Texas Law Review

Volume 73, Number 2, December 1994

Articles

Interpreting the Religious Freedom Restoration Act

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In Employment Division v. Smith, *the Supreme Court held that neutral and generally applicable laws can be applied to suppress religious practices, and that states need have no reason for refusing exemptions for the free exercise of religion. The Religious Freedom Restoration Act responds to* Smith, *creating a statutory right to free exercise exemptions, subject to the compelling interest test.*

Professor Laycock and Mr. Thomas draw on intimate knowledge of the Act's legislative history to argue for interpretations that will implement the congressional purpose. They argue that the generality of the Act resulted from a principled determination to treat all religions equally. They elaborate the meaning of the three critical

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Many things happen orally in the course of drafting, negotiating, lobbying for and against, and deliberating on major legislation. Mr. Thomas was intimately involved in the discussions about the Religious Freedom Restoration Act; Professor Laycock was peripherally involved. We have cited the written record when possible, and with respect to congressional intent, only the written record is authoritative. But with respect to the fears, desires, hopes, and negotiating positions of groups supporting and opposing the bill, the written record is fragmentary, much of what is written is not accessible, and the written materials cited are secondary evidence at best. Whatever we may have cited with respect to these background matters, we have relied principally on the personal knowledge of Mr. Thomas.

phrases in the Act: "compelling interest," "substantially burden," and "exercise of religion." Finally, they examine three potential applications that were of particular concern to Congress: abortion, prisons, and tax exemption and funding for religious institutions.

On October 27, 1993, the U.S. Senate passed the Religious Freedom Restoration Act of 1993[1] (RFRA) by a vote of 97-3.[2] The House of Representatives, after passing a similar bill by unanimous voice vote on May 11, 1993,[3] passed the Senate version of the bill on November 3,[4] and President Clinton signed it into law on November 16.[5]

The Act is designed to repair the damage to religious liberty caused by the Supreme Court's decision in *Employment Division v. Smith*.[6] *Smith* held that neutral and generally applicable laws can be applied to suppress religious practices and that government need not have a reason for refusing to exempt those practices from regulation.[7] RFRA creates a statutory right, subject to the traditional compelling interest test, to regulatory exemptions for religiously motivated conduct.[8] It was supported by one of the broadest coalitions in recent political history, including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations.[9] Coalition members came from the political left and the political

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1. Pub. L. No. 103-141, 107 Stat. 1488 (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

2. 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993).

3. The vote is reported at 139 CONG. REC. H2363 (daily ed. May 11, 1993). The unanimity of the vote was reported in the press. *See* Linda Feldmann, *Congress to Boost Freedom of Religion*, CHRIST. SCI. MON., May 17, 1993, at 1.

4. 139 CONG. REC. H8715 (daily ed. Nov. 3, 1993).

5. 139 CONG. REC. D1315 (daily ed. Nov. 16, 1993).

6. 494 U.S. 872 (1990). For congressional rejection of *Smith*, see 42 U.S.C. § 2000bb (Supp. V 1993).

7. *Smith*, 494 U.S. at 885.

8. Section 3 of the Act provides:

> (a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
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> (b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
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> (1) is in furtherance of a compelling governmental interest; and
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> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a) to (b) (Supp. V 1993).

9. The Coalition for the Free Exercise of Religion included: Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of

right—the lead sponsors in the Senate were Senator Edward Kennedy, a leading liberal Democrat from Massachusetts, and Senator Orrin Hatch, a leading conservative Republican from Utah.[10]

As to the federal government, RFRA is both a rule of interpretation for future federal legislation and an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place. As to the states, RFRA is enacted pursuant to Section Five of the Fourteenth Amendment.[11] Congress found that the remedies available under *Smith* were inadequate to protect free exercise rights, because "throughout much of our history, facially neutral laws" had "severely undermined religious observance,"[12] and because it is impossible either to seek legislative exemptions from every generally applicable state and federal statute or regulation that burdens religious exercise,[13] or to litigate governmental motive in every

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Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; Nationsl Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism. The organizations constituting the Coalition are listed on its letterhead (on file with the *Texas Law Review*). The American Bar Association did not formally join the Coalition, but repeatedly endorsed the bill. *See, e.g.*, American Bar Association, Statement of Support for the Religious Freedom Restoration Act of 1993 (Mar. 11, 1993) (on file with the *Texas Law Review*).

10. 140 CONG. REC. S5014 (daily ed. May 3, 1994) (statement of Sen. Hatch).

11. HOUSE COMM. ON THE JUDICIARY, RELIGIOUS FREEDOM RESTORATION ACT OF 1993, H.R. REP. NO. 88, 103d Cong., 1st Sess. 9 (1993) [hereinafter HOUSE REPORT]; SENATE COMM. ON THE JUDICIARY, RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. NO. 111, 103d Cong., 1st Sess. 13-14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 [hereinafter SENATE REPORT]; Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 245; Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73, 90.

12. SENATE REPORT, *supra* note 11, at 5.

13. *See* HOUSE REPORT, *supra* note 11, at 6 ("It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious

case to determine whether generally applicable laws were in fact designed to restrict a religious practice.[14]

Smith has already been the subject of more than fifty scholarly articles,[15] and one of us has written both on the need for RFRA and the source of congressional authority to enact it.[16] This Article addresses the interpretation of RFRA in light of the statutory text, the legislative history, and the problems the Act was designed to solve. The Act's effectiveness will depend upon judicial interpretation of three quite general terms: "compelling interest," "substantially burden," and "exercise of religion." There were both good and bad reasons for legislating at such a level of generality.

I. A Quick Review of the Need for RFRA

The religion clauses of the state[17] and federal constitutions represent both a legal guarantee of religious liberty and a political commitment to religious liberty. This country's religious pluralism is a testimony to the

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exemptions in every Federal, State, and local statute."); SENATE REPORT, *supra* note 11, at 8 ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right.").

