

monetary remedies that allow an infringer to *use* an invention against the patentee's wishes."<sup>52</sup> Fifth, the Court's acknowledgment that a "patent holder who has unreasonably declined to use the patent" may nevertheless be entitled to an injunction<sup>53</sup> demonstrates that concern for the exclusionary nature of the patent right must continue to play a role in the determination of a remedy. Such a patentee does not license, practice, or otherwise advance its material position through the exercise of its patent and therefore will not suffer concrete injuries such as lost profits, market share, or goodwill when its patent is infringed. It is difficult to imagine how such a patentee could show that it has been irreparably harmed by infringement unless that harm consisted solely of the invasion of the right to exclude.

At the same time, it is apparent that the nature of the right to exclude cannot be given the great, injunction-justifying weight that it has enjoyed heretofore: a perfunctory recitation of how invasion of the right to exclude establishes an irreparable harm, the inadequacy of damages, a compelling public interest, and a balance of hardships favoring the plaintiff is little more than a wordier version of the "general rule" rejected in *eBay*. Additionally, Justice Kennedy's concurrence suggests that at least four Justices may not view the nature of the right to exclude as informing the selection of a remedy. This viewpoint is evident in Justice Kennedy's assertion that "the traditional practice of issuing injunctions against patent infringers does *not* seem to rest on 'the difficulty of protecting a right to *exclude* through monetary remedies'" but is merely the result of the four-factor test applied in the contexts then prevalent.<sup>54</sup>

The Court's endorsement of the traditional four-factor test could not have come at a more appropriate time. As the patent system faces new challenges in the form of trolling, the four-factor test will force judges to evaluate carefully whether the traditional reasons for granting injunctions to protect patent rights endure. Although the Court has certainly given district courts wider discretion to select remedies, courts should be careful not to smash the bridge of traditional patent practice when swatting the patent troll.

#### D. Religious Freedom Restoration Act

*Statutory Exemptions.* — Though religious accommodation has long divided people politically, in recent years it has also placed Congress at odds with the Supreme Court. The Court's 1990 opinion *Em-*

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<sup>52</sup> *Id.* at 1841 (Roberts, C.J., concurring).

<sup>53</sup> *Id.* at 1840–41 (majority opinion).

<sup>54</sup> *Id.* at 1842 (Kennedy, J., concurring) (first emphasis added) (quoting *id.* at 1841 (Roberts, C.J., concurring)).

*ployment Division v. Smith*,<sup>1</sup> in many scholars' estimation,<sup>2</sup> undid existing First Amendment precedent with respect to the Free Exercise Clause<sup>3</sup> by holding that a neutral law of general applicability required only minimal scrutiny to withstand a claim for religious exemption.<sup>4</sup> Riding a wave of popular, academic, and political criticism of this holding, Congress enacted the Religious Freedom Restoration Act of 1993<sup>5</sup> (RFRA). Through RFRA, Congress effectively overturned *Smith*, shifting the burden of proof to the government in cases in which the litigant succeeds in showing a disparate impact.<sup>6</sup> RFRA has enjoyed many labels: It has been dubbed "one of the most important steps to reaffirm religious freedom in [our] lifetime."<sup>7</sup> It has been praised as a work of "genius" designed to "counteract[] the bureaucratic imperative."<sup>8</sup> It has also been called "one of the saddest chapters in the history of American constitutional law,"<sup>9</sup> a legislative act that "disregards principles essential to religious liberty and corrupts

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

<sup>2</sup> See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 82 ("In [the view of opponents], *Smith* was preceded by a long constitutional tradition of excusing religious believers from compliance with laws that everyone else was obliged to obey. The five-Justice majority in *Smith* hijacked that tradition, a tradition upon which minority religious believers depended for their protection from indifferent or hostile majorities."); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409-10 (1992) (compiling sources criticizing the *Smith* holding).

