3-15-2018

RFRA as Legislative Entrenchment

Branden Lewiston

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the First Amendment Commons, Legislation Commons, and the Religion Law Commons

Recommended Citation

Branden Lewiston RFRA as Legislative Entrenchment, 2017 Pepp. L. Rev. 26 (2018)
Available at: https://digitalcommons.pepperdine.edu/plr/vol2017/iss1/2

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu , anna.speth@pepperdine.edu.
RFRA as Legislative Entrenchment

Branden Lewiston

Abstract

When there is a conflict between two federal statutes, the more recent statute overrides the past statute. However, courts have used the Religious Freedom Restoration Act (RFRA) to preempt federal laws passed after it. Normally that is the role of constitutional provisions, not statutes. RFRA has been subject to much constitutional criticism, but its attempt to control subsequent federal law has drawn little attention. Courts use RFRA to trump subsequent federal statutes without second thought. This Essay draws on legislative entrenchment doctrine to argue that this feature of RFRA is unconstitutional. RFRA should be used to strike down prior laws that violate its commandments, but it cannot bind the hands of future Congresses.

Table of Contents

I. INTRODUCTION .................................................................26
II. BACKGROUND OF LEGISLATIVE ENTRENCHMENT ....................30
III. RFRA AS LEGISLATIVE ENTRENCHMENT .............................34
IV. ENTRENCHMENT AGAINST REGULATIONS ..............................37
V. CONCLUSION ..................................................................41

I. INTRODUCTION

The Religious Freedom Restoration Act (RFRA) restored the compelling interest test for neutral policies that burden the free exercise of religion.¹ The Supreme Court had long used that test for evaluating free exercise claims,² but in Employment Division v. Smith, the Court changed course and held that

---


26
neutral laws of general applicability do not violate the Free Exercise Clause.\(^3\) Congress thought that \textit{Smith} “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”\(^4\) Congress instead preferred the compelling interest test, so Congress created RFRA.\(^5\) Any federal or state laws, even those passed after RFRA, could not burden the free exercise of religion unless they passed the compelling interest test.\(^6\)

Congress encountered some problems in trying to revive a constitutional standard via statute. Statutes cannot, of course, change constitutional standards,\(^7\) but Congress can provide protections above the floor set by the Constitution if doing so is otherwise within Congress’s legislative power.\(^8\) RFRA originally imposed the compelling interest test on both federal and state law.\(^9\) Congress defended RFRA’s application to states as a valid exercise of Congressional enforcement power under the Fourteenth Amendment.\(^10\) However, in \textit{City of Boerne v. Flores}, the Court invalidated RFRA’s application to the states, finding that it exceeded Congress’s enforcement power.\(^11\) Now RFRA applies to “all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”\(^12\)

RFRA’s application to the federal government has also been contested. Justice Stevens, concurring in \textit{Flores}, went further than the Court and argued that RFRA violated the Establishment Clause.\(^13\) Some scholars have agreed,\(^14\) but several circuit courts have rejected this argument.\(^15\) The Court has largely

---

\(^5\) Id.
\(^7\) See \textit{Marbury v. Madison}, 5 U.S. 137, 177–78 (1803) (legislative acts cannot alter the Constitution).
\(^8\) \textit{See In re Young}, 141 F.3d 854, 860 (8th Cir. 1998) (upholding the constitutionality of RFRA as applied to federal law because Congress can “provide[] statutory protection of individual liberties that exceed the Supreme Court’s interpretation of constitutional protection.”).
\(^10\) Id. at 516–17.
\(^11\) Id. at 529–36
\(^12\) 42 U.S.C. § 2000bb-3(a) (2012).
\(^13\) \textit{Flores}, 521 U.S. at 536–37.
\(^15\) See, e.g., \textit{In re Young}, 141 F.3d 854, 863 (8th Cir. 1998) (upholding RFRA against
foreclosed the challenge by holding in Cutter v. Wilkinson that a similar statute did not violate the Establishment Clause.16 Other scholars claim that RFRA is unconstitutional because it "circumvent[s]" the constitutional amendment process.17 Alternatively, maybe RFRA is unconstitutional because it appropriates the judicial function or forces courts to decide cases outside the realm of their institutional competency.19 Or maybe RFRA is just beyond Congress's enumerated powers.20 An amicus brief filed in Burwell v. Hobby Lobby Stores, Inc. argued that RFRA was unconstitutional for four independent reasons.21 Despite these constitutional attacks, the Court has applied RFRA to strike down federal programs without addressing constitutional concerns.22

