

## I. Introduction

In 1990 the United States Supreme Court sparked the ire of scholars, civil rights activists, religious minorities and the United States Congress when it issued its controversial decision in *Employment Division v. Smith*.<sup>1</sup> That decision has been criticized by scholars and activists from all different perspectives who have interpreted it as severely limiting the free exercise rights of many religious minorities. The decision inspired Congress to pass a law, *the Religious Freedom Restoration Act* (RFRA) designed to circumvent the Supreme Court and effectively overturn the *Smith* decision.<sup>2</sup> The passage of the RFRA created a battle of the branches reminiscent of the separation of powers debate decided by Justice Marshall in *Marbury v. Madison*.<sup>3</sup> With respect to the RFRA, the judicial branch won the battle when, in 1997, the Supreme Court declared the RFRA unconstitutional in *City of Boerne v. Flores*.<sup>4</sup>

Undeterred, in 2000 Congress passed the *Religious Land Use and Institutionalized Persons Act* (RLUIPA).<sup>5</sup> Under the Act, Congress again attempted to undermine the Supreme Court's decision in *Smith*. However, Congress was wary of the constitutional questions posed in

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<sup>1</sup> 494 U.S. 872 (1990).

<sup>2</sup> 42 U.S.C. § 2000bb *et seq* (1993).

<sup>3</sup> 1 Cranch 137(1803).

<sup>4</sup> 521 U.S. 507 (1997).

<sup>5</sup> 42 U.S.C. § 2000cc *et seq* (2000).

*City of Boerne*, and thus asserted separate constitutional grounds to justify the legislation.<sup>6</sup> The Supreme Court has not yet heard an RLUIPA case. However, numerous constitutional challenges have been brought in the district and circuit courts alleging various constitutional violations. Thus far, a majority of the courts deciding the issue have found the statute constitutional, but a distinct minority of courts have ruled otherwise.

While the question of the RLUIPA's constitutionality remains unanswered, Congress and the state legislatures continue to consider legislation designed to limit or overturn the Supreme Court's law & religion jurisprudence. In response to the Court's decision in *City of Boerne*, several state legislatures passed statutes with wording similar to or identical to the RFRA.<sup>7</sup> In 2000, Congress amended the RFRA to eliminate its application to the states, consistent with the Court's ruling in *City of Boerne*.<sup>8</sup>

Most recently, in April of 2003, United States representative Ron Paul proposed revised legislation in the United States House of Representatives again entitled "the Religious Freedom Restoration Act" (RFRA II).<sup>9</sup> Following the RFRA's and the RLUIPA's lead, the house bill again attempts to circumvent the Supreme Court, and like the drafters of the RLUIPA, it is obvious that the drafters of RFRA II were cognizant of the Court's holding in *City of Boerne*, and thus attempted to draft legislation that would not be overturned under the *City of Boerne*

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<sup>6</sup> The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(2) (2000).

<sup>7</sup> See, e.g. 775 Ill. Comp. Stat. 35/15. For a discussion of the Illinois RFRA, see 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).

<sup>8</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* (2000).

<sup>9</sup> Religious Freedom Restoration Act, H.R. 1547, 108<sup>th</sup> Cong. (2003).

holding. Unlike RFRA and RLUIPA, RFRA II is not directed at overturning the Supreme Court’s decision in *Smith*, but rather the concerns of the drafters run far broader. RFRA II proposes to circumvent a plethora of Supreme Court opinions on a variety of law & religion issues by removing from the federal courts jurisdiction “to hear or determine any religious freedom-related case.”<sup>10</sup> Serious questions exist as to whether RFRA II is constitutional.

This paper will explore the background of this recent legislative desire to circumvent the judiciary. It will examine the majority decision in *Employment Division v. Smith* and show how that controversial decision prompted the outcry that led Congress to act as it has. Next, the paper will examine the text of the RFRA, and through an analysis of *City of Boerne v. Flores*, illustrate why the Supreme Court found the RFRA unconstitutional. The paper will then compare the RFRA to the text of the RLUIPA and will summarize the leading case law on the constitutionality of the RLUIPA. Next, the paper will compare the text of RFRA II to the two previous statutes and will analyze, based on *City of Boerne* and those cases interpreting the RLUIPA, the constitutionality of RFRA II. The paper will show, through an analysis of these three pieces of legislation, that Congress is constitutionally prohibited, regardless of its methods, from legislatively overturning decisions of the Supreme Court.

## **II. Background**

### **A. The Case that Started the Controversy: *Employment Division v. Smith***

In *Employment Division v. Smith*<sup>11</sup>, the Supreme Court sharply departed from prior

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<sup>10</sup> Id. at §§ 3 and 4.

<sup>11</sup> 494 U.S. 872 (1990).

precedent and, in fashioning a bright line rule regarding government action and individual free exercise rights, substantially narrowed the scope of the Free Exercise Clause. Many viewed the Court's decision as draconian, and groups representing all sides of the law & religion debate criticized the Court's holding as essentially eradicating individual free exercise rights.<sup>12</sup> In essence, under the Court's holding a government is free to adopt a rule or law that substantially interferes with, or prohibits, an individual's personal religious practice.

Respondents in *Smith*, Alfred Smith and Galen Black were members of the Native American Church.<sup>13</sup> In accordance with church practice, both Smith and Black engaged in sacramental peyote use.<sup>14</sup> The state of Oregon had a law making the possession of a controlled substance a felony. Peyote was considered a controlled substance under the law.<sup>15</sup> Respondents' employer, a drug rehabilitation facility, became aware of respondents' ceremonial peyote use, and terminated their employment.<sup>16</sup> Respondents then applied to the state of Oregon for unemployment benefits. Their claim was denied because they were terminated for "work-related 'misconduct.'"<sup>17</sup>

Smith and Black appealed the decision of the state employment division up to the state

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<sup>12</sup> See generally Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J. L. & POL. 387, 434-35 (2002).

<sup>13</sup> See *Employment Division v. Smith*, 494 U.S. 872, 874 (1990).

<sup>14</sup> See *Smith*, 494 U.S. at 874

<sup>15</sup> See *Id.*

<sup>16</sup> See *Id.*

<sup>17</sup> See *Id.*

supreme court.<sup>18</sup> That court held that, although the respondents technically violated state law, the employment division was not justified, under free exercise grounds, in denying them unemployment benefits.<sup>19</sup> The state supreme court relied on prior Supreme Court precedent and applied a strict scrutiny analysis.<sup>20</sup> The Court ultimately found that, in light of the respondents' free exercise rights, the state did not have a compelling interest in denying them benefits.<sup>21</sup>

In 1988, the Supreme Court first heard the case, and held that if a state is free to prohibit a religious practice through the criminal law, it is free to impose lesser burdens, such as a denial of benefits.<sup>22</sup> The Court, however, determined that it was unclear under Oregon law whether the use of peyote for religious ceremonies was illegal.<sup>23</sup> It thereafter vacated the Oregon Supreme Court's decision and remanded for further consideration.<sup>24</sup> On remand, the Oregon Supreme Court found that, indeed, Smith and Black's peyote use was proscribed under the statute, but then invalidated the statute as unconstitutional.<sup>25</sup> The Supreme Court again granted certiorari and, in 1990, reversed.

The Court limited its decision in the case to whether the state could criminalize peyote

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<sup>18</sup> *See Id.* at 875.

<sup>19</sup> *See Smith v. Employment Div.*, 721 P.2d 445, 449-50 (1986).

<sup>20</sup> *See Id.*

<sup>21</sup> *See Id.*

<sup>22</sup> *See Employment Division v. Smith*, 485 U.S. 660 (1988).

<sup>23</sup> *See Id.*

<sup>24</sup> *See Id.*

<sup>25</sup> *See Smith v. Employment Division*, 763 P. 2d 146 (1988).

use in the first instance.<sup>26</sup> The Court based its decision on the distinction between government compulsion or prohibition of religious *beliefs* versus government prohibition of religious *acts*, and found that the Free Exercise Clause prohibits the former, but that states are free to regulate neutrally, with respect to the latter, so long as the law is applied to all citizens, and is not directed at religious practices intentionally.<sup>27</sup> In order to reach this bright line result, the Court was forced to address its prior precedent.

Under *Sherbert v. Verner*<sup>28</sup> and its progeny, the Court developed a balancing test for governments to use to determine whether the Free Exercise Clause required them to create a religious exemption to otherwise generally applicable laws. Those earlier cases required a religious exemption if a law substantially burdened a religious practice unless the state had a compelling interest in not granting the exemption.<sup>29</sup> In *Smith*, the Court distinguished the prior precedent. Based on the facts of those prior cases, the Court determined that the line of cases could be limited to the situation where the state denies unemployment benefits.<sup>30</sup> The Court refused to expand the *Sherbert* rationale to generally applicable criminal law, writing, “The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the

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<sup>26</sup> See *Smith*, 494 U.S. at 876.

<sup>27</sup> See *Id.* at 877-79.

<sup>28</sup> 374 U.S. 398 (1963).