<sup>3</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

<sup>4</sup> *Smith* involved a challenge to an Oregon controlled substance law. The claimants were Native Americans who for sacramental purposes ingested peyote and were consequently fired and denied unemployment benefits by the State. *Smith*, 494 U.S. at 874. The claimants relied on the balancing test employed most prominently in another unemployment compensation case, *Sherbert v. Verner*, 374 U.S. 398 (1963), which weighed the potential burden on religious practice against the governmental interest giving rise to that burden. See *Smith*, 494 U.S. at 882-90. Justice Scalia, writing for the majority, held that the *Sherbert* test did not apply to "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,'" he concluded, "contradicts both constitutional tradition and common sense." *Id.* at 885.

<sup>5</sup> Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (2000)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>6</sup> *Id.*

<sup>7</sup> Jeremy Leaming, *A Stampede of State Religious-Freedom Protection Bills: What's Going On?*, KEEPING FAITH: RELIGIOUS RIGHTS AT A CROSSROADS, <http://www.freedomforum.org/packages/first/keepingfaith/part1.htm> (last visited Oct. 15, 2006) (quoting Vice President Al Gore) (internal quotation marks omitted).

<sup>8</sup> Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 157-58 (1997).

<sup>9</sup> Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507, 536 (1999).

the processes of government in novel and dangerous ways.”<sup>10</sup> In *City of Boerne v. Flores*,<sup>11</sup> the Court struck down RFRA as applied to the states, on the grounds that Congress had overstepped its Fourteenth Amendment authority to proscribe state conduct.<sup>12</sup> But *Boerne* left unresolved the question of whether RFRA is constitutional as applied to the *federal* government — whether the statute represents an impermissible rebuff by Congress of a decision that properly belongs in the realm of the judiciary.<sup>13</sup> The next time RFRA was brought before the Court, it appeared, that question would finally be adjudicated.<sup>14</sup>

Last Term, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>15</sup> the question of RFRA’s constitutionality as applied to the federal government was, at least tacitly, resolved. The Court applied the compelling interest test mandated by RFRA to dismiss the Government’s argument that the Controlled Substances Act<sup>16</sup> (CSA) admitted of no exceptions, religious or otherwise. Conspicuously missing from *O Centro* were the contentious debates, played out in vociferous dissents and reluctant concurrences, that characterized both the *Smith* and *Boerne* opinions. Instead, *O Centro* is marked by a shrugging acceptance of RFRA’s legislative mandate and, by implication, of Congress’s legitimacy in explicitly contradicting the Court’s constitutional interpretation in *Smith*. While the *O Centro* Court’s silent complai-

<sup>10</sup> Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 439 (1994).

<sup>11</sup> 521 U.S. 507 (1997).

<sup>12</sup> Section 1 of the Fourteenth Amendment prohibits states from making or enforcing any law that would “abridge the privileges or immunities of citizens of the United States; . . . deprive any person of life, liberty, or property, without due process of law; [or] deny to any person . . . equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Section 5 empowers Congress to pass legislation enforcing the Amendment’s other provisions. *Id.* § 5. The *Boerne* Court held that Congress’s Section 5 enforcement power, though broad, can be used only remedially and not to determine the *substance* of a constitutional violation, as RFRA attempted with the Free Exercise Clause. *See Boerne*, 521 U.S. at 518–20.

<sup>13</sup> *See* William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 434 (1998) (“The extent to which federal legislation has been placed in jeopardy by the *Boerne* decision is necessarily uncertain.”); Eisgruber & Sager, *supra* note 2, at 131 (“[*Boerne*] did not explicitly decide the fate of RFRA’s federal applications.”); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 1 (1998) (“[T]he message of *Boerne* is that RFRA is unconstitutional under any scenario, whether it is applied to state or federal law.”).

<sup>14</sup> *See, e.g.*, *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 n.2 (2005) (“RFRA, Courts of Appeals have held, remains operative as to the Federal Government . . . . This Court, however, has not had occasion to rule on the matter.”). RFRA has proven divisive even among members of the Court: *Boerne*, a 5–4 decision, was marked by a tense exchange between Justices Scalia and O’Connor over the justifiability of the *Smith* decision, *see Boerne*, 521 U.S. at 537–44 (Scalia, J., concurring); *id.* at 544–65 (O’Connor, J., dissenting), and a separate concurrence by Justice Stevens condemning RFRA as violating the Establishment Clause of the First Amendment, *see id.* at 536–37 (Stevens, J., concurring).

