Congress purports . . . to bind the Court to reach a result that is independently unconstitutional."¹⁷³ The best understanding of the first *Klein* principle is that it merely augments the second by expressly barring Congress from using its power to limit the Court's appellate jurisdiction as a means toward a substantive unconstitutional end, such as usurping executive power.¹⁷⁴

18 U.S.C. § 3626(b) (Supp. IV 1998), which announces new substantive standards for courts to apply in cases challenging prison conditions. See *Miller v. French*, 530 U.S. 327 (2000) (leaving open question of standards' constitutionality); Bloom, *supra* note 159, at 406-14 (arguing that PLRA standards are unconstitutional under *Klein*); see also *infra* notes 355-358 and accompanying text (discussing *Miller* Court's construction of PLRA's automatic stay provision).

170. 74 U.S. (7 Wall.) 506 (1868) (holding pursuant to Exceptions Clause, Art. III, § 2, cl. 2, that Congress has broad power to limit or withdraw the Supreme Court's appellate jurisdiction).

171. See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2613 (1998) (rejecting reading of *Klein* as barring Congress from telling courts how to decide cases because "legislation often affects — if not directs — the outcome of litigation"). Professor Sager acknowledges that reading *Klein* to preclude Congress from altering a statutory right by telling courts how to decide cases that implicate the right would "exalt form over substance." Sager, *supra* note 158, at 2526.

172. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Scalia, J.) (distinguishing *Klein* on the ground that statute that retroactively altered limitations period "d[id] set out substantive legal standards for the Judiciary to apply, and in that sense change[d] the law"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (Thomas, J.) (declining to consider whether *Klein* prohibited Congress from enacting statutes that direct decisions in pending cases without amending any law, based on conclusion that statute settling pending disputes over timber amended applicable law); cf. Bloom, *supra* note 159, at 397-98 (criticizing *Robertson* and arguing that timber settlement violated *Klein*).

173. RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 369-70 (4th ed. 1996); see also Meltzer, *supra* note 110, at 2538-39 (discussing narrow reading of *Klein*). In fact, Federal RFRA is more likely to violate the second *Klein* principle than the first. The Act applies to any "official . . . of the United States," 42 U.S.C. § 2000bb-2(1) (1994) (amended 1997), and it governs "all [f]ederal . . . law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3 (1994) (amended 1997). That language appears to encompass executive orders, agreements, and even treaties. If a claimant invoked Federal RFRA to gain relief from the effects of an executive action that rested on a specific constitutional grant of authority to the president, the reviewing court might appropriately invoke *Klein* to safeguard presidential authority.

174. Call this the "hybrid wrongs" explanation of the first *Klein* principle. See *supra* note 21 (discussing *Smith* Court's distinction of "hybrid rights" claims under Free Exercise Clause).

Aside from the hazards of a strong reading of the first *Klein* principle, the analogy between *Klein* and Federal RFRA is strained. RFRA's heightened scrutiny standard does not impose anything close to conclusive presumptions on litigation, as the modest success rate of early RFRA claims confirms.¹⁷⁵ The Act certainly does not direct outcomes in the federal government's favor;¹⁷⁶ quite the contrary, its central purpose is to disadvantage the government in religious freedom cases. RFRA does not direct outcomes in specific cases but merely creates a statutory rule for application over an entire category of cases involving an unpredictable range of parties and factual circumstances.¹⁷⁷ Finally, as discussed above, Federal RFRA announces no constitutional standard, and thus it simply lacks the capacity to affect the decision in any constitutional case.¹⁷⁸ By setting a legal standard and instructing courts to apply it, Federal RFRA does what countless other statutes do. It is distinct only in that its rule applies across the board to religious freedom claims against all applications of federal law.¹⁷⁹

None of the Court's major statements on the conflict between legislative and judicial power is squarely on point with Federal RFRA, because all have involved situations in which Congress altered results in pending or prior court cases.¹⁸⁰ The most salient comparisons are to

175. See *infra* notes 265-267 and accompanying text.

176. The Court emphasized this aspect of *Klein* when it described the first *Klein* principle in *United States v. Sioux Nation*, 448 U.S. 371, 404 (1980) (stating that Congress in *Klein* "prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the [g]overnment's favor").

177. See *supra* note 110.

178. See *supra* notes 144-147 and accompanying text. A variation on the *Klein* objection emphasizes the expressive character of judicial decisions: "The judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees." Sager, *supra* note 158, at 2529 (footnote omitted); see also *id.* at 2534-35 (arguing that essence of first *Klein* principle is to prevent public spectacle of Congress's forcing judiciary to adjudicate based on standards with which judiciary disagrees); Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 471 (arguing that RFRA violates *Klein* because any court that applies RFRA "is being asked to assume the role of a false conscience"); Meltzer, *supra* note 110, at 2540 (agreeing that first *Klein* principle means "Congress may not compel the courts to speak a constitutional untruth" but advocating substantially narrower view of that principle than Sager advances). This is the mirror image of the *Marbury* objection's emphasis on constitutional language. There, the concern is with the impact of RFRA's constitutional rhetoric. See *supra* notes 130-135 and accompanying text. Here, the concern is with the impact of the constitutional rhetoric RFRA elicits from courts. The answer is the same: Federal RFRA is not a constitutional rule, and thus it has no impact on our understanding of constitutional principles. See Meltzer, *supra* note 110, at 2543-49 (refuting Sager's rhetoric-focused version of *Klein* objection).

179. See *supra* Section II.B.

180. In addition to the cases discussed in text, see *Miller v. French*, 530 U.S. 327 (2000) (rejecting separation of powers challenge to statutory provision that imposes automatic stay of previously entered injunctive relief when injunction is challenged under new statutory standard); *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) (striking down on separation of

*United States v. Sioux Nation*¹⁸¹ and *Pennsylvania v. Wheeling & Belmont Bridge Co.*¹⁸² In both of those cases Congress changed the law in order to reverse the effects of prior court decisions. In each instance the Court upheld Congress's action as a valid change to the underlying law. The statutes in both cases posed greater threats to judicial authority than Federal RFRA does, because they altered previously settled outcomes in specific disputes. In addition, *Sioux Nation* entailed congressional waiver of "legal defenses based upon doctrines central to the courts' structural independence."¹⁸³ Both cases differ from *Klein* primarily in that Congress's underlying policy goals did not violate the Constitution. *Sioux Nation* and *Wheeling Bridge* establish that Congress does not usurp judicial power simply by telling the Court to adjudicate a claim or set of claims under a different rule than the one the Court developed prior to receiving any congressional guidance. *Sioux Nation* makes that conclusion especially clear for circumstances in which Congress has acted against the government's interest.¹⁸⁴ The two decisions also strengthen the conclusion that any argument that RFRA violates *Klein* must appeal to some independent constitutional violation.¹⁸⁵

Beyond the logical failings of the arguments from *Marbury* and *Klein*, prudential considerations should compel the Court to respect Congress's precommitment in Federal RFRA to protect religious freedom. A judicial declaration that a statute intrudes on courts' authority, especially in an area of acute political concern like religious liberty, necessarily disturbs interbranch comity and restricts the vigorous give and take that characterizes robust government.¹⁸⁶ Such a

powers grounds congressional effort to apply a new, more generous statute of limitations retroactively to reopen final judgments of dismissal); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (upholding against separation of powers challenge federal statute that prescribed outcomes in pending cases involving timber claims); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (establishing principle that Congress may not authorize Executive Branch officials to review judicial decisions).

181. 448 U.S. 371 (1980) (sustaining against separation of powers challenge a statute that required Court of Claims to rehear Native American tribe's claim against the government without regard to res judicata or collateral estoppel defenses, even though that court previously had rejected the claim).

182. 59 U.S. (18 How.) 421, 429 (1855) [hereinafter *Wheeling Bridge II*] (sustaining against separation of powers challenge a statute that, in contravention of Court's prior order that a bridge be altered or removed because it unlawfully interfered with navigation, declared bridge a "lawful structure[]" and thus authorized its reconstruction).

183. *Plaut*, 514 U.S. at 230-32 (discussing congressional waiver in *Sioux Nation* of res judicata and collateral estoppel defenses).

184. See *supra* text accompanying note 176.

185. See *supra* note 174 and accompanying text. As above, the discussion in this section rests on the premise that Federal RFRA does not violate the Establishment Clause. I justify that premise at length below. See *infra* Part III.

186. See *supra* notes 151-157 and accompanying text.

declaration is a constitutional trump, analogous to Congress's constitutional authority to limit the Supreme Court's jurisdiction,¹⁸⁷ albeit less potent. Prudence dictates that these trumps should be instruments of last resort. The Court, for its part, should restrict action to protect its own territory against otherwise valid congressional action to instances where Congress invades the judicial domain in such a manner or to such an extent that the Court can preserve the structural integrity of government only by rejecting the congressional action.¹⁸⁸ The invalidation of Federal RFRA urged by the structural critics would intensify interbranch conflict, thus threatening just the sort of governmental tumult these critics fear from RFRA itself, while also denying a legislative effort to expand rights.¹⁸⁹

187. See U.S. CONST. art. III, § 2, cl. 2 (defining appellate jurisdiction of Supreme Court subject to "such Exceptions, and under such Regulations as the Congress shall make"); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868) (dismissing appeal on authority of statute stripping Court of jurisdiction). For discussion of the proper scope of congressional power under the Exceptions Clause, see, for example, Symposium, *Congress and the Courts: Jurisdiction and Remedies*, 86 GEO. L.J. 2445 (1998); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982).

188. See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress' Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2506-10 (1998) (praising Court's historic tendency to construe congressional efforts to limit courts' jurisdiction narrowly enough to preserve sufficient jurisdiction to satisfy apparent constitutional standards, rather than addressing constitutional issues directly); Devins, *supra* note 127, at 661 ("Balance-of-powers disputes, in particular, are best resolved through [a] process of give-and-take between the branches."); Friedman, *supra* note 150, at 771, 777-78 (suggesting value of moderation in both legislative and judicial use of constitutional trumps); Meltzer, *supra* note 110, at 2543 (contending that "the Court needs to have . . . a strong moral or political justification for broadly curtailing the authority of legislative (and other) institutions"); cf. Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (arguing for a dialogic process between Congress and Court to determine boundaries of federal judicial power).

189. Calls for judicial retaliation based on RFRA's legislative history are especially disturbing. Professors Gressman and Carmella, for example, argue that the Court should strike down RFRA as an "incursion[] by Congress into the independent kingdom of the judiciary" based in part on "repeated statements by RFRA's sponsors that [their] real purpose is to overrule *Smith*." Gressman & Carmella, *supra* note 84, at 122, 123 n.237; see also *id.* at 93 (stressing that "[m]embers of Congress . . . [called *Smith*] an infamous, disastrous, unfortunate, mischievous, dastardly, and ill-advised opinion that should and must be 'overruled' ") (citation omitted); *id.* at 133; *id.* at 139 n.283; Gressman, *Downfall*, *supra* note 84, at 77-78 (basing argument that RFRA is unconstitutional on "[t]he entire legislative history of RFRA, supplemented by the later statements of its ardent defenders"). For the Court to use such second-hand evidence of motive where legislative purpose made a substantive constitutional difference would be problematic enough. Cf. *infra* notes 311-313 and accompanying text (discussing limits of appropriate judicial inquiry into legislative purpose under Establishment Clause). To invoke legislative vitriol as an independent basis for holding that Congress exceeded its powers would provoke the political branches needlessly.

D. *The Institutional Competence Objection: RFRA and the Court's Power to Constrain Judicial Methodology*

The final separation of powers objection to Federal RFRA, the institutional competence objection, implicates not RFRA's legislative methodology of precommitment but rather the Act's requirement that courts apply the judicial methodology of strict scrutiny in religious freedom challenges to neutral applications of federal law. The institutional competence critics emphasize that the Court in *Employment Division v. Smith*¹⁹⁰ categorically rejected the judicial inquiry into religious substance that are necessary for strict scrutiny.¹⁹¹ Having announced that limit on judicial competence, these commentators maintain, the Court had to reject Congress's attempt, through RFRA, to force courts to make just that sort of inquiry. In questioning the mechanism by which Congress sought to enforce Federal RFRA's precommitment to safeguard religious freedom, the institutional competence challenge is the RFRA analog to the arguments that doomed the federal line-item veto.¹⁹² Critics have articulated two variations on the institutional competence objection: that RFRA encroaches on the Court's fundamental power to assess which issues judges are capable of deciding, and that RFRA runs afoul of a substantive judgment about religious freedom implicit in the *Smith* account of judicial competence.

190. 494 U.S. 872 (1990).

191. See *Smith*, 494 U.S. at 887 (citations omitted):

What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

The *Smith* Court's rejection of substantive inquiries into religious doctrine was not novel. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988) (stating that judicial determination of which lands are "central" to a religion "would require [the Court] to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play."); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("[The] guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . [I]t is not within the judicial function and judicial competence to inquire [who] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Serbian Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 710 (1976) (noting that, because judicial resolution of controversies over religious doctrine and practice jeopardizes First Amendment values, courts are bound to the decisions of church judicatories regarding such controversies).

192. See *supra* notes 75-79 and accompanying text. The Supreme Court's rejection of the Line Item Veto Act provides no more than an analogy to Federal RFRA. That statute failed because it gave the president excessive discretion in violation of U.S. CONST. art. I, § 7. See *Clinton v. New York*, 524 U.S. 417 (1998).

1. *Pure Institutional Competence*

The first version of the institutional competence objection claims that *Smith* authoritatively denied that courts have the capacity to determine whether a given religious practice is sufficiently “central” to a plaintiff’s religious belief that interference with that practice “substantially burden[s]” her exercise of that belief.¹⁹³ According to Daniel Conkle, “[t]he Court [in *Smith*] especially objected to the prospect of balancing religious claims against competing state interests in a wide variety of possible contexts, a task for which, according to the Court, judges are not well-suited.”¹⁹⁴ Joanne Brant concludes that this judicial rejection of free exercise balancing is “the only intelligible basis for the *Smith* opinion”¹⁹⁵ and maintains that “the Court’s power to make decisions based on this line of reasoning cannot be doubted” because “[e]ach branch of government has the inherent power to determine its own limitations.”¹⁹⁶ Thus, Congress’s direction in RFRA of a standard that requires such balancing violates the separation of powers.¹⁹⁷

193. See *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591, 600 n.8 (D. Md. 1996); Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); see also Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 266-67 (1994) (arguing that the difficulty of defining a “substantial[] burden” on religious exercise renders RFRA a dangerously manipulable statute).

194. Conkle, *Constitutional Significance*, *supra* note 130, at 57 (citation omitted). Professor Conkle expressly objects only to RFRA’s state and local applications. See *id.* at 40. But his arguments, articulated prior to *Boerne*, apply to the Act’s federal applications as well, insofar as he believes the Act countermands the *Smith* Court’s authoritative assessment of judicial competence or violates the Establishment Clause.

195. Brant, *supra* note 193, at 13; see also *id.* at 17 (“*Smith* is not a decision about authority: jurisdictional, constitutional or otherwise. It is a decision grounded in the Court’s somewhat inchoate concerns about institutional limitations.”); Berg, *Congress*, *supra* note 26, at 8-9 (“*Smith*’s rule was based on ‘judicial restraint’ and institutional concerns related to the separation of powers . . . balancing the relative importance of the religious claim against the governmental interest gave too much discretion to unelected and unaccountable judges”); Layock, *Remnants*, *supra* note 21, at 31-33 (characterizing and attacking *Smith* as a rejection of balancing generally); Lupu, *Statutes*, *supra* note 6, at 59 (calling *Smith* “a decision about institutional arrangements more than about substantive merits”); Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 736 (1992) [hereinafter McConnell, *Update*] (“The principal argument in *Smith* is that judges are institutionally incapable of engaging in the balance between religious conscience and the interests of the government that free exercise accommodations are said to require.”). But see Robin-Vergeer, *supra* note 13, at 663-71 (arguing that *Smith* reflected both substantive and institutional concerns).

196. Brant, *supra* note 193, at 19.

197. Douglas Laycock and others have attempted to portray the institutional competence strand of *Smith* as merely a statement that “the Court does not want final responsibility for applying the compelling interest test to religious conduct.” Laycock, *Act*, *supra* note 25, at 252 (emphasis added); see also Berg, *Constitutional Future*, *supra* note 13, at 745 (summarily rejecting the “pure institutional competence” objection on the ground that the *Smith* Court was merely practicing judicial restraint, not defining the limits of its competence); Paulsen, *supra* note 13, at 253 n.11 (same); Volokh, *Common-Law Model*, *supra* note 12, at 1491-92 (same). On this reading, RFRA presented no problem under *Smith* because

An initial flaw in the pure institutional competence objection is that RFRA does not necessarily require balancing.¹⁹⁸ Rather, a claimant must meet the substantial burden threshold, and the government must then show that the burden imposed is the least restrictive means of accomplishing a compelling governmental interest. Even assuming RFRA will prompt a balancing analysis in many cases, the Court should resist any inclination to strike down Federal RFRA based on the pure institutional competence strand of *Smith* for two reasons. First, *Smith* on this reading depends on an unprecedented and unworkable mandate for the Court to define judicial competence. Second, to whatever extent the *Smith* Court acted within its authority to abjure judicial competence to perform the analysis required by RFRA, it erred by presuming that strict scrutiny requires Courts to determine the “centrality” of claimants’ burdened religious practices.¹⁹⁹

“Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of [religious accommodations].” Laycock, *Act, supra* note 25, at 253. On Professor Brant’s reading, however, *Smith* flatly denied courts’ capacity to perform the analysis mandated by RFRA. Even the availability of a legislative corrective does not eliminate that concern. A court might make matters worse by its incompetent attempt at analysis, thereby tainting subsequent legislative deliberations, or any number of institutional constraints might prevent Congress from correcting an errant judicial decision, thereby giving the court the last word.

198. In a recent amendment to RFRA, Congress may have muted the pure institutional competence objection as to future cases. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to a system of religious belief.” Pub. L. No. 106-274, § 8(7)(A), 114 Stat. 803, 807 (Sept. 22, 2000). RLUIPA extends that definition to RFRA, replacing RFRA’s original language that defined “religious exercise” as “the exercise of religion under the First Amendment to the Constitution.” See *id.* § 7(a)(3); 42 U.S.C. § 3, 2000bb-2(4) (2001). The amended definition seems likely to encourage the alternatives to centrality analysis discussed *infra* notes 222-234 and accompanying text. See, e.g., *Kikumura v. Hurley*, 242 F.3d 950, 960-61 (10th Cir. 2001) (suggesting that amended definition of “religious exercise” relieved RFRA claimant from having to show that religious practice at issue was mandatory).

199. Several commentators have dismissed the pure institutional competence critique by arguing that the *Smith* Court could not have meant that courts cannot adjudicate religious freedom claims under strict scrutiny, because the *Smith* Court itself allowed for such adjudication in “hybrid rights” cases. *Employment Div. v. Smith*, 494 U.S. 872, 881-82 & n.1 (1990); see Berg, *Constitutional Future, supra* note 13, at 744-45; Lupu, *Codification, supra* note 83, at 589. That argument, however, presumes the *Smith* “hybrid rights” doctrine reflects a coherent and principled distinction of *Sherbert* and *Yoder* that entails a true free exercise analysis. In fact, the least problematic account of the “hybrid rights” exception is that its requirement of a second constitutional claim independently amenable to adjudication (e.g., free speech or due process) obviates the need to analyze the free exercise claim at all. See *supra* note 21. The *Smith* Court’s continued allowance for strict scrutiny in cases that involve “system[s] of individualized exemption[],” *Smith*, 494 U.S. at 884, or burdens targeted at religion, *id.* at 877-78, also has been noted. See Berg, *Constitutional Future, supra* note 13, at 744-45. Both of those categories, however, involve willful discrimination. See Eisgruber & Sager, *Conscience, supra* note 21, at 1287-88 (arguing that denials of religious exemptions in unemployment benefit cases reflected failure of equal regard for religious beliefs); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down ordinance on ground of purposeful discrimination against a religious practice). Such discrimination creates a presumption of invalidity that effectively obviates the need to invoke RFRA. The even

The notion that the Supreme Court may limit categorically the types of issues courts are capable of deciding is highly problematic. The closest analogues in federal law are the abstention doctrines²⁰⁰ and the requirement of a judicially manageable standard as a baseline for distinguishing judicially cognizable matters from political questions.²⁰¹ But those doctrines differ dramatically from the pure institutional competence reading of *Smith*. Both abstention and the refusal to adjudicate absent judicially manageable standards reflect judicial self-limitation and deference to the power of coordinate branches or distinct sovereigns. The Court will declare an absence of judicially manageable standards where it is in danger of usurping legislative or agency decisionmaking authority.²⁰² Similarly, federal courts abstain from decision to avoid usurping state courts' authority to construe the meaning of state statutes.²⁰³ In contrast, reading *Smith* as an authoritative statement on judicial competence would allow the Court to abjure decision — and in this case, to strike down a federal statute — based not on deference to the power of a coordinate branch or distinct sov-

broader argument that the pure institutional competence critique fails because courts apply heightened scrutiny in other circumstances, see McConnell, *Institutions*, *supra* note 50, at 191-92, simply denies the premise that religion differs at all from other characteristics that entail heightened scrutiny and thus fails to confront *Smith* on its own terms.

200. See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (holding that federal courts should abstain from deciding a constitutional issue pending a definitive ruling by a state court on a matter of state law that could resolve the controversy); *Kusper v. Pontikes*, 414 U.S. 51, 54-55 (1973) (holding that where challenged state statute is susceptible of construction by state court that would avoid or modify necessity of reaching federal constitutional question, the federal courts should abstain); see also Brant, *supra* note 193, at 25 (comparing pure institutional competence reading of *Smith* to *Pullman* abstention doctrine).