<sup>29</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>30</sup> See *Smith*, 494 U.S. at 881-85.

effects of a governmental action on a religious objector’s spiritual development.”<sup>31</sup> The Court was also forced to address its decision in *Wisconsin v. Yoder*.<sup>32</sup> In *Yoder*, the Court held that the state of Wisconsin was required to grant exemptions to its compulsory school attendance laws to Amish families who believed that compelled school attendance, beyond the age of sixteen, interfered with their religious practices.<sup>33</sup> The *Smith* Court distinguished *Yoder*, and in so doing created a new class of constitutional case. The Court characterized *Yoder* and cases like it as “hybrid” cases.<sup>34</sup> “Hybrid” cases, according to the Court in *Smith*, do not rest solely on free exercise clause grounds, but rather involve other fundamental rights.<sup>35</sup> In *Yoder*, the Court relied primarily on a parent’s right to make educational decisions for his or her child.<sup>36</sup>

After dispensing with *Sherbert* and *Yoder*, The Court held that governments need not show a compelling reason to enforce a generally applicable law that substantially burdens an individual’s free exercise of religion.<sup>37</sup> Under *Smith*, the two exceptions to the rule would be those cases arising out of a denial of unemployment benefits and “hybrid” cases. The Court pointed out that states are free to create statutory exemptions to their laws, but the state is under

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<sup>31</sup> *Id.* at 885.

<sup>32</sup> 406 U.S. 205 (1972).

<sup>33</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>34</sup> *See Smith*, 494 U.S. at 881.

<sup>35</sup> *See Id.*

<sup>36</sup> *See Yoder*, 406 U.S. 205.

<sup>37</sup> *See Id.*

no constitutional obligation to do so.<sup>38</sup> By abandoning the compelling interest test from *Sherbert*, the Supreme Court's decision in this case represented a monumental shift in Free Exercise Clause jurisprudence.

The four concurring and dissenting justices in *Smith* argued vociferously that the case should have been decided under the compelling interest test.<sup>39</sup> Those justices believed that the compelling interest test allows courts to balance an individual's free exercise rights against the interests of the government in burdening those rights.<sup>40</sup> The concurrence and the dissent criticized the majority for misapplying precedent. Justice O'Connor, in her concurring opinion, wrote, "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury,' . . . is to denigrate 'the very purpose of a Bill of Rights.'"<sup>41</sup>

## **B. The Aftermath of *Smith***

Like the concurring and dissenting justices, people from all sides of the law & religion debate were outraged that the Court eliminated the compelling interest test.<sup>42</sup> Those groups,

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<sup>38</sup> *See Id.* at 890

<sup>39</sup> *See Smith*, 494 U.S. at 891 (O'Connor, J. Concurring), and 907 (Blackmun J., dissenting).

<sup>40</sup> *See Smith*, 494 U.S. at 895 (O'Connor, J. Concurring).

<sup>41</sup> *Id.* at 903 (O'Connor, J. Concurring).

<sup>42</sup> *See* Hamilton, *supra* note 12 at 434-35; Robert P. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L. J. 101, 115 (1997); Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration*

united in their advocacy for the protection of free exercise rights, were profoundly concerned that the court's opinion essentially provided state and federal governments carte blanche to legislate without regard for the impact on religious practice.<sup>43</sup> For example, under the Court's newly created rule, if a city passed an ordinance that made it unlawful to consume alcohol on Sundays, Christians partaking in communion would be prohibited from consuming wine - a practice that is central to the Christian faith. Assuming the law was generally applicable, Christians would have no recourse even though the city would likely not be able to demonstrate a narrowly tailored compelling governmental interest.<sup>44</sup> Since Christianity is a majority religion in most cities, it is unlikely that such a law would be passed, but like the peyote law at issue in *Smith*, it is entirely likely, and in fact probable, that local and state governments may pass generally applicable laws that have the effect of prohibiting a practice that is central to the faith of practitioners of a minority religion - akin to the Christian sacrament of communion. In those

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*Act*, 95 MICH. L. REV. 1472, 1472 (1997).

<sup>43</sup> See generally Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power*, 16 B.Y.U. J. PUB. L. 1, 5 (2001); Drinan, *supra* note 42 at 120.

<sup>44</sup> See generally Drinan, *supra* note 42 at 120. Drinan posits other examples, such as, "a law protecting the rights of homosexuals that requires a church to hire a gay minister. . . an ordinance that denies the right of a Jewish man to wear a yarmulke." *Id.* Drinan further discusses the ramifications of the *Smith* decision absent some limiting principle, such as RFRA, stating,

At the local level, zoning commissions will quietly deny access to Jewish temples, controversial denominations, or Catholic schools. Appeals will not be taken nor will there be any public outcry. The number of individuals who will seek to vindicate their rights under the *Smith* decision will be small.

*Id.* at 115-16.

situations, members of the minority religion would have no recourse under *Smith*.

This result infuriated civil rights groups, religious minority groups, and other deeply religious members of majority religions.<sup>45</sup> Scholars immediately began writing scathing articles of the *Smith* decision.<sup>46</sup> Groups with diverse interests lobbied Congress to enact legislation limiting the impact of the *Smith* decision.<sup>47</sup> In 1997, Congress capitulated, and with overwhelming bipartisan support, passed the Religious Freedom Restoration Act.<sup>48</sup> The public fear that individual religious liberty was being eroded by the Court was somewhat assuaged by the passage of the legislation<sup>49</sup>. Essentially, by demanding governments to establish a compelling interest before burdening religion through neutral laws, the RFRA mandated the judicial standards courts were to apply when analyzing a religious liberty case.<sup>50</sup> The statute overturned *Smith* and re-instated the compelling interest test.<sup>51</sup> The text of the Act made it

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<sup>45</sup> Sixty-eight different religious and civil liberties groups sponsored the RFRA in Congress. *See* Drinan, *supra* note 42 at 118.

<sup>46</sup> “The rivers of ink spilled in criticism of the decision in *Employment Division v. Smith* are the stuff of which legends are made. The law review articles, the hearings in Congress, and the numerous editorials in newspapers and magazines contributed to a Nile of print. The standard story was apocalyptic, with the Supreme Court - actually, Justice Scalia himself - betraying the Free Exercise Clause and ruining religious liberty.” Hamilton, *supra* note 12 at 434.

<sup>47</sup> *See* Drinan, *supra* note 42 at 118; Seeger, *supra* note 42 at 1472-73.

<sup>48</sup> 42 U.S.C. § 2000bb *et. seq.* (1993).

<sup>49</sup> *See* Seeger, *supra* note 42 at 1472-73.

<sup>50</sup> 42 U.S.C. § 2000bb-1 (1993).

<sup>51</sup> Upon signing the bill, president Clinton proclaimed that the RFRA “[R]everse[s] the Supreme Court’s decision [in] *Employment Division* against *Smith*, and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme

specifically applicable to the states. Subsequently, courts followed the mandates of the RFRA and again began to analyze religious liberty claims under the compelling interest test.<sup>52</sup>

### **C. The *Religious Freedom Restoration Act*: Congress's First Attempt to Overturn the Supreme Court**

The RFRA was passed by both houses of Congress with virtually no challenge.<sup>53</sup> The legislative history shows a general distaste for the *Smith* decision and a generalized fear that the decision would erode religious liberty.<sup>54</sup> However, members of Congress did not point to any specific religious rights that they feared would be eroded under *Smith*.<sup>55</sup> Congress's primary motivation, it appears, was to overturn the *Smith* decision.<sup>56</sup> Whether this desire was motivated by true and articulated fears of religious oppression, or whether the motivation was purely reactionary - a response to an unpopular, but perhaps innocuous Court decision, is questionable.<sup>57</sup>

The text of the RFRA contains specific congressional findings. These findings include:

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Court decision.” Eugene Gressman, *State and Federal Religious Liberty Legislation: Is it Necessary? Is it Constitutional? Is it Good Policy? RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507, 514.

<sup>52</sup> Approximately 300 cases were brought under RFRA. *See* Drinan, *supra* note 42 at 104. An overwhelming majority of those plaintiffs did not prevail. *See Id.*

<sup>53</sup> *See Id.*

<sup>54</sup> For an interesting examination of the legislative history, *see* Gressman, *supra* note 51 at 515.

<sup>55</sup> *See Id.*

<sup>56</sup> *See Id.*

<sup>57</sup> *See Id.*

- (2) laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (5) 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 governmental interests.<sup>58</sup>

The RFRA also contains a section listing the ‘purposes’ of the Act. Here, the Congress stated that its purpose was:

- (1) to restore the compelling interest test as set forth in *Sherbert* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>59</sup>

It is clear from the text that Congress intended, by passing the RFRA, to specifically overturn the Court’s decision in *Smith*.

The substantive portion of the statute is remarkably short. It provides one general, overriding principle, and one exception to that principle. The primary principle states, “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . .”<sup>60</sup> Under the exception, government may substantially burden a person’s religious exercise if it can show that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

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<sup>58</sup> 42 U.S.C. § 2000bb(a) (1993)

<sup>59</sup> 42 U.S.C. § 2000bb(b) (1993)

<sup>60</sup> 42 U.S.C. § 2000bb-1 (1993)

furthering that compelling governmental interest.”<sup>61</sup> In other words, Congress re-instated the balancing test articulated under *Sherbert*. RFRA also provides that, where applicable, a person can assert his or her rights under the statute as a claim or defense against a government, and can obtain appropriate relief from that government.<sup>62</sup>

Congress made the statute specifically applicable to state and local governments.<sup>63</sup> The definition of government specifically included “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a State, or a subdivision of a State.”<sup>64</sup> Further, the Act stated, “This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise. . . .”<sup>65</sup> In *City of Boerne v. Flores*<sup>66</sup>, Congress’s authority to dictate judicial standards to state courts and state governments was questioned. While the holding in *City of Boerne* may technically be limited to the RFRA’s application to the states, its rationale is more far reaching.