<sup>15</sup> 126 S. Ct. 1211 (2006).

<sup>16</sup> 21 U.S.C.A. §§ 801–904 (West 1999 & Supp. 2006).

sance lends itself to various interpretations, it implies foremost a recognition that RFRA's record of inefficacy in the lower courts has effectively rendered moot the debate over the statute's constitutionality.

O Centro Espirita Beneficente Uniao do Vegetal (UDV) is a thirty-five-year-old church originating in Brazil, with roots in both Christianity and indigenous South American beliefs.<sup>17</sup> UDV adherents celebrate communion using a tea known as *hoasca*,<sup>18</sup> derived from two plants unique to the Amazon region, one of which contains the hallucinogen dimethyltryptamine (DMT).<sup>19</sup> DMT is listed in Schedule I<sup>20</sup> of the Controlled Substances Act and thus is regulated under federal law as strictly as heroin, LSD, and marijuana.<sup>21</sup> In 1999, the United States Customs Service intercepted a shipment of *hoasca* en route from Brazil to the Church's American chapter, and the federal government threatened prosecution.<sup>22</sup> The UDV sued for declaratory and injunctive relief and moved for a preliminary injunction to continue its use of *hoasca* pending a trial on the merits.<sup>23</sup>

At the preliminary injunction hearing, the UDV argued for a religious exemption from the CSA by relying alternatively on RFRA and the First Amendment.<sup>24</sup> Though the district court rejected the First Amendment argument,<sup>25</sup> it found in RFRA a persuasive basis for the UDV's claim. Purporting to revive the strict scrutiny used in *Sherbert v. Verner*,<sup>26</sup> RFRA specifically mandated that the government may not "substantially burden a person's exercise of religion" unless the burden

<sup>17</sup> O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002).

<sup>18</sup> Pronounced "wass-ca." O Centro, 126 S. Ct. at 1217.

<sup>19</sup> Id.

<sup>20</sup> Controlled Substances Act, 21 U.S.C. § 812(c), sched. I, at (c)(6).

<sup>21</sup> 21 U.S.C. § 812(c), sched. I, at (b)(10), (c)(9), (c)(10).

<sup>22</sup> O Centro, 282 F. Supp. 2d at 1240.

<sup>23</sup> Id.

<sup>24</sup> Id. at 1240-42, 1252.

<sup>25</sup> The court rejected the First Amendment claim because the CSA was not a "valid and neutral law of general applicability" as contemplated by *Smith*, and the UDV could therefore enjoy the protections of the Free Exercise Clause without ever reaching the compelling interest test disallowed by *Smith*. Id. at 1241-48. The Court also rejected claims by the UDV based on statutory construction of the CSA and on international comity. Id. at 1248-52. Neither of these arguments was raised on appeal.

<sup>26</sup> 374 U.S. 398 (1963). *Sherbert* employed a balancing test to weigh the potential burden on religious practice against the governmental interest giving rise to that burden. *Smith* later overruled that test. *Employment Div. v. Smith*, 494 U.S. 872, 884-85 (1990). Claimants rarely prevailed under the *Sherbert* test; however, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court upheld a religion-based challenge by Amish parents to a compulsory school attendance law. Justice Scalia conceded in *Smith* that *Yoder* did represent one of a few instances in which the Free Exercise Clause barred application of a neutral, generally applicable law, but he distinguished these instances on the grounds that the Clause was operating "in conjunction with other constitutional protections," such as the right to direct the education of one's children. *Smith*, 494 U.S. at 881.