201. See *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the lack of a judicially manageable standard indicates that the Constitution has committed the issue to another branch of government, making the controversy nonjusticiable); *Baker v. Carr*, 369 U.S. 186 (1961) (holding that the lack of a judicially discoverable and manageable standard for resolving a case indicates that resolution of the issue may be better handled by another branch of government); cf. Brant, *supra* note 193, at 22-25 (comparing the pure institutional competence reading of *Smith* to the political question doctrine and the requirement of a judicially manageable standard); Lupu, *Statutes*, *supra* note 6, at 59 (considering *Smith* as a "political question case, holding that judicially manageable standards for the resolution of Free Exercise exemption claims are lacking").

202. See *Baker*, 369 U.S. at 208-10 (holding challenge to state legislative apportionment within judicial competence). Qualitative difficulties in managing constitutional standards are common outside the political question setting. See Lupu, *Trouble*, *supra* note 17, at 760; McConnell, *Update*, *supra* note 195, at 737.

203. See, e.g., *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (stating in general that where a state statute has not been construed by the state courts and is susceptible to a reading which would avoid or substantially modify the federal constitutional challenge, the district court should abstain from passing on the constitutionality of the statute); *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84-85 (1975) (concluding that where the uncertain status of a local law stems from the unsettled relationship between the state constitution and a statute, the district court should abstain from determining the constitutionality of the local law until the state court can construe the state statute); see also Brant, *supra* note 193, at 25 (acknowledging that "[a]bstention is rooted in considerations of federalism and comity").

ereign but on the Court's conclusion that a legal concept simply defied application. For the Court to strike down RFRA as in excess of legislative power by reference to doctrines whose purpose is to rein in judicial power would be perverse.²⁰⁴

Professor Brant points to *Lujan v. Defenders of Wildlife*²⁰⁵ as another analog to the idea of rejecting RFRA based on the Court's assessment that the judicial branch lacks competence to balance religious claims against state interests.²⁰⁶ In *Lujan* the Court rejected Congress's decision to allow citizen suits under the Endangered Species Act²⁰⁷ because Congress purportedly had authorized plaintiffs to sue the government absent any "injury-in-fact," a requirement for standing under Article III.²⁰⁸ *Lujan*, however, differs critically from Professor Brant's reading of *Smith*, for the same reason the abstention and political question doctrines do: it is a decision not about *competence* but about *authority*. The *Lujan* Court held squarely that the Constitution did not authorize courts to decide the kind of cases Congress directed them to decide in the citizen suit provision. It did not hold that courts had authority to decide such cases but lacked the capacity to do so.²⁰⁹

Even aside from the dearth of precedent, the validity of sua sponte judicial denials of institutional competence within the scheme of separation of powers is highly questionable. The Constitution gives Congress broad power to control the Supreme Court's appellate juris-

204. Cf. Laycock, *Remnants*, *supra* note 21, at 33-36 (characterizing *Smith* decision as "[j]udicial activism in pursuit of judicial minimalism"); McConnell, *Institutions*, *supra* note 50, at 191 (suggesting, in context of criticizing Section 5 holding of *Boerne*, that Congress has authority to supersede Supreme Court's declaration of institutional incompetence, because Congress lacks the institutional limitations that inspire such a declaration); Resnik, *supra* note 171, at 2614-15 (discussing phenomenon of Court's rejecting litigation authorized by Congress).

205. 504 U.S. 555 (1992).

206. See Brant, *supra* note 193, at 26-27.

207. 16 U.S.C. § 1540(g) (1994).

208. See *Lujan*, 504 U.S. at 571-73. For an incisive critique of *Lujan*, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

209. Professor Brant characterizes this critical difference as a mere distinction between constitutional and prudential limits on judicial authority, and she suggests that the *Lujan* Court collapsed that distinction. See Brant, *supra* note 193, at 27 n.96 (noting widely held view that *Lujan* simply "constitutionalized" the prudential rule against standing to raise generalized grievances, and suggesting a similar move could undermine RFRA). But even the "prudential" rule against standing to raise generalized grievances deals with how much power the judicial branch should exercise, not merely judicial competence to decide a particular sort of case. See, e.g., *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) ("[T]o invoke judicial power the claimant must have a 'personal stake in the outcome,' or a 'particular, concrete injury,' or 'a direct injury;' in short, something more than 'generalized grievances.'" (emphasis added; citations omitted)). Moreover, the hypothesis that the *Lujan* Court mustered a majority for the unprincipled act of "constitutionalizing" a nonconstitutional rule provides no reason to believe the Court can, let alone should, do so again.

diction and the existence of lower federal courts.²¹⁰ The political branches, not the courts, define the particular boundaries within which the constitutional judicial power operates. In that context, broad declarations of institutional incompetence by courts, particularly in areas that Congress expressly has instructed federal courts to adjudicate, seem at least undesirable and perhaps impermissible, absent a substantive constitutional barrier — federalism or a guarantee of personal freedom.²¹¹ “The judicial role is defined by the Constitution; the Constitution is not defined by changing conceptions of the judicial role.”²¹²

Allowing courts to opt out of particular controversies would give them far too much opportunity to reach particular outcomes without addressing the merits. Imagine that Congress passed a law permitting, or requiring, the consideration of statistical evidence in evaluating equal protection challenges to capital sentences.²¹³ Could the Supreme

210. U.S. CONST. art. III; *see supra* note 187.

211. Professor Sager has argued that the Court forswears full enforcement of various constitutional provisions on “institutional” rather than “analytic” grounds. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-20 (1978). While Professor Sager characterizes such institutional self-limitations as “based upon questions of propriety or capacity,” *id.* at 1217 (emphasis added), none of his examples mirrors the “pure institutional competence” account of *Smith*. Professor Sager’s underenforced constitutional norms reflect either judicial regard for coordinate branches or for state sovereignty, *see id.* at 1218 (discussing federal courts’ refusal to enforce equal protection norms against state tax and regulatory measures); uncertain distinctions between institutional and analytic/substantive limitations, *see id.* at 1220 & n.24 (discussing substantive due process); or traditions of nonenforcement dating to the inception of the norm at issue. *See id.* at 1219-20 & n.23 (discussing Fourteenth Amendment Privileges or Immunities Clause). Moreover, the increased vitality in the ensuing two decades of the Fifth Amendment’s Takings Clause, which Professor Sager included among his underenforced norms, demonstrates that courts’ reasons for declining to tackle a constitutional provision may not run any deeper than the normative or intellectual commitments of the judiciary at a particular time.

212. Laycock, *Remnants*, *supra* note 21, at 38-39; *see also* Berg, *Constitutional Future*, *supra* note 13, at 744 (“Concerns for administrability may be one important factor in the courts’ choice between constitutional rules, but it hardly follows that such concerns authorize the courts to refuse to follow or enforce a statute enacted by Congress.”); McConnell, *Institutions*, *supra* note 50, at 192 (“Although concern about the lack of judicially manageable standards is reason for courts to avoid taking upon themselves an inappropriately intrusive role, it is not a sufficient reason for refusing a responsibility vested in them by Congress.”). *But see* Mark Tushnet, “Of Church and State and the Supreme Court”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 374-75 (advancing “administrability” argument in favor of restricting accommodation of religion).

213. Such legislation has been proposed. Title XVI of the Omnibus Crime Control Act of 1991, the Fairness in Death Sentencing Act, would have barred imposition of the death penalty on the basis of the race of the defendant or victim; to prove the influence of race in a particular case, the Act permitted the use of statistical evidence to establish a *prima facie* case of racial discrimination. *See* H.R. Rep. No. 102-242 (pt. I), at 153-59 (1991). Professor Brant recognizes that such legislation would amount to congressional expansion of rights, *see* Brant, *supra* note 193, at 34, but she denies that it could “threaten[] the Court’s determination of its institutional capabilities.” *Id.* at 35. Under Professor Brant’s view of the Court’s authority to determine its own institutional competence, however, the accuracy of her predictive judgment would depend entirely on whether or not the Court chose to *characterize*

Court affirm a capital sentence against a “statistical equal protection” challenge by deciding that courts are not competent to consider that sort of evidence, without addressing the merits of the petitioner’s equal protection argument? Similarly, would the Court be justified in banning abortion, or in forbidding all restrictions on the right to reproductive choice, by positing that the distinction between fetus and person was dispositive of the constitutional question and then declaring courts institutionally incompetent to draw the requisite line?²¹⁴ Such declarations of institutional limits would have the uncomfortable appearance of substantive decisions masquerading as judicial restraint. Courts have a duty to make what they can of what Congress gives them,²¹⁵ and if their work does not satisfy Congress, it can amend the statute.²¹⁶

The ultimate problem with the view that the *Smith* Court authoritatively proscribed judicial competence is that no principle would limit such judicial authority. Professor Brant, attempting to identify a limiting principle, suggests two possibilities. First, she argues that “[t]he Court cannot refuse to enforce an *explicit* provision of the Constitution.”²¹⁷ The major problem with this suggestion is that the Court itself has authority to define what is or is not an “explicit” command of the Constitution.²¹⁸ Moreover, Professor Brant never suggests why the distinction between explicit and implicit provisions, if it can be charted, should make a difference in the Court’s determination whether or not it has the capacity to enforce a constitutional provision.²¹⁹ In any

the legislation as threatening that authority — a characterization that seems perfectly reasonable.

214. In fact, abortion is a topic as to which the Court probably *is* institutionally incompetent in some meaningful sense but has shown the fortitude to resolve a difficult constitutional dispute where no path of least resistance was available. In its watershed abortion rights decisions, the Court has acknowledged the intractability of the question when life begins but has developed a constitutional jurisprudence based on its best understanding of that issue. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

215. Cf. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) (“Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. . . . [I]t is our role to make sense rather than nonsense out of the *corpus juris*.”) (citation omitted).

216. See Robin-Vergeer, *supra* note 13, at 623 (“If it turns out that RFRA is not easily administered, the answer is for Congress to amend or repeal it.”); Smith, *supra* note 113, at 684-85 (describing “definitional dialogue” in which Court and Congress may engage to arrive at correct interpretation of statutes); see also *supra* notes 151-157 and accompanying text (discussing dialogic approach to implementation of Federal RFRA).

217. Brant, *supra* note 193, at 35 (emphasis added); see also *id.* at 19 (suggesting that a determination of institutional competence “amounting to abdication of an essential function” would not be binding on coordinate branches).

218. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

219. As Professor Brant acknowledges, the Court in the past has refused to enforce explicit constitutional provisions where it concluded that such provisions committed authority

event, a strong argument exists that *Smith* represents the quintessential refusal to enforce an explicit provision of the Constitution: the Free Exercise Clause.²²⁰ Second, Professor Brant suggests that Congress may override prudential limits on judicial authority where “their relationship to judicial competency is more attenuated than the claim made in *Smith*.”²²¹ Here again, however, the Court would appear to have the last word on how “attenuated” any prudential limit is from its authority to determine judicial competence, and thus the posited limiting principle disappears.

Even assuming the Court owns the sort of power to proscribe the judicial role posited by the pure institutional competence critique of RFRA, the *Smith* Court overstated the necessity of “centrality” analysis under strict scrutiny. Courts that apply RFRA have two well-established alternatives. First, courts can focus on the categorical determination whether a given claim is “religious” within the meaning of the Act.²²² This was the Court’s approach in *Thomas v. Review Board*,²²³ which distinguished between “religious” and “nonreligious” conscientious claims²²⁴ but accorded great deference to the claimant’s account of his religious belief.²²⁵ Such an inquiry requires sufficient deference to ensure that novel or nontraditional religious claims will be fully recognized.²²⁶ Although defining what is religious is a delicate

to other branches. See *Baker v. Carr*, 369 U.S. 186, 224-26 (1962) (canvassing Guaranty Clause cases challenging congressional actions); Brant, *supra* note 193, at 24-25.

220. See, e.g., Laycock, *Remnants*, *supra* note 21, at 38-39; McConnell, *Revisionism*, *supra* note 21, at 1141-44; see also *infra* notes 249-255 and accompanying text. Professor Brant rejects the notion that *Smith* abdicated the Court’s duty to enforce the Free Exercise Clause: “*Smith* did not find that enforcement of the Free Exercise Clause was inconsistent with the judicial role. The Court merely rejected the use of the compelling interest test and substituted a neutrality standard. Enforcement of the Free Exercise Clause continues under this new standard.” Brant, *supra* note 193, at 28 (citation omitted). This account of *Smith* is circular. The question is whether the Court’s power to define the competence of the judiciary extends to proscribing enforcement of “explicit” constitutional provisions. To reply that the *Smith* Court did no such thing, because the Court continues to enforce a narrowed version of the Free Exercise Clause, is no answer if, as Professor Brant posits, the *Smith* Court’s basis for narrowing the Free Exercise Clause was its narrow view of judicial competence.

221. Brant, *supra* note 193, at 36 (suggesting that Congress could overrule abstention doctrines); see also Laycock, *Ratchet*, *supra* note 13, at 169 (same).

222. The contours of this inquiry would depend on the meaning of the term “religion” in RFRA, a matter whose resolution may be influenced by Establishment Clause concerns. See *infra* Section III.C.

223. 450 U.S. 707 (1981).

224. *Id.* at 713 (“Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.”).

225. See *id.* at 714 (stating that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”).

226. The Court has long acknowledged this dictate in the free exercise context, stating that “it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.” *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); see also Kent Greenawalt, *Judicial Resolution of Issues About Relig-*

task,²²⁷ any complaint that attempting to do so entangles the court excessively in religious substance²²⁸ proves too much. Courts must make judgments about what is religious in order to enforce the Religion Clauses at all.²²⁹ Analysis of whether a practice is religious at all restricts judicial subjectivity far more tightly than does centrality analysis, which asks whether a given practice has an especially important religious pedigree. Second, courts can focus on the subjective validity of a RFRA claim.²³⁰ In *Mack v. O'Leary*,²³¹ for example, Chief Judge

ious Conviction, 81 MARQ. L. REV. 461, 463 (1998) [hereinafter Greenawalt, *Judicial Resolution*] (advocating "a broad approach to what counts as religious"). *But see* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 622-28 (2000) (criticizing deference under RFRA in defining "religion" where exemption at issue causes harm to third parties).

227. *See* W. Cole Durham, Jr., *State RFRA's and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 682-87 (1999) (discussing problems with defining what is religious); Greenawalt, *Religious Law*, *supra* note 25, at 812-16 (describing complexities inherent in determining religious character of bill of divorce under traditional Jewish law).

228. *See* Lupu, *Burdens*, *supra* note 29, at 957-58 (expressing concerns that religiosity may defy definition and that attempts to define what is religious discriminate against minority religions); Marshall, *Exemption*, *supra* note 25, at 359, 386-88 (arguing that attempts to define religions entangle courts in matters of religious substance); Professor Greenawalt also has noted the Establishment Clause problem with judicial declarations on "debatable issues of religious law," as opposed to "straightforward determinations of religious requirements." Greenawalt, *Religious Law*, *supra* note 25, at 839.

229. *See* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 299 (1985) (noting that lower courts, in assessing religious group's claim that its regulated activity had religious purpose, "were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope"); Greenawalt, *Judicial Resolution*, *supra* note 226, at 463-65 (discussing types of cases that require judicial inquiries into religiosity); Lipson, *supra* note 226, at 602 (criticizing courts' reluctance to define religion on ground that "[i]t is difficult to see how courts can protect something if they cannot define it"); Loewy, *supra* note 58, at 112-113 (maintaining that some measure of centrality analysis is necessary for free exercise adjudication); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 325-31 (studying courts' tendency to avoid questioning religious sincerity or defining religion, and proposing ways in which courts may do so in order to effectuate Free Exercise Clause); *see also infra* notes 256-261 and accompanying text.

230. *See* Greenawalt, *Judicial Resolution*, *supra* note 226, at 462-63 (discussing inquiry into sincerity as a baseline for accommodation claims); Paulsen, *supra* note 13, at 277-78 (explaining that courts focused on the subjective sincerity of religious claimants' beliefs in the wake of *Sherbert v. Verner*, and advocating such an approach to RFRA). Professor Lupu and Professor Marshall object to inquiries into subjective validity, just as they object to "religiosity" inquiries, on grounds of judicial entanglement with questions of religious substance. *See* Lupu, *Burdens*, *supra* note 29, at 954-57. Marshall, *Defense*, *supra* note 23, at 310-11; Marshall, *Exemption*, *supra* note 25, at 359, 386-88. Professor Marshall encapsulates the concern: "[H]ow can one judge the sincerity of an individual's belief without judging the reasonableness of the belief?" *Id.* at 387; *see also id.* at 403. The answer is that every credibility determination involves a determination of sincerity, and many of those determinations concern unreasonable beliefs. If a court can determine that a party before it is a sincere Nazi or misogynist or millenarian, as any number of cases might require, then it must be able to determine whether a party before it sincerely holds a religious view, whether that view appears reasonable to the finder of fact or not. The Supreme Court has established that a judicial determination of an actor's subjective motivation need not entail any judgment about the merits of the motivating thought or idea. *See* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding against free speech challenge a statutory penalty enhancement for bias-motivated crimes).

Posner adopted what he termed a "generous" test for substantial burdens under RFRA, focused on the subjective importance of the burdened religious practice.²³² Again, inquiry into the importance of a religious practice to the claimant herself entails far less judicial meddling in matters of religious substance than centrality analysis, which examines the importance of the practice in the religion's doctrine generally. Either of these two alternatives would avoid centrality analysis and defuse the pure institutional competence concern.²³³ Once a court has made such a *prima facie* inquiry, it can proceed to evaluate how severely the government's action impedes the claimant's practice.²³⁴

The extent to which either the religiosity or the subjective importance approach would ease the *prima facie* showing required for a RFRA claim means courts would need to exercise some control over

231. 80 F.3d 1175 (7th Cir. 1996), *vacated and remanded*, 522 U.S. 801 (1997), *on remand*, 1999 U.S. Dist. LEXIS 7239 (N.D. Ill. 1999).

232. "[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." *Mack*, 80 F.3d at 1179.

233. In addition, under heightened scrutiny "there are also easy cases — cases that can be decided without any case-specific balancing whatsoever — and the principles constrain judicial discretion. Indeed, in most free exercise cases no 'balancing' is required at all, because the relevant factors are ones of kind rather than of degree." McConnell, *Revisionism*, *supra* note 21, at 1145; *see also* Lupu, *Trouble*, *supra* note 17, at 757 (contending that problems of judicial inquiry into centrality "are at the margin" because centrality of some religious practices lies "beyond reasonable controversy"); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 602 (1991) [hereinafter Lupu, *Reconstructing*] (arguing that balancing is not always necessary in free exercise cases because "[j]udicial decisions must rest on norms that transcend the immediate context in which they are applied.") (citation omitted); McConnell, *Update*, *supra* note 195, at 735 (arguing that inquiries into religiosity and sincerity often are unnecessary). Thus, even if the reasoning of *Smith* did force courts to abjure all analysis of the seriousness of religious freedom claims, many RFRA cases would remain amenable to adjudication.

234. Laycock, *Act*, *supra* note 25, at 240-41:

The Court should not say that minor burdens on constitutional rights require no justification. Rather, it should say that minor burdens require justification proportionate to the burden — that the state's interest must compellingly outweigh the burden on the constitutional right. . . .

It is only common sense to recognize that a minor burden on a right may be justified by a less compelling interest than a total prohibition on the same right.

To the extent such an analysis "require[s] both empirical guesswork and delicate computations of tradeoffs," Brant, *supra* note 193, at 17, it is no more or less problematic under RFRA than under any other scheme that employs strict scrutiny. Courts always have had to contend with the question "what public purposes are sufficiently important that they justify limiting rights of conscience." Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 826-27 (1998) [hereinafter McConnell, *Historical Arguments*]; *see id.* at 822-32 (examining historical roots of religious accommodation doctrine). Neither the *Smith* rule nor RFRA nor any other formulation of religious accommodation doctrine can obviate that question.

the Act's reach on the back end, by sympathetically considering the government's asserted "compelling interest."²³⁵ This imperative to take serious account of the government's interest raises two concerns. First, courts might fall into a pattern of overly credulous acceptance of the government's asserted interests, a serious problem under pre-*Smith* jurisprudence.²³⁶ Although this problem could dilute the force of RFRA, it is preferable to the alternatives of no protection on one side and rule of law problems on the other. The scheme of RFRA compels some measure of trust — backed up by legislative oversight — that courts will implement the Act with sensitivity to the religious liberty interests that prompted the Act as well as the genuine societal interests that sometimes trump them.²³⁷

Second, the *Smith* Court warned that the proven integrity of the compelling interest standard, established in the free speech, equal protection, and Dormant Commerce Clause contexts, would be undermined by a more credulous jurisprudential approach to strict scrutiny in religious freedom cases.²³⁸ As an initial matter, this concern seems somewhat gratuitous, given that strict scrutiny still applies after *Smith* in constitutional religious accommodation cases that involve either so-called "hybrid rights" or government actions other than generally applicable laws.²³⁹ In any event, congressionally directed strict scrutiny under RFRA need no more affect the meaning of constitutional strict scrutiny generally than it affects the meaning of the Free Exercise

235. See Greenawalt, *Judicial Resolution*, *supra* note 226, at 469 (discussing judicial strategies for adjusting strict scrutiny in religious freedom cases if sincere motivation became the only test for a substantial burden); Lupu, *Burdens*, *supra* note 29, at 948 ("At the level of claim definition, as well as in the application of the relevant standard of review, free exercise adjudication provides seemingly legitimate ways for judges to say no.").