#### **D. City of Boerne v. Flores: The Supreme Court Trumps Congress on Questions of Constitutional Interpretation**

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 42 U.S.C. § 2000bb-2 (1993)

<sup>64</sup> *Id.* This text was amended in 2000 in light of the *City of Boerne* Decision. The text “a State, or a subdivision of a State” was replaced with the text “a covered entity.” “Covered entity” was then defined as the District of Columbia, Puerto Rico, and each territory and possession of the United States, thus all application to the states was deleted from the text of the Act.” 42 U.S.C. § 2000bb-2 (2003).

<sup>65</sup> 42 U.S.C. § 2000bb-2 (1993) Again, the reference to state law was stricken in the 2000 amendments.

<sup>66</sup> 521 U.S. 507 (1997).

In *City of Boerne v. Flores*<sup>67</sup>, the Supreme Court held that RFRA's application to the states was unconstitutional.<sup>68</sup> In *City of Boerne*, the Archbishop of San Antonio applied to the city of San Antonio's Historic Landmark Commission for a permit to enlarge St. Peter Catholic Church, a building which was identified as historic, and which thus fell under the purview of the Commission.<sup>69</sup> The Commission denied the application, and the Archbishop sued the Commission under the RFRA, claiming the Commission did not have a compelling governmental interest in denying his request and that the denial was not narrowly tailored as was required under the RFRA.<sup>70</sup> The District Court held that the RFRA was an unconstitutional application of Congress's power to enforce the terms of the Fourteenth Amendment.<sup>71</sup> The Fifth Circuit Court of Appeals reversed the district court, and found the RFRA constitutional.<sup>72</sup>

In reaching its decision, the Supreme Court was forced to grapple with foundational constitutional questions relating to the separation of powers and federalism. The Court began its analysis by examining the text and legislative history of the RFRA and concluded that by enacting the RFRA Congress clearly intended to circumvent the Court's decision in *Smith*.<sup>73</sup> The

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<sup>67</sup> *Id.*

<sup>68</sup> *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>69</sup> *See City of Boerne*, 521 U.S. at 512. These facts provide an excellent example of how the RFRA was designed to be implemented.

<sup>70</sup> *See Id.*

<sup>71</sup> 14<sup>th</sup> Amendment, Article 5 states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5.

<sup>72</sup> *See City of Boerne*, 521 U.S. at 512.

<sup>73</sup> *See Id.* at 512-13.

Court then addressed the question of whether Congress has the constitutional authority to overturn a decision of the Supreme Court on the basis of constitutional interpretation.<sup>74</sup> The Court determined, based on the House and Senate reports, that the framers of RFRA, in enacting the legislation, relied upon their powers under the Fourteenth Amendment.<sup>75</sup> Section 5 of the Fourteenth Amendment provides Congress the power to enact necessary laws to enforce the provisions of the Article.<sup>76</sup>

The Court acknowledged Congress's power under section 5 to remediate perceived constitutional wrongs through legislation, even legislation that forced states to comply.<sup>77</sup> However, according to the Court, Congress's power is not limitless.<sup>78</sup> In order for congressional dictates under section 5 to apply to the states, Congress is required to show a clear history of constitutional violations by the states, and must show that legislative remediation is necessary to remedy an existing and pervasive wrong.<sup>79</sup> Under the RFRA, according to the Court, the legislative history gave no indication of severe or pervasive violations of free exercise rights

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<sup>74</sup> *See Id.* at 516.

<sup>75</sup> *See Id.*

<sup>76</sup> U.S. Const. amend XIV, § 5. Congress has the authority to force legislation upon the states under Section 5 of the Fourteenth Amendment in order to remedy constitutional violations. Here, Congress intended to circumvent state action that would limit religious freedom. In other words, In the mind of Congress, the *Smith* decision revoked constitutional protection from those desiring to practice their religions, and thus Congress, under its authority to enforce the Fourteenth Amendment, enacted legislation to reinstate those constitutional protections.

<sup>77</sup> *See City of Boerne*, 521 U.S. at 517-18.

<sup>78</sup> *See Id.* at 518.

<sup>79</sup> *See Id.* at 530.

where states have adopted neutral laws.<sup>80</sup>

Section 5 gives Congress the power to *enforce* the Fourteenth Amendment. The Court distinguished Congress's actions in passing the RFRA as going beyond enforcement.<sup>81</sup> Congress's power is limited to enforcing the Fourteenth Amendment as defined and interpreted by the Supreme Court. One basis for determining whether Congress is enforcing, as opposed to defining, according to the Court, is whether "there [is] congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>82</sup> Again, the Court concluded that the RFRA's legislative history did not point to any substantial constitutional deprivation of individual rights by the states.. Thus the broad legislation adopted by Congress exceeded Congress's enforcement powers.<sup>83</sup> The legislative history of the Fourteenth Amendment provided further support for the Court's decision that Congress's power to legislate regarding the terms of the amendments must be narrowly construed in order to prevent Congress from usurping the power of state legislatures.<sup>84</sup> The Court also relied upon the legislative history of the Fourteenth Amendment expressing congressional concern that a broader grant of power to the Congress under the Fourteenth Amendment would erode the foundations of the separation of powers doctrine.<sup>85</sup> The Court then examined its precedent to show that its interpretation of

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<sup>80</sup> *See Id.*

<sup>81</sup> *See Id.* at 519-20.

<sup>82</sup> *Id.* at 520..

<sup>83</sup> *See City of Boerne*, 521 U.S. at 532.

<sup>84</sup> *See Id.* at 520-24.

<sup>85</sup> *See Id.*

Congress's power under the Fourteenth Amendment was supported by prior case law.<sup>86</sup>

The Court applied its interpretation of Congress's authority under Section 5 of the Fourteenth Amendment, and held that the application of the RFRA to the states was unconstitutional. The Court cited the glaring lack of any record in RFRA's legislative history of profound denials of protected rights.<sup>87</sup> As such, Congress had no reason to remediate, and thus acted outside its constitutionally authorized authority. The Court wrote,

RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. 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.<sup>88</sup>

The Court criticized the scope of RFRA's reach, stating that Congress should limit its remedial legislation to focus on those instances and situations of specific constitutional violation.<sup>89</sup>

RFRA, on the other hand, applied to every government official or body, both federal and state, at all levels of government.<sup>90</sup>

In conclusion, the Court made broader pronouncements, beyond the text of Section 5, regarding congressional authority to interpret the Constitution via legislation.<sup>91</sup> The Court

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<sup>86</sup> *See Id.* at 525-29.

<sup>87</sup> *Id.* at 536.

<sup>88</sup> *Id.* at 532.

<sup>89</sup> *See City of Boerne*, 521 U.S. at 532.

<sup>90</sup> *See Id.*

<sup>91</sup> *See Id.* at 535-36.

quoted famous language from *Marbury v. Madison*<sup>92</sup> in concluding that Congress may not legislate on the substance of constitutional issues.<sup>93</sup> The Court, relying on Chief Justice Marshall's decision in *Marbury* wrote,

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it. . . .' Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.<sup>94</sup>

After concluding that the application of RFRA to the states violated the Constitution, the Court admonished Congress to refrain from violating the principles of the separation of powers, writing,

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. . . . 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. . . . RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.<sup>95</sup>

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<sup>92</sup> 1 Cranch 137 (1803).

<sup>93</sup> See *City of Boerne*, 521 U.S. at 529.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 535-36.

The Court’s recognition that the judicial branch, not the legislative branch, was given the authority under the Constitution to hear and determine cases and controversies, along with the Court’s concern regarding the principles of separation of powers and federalism make the application of this case far broader in scope than the actual holding.

Even after the *City of Boerne* case the RFRA remains the law, at least with respect to the federal government. RFRA was amended in 2000 and application to the states was removed.<sup>96</sup> After the Court’s broad decision in *City of Boerne*, however, the RFRA’s overall constitutionality is questionable. Further, Congress failed to adhere to the Court’s admonition, and immediately began work on legislation that would accomplish the same result as the RFRA through what it hoped would be constitutional means.<sup>97</sup>

#### **E. The Religious Land Use and Institutionalized Persons Act: Congress Strikes Back**

Shortly after the Court’s decision in *City of Boerne v. Flores*, the House of Representatives attempted to re-work the RFRA, under the title “Religious Liberty Protection Act” (RLPA).<sup>98</sup> The bill had the same ends as the RFRA. However, Congress attempted to circumvent the *City of Boerne* holding by deriving its authority from Congress’s Article II powers, rather than Section 5 of the Fourteenth Amendment; namely the Commerce Clause and the Spending Clause.<sup>99</sup> The bill was passed in the House of Representatives in 1999, but

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<sup>96</sup> 42 U.S.C. § 2000bb-2 (2000).

<sup>97</sup> See Gressman, *supra* note 51 at 529-30.