“is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering” that interest.<sup>27</sup> The court examined evidence from both parties on the health risks of *hoasca* and the potential for diversion of the drug to non-UDV members.<sup>28</sup> Finding the evidence on either side to be “in equipoise,”<sup>29</sup> the court held that the Government had failed to overcome the strict scrutiny required by RFRA and entered a preliminary injunction in favor of the UDV.<sup>30</sup> A Tenth Circuit panel affirmed,<sup>31</sup> as did a divided Tenth Circuit sitting en banc,<sup>32</sup> a majority of which determined that the UDV had met the court’s heightened standard for a preliminary injunction.<sup>33</sup>

The Supreme Court affirmed. Chief Justice Roberts, writing for a unanimous Court,<sup>34</sup> reiterated that RFRA was controlling law and that the Government had failed at the preliminary injunction stage to show a compelling interest in favor of enforcing a law that burdened the UDV’s use of *hoasca*.<sup>35</sup> Chief Justice Roberts quickly dispatched the Government’s claimed interest in adhering to the U.N. Convention on Psychotropic Substances,<sup>36</sup> an argument the Government neglected to support with any actual evidence.<sup>37</sup> Equally unavailing was the Government’s argument that the moving party (here, the UDV) bore the burden “of demonstrating a likelihood of success on the merits.”<sup>38</sup>

Most significant was the failure of the Government’s primary argument. The Government claimed that the CSA, by the very language

<sup>27</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488, 1488–89 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (2000)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>28</sup> *O Centro*, 282 F. Supp. 2d at 1255–66. The Government conceded the UDV’s prima facie case: (1) a substantial burden had been imposed on the UDV’s (2) sincere (3) exercise of religion. See *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (outlining the three building blocks for a prima facie case). The Government also argued unsuccessfully that it was bound by principles of international comity as a signatory to the United Nations Convention on Psychotropic Substances, *opened for signature* February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, to enforce the CSA. *O Centro*, 282 F. Supp. 2d at 1266–69.

<sup>29</sup> *O Centro*, 282 F. Supp. 2d at 1262.

<sup>30</sup> *Id.* at 1271.

<sup>31</sup> *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003).

<sup>32</sup> *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc) (per curiam).

<sup>33</sup> See *O Centro*, 282 F. Supp. 2d at 1270–71.

<sup>34</sup> Justice Alito took no part in the decision.

<sup>35</sup> See *O Centro*, 126 S. Ct. at 1225.

<sup>36</sup> *Opened for signature* February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

<sup>37</sup> *O Centro*, 126 S. Ct. at 1224–25.

<sup>38</sup> *Id.* at 1219–20. Citing its earlier holding in *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004), the Court reaffirmed that “the burdens at the preliminary injunction stage track the burdens at trial.” *O Centro*, 126 S. Ct. at 1219. Although *Ashcroft* had involved a constitutional issue (freedom of speech), the effect in *O Centro* was the same, given that Congress had placed the onus squarely on the Government through RFRA’s compelling interest test. *Id.* at 1219–20.

it used to describe Schedule I substances,<sup>39</sup> precluded any possibility of individualized exceptions for religious purposes.<sup>40</sup> Not so, the Chief Justice responded: RFRA adopted a compelling interest test similar to that employed in *Sherbert v. Verner* and *Wisconsin v. Yoder*,<sup>41</sup> both of which upheld individualized religious exemptions to government mandates.<sup>42</sup> Moreover, the CSA lacked any language indicating that the prohibition of Schedule I substances expressly precluded any claim of religious exemption.<sup>43</sup> Indeed, the Court observed, not only did the CSA actively contemplate the possibility of exceptions — allowing the Attorney General to waive certain restrictions for “manufacturers, distributors, or dispensers” when “he finds it consistent with the public health and safety”<sup>44</sup> — but Congress had in fact carved out an exception, long enforced, for the use of peyote by Native Americans.<sup>45</sup> “If such use is permitted . . . for hundreds of thousands of Native Americans practicing their faith,” Chief Justice Roberts wrote, “it is difficult to see how . . . 130 or so American members of the UDV” would irrefutably cause harm by practicing theirs.<sup>46</sup>

The Court also dismissed the Government’s reliance on certain pre-*Smith* cases that rejected claims for religious exemption based on a need for uniformity in enforcement of the law.<sup>47</sup> Whereas these previous cases “scrutinized the asserted need and explained why the denied exemptions could not be accommodated,”<sup>48</sup> the Government’s argument in *O Centro* did not sufficiently focus on the CSA specifically, but rather seemed based on fears of a slippery slope resulting from, and applicable to, *any* RFRA claim for an exemption from *any* generally applicable law. “The Government’s argument,” wrote the Chief Justice, “echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”<sup>49</sup>

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<sup>39</sup> According to the CSA, Schedule I substances have “a high potential for abuse,” have “no currently accepted medical use in treatment in the United States,” and exhibit “a lack of accepted safety for use . . . under medical supervision.” Controlled Substances Act, 21 U.S.C. § 812(b)(1) (2000).