This Essay addresses an understudied constitutional objection to RFRA: whether the statute involves unconstitutional legislative entrenchment. Legislative entrenchment doctrine holds that "one legislature cannot abridge the powers of a succeeding legislature."23 Past statutes cannot trump future statutes. RFRA tries to do just that by purporting to invalidate federal laws passed after RFRA's enactment.24 It does not just amend existing law, but attempts to affirmatively constrain future federal law. RFRA tries to save itself, however, by exempting any subsequent statute that "explicitly excludes"
application of RFRA by referencing it. But legislative entrenchment doctrine blocks such “express-reference” provisions as well. Congress’s legislative power does not extend to block future Congresses from exercising the full sweep of their legislative power. RFRA, passed in 1993, cannot undermine subsequent federal law.

This critique of RFRA is not entirely novel. The Sixth Circuit has pointed out RFRA’s legislative entrenchment problem in a footnote, but the court did not reach the issue. Laurence Tribe also mentioned in a footnote that RFRA would “raise serious constitutional questions” because of its express-reference provision. A few others have echoed this concern in passing, but most scholars instead assume that “as a limitation on federal power, Congress clearly had the power to enact RFRA . . . .” Courts now say, without second thought, that “RFRA trumps later federal statutes.”

No one has analyzed in-depth whether RFRA is legislative entrenchment. This Essay does, and it concludes that RFRA is invalid legislative entrenchment. Part II examines legislative entrenchment doctrine. Part III argues that RFRA involves invalid legislative entrenchment. RFRA should therefore not be used to strike down subsequent statutes, although it can be used as evidence in interpreting subsequent statutes. Part IV argues that legislative entrenchment doctrine also means that RFRA should also not be used to strike

30. Dorf, supra note 16.
31. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013), aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); see also Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013) (explaining that RFRA applies prospectively and assuming that is valid).
32. See infra Part II.
33. See infra Part III.
34. See infra Part III.
down subsequent regulations. Part V briefly concludes by offering that RFRA be used as an interpretative tool.

II. BACKGROUND OF LEGISLATIVE ENTRACEMENT

Legislative entrenchment doctrine dates to eighteenth century England. Blackstone said that, "[a]ct[s of parliament derogatory from the power of subsequent parliaments bind not." Early hints of American legislative entrenchment doctrine are present in foundational constitutional cases. In Marbury v. Madison, Chief Justice Marshall distinguished between constitutional law and statutory law. Marshall thought that the difference was that constitutional law could not be changed by statutory law, unlike "ordinary act[s] of the legislature," which are "alterable when the legislature shall please to alter it." For Marshall, statutes are by nature alterable by subsequent statutes. In Fletcher v. Peck, Marshall explained that although a statute cannot undo certain past legislative commitments (such as contractual obligations), the general principle remains that "one legislature cannot abridge the powers of a succeeding legislature." Instead, "one legislature is competent to repeal any act which a former legislature was competent to pass."

In Great Northern v. United States, the Court considered legislative entrenchment at greater length. The case concerned the general federal savings clause, which stated, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide." This clause, then, might be called an "express-statement requirement[]." The Court thought that, if possible, it should give effect to both this clause and any

35. See infra Part IV.
36. See infra Part V.
37. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 62 (1830)
38. See infra notes 39–43 and accompanying text.
40. Id.
41. See id.
42. 10 U.S. 87, 135 (1810).
43. Id.
44. 208 U.S. 452, 465 (1908).
45. Id.
subsequent act of Congress.47 However, if there were a conflict between this clause and a subsequent statute, the Court explained that this provision could not bind the subsequent Congress: “its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment.”48 Even if the subsequent statute fails to expressly state that this clause does not apply, the subsequent statute can still be valid because the ultimate question is Congress’s intent in enacting the subsequent statute.49

Two years later, the Court in Hertz v. Woodman again addressed the question of how the savings clause applies to subsequent statutes.50 Interpreting the same clause as Great Northern, the Court explained that if there is a conflict between the clause and a subsequent statute, “the latest expression of the legislative will must prevail.”51 The subsequent statute need not comply with the express-statement requirement—instead, Congress can exempt itself from the requirement by “plain implication.”52 Again, however, the Court left some role for the express-statement requirement, hinting that it provides “principles of interpretation,” even if it does not bind a subsequent Congress in any way.53