<sup>98</sup> See *Id.*

<sup>99</sup> See *Id.*

ultimately died in the Senate. RLUIPA, a much narrower compromise bill was passed by both houses in 2000.<sup>100</sup>

The House of Representatives, in debating the RLPA, attempted to overcome RFRA's constitutional deficiencies. First, Congress based its authority on Commerce Clause and Spending Clause powers, rather than Section 5 powers.<sup>101</sup> Next, Congress attempted to comply with the Court's reasoning in *City of Boerne* that in order for federal legislation to be controlling on the states, Congress was required to create a record and illustrate how their powers, either under section 5 or under the Commerce or Spending clauses, could be invoked.<sup>102</sup> The RLPA did not pass in the Senate.<sup>103</sup> However, strong lobbying groups interested in preserving and protecting religious liberty from land use and zoning boards and prison officials, succeeded in getting a narrower version of the RLPA, related specifically to those two areas of concern, passed by both houses.<sup>104</sup> There is next to no independent legislative history on the RLUIPA because it was truly an offshoot of the RLPA.<sup>105</sup> However, the legislative history of the RLPA contains a record showing examples of instances where free exercise rights were allegedly

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<sup>100</sup> See Stanton K. Oishi, *RFRA II: The Failure of the Religious Land Use and Institutionalized Persons Act of 2000 Under Section 5 of the Fourteenth Amendment*, 25 U. HAW. L. REV. 131, 138 (2002).

<sup>101</sup> See Gressman, *supra* note 51 at 529-30.

<sup>102</sup> See *Id.*

<sup>103</sup> See Oishi, *supra* note 100 at 138.

<sup>104</sup> See Marci Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L. J. 311, 333-34 (2003).

<sup>105</sup> See *Id.*

violated by state and local land use boards and prison officials.<sup>106</sup>

The text of the RLUIPA is substantially similar to the text of the RFRA, except the RLUIPA draws a much narrower scope and explicitly states the basis of congressional authority.<sup>107</sup> Like RFRA, the RLUIPA sets forth single principles of law to govern government conduct with respect to infringement of religious liberty, and contains a single exception to the general principle.<sup>108</sup> However, unlike the RFRA, which covered all religious practice, the RLUIPA's coverage is limited to land use and institutionalized persons cases.<sup>109</sup> The land use provisions of the RLUIPA state,

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution -  
(A) is in furtherance of a compelling governmental interest; and  
(B) is the least restrictive means of furthering that compelling governmental interest.<sup>110</sup>

The institutionalized persons provision states,

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution. . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -

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<sup>106</sup> The scope of this legislative history has been disputed. Some argue that it is enough to satisfy the *City of Boerne* mandate that Congress demonstrate widespread systemic constitutional violations, while others believe the record fails to illustrate a valid concern to invoke Congress's power to legislate state activity. See David B. Zocco, *Supersized with Fries: Regulating Religious Land Use in the Megachurches*, 88 MINN. L. REV. 416, 433 (2003). But see, Gressman, *supra* note 51 at 529-30.

<sup>107</sup> 42 U.S.C. § 2000cc (2000).

<sup>108</sup> *See Id.*

<sup>109</sup> *See Id.*

<sup>110</sup> 42 U.S.C. § 2000cc(a).

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.<sup>111</sup>

Congress made both provisions applicable to any program or activity that receives federal funding or any program or activity affecting commerce.<sup>112</sup> In addition, the provisions relating to land use provide that the statute applies to any governmental subdivision that makes “individualized assessments of the proposed uses for the property involved.”<sup>113</sup> Presumably, Congress derived its authority to enact this provision from its Fourteenth Amendment section 5 powers.<sup>114</sup> The text of the RLUIPA specifically indicates that the statute applies to state and local governments.<sup>115</sup>

In effect, the RLUIPA would overturn the Court’s *Smith* decision in cases alleging a substantial burden on free exercise rights in land use decisions and prisoner’s rights cases. Read literally, and assuming it is constitutional, its application would likely have led to a victory for the Catholic church in the underlying factual case in *City of Boerne*. If, in that case, the Court determined that the Catholic church was “substantially burdened” by the committees’s decision to deny its application for expansion, then the RLUIPA would require the city to prove that it had a compelling interest in denying the application and that the process by which the

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<sup>111</sup> See 42 U.S.C. § 2000cc-1(a).

<sup>112</sup> 42 U.S.C. §§ 2000cc(a)(2) & cc-1(b).

<sup>113</sup> 42 U.S.C. § 2000cc(a)(2)(c). (Thus invoking its powers under the Spending Clause and the Commerce Clause.).

<sup>114</sup> See *Westchester Day School v. Village of Mamoreneck*, 280 F. Supp. 2d. 230, 234-35 (S.D. NY, 2003) (analyzing RLUIPA under Section 5 of the Fourteenth Amendment).

<sup>115</sup> 42 U.S.C. § 2000cc-5(4).

application was denied was narrowly tailored to serve the compelling interest. Similarly, under the institutionalized persons provisions of the RLUIPA, where a prisoner's request to wear a garment or accessory required by his religion, a yarmulke for example, is denied, and the prisoner is able to show that such a denial amounts to a substantial burden on his religion, the state would be required to show that it has a compelling interest in denying the prisoner's request to wear the yarmulke, and that the denial is narrowly tailored to serve any such compelling interest. In other words, the RLUIPA would, in the context of land use and prisoner cases, reinstate the pre-*Smith* interpretation of the Free Exercise Clause articulated in *Sherbert* and its progeny.

**F. Is the RLUIPA Constitutional: A review of existing case law**

Several district courts have applied the RLUIPA to cases similar to those just mentioned, with varying results.<sup>116</sup> Depending on how those court defined "substantial burden" many local zoning decisions and decisions of prison officials have been overturned under the RLUIPA<sup>117</sup> because the government could not prove a compelling interest in burdening the person's free exercise rights. The district courts have also been divided over whether the RLUIPA is

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<sup>116</sup> See *Kokinov v. Orange County*, 302 F. Supp. 2d 1328 (M.D. Fla., 2004) (zoning provision banning use of land for religious organization did not violate the RLUIPA because there was no substantial burden), *Murphy v. Zoning Comm'n*, 289 F. Supp. 2d 87, 113 (D. Conn., 2003) (Cease and desist order from town's zoning commission prohibiting prayer group meeting substantially burdened religion.), *Charles v. Verhagen*, 220 F. Supp. 2d 937, 949-50 (W.D. Wisc., 2002) (Prison policy that denied Muslim prisoner access to cleansing oils was a substantial burden on his religion.).

<sup>117</sup> See *Id.*

constitutional.<sup>118</sup> Multiple arguments have been made, many of which are similar to the arguments relied upon by the Court in *City of Boerne*, against the constitutionality of the statute.<sup>119</sup> At present, four federal circuit courts have addressed the RLUIPA's constitutionality. Three have found the statute constitutional.<sup>120</sup>

In *Mayweathers v. Newland*<sup>121</sup>, a group of Muslim prisoners sued officials of the California Prison Systems under the RLUIPA alleging that prison rules prohibited them from attending a Friday afternoon religious service, the Jumu'ah, in violation of their free exercise rights.<sup>122</sup> The state of California challenged the constitutionality of the RLUIPA on a number of grounds.<sup>123</sup> The Ninth Circuit first determined that Congress was authorized, under its Spending Clause powers, to enact the legislation and make it applicable to the states.<sup>124</sup> Next, the Court entertained several arguments made by the state that the statute was unconstitutional on other grounds.<sup>125</sup> The Court systematically dismissed all of the state's arguments. First, the state

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<sup>118</sup> See *U.S. v. Maui County*, 298 F. Supp. 2d 1010 (D. Hawaii, 2003) (Finding the RLUIPA constitutional). *But see*, *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va., 2003) (Finding the RLUIPA unconstitutional) (Reversed by *Madison v. Riter*, 355 F.3d 310 (4<sup>th</sup> Cir. 2003)).

<sup>119</sup> See *Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir. 2002) (Arguments were made that the RLUIPA violates the Establishment Clause, the Tenth and Eleventh Amendments and the principle of separation of powers).

<sup>120</sup> 314 F. 3d 1062 (9<sup>th</sup> Cir., 2002).

<sup>121</sup> See *Mayweathers*, 314 F.3d at 1066.

<sup>122</sup> See *Id.*

<sup>123</sup> See *Id.*

<sup>124</sup> See *Id.* at 1066-67.

<sup>125</sup> See *Id.* at 1068.

argued that the RLUIPA was a violation of the Establishment Clause as a law “respecting the establishment of religion.”<sup>126</sup> The Court applied the *Lemon*<sup>127</sup> test and determined that the protection of religious liberty is a secular purpose, that the primary effects of the statute neither advance nor inhibit religion, and that there is no excessive entanglement between the government and religion.<sup>128</sup> The state next argued violations of the Tenth and Eleventh amendments.<sup>129</sup> The Court, however, found no such violations.<sup>130</sup> Finally, the state argued that the RLUIPA was unconstitutional on separation of powers grounds.<sup>131</sup> The Court admitted that the RLUIPA was drafted in response to the Court’s decision in *Smith*.<sup>132</sup> However, the Court determined that the standards set forth in *Smith* were simply constitutional minimums, and that the legislature was free to expand the scope of protection under the Free Exercise Clause.<sup>133</sup>

In *Charles v. Verhagen*<sup>134</sup>, the Seventh Circuit Court of Appeals examined the

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<sup>126</sup> *Id.*

<sup>127</sup> “A statute will survive an Establishment Clause attack if (1) it has a secular legislative purpose, (2) the primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion.” *Mayweathers*, 314 F. 3d at 1068, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>128</sup> *See Mayweathers*, 314 F. 3d at 1068-69.

<sup>129</sup> *See Id.* at 1069-70.

<sup>130</sup> *See Id.* (The Tenth and Eleventh Amendment arguments are beyond the scope of this paper).

<sup>131</sup> *See Id.* at 1070.