<sup>40</sup> *O Centro*, 126 S. Ct. at 1220. The Government relied also on *Gonzales v. Raich*, 125 S. Ct. 2195, 2203–04 (2005), to argue that the CSA acts as a “closed” system that allows for only the exceptions that the Act expressly authorizes. *O Centro*, 126 S. Ct. at 1220.

<sup>41</sup> 406 U.S. 205 (1972).

<sup>42</sup> See *O Centro*, 126 S. Ct. at 1220.

<sup>43</sup> See *id.* at 1221–22.

<sup>44</sup> *Id.* at 1221 (quoting 21 U.S.C. § 822(d)).

<sup>45</sup> *Id.* at 1221–22 (citing 21 C.F.R. § 1307.31 (2005); 42 U.S.C. § 1996a(b)(1) (1994)).

<sup>46</sup> *Id.* at 1222.

<sup>47</sup> *Id.* at 1223 (citing *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989); *United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Whereas RFRA continued after *Boerne* to cast a shadow of uncertainty over the balance of power between Congress and the Court, *O Centro* signals that the Justices no longer harbor significant concerns about the statute's constitutionality. Whatever peril existed in theory — and provoked dissension in the academy and on the Court — the Court's present obedience to the statute implies a recognition that, in practice, RFRA poses little threat to the balance of power. This result is surprising, given the volatile legacy on which it rests. But in light of the dismal track record of RFRA claims in the federal courts, *O Centro* may represent a sensible conclusion to a long-running debate.

Broadly speaking, the arguments for the unconstitutionality of RFRA as applied to the federal government fall into three categories, each of which was acknowledged to some extent by the Court in *Boerne*. The first and most important argument is that RFRA violates the separation of powers doctrine, in that Congress essentially overruled the Court's constitutional interpretation by means of a mere statute.<sup>50</sup> RFRA, as this argument goes, is not merely an instance of Congress imposing on itself standards more exacting than the Constitution requires. Rather, Congress effectively replaced the Free Exercise Clause, as interpreted by the Court, with a statutory substitute whose standard of review was established by the legislature acting alone.<sup>51</sup> Professors Christopher Eisgruber and Lawrence Sager argue that RFRA is paralleled only by a single nineteenth-century precedent, *United States v. Klein*,<sup>52</sup> in the scope of its "assault upon the judiciary's interpretive autonomy."<sup>53</sup> This need not have been the case.

<sup>50</sup> RFRA's legislative history leaves no question that overturning *Smith* was Congress's explicit goal. See, e.g., S. REP. NO. 103-111, at 12 (1993), as reprinted in U.S.C.C.A.N. 1892, 1902.

<sup>51</sup> See, e.g., Gressman, *supra* note 9, at 517-18 (arguing that Congress "has exceeded its authority by requiring the federal courts to [act] . . . in a manner repugnant to the text, structure, and traditions of Article III" by "creat[ing] a statutory 'case or controversy' . . . for use whenever a neutral law has allegedly burdened some religious exercise." (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995))); Hamilton, *supra* note 13, at 3 ("RFRA . . . does not amend the text of any federal law. Rather it changes the way in which the courts scrutinize federal law."); Thomas D. Dillard, Note, *The RFRA: Two Years Later and Two Questions Threaten Its Legitimacy*, 22 J. CONTEMP. L. 435, 455-56 (1996) ("Congress should not set a standard of review to be applied by all the federal courts [which] the Supreme Court has considered and rejected . . .").

<sup>52</sup> 80 U.S. (13 Wall.) 128 (1871).