In Marcellino v. Bonds, the Court considered a clause in the Administrative Procedure Act (APA) that stated, “[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.”54 A deportation statute seemed to provide different procedures than the APA.55 The Court did not want to find a conflict between the statutes—it would not lightly presume an exemption from the APA’s express-statement requirement.56 The Court cited Shaughnessy v. Pedreiro, where just a month earlier it had interpreted an ambiguity in an immigration statute by looking to the express-statement requirement in the APA.57 Nonetheless, in Marcellino the Court thought that the deportation

---

48. Id.
49. Id.
50. 218 U.S. 205, 210 (1910).
51. Id. at 218.
52. Id.
53. Id.
54. 349 U.S. 302, 316 (1955) (Black, J., dissenting) (quoting Section 12 of the Procedure Act).
55. Id. at 309.
56. Id. at 310.
statute plainly conflicted with and therefore trumped the APA, notwithstanding the absence of an express statement.\textsuperscript{58} The Court explained that it will not “require the Congress to employ magical passwords” to exempt itself from past statutes.\textsuperscript{59}

Legislative entrenchment doctrine lurked in the background in \textit{Lockhart v. United States}.\textsuperscript{60} The case concerned a section of the Social Security Act that protected benefits from “attachment, garnishment, or other legal process.”\textsuperscript{61} The section stated that, “[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by \textit{express reference} to this section.”\textsuperscript{62} The provision therefore trumped subsequent statutes if they did not expressly reference it.\textsuperscript{63} The Court concluded that, in this case, the subsequent statute at issue complied with the express-reference requirement, so the validity of the requirement did not need to be discussed.\textsuperscript{64} However, in a concurrence, Justice Scalia wrote that the express-reference requirement was invalid because of the principle that a previous legislature cannot bind subsequent legislatures.\textsuperscript{65} He further called for a revival of legislative entrenchment doctrine, arguing that the Court should not “keep secret the fact that such express-reference provisions are ineffective.”\textsuperscript{66} In doing so, he listed some statutes on the books that “regrettably” included express-reference provisions.\textsuperscript{67} One section of the U.S. Code that he cited was 42 U.S.C. § 2000bb–3(b)—also known as RFRA.\textsuperscript{68}

Legislative entrenchment doctrine continues to have vitality in modern cases. In \textit{Dorsey v. United States}, the Court addressed the appropriate sentencing regime for certain crack cocaine crimes.\textsuperscript{69} Previously, sentencing for crack cocaine was 100 times harsher than sentencing for powder cocaine.\textsuperscript{70}

\begin{thebibliography}{99}
\bibitem{58} 349 U.S. at 310.
\bibitem{59} \textit{Id}.
\bibitem{60} See 546 U.S. 142, 144 (2005).
\bibitem{61} \textit{Id}.
\bibitem{62} \textit{Id} (emphasis added).
\bibitem{63} \textit{Id}.
\bibitem{64} \textit{Id} at 145–46.
\bibitem{65} \textit{Id} at 147–48 (Scalia, J., concurring).
\bibitem{66} \textit{Id} at 150.
\bibitem{67} \textit{Id} at 149.
\bibitem{68} \textit{Id}.
\bibitem{69} 567 U.S. 260, 263–64 (2012).
\bibitem{70} \textit{Id}.
\end{thebibliography}
However, with the Fair Sentencing Act, which took effect on August 3, 2010, Congress greatly reduced the sentencing disparity. The defendants in Dorsey committed crack cocaine crimes prior to August 3, 2010, but they were sentenced afterward. Both defendants were sentenced under the older, harsher sentencing regime. The same federal saving statutes at issue in Great Northern and Hertz implied that the old sentencing regime should apply because the new statute did not expressly state that a new set of penalties should replace the old penalties for crimes committed before August 3, 2010. But this arguably conflicted with the new statute, which stated that sentencing determinations should be based on the law at the time the sentence was imposed. Thus the question: does the savings clause trump the subsequent statute because the subsequent statute failed to make an express statement exempting itself?