236. See *supra* notes 24-27 and accompanying text; Idleman, *supra* note 193, at 274-80 (emphasizing manipulability of "compelling interest" standard as a reason to doubt RFRA as a substantial guarantor of religious liberty); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 210 (2000) [hereinafter Marshall, *Equality*] (suggesting, based on RFRA and pre-*Smith* free exercise cases, that courts tend "to under-enforce religious exemption claims because of the difficult interpretive steps that religion claims require") (citation omitted).

237. As Michael Paulsen has noted, the universal coverage of RFRA in the federal sphere effectively precludes the government from arguing that uniform application of an affected law is itself a compelling interest that justifies an exception to RFRA's directive to accommodate religion. See Paulsen, *supra* note 13, at 270-74.

238. See *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990); see also Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 452 (arguing that use of strict scrutiny in RFRA "will almost certainly have the effect of diluting that test in other contexts where the Court has found the test normatively apt and workable in application"); Lupu, *Statutes*, *supra* note 6, at 66 (positing dilution concern); Sherry, *supra* note 29, at 149 n.103 (same); Volokh, *Common-Law Model*, *supra* note 12, at 1500-01 (same).

239. See McConnell, *Singling Out*, *supra* note 11, at 3-4.

Clause.²⁴⁰ Moreover, the Court has shown no tendency to allow its understanding of strict scrutiny, including the soft version applied in religious freedom cases between *Sherbert* and *Smith*,²⁴¹ to bleed from one context to another.

2. *Institutional Competence Based on a Substantive Determination About Religious Liberty*

Professor Conkle observes that “judicial decisions rejecting heightened constitutional scrutiny typically involve a complex interplay of substantive and institutional considerations.”²⁴² A variation on the institutional competence objection reads *Smith* as an authoritative constitutional judgment that the substantive content of the Religion Clauses precludes courts from balancing religious claims against government interests.²⁴³ This critique does not purport to prove the correctness of the Court’s substantive constitutional judgment; rather, it invokes the Court’s authority to make that judgment as a reason to honor the Court’s antecedent methodological judgment. From the perspective of the substantive institutional competence critique, the *Smith* Court’s authoritative rejection of the methodology of strict scrutiny as incompatible with the First Amendment compels invalidation of RFRA.

Professors Eisgruber and Sager portray the *Smith* Court’s holding that strict scrutiny of religious exemption claims produced a “constitutional anomaly”²⁴⁴ as meaning that strict scrutiny “does not support religious liberty at all, and that even if [RFRA] does not rise to the level of an Establishment Clause violation, it works at cross-purposes

240. See *supra* notes 143-150 and accompanying text (explaining that RFRA can have no effect on meaning of Free Exercise Clause).

241. See *supra* notes 24-27 and accompanying text; see also Lupu, *Statutes*, *supra* note 6, at 64 (maintaining that strict scrutiny as applied in *Sherbert* and *Yoder* actually called for “judicial evaluation of tradeoffs among the intrusion on liberty, the weight of the state’s ends, and the relative effectiveness of the intrusion, as compared with other means, for reaching those ends”).

242. Conkle, *Constitutional Significance*, *supra* note 130, at 66.

243. See Brant, *supra* note 193, at 23 (“the [*Smith*] Court’s institutional argument may prove to have a foundation in the Establishment Clause”); Conkle, *Constitutional Significance*, *supra* note 130, at 64-65 (“the Court [in *Smith*] was concerned that religious equality could not be adequately protected by the process of judicial balancing”); Hamilton, *Unconstitutional*, *supra* note 14, at 10-12; see also Greenawalt, *Amendment*, *supra* note 16, at 696 (noting that “the separation of powers objection to RFRA approaches the related objection that a legislative directive to courts to apply an unmanageable standard for religious exercise amounts to an establishment of religion”); Marshall, *Equality*, *supra* note 236, at 208-11 (generally discussing constitutional concerns arising from judicial determinations about matters of religious substance). But see 1 TRIBE, *supra* note 50, § 5-16 at 951 n.121 (dismissing idea that RFRA’s conception of free exercise so clashes with Establishment Clause as to render RFRA outside bounds of constitutional power).

244. *Smith*, 494 U.S. at 886 (citation omitted).

with the Court's understanding of religious liberty or other elements of constitutional justice."²⁴⁵ Similarly, Eugene Gressman and Angela Carmella, who reject the "pure" institutional competence critique of RFRA,²⁴⁶ argue that the *Smith* Court's rejection of strict scrutiny in favor of a categorical approach to free exercise was a methodological decision whose "natural consequence" is a free exercise doctrine that affords less protection to religious exercise against the effects of neutral, generally applicable laws.²⁴⁷ For Professors Gressman and Carmella, *Smith* provides the last word on resolving conflicts between religious liberty and government's regulatory prerogatives: "*Smith* rejected the balancing approach for generally applicable, facially neutral laws and with it the doctrinal formulation that the meaning of the Free Exercise Clause is dependent upon a judicial weighing of religious claims and governmental interests."²⁴⁸

The substantive institutional competence objection turns on an unnecessarily sweeping reading of *Smith* that would diminish protection of religious freedom far more drastically than the Court appears to have intended. If *Smith* rejected judicial balancing of religious claims against governmental interests not only as a constitutional mandate but also when called for by a statutory system, then the Court irreparably skewed the proper institutional roles of Congress and the judiciary in protecting religious freedom.²⁴⁹ In *Smith*, the Court appropriated the congressional role of deciding how to deal with the broad political issue of religious accommodation and held that the Religion Clauses required Congress to decide whether particular accommodations should be granted.²⁵⁰ Federal RFRA accedes to the *Smith* reading of the Religion Clauses but attempts a better allocation of institutional roles by announcing a general standard to govern accommodations and enlisting the courts to strike proper balances in

245. Eisgruber & Sager, *After Boerne*, *supra* note 36, at 98; *see also* Eisgruber & Sager, *Conscience*, *supra* note 21, at 1302-04 (arguing that courts lack capacity to balance competing interests in many cases that implicate core religious freedom principle of "equal regard"); Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 459 (same).

246. *See* Gressman & Carmella, *supra* note 84, at 73-75, 92 & n.116.

247. *See id.* at 75-92.

248. *Id.* at 86. Professor Gressman reiterates this argument in a post-*Boerne* article that addresses RFRA's federal law applications.

249. *See* Greenawalt, *Judicial Resolution*, *supra* note 226, at 471-72 (defending "troublesome" judicial line-drawing in religious freedom cases as preferable to alternatives of nonenforcement, underenforcement, and overenforcement); McConnell, *Institutions*, *supra* note 50, at 191-92 (arguing that legislatures should set general principles for religious accommodations and courts should adjudicate particular cases).

250. *See Smith*, 494 U.S. at 890 (holding that accommodation of religious exercise is properly left to the political process rather than to judges who would weigh the social importance of all laws against the centrality of all religious beliefs).

particular cases.²⁵¹ This arrangement is particularly appropriate in the religious freedom setting. The Religion Clauses are designed to protect minorities from majoritarian tyranny.²⁵² A doctrine of religious exemptions that transcends discrete legislative judgments can strongly enhance that protection.²⁵³ If *Smith* bars Congress from harnessing the courts' adjudicative function in this manner, then the *Smith* Court severely constrained the constitutional rights of religious minorities and

251. Some commentators have argued that, under RFRA's division of labor, courts should grant exemptions more freely than they did under the pre-*Smith* Free Exercise Clause because now they are effectuating the (amendable) political will rather than imposing their own moral judgments. See Berg, *Congress*, *supra* note 26, at 29; Volokh, *Intermediate Questions*, *supra* note 36, at 617-18; Volokh, *Common-Law Model*, *supra* note 12, at 1487-90. That view understates the proper force of courts' constitutional judgments under both the Free Exercise Clause (pre-*Smith*) and the Establishment Clause, see *infra* Section III.D.1., while also confusing courts' duty to effectuate the political will as expressed in statutes with a license to legislate from the bench under statutory cover. See Lupu, *Statutes*, *supra* note 6, at 25 ("A judge who perceives that a legislature has chosen her institutional path rather than its own may erroneously interpret such an enactment as more of an affirmation of judicial discretion than it is meant to be.").

252. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'") (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (plurality opinion); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (describing Bill of Rights as designed to remove certain interests "from the vicissitudes of political controversy"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting heightened judicial scrutiny of legislative acts that discriminate against "discrete and insular minorities"). I argue below that this deeply entrenched principle of protecting minority religions makes accommodations that equalize the government's treatment of similarly situated religious groups acceptable under the Establishment Clause. See *infra* Section III.D.2.a.

253. "To move application of the [compelling interest] test from the courts to lawmaking bodies . . . would maximize the risks of underprotecting small or unpopular faiths and overprotecting large, well-accepted faiths." Laycock & Thomas, *supra* note 30, at 221; see also Lupu, *Trouble*, *supra* note 17, at 777 ("[L]egislative politics most probably will favor dominant religious traditions."); McConnell, *Institutions*, *supra* note 50, at 192 ("To insist that legislatures deal with 'concrete cases' on an individual basis is an invitation to arbitrariness and favoritism.") (footnote omitted); Sherry, *supra* note 29, at 152 (arguing that giving legislature responsibility for deciding accommodation claims exacerbates bias against minority religions already present in judicial determinations). But see Marshall, *Equality*, *supra* note 236, at 210 (arguing that, under regime of aggressive judicial protection of religious freedom, "minority belief systems will undoubtedly be the worse for wear"); Volokh, *Common-Law Model*, *supra* note 12, at 1554 (arguing that "[legislative] exemption-by-exemption decisions would neither violate constitutional equality guarantees nor be inherently unfair") (footnotes omitted).

One response is that "RFRA is largely the majoritarian product of the demands and pressures brought by a powerful religious coalition." Gressman, *Comedy*, *supra* note 3, at 518; see also Lupu, *Codification*, *supra* note 83, at 582-83 (maintaining that RFRA increases danger of religious discrimination because its drafting reflects the interests of majority religions). That argument has force to the extent RFRA raises concerns about competing rights that may be undermined by RFRA's heightened protection of religious liberty. See *infra* Part III. In the context of minority religions' quest for protection, however, it is difficult to argue that judicial review under RFRA is worse than legislative fiat. See *infra* Section III.D.2.a.

permanently consigned what remains of those rights to majority will.²⁵⁴ That would be a strongly undesirable outcome.²⁵⁵ The better reading of *Smith* is that it held strict scrutiny inappropriate for constitutional adjudication under the Religion Clauses but not necessarily incompatible with the substance of the First Amendment.

Aside from its unpalatable doctrinal consequences, the substantive institutional competence reading of *Smith* would cause severe interpretive problems for courts in applying the Religion Clauses. The determinations about religious substance necessary for strict scrutiny of accommodation claims differ only in degree from the most basic judgments about what constitutes "religion" within the meaning of the First Amendment.²⁵⁶ If courts could not make such judgments, then they could not protect religious exercise even against the sort of intentional and discriminatory attacks that *Smith* acknowledged courts

254. This is the state of free exercise doctrine after *Smith*. Justice Scalia made clear that the fate of minority religions under a weakened Free Exercise Clause did not trouble the Court:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Smith, 494 U.S. at 890. Commentators have condemned the *Smith* Court's indifference to minority interests. See Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1727 (2000) ("*Smith* poignantly illustrates . . . the reduction in the level of Supreme Court protection for nonmainstream religions."); McConnell, *Historical Arguments*, *supra* note 234, at 824 (arguing that "[w]hile the *Smith* interpretation of free exercise is adequate to ward off religious persecution, it is not adequate to achieve a full liberty of conscience"). But see Eisgruber & Sager, *After Boerne*, *supra* note 36, at 130 (arguing that *Smith* leaves religious minorities with the same degree of legislative protection enjoyed by speech); Hamilton, *Rhetoric*, *supra* note 23, at 631 (asserting that minority religions, as "small, organized groups," will "do better in the legislative process than disorganized minorities"); Volokh, *Common-Law Model*, *supra* note 12, at 1535 (asserting that "[m]ost religious groups in the United States today do not lead particularly discrete and insular lifestyles").

255. Professors Eisgruber and Sager argue that "legislatures may be better at . . . the general task of accommodating religious interests." Eisgruber & Sager, *Conscience*, *supra* note 21, at 1304. They offer two salves for the danger of legislative bias. First, they argue that bias is more of a danger "in small policy-making bodies that work in poorly lit corners of the public square" than in "more cosmopolitan institutions" like Congress. *Id.* at 1305. Majorities are majorities, however, and they will exert the same pressure on large, "cosmopolitan" institutions that they exert on local school boards. Moreover, even when representative bodies have good intentions, they may be prone to careless or ignorant disregard of minorities' preferences. See *infra* notes 398-401 and accompanying text. Second, Professors Eisgruber and Sager maintain that "political institutions may react differently to an issue once they see it as a matter of religious liberty," correctly noting that on several occasions Congress has accommodated religious exercise where the Court would not. Eisgruber & Sager, *Conscience*, *supra* note 21, at 1305-06. But this is, at best, a guarantee of a fair political fight. By applying RFRA to federal law, Congress made a precommitment to give religious exercise more than that, out of the belief that legislators might not always respect this important value in the heat of political battle.

256. See *supra* notes 222-229 and accompanying text (suggesting objective religiosity inquiry for judicial assessment of prima facie claims under RFRA).

could proscribe.²⁵⁷ Forbidding such judgments out of concern about judicial encroachment on religion would amount to killing free exercise protection with kindness. By the same token, if courts could not discern which practices are “religious,” then they could not credibly assess governmental actions under the Establishment Clause.²⁵⁸ They could not, in effect, distinguish between a nativity scene and a red-nosed reindeer.²⁵⁹ Absolute judicial avoidance of inquiries into religious substance, especially if it resulted in a weakened Establishment Clause, would cross the line that divides appropriate respect for religious autonomy from inappropriate solicitude for religious claims of transcendence.²⁶⁰ As Professor Conkle has observed, “[t]he Court cannot entirely escape the definitional problem — that is, as long as the Court finds any content in the religion clauses.”²⁶¹

E. *Turning to the Real Challenge of Federal RFRA*

The preceding discussion has established that the Court should respect and effectuate Congress’s precommitment in Federal RFRA to provide heightened protection for religious freedom. Despite the Act’s employment of a methodology usually associated with the Constitution, its federal law applications neither exercise power without constitutional authority nor usurp the Court’s authority to interpret or apply the Constitution. Moreover, the mechanism Congress chose to carry

257. See *Smith*, 494 U.S. at 877-78 (stating that governmental prohibition of acts or abstentions when performed solely for religious reasons, or only because they display religious belief, violates the Free Exercise Clause); cf. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down local ordinance held to burden purposefully a particular religion’s practice of animal sacrifice).

258. “The majoritarianism reflected in *Smith* complements the majoritarianism implicit in the permissive establishment cases: It is as if the Court wears blinders, so that it cannot see an establishment of mainstream Christianity and cannot see free exercise violations of anything else.” Sullivan, *supra* note 26, at 216; cf. Greenawalt, *Judicial Resolution*, *supra* note 226, at 467 (noting similarity between inquiry into individual’s subjective perception of substantial burden on religious exercise and inquiry into subjective perception that government action “endorses or impermissibly aids a religion”). Professor Marshall, vigorously objecting to judicial attempts to define religion, recognizes this Establishment Clause problem but offers no answer to it. See Marshall, *Exemption*, *supra* note 25, at 386 n.136.

259. Whether courts have proved capable of making such distinctions in the past is a fair question. See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding municipal display of creche as part of “traditional” Christmas display); *id.* at 712 (Brennan, J., dissenting) (criticizing majority for holding creche “‘traditional’ and therefore no different from Santa’s house or reindeer”).

260. See Lupu, *Trouble*, *supra* note 17, at 772 (“[I]t is easy to slip from a belief in the ‘sovereignty of God’ to the idea that the state lacks authority to question the *bona fides* of religious claims.”) (footnote omitted); McConnell, *Singling Out*, *supra* note 11, at 25 (“merely because the civil magistrate is not a competent judge of a particular category of truth does not mean that it enjoys any special constitutional status”).

261. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 32 (2000) [hereinafter Conkle, *Religious Liberty*].

out its precommitment — strict judicial scrutiny of religious freedom claims — does not force upon the judiciary an analytic standard it lacks competence to administer. The sort of legislative precommitment to prioritize rights manifest in Federal RFRA may be an important source of civil liberties in an era in which judicial expansion of rights is criticized as an intrusion on the authority of the political branches.²⁶² Federal RFRA is the law, and the courts must effectuate that law.

However, the methodology of precommitment, even in the service of personal freedom, exacerbates a danger that is always present in legislation. By making heightened solicitude for a given right effectively automatic, Congress foregoes case-by-case analysis of the danger that such solicitude might violate other rights guaranteed by the Constitution.²⁶³ The separation of powers arguments lodged against Federal RFRA threaten to distract judicial attention from the essential task of safeguarding personal liberties.²⁶⁴ Any legislative solicitude for religion, including RFRA's sweeping protection of religious freedom beyond what the Constitution requires of the federal government, threatens to violate the Establishment Clause. This is the real challenge Federal RFRA presents reviewing courts: to effectuate the congressional will to protect religious freedom while preserving the separation of church and state. The remainder of this Article explores how courts can meet that challenge.

262. Critics of RFRA have expressed concern that the Act would impede rights by preventing enforcement of civil rights legislation in cases of religious motivated discrimination based on race, gender, or sexual orientation. *See generally* O'Neil, *supra* note 25 (discussing possible conflicts). Federal civil rights protections have several effective layers of protection from Federal RFRA. First, note that this is not a constitutional problem. RFRA, a mere statute, has nothing to say about constitutional nondiscrimination requirements. Second, courts should, and presumably will, consider civil rights enforcement to be a "compelling interest" that justifies encroachment on religious exercise in a broad range of cases. Third, Congress retains the power to exempt existing or future civil rights protections from the effect of Federal RFRA.

263. *See supra* Section II.A. The potential for a legislative precommitment to have impermissible consequences should not be confused with the argument that the precommitment methodology's inattention to particular applications makes the methodology inherently suspect under some notion of due process of lawmaking. *See supra* notes 114-123 and accompanying text.

264. *Cf.* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (arguing that federal courts should forego review of federalism and separation of powers questions in order to preserve institutional capital for individual rights cases).

III. EFFECTUATING FEDERAL RFRA

RFRA has met with middling success in its aim of protecting religious exercise.²⁶⁵ Many more federal RFRA claims have failed²⁶⁶ than

265. Ira Lupu's 1998 survey of reported pre-*Boerne* judicial and administrative decisions found that, in the administrative arena, "there is absolutely no evidence that RFRA did anything to protect religion in decision making by the agencies of the United States." Lupu, *Failure*, *supra* note 86, at 589; *see id.* at 588-97 (surveying pre-*Boerne* decisions and concluding that RFRA was largely ineffective). In federal court cases, prisoners raising RFRA claims had prevailed in only nine of eighty-four cases, while other RFRA claimants won in nine of fifty cases. *Id.* at 591. Professor Lupu concludes: "If the goal of RFRA was to empower religious believers and institutions, it accomplished far less than its backers hoped and promised." *Id.* at 597; *see also* James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992) (contending that religious freedom advocates have overstated the harm of *Smith* and the benefits of RFRA). But *see* Berg, *New Attacks*, *supra* note 110, at 419-22 (defending RFRA's effectiveness); Frederick Mark Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95, 95 (1995) [hereinafter Gedicks, *Justice*] (expressing skepticism about the likely effectiveness of RFRA in protecting religious freedom but suggesting the Act would improve over pre-*Smith* free exercise law in trial courts and administrative proceedings); Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 969 (1998) [hereinafter Laycock, *International Human Rights*] ("The experience in the courts under [RFRA] was not good . . . but it was not terrible."). Professor Lupu's statistics do not seem to me to support his broad pronouncement that "a crisply codified doctrine of free exercise exemptions cannot be made to work." Lupu, *Failure*, *supra* note 86, at 597. Perhaps eighteen successes out of 134 cases is a disappointing result for RFRA's "backers," but it certainly represents meaningful "work" toward checking governmental encroachment on religious freedom. What Professor Lupu's numbers establish is that federal courts are not applying RFRA with anything like the vigor that Congress directed. My point here is that the present posture of Federal RFRA provides a realistic opportunity for courts to do more and better with the Act. Because I am not concerned here with the question whether RFRA was the optimal means of ensuring religious freedom, I neither endorse nor dispute Professor Lupu's preference for alternate means toward that end. *See id.* at 597-603.