<sup>132</sup> *See Id.*

<sup>133</sup> *See Id.*

<sup>134</sup> 348 F.3d 601 (7<sup>th</sup> Cir. 2003).

constitutionality of the RLUIPA.<sup>135</sup> The Court relied heavily on the Ninth Circuit’s decision in *Mayweathers*, and reached a virtually identical result. In this case, a Muslim prisoner sued the state Department of Corrections under the RLUIPA for its refusal to allow him to possess cleansing oils necessary for ritual prayer.<sup>136</sup> Prison regulations listed specific religious items that members of each “umbrella” religion could possess.<sup>137</sup> Under the regulations for the Muslim religion, cleansing oils were not listed. The Court found that the RLUIPA was a valid exercise of Congress’s Spending Clause power.<sup>138</sup> The Court rejected the state’s arguments that the RLUIPA violated the Tenth and Eleventh amendments and the Establishment Clause.<sup>139</sup> Like in *Mayweathers*, the Court applied the *Lemon* test and determined that the effects of the statute did not advance or inhibit religion, but rather sought to ensure individual liberty.<sup>140</sup> The Court did not address the separation of powers argument.

Amazingly, neither court addressed the *City of Boerne Case*. In fact, in *Mayweathers*, the Court wrote, “RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court because the statute does not overturn the Court’s constitutional interpretation in *Smith*.”<sup>141</sup> With that, the Court dismissed the separation of powers argument. In *City of Boerne*,

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<sup>135</sup> *Charles v. Verhagen*, 348 F.3d 601 (7<sup>th</sup> Cir. 2003).

<sup>136</sup> *See Charles*, 348 F.3d at 604-05.

<sup>137</sup> The policies identified seven “umbrella” religions (Protestant, Catholic, Jewish, Buddhist, Muslim, Native American, and Wiccan). *See Id.* at 605.

<sup>138</sup> *See Id.* at 607-09.

<sup>139</sup> *See Id.* at 609-10.

<sup>140</sup> *See Id.* at 610-11.

<sup>141</sup> *Mayweathers*, 314 F.3d at 1070.

the Court held language almost identical to the RLUIPA unconstitutional, in part because of a violation of the separation of powers.<sup>142</sup> In that case, the Court stressed that it was the judiciary's role to define the scope of the Constitution.<sup>143</sup> Regardless of what authority Congress relies upon, it invades the province of the judiciary when it legislates on matters of constitutional interpretation, and then makes its interpretation of the Constitution binding on the States. Under the RLUIPA, Congress has set forth criteria courts must use to determine specific cases and controversies brought under the Constitution<sup>144</sup>. Such practice clearly usurps the role of the judiciary.<sup>145</sup> It is amazing that the Court in *Mayweathers* provided such a cursory discussion of the issue and that both *Mayweathers* and *Charles* completely failed to distinguish the *City of Boerne* case.

In *Madison v. Riter*<sup>146</sup>, a man sued state prison officials under the RLUIPA claiming that their denial of his request for a kosher menu violated the RLUIPA.<sup>147</sup> The Fourth Circuit, limiting its analysis solely to the Establishment Clause, reversed the decision of the district court and found that the RLUIPA did not violate the Establishment Clause.<sup>148</sup> The Court noted that the RLUIPA was not designed to advance or discourage religion, but was rather a congressional attempt to “lift[] government burdens on religious exercise and thereby facilitate[] free exercise of

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<sup>142</sup> See *City of Boerne*, 521 U.S. 507, 535-36.

<sup>143</sup> See *Id.*

<sup>144</sup> 42 U.S.C. §§ 2000cc & 2000cc-1 (2000).

<sup>145</sup> See generally, Gressman, *supra* note 51 at 517-19.

<sup>146</sup> 355 F. 3d 310 (2003).

<sup>147</sup> See *Madison v. Riter*, 355 F.3d 310, 313-14 (4<sup>th</sup> Cir. 2003).

<sup>148</sup> See *Madison*, 355 F.3d at 322.

religion for those who wish to practice their faiths.”<sup>149</sup> The Court dismissed the reasoning of the district court that the RLUIPA exalts religious rights above other fundamental rights.<sup>150</sup> In response, the Court stated, “no provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection.”<sup>151</sup> Interestingly, the Court characterized the RLUIPA as Congress’s attempt to “conform to the Supreme Court’s decisions in *Employment Division v. Smith*, and *City of Boerne v. Flores* [citations omitted],” when in fact, it is clear that Congress actually attempted to circumvent those decisions.<sup>152</sup> In analyzing the Establishment Clause argument, the Court relied heavily on prior Supreme Court precedent authorizing legislatures to accommodate religion without violating the Establishment Clause. In conclusion, the Court wrote, “legislative bodies have every right to accommodate free exercise, so long as government does not privilege any faith, belief, or religious viewpoint in particular.”<sup>153</sup> The Court remanded other issues of constitutionality, such as Tenth and Eleventh Amendment claims to the District Court.<sup>154</sup>

The Sixth Circuit disagreed with the Fourth, Seventh and Ninth Circuits, and in *Cutter v. Wilkinson*<sup>155</sup>, held that the RLUIPA was unconstitutional on Establishment Clause grounds.<sup>156</sup>

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<sup>149</sup> *Id.* at 318

<sup>150</sup> *See Id.* at 318-19.

<sup>151</sup> *Id.* at 319.

<sup>152</sup> *Id.* at 314.

<sup>153</sup> *Id.* at 322.

<sup>154</sup> *See Madison*, 355 F.3d at 322.

<sup>155</sup> 349 F.3d 257 (2003).

<sup>156</sup> *See Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003).

The Court noted that the RLUIPA was not a legitimate response to a real constitutional problem, when, according to the Supreme Court's decision in *Smith*, the Constitution does not require a strict scrutiny analysis in religious freedom cases.<sup>157</sup> As such, according to the Court, Congress had no basis for enacting a law interpreting the Constitution where there were no provable widespread constitutional violations.<sup>158</sup> Like in the other cases, the Court analyzed the issue under the *Lemon* test. When examining the effects prong of the test, however, the Court based its decision on the endorsement test articulated in prior Supreme Court precedent.<sup>159</sup> Applying the Endorsement Test, the Court found that a reasonable observer would believe the RLUIPA was an endorsement of religion and that it had the impermissible effect of advancing religion.<sup>160</sup> The Court noted that Congress had no proof that individual religious rights were at a greater risk of being deprived than other fundamental constitutional rights.<sup>161</sup> The effect of the RLUIPA, therefore, was to advance and encourage religion by providing those with religious convictions more freedom and by encouraging those without strong religious convictions to feign such conviction to accrue the additional benefits awarded under the RLUIPA.<sup>162</sup> Further, according to

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<sup>157</sup> *See Cutter*, 349 F.3d at 263-64.

<sup>158</sup> *See Id.*

<sup>159</sup> *See Id.* at 264, *relying on Lynch v. Donnelly*, 465 U.S. 668, 690 (19XX) (O'Connor, J., concurring).

<sup>160</sup> *See Cutter*, 349 F.3d at 267.

<sup>161</sup> *See Id.* at 265.

<sup>162</sup> The Court quoted an example given by the district Court in *Madison*. *See Id.* at 265. In the example, the Court assumes two equally situated prisoners, one who is politically affiliated with the Aryan Nation and the other who is affiliated with a religious anti-semitic organization. In both cases prison officials confiscate white supremacist literature from the prisoners. The district court details the problems associated with the RLUIPA, writing,

the Court, the RLUIPA was unnecessary because prisoners already had a remedy and a forum for the adjudication of free exercise rights claims prior to the adoption of the RLUIPA.<sup>163</sup> If the prisoner could prove that the prison official's actions were neither reasonable or neutral, then the rule would be held unconstitutional under the Free Exercise Clause.<sup>164</sup> By providing religious prisoners who feel their fundamental rights have been violated a stronger standard of review than other prisoners whose rights are equally violated, but for reasons that are not religious, according to the Court, the RLUIPA advances religion, especially in light of the Supreme Court's decision in *Smith* that strict scrutiny is not constitutionally required.<sup>165</sup> The Court did not address other

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“[t]he non-religious inmate may challenge the confiscation as a violation of his rights to free expression and free association. A court would evaluate these claims under the deferential rational relationship test . . . , placing a high burden of proof on the inmate and leaving the inmate with correspondingly dim prospects of success. However, the religious inmate, as a member of [a religious sect], may assert a RLUIPA claim, arguing that the confiscation places substantial burden on his religious exercise. The religious white supremacist now has a much better chance of success than the non-religious white supremacist, as prison officials bear the burden of proving that the prison policy satisfies a compelling interest and is the least restrictive means of satisfying the interest.” The Court then points out the obvious problem, “non-religious prisoners will know what they have to do so that they, too, can benefit from the softer rules: become religious.”

*Madison*, 240 F. Supp. 2d at 577.

<sup>163</sup> *Cutter*, 349 F.3d at 265.

<sup>164</sup> The Court, again quoting the district court decision in *Madison*, detailed the incredible shift in practice the RLUIPA created by changing the standard of constitutional review from rational basis to strict scrutiny. *See Id.* at 265. The strict scrutiny standard “requir[es] prison officials, rather than the inmate, to bear the burden of proof that the regulation furthers a compelling penological interest and is the least restrict means of satisfying this interest. . . . As is well known from the history of constitutional law, the change that RLUIPA imposes is revolutionary, switching from a scheme of deference to one of presumptive unconstitutionality. *Madison*, 240 F. Supp. 2d at 575.

<sup>165</sup> *See Cutter*, 349 F.3d at 266. “When Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind

constitutional questions in its decision.