In answering this question, the Court drew heavily from legislative entrenchment doctrine. The Court explained that Congress cannot bind a subsequent Congress, and that “Congress remains free to express any such intention either expressly or by implication as it chooses.” Citing Great Northern, the Court noted that no express statement was required to exempt a subsequent statute from a past one. And citing Marcello, the Court refused to permit past statutes to impose “magical passwords” on subsequent Congresses. However, in line with precedent, the Court did not render the express-statement requirement meaningless. Instead, the Court noted that it set “forth an important background principle of interpretation.” A subsequent statute overrides a past statute, notwithstanding express-statement requirements, if “ordinary interpretive considerations point clearly in that direction.” The Court then found that the “plain import” of the 2010 statute

71. Id. at 264.
72. Id. at 270–71.
73. Id.
74. See id. at 273–74.
75. Id. at 273.
76. See id. at 264.
77. See id. at 273–74.
78. Id. at 274.
79. Id. (citing Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908)).
80. Id. (citing Marcello v. Bonds, 349 U.S. 302, 310 (1955)).
81. Id.
82. Id.
83. Id. at 275.
required it to apply to all sentencing decisions made after that statute became effective. Justice Scalia dissented. He agreed that legislative entrenchment doctrine governed—indeed, both the majority and dissent relied on his Lockhart concurrence—but he disagreed on how it played out on the facts of this case.

II. RFRA as Legislative Entrenchment

RFRA is legislative entrenchment. It seeks to invalidate any provision in federal law that burdens the free exercise of religion and fails the compelling interest test “whether adopted before or after November 16, 1993.” Additionally, it provides an exception for any statute that “explicitly excludes” application of RFRA by “reference to this chapter.” This is equivalent to the entrenching provision in the APA at issue in Marcello v. Bonds. That provision applied to “subsequent legislation,” unless it exempted itself “expressly.” The Court found the provision in Marcello to be legislative entrenchment. RFRA’s language is even more similar to the Social Security Act provision in Lockhart v. United States. That provision applied to any “provision of law, enacted before, on, or after April 20, 1983,” but it did not apply if the subsequent statute exempted itself by “express reference to this section.” Justice Scalia explained that the statute’s prospective application cannot actually bind future legislatures, despite the “express-reference” exception. Scalia even directly analogized the statute to RFRA. RFRA tries to bind subsequent Congresses, but legislative entrenchment doctrine says that it cannot.

Professor Laurence Tribe has also concluded that RFRA involves

84. Id.
85. See id. at 288–97 (Scalia, J., dissenting).
86. Id.
89. 349 U.S. 302, 305 (1955).
90. See id. at 316 (Black, J., dissenting).
91. See id. at 310.
93. Id.
94. Id. at 147–50 (Scalia, J., concurring).
95. Id. at 149.
legislative entrenchment. 96 In a footnote in his constitutional law treatise, he briefly examines legislative entrenchment doctrine. 97 He offers RFRA as a prime example of a modern entrenchment statute. 98 He acknowledges that RFRA provides an exception for subsequent statutes that expressly reference RFRA, but he answers that such provisions are invalid because they would “permit an earlier Congress to add to art. I’s requirements for the enactment of laws by a later Congress.” 99 RFRA thus raises “serious constitutional questions.” 100 He concludes, however, by noting that the express-reference requirement might still be helpful as an interpretive tool, but it could not always overcome “other interpretive indicia.” 101

By contrast, a few academics have argued that “express-reference” provisions should save statutes that would otherwise be legislative entrenchment. 102 Nicholas Rosenkranz argues that statutes like RFRA with express-reference provisions do not actually bind future Congresses. 103 Congress’s hands are not tied because it can just comply with the express-reference requirement. 104 Congress can still “exercise the full panoply of legislative power,” so long as it satisfies with the express-reference requirement. 105 However, this argument has two problems. First, even if it is logically sound, it is inconsistent with a century of Supreme Court precedent. 106 Since Great Northern and Hertz in the early 1900’s, the Court has consistently refused to give binding effect to express-reference requirements. 107 One hundred years later, the Court continues to apply those cases and remains unwilling to give

96. TRIBE, supra note 28, at 125 n.1.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
103. Rosenkranz, supra note 29, at 2117–18.
104. See id.
105. Id. at 2118.
106. See infra notes 107–10 and accompanying text.
107. See supra notes 44–53 and accompanying text.
entrenching statutes binding effect. Rosenkranz never cites Great Northern or Hertz, or even Scalia’s more recent critique of express-reference provisions in Lockhart, and for good reason. The argument may be an interesting academic exercise, but it has been consistently and explicitly rejected by the Court.  