<sup>53</sup> Eisgruber & Sager, *supra* note 10, at 470. *Klein* captures a moment of history in which a post-Civil War Congress sought to overturn a Supreme Court holding via legislation. After the Court ruled that a presidential pardon was sufficient to allow former rebels to reclaim property captured by the government, see *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869), Congress directed the Court of Claims and the Supreme Court to surrender jurisdiction over any claims by the pardons' recipients. *Klein*, 80 U.S. (13 Wall.) at 143-44. The Court responded by holding the statute unconstitutional on the grounds both that it interfered with the Executive's power and, more applicable to the controversy over RFRA, that it placed the judiciary in a position of contradicting its own constitutional interpretation. *Id.* at 145-49. Professors Eisgruber and Sager wrote: "What *Klein* prohibits is the conscription of the Court by Congress . . . to act as though its own judgment about a matter of consequence is different than it actually is. Where

Congress could have acted well within its sphere by enacting a compelling interest test for religious exemption claims in narrower contexts: drug prohibition, environmental protection, employment discrimination. Instead, RFRA took the form of “an amendment to every federal law and regulation in the land,”<sup>54</sup> an all-encompassing measure that the *Smith* Court found unworkable.<sup>55</sup>

Although *Boerne* allowed RFRA to stand as applied to the federal government, the Court made clear its separation of powers objections to Congress’s infringement on the Court’s authority. RFRA’s “[s]weeping coverage,” the *Boerne* Court observed, “ensures its intrusion at every level of government” — including not only the state and local levels, but the federal level as well — “displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”<sup>56</sup> Though *Boerne* confined its holding to Congress’s power under the Fourteenth Amendment, Justice Kennedy hinted at

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matters of constitutional substance are at stake, this is a particularly grave matter.” Eisgruber & Sager, *supra* note 10, at 471. *But see* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538–49 (1998) (arguing that Professor Sager’s broad reading of *Klein* would cast doubt on a number of important statutes, such as the Voting Rights Act Amendments of 1982 and the Pregnancy Discrimination Act of 1978, whose constitutionality is considered long settled).

<sup>54</sup> Gressman, *supra* note 9, at 526. In addition to the concern over Congress’s substantive encroachment on the Court’s judgment, Professor Joanne Brant has noted an “institutional” aspect as well: that is, the Court is arguably in a far better position than Congress to assess the practical difficulties imposed on federal courts by a mandate to engage in a balancing test for each and every religious exemption claim that arises. Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 9–13 (1995) (analyzing the testimony of Professors Ira Lupu and Douglas Laycock and “concluding that RFRA fails to take account of the Court’s institutional concerns”). During the congressional hearings preceding the passage of RFRA, Professor Lupu encapsulated this “institutional” view: “[C]ourts, in the absence of focused legislative judgments about the impact of religious concerns on governmental ones (and vice versa), should not engage in the unpredictable business of assessing incommensurables like religious liberty and government need.” *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 391–92 (1992). RFRA, Professor Lupu made clear, does not represent such a “focused legislative judgment.” *Id.*

<sup>55</sup> One commentator observes: “Presumably, Congress was able to enact Federal RFRA because the power to enact legislation modifying extant federal statutes pursuant to the specific power employed to pass each individual statute, while not explicitly granted in the Constitution, is inherent in a system of enumerated powers.” Michael Paisner, Note, *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress’s Article I Powers*, 105 COLUM. L. REV. 537, 545 n.44 (2005). But if this is the basis on which the Court has accepted RFRA’s validity, it certainly did not make clear this reasoning in *Boerne*.

Professors Eisgruber and Sager go to some length to distinguish RFRA from “foundational” statutes — for example, Title VII of the Civil Rights Act of 1964 and the Sherman Antitrust Act — that “invite and require the judiciary to create a substantial jurisprudence”; RFRA, in contrast, is intended to “subvert rather than to supplement the constitutional judgment of the Supreme Court.” Eisgruber & Sager, *supra* note 10, at 442–43.