The question left unanswered in these cases is whether Congress has the authority to overturn the Supreme Court and make its interpretation binding on the states. The issue remains whether Congress violates the concept of separation of powers when it attempts to legislate on matters of constitutional interpretation, and forces state and local agencies to abide by its more stringent constitutional standards. The courts may be correct that the RLUIPA does not violate the Establishment Clause, but Congress's actions likely violate the principles of the separation of powers because, in trying to overturn the Supreme Court, Congress usurps the judiciary's power of constitutional interpretation in conflicts involving constitutional questions.<sup>166</sup> Further analysis of the constitutionality of the RLUIPA is beyond the scope of this paper. The concepts articulated by the various courts will be helpful, however, in analyzing Congress's next attempt to legislate around Supreme Court law & religion precedent.

#### **G. Congress's Next Attempt to Overturn the Supreme Court: RFRA II**

Perhaps sensing the trend among circuit courts to uphold Congress's attempts to overturn Supreme Court precedent, at least some members of the House of Representatives are attempting to enact new legislation that would re-interpret and re-define the Free Exercise and Establishment Clauses, and which would have sweeping consequences to current Supreme Court interpretations of the religion clauses. In what is again titled the *Religious Freedom Restoration*

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one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause.” *Madison*, 240 F. Supp. 2d at 577.

<sup>166</sup> See generally, Gressman, *supra* note 51; *City of Boerne*, 521 U.S. at 535-36.

*Act* (RFRA II)<sup>167</sup>, Representative Ron Paul has proposed a bill that would undercut a wide variety of Supreme Court cases and would wrest jurisdiction over religious freedom-related cases from the federal district courts completely<sup>168</sup>. The bill lists extensive congressional findings of misinterpretations of the Constitution by the federal courts. The findings condemn the Court's separationist history as being antithetical to the true meaning of the Constitution.<sup>169</sup>

The Bill states,

The Court invented the distorted meaning of the first amendment utilizing the separation of 'church and state' in 1947 in *Everson v. Board of Education* when it announced: The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. [citation omitted]. Over the past five decades, rulings of the United States Supreme Court have served to infringe upon the rights of Americans to enjoy freedom of speech relating to religious matters. Such infringements include the outlawing of prayer in schools and of the display of the Ten Commandments in public places. These rulings have not reflected a neutrality toward religious denominations but a hostility toward religious thought. They have served to undermine the foundation of not only our moral code but our system of law and justice.<sup>170</sup>

These harsh words aimed at the Court continue. The drafters of the bill accuse the Court

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<sup>167</sup> H.R. 1547, 108<sup>th</sup> Cong. (2003).

<sup>168</sup> The Senate has a similar bill pending. Senate Bill 1558, entitled the Religious Liberties Restoration Act, was introduced by Senator Wayne Allard. The text of the bill is similar to that of the RLPA II. However, the Senate bill explicitly states that Congress will derive its power to enact the legislation from Section 5 of the Fourteenth Amendment and Article III, section 2 of the Constitution. The Senate bill would protect displays of the Ten Commandments; the word "God" in the Pledge of Allegiance; and the motto "In God We Trust" as specific questions preserved by the Constitution to the discretion of the individual states. As such, the bill would remove such questions from the jurisdiction of the federal courts inferior to the Supreme Courts. S. 1558, 108<sup>th</sup> Cong. §2 (7) & (8).

<sup>169</sup> H.R. 1547 § 2.

<sup>170</sup> *Id.* at §2(4).

of “ignor[ing] historical precedent. . . , the wording of the First Amendment, and the intent of its framers.”<sup>171</sup> The drafters state, “it is incumbent upon this Congress to review not only the rulings of the Court which are in question but the wording and history of the First Amendment to determine the intent of its framers.”<sup>172</sup> The drafters then list several specific areas in which the Court has decided cases, complete with references to Supreme Court decisions, that they believe are inconsistent with the Constitution. These areas center around the issues of school prayer and freedom of speech, and Ten Commandments displays.<sup>173</sup> The drafters accuse the Court of breaching their duty to maintain the separation of powers because they believe the Court’s decisions have been “de facto legislation or Constitution-amending.”<sup>174</sup> The drafters then engage in their own review of the historical underpinnings of the religion clauses, concluding that the Court has consistently misinterpreted the clauses over the past fifty years.<sup>175</sup> The drafters conclude their findings by stating,

Because the Court does not seem to be disposed to correct this egregious error, it is incumbent upon the Congress of the United States to perform its duty to support and defend the Constitution of the United States, by the use of its authority to apply checks and balances to other branches of the government, when usurpations and the exercise of excesses of power are evident. The Congress must, then, take the appropriate steps to correct egregious problem [sic].<sup>176</sup>

In remedying what it perceived to be “egregious problems” with the Court’s school

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<sup>171</sup> *Id.* at §2(5).

<sup>172</sup> *Id.*

<sup>173</sup> *See Id.*

<sup>174</sup> *Id.*

<sup>175</sup> H.R. 1547 § 2(5)-(22).

<sup>176</sup> *Id.* at § 2(22).

prayer and Ten Commandments cases, the drafters propose a seemingly simple solution: take away the court’s power to hear such cases.<sup>177</sup> The bill would have Congress amend the Judiciary Act to remove “religious freedom-related cases from federal district court jurisdiction,” and from federal claims court jurisdiction.<sup>178</sup> In substance, the drafters propose “The district courts of the United States, . . . [and the United States Court of Federal Claims] shall not have jurisdiction to hear or determine any religious freedom-related cases.”<sup>179</sup> The drafters define “religious freedom-related case” as “any action in which any requirement, prohibition, or other provision relating to religious freedom that is contained in a State or Federal Statute is at issue.”<sup>180</sup> If RFRA II passes Congress, which is probably unlikely, the Courts should strike it down as an unconstitutional violation of the principle of the separation of powers and as a violation of both the Establishment Clause and of Section 5 of the Fourteenth Amendment. This most recent attack by Congress on the Supreme Court, if allowed to stand, will seriously undermine the principles of checks and balances upon which the country was founded.

### **III. Analysis - Is the RFRA II Constitutional?**

In analyzing the constitutionality of federal legislation, the first question to be addressed

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<sup>177</sup> *See Id.* at §§ 3 & 4.

<sup>178</sup> *See Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at §§ 3(a) & 4(a).

is from where has Congress derived its authority to legislate.<sup>181</sup> Under the Necessary and Proper Clause, Congress is empowered to legislate on any of the enumerated powers granted to it by the other provisions of Article II, and on any other matters necessary to implement the Constitution.<sup>182</sup> In *M’Culloch v. Maryland*<sup>183</sup>, Chief Justice Marshall, writing for the Court, set forth a three prong test to determine whether Congress was acting within the scope of its necessary and proper clause powers. “[1] Let the end be legitimate, let it be within the scope of the constitution, [2] and all means which are appropriate, which are plainly adapted to that end, [and] [3] which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.”<sup>184</sup> The same standards have been used to determine the appropriate scope of congressional power under Section 5 of the Fourteenth Amendment.<sup>185</sup>

Important questions of federalism are implicated when Congress attempts to dictate the

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<sup>181</sup> Under *Marbury v. Madison*, 1 Cranch 137 (1803) Congress may act under any of its enumerated powers, or through the necessary and proper clause to effectuate any of its enumerated powers.

<sup>182</sup> See generally, *Marbury*, 1 Cranch 137.

<sup>183</sup> 4 Wheat 316 (1819).

<sup>184</sup> *M’Culloch v. Maryland*, 4 Wheat 316, 421 (1819). The Court goes on to state,

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should such a case requiring such a decision come before it, to say that such an act was not the law of the land. [emphasis added].

*Id.* at 423.

<sup>185</sup> See Gressman, *supra* note 51 at 520-21.

activities of the states. Such questions led the Supreme Court to overturn the RFRA and created serious questions regarding the constitutionality of the RLUIPA.<sup>186</sup> However, under RFRA II, Congress is not attempting to limit or control state activity, but rather, the opposite is true. The effect of RFRA II would be to protect the decisions of state legislatures from being deemed unconstitutional by the federal courts. RFRA II, therefore, avoids the serious questions of federalism that guided the Court's decision in *City of Boerne*. However, Congress must still have a constitutional basis for legislating and the legislation must not violate any other provisions of the Constitution.<sup>187</sup>

It appears that the drafters of RFRA II believe that Congress is authorized to legislate based on its powers under Article III, Section 2 of the Constitution and Section 5 of the Fourteenth Amendment.<sup>188</sup> Congress's powers under these provisions are not unlimited.<sup>189</sup> As the Court in *City of Boerne* pointed out, Congress must establish a compelling record of some evil or ill being remediated in order to legislate under Section 5 of the Fourteenth Amendment.<sup>190</sup> It is unlikely that Congress will be able to show such a record where the states have complied with the Supreme Court's interpretation of the Constitution. Under Article III, Section 2,

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<sup>186</sup> See *City of Boerne*, 521 U.S. 507.

<sup>187</sup> See *Marbury*, 1 Cranch at 176-77, *M'Culloch*, 4 Wheat at 421-23.

<sup>188</sup> Although there is no explicit mention in H.R. 1547 as to where Congress would derive its authority in the RFRA II, the drafters of the Senate version explicitly state that they have the power to legislate on this subject under these two constitutional provisions. S. 1558, 108<sup>th</sup> Cong. §2(7) & (8).