266. A search for rejections on the merits of federal claims under RFRA turned up the following decisions (thirteen appellate, eighteen trial-level): *United States v. Oliver*, No. 00-3526, 2001 U.S. App LEXIS 13284 (8th Cir. June 14, 2001) (prosecuting a Native American for taking a bald eagle for religious purposes is not a violation of RFRA); *Henderson v. Kennedy*, No. 00-5070, 2001 U.S. App LEXIS 14235 (D.C. Cir. June 26, 2001) (ban on t-shirt sales in public area did not substantially burden religious exercise of group that sold religion-themed t-shirts); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (applying federal employment tax laws to a church is not a violation of RFRA); *Miller v. Comm'r of Internal Revenue*, 114 T.C. 511 (2000) (requiring Social Security numbers for children is not a violation of RFRA); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-21 (9th Cir. 2000) (rejecting RFRA defense against copyright infringement claim); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (IRS's revocation of church's tax-exempt status did not violate RFRA); *Lipton v. Peters*, No. CIV.SA-99-CA-0235-EP, 1999 WL 33289705 (W.D. Tex. Oct 12, 1999) (affirming military's finding that religious conscientious objector's claim was not based on a sincerely held belief); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) (RFRA claim by employee against hospital as private entity invalid); *United States v. Sandia*, 188 F.3d 1215 (10th Cir. 1999) (RFRA claim invalid where defendant takes, possesses, and sells a protected bird for commercial gain); *Browne v. United States*, 176 F.3d 25 (2nd Cir. 1999) (IRS penalties and interest levied for taxes withheld on grounds of religious opposition to war did not violate RFRA); *In re Grand Jury Empanelling of Special Grand Jury*, 171 F.3d 826 (3rd Cir. 1999) (enforcement of subpoenas to testify did not violate RFRA); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173 (3rd Cir. 1999) (government's failure to accommodate taxpayer's anti-military religious beliefs did not violate RFRA); *Nichols v. United States*, 1999 U.S. App. LEXIS 10992 (9th Cir. May 25, 1999) (rejecting RFRA defense against enforce-

succeeded.²⁶⁷ The shortcomings do not appear inevitable from the face of the statute.²⁶⁸ Rather, courts appear to have construed the statute

ment of IRS third-party summonses); *McNair-Bey v. Bledsoe*, 165 F.3d 32 (Table, Text in WESTLAW), Unpublished Disposition, No. 97-1701, 1998 WL 879503 (7th Cir. 1998) (prison officials did not violate RFRA by punishing prisoner who refused to remove or cover religious pin worn on outside of clothing); *Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998) (RFRA does not provide church with basis to challenge Parole Commission's decision to deny parole to its pastor); *FCC v. Girona*, No. 3:99CV1262 AWT, 2000 WL 565496 (D. Conn. 2000) (regulation prohibiting issuance of licenses for low-power broadcasters does not violate RFRA); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 180-81 (D.D.C. 2000) (policy statement declaring genetically altered foods presumptively nonharmful did not impose substantial burden on RFRA claimants' religious exercise); *United States v. Any and All Radio Station Equip.*, 93 F.Supp.2d 414 (S.D.N.Y. 2000) (statutory prohibition on operating radio station without license did not violate RFRA); *Jackson v. District of Columbia*, 89 F. Supp. 2d 48 (D.D.C. 2000) (Department of Corrections' grooming policy as applied to federal prisoners did not violate RFRA); *Marrero v. Apfel*, 87 F. Supp. 2d 340 (S.D.N.Y. 2000) (denial of SSI benefits to non-disabled claimant, who asserted that his faith prevented him from working, did not violate RFRA); *In re Tzu Jung*, No. 99-0420, 2000 WL 195066 (D.D.C. 2000) (no unconstitutional burden on free exercise of religion under RFRA not to excuse failure to appear at trial); *Gibson v. Babbitt*, 72 F. Supp. 2d 1356 (S.D. Fla. 1999) (regulation requiring that applicants for eagle parts under religious purposes exemption of the Bald and Golden Eagle Protection Act be members of a federally recognized Indian tribe did not violate RFRA as applied to Native American applicant not belonging to a recognized tribe); *Molotsky v. Henderson*, No. CIV. A. 98-5519, 1999 WL 165683 (E.D. Pa. 1999) (no federal remedy available under RFRA to federal employee suing on employment discrimination claim); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (RFRA does not bar application of Age Discrimination in Employment Act); *In re Three Children*, 24 F. Supp. 2d 389 (D.N.J. 1998) (subpoena directing Orthodox Jewish children to testify against their parent did not violate children's rights under RFRA); *Packard v. United States*, 7 F. Supp. 2d 143 (D. Conn. 1998) (penalties levied on religious tax protestor for nonpayment of taxes did not violate RFRA); *Gunning v. Runyon*, 3 F. Supp. 2d 1423 (S.D. Fla. 1998) (postal employee failed to establish *prima facie* case under RFRA based on decision of post office to cease playing Christian music station over its public address system); *Morehouse v. U.S. Dep't of Justice*, No. CIV.A.3:97-CV-0300-D, 1998 WL 320268, at *3 (N.D. Tex. 1998) (RFRA claim dismissed where defendant on supervised release failed to set out details of his beliefs and burden on his free exercise of religion); *Steckler v. United States*, 1998 WL 28235 (E.D. La. 1998) (RFRA claim for refusal to use Social Security number for religious reasons improper because government used least restrictive means of furthering its interest in tracking taxable income); *Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes)*, 219 B.R. 286 (Bankr. D. Or. 1998) (recovery of debtors' tithes and offerings to church by Chapter 7 trustee did not violate RFRA).

267. A search for favorable adjudications of federal claims under RFRA turned up the following decisions (2 appellate, 6 trial-level): *Kikumura v. Hurley*, 242 F.3d 950, 958-62 (10th Cir. 2001) (holding that plaintiff had substantial likelihood of success in proving that prison warden's denial of pastoral visit violated RFRA); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir. 1998) (RFRA prevents recovering bankruptcy debtors' religious tithes as avoidable transactions in bankruptcy proceedings); *Caldwell v. Caesar*, No. 98-1847, 2001 U.S. Dist. LEXIS 6914 (D.D.C. May 22, 2001) (denying summary judgment on claim that RFRA is not violated when prisoners are required to request religious diets at certain intervals); *United States v. Ramon*, 86 F. Supp. 2d 665 (W.D. Tex. 2000) (border patrol's use of religious symbols on vehicle as basis for stop on suspicion of drug smuggling violated RFRA when no other factors were sufficient to support reasonable suspicion to stop vehicle); *United States v. Valrey*, No. CR96-549Z, 2000 WL 692647 (W.D. Wash. 2000) (under RFRA, government's restriction on use of marijuana by Rastafarian on supervised release from prison may be accomplished through less restrictive means and without burdening exercise of religion); *United States v. Any and All Radio Station Transmission Equip.*, No. Civ.A. 99-2260, 1999 WL 718646 (E.D. Pa. 1999) (seizure of unlicensed religious radio station's equipment was not least restrictive means of furthering

narrowly, in a pattern that replicates the Supreme Court's stingy application prior to *Smith* of the strict scrutiny mandated by *Sherbert* and *Yoder*.²⁶⁹ Several causes might account for judges' narrow application of RFRA.²⁷⁰ One likely cause, prior to *Boerne*, was the very breadth of the Act. Any judge validating a claim under RFRA had to consider the possibility that ruling in favor of a claimant might affect fifty state governments and thousands of municipalities. *Boerne* greatly diminished that source of anxiety. Now any judge who has to apply RFRA can rest assured that only Congress — the body that enacted RFRA and retains power to alter or repeal it — will be constrained by successful RFRA claims. But a second plausible source of judicial caution in applying RFRA survives *Boerne*: the fear that ordering religious exemptions might put the court, and the governmental entity at bar, in

compelling government interest, thus violating RFRA); *United States v. Hsia*, 24 F. Supp. 2d 33 (D.D.C. 1998) (Buddhist defendant met requirements for third-party standing to challenge indictment on grounds that it infringed on right of temple and its monastics to free exercise of religion in violation of RFRA); *Magic Valley Evangelical Free Church v. Fitzgerald (In re Hodge)*, 220 B.R. 386 (D. Id. 1998) (RFRA provided defense to Chapter 7 trustee's action to recover debtors' tithes to their church); see also *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998) (denying motion to dismiss damages action against federal officials on ground that availability of damages under RFRA remains undetermined).

268. One important textual impediment to RFRA's success that Professor Lupu emphasizes is the Act's mechanical adoption from judicial precedents of the "substantial burden" standard, which Professor Lupu characterizes as "poorly defined and subject to pro-government manipulation." Lupu, *Failure*, *supra* note 86, at 594; see also Laycock, *International Human Rights*, *supra* note 265, at 969 ("The most common reason for rejecting RFRA claims was to find that there was no substantial burden on the religion."); Marshall, *Exemption*, *supra* note 25, at 394 ("doctrinal inconsistency is an inevitable product of the *Sherbert* methodology"). But see Durham, *supra* note 227, at 697-711 (defending substantial burden standard as necessary to define scope of RFRA); Greenawalt, *Judicial Resolution*, *supra* note 226, at 469 (arguing that, absent substantial burden standard, courts would develop alternative means to constrain religious freedom protections).

269. See *supra* notes 24-27 and accompanying text. Professor Lupu observes that, in addition to continuing their past narrow construction of the "substantial burden" standard, courts applying RFRA have tended to vindicate claims only where the burdened practice was compelled by the claimant's religion, validate government actions that merely inhibited religious practices rather than prohibiting them entirely, and give undue consideration to government claims of expedience and practicality in determining whether the challenged action was the least restrictive means of satisfying the posited compelling interest. Lupu, *Failure*, *supra* note 86, at 594-97; see also Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531, 572 (1999) [hereinafter Berg, *State RFRA*s] (warning against undue judicial deference to governmental interests in application of RFRA's).

270. In addition to the reasons discussed in the text, several other factors identified by Professor Lupu may contribute to courts' reluctance to apply RFRA vigorously. First, courts tend to disfavor any claim for exemption from generally applicable laws. Lupu, *Failure*, *supra* note 86, at 592. Religious exemption claims in particular present further problems: judges, generally drawn from the "educated elite," may be skeptical of religion, and they may have concerns about fraudulent claims. *Id.* at 593. Frederick Gedicks adds the thesis that courts partake of a generalized societal commitment to egalitarianism that precludes specifically religious exemptions. See Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 ARK.-LITTLE ROCK L.J. 555, 568-72 (1998) [hereinafter Gedicks, *Unfirm Foundation*].

the position of violating the Establishment Clause by favoring religious over secular interests.²⁷¹

This Part evaluates the implications of the Establishment Clause for RFRA and suggests means by which courts can fulfill their dual obligation to effectuate Federal RFRA's precommitment to protect religious exercise while maintaining the separation of church and state. The first section sets forth the Establishment Clause issues that may bear on Federal RFRA. The second section considers and rejects arguments that the Act on its face violates the Establishment Clause but concludes that many applications of the Act will. This means that courts must develop a methodology for distinguishing permissible from impermissible applications. The third section proposes a libertarian approach, under which the Court would interpret Federal RFRA as mandating accommodation not only of theistic views but also of strongly held conscientious beliefs that are not "religious" in the conventional sense. The symbiosis of *Smith* and RFRA, by shifting the source of mandatory accommodation claims from the Constitution to a statute, provides a distinctly appropriate vehicle for this inclusive approach to "religious" accommodation. The fourth section offers an alternative, more restrictive approach, under which the Court simply would recognize that, to the extent Federal RFRA embodies a level of free exercise protection rejected as a constitutional matter in *Smith*, claims under the statute must be subordinated to the Establishment Clause. This section proceeds to describe some accommodations under the Act that should survive even under this restrictive approach to statutory construction. Either of these approaches would give the Act meaningful effect in the federal sphere, preserve the constitutional separation of church and state, and facilitate a consistent jurisprudence of mandatory accommodation at the federal level.

A. Federal RFRA and the Establishment Clause

The task of parsing the meaning and proper effect of the Establishment Clause has proved notoriously difficult.²⁷² The prevailing ap-

271. See Laycock, *International Human Rights*, *supra* note 265, at 969-70 (calling poor success rate of RFRA claims "mostly a function of the secular view that religion should not get any special treatment, and partly a function of the view that these are hard cases, and the courts would rather not be bothered with them"); Lupu, *Failure*, *supra* note 86, at 593.

272. Numerous commentators on RFRA have discussed the analytic problems caused by the Court's inconsistent Establishment Clause jurisprudence. See Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645, 647 (1999) [hereinafter Chemerinsky, *Establishment Clause*] ("the Court has not been consistent in its approach or test for this constitutional provision"); Teresa Stanton Collett, *Heads, Secularists Win; Tails, Believers Lose — Returning Only Free Exercise to the Political Process*, 20 ARK.-LITTLE ROCK L.J. 689, 694 & n.33 (1998) (expressing concern that, after *Smith* and *Boerne*, "efforts to obtain political accommodations for religious believers will be substantially impeded by the current confusion in the jurisprudence surrounding the Establishment Clause"); Marshall, *Concerns*, *supra* note

proach to Establishment Clause analysis emphasizes the purposes and/or effects on religion of the governmental action at issue. In *Lemon v. Kurtzman*,²⁷³ the Court set forth a three-part test for a governmental action to pass muster under the Establishment Clause: the action must have a secular purpose, its primary effect must not advance or inhibit religion, and it must not excessively entangle the government with religious matters.²⁷⁴ The *Lemon* test has been frequently criticized,²⁷⁵ but it remains one of the primary analytic lenses through which the Court considers Establishment Clause claims.²⁷⁶ Other recent decisions have applied an "endorsement" test, articulated by Justice O'Connor, which asks whether the purpose of a government program is to advance or inhibit religion and whether the program creates the impression that its purpose is to advance or inhibit religion.²⁷⁷

14, at 239 (noting absence of theoretical underpinnings for Supreme Court's often inconsistent Establishment Clause decisions). See generally LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed. 1994).

273. 403 U.S. 602 (1971).

274. *Lemon*, 403 U.S. at 612-13.

275. Commentators who oppose a strongly separationist approach under the Establishment Clause have been particularly critical of *Lemon*, see, e.g., Jesse H. Choper, *Federal Constitutional Issues*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 235, 237 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (calling *Lemon* jurisprudence "a conceptual disaster area"), although separationists also find fault with the test. See, e.g., LEVY, *supra* note 272, at 158 ("Use of the *Lemon* test does not really aid the Court in deciding establishment-clause cases."). The Court in some Establishment Clause cases has declined to apply the *Lemon* test, see, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (expressing Court's "unwillingness to be confined to any single test or criterion in this sensitive area"), and most of the present Justices have criticized the test. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., joined by Thomas, J., concurring in judgment); *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 108-14 (1985) (Rehnquist, J. dissenting); *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

276. The Court has applied or adapted *Lemon* in varied contexts in recent Terms. The *Lemon* test played a pivotal role in the Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which upheld a facial challenge to a school district's policy of allowing prayer before football games. The *Santa Fe* majority used the *Lemon* "purpose" analysis to support facial invalidation of the policy. See *id.* at 314-17. On the same day the Court handed down *Santa Fe*, the six justices who made up the majority in that case (including three of *Lemon*'s sometime critics) declined Justice Scalia's admonition to grant certiorari in a case he saw as "an opportunity to inter the *Lemon* test once for all." See *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari). In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court applied a variation on the *Lemon* test that folded the third, "entanglement" prong into the "effects" inquiry for the purpose of evaluating government support for religious institutions. See *id.* at 233; see also *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (purporting to apply *Agostini* test). The Court also applied *Lemon* in *Lamb's Chapel*, 508 U.S. at 395, a case about religious groups' access to public facilities.

277. See *County of Allegheny*, 492 U.S. at 623-27 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring). Professor Greenawalt has noted that "courts need

“Religious accommodation” generally refers to government action that relieves religious believers from the effects of adverse governmental regulation.²⁷⁸ In practice, however, this sort of governmental consideration for religious believers may closely resemble active governmental support for religion, just as a tax exemption may resemble a subsidy. Thus, many Establishment Clause cases can also be understood as discretionary accommodation cases.²⁷⁹ Establishment Clause challenges oppose governmental efforts to aid religious believers, whether by allowing the display of religious symbols on public property,²⁸⁰ commingling religion with public education,²⁸¹ or providing benefits to religious institutions.²⁸² Because the Court rarely equates Establishment Clause claims with accommodation claims, the cases have not clarified the extent to which the Establishment Clause re-

to think carefully about when endorsement terminology is closely similar to other inquiries about aid and when the questions are genuinely different.” Greenawalt, *Religious Law*, *supra* note 25, at 843; *see also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987) (critiquing endorsement test).

278. *See supra* note 17.

279. Conversely, many accommodation cases raise Establishment Clause issues, although *Smith*, in which the Court foreclosed most mandatory accommodations under the Free Exercise Clause, ignored the Establishment Clause. *See supra* note 29 and accompanying text. In one line of mandatory accommodation cases that remains vital, those in which the Court has required the state to grant religious groups equal access to nonscarce public resources under the Free Speech Clause, the Court has considered and rejected Establishment Clause objections. *See* *Good News Club v. Milford Cent. Sch.*, No. 99-2036, slip op. (U.S. June 11, 2001) (holding that allowing religious group to conduct after-school meetings in limited public forum does not violate Establishment Clause); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that public university’s funding religious student publication on equal basis with other student activities does not violate Establishment Clause); *Lamb’s Chapel*, 508 U.S. 384 (holding that giving religious group equal access to public school facilities does not violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that policy allowing student religious group equal access to state university facilities comports with Establishment Clause).

280. *See* *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding inclusion of cross placed by Ku Klux Klan in area of state capitol grounds open to public displays); *County of Allegheny*, 492 U.S. 573 (1989) (upholding government-sponsored display of menorah); *Lynch*, 465 U.S. 668 (upholding inclusion of creche in municipal holiday display).

281. *See* *Santa Fe*, 530 U.S. 290 (2000) (striking down school district’s policy that permitted sectarian prayers at school football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down sectarian prayer at public school graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down state statute providing for school prayer).

282. *Compare* *Agostini v. Felton*, 521 U.S. 203 (1997) (reversing Court’s prior decision that forbade public school district from sending public special education teachers to parochial schools) *with* *Aguilar v. Felton*, 473 U.S. 402 (1985) (striking down school district’s policy of providing special education teachers to parochial schools); *see, e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding use of federal funds to purchase instructional materials for parochial schools); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding inclusion of sectarian agencies among recipients of federal grants for youth sex education); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax benefit that accrued largely to parents of children in parochial schools); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (upholding extension of tax exemption to churches).

stricts discretionary accommodations. The few cases in which the Court has made the doctrinal relationship explicit have reached inconsistent results. In *Corporation of the Presiding Bishop v. Amos*,²⁸³ the Court held that exempting a religious employer from the Title VII prohibition on religious discrimination in employment did not violate the Establishment Clause. In contrast, in *Estate of Thornton v. Caldor, Inc.*,²⁸⁴ the Court struck down a state's mandatory accommodation for sabbatarian employees as an Establishment Clause violation; in *Texas Monthly, Inc. v. Bullock*,²⁸⁵ the Court held that a special exemption for religious publications from a state's sales and use tax violated the Establishment Clause; and in *Board of Education v. Grumet*,²⁸⁶ the Court struck down a school district that a state had created especially for a religious group.²⁸⁷

Notwithstanding this doctrinal uncertainty, application of the *Lemon* and endorsement tests to RFRA raises obvious red flags. The Act mandates accommodation in all cases where the government cannot demonstrate a compelling interest in the application of neutral laws to religious conduct. Numerous situations exist in which no governmental interest would bar an accommodation that would advance a religious belief or religion in general.²⁸⁸ Such applications of RFRA would have the purpose and effect of advancing religion, in violation

283. 483 U.S. 327 (1987).

284. 472 U.S. 703 (1985).

285. 489 U.S. 1 (1989); *see id.* at 26-29 (Blackmun, J., concurring) (noting that the "tension between mandated and prohibited religious exemptions is well recognized" and suggesting that Establishment Clause sometimes may prohibit what Free Exercise Clause requires).

286. 512 U.S. 687 (1994); *see id.* at 702-05 (discussing religious accommodations in context of Establishment Clause concerns).

287. In addition, the Court has limited the Title VII requirement that employers reasonably accommodate employees' religious practices to require only *de minimis* accommodations. *See TWA v. Hardison*, 432 U.S. 63, 84-85 (1977). Professor Lupu suggests that the result in *Hardison* was dictated by a concern about the statutory preference for religious believers. *See Lupu, Reconstructing*, *supra* note 233, at 593.

288. Several commentators also have suggested that special accommodations of religious speech might discriminate against nonreligious expression, violating the Free Speech Clause and perhaps the Equal Protection Clause as well. *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999); Marshall, *Exemption*, *supra* note 25 (making equal protection and free speech objections to mandatory accommodations); McConnell, *Singling Out*, *supra* note 11, at 40 ("Favoring religious speakers over similarly situated nonreligious speakers would violate the viewpoint-neutrality requirement of the Free Speech Clause." (footnote omitted)); Volokh, *Intermediate Questions*, *supra* note 36, at 610-17 (considering argument that purely religious exemptions under federal and state RFRA may violate constitutional free speech protections); *see also* Eisgruber & Sager, *Conscience*, *supra* note 21, at 1271-72 (suggesting that purely religious exemptions under the Free Exercise Clause might violate the Equal Protection Clause). Any free speech-based objection to applications of Federal RFRA seems to me subsumed in the Establishment Clause objection: if an accommodation of religious speech is found to discriminate against nonreligious speech, that accommodation improperly favors religion over non-religion.

of the *Lemon* test, and give the appearance of gratuitous governmental support for religion, failing the endorsement test.²⁸⁹ Thus, while various commentators have defended purely religious accommodations under RFRA²⁹⁰ on the ground that RFRA merely protects religious exercise from government interference²⁹¹ or that religion is somehow distinct from other priorities that might require accommodation,²⁹² several others, following lines of argument against purely religious accommodations under the Free Exercise Clause,²⁹³

289. Cf. Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 769 (1986) (noting, in constitutional context, that "[f]ree exercise exemptions from general regulatory statutes are a form of constitutional tribute to individual acts of faith").