Second, express-reference requirements subtract from Congress’s legislative power by requiring Congress to jump through hoops to legislate. Tribe argues that such requirements functionally add to Article I’s requirements for enacting laws. Scalia echoes this concern, arguing in his Lockhart v. United States concurrence that “[a]mong the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate . . . .” For Scalia, Congress can express its will to “repeal of pre-existing provisions by simply and clearly contradicting them.” An express-reference requirement tries to prevent Congress from doing just that. Limiting how Congress can legislate infringes Congress’s legislative powers, even if Congress can still legislate the result it wants.

RFRA is not unconstitutional merely because it is legislative entrenchment, and courts need not strike RFRA from the U.S. Code to remedy its defects. However, if RFRA is legislative entrenchment, it must be used differently than how courts have used it. RFRA attempts to invalidate future federal law, and courts have indeed applied RFRA to do just that. But that is not a proper use of entrenchment statutes. Courts should instead look to Dorsey v.

108. See supra notes 69–86 and accompanying text.
109. See generally Rosenkranz, supra note 29 (lacking discussion of these decisions).
110. See supra notes 106–09 and accompanying text. This Essay argues that RFRA is legislative entrenchment under current doctrine. Rosenkranz’s argument basically rejects current doctrine. Rosenkranz, supra note 29, at 2141–43. Maybe the Court should change course—although I am not convinced it should—but even if so, that broader point is beyond the scope of this Essay.
112. Tribe, supra note 28, at 125 n.1.
113. 546 U.S. 142, 148 (Scalia, J., concurring).
114. Id.
115. See Alexander & Prakash, supra note 111, at 105 (“Congress may not force a future Congress to use particular language to legislate. If a meaning emerges from a statute, that meaning must control, rather than some artificial meaning that emerges from an inflexible adherence to rule of interpretation promulgated by a prior Congress.”).
United States.\textsuperscript{117} The entrenching statute at issue there was not held to be capable of invalidating future laws.\textsuperscript{118} Rather, the Court used the entrenching statute as an interpretive guide to the subsequent statute.\textsuperscript{119} Indeed, all nine justices in 

\textit{Dorsey} signed onto opinions using the entrenching statute in that way.\textsuperscript{120} The debate in \textit{Dorsey} was simply about the weight of the entrenching statute as an interpretive tool, and how that interpretive evidence should be weighed against other sources of Congressional intent. Yet the real question in \textit{Dorsey} was what the subsequent statute meant, and the prior entrenching statute was just evidence. That is how courts should use RFRA. RFRA should create a presumption against interpreting subsequent statutes to violate the compelling interest test for free exercise of religion. However, that interpretive evidence must be weighed against other sources of interpretation, and in some cases, just as in \textit{Dorsey}, other interpretive evidence may overcome the presumption. A future statute might still validly restrict free exercise of religion beyond what RFRA permits.

III. ENTRENCHMENT AGAINST REGULATIONS

RFRA applies to “all Federal law, and the implementation of that law, whether statutory or otherwise.”\textsuperscript{121} Its application to statutes passed after RFRA’s enactment runs into serious constitutional difficulty, but it might be on stronger ground as applied to regulations and other forms of agency action. A defender of RFRA could argue that even if Congress cannot bind subsequent Congresses, it can certainly bind executive agencies.\textsuperscript{122} After all, executive agencies exercise authority delegated by Congress. Congress should therefore be able to put constraints on the exercise of that delegated authority. More specifically, Congress should be able to limit the authority delegated to exclude policies that violate the free exercise compelling interest test. If this is the case, then RFRA would be partially saved. It could apply to regulations and other agency decisions, just not to statutes.