<sup>189</sup> It is limited by the rationale articulated in *Marbury* and *M'Culloch* - that is it must not violate any other constitutional provision. Section 5 of the Fourteenth Amendment is further limited by the Supreme Court's decision in *City of Boerne*.

<sup>190</sup> See *City of Boerne*, 521 U.S. at 530.

Congress has the power to create federal courts inferior to the Supreme Court. Once Congress creates the lower courts, it is not authorized to limit their jurisdiction with respect to questions of constitutional interpretation if its intent is to circumvent the Supreme Court and discriminate against non-believers and religious minorities. Such a result violates the principle of separation of powers and the Establishment Clause.<sup>191</sup> The RFRA II raises serious constitutional concerns. Under the Sixth Circuit's rationale in *Cutter*, it is likely that the RFRA II is a violation of the Establishment Clause. Further, under the Court's reasoning in *City of Boerne*, it is likely that the RFRA II is a violation of the principles of separation of powers.

**A. Is Congress constitutionally authorized to enact the RFRA II?**

**1. Section 5 of the Fourteenth Amendment**

The effects of the RFRA II would be to make state and local governments immune from federal constitutional inquiry relating to certain religious decision-making. In order to provide the states with this immunity, the drafters of the RFRA II propose to eliminate such questions from the jurisdiction of the federal courts.<sup>192</sup> Congress may be authorized to legislate on this subject based on their power to enforce the terms of the Fourteenth Amendment, which makes the religion (and other) clauses applicable to the states.<sup>193</sup> In other words, the drafters believe the courts have misinterpreted the religion clauses, and thus, under Congress's enforcement powers, the RFRA II will shield the states from these inaccurate interpretations of the Constitution by removing such questions from the purview of the federal courts.

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<sup>191</sup> See *Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003), *City of Boerne*, 521 U.S. 507.

<sup>192</sup> See H.R. 1547 §§ 3 & 4.

<sup>193</sup> See generally, *City of Boerne*, 521 U.S. 507. (Section 5 of the Fourteenth Amendment is an affirmative grant of authority to Congress to legislate on constitutional issues.).

As the Court in *City of Boerne* pointed out, however, Congress may not legislate under its Section 5 powers unless it has shown some pervasive constitutional violation.<sup>194</sup> Since the RFRA II is in the early stages of congressional debate, there is no record indicating pervasive constitutional violations other than the assertions made by the drafters in their “findings” section.<sup>195</sup> This section is mere rhetoric. The drafters chastise the Court for misinterpreting the Constitution and violating individual free speech and free exercise rights. The drafters provide their own interpretation of what the Constitution requires, based on their own review of the history of the religion clauses. The drafters then point to specific Supreme Court cases that they believe deprive individuals of their religious liberty.<sup>196</sup>

The RFRA II faces the same problems as RFRA. Congress does not have the authority, under the enforcement clause of the Fourteenth Amendment to interpret the Constitution.<sup>197</sup> Rather, constitutional interpretation is left solely to the judiciary.<sup>198</sup> In the cases cited by the drafters, the Supreme Court determined what the constitution requires. It is impossible, therefore, for Congress to attempt to overturn Supreme Court precedent under its enforcement clause powers. Those powers are limited to *enforcing* the Constitution - that is enforcing what the Supreme Court determines the Constitution to mean. Further, it would be impossible for the drafters to show pervasive constitutional violations when, the examples that they give, were all

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<sup>194</sup> See *City of Boerne*, 521 U.S. at 530.

<sup>195</sup> See H.R. 1547 § 2.

<sup>196</sup> See *Id.*

<sup>197</sup> Congress’s role is to enforce, not define the Constitution. See *City of Boerne*, 526 U.S. at 519-20.

<sup>198</sup> See *M’Culloch*, 4 Wheat at 423, *Marbury*, 1 Cranch at 178.

determined constitutional by the Supreme Court.

## **B. Article III, section 2**

The Supreme Court has consistently held that Article III, section 2 grants Congress the authority to define the jurisdiction of the federal courts.<sup>199</sup> In many instances, the Court has upheld legislation that removes or limits the federal court's jurisdiction over certain subjects.<sup>200</sup> However, a more complex question is raised when Congress removes jurisdiction over constitutional interpretation because Congress is unsatisfied with judicial interpretations of the Constitution. Congress's authority to legislate on matters limiting the jurisdiction of the federal courts must not conflict with other constitutional provisions, as Justice Marshall made clear *McCulloch v. Maryland*.<sup>201</sup>

Congress may only act according to its enumerated powers when it does not violate any other provision of the Constitution.<sup>202</sup> Where Congress clearly attempts to legislate away the Supreme Court's interpretation of the Constitution, separation of powers issues are clearly implicated. Congress is not free to remove jurisdiction from the federal courts for the articulated

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<sup>199</sup> See *Ex Parte Yenger*, 75 U.S. 85 (1868) (Congress has the power to define the Supreme Court's appellate jurisdiction under Art. III, § 2), *Bruner v. U.S.*, 343 U.S. 112 (1957).

<sup>200</sup> See *Id.*

<sup>201</sup> 4 Wheat at 421-23.

<sup>202</sup> See *Marbury*, 1 Cranch at 176-77, *M'ulloch*, 4 Wheat at 421-23. Proponents of removing constitutional questions over controversial issues from the federal courts hope to direct the cases to the state courts who, they believe, will be more sympathetic to the decisions of state and local governments. This purpose may itself implicate due process concerns. If Congress is attempting to channel cases into non-neutral tribunals, those parties arguing for unpopular rights will be denied true due process of law.

purpose of erasing the judiciary's interpretation of the Constitution. Such a result violates the separation of powers doctrine and thus make the legislation unconstitutional under *McCulloch v. Maryland*.<sup>203</sup> Under the RFRA II, the drafters make it exceedingly clear that their intent is to undermine the judiciary.<sup>204</sup> In *City of Boerne*, the Supreme Court made it clear that Congress was not free to legislate on the interpretation of constitutional provisions that the Court had already ruled upon.<sup>205</sup> Under the Constitution, the judiciary has the authority to interpret the constitution in order to decide cases and controversies.<sup>206</sup> By removing jurisdiction from the

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<sup>203</sup> While removal of jurisdiction from the federal courts, in and of itself, does not violate separation of powers principles, the admitted intent of the drafters, along with their stated findings, make clear that the drafters are attempting to undermine the Supreme Court. Justice Marshall, in *M'Culloch*, cautioned Congress against passing legislation when the true intent is to undermine the Constitution. *See M'Culloch*, 4 Wheat at 423. Eugene Gressman makes this point clear,

Because the clause justifies only those laws that carry into execution some other vested object, it necessarily prohibits those that are mere subterfuges or pretexts for executing an end not entrusted to Congress or any other organ of government.

There is no legitimate power residing in Congress to thwart or undo the enforcement of prevailing constitutional doctrines, developed by the Supreme Court. Under the constitutional scheme, that is a power reserved for the Court itself, absent a constitutional amendment.

In effect, destroying lower- court jurisdiction is simply a step toward the larger objective of destroying the Supreme Court's appellate jurisdiction over these matters, which in turn is the final step toward the destruction of prevailing constitutional doctrines regarding school prayer and Bible reading. Such an objective, from the first step to the last, is quite impermissible under the ends-means test.

Eugene Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 514 (1983).

<sup>204</sup> *See* H.R. 2547 § 2.

<sup>205</sup> *See City of Boerne*, 521 U.S. at 530.

<sup>206</sup> U.S. Const. Art. III, § 2.

federal courts, the RFRA II would have the impermissible purpose of treading on the Court's power to adjudicate such cases and controversies. Where Congress explicitly attempts to remove jurisdiction from the courts to undermine Supreme Court precedent, it removes the power of that court to interpret the constitution and decide cases, both in the first instance and through application of its precedent. As such, Congress is not free to act, either directly or indirectly to overturn the precedent of the Supreme Court on matters of constitutional interpretation.

Finally, under the RFRA II, Congress fails to recognize the countervailing rights of citizens, recognized in the Supreme Court's precedent, to be free from governmental establishment of religion and to be free from coerced religious pressures. As will be discussed more fully below, the RFRA II may violate the constitutional prohibition of governmental establishment of religion. It would appear that the drafters of the RFRA II ignore the Establishment Clause and free exercise rights recognized by the Supreme Court precedent they attempt to overturn. The effect of the legislation, then would be to infringe on other constitutional rights. Such an effect would be in violation of the Constitution, and thus, under *McCulloch*, would prohibit Congress from acting pursuant to its Article III, section 2 authority.<sup>207</sup> Any time Congress legislates, it must act consistently with the other provisions of the Constitution. The RFRA II implicates separation of powers concerns, due process concerns, and Establishment Clause concerns. Thus RFRA II, if enacted, should be overturned as an unconstitutional application of Congress's powers under either Article III, section 2 or Section 5 of the Fourteenth Amendment.

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<sup>207</sup> See *M'ulloch*, 4 Wheat at 421-23.