290. Pre-RFRA defenses of purely religious exemptions include John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*]; Pepper, *supra* note 229; see also Choper, *supra* note 254, at 1736 (arguing that purely religious accommodations do not violate Establishment Clause "when no meaningful threat to individual religious freedom can be said to exist"); Lupu, *Reconstructing*, *supra* note 233, at 562-64 (endorsing a narrowly defined class of mandatory accommodations under Free Exercise Clause).

291. See Berg, *Congress*, *supra* note 26, at 25 ("In most cases the exemption works to remove a burden on religion rather than creating incentives in its favor."); Chemerinsky, *Establishment Clause*, *supra* note 272, at 655 ("permitting people to practice their religion free from government involvement is a permissible and desirable effect"); Collett, *supra* note 272, at 701-13 (arguing that substantial categories of religious accommodation comport with the Establishment Clause under *Lemon*); Conkle, *Constitutional Significance*, *supra* note 130, at 77 n.187 (arguing that RFRA "does no more than protect religion from governmentally imposed burdens"). The obvious problem with this defense of purely religious exemptions is that it merely reframes the underlying tension between the establishment and free exercise principles: a government action that a believer sees as accommodating religion may fairly appear to a nonbeliever to advance religion. See *supra* notes 28-29 and accompanying text.

292. See Berg, *State RFRA's*, *supra* note 269, at 533-34 (arguing that religious interests "tend to be deeply felt and constitutive of identity" and "offer a unique counter to the power of the state"); Chemerinsky, *Constitutional Expansion*, *supra* note 110, at 632-34 (arguing that Court's past strict scrutiny of religious freedom claims proves such scrutiny does not violate Establishment Clause and, in the alternative, that protecting free exercise can be a compelling interest that justifies violating Establishment Clause); Durham, *supra* note 227, at 667-70 (arguing that proper understanding of social contract compels accommodation of religious believers); John H. Garvey, *All Things Being Equal . . .*, 1996 BYU L. REV. 587, 609 (arguing that religious believers deserve accommodation because "they are doing a good thing and the government should not interfere with them"); Timothy L. Hall, *Omnibus Protections of Religious Liberty and the Establishment Clause*, 21 CARDOZO L. REV. 539, 543 (1999) (advocating "difference-regarding" view of religion as justification for religious exemptions); Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 6-24 [hereinafter McConnell, *Accommodation*] (arguing for "[t]he special status of religion"); see also Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993) (arguing that unique political burdens on religion required by the Establishment Clause justify unique accommodations under Free Exercise Clause).

293. Arguments against purely religious accommodations under the Free Exercise Clause include Eisgruber & Sager, *Conscience*, *supra* note 21; Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978-79); Marshall, *Exemption*, *supra* note 25; Sherry, *supra* note 29; Mark

have maintained that the Act unconstitutionally privileges religious interests at the expense of secular interests,²⁹⁴ or that the Act at least creates the potential for applications that would violate the Establishment Clause.²⁹⁵

I will examine the constitutionality of RFRA based on a separationist account of the Establishment Clause, which entails skepticism about the constitutionality of exclusively religious exemptions.²⁹⁶ That

Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 591 (1991). See also Lupu, *Trouble*, *supra* note 17 (opposing purely religious discretionary accommodations but advocating mandatory accommodations under the Free Exercise Clause in some circumstances).

294. See Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 454 ("RFRA is . . . a clear instance of the favoritism condemned by the Court's decisions in *Thornton* and *Texas Monthly*."); Gedicks, *Justice*, *supra* note 265, at 99 ("Liberal neutrality seems to foreclose the possibility of a religious exemption to generally applicable laws precisely because such exemptions distort private religious choice."); Hamilton, *Unconstitutional*, *supra* note 14, at 8-14; Idleman, *supra* note 193, at 285-302; Marshall, *Concerns*, *supra* note 14; see also Lupu, *Reflections*, *supra* note 49, at 809 (noting that "[a]ccommodations of religion and religion alone have not fared well in the Supreme Court" and calling RFRA's survival under current Establishment Clause doctrine "a close question").

A distinct objection to RFRA on Establishment Clause grounds rests on the idea that the Founders intended the Establishment Clause to prevent the federal government from interfering with states' own establishments of religion by, *inter alia*, enforcing the Free Exercise Clause against the states. See Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997); see also Graglia, *supra* note 2, at 680, 682-83 (asserting that RFRA violated the purpose of the Religion Clauses to protect states from federal interference). This federalism-based concern applies only to RFRA's application to state and local law.

295. See 1 TRIBE, *supra* note 50, §§ 5-16 at 959 n.169 (suggesting some applications of Federal RFRA might violate Establishment Clause); Vikram David Amar, *State RFRA's and the Workplace*, 32 U.C. DAVIS L. REV. 513, 527 (1999) (suggesting applications of state RFRA's in employment setting might trigger serious Establishment Clause analysis because workplace accommodations "seem to involve zero-sum games among employees"); Lupu, *Codification*, *supra* note 83, at 591 ("The argument that some applications of RFRA may violate the Establishment Clause by forcing religion-subsidizing transfers is a compelling one in those circumstances where it fits the facts."); Volokh, *Common-Law Model*, *supra* note 12, at 1492-94 (calling limitation of accommodations to religious claims "both morally and (less certainly) constitutionally troublesome").

296. The view that the Establishment Clause requires a strict "wall of separation" between religion and the public sphere has its contemporary roots in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) (citation omitted). Two especially helpful expositions of separationist principles are LEVY, *supra* note 272 (contending that separationism comports with the Framers' intent and evaluating Establishment Clause jurisprudence from a separationist perspective), and Sullivan, *supra* note 26, at 197-99, 202-14 (contending that the Establishment Clause created a secular civil order to resolve disputes between religions in the public sphere). The opposite approach to the Establishment Clause is *nonpreferentialism*, which posits that the government need only avoid preferring one religion over another. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting) (advocating nonpreferentialism). *Neutrality* is a middle ground that bars the government from specially burdening or benefiting religion. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (advocating "benevolent neutrality"). In general, separationists would bar government from contact with religion; advocates of neutrality would bar government from endorsing religion; and nonpreferentialists would bar government only from coercing religion. See Sullivan, *supra* note 26, at 202-03.

account provides the strongest challenge to my thesis that courts can construe RFRA in a manner that will obviate Establishment Clause concerns, and it also reflects my own sense of how the Establishment Clause should apply in this area. In my view, equitable treatment of individuals, without regard to their religious convictions or lack thereof, is a central Establishment Clause value.²⁹⁷ Therefore, a governmental preference extended only on grounds of religious belief is impermissible unless it can be justified and understood without regard to religion. One predictable response to this separationist position is the assertion that religion is a uniquely important source of conscientious commitments and that, accordingly, an equality norm should permit and may even require religious accommodations in various circumstances.²⁹⁸ Thus, Michael McConnell, in advocating exclusively religious accommodations, emphasizes that “[n]o other freedom is a duty to a higher authority.”²⁹⁹ That argument, aside from its dubious account of equitable treatment,³⁰⁰ suggests a good reason *not* to privi-

297. “Most of the framers of [the Establishment Clause] very probably meant that government should not promote, sponsor, or subsidize religion because it is best left to private voluntary support for the sake of religion itself as well as for government, and above all for the sake of the individual.” LEVY, *supra* note 272, at 146.

298. See *supra* note 292 and accompanying text. Michael Perry offers a different response: he simply classifies the belief that “there is a God, who created us and who both loves us and judges us” and the belief that “because God created us and loves us, we are all sacred” as exceptions to the nonestablishment rule that government may not discriminate in favor of religious beliefs. Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L.J. 295, 310 (2000).

299. McConnell, *Singling Out*, *supra* note 11, at 30. Professor McConnell also points out that the government may promote, for example, environmentalism, whereas it may not promote religion, and he argues that the government accordingly should lack the power to burden religious conduct to the same extent it may burden environmentalism. See *id.* at 10. The argument is unduly linear, because equitable treatment of individuals has nothing to do with any other restriction the Establishment Clause may impose on the government. Adherents of nontheistic conscientious commitments who bear a heavier regulatory burden than their religious counterparts receive no succor from the fact that the government is not barred from cheering for their views. A narrower and more viable variation on Professor McConnell’s insight is Professor Gedicks’s suggestion that permissive accommodations are constitutional “only in the relatively narrow range of cases in which religion suffers from special Establishment Clause or other unique disadvantages.” Gedicks, *Normalized*, *supra* note 50, at 98-99.

300. Commentators have persuasively refuted the claim that the special status of religion should entitle religious believers to exemptions. See, e.g., Eisgruber & Sager, *Conscience*, *supra* note 21, at 1260-67; Gedicks, *Unfirm Foundation*, *supra* note 270, at 557-68; Marshall, *Exemption*, *supra* note 25, at 382-85 (rejecting claims of special nature of religion as grounds for religious accommodations generally); Sherry, *supra* note 29, at 137-42 (critiquing McConnell’s argument for special status of religious believers). Professor Durham’s contractarian argument demonstrates the problems with claims of this sort. Professor Durham maintains that the state must honor religious believers’ spiritual commitments because (a) those commitments transcend the commitments of secular society in believers’ minds and (b) thus, believers never would have submitted to secular rule absent an understanding that the state would accommodate their religious commitments. See Durham, *supra* note 227, at 667-70. Premise (b) ignores the possibility that nonbelievers would have abstained from the social contract had they known that their own commitments — moral, ethical, ideological, etc. — would be subordinated categorically to the presumptively superior commitments of re-

lege religion belief: religious belief has a unique capacity to promote conflict and factionalism in society. We should understand the Constitution to constrain the government from using religion as a singular basis for exempting individuals from the law precisely because religion is a matter of uniquely intense conviction.³⁰¹ I now turn to the question whether and to what extent RFRA can be construed not to violate this separationist conception of the Establishment Clause.

B. *Why RFRA on its Face Does Not Violate the Establishment Clause*

Justice Stevens contended in his brief *Boerne* concurrence that RFRA on its face violated the Establishment Clause.³⁰² Several scholars have entertained the same idea.³⁰³ The Supreme Court generally will invalidate a statute on its face only where the law has no constitutionally permissible applications.³⁰⁴ Thus, for example, the Supreme Court rejected a facial challenge to a statute that included religious social service providers in a program of grants to encourage family planning counseling, emphasizing that the statute had a secular purpose and effect, but remanded for consideration whether the statute as applied violated the Establishment Clause.³⁰⁵ The Court in *Santa Fe Independent School District v. Doe*³⁰⁶ clarified the standard for Establishment Clause challenges: a state action is subject to facial

ligious believers. Thus, the argument reduces to the presumption underlying premise (a): that religious commitments are more important to their adherents than nonreligious commitments are to theirs. That presumption is both dubious on its face and antithetical to the civil society the social contract is supposed to establish. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971); see also Eisgruber & Sager, *Conscience*, *supra* note 21, at 1260-62 (rejecting privileging of religious priorities as inconsistent with liberal democracy).

301. See, e.g., Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997) (contending that religious conviction is inherently incompatible with liberal norms of toleration); Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 381-82 (arguing that reliance of religious speech on a higher authority renders it fundamentally antidemocratic).

302. See *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997).

303. See Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 457-58 (arguing that RFRA's use of constitutional language to overprotect religious freedom violates the endorsement test); Hamilton, *Unconstitutional*, *supra* note 14, at 8-14 (agreeing with Justice Stevens's *Boerne* concurrence and arguing that RFRA violates Establishment Clause under settled jurisprudence); see also Idleman, *supra* note 193, at 285-96 (discussing arguments for facial invalidity); Marshall, *Concerns*, *supra* note 14, at 237-42 (same).

304. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

305. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); see also *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) (emphasizing facial neutrality of statutory provision exempting religious employers from prohibition on religious discrimination in upholding application of the exemption to religious employer's nonreligious activity).

306. 530 U.S. 290 (2000).

invalidation under the Establishment Clause if it lacks a secular purpose.³⁰⁷ In *Santa Fe*, five Justices who had not joined Justice Stevens's Establishment Clause reasoning in *Boerne* concurred with his opinion facially invalidating a high school's policy that orchestrated prayers at football games, because the policy "specifie[d] only one, clearly preferred message — that of [the school district's] traditional religious 'invocation.'"³⁰⁸

The most familiar argument for facial invalidation of RFRA borrows the *Boerne* Court's conclusion, critical to its invalidation of RFRA's applications to state and local governments, that Congress failed to demonstrate any real-world burden on religious exercise that warranted protection from facially neutral laws.³⁰⁹ The Establishment Clause variation posits that, absent any discernible burden, RFRA fails the *Lemon* test because (1) Congress lacked a secular purpose for RFRA and (2) the sole effect of the Act is to advance religion rather than to protect it.³¹⁰ As to purpose — the crucial inquiry under *Santa Fe* — this argument improperly denies deference to congressional explanations for legislation. Even if Congress's failure to identify concrete grounds for extending legislative protection to religious freedom claims justified the Court in imposing its stringent "congruence and proportionality" test to protect states against congressional power grabs under Section 5,³¹¹ that failure provides no basis for tightening scrutiny of congressional purposes under the Establishment Clause.³¹² As to effects, the argument that RFRA violates the Establishment Clause because it lacks a discernible basis defeats itself. If no situa-

307. "Our Establishment Clause cases involving facial challenges . . . have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose." *Santa Fe*, 530 U.S. at 314. *But see* Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (noting practice in Establishment Clause decisions of distinguishing between facial invalidity and invalidity of applications and suggesting that facial challenge is inappropriate where government aid to religion may provide only secular benefits); *see also* Dolan, *supra* note 12, at 189-90 (arguing that RFRA may be invalid on its face despite permissible applications).

308. 530 U.S. at 315.

309. *See Boerne*, 521 U.S. at 530-32.

310. *See* Hamilton, *Unconstitutional*, *supra* note 14, at 9-10; Garvey, *supra* note 58, at 505-06; *see also* Chemerinsky, *Establishment Clause*, *supra* note 272, at 648 (identifying argument that RFRA lacks secular purpose as central aspect of Establishment Clause objection); Gedicks, *Normalized*, *supra* note 50, at 102-03 (noting that the Court has found insufficient empirical justification for benign race and sex-based preferences and arguing that permissive religious accommodations have less empirical justification than those preferences); Marshall, *Concerns*, *supra* note 14, at 237-38.

311. *See Boerne*, 521 U.S. at 519.

312. *See* Sullivan, *supra* note 26, at 197 n.9 (arguing that under *Lemon* courts should require only a *post hoc* secular rationale and not proof that the legislation reflected a secular motive).

tions exist where RFRA is necessary, then RFRA, if faithfully applied, will have no effect at all.³¹³

The Court has made clear that at least some discretionary legislative accommodations do not violate the Establishment Clause,³¹⁴ and even some of RFRA's most ardent critics agree.³¹⁵ Despite the acknowledgement in *Santa Fe* of a looser standard for facial invalidation of statutes in Establishment Clause cases, the Court never has suggested that the possibility that many or most of a statute's applications will violate the Establishment Clause warrants facial invalidation.³¹⁶ Federal RFRA, as I demonstrate below, has potential applications with permissible, secular effects, even if the Act is construed to provide exclusively religious exemptions: to safeguard the religious equality guaranteed by the Constitution³¹⁷ and to accommodate idiosyncratic religious practices.³¹⁸ Finally, the fact that RFRA explicitly forswears any transgression of the Establishment Clause³¹⁹ underscores the Court's obligation to construe the statute not to violate the Constitution if possible.³²⁰

313. For a discussion and refutation of the argument that RFRA in effect violates the "entanglement" prong of *Lemon* because strict scrutiny requires courts to make substantive inquiries into matters of religious doctrine, see *supra* Section II.D.2.

314. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-40 (1987) (upholding provision of Title VII that exempts religious employers from prohibition against religious discrimination in hiring); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (upholding tax exemption for religious organizations).

315. See *Eisgruber & Sager, After Boerne*, *supra* note 36, at 134 ("Whatever the fate of federal RFRA, nothing in *Boerne* should prevent either Congress or the states from enacting more nuanced protections for religious commitments. . . . Nor would such laws encounter Establishment Clause barriers."); *Gressman & Carmella*, *supra* note 84, at 94-95 & n.121 (estimating that there are as many as 2000 statutory religious accommodations in state and federal law, and calling legislative accommodations "common and legitimate"); *Hamilton, Unconstitutional*, *supra* note 14, at 2. *But see Lupu, Trouble*, *supra* note 17, at 778-79 (opposing discretionary accommodations and arguing that any legislative aid to religion must be extended "to other institutions that are, on secular grounds, similarly situated"); *Marshall, Concerns*, *supra* note 14, at 237 ("By holding that the Free Exercise Clause does not require exemptions for religious claimants, [*Smith*] refutes the argument that religious claims are constitutionally privileged" in legislative arena).

316. The question would be different if the Court found those applications of Federal RFRA that violated the Establishment Clause inseparable from those that did not. As with the question of the severability of RFRA's federal from its state applications, however, the far more plausible conclusion is that Congress wanted, at a minimum, whatever statutory protection for religious freedom the Court would uphold. See *supra* note 16.

317. See *infra* Section III.D.2.a.

318. See *infra* Section III.D.2.b.

319. See 42 U.S.C. § 2000bb-4 (1994) ("Nothing in this [Act] shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion . . .").

320. Cf. *Lupu, Statutes*, *supra* note 6, at 11-12 (calling provision in War Powers Resolution of 1973 that forswore alteration of political branches' constitutional authority "gratui-

Professors Eisgruber and Sager make a different sort of appeal to nonestablishment principles in support of an argument that RFRA should be facially invalidated. They maintain that the strict scrutiny RFRA mandates for religious freedom claims is both "normatively unjustified" and "wholly unworkable."³²¹ First, they insist strict scrutiny would elevate sectarian interests over not only improper, inequitable government infringements on religious practice but also legitimate, even essential government infringements on religious practice.³²² Second, they suggest that courts' pre-*Smith* inconsistencies in applying the *Sherbert-Yoder* compelling interest standard, which they characterize as "strict only in theory and notoriously feeble in fact,"³²³ mark that standard as ineffectual and counterproductive to religious freedom.³²⁴ They argue, based on both grounds, that the judicial branch may and must declare RFRA unconstitutional.

The first problem with Professors Eisgruber and Sager's argument for facial invalidation is that it talks out of both sides of its mouth. The fact that strict scrutiny seemed to underprotect religious freedom in practice belies the danger of overprotection. The plausible hypothesis

tous" but acknowledging that it "represents . . . legislative acknowledgement of a conservative rule of construction").

321. Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 451; *see also* Eisgruber & Sager, *After Boerne*, *supra* note 36, at 104 (arguing that *Smith* pronounced strict scrutiny of religious freedom claims "both normatively unattractive and unworkable in practice"). This argument is closely related to Professors Eisgruber and Sager's account of the "substantive institutional competence" objection to Federal RFRA. *See supra* notes 244-245 and accompanying text.

322. According to Professors Eisgruber and Sager, "[t]he compelling state interest test is suitable only where it is appropriate to indulge in a broad and robust presumption of unconstitutionality . . ." Eisgruber & Sager, *Conscience*, *supra* note 21, at 1306; *see also id.* at 1258-60, 1286-89; Eisgruber & Sager, *Protecting*, *supra* note 158, at 106; Eisgruber & Sager, *After Boerne*, *supra* note 36, at 130; Lupu, *Statutes*, *supra* note 6, at 63 (calling strict scrutiny as set forth in RFRA "an engine of destruction for virtually any policy made subject to it"); Volokh, *Common-Law Model*, *supra* note 12, at 1502 (arguing that state RFRA's should avoid strict scrutiny in favor of "explicitly delegat[ing] to courts common-law-making authority so that they can generate different tests for different situations"). *But see* McConnell, *Revisionism*, *supra* note 21, at 1136 (characterizing strict scrutiny of free exercise claims as nothing more than "a way to determine whether government decisions that interfere with the religious exercise of religious minorities are in fact neutral").

323. Eisgruber & Sager, *Protecting*, *supra* note 158, at 104; *see also* Lupu, *Statutes*, *supra* note 6 (arguing that pre-*Smith* "strict scrutiny" of free exercise claims actually involved a nuanced balancing test).

324. *See* Eisgruber & Sager, *Conscience*, *supra* note 21, at 1307 ("Instead of evaluating specific claims for exemption, Congress simply handed the problem back to the judiciary, inviting it to continue on its erratic pre-*Smith* course."); Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 445-46 ("*Sherbert's* promise of the ruthless compelling state interest test proved remarkably toothless."); Eisgruber & Sager, *After Boerne*, *supra* note 36, at 101 ("RFRA's compelling state interest test could not be defended as a proven vehicle for vindicating Free Exercise Clause concerns. Its track record was neither extensive nor impressive."); *see also* Lupu, *Statutes*, *supra* note 6, at 65-66 (expressing concern that courts would construe constitutional terminology in RFRA so restrictively as to prevent appreciable improvement in protection for religious liberty).

that the pre-*Smith* underprotection was a reaction to the undesirable potential for overprotection³²⁵ provides an argument for refining the standard, not for a constitutional quarantine. The overprotection concern, for its part, reflects an unnecessarily rigid account of strict scrutiny under RFRA. Fealty to the Establishment Clause should provide a compelling government interest that will defeat RFRA claims in appropriate cases. To the extent problems remain, courts may and should adjust the strict scrutiny analysis to provide reasonable calibration of the competing interests.³²⁶ Similarly, as to the underprotection concern, Federal RFRA gives courts another chance, away from the high-stakes game of constitutional doctrine, to develop an approach to strict scrutiny that will better protect religious exercise in appropriate cases.