\textsuperscript{117} 567 U.S. 260, 272–73 (2012).
\textsuperscript{118} \textit{Id.} at 280.
\textsuperscript{119} \textit{Id.} at 273–82.
\textsuperscript{120} \textit{Id.; see also id.} at 288–90 (Scalia, J., dissenting).
\textsuperscript{122} \textit{See} Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE, 2014 WL 6603399, at *3–5 (W.D. Okla. Nov. 19, 2014) (noting that RFRA has a legislative entrenchment problem but concluding the problem is minimal when applied to regulations).
However, things are not so simple. Agencies do not exercise authority in a vacuum. Instead, their regulatory authority must come from Congress. Legislative power comes from Article I, and “only Congress can open the gates of power, and only Congress can direct where the power will flow.”123 Courts only defer to an agency’s regulation if Congress has delegated authority to that agency over the subject of the regulation, and the regulation falls within that authority.124 So, if RFRA were to block an agency from issuing an otherwise valid regulation, it would do so by narrowing the authority delegated to that agency. It would be the equivalent of saying to a future Congress: “no, you can’t delegate to an agency authority to enact certain regulations, unless in so delegating you comply with the express reference provision of RFRA.” That is not just a limitation on agencies—rather, it is a limitation on Congress’s authority to delegate. This is the same as limiting Congress’s other legislative powers. Legislative entrenchment doctrine therefore blocks a past Congress from binding an agency in interpreting a statute passed by a subsequent Congress. RFRA cannot bind subsequent Congresses, even when Congress delegates to an agency.

An example might make this clearer. Imagine that, instead of RFRA, we had a statute that sought to prevent future federal law from regulating carbon dioxide emissions. Decades after the Carbon Freedom Restoration Act (CFRA), Congress passed a law directing the Environmental Protection Agency (EPA) to regulate emissions of all major greenhouse gases. The EPA issues a regulation doing just that—capping carbon dioxide and other greenhouse gas emissions—but the regulation as applied to carbon dioxide is then invalidated under CFRA. Despite Congress’s intent that the EPA regulate all greenhouse gas emissions, the EPA is nevertheless unable to regulate carbon dioxide. This example makes clear that invalidating the regulation ties the hands of Congress, not just the agency. Congress delegated authority to regulate the entire category of greenhouse gases. Carbon dioxide is certainly in that category, but CFRA said that carbon dioxide could not be regulated. Agency actions regulating carbon dioxide were then set aside. That is the equivalent of telling Congress that it cannot delegate authority to regulate carbon dioxide. What is set aside is an agency regulation, but if the agency is

124. See, e.g., King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (finding that Congress did not delegate authority to the IRS over the Affordable Care Act and therefore declining to defer to the agency interpretation).
exercising authority that Congress meant to delegate, then setting aside a regulation that validly exercises that authority actually restrains Congress itself.

Now wait—isn’t Chevron deference all about agencies making regulations based on statutory ambiguities? If agencies can regulate even when Congress did not delegate authority, then binding agencies is not just another way of binding Congress. This interpretation of Chevron was largely rejected in United States v. Mead Corporation.125 The Court in Mead interpreted Chevron to only apply when Congress actually delegated authority to an agency.126 Congress often delegates explicitly, but the Court reasoned that Congress can also delegate to an agency implicitly by using ambiguous language, and that is where Chevron deference comes in.127 Justice Scalia dissented, arguing that Chevron should not be limited to situations when Congress delegates to an agency, but the majority’s view prevailed.128 Chevron only applies when “the agency was acting under a congressional delegation of lawmaking authority.”129 Agency regulations are valid if issued under authority delegated by Congress—and Congress can delegate explicitly or implicitly.130

Congress’s power to delegate is not mere incidental power. Congress delegates frequently over vast areas of federal law. Today it can be argued that agencies, not Congress, are “the federal government’s principal lawmaking organ.”131 The non-delegation doctrine may have stood in the way of this development, but today that doctrine is dead.132 For better or for worse, “the national government’s now-general legislative powers [are] exercised by administrative agencies” acting under Congressional delegation.133 A limitation

126. Id.
127. Id.
128. Id. at 239 (Scalia, J., dissenting).
130. See also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (“Deferece under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”).
133. Id.
on Congress’s power to delegate is a serious limitation indeed.

_Hobby Lobby_ illustrates how RFRA can thwart Congressional will when applied to agency regulations.\(^\text{134}\) The case concerned a regulation promulgated under 42 U.S.C. § 300gg–13(a)(4).\(^\text{135}\) That provision was added to the Affordable Care Act (ACA) by the “Women’s Health Amendment.”\(^\text{136}\) The drafters of the amendment intended the provision to include preventive care for women.\(^\text{137}\) One key goal of the amendment was to “reduce unintended pregnancies.”\(^\text{138}\) To accomplish that, it directed the Department of Health & Human Services (HHS) to issue regulations requiring health insurance to cover “additional preventative care and screenings” specifically for women.\(^\text{139}\) Furthermore, there was a proposed counter-amendment to the Women’s Health Amendment, the so-called “conscience amendment.”\(^\text{140}\) This amendment would have explicitly permitted exemptions to preventive care requirements based on religious beliefs, but Congress rejected that amendment.\(^\text{141}\) Senator Mikulski, the sponsor of the Women’s Health Amendment, argued that the conscience amendment would allow employers’ personal opinions to trump women’s access to preventative care.\(^\text{142}\)