<sup>56</sup> *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

broader objections to RFRA's scope, objections that seemed very likely to resurface when RFRA next was brought before the Court:

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 political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.<sup>57</sup>

The second argument in favor of RFRA's unconstitutionality is that RFRA circumvents the procedural requirements of Article V, essentially representing a constitutional amendment in the guise of a statute.<sup>58</sup> To the extent that the unpopular *Smith* holding demonstrated the Court's role as a countermajoritarian force, acting according to its own conscience and its own independent interpretation of the Constitution, RFRA represents the intervention of the majority imposing its own interpretation of the Constitution. The argument that RFRA violates Article V must be read in conjunction with the separation of powers argument: the *Boerne* Court mentioned Article V in supporting its constriction of Congress's authority to affect the states under the Fourteenth Amendment,<sup>59</sup> but that reasoning could apply equally well to RFRA's mandated interpretation of the Free Exercise Clause.<sup>60</sup>

Finally, there is at least some argument that RFRA violates the Establishment Clause of the First Amendment.<sup>61</sup> *Boerne* made a small gesture acknowledging this possibility when Justice Stevens, in a concurrence, opined that RFRA gives a religious claimant "a legal weapon that no atheist or agnostic can obtain," and that such "governmental preference for religion, as opposed to irreligion, is forbidden by the

<sup>57</sup> *Id.* at 535–36.

<sup>58</sup> See Paisner, *supra* note 55, at 556 (explaining that according to the Article V argument, RFRA as applied to the federal government "functionally mimics a constitutional amendment without going through the proper Article V procedure. With such an alternative available to Congresses that are dissatisfied with court rulings, no longer will 'Article V's onerous procedures stabilize the United States' system of representative democracy by delaying the rush to alter the constitutional equilibrium.'" (quoting Hamilton, *supra* note 13, at 8)).

<sup>59</sup> *Boerne*, 521 U.S. at 529 ("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.' . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

<sup>60</sup> See Hamilton, *supra* note 13, at 8 ("If RFRA is deemed constitutional as applied to federal law, it would endow Congress with the authority to alter the constitutional balance between church and state through nothing more than a majority vote.").

<sup>61</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

First Amendment.”<sup>62</sup> Or, as one commentator more bluntly states, RFRA is a “direct, unprecedented congressional effort to govern church-state relations.”<sup>63</sup>

None of these concerns surfaces in the *O Centro* decision.<sup>64</sup> Few cases could have presented a better occasion than *O Centro* to adjudicate the constitutionality of RFRA as applied to the federal government; yet despite the *Boerne* Court’s multifaceted antagonism to the statute, and despite the Court’s ominous suggestion in *Cutter v. Wilkinson*<sup>65</sup> that it would revisit RFRA as applied to the federal government,<sup>66</sup> the Court seemed to ignore these objections entirely. Chief Justice Roberts simply acknowledged that RFRA “adopts a statutory rule comparable to the constitutional rule rejected in *Smith*” and went on to apply the rule with minimal commentary.<sup>67</sup> The only hint of friction was in regard to the burden placed by Congress on the courts;<sup>68</sup> yet the Chief Justice expressed confidence that the compelling interest test could and would be applied appropriately: “Nothing . . . suggest[s] that courts [a]re not up to the task.”<sup>69</sup> On the contrary, the *O Centro* Court actively embraced RFRA’s language regarding the role of the courts. Chief Justice Roberts upbraided the government for its argument that the CSA should be subject only to

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<sup>62</sup> *Boerne*, 521 U.S. at 537 (Stevens, J., concurring); see also Eisgruber & Sager, *supra* note 2, at 109 (“[T]here is no good constitutional or other normative justification for conferring a sweeping privilege on religiously motivated conduct.”).

<sup>63</sup> Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2358 (1997); see also Hamilton, *supra* note 13, at 9–11 (concluding that, according to the criteria of the test recently expanded in *Agostini v. Felton*, 521 U.S. 203 (1997), RFRA not only has the purpose and effect of advancing religion, but results — at least with respect to the theoretical incentives it creates for legislators — in a relationship of “excessive entanglement” between government and religion).

<sup>64</sup> Though the petitioner did not challenge the constitutionality of the statute, the Court could easily have asked for further briefing. Justice O’Connor, in her *Boerne* dissent, expressed a desire for reargument in order to revisit the constitutionality of the *Smith* decision. *City of Boerne v. Flores*, 521 U.S. 507, 544–45 (O’Connor, J., dissenting).

<sup>65</sup> 125 S. Ct. 2113 (2005).