Professors Eisgruber and Sager deride suggestions that courts should attempt to refine strict scrutiny to fit the problem of religious freedom as “at best fronts for more substantive but obscure intuitions about how particular claims for religious exemptions ought to come out.”³²⁷ Fair enough. A statutory scheme that harnesses the analytic skills of courts in an effort to refine and actualize such obscure intuitions is an eminently reasonable method of making policy in an area where obscure and competing intuitions inevitably define the political discourse.³²⁸ More important, it is the method Congress chose. Even if strict scrutiny proves as unworkable as Professors Eisgruber and Sager predict, the constitutional constraint of the Establishment Clause, and the ability of the courts and Congress to communicate about the Act through the interplay of adjudication and legislative oversight, will prevent its failure from transgressing constitutional boundaries.

325. See Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 447 (“The feeble quality of the Court’s pre-*Smith* jurisprudence was no accident. The compelling interest test cannot bear the meaning in the area of religious exemptions that it has elsewhere.”). But cf. McConnell, *Revisionism*, *supra* note 21, at 1144 (criticizing *Smith* Court for “eliminating the doctrine of free exercise exemptions rather than . . . contributing to the development of a more principled approach”).

326. See *supra* note 235 and accompanying text (discussing need to adjust strict scrutiny inquiry in order to avoid excessive judicial inquiries into religious substance).

327. Eisgruber & Sager, *Conscience*, *supra* note 21, at 1259; see also Eisgruber & Sager, *After Boerne*, *supra* note 36, at 130 (asserting that “the compelling interest standard . . . is too blunt and too invasive to serve as a sensible vehicle for identifying instances of disparate impact or disparate treatment”); Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 474-75 (suggesting that Court could save RFRA by “dilut[ing] the ‘compelling interest standard’ ” to render it “duplicative of post-*Smith* constitutional protection for religious liberty” but dismissing such a gambit as undesirable); cf. Volokh, *Common-Law Model*, *supra* note 12, at 1498 (rejecting possibility of judicial adjustment as a defense of strict scrutiny under RFRA because that solution is “far from certain” and entails “set[ting] up a test that courts have to ignore in order to reach the right results”).

328. Cf. Lupu, *Statutes*, *supra* note 6, at 21-22 (noting that legislators may adopt constitutional language in order to address “difficulty in resolving the difficult policy questions that surround the drafting task”).

Invalidating Federal RFRA on Professors Eisgruber and Sager's "unworkability" reasoning would grossly exceed the judicial function.

Although I reject arguments that RFRA is facially invalid under the Establishment Clause, I believe a freewheeling regime of purely religious exemptions would offend both Establishment Clause doctrine and separationist principle. Douglas Laycock would construe RFRA to create just such a broad-based regime of exemptions, contending that "[RFRA] can work only if it is as broad as the Free Exercise Clause."³²⁹ I agree with Professor Laycock's implicit assumption that protecting religious believers from unwanted autopsies³³⁰ or permitting believers to attend church-affiliated schools³³¹ raises no Establishment Clause concern. These protections afford believers benefits that others generally do not want, what I refer to below as "idiosyncratic accommodations."³³² I disagree, however, that the state could relieve a religious believer who drives of the otherwise universal obligation to carry a photographic license³³³ or permit members of a particular church to practice polygamy.³³⁴ These protections would improperly privilege religion, because they would inequitably relieve believers of constraints from which many nonbelievers might also prefer to be free.³³⁵ RFRA is not the Free Exercise Clause, and courts therefore must apply the Establishment Clause to draw the constitutional boundaries of Federal RFRA.³³⁶ At the same time, courts have

329. Laycock, *Act*, *supra* note 25, at 221.

330. *See id.* at 226 (discussing *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990)).

331. *See id.* at 223-24 (discussing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

332. *See infra* Section III.D.2.b.

333. *See id.* at 229 (discussing *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided Court sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985)).

334. *See id.* at 223-24 (discussing *Reynolds v. United States*, 98 U.S. 145 (1878)).

335. *See supra* notes 297-301 and accompanying text.

336. Some have conceptualized the boundaries in economic terms. Professor Berg, for instance, dismisses the Establishment Clause concern on the ground that "[a] great many religious accommodations [im]pose only minimal costs on others, or only diffuse costs absorbed by the whole of society." Berg, *Constitutional Future*, *supra* note 13, at 737; Lipson, *supra* note 226 (emphasizing importance of third-party harms in determining validity of accommodations); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 46 (1989) (discussing permissibility of exemptions in terms of "the prevention of negative externalities"); Pepper, *supra* note 229, at 332-35 (arguing for distinction under Establishment Clause between "private" and "public" harms). *But see* Eisgruber & Sager, *Conscience*, *supra* note 21, at 1290-91 (questioning utility of externality approach); Volokh, *Intermediate Questions*, *supra* note 36, at 608-10, 618-24 (discussing and critiquing externality approach).

I agree that the absence of externalized costs may be relevant in identifying permissible accommodations. *Cf. infra* Section III.D.2.b (discussing idiosyncratic accommodations). However, permitting establishments on the ground that their costs were diffuse rather than concentrated would write the Establishment Clause out of the Constitution. The costs of the ultimate Establishment Clause violation — governmental creation of a national church — would be diffused across society, but that fact would underscore the affront to the Constitution, not ameliorate it. The Court has signaled the irrelevance of the concentration

an obligation to construe a statute in a manner that renders it constitutional, where such an interpretation is possible.³³⁷ Federal courts that apply RFRA can avoid Establishment Clause problems either by expansively construing the statutory term "religion" or by simply restricting the scope of Federal RFRA's purely religious applications to comport with the Establishment Clause.³³⁸

C. *A Libertarian Approach to Interpretation: Broad Construction of "Religion"*

One approach to construction of Federal RFRA takes account of the Establishment Clause at the root of the interpretive process, obviating the need for Establishment Clause analysis of each distinct application. The approach is simple: to avoid Establishment Clause problems, the meaning of "religion" in the text of RFRA should be understood to encompass all deeply held conscientious beliefs, whether or not the believers profess faith in a supreme being.³³⁹ Several commentators have suggested in passing that courts might extend

of establishment costs in two ways: by suspending for Establishment Clause claims the ordinary prudential standing rule against raising "generalized grievances," see *Flast v. Cohen*, 392 U.S. 83, 101-06 (1968), and by emphasizing the symbolic costs of actual or perceived governmental endorsements of religion. See *supra* note 277 and accompanying text (discussing endorsement test).

337. *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); see *infra* notes 354-358 and accompanying text (discussing canon of constitutional doubt).

338. Courts might also attempt to avoid Establishment Clause concerns by construing RFRA as returning the law to its pre-*Smith* state. See Chemerinsky, *Constitutional Expansion*, *supra* note 110, at 633-34; see also Lupu, *Lawyer's Guide*, *supra* note 25, at 221-25 (advocating such a construction to avoid separation of powers concerns). That approach, however, might fail both to effectuate RFRA in a meaningful way and to solve the Establishment Clause problem. As to effectuating RFRA, the defects of the *Sherbert-Smith* interregnum in protecting religious freedom are well documented. See *supra* notes 24-27 and accompanying text. As to the Establishment Clause, the Court prior to *Smith* held certain endorsements mandatory as a matter of constitutional right under the Free Exercise Clause. *Smith* announced the effective demise of constitutionally compelled accommodations. Congress cannot make a law that, like the Free Exercise Clause, stands on equal footing with the Establishment Clause. Thus, the Court might construe RFRA as attempting to reinstate the pre-*Smith* law and still hold that the Act violated the Establishment Clause because Establishment Clause concerns trumped Congress's statutory initiative in a way that they could not trump the Free Exercise Clause. But see Chemerinsky, *Establishment Clause*, *supra* note 272, at 653 (arguing that congressional power to interpret Constitution extends to expansion of free exercise rights to pre-*Smith* boundaries, apparently without regard to Establishment Clause).

339. Steven Smith has noted that treating nontheistic conscientious accommodation claims like religious accommodation claims presumes religion is not meaningfully distinct from nontheistic sources of conscientious commitment, and that such a presumption can only be sustained by reference to some substantive principle. See Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 65-70 (2000). In my view, religion is distinctive, but what makes it distinctive — its status as a uniquely potent and thus divisive source of conviction — is what makes it a constitutionally suspect ground for special exemptions from the law. See *supra* notes 298-301 and accompanying text.

RFRA to cover nontheistic conscientious claims,³⁴⁰ but the problems and possibilities such an approach would present for statutory construction remain unexamined.

The notion of broadly construing the statutory term “religion” derives from the Court’s resolution of a similar problem in *Welsh v. United States*.³⁴¹ That Vietnam-era case required the Court to determine who could qualify as a conscientious objector under section 6(j) of the Universal Military Training and Service Act. The statutory text was blatantly sectarian, making the only acceptable basis for exemption from military service “religious training and belief” and limiting that category to “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.”³⁴² When the Court initially confronted the statute in *United States v. Seeger*,³⁴³ it avoided the Establishment Clause issue by holding that any “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption” fell within the statutory definition.³⁴⁴ *Welsh*, decided five years later, went farther, essentially turning the statutory definition on its head. The Court made clear that the *Seeger* umbrella encompassed “beliefs that are purely ethical or moral in source and content but that nevertheless impose upon [the believer] a duty of conscience to refrain from participating in any war at any time.”³⁴⁵ The Court avoided the

340. See Conkle, *Constitutional Significance*, *supra* note 130, at 77 n.187; Lupu, *Reflections*, *supra* note 49, at 809 & n.83; Lupu, *Codification*, *supra* note 83, at 590-91; Perry, *supra* note 298, at 315 n.67; Volokh, *Intermediate Questions*, *supra* note 36, at 606; Volokh, *Common-Law Model*, *supra* note 12, at 1493-94; *see also* Smolla, *supra* note 23, at 942 & n.82 (proposing an intermediate scrutiny standard for religious accommodation claims that would have the effect of putting theistic and nontheistic conscientious claims on the same footing). *But see* Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 473 (recanting earlier suggestion that saving construction of RFRA might be viable, on ground that RFRA “sends signals that are both difficult to ignore and impossible to reconcile with constitutional principle”); Marshall, *Concerns*, *supra* note 14, at 232-235 (expressing skepticism about interpreting RFRA to protect nontheistic conscientious practices); Smith, *supra* note 113, at 658-59 (arguing, in context of a proposed religious equality statute, that “since contemporary courts appear disinclined to engage in dynamic statutory interpretation, it is doubtful that courts would interpret ‘religion’ to include nontheistic conscientious commitments (footnote omitted)).

341. 398 U.S. 333 (1970).

342. 50 U.S.C. § 456(j) (1964) (amended 1967). The *Welsh* Court noted that a 1967 amendment to the Act had deleted the reference to “a Supreme Being.” *Id.* (1964 ed. Supp. IV), cited in *Welsh*, 398 U.S. at 336 n.2.

343. 380 U.S. 163 (1965).

344. *Seeger*, 380 U.S. at 176.

345. *Welsh*, 398 U.S. at 340; *see also id.* at 344 (concluding that statute “exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war”). Justice Harlan, who had joined the *Seeger* majority, concurred only

Hobson's choice between countenancing a blatant preference for religion and ending the possibility of exemption from the draft, distilling from the words of the statute the essence of conscientious opposition to violence.³⁴⁶

Some commentators, recognizing the Establishment Clause problem raised by disparate treatment of different classes of conscientious beliefs, have urged a constitutional system of accommodations that essentially adopts the *Welsh* principle.³⁴⁷ But understanding the term "religion" in the text of the First Amendment — the source of mandatory accommodation claims — to encompass nontheistic belief systems would present a host of problems. First, such a reading obviously would be difficult to justify textually or by reference to the Framers'

in the judgment in *Welsh*, rejecting "the liberties taken with the statute" by the Court but agreeing that the statute should be applied expansively "as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified" under the Establishment Clause. *See id.* at 345 (Harlan, J., concurring in the result). For more detailed discussion of the Court's approach to statutory construction in *Welsh*, see Eisgruber & Sager, *Conscience*, *supra* note 21, at 1294-95; Marshall, *Concerns*, *supra* note 14, at 229-232.

346. The Court revisited the conscientious objector statute in *Gillette v. United States*, 401 U.S. 437 (1971), where it held that the statute's limitation to objectors who opposed all wars, as opposed to people who believed that some wars could be just, neither interfered with the free exercise rights of the latter group, *see id.* at 461-62, nor preferred some religions over others in violation of the Establishment Clause, *see id.* at 448-60. Justice Douglas's dissent portrayed the Court as preferring theistic over nontheistic conscientious claims. *See id.* at 463-70 (Douglas, J. dissenting). The Court, however, was careful to emphasize that the interpretive issues addressed in *Seeger* and *Welsh* were "not relevant to the present issue," *id.* at 447, and it repeatedly used the ambivalent phrase "religion and conscience" or "conscience and religion" to describe the subject of the statute. *See id.* at 445, 455, 458, 459, 461. The Court expressly held "that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is 'religious' in character." *Id.* at 447. One of the two objectors in *Gillette* was Catholic, but the Court described the second as basing his claim on "a humanist approach to religion" and "fundamental principles of conscience and deeply held views about the purpose and obligation of human existence." *Id.* at 439.

347. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27-28 (1989) (Blackmun, J., concurring) (suggesting that, where Establishment Clause forbids accommodation Free Exercise Clause requires, court should require government to expand accommodation to similarly situated nonbelievers); Eisgruber & Sager, *Conscience*, *supra* note 21, at 1282-1301 (proposing "equal regard" approach to constitutional accommodations); Laycock, *Neutrality*, *supra* note 29, at 1002; Lupu, *Trouble*, *supra* note 17, at 778-79; Marshall, *Equality*, *supra* note 236, at 205; *see also* Gedicks, *Unfirm Foundation*, *supra* note 270, at 571-72 (discussing proposals for extending free exercise accommodations to secular conscientious beliefs). *But see* Durham, *supra* note 227, at 685 ("It may be that worldviews should receive equal treatment whether they are religious or not. But this does not imply that all worldviews are necessarily religious." (footnote omitted)); Hall, *supra* note 292, at 545-48 (arguing that Court's free exercise jurisprudence accords religious commitments protection not accorded to other conscientious commitments based on special characteristics of religion); McConnell, *Update*, *supra* note 195, at 717 (arguing that text of First Amendment requires preference for accommodation of religious over nonreligious norms); Sherry, *supra* note 29, at 149 n.103 (arguing that avoiding Establishment Clause problems by accommodating those similarly situated to religious believers "would be highly impractical").

intent.³⁴⁸ Second, if the Court construed the Free Exercise Clause to protect “religion in the traditional sense, or any other conscientious belief system,” it would dramatically expand the class of beliefs entitled to immutable constitutional protection. The Court has resisted expanding Free Exercise Clause protection beyond traditionally constituted religions.³⁴⁹ Third, the word “religion” in the First Amendment animates not only the Free Exercise Clause but also the Establishment Clause. Reading the Establishment Clause to bar the federal government from “establishing” any conscientious belief system could inhibit the president and Congress from advocating and implementing all manner of policies, from racial justice to free trade and beyond, that may constitute deeply held commitments of conscience.³⁵⁰

In contrast, Federal RFRA creates an unprecedented opportunity to develop a broad-based system of accommodations under federal law that incorporates the *Welsh* principle — if the Court is willing to take a significant interpretive step. Because RFRA is only a statute, interpreting the word “religion” in its text to encompass nontheistic conscientious beliefs would not have the broad implications of trying to impose that reading on the Constitution.³⁵¹ Courts may consider

348. See McConnell, *Origins*, *supra* note 290, at 1488-500 (discussing Framers' consideration and rejection of broad constitutional protection for conscientious beliefs).

349. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (emphasizing distinction between Amish religious beliefs and nonreligious, philosophical beliefs as grounds for exemption from general laws); *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981) (declining to extend Free Exercise Clause to nonreligious conscientious objection). *But see* *Torcaso v. Watkins*, 367 U.S. 488, 489-90, 495 n.11 (1961) (striking down state's requirement that officeholders profess belief in God because requirement discriminated against nontheistic religions).

350. “The culture of liberal democracy may well function as a belief system with substantive content, rather than a neutral and transcendent arbiter among other belief systems.” Sullivan, *supra* note 26, at 199; *see also* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1082 (1996) [hereinafter Laycock, *Continuity and Change*] (“[G]eneral public policy and the operation of public institutions must inevitably be based on the moral decisions of political bodies.”); Lupu, *Burdens*, *supra* note 29, at 987 (“Government . . . transmits messages about value, direction, and goals for its citizens.”). The federal government frequently advocates policy initiatives in moral or conscientious terms. *See, e.g.*, Jack Germond & Jules Witcover, . . . *And a Moral Justification?*, THE COURIER-JOURNAL, Louisville, Ky., Jan. 6, 1991, at 3D (recounting President Bush I's professed moral justification for U.S. involvement in the Persian Gulf); Doyle McManus, *Shultz Criticized For Opposing Aid to Angolan Rebels*, L.A. TIMES, Oct. 24, 1985, at 16 (recounting House Republican Leader Robert H. Michel's statement that U.S. support for Angolan Rebels was based not only on geostrategy but moral necessity). *See generally* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

351. In light of RFRA's textual limitation to “religion,” the Court might limit the scope of Federal RFRA to those accommodations of conscience that would be constitutionally permissible on purely religious grounds. That approach would mirror the view of some commentators that religion should receive at least as much protection as any other sort of conscientious claim. *Cf.* Laycock, *Remnants*, *supra* note 21, at 49-50 (suggesting constitutional “most-favored nation status” for religious liberty claims); McConnell, *Accommodation*, *supra* note 292, at 14 (“Religion . . . is at least as protected and encouraged as any other form of belief and association — in some ways more so.”); Smith, *supra* note 113, at 674

nontheistic conscientious claims and religious conscientious claims on the same footing, extending heightened protection to both categories as a matter not of constitutional mandate but of statutory right. Thus, under this approach, the claim of a committed communist to relief from a congressional ban on travel to Cuba would stand on comparable footing with the claim of a Sikh who wore a ceremonial dagger to relief from a ban on carrying weapons into a federal building. The *Welsh* principle could apply in the same manner to any statutory scheme of permissive accommodation, but RFRA presents a distinctive vehicle for extending generalized protection of conscience over the whole of federal law.

The most significant problem with following *Welsh* as an interpretive model for Federal RFRA is that the statute, as originally enacted, defined the term "exercise of religion" to correspond with the meaning of that term in the First Amendment.³⁵² Because of the problems presented by reading the Free Exercise Clause to encompass nontheistic conscientious practices, and because the Court has declined to expand the meaning of the Free Exercise Clause in that manner, Congress's decision to lash the statute to the Constitution appears to preclude a *Welsh* approach to RFRA.³⁵³ The canon of constitutional doubt, however, dictates that the Court must, if possible, construe a statutory provision in a manner that avoids serious constitutional problems.³⁵⁴ The Court's recent decision in *Miller v. French*³⁵⁵ followed

(proposing religious equality statute under which "[n]either religion nor conscience could be discriminated against on establishment grounds."); see also Lupu, *Trouble*, *supra* note 17, at 779 (suggesting that religion should not be excluded from generally available government aid). But see Volokh, *Common-Law Model*, *supra* note 12, at 1539-42 (objecting to approach to accommodations whereby any exception to an application of a legal rule compels equivalent accommodation of religion). On the other hand, the Court might decide that Congress drafted RFRA to extend the fullest constitutionally permissible protection to conscience. Under that construction, the Establishment Clause might impose constraints on "religious" claims within the meaning of the First Amendment that would not limit parallel nontheistic claims.

352. See 42 U.S.C. § 2000bb-2 (1994) ("As used in this [Act] . . . the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution."). Congress in 2000 ameliorated this problem for future cases when it amended RFRA to define "religious exercise" without reference to the First Amendment. See *supra* note 198. RFRA now defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4) (2001). The new definition arguably bolsters the case for a *Welsh*-like reading of Federal RFRA, because it decouples the "exercise of religion" from any "system of religious belief." The original definition still matters in adjudicating claims for retroactive relief brought under RFRA prior to the amendment. Cf. *Kikumura v. Hurley*, 242 F.3d 950, 960 n.5 (10th Cir. 2001) (applying amendment retroactively where primary relief sought was injunctive).

353. See Idleman, *supra* note 193, at 288 n.217 (arguing that such a reading would be "thoroughly in derogation of clear statutory language and express constitutional intent"); Marshall, *Concerns*, *supra* note 14, at 232-33.

354. "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be

a strict line on this principle of construction. The Prison Litigation Reform Act ("PLRA") imposes an automatic stay of the terms of existing injunctive relief if prison officials or intervenors move to lift the injunction under the new substantive standards announced by the PLRA.³⁵⁶ In *Miller*, the Court declined to read into the automatic stay provision an allowance for judges to suspend the automatic stay in their equitable discretion, holding instead that Congress clearly had intended for the automatic stay to be mandatory.³⁵⁷ The contrast between the PLRA and Federal RFRA is illuminating. In both instances, Congress would have wanted to avoid a finding of unconstitutionality. In the PLRA context, however, the path of least constitutional resistance would have required Congress to contradict the policy of the statute, which is to raise the hurdle prisoners must clear in order to sustain injunctive relief. In contrast, reading Federal RFRA to encompass nontheistic conscientious claims would be at worst irrelevant to the policy of the statute. Congress in RFRA wanted to protect religious exercise from governmental interference. Nothing in the text or legislative history of the Act suggests that Congress affirmatively wanted to privilege religious exercise to the exclusion of other conscientious practices. The villain was government regulation, not secular conscience. Thus, *Miller* suggests that application of the canon of constitutional doubt would be appropriate in construing Federal RFRA.³⁵⁸

avoided." *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Court has been very assertive in imputing meanings to statutes in order to satisfy the *Ashwander* directive. See, e.g., *Solid Waste Agency v. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (refusing to accept agency's construction of Clean Water Act, which invoked the "outer limits" of Congress's Commerce Clause power, without clear evidence of congressional intent, due to Court's "prudential desire not to needlessly reach constitutional issues"); *United States v. X-Citement Video*, 513 U.S. 64 (1994) (imputing scienter requirement as to age of minority to subsections of statute prohibiting child pornography); see also *Communications Workers v. Beck*, 487 U.S. 735 (1988) (declining to construe subsection of National Labor Relations Act differently from that of a materially identical statute in which avoidance of constitutional questions was deemed reasonable).