**C. RFRA II is an unconstitutional establishment of religion.**

In *Lynch v. Donnelly*<sup>208</sup>, Justice O’Conner, in a concurring opinion, set forth the terms of the endorsement test<sup>209</sup>. Since then, the endorsement test has been used to determine whether a law has the impermissible effect of advancing or encouraging religion.<sup>210</sup> The test has been applied on its own, and as a means of determining whether the effects prong of the *Lemon* test has been violated. In *Cutter*, the Sixth Circuit gave the endorsement test the latter treatment.<sup>211</sup> In that case, the Court held that the RLUIPA was an unconstitutional establishment of religion.<sup>212</sup> The Court applied the *Lemon* test, which requires government action to have a legitimate secular purpose, the effects of which will neither advance or discourage religion, and which does not result in excessive government entanglement of religion.<sup>213</sup> In *Cutter*, the Sixth Circuit determined that the statute had the impermissible effect of endorsing religion because, according to the court, it gave preferential treatment to those who chose to practice a religion.<sup>214</sup>

The RFRA II must fail for the same reasons. Under the proposed statute, the drafters discriminate against both non-believers and minority religions. By preventing federal courts from hearing questions related to school prayer and Ten Commandment displays, the drafters

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<sup>208</sup> 465 U.S. 668.

<sup>209</sup> *Lynch*, 465 U.S. at 690. (“The effects prong [of *Lemon*] asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval” to an objective observer. *Id.*)

<sup>210</sup> *See, e.g., Cutter*, 349 F.3d at 263-64.

<sup>211</sup> *See Id.*

<sup>212</sup> *See Id.*

<sup>213</sup> *Lemon*, 403 U.S. at 612-13.

<sup>214</sup> *See Cutter*, 349 F.3d at 263-64.

hope that precedent finding those practices unconstitutional will be overturned or ignored by state and local governments.<sup>215</sup> In essence, the drafter's purpose in proposing the legislation is to promote Christianity by allowing school prayer and public displays of the Ten Commandments. The drafters could argue that their purpose is to protect individual religious liberties. Since Courts generally do not question the congressional purpose of a statute where there is at least some indication of a secular legislative purpose, it is likely that despite the real purpose of the RFRA II, the courts would likely not overturn it on the purpose prong of the *Lemon* test.<sup>216</sup>

However, when examining the effects prong under the endorsement test, as the court in *Cutter* did, it is obvious that a reasonable observer, knowing the full history of the government action, would find the proposed act to be an endorsement of religion. It is clearly intended to make certain religious individuals appear to be political insiders, while shutting minority and anti-religious people out of the political process. The endorsement is most pernicious here because the drafters intend to shut those people, currently protected under the Supreme Court's prior cases, out of the judicial process completely.<sup>217</sup> Under the RFRA II, a school could engage

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<sup>215</sup> The drafters of RFRA II intend for such disputes to be heard by state courts, who are more susceptible to political pressure and thus more likely to follow the will of the people. See Lawrence Gene Sager, *Forward: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68-69. Sager characterized this interaction as "if Congress were casting a lewd wink in the state court's direction." *Id.* at 41.

<sup>216</sup> See, e.g. *Lynch*, 465 U.S. at 681, note 6. *But see*, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Supreme Court held state statute unconstitutional under the purpose prong of *Lemon*. The Court did note that generally courts should give deference to the stated legislative purpose of the state.).

<sup>217</sup> Such a result also implicates due process concerns. See *Sager*, *supra* note 215 at 70. ("To the extent that local officials interfere with the exercise of rights, those claiming the rights may require judicial assistance; if constitutional claimants are deprived of timely and effective judicial relief, the exercise of their right is burdened." *Id.* at 70.

in teacher-led school prayer, without regard to the effects such prayer would have on members of minority religions and those who do not accept religion at all. Where prior Supreme Court precedent respected the rights of these individuals to be free from proselytizing in the public schools, the proposed Act would remove protection from these individuals, and even worse, would remove from them a neutral forum for the enforcement of their rights. Clearly, such a result would have the impermissible effect of endorsing religion, and would thus be unconstitutional.

Further, like the Sixth Circuit in *Cutter* pointed out under the RLUIPA, RFRA II attempts only to protect free speech rights as they relate to religious speech.<sup>218</sup> The proposed statute would give additional protections to those individuals attempting to vindicate religious speech rights. The bill would remove the court's jurisdiction only in cases related to "religious-freedom." The discrimination is two-fold. For religious minorities, they lose a forum in which to address their constitutional grievances whereas those individuals who feel that their state and local governments are infringing on other fundamental constitutional rights would still have access to the federal courts to challenge such acts. In other words, the RFRA II would treat the religious liberty rights of religious minorities and non-believers as subordinate to other fundamental constitutional rights.<sup>219</sup> Second, given the congressional findings articulated in the bill, it is clear that the drafters intend for state and local governments to enact legislation or policies that would allow prayer in school and public displays of the Ten Commandments.

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<sup>218</sup> See *Cutter*, 349 F.3d at 265-66. The RFRA II states, "Over the past five decades, rulings of the United States Supreme Court have served to infringe upon the rights of Americans to enjoy freedom of speech relating to religious matters." H.R. 1547 § 2 (4).

<sup>219</sup> And in so doing, implicate due process concerns. *See supra* note 217.

Under current precedent, such state action is unconstitutional because it has the impermissible effect of encouraging and supporting religion. By removing the important federal check on a state's power to legislate with respect to religion, the denial of jurisdiction to the federal courts acts, for all practical effects, to overturn the Supreme Court's precedent, and allow, and in fact encourage, states to support and encourage religion. For all the reasons articulated in the Supreme Court's school prayer and public displays of religious symbols cases, such a result violates the establishment clause. Thus, The RFRA II acts to discriminate against religious minorities and non-believers by providing unfavorable treatment to the enforcement of religious liberty rights as opposed to other fundamental rights; and by encouraging state and local governments to enact laws and policies that the Supreme Court has previously determined to be unconstitutional violations of the Establishment Clause without fear of reversal by the federal courts. The RFRA II is a clear violation of the Establishment Clause.

#### **D. Apparently Congress Hasn't Learned its Lesson**

A core fundamental principle undergirding our legal system is the concept of separation of powers. Every elementary student learns about the tripartite system of government and the important system of checks and balances that such a system requires. The Constitution itself embodies this notion of separation of powers by granting each branch of government specific duties and powers. The Judicial branch was charged with hearing cases and controversies arising under the Constitution.<sup>220</sup> It is true that Article III grants Congress the authority to

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<sup>220</sup> U.S. Const. Art. III, § 2.

remove or restrict the jurisdiction of the federal courts, but surely the framers did not intend for Congress to use its power to overturn the Supreme Court. If that were the case, as Justice Marshall observed in *M'Culloch*, Congress would have the authority to re-write the Constitution based upon the fickle whim of the legislature - a result that would make moot the arduous amendment process detailed in the Constitution. Further, such a reading would make the creation of the Supreme Court seem trivial. If Congress can limit the original jurisdiction of the federal courts and the appellate jurisdiction of the Supreme Court, then the Supreme Court would have only its original jurisdiction (which only covers a few types of disputes) and the cases and controversies clause, granting the courts the authority to hear cases arising under the Constitution would be mere surplusage.<sup>221</sup>

If such a result were intended, Congress would be the supreme arbiter of the Constitution, for if Congress so chose, it could deny the Supreme Court appellate jurisdiction and the federal courts original jurisdiction to hear any case arising under the Constitution.<sup>222</sup> At that point, Congress could pass laws “interpreting” the Constitution - and in fact even amending it, and the courts, despite Justice Marshall’s conclusion in *Marbury* that there is judicial review of congressional acts, would have no authority to intervene. Such a result is ludicrous, and flies in the face of any true notion of separation of powers.

Justice Marshall, in *M'Culloch* got it right. Congress cannot act when such an act would violate other constitutional principles. Separation of powers is a fundamental constitutional

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<sup>221</sup> See generally Gressman, *supra* note 51, Sager, *supra* note 217.

<sup>222</sup> States have no federal obligation to maintain a court that hears federal constitutional questions, even though in practical effect, if Congress limited the federal courts’ jurisdiction the state courts would hear the case.

principle. Regardless of its methods, Congress cannot, consistent with the separation of powers principles, enact legislation overturning, or intending to overturn, the Supreme Court.

#### **IV. Conclusion**

By dramatically changing the landscape of Free Exercise Clause jurisprudence, the Supreme Court in *Employment Division v. Smith* set off a battle of the branches that is still being waged. In response to the Court's decision in *Smith*, Congress enacted the RFRA, the purpose of which was, essentially, to overturn the Court's decision in *Smith*. In *City of Boerne v. Flores*, the Court held that the RFRA, as it applied to the states, was an unconstitutional exercise of congressional authority. In its decision, the Court chastised Congress for violating the principle of the separation of powers which is a foundational principle of constitutional law. In response, Congress enacted subsequent legislation, the RLUIPA, to achieve a purpose similar to the RFRA, but to avoid the constitutional problems that led to RFRA's demise. Serious questions related to the Tenth and Eleventh Amendments, the separation of powers, and the Establishment Clause were raised as states challenged the constitutionality of the RLUIPA. Thus far, only one circuit court has held the RLUIPA unconstitutional, and that was on Establishment Clause grounds. In 2003, legislation was proposed in both the House of Representatives and Senate, along the same lines as the RFRA and the RLUIPA, intending to overturn Supreme Court precedent as it relates to school prayer and religious display cases. Based on the historic concepts of the separation of powers as addressed in *Marbury* and *McCulloch* and the Establishment Clause under the Supreme Court's recent jurisprudence, the RLPA II, if enacted, will likely be found unconstitutional.

These three pieces of legislation all illustrate a congressional attempt to usurp power

from the judiciary. For various reasons, it has been shown that each piece of legislation is likely unconstitutional. Paramount, however, is the notion that Congress does not have the authority, regardless of its methods, to circumvent the Supreme Court.