<sup>66</sup> *Id.* at 2118 n.2 (“RFRA, Courts of Appeals have held, remains operative as to the Federal Government . . . . This Court, however, has not had occasion to rule on the matter.”).

<sup>67</sup> *O Centro*, 126 S. Ct. at 1216.

<sup>68</sup> See *id.* at 1225 (“We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one.”); cf. *Employment Div. v. Smith*, 494 U.S. 872, 888–89, 889 n.5 (1990) (contending that “[t]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind” and that “courts would constantly be in the business of determining whether the ‘severe impact’ of various laws on religious practice . . . suffices to permit us to confer an exemption.”).

<sup>69</sup> *O Centro*, 126 S. Ct. at 1224 (citing *Cutter*, 125 S. Ct. at 2122–23). *Cutter* involved the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, 2000cc-1 to 2000cc-5 (2000), rather than RFRA, but both pieces of legislation use the same standard to analyze claims for religious exemption.

legislative exemptions: “RFRA . . . plainly contemplates that *courts* would recognize exceptions — that is how the law works.”<sup>70</sup>

Given *O Centro*’s straightforward result, its chief mystery is what message it is meant to convey. Through its silence, the Court seems to imply that its previous concerns about RFRA are no longer weighty enough to merit even a cursory debate over the statute’s constitutionality. There are multiple explanations for the Court’s refusal to engage the constitutional question,<sup>71</sup> but the most plausible is simply that the statute has had very little impact on litigation results.<sup>72</sup> In light of RFRA’s “surprisingly tepid” litigation record,<sup>73</sup> the fiery controversy surrounding the statute, memorialized in *Boerne*, is more a dull ember in practical consequence. In this sense *O Centro* could mark a de nouement in the RFRA saga, which will henceforth be characterized by holdings that, should another case ever again reach the point of being granted certiorari, can be expected, like *O Centro*’s, to be quite narrow.

### E. Review of Administrative Action

1. *Clean Water Act — Federal Jurisdiction over Navigable Waters.* — Many of us think of swamps, bogs, and morasses as places to avoid. Yet in environmental law and policy, the subject of such zones, known as wetlands, is far from avoided. Indeed, debates abound over how wetlands should be regulated<sup>1</sup> and even defined.<sup>2</sup> Since Congress

<sup>70</sup> *O Centro*, 126 S. Ct. at 1222.

<sup>71</sup> A partial reason, not explored here, might center on changes in the Court’s makeup. Chief Justice Roberts, having had no part in the *Smith* and *Boerne* decisions, is perhaps apt not to take so personally Congress’s arguable trespass on the Court’s domain. Justice O’Connor is no longer on the Court, and it was the exchanges between her and Justice Scalia that contributed most to the contentious atmosphere of both the *Smith* and *Boerne* decisions.

<sup>72</sup> As of 1998, according to a study by Professor Ira Lupu, only fifteen percent of cases involving RFRA resulted in a victory by those claiming a religious exemption; administrative agencies virtually ignored the statute. See Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 569–70 (1999); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 590–92 (1998). However, other commentators have suggested that RFRA’s impact has been significant by sheer dint of the variety of claims brought under the statute. See, e.g., Eisgruber & Sager, *supra* note 2, at 102–03 & nn.78–82 (“The statute generated a tide of Free Exercise litigation in the federal courts. . . . A substantial number of these claims in fact prevailed under RFRA.”).

<sup>73</sup> Lupu, *The Failure of RFRA*, *supra* note 72, at 592. Interestingly, the “compelling interest” test of *Sherbert v. Verner* — a less strict standard for analyzing government interest than RFRA itself contemplates — generated similarly lukewarm results, at least at the Supreme Court level. See Ryan, *supra* note 2, at 1413–14 (explaining that between the *Sherbert* decision in 1963 and the *Smith* decision in 1990, the Court “rejected thirteen of the seventeen free exercise claims it heard” and that “three of the four victories [that is, all but *Wisconsin v. Yoder*] involved unemployment compensation and thus were governed by the explicit precedent of *Sherbert*.” (footnotes omitted)).

<sup>1</sup> See Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L.