355. 530 U.S. 327 (2000); see also *Stenberg v. Carhart*, 530 U.S. 914 (2000) (declining to construe reference to "substantial portion" of fetus in statute banning late-term abortions narrowly to exclude constitutionally protected abortion procedure); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (holding application of canon of constitutional doubt inappropriate where "plainly contrary to the intent of Congress"); *United States v. Albertini*, 472 U.S. 675, 680 (1985) ("Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature.").

356. See 18 U.S.C. § 3626(e)(2) (Supp. IV 1998). The substantive provisions of the PLRA set forth new, more stringent standards that plaintiffs must satisfy in order to win injunctive relief against prisons or to sustain existing injunctive relief against a motion to terminate. See 18 U.S.C. § 3626(b) (Supp. IV 1998).

357. See *Miller*, 530 U.S. 327 (2000).

358. Cf. Lupu, *Statutes*, *supra* note 6, at 73 (contending that legislative purpose should play a relatively greater role, and plain meaning a relatively lesser role, in judicial construction of statutes that borrow constitutional terminology, because "[s]tatutes that borrow lan-

Apart from the fundamental Establishment Clause issue, two features of RFRA provide affirmative reasons for the Court to adopt a *Welsh* construction of the Act. The first involves another canon of statutory construction: that the Court must, if possible, read a statute to give effect to all its provisions.³⁵⁹ A strong reading of Congress's statement that the term "exercise of religion" in RFRA means what that term means in the Constitution would compromise RFRA by equating the statute with the Free Exercise Clause as narrowly interpreted in *Smith*.³⁶⁰ Thus, taking at face value Congress's equation of the statutory and constitutional "religion" terms could render RFRA incoherent or ineffectual.³⁶¹ To avoid this conundrum, the Court might fairly interpret the Act's definitional language as providing that the statutory term "exercise of religion" meant *nothing less than* the constitutional term, or that the statutory term should apply as broadly as the broadest conception of constitutional free exercise the Court had articulated prior to *Smith*.³⁶² The Court might be reluctant to construe RFRA's definitional language in this manner, because Congress knew when it drafted the statute that the *Smith* Court had construed the Free Exercise Clause narrowly. Congress, however, did not know con-

guage from judicial decisions, in which that language is both artful and contextually constituted, simply cannot be understood as possessing meaning that is plain").

359. SUTHERLAND STATUTORY CONSTRUCTION § 46.05 at 105 (Norman J. Singer ed., 5th ed. 1992) [hereinafter SUTHERLAND] (footnotes omitted):

[T]he general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction.

See *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("[W]e must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.").

360. "[I]f [a statutory] definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation or is so discordant to common usage as to generate confusion, it should not be used." SUTHERLAND § 47.07 at 152.

361. See Berg, *Congress*, *supra* note 26, at 26 ("If courts . . . do no more than wipe *Smith* itself off the books . . . then the statute will accomplish little."); cf. Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 474-75 (suggesting the Court could save RFRA from unconstitutionality by limiting its protection to post-*Smith* understanding of Free Exercise Clause); Eisgruber & Sager, *After Boerne*, *supra* note 36, at 132-33 (suggesting and rejecting same narrowing construction); see also Lupu, *Statutes*, *supra* note 6, at 25 ("A judge who perceives that a legislature has chosen her institutional path rather than its own may erroneously interpret such an enactment as more of an affirmation of judicial discretion than it is meant to be.").

362. In fact, the reason for Congress's adoption of the constitutional meaning of "exercise of religion" appears to have been nothing more than a desire to avoid the need for a legislative determination whether protected religious exercise entailed religious compulsion as opposed to mere religious motivation. See Laycock & Thomas, *supra* note 30, at 230-31 & n.125 (describing legislative history of RFRA's "exercise of religion" definition).

clusively until *Boerne* that it lacked authority to expand the meaning of constitutional protections when legislating under Section 5.³⁶³

Second, the context of RFRA's drafting and passage should inform the Court's understanding of what Congress meant when it set out to protect "religion." Congress drafted, debated, and enacted RFRA in 1993, in response to a case that itself presented a claim the Framers might not have accepted as "religious." The last two centuries have brought developments in philosophy and the natural sciences that have scattered Americans' spiritual and conscientious commitments far beyond the range of traditional, theistic beliefs.³⁶⁴ Those developments cast doubt on the need to limit the statutory term "religion" to traditional, theistic belief systems. RFRA's broad support among groups that frequently differ on questions of governmental solicitude toward religion³⁶⁵ and its nearly universal support in Congress³⁶⁶ are consistent with a congressional purpose of spreading the statute's benefits to the broadest possible set of deeply held conscientious commitments.

Construing Federal RFRA to protect all adherents of conscientious belief systems from federal interference with their conscientious exercise would bring significant benefits. First and foremost, the Act would present no Establishment Clause problem, because it would distribute benefits on an equitable basis that would have nothing to do with the constitutionally problematic category of "religion." The political will embodied in RFRA to protect freedom of conscience would be fully effectuated in the federal sphere. In addition, the proposed construction would dampen the *Smith* Court's concern about avoiding judicial forays into questions of religious doctrine,³⁶⁷ a distinctly prob-

363. This argument would be simpler had Congress enacted an independent Federal RFRA without applying the Act to the states through Section 5, and then defined the statutory term "free exercise of religion" to track the constitutional term. In that scenario, if my arguments *supra* Part I are correct, Congress would have had no reason to doubt its power to extend the concept of "free exercise of religion" as far as it wished in protecting conscientious beliefs against federal encroachment. Interpretation of the surviving federal applications of RFRA, however, must take into account the entire Act as originally enacted.

364. See Conkle, *Religious Liberty*, *supra* note 261, at 29-32 (discussing the growing importance of nontheistic analogues to religion and suggesting that "the Court appears to believe — perhaps with good reason — that the line between religion and nonreligion is increasingly thin in contemporary America"); Laycock, *Continuity and Change*, *supra* note 350, at 1079-81 (discussing ubiquity of theistic religions outside the Judeo-Christian tradition, "so-called cults," New Age spirituality, and secular humanist attempts "to fill the functions of religion"); Lupu, *Reconstructing*, *supra* note 233, at 592 (noting that "[n]onreligious associations may perform many of the psychological, social, political, and economic functions commonly associated with religion").

365. See *supra* note 30 and accompanying text.

366. See *supra* note 31 and accompanying text; see also Laycock & Thomas, *supra* note 30, at 244 ("The lopsided votes in both houses of Congress should send a strong message to the judiciary that accommodating religious exercise is important.").

367. See *supra* Section II.C.

lematic enterprise under the First Amendment, because the RFRA inquiry would focus on whether the claimant sincerely held any conscientious belief that the challenged governmental practice substantially burdened.³⁶⁸

The major disadvantage of this broad construction, aside from the interpretive complications discussed above, is that a Federal RFRA construed to protect all manner of conscientious claims could shield masses of people from the reach of generally applicable laws. Justice Scalia's opinion in *Smith* emphasized the danger that strict scrutiny of free exercise claims would yield "a system in which each conscience is a law unto itself."³⁶⁹ Professors Eisgruber and Sager have warned repeatedly of the anarchic potential of a wide-ranging religious accommodation doctrine.³⁷⁰ With regard to religion in particular, they explain:

Religious belief need not be founded on reason, guided by reason, or governed in any way by the reasonable. Accordingly, the demands that religions place on the faithful, and the demands that the faithful can in turn place on society in the name of unimpaired flourishing [of religion], are potentially extravagant.³⁷¹

An interpretive approach that constrained RFRA within the Establishment Clause, which I sketch below, would substantially alleviate this concern in a manner not possible under a constitutional doctrine of mandatory exemptions.³⁷² But my proposed broad construction of the statutory term "religion" to extend Federal

368. "Conscience" is a difficult term to define, perhaps more difficult if less problematic than "religion," and if the Act is construed in the manner I propose, courts will need to sort out what sorts of claims Federal RFRA encompasses. See Eisgruber & Sager, *Conscience*, *supra* note 21, at 1268-70 (discussing conceptual difficulties inherent in defining "conscience"); Smith, *supra* note 113, at 675-86 (same); cf. *supra* notes 222-229 and accompanying text (discussing possibility of determining whether a claim is "religious"). In the alternative, courts could default to a deferential evaluation of the claimant's subjective conscientious beliefs. Cf. *supra* notes 230-232 and accompanying text (proposing judicial inquiry into subjective sincerity of claimant's belief as an alternative to determining whether claim is objectively "religious" within meaning of RFRA). The Court's approach in the Vietnam-era conscientious objector cases could provide additional guidance. See *supra* notes 341-346 and accompanying text.

369. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

370. See Eisgruber & Sager, *Conscience*, *supra* note 21, at 1256-57; Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 447-48.

371. Eisgruber & Sager, *Conscience*, *supra* note 21, at 1256; see also Fish, *supra* note 301, at 2255 ("All of liberalism's efforts to accommodate or tame illiberal forces fail, either by underestimating and trivializing the illiberal impulse, or by mirroring it."). But see McConnell, *Revisionism*, *supra* note 21, at 1149-52 (suggesting that courts must subordinate rule of law concerns to constitutional guarantee of religious freedom).

372. See *infra* Section III.D.1.

RFRA's coverage to nontheistic conscientious claims would exacerbate the problem.³⁷³

Fortunately, the very scope of a Federal RFRA construed to protect all conscientious claims implies the means for its own limitation. Courts should consider the potentially sweeping effects that accommodating particular conscientious beliefs or practices would have over a range of cases.³⁷⁴ This sort of analysis has led courts consistently to deny free exercise claims for relief from the obligation to pay taxes.³⁷⁵ Even steadfast defenders of a strict scrutiny standard for purely religious accommodation claims have acknowledged that consideration of a given accommodation's potentially sweeping applications should inform the compelling interest analysis to some extent.³⁷⁶ This approach to the compelling interest requirement would not implicate the overblown concern that applying strict scrutiny under a broadly construed Federal RFRA would "water down" the standard in constitutional set-

373. "There is simply no government activity that could not compromise someone's conscience." Loewy, *supra* note 58, at 107; *see also* Eisgruber & Sager, *Conscience*, *supra* note 21, at 1268-69 (pointing out that nontheistic conscientious commitments share many of the features that cause accommodation of religious commitments to threaten the rule of law); Volokh, *Intermediate Questions*, *supra* note 36, at 606-07 (suggesting that extending exemptions under RFRA to encompass nontheistic claims might increase the volume of claims sufficiently to undermine compelling governmental interests). *But see* Smith, *supra* note 113, at 682-83 (noting "strong cultural currents that often cut against exercising one's conscience").

374. *See supra* notes 325-328 and accompanying text.

375. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (though requirement to pay Social Security taxes burdened Amish employer's free exercise rights, requirement is nevertheless constitutional). Courts applying RFRA have continued to deny accommodation claims for relief from the obligation to pay taxes. *See, e.g.*, *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999) (IRS penalties and interest levied for taxes withheld on grounds of religious opposition to war did not violate RFRA).

376. *See Laycock, Ratchet*, *supra* note 13, at 148:

I agree that the number of potential claims is relevant to assessing the government's interest; it matters if we know that many claims are likely. Because the government must give equal treatment to similarly situated conscientious objectors, an exemption for one objector entails an exemption for all others who hold the same belief. Arbitrarily exempting some and prosecuting others similarly situated is not a less restrictive means of exempting some. So if the government has a compelling interest in denying exemption to the whole group of similarly situated objectors, it also has a compelling interest in denying exemption to each one of them.

See also id. at 149 (suggesting that government has compelling interest in denying accommodations in contexts, such as tax objections, where "self interest creates incentives to large numbers of claims"); Berg, *New Attacks*, *supra* note 110, at 431-32; Marshall, *Defense*, *supra* note 23, at 312. *But see* Durham, *supra* note 227, at 715 (arguing that government interest must be assessed "by reference to the harm associated with exempting the religious claimant alone and not by assessing the total damage if the exemption were somehow universalized or turned into a precedent that somehow unraveled the entire governmental program").

tings,³⁷⁷ because the compelling interest in maintaining the rule of law is distinctive to the conditions such a statute would create.³⁷⁸

Despite the drawbacks of a *Welsh*-like construction of Federal RFRA, the Court should follow this libertarian course. Doing so is, on balance, the best way for the judicial branch to uphold the Constitution while also effectuating the political will embodied in RFRA to the greatest possible extent.

D. *A Restrictive Approach to Interpretation: Subordinating RFRA Accommodation Claims to the Establishment Clause*

If the Court did not accept the broad interpretation of "religion" advocated above, a second mechanism would be available to eliminate the Establishment Clause problems raised by RFRA. The symbiosis of *Smith* and RFRA replaces the federal government's political discretion not to accommodate religion with a firm constitutional limitation grounded in the Establishment Clause. Reading Federal RFRA to permit accommodation of religion within Establishment Clause boundaries would secure the Establishment Clause against violation under the Act while leaving a significant set of permissible applications.³⁷⁹

1. *Subordinating Federal RFRA to the Establishment Clause*

Although RFRA's language reflects clear congressional will to "overrule" *Smith*, the Act may be understood to work in conjunction with *Smith* to form a regime that governs religious accommodation in the federal sphere. RFRA states as a statutory matter that accommodation is required to the extent it is constitutionally permissible. Thus,

377. See *supra* notes 238-341 and accompanying text (refuting *Smith* Court's parallel objection to broadly applying strict scrutiny under Free Exercise Clause).

378. A different potential objection to the broad construction of "religion" I propose is that it would "water down" the potency of strict scrutiny in religious accommodation cases by expanding the range of potential claimants and thus the threat accommodations pose to the rule of law. This objection, of course, does not apply to constitutional religious freedom claims, because whatever free exercise accommodation claims survived *Smith* (e.g., "hybrid rights" claims) remain limited by narrow First Amendment meaning of "religion." See *supra* notes 347-350 and accompanying text. As to religious accommodation claims under RFRA itself, my contention is that the Establishment Clause would void many if not most purely religious applications absent my proposed broad construction. Thus, there is nothing to water down.

379. Professor Lupu characterizes the Establishment Clause objection to Federal RFRA as broader than the separation of powers objections, "because the Establishment Clause ground would have consequences for state legislation as well." Lupu, *Reflections, supra* note 49, at 810 n.84. Presumably Professor Lupu is referring to a *facial* Establishment Clause attack on the Act. My suggestion that the Establishment Clause forbids some but not all purely religious accommodations renders its consequences potentially narrower at the federal level (and perhaps in the aggregate) than the consequences of a separation of powers problem.

the task of courts that apply RFRA is simply to measure the scope of the Act against the Establishment Clause.³⁸⁰ In the past, the jurisprudence of religious accommodation has been complicated by the often unstated imperative to balance free exercise against establishment concerns.³⁸¹ Under Federal RFRA, the Supreme Court can administer a meaningful regime of accommodations without having to choose between competing constitutional provisions.³⁸² It can limit its constitutional analysis to "monitor[ing] 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."³⁸³ The federal government likely will intensify the Establishment Clause focus of RFRA cases by advancing its duty to

380. See Lupu, *Statutes*, *supra* note 6, at 60 & n.272 (stating that "[a]ll courts need do with [discretionary accommodations] is measure them against the Establishment Clause" but noting that such measurement "is no simple task"); Marshall, *Defense*, *supra* note 23, at 323 ("Statutory exemptions raise the Establishment Clause issue of what the Constitution allows; the free exercise exemption asks what the Constitution requires."); Smith, *supra* note 113, at 652-53 (noting that a religious equality statute would continue to be trumped by the First Amendment); Volokh, *Intermediate Questions*, *supra* note 36, at 601 (suggesting that under RFRA the "constitutional norm of equal treatment without regard to religiosity trumps the statutory preference for religious objectors over conscientious objectors").

381. See *supra* notes 283-287 and accompanying text; see also Lupu, *Reconstructing*, *supra* note 233, at 575-76 ("Free exercise rights trump Establishment Clause limits, but free exercise 'values' do not By the same token, Establishment Clause 'values' do not trump free exercise rights.").

382. Enforcing Federal RFRA under a strong conception of the Establishment Clause does not endanger the possibility that the Court might revisit *Smith* and expand the reach of the Free Exercise Clause. Such freezing in place of *Smith* was a danger under RFRA as originally enacted, because the Act converted almost all religious freedom claims from constitutional to statutory. See Conkle, *Constitutional Significance*, *supra* note 130, at 75; Gressman & Carmella, *supra* note 84, at 142; Hamilton, *Section 5*, *supra* note 85, at 382; Laycock, *Act*, *supra* note 25, at 254-56; see also Idleman, *supra* note 193, at 328-29; Lupu, *Codification*, *supra* note 83, at 580-82 (discussing general danger that religious freedom legislation will cause "atrophy" in development of constitutional religious freedom norms). After *Boerne*, however, any free exercise claim against a state or local government could provide a vehicle for overruling *Smith*.

383. Hamilton, *Unconstitutional*, *supra* note 14, at 12. Professor Hamilton emphasizes the Court's duty to enforce the Establishment Clause in accommodation cases as a reason to reject RFRA. See *id.* In my view, RFRA makes that duty far easier to perform than it was under the *Sherbert* era's constitutional tension between the religion clauses. Indeed, Federal RFRA may enhance the scope of judicial review of accommodations under the Establishment Clause. Professor McConnell noted prior to RFRA's enactment that "[l]egislative [a]ccommodation can be accomplished by inaction just as it can by action. . . . [L]egislatures can simply refrain from passing laws that burden the exercise of religion by mainstream groups, and there is nothing the Establishment Clause can do about this." McConnell, *Revisionism*, *supra* note 21, at 1132. Under Federal RFRA, Congress need not fear that any generally applicable law will substantially burden religious practice; thus, it may enact some laws that previously it would have foregone. The Court, however, may then have an opportunity to weigh religious believers' claims for exemption from such laws against the Establishment Clause. Until and unless Congress begins to consider the danger of judicial action, the net result under RFRA should be a federal regulatory structure in which favoritism toward religion plays a lesser role.

avoid establishments as the compelling interest that justifies departures from Federal RFRA's mandate.³⁸⁴

The Eighth Circuit's *In re Young*³⁸⁵ decision is an example of an application of RFRA that should have been scrutinized and rejected under the Establishment Clause. That court properly rejected a facial challenge to Federal RFRA on Establishment Clause grounds³⁸⁶ but declined to consider the possibility that applying RFRA to the case at bar might offend the Establishment Clause. To award religious believers a special exemption from bankruptcy law, a mechanism provided by the federal government to sort out private rights under circumstances of financial hardship, does not protect religious exercise. Religious exercise, like any expression of conscience, is necessarily subject to material constraints of the believer's own making.³⁸⁷ Rather, the result in *Young* advanced religion by protecting a church's coffers, and the court created a strong appearance of endorsement by validating a purported congressional decision to favor churches' creditors.³⁸⁸

384. Cf. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 837-46 (1995) (rejecting state's argument that Establishment Clause prevented it from funding religious publication at public university); see Brownstein, *supra* note 288, at 611 (contending that government's duty to avoid establishments should provide compelling interest to prevent RFRA's from providing exemptions from content-neutral speech regulations); Chemerinsky, *Establishment Clause*, *supra* note 272, at 657-58. Professor Chemerinsky implies that the Establishment Clause is relevant in RFRA cases only if the government invokes the clause as the source of its compelling interest in denying a RFRA claim. See *id.* at 657 (contending that "the Establishment Clause is not irrelevant under a state RFRA" because "[t]he government should be regarded as having a compelling interest in not violating the Establishment Clause"). Courts, however, have the prerogative and the duty to raise the Establishment Clause *sua sponte* where appropriate, in order to prevent their own actions in enforcing RFRA claims from establishing religion. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of private discrimination violates Equal Protection Clause).

385. *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (1998). For a description of the *Young* case, see *supra* notes 52-58 and accompanying text.

386. See *id.* at 861-63.

387. In this sense *Young* differs significantly from cases like *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court determined that the claimant, who lost her job because she followed her religious tenet of refusing to work on Saturday, was not voluntarily unemployed. Her lack of employment was, in a sense, her own choice, but her religious convictions motivated that choice, and the Court determined that the Free Exercise Clause precluded the state from punishing her for adhering to those convictions. See *id.* at 409-10. In contrast, the bankruptcy of the claimants in *Young* presumably had nothing to do with their religious convictions: it was, instead, a consequence of nonreligious choices (and circumstances), but one that happened to affect their ability to tithe to their church. In *Sherbert*, the Court barred the government from penalizing a religious believer based on her religious exercise. In *Young*, the court forced the government to grant religious believers a special reprieve from the consequences of their nonconscientious actions.