The back-and-forth with the Women’s Health Amendment and the conscience amendment shows that Congress intended for regulations issued under the ACA to cover contraceptives, even if employers had religious objections. However, in _Hobby Lobby_, the Court applied RFRA to accomplish just the opposite.\(^\text{143}\) The Court considered whether it mattered that Congress had considered and rejected the conscience amendment and concluded that Congress did not expressly reference RFRA in rejecting the conscience amendment, and as a result RFRA controlled.\(^\text{144}\) Congress rejected the conscience amendment, but it might as well have included it because the primary effect of the amendment applied to the ACA anyway through RFRA.\(^\text{145}\)

\(^{134}\) See 134 S. Ct. 2751, 2786 (2014).

\(^{135}\) Id. at 2762.

\(^{136}\) Id. at 2788 (Ginsburg, J., dissenting).

\(^{137}\) Id.

\(^{138}\) Id. (quoting 155 CONG. REC. 29768 (2009) (statement of Sen. Durbin)).


\(^{140}\) Hobby Lobby, 134 S. Ct. at 2789 (Ginsburg, J., dissenting).

\(^{141}\) Id.

\(^{142}\) See id.

\(^{143}\) Id. at 2775.

\(^{144}\) Id. at 2775, n.30.

\(^{145}\) See id. The majority and dissent disagree about how similar the conscience amendment and
Furthermore, the Congress that passed the ACA and the Women’s Health Amendment would not see much of a difference between RFRA applying to the ACA itself rather than just regulations issued under the ACA. Congress tried to delegate authority to HHS to issue the contraceptive mandate, but the Court applied RFRA to say that HHS could not exercise that authority. Regardless of whether RFRA applies to a statute or a regulation issued under that statute, the will of Congress is thwarted either way.

IV. CONCLUSION

RFRA is legislative entrenchment. Neither its express-reference exception nor its application to agency action can save RFRA. The statute need not be struck down, but it must not be used to strike down other statutes either. Instead, RFRA should be an interpretive tool.\textsuperscript{146} If a subsequent statute is ambiguous, with one reading violating RFRA’s test and another satisfying RFRA’s test, then RFRA is strong evidence in favor of the latter interpretation. In \textit{Hobby Lobby}, RFRA still would have played a role. However, with our understanding of RFRA, the debate in \textit{Hobby Lobby} should have been whether Congress actually delegated authority to HHS to issue the contraceptive mandate. RFRA may have been evidence that Congress did not intend to delegate such authority, and the legislative history behind the Women’s Health Amendment may have been evidence that Congress did. That debate about statutory interpretation and deference to agency interpretation, however, would have been entirely different than the actual debate that took place in \textit{Hobby Lobby}.

If RFRA is legislative entrenchment, the question remains why this argument has not been seriously presented to the Court. The Court has applied RFRA without explicitly considering legislative entrenchment doctrine. One reason may be that in the major cases involving RFRA—such as \textit{Hobby Lobby}—the defendant is the United States. The Solicitor General’s office is put in a strange bind when defending federal law from a RFRA challenge. First, constitutional challenges to RFRA would put the Solicitor General’s office in the position of defending the validity of one federal statute by attacking

\textsuperscript{146} See Grewal, supra note 29, at 1040 (“Although legislative entrenchment rules should not automatically nullify future legislation when their requirements go unmet, these rules should not necessarily be ignored. They are evidence of congressional intent, no different from other legislation that forms the backdrop against which Congress acts.”).
the validity of a different federal statute—not quite the position that the office normally takes. Second, recent presidential administrations have had little appetite to openly attack RFRA. Attacking the “Religious Freedom Restoration Act” does not sound like good politics. Instead, when a federal law is subject to a RFRA challenge, the government argues that the law complies with RFRA, but it does not question whether RFRA is valid in the first place. Thus, if this Essay’s objection to RFRA is to be raised in court, it may therefore need to come from private amicus litigants.