388. The Eighth Circuit has not been alone in its errant application of RFRA in bankruptcy cases. See *Magic Valley Evangelical Free Church v. Fitzgerald (In re Hodge)*, 220 B.R. 386 (D. Idaho 1998) (RFRA provided defense to Chapter 7 trustee's action to recover tithing payments made by debtors to their church). But see *Hartvig v. Tri-City Temple of Milwaukee (In re Gomes)*, 219 B.R. 286 (Bankr. D. Or. 1998) (recovery of debtors' tithes and offerings to church by Chapter 7 trustee did not violate RFRA); cf. *Waguespack v. Rodriguez*, 220 B.R. 31 (W.D. La. 1998) (holding that *Boerne* declared RFRA unconstitu-

Subordinating RFRA to the Establishment Clause, like the alternate interpretive course of broadly construing the statutory term "religion," would relieve courts of the need to balance and reconcile establishment and free exercise principles. In addition, this more restrictive approach would dramatically limit the breadth of Federal RFRA's coverage, thereby alleviating rule of law concerns.³⁸⁹ On the other hand, the Act under this construction would do less than under the libertarian construction to effectuate Congress's intent to protect religious exercise to the broadest possible extent. The restrictive construction, by keeping the focus of RFRA on "religion" as understood in the Constitution, also would have the disadvantage of requiring courts to engage with religious substance. In addition, Rodney Smith has suggested — approvingly — that religious liberty statutes might influence courts to soften their applications of the Establishment Clause at the margin.³⁹⁰ The likelihood that courts would follow such an approach to Federal RFRA is uncertain, but from a separationist standpoint it is a danger that cannot be ignored.

RFRA's critics might see this analysis as an alternative route to their conclusion that the Act, in all its applications, must fall before the Establishment Clause.³⁹¹ Certainly, under the formulation of the Establishment Clause I am applying here,³⁹² many conceivable accommodations will be barred in regulatory fields ranging from immigration to criminal law to taxation. Likewise, direct governmental subsidies of religious practice, whether demanded under RFRA or volunteered, raise unacceptable establishment concerns on both symbolic and fiscal grounds.³⁹³ Significant accommodation, however, is

tional in its totality; thus, RFRA has no application as to claim that denial of debtors' tithing infringes on their free exercise).

389. See *supra* notes 369-373 and accompanying text.

390. See Smith, *supra* note 113, at 653-54.

391. See, e.g., Marshall, *Concerns*, *supra* note 14, at 242 (suggesting that applications of RFRA might present a categorical problem under the endorsement test for Establishment Clause violations); cf. Idleman, *supra* note 193, at 325-27 (lamenting possibility that interpretation of RFRA in light of the Establishment Clause might result in extremely narrow construction).

392. See *supra* notes 296-301 and accompanying text.

393. Cf. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (holding that state financial aid programs for nonpublic schools serving low-income families, and for parents of pupils of such schools, violate the Establishment Clause by subsidizing and advancing religious activities of sectarian schools); see Sullivan, *supra* note 26, at 209-10 (explaining that forcing the public to fund religious activities "will cause profound divisiveness and offense"). But see Perry, *supra* note 298, at 322 (arguing that Establishment Clause permits direct aid to religious entities if "the aid is provided on a religiously neutral basis" and "the aid program is not a subterfuge for discriminating in favor of one or more religions in relation to one or more other religions or to no religion"). Professors Eisgruber and Sager argue generally that purely religious exemptions are indistinguishable from subsidies of religious institutions, and thus they assail "the incongruity of calling for exemptions on the one hand while renouncing subsidies on the other." Eisgruber & Sager, *After Boerne*, *supra* note 36, at 106. The equation of exemptions with subsidies may be accurate in many circumstances, but it does not

permissible under the Establishment Clause, even if RFRA extends only to "religious belief" as conventionally understood.

2. *Some Permissible Religious Accommodations Under Federal RFRA*

The question of what applications of Federal RFRA, as construed in the restrictive manner just articulated, would be permissible under the Establishment Clause implicates debates about what accommodations the Court should understand the Free Exercise Clause to mandate and what accommodations legislatures may choose to make.³⁹⁴ This brief discussion aims not to resolve those debates, nor to diagram the full set of accommodations that federal courts might or should allow under RFRA.³⁹⁵ I merely want to set forth two important categories of mandatory statutory accommodations that I believe are permissible under a separationist conception of the Establishment Clause, in order to demonstrate that a RFRA subordinated to the Establishment Clause would still have meaningful impact. Both of these categories of religious accommodations can be justified and understood without regard to religion — the first as a nondiscrimination principle, the second as a utilitarian principle.

a. Egalitarian accommodations

First, Federal RFRA can bolster the constitutional protection against religious discrimination. The law of free exercise typically divides legal affronts to religious practice into two categories: (a) willful state action that discriminates against a particular religion or against religion in general, and (b) neutral state action that incidentally burdens religion. The Court in *Church of the Lukumi Babalu Aye v. City*

describe the categories of purely religious accommodations defended below. See *infra* Section III.D.2.a. (discussing egalitarian accommodations); *infra* Section III.D.2.b. (discussing idiosyncratic accommodations). A straightforward equation of exemptions with subsidies misses the emphasis that Establishment Clause doctrine properly places on the *apparent* character of a government action, a factor manifest in the purpose inquiry under the *Lemon* test and central to the endorsement test. See *supra* notes 273-277 and accompanying text.

394. See *supra* notes 290-295 and accompanying text.

395. Others have offered general theories of permissible legislative accommodation. See Berg, *Congress, supra* note 26, at 45-51 (suggesting interpretive theory to prevent establishments under RFRA, focused on avoiding accommodations that coerce or strongly encourage religious participation and emphasizing accommodations' function of guaranteeing "autonomy" for religious practices; McConnell, *Update, supra* note 195, at 710-12 (suggesting ways in which "government's authority to accommodate is broader than its obligation to accommodate under pre-Smith law"); Volokh, *Intermediate Questions, supra* note 36, at 600-08 (recognizing "the possibility that *some* religion-only exemptions are constitutional and others aren't," and accordingly attempting to identify critical questions that need to be answered in order to sort out religious exemptions that may violate the Establishment Clause from those that do not).

of *Hialeah*³⁹⁶ confirmed that the first category requires strict scrutiny, while *Smith* held that the second does not. But a third sort of case does not fit comfortably into either category: neutral state action that, over a range of cases, disproportionately burdens some religions — typically minority religions — while expressly or implicitly accommodating others. Although courts generally lump such state actions with the second, “incidental burdens” category, they raise a different, more serious problem. It is one thing if a neutral law — a building code, say — happens to hamper a minority religion and not a majority religion in a particular case. It is another thing if a law intended to be neutral, such as a provision for worship opportunities in a federal prison, is designed in a way that systematically discriminates against a particular religion. Because of the nondiscrimination principle at the core of free exercise doctrine, such discriminatory effects warrant close scrutiny,³⁹⁷ but the Court in *Lukumi* extended constitutional protection only against willful discrimination.

Part of the problem is that the conventional antidiscrimination norm that similarly situated persons must be treated similarly does not always recognize discrimination where similarities in situation are not obvious.³⁹⁸ In the words of Professors Eisgruber and Sager:

[T]he deep concerns of religious believers can differ sharply from each other and from widely shared secular concerns; systems of religious belief can rest on radically distinct epistemologies and be inaccessible to the reason and intuitions of nonbelievers; and religious believers may be tempted to celebrate or reward their own faith, even while filled with

396. 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.”); see also *Larson v. Valente*, 456 U.S. 228 (1982) (striking down provision in state’s charitable solicitation statute that required only those religions that receive more than half their financial support from members to register and report).

397. See McConnell, *Update*, *supra* note 195, at 706 (“[T]he logic of the Religion Clauses requires that accommodations be extended to all comparable religious practices unless the government has sufficient justification for differential treatment.”); see also Lupu, *Burdens*, *supra* note 29, at 982-87 (arguing that Equal Protection Clause must be invoked to prevent religious discrimination). But see Volokh, *Common-Law Model*, *supra* note 12, at 1542-44 (arguing that democratic process properly may set policies that have differential effects on different religions). I do not extend the egalitarian principle, as Professor McConnell does, to encompass consideration of counterfactuals in which the majority must adhere to a baseline defined by a minority religious practice. See, e.g., McConnell, *Update*, *supra* note 195, at 706 (arguing that government should accommodate religion-motivated desire not to make social security contributions because it would make such an accommodation if the majority shared that desire). My view is that courts under Federal RFRA may require the government to accommodate minority religions to the same extent majority religions are, in fact, accommodated.

398. This insight has been richly developed in the literature on race-based and gender-based discrimination. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286-87 (1991).

loving concern for the souls of nonbelievers. As a result, the interests of religious believers may be invisible, or may appear as mere tastes or even delusions, from the standpoint of outside observers.³⁹⁹

Strict scrutiny forces courts to examine seemingly dissimilar religious practices in the same light. Some religious practices, of course, are distinct in ways that will make a difference under strict scrutiny. For example, a plausible argument exists that the federal government has a compelling interest in preventing the abuse of peyote, which could justify enforcing the ban on that drug even as to its religious uses, but lacks a similarly compelling interest in preventing the abuse of wine.⁴⁰⁰ The requirement of showing a compelling interest, however, ensures that similar religious practices will not be treated differently simply because government decisionmakers and reviewing courts fail to notice their similarity.⁴⁰¹ Far from creating any Establishment Clause problem, using RFRA to root out unwitting government discrimina-

399. Eisgruber & Sager, *Conscience*, *supra* note 21, at 1298-99; *see also* Laycock, *Neutrality*, *supra* note 29, at 1015-16 ("The practice of a small faith may be forbidden just because the legislature did not know about it and never considered its needs."); Lupu, *Reflections*, *supra* note 49, at 800 (noting that "[e]lected politicians will rarely be insensitive to mainstream religions, but they may readily overlook the interests of other religious traditions"); Pepper, *supra* note 229, at 314 (observing that, although the religious majority is unlikely to disadvantage itself, it is likely to impose inadvertently on the interests of minority religions); Sherry, *supra* note 29, at 145 ("Those who oppose exemptions for believers often fail to see that neutral laws, rigidly applied, constitute a form of discrimination against believers . . ."); Sullivan, *supra* note 26, at 207 ("[m]ajority practices are myopically seen by their own practitioners as uncontroversial").

400. Justice O'Connor concurred in the judgment in *Smith* on this basis, strongly disagreeing with the Court's refusal to apply strict scrutiny but concluding that, under that test, Oregon had a compelling interest in preventing abuse of peyote that justified a ban on the drug even in the religious setting. *See Smith*, 494 U.S. at 905 (O'Connor, J., concurring in the judgment); *cf. id.* at 913 & n.6 (Blackmun, J., dissenting) (analogizing Native American Church's ritual use of peyote to Catholic Church's ritual use of wine, and noting lack of compelling interest in preventing alcohol abuse that would justify banning wine in the religious setting). *But see* McConnell, *Revisionism*, *supra* note 21, at 1135 ("Evidence in the *Smith* case showed that ingestion of peyote by members of the Native American Church is not dangerous and does not lead to drug problems or substance abuse.").

401. *See* Laycock, *Remnants*, *supra* note 21, at 15 (arguing that courts, unlike legislatures, are bound "to treat like cases alike"); Lupu, *Reconstructing*, *supra* note 233, at 600-09 (developing reasons why courts are preferable to legislatures in defining religious accommodations); McConnell, *Institutions*, *supra* note 50, at 157 (explaining that strict scrutiny "require[s] government officials to think seriously about the feasibility of accommodations and [gives] aggrieved persons the right to a hearing on the accommodation issue from a more disinterested governmental figure, a judge"). *But see* Eisgruber & Sager, *After Boerne*, *supra* note 36, at 130 (asserting that strict scrutiny "is too blunt and too invasive to serve as a sensible vehicle for identifying instances of disparate impact or disparate treatment"); Sherry, *supra* note 29, at 128 (arguing that *Sherbert*-era strong-Establishment, strong-Free Exercise regime allowed Court "to pick and choose among religions" in accommodation decisions); Tushnet, *supra* note 212, at 381-83 (contending that courts are likely to favor mainstream religious claimants). The possibility that cultural disconnect may lead to underprotection of minority religions absent strict scrutiny is exacerbated by the coincidence between religious and racial minority status. *See* Laycock, *Act*, *supra* note 25, at 226-27 (discussing cases in which courts denied accommodations to African-American and Hmong religious believers).

tion against religion minimizes the extent to which the government affords any particular religion preferential treatment.⁴⁰²

Egalitarian themes are familiar in accounts of constitutional free exercise protection.⁴⁰³ The most prominent example in recent scholarship is the “equal regard” formulation of Professors Eisgruber and Sager, which “requires that the state treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally.”⁴⁰⁴ That principle protects religious interests somewhat more broadly than my notion of egalitarian accommodations under RFRA, which would require courts to accord minority religions only the same level of accommodation accorded other religions, not necessarily the same level of accommodation accorded any nonreligious interest. In addition, Professors Eisgruber and Sager would impose a distinct “reasonableness” requirement for judicial validation of secular claims.⁴⁰⁵ The differences in appropriate equality principles under the Free Exercise Clause and RFRA reflect the understanding that the Act is subordinate to the Establishment Clause.

b. Idiosyncratic accommodations

Second, Federal RFRA may appropriately be applied in “idiosyncratic” cases, where granting a religious believer’s request for accommodation would neither deny adherents of other religions, or of no religion, any benefit that they want and have a factual basis for claim-

402. Professor Marshall objects to equality justifications for generalized religious accommodations on the theory that two wrongs don’t make a right: if an accommodation violates the Establishment Clause, expanding its scope to benefit minority religions would expand the violation. See Marshall, *Exemption*, *supra* note 25, at 379-80. Courts certainly should address substantive establishment concerns in RFRA cases where they arise. It seems unlikely, however, that discrimination in accommodations stops at the elusive line where accommodations begin to satisfy the Establishment Clause. To the extent Federal RFRA leads courts to conclude that accommodations violate the Establishment Clause, fairness will be enhanced because all religions will be subjected to the same establishment bar.

403. A particularly rich examination of equality and antidiscrimination themes in free exercise jurisprudence is scattered throughout Symposium, *Religious Liberty at the Dawn of a New Millennium*, 75 IND. L.J. 1 (2000). See Conkle, *Religious Liberty*, *supra* note 261, at 5-24 (discussing ascendance in religion clause jurisprudence of ideas of denominational equality and formal neutrality); Gedicks, *Normalized*, *supra* note 50 (assessing free exercise jurisprudence in light of equal protection jurisprudence); Marshall, *Equality*, *supra* note 236 (analyzing and advocating equality principle as basis for religion clause jurisprudence); *cf.* Smith, *supra* note 339, at 62-70 (criticizing prominence of equality rhetoric in religious freedom scholarship and jurisprudence).

404. Eisgruber & Sager, *Conscience*, *supra* note 21, at 1285; *see also id.* at 1277-82 (contending that equal regard principle explains pre-Smith cases in which Court granted free exercise exemptions); Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 449-50 (same); Eisgruber & Sager, *After Boerne*, *supra* note 36, at 104-05 (arguing that Smith and Boerne decisions are best understood as adopting an equal regard approach); *cf.* McConnell, *Singling Out*, *supra* note 11, at 32-38 (criticizing equal regard theory).

405. *See* Eisgruber & Sager, *Conscience*, *supra* note 21, at 1291-97.

ing, nor impose substantial costs on nonbeneficiaries. As discussed above, most of the objections to purely religious accommodations emphasize the problem of favoring religion over nonreligion.⁴⁰⁶ Providing a religious accommodation is less problematic when few nonbelievers want it, because the religious benefit does not entail distribution of scarce resources based on religion.⁴⁰⁷ A variation on the idiosyncratic accommodation is a benefit that believers in other religions or nonbelievers might want but lack any factual (as opposed to doctrinal or spiritual) predicate for claiming. Both sorts of idiosyncratic accommodations avoid the problem of favoring religious interests.⁴⁰⁸ The idea of idiosyncratic accommodation resembles the notion of measuring permissible accommodations based on the absence of externalized costs,⁴⁰⁹ but it takes account of the sometimes invisible cost of unmet desire on the part of nonrecipients. Even if a believer's accommodation costs a nonbeliever nothing, separationist values are threatened if the nonbeliever values and has a factual basis for claiming the accommodation.

*Goldman v. Weinberger*⁴¹⁰ demonstrates the viability of idiosyncratic accommodations. In that case, an Orthodox Jewish Air Force doctor sought the right to wear a yarmulke with his uniform, in contravention of a military restriction that forbade the wearing of headgear indoors. The Court rejected the free exercise claim, deferring almost completely to the military's assertion that the requested

406. See *supra* notes 293-295 and accompanying text.

407. Loewy, *supra* note 58, at 115; see also Greenawalt, *Religious Law*, *supra* note 25, at 840 ("In determining whether a religion is impermissibly assisted, a court should ask whether other groups have similar needs that are unmet."). Arnold Loewy notes another advantage of accommodations not sought by nonbelievers: "the general undesirability of the benefit sought is some evidence of, though certainly not a perfect proxy for, sincerity." Loewy, *supra* note 58, at 115; see also Berg, *Congress*, *supra* note 26, at 43 (arguing that accommodation requests that "coincide[] strongly with secular self-interest" will be more likely to "encourage many other claims, including false ones that may be difficult to identify"). Thus, idiosyncratic accommodations avoid not only the Establishment Clause concern with religious accommodations but also the rule of law concern of *Smith*.

408. By contending that courts may apply RFRA to require idiosyncratic accommodations, I do not mean to suggest that they must grant accommodations in all instances, such as voluntary human sacrifice, where the government asserts paternalistic concerns for the lives or safety of consenting believers. See Volokh, *Intermediate Questions*, *supra* note 36, at 624-30 (discussing paternalistic justifications for nonaccommodation). Certainly such concerns may amount to compelling government interests. My point is simply that idiosyncratic accommodations generally should not violate the Establishment Clause.

409. See *supra* note 336. Other close analogues to the idiosyncratic accommodation idea include Professors Eisgruber and Sager's suggestion that accommodations might not violate the Establishment Clause where the challenged government policy is "irrational," Eisgruber & Sager, *Unconstitutional*, *supra* note 36, at 455 n.66, and cases in which a religious believer seeks equal access to a nonfinite state resource, which the Court has analyzed under the nondiscrimination norm of the Free Speech Clause. See cases cited *supra* note 279.

410. 475 U.S. 503 (1986).

accommodation would undermine order and discipline.⁴¹¹ Strict scrutiny of the claim in *Goldman* would have compelled the Court to strike what was a close balance even under rationality review in favor of the claimant. Accommodation would have given him what he wanted while denying nothing to devotees of other conscientious beliefs, theistic or otherwise. Most people who did not share Goldman's religious beliefs would not care one way or another about accommodating his preference. Others might have wanted the same accommodation but lacked a basis for claiming it because their preferred religious headgear or attire would have presented bona fide concerns sufficient to satisfy strict scrutiny.⁴¹² Requiring the government to make a strong showing before interfering with a religious practice that matters to the claimant but not to everyone else comports with Establishment Clause values.

CONCLUSION

In the federal sphere, the Religious Freedom Restoration Act constrains only federal power, reflecting a congressional precommitment to heightened protection for religious exercise. That precommitment required no exercise of constitutional power and has nothing to do with the Court's prerogatives to interpret and apply constitutional principles. The courts' proper role in applying a legislative precommitment to "overprotect" rights is to prevent violations of the rights secured by the Constitution. Federal RFRA presents a serious danger of Establishment Clause violations, but courts can defuse that danger through careful construction and application of the Act. The Supreme Court can, and should, construe the Act as applying to all deeply held conscientious beliefs, thereby maximizing the Act's effectiveness while

411. *Id.* at 507-10. Congress subsequently overruled *Goldman*, passing a statute that allowed military personnel to wear "neat and conservative" attire compelled by their religious beliefs. 10 U.S.C. § 774(b)(2) (1994).

412. Justice Stevens, concurring in *Goldman*, argued that allowing Goldman to wear a yarmulke presented a danger that the military might in the future confront a claim by a Sikh to wear a turban or a Rastafarian to wear dreadlocks. In Justice Stevens's view, "[t]he Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application." *Goldman*, 475 U.S. at 513 (Stevens, J., concurring). A yarmulke, however, differs from dreadlocks or a turban in that it does not protrude from the head. The military might well establish a compelling interest in barring protruding headgear. Federal RFRA, by requiring strict scrutiny, would alleviate what appears to be Justice Stevens's driving concern — that such distinctions would reflect discriminatory premises rather than actual differences. See *supra* Section III.D.2.a. Moreover, Justice Stevens's premise — that any regime of accommodation will lead to discrimination — discounts the possibility, later made manifest in *Smith*, that a regime of ostensible nonaccommodation could result in discriminatory preferences for majority religions. See *supra* notes 252-255 and accompanying text; cf. Conkle, *Constitutional Significance*, *supra* note 130, at 77 n.187 ("RFRA's generalized scheme of accommodations might actually mitigate one Establishment Clause concern, the risk of selective accommodations that discriminate among similar religious claims").

eliminating any favoritism it shows religious commitments over non-theistic commitments of conscience. Alternatively, courts simply can subordinate all accommodation claims, which now have a strictly statutory basis, to the Establishment Clause, and mandate only those accommodations that comport with secular values. Separationists and defenders of judicial authority should spend their energy encouraging prudent, rights-regarding adjudication of RFRA's applications to federal law, rather than urging the Court to overstep its authority and strike those applications down.