14. *See* HOUSE REPORT, *supra* note 11, at 6 ("[L]egislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.").

15. *E.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. REV. 7.

For defenses of the result, although not of the opinion, see William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Suzanna Sherry, Lee v Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123. For a proposed compromise between *Smith* and its critics, see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994). For a more extensive list of articles about *Smith*, see *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Comm. on the Judiciary*, 102d Cong., 2d Sess. 60-62 (1992) [hereinafter *Senate Hearing*] (Appendix IV to testimony of Oliver S. Thomas on behalf of Baptist Joint Committee and American Jewish Committee).

16. Laycock, *supra* note 11. For further analysis of both issues, see Lee, *supra* note 11. For further debate on the constitutionality of the Act, see Symposium, 55 MONT. L. REV. 303 (forthcoming Summer 1994); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993).

17. For reviews of state constitutional law on religious exemptions, see Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275; Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMPLE L. REV. 1017 (1994). For a history of the earliest state guarantees, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-73 (1990).

largely successful implementation of these commitments. Religious liberty is one of America's great contributions to civilization. But a countertradition also runs through American history. This country has seen religious intolerance, even religious persccutions. Quakers, Baptists, and slaves in colonial times; Catholics and Mormons in the nineteenth century; Jehovah's Witnesses in the mid-twentieth century; and Hare Krishnas, Scientologists, and believers in Santeria today have all experienced physical violence, active efforts at legal suppression, or both.[18]

America's history of sporadic religious intolerance shows the need for vigorous enforcement of the Free Exercise Clause. But this history also makes a more specific point. Facially neutral laws of general application—the kind that raise no constitutional issue after *Smith*—were central to some of this country's worst religious persecutions. Both the polygamy law that underlay much of the Mormon persecution,[19] and the flag salute law invoked against Jehovah's Witnesses,[20] were facially neutral, generally applicable laws. A facially neutral law in Oregon would have required all children to attend public school; the underlying motive was to suppress Catholic schools. The Court struck this law down in 1925,[21] but today the constitutional result would depend on a coalition of the two remaining Justices who reject the authority of *Smith* (O'Connor, Souter)[22] and the two Justices in the *Smith* majority who are willing to look at legislative motive (Stevens, Kennedy),[23] prospecting for a fifth vote among the two Justices appointed too rccently to have spoken on these issues (Ginsburg, Breyer). Alternatively, it might rest on an alleged unenumerated right to control the education of one's children.[24]

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18. *See* Laycock, *supra* note 15, at 60-67 (reviewing the persecution of various American religious groups). For the successful outcome of the Santeria litigation, in which ordinances that would have suppressed the religion's central ritual were invalidated, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993). The continued existence of the Hare Krishnas was threatened by multi-million dollar judgments for various torts allegedly committed by religious speech and by persuasion of new adherents; the largest such judgment was vacated, International Soc'y for Krishna Consciousness v. George, 499 U.S. 914 (1991), and the case subsequently settled for a sum that left the church in possession of its temples and ashrams, Mark I. Pinsky, *Krishnas Settle 16-Year Fight with Mother-Daughter*, L.A. TIMES, June 3, 1993, at B1.

Professor Laycock served as counsel for the church in *Church of the Lukumi* and for amici curiae supporting the Hare Krishnas in *George*. Mr. Thomas served as counsel for amici curiae in both cases.

19. *See* Reynolds v. United States, 98 U.S. 145 (1878) (upholding an indictment for bigamy).

20. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding an ordinance that required school children to salute the flag).

21. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

22. *See Church of the Lukumi*, 113 S. Ct. at 2243-50 (Souter, J., concurring) (questioning both *Smith*'s reasoning and its precedential authority); *id.* at 2250 (Blackmun, J., with whom O'Connor, J., joins, concurring) (adhering to the view that *Smith* was "wrongly decided").

23. *See id.* at 2230-31 (plurality opinion) (citing legislative history to show the anti-religious motivation behind ordinances banning animal sacrifice).

24. *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously

The deleterious effects of *Smith* were not merely hypothetical. Less than a week after it was decided, *Smith* was cited as the basis for vacating a Minnesota judgment that had upheld an Amish farmer's free exercise claim.[25] The state court had exempted the farmer from the requirement that he attach a bright orange triangle to his horse drawn carriage.[26] He objected on religious grounds to displaying such a "worldly" symbol, offering expert testimony that more modest silver reflector tape was equally effective in preventing accidents.[27] On remand, the Minnesota Supreme Court rejected *Smith*'s persuasive authority and protected Hershberger under the free exercise clause in the state constitution.[28]

Hershberger was only the beginning for the new federal law of religious liberty; dozens of reported cases have been decided against religious claimants since *Smith*.[29] The *Smith* opinion contained a number of exceptions, perhaps because the fifth vote insisted that no case could be overruled, but little has come of those exceptions. The hybrid rights exception, which purported to protect free exercise in association with some other constitutional right (such as speech or association), has been rejected precisely because it had the potential to swallow the rule. The Sixth

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motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children." (citations omitted)). However, there is little modern authority for the existence of such an unenumerated right. *Compare* People v. DeJonge, 501 N.W.2d 127, 131-44 (Mich. 1993) (applying the compelling interest test to a hybrid claim of free exercise and the unenumerated right to direct the religious education of one's children) *with* People v. Bennett, 501 N.W.2d 106, 111-17 (Mich. 1993) (applying the rational basis test to a claim of the unenumerated right to direct the secular education of one's children).

25. Minnesota v. Hershberger, 495 U.S. 901 (1990) (mem.).

26. State v. Hershberger, 444 N.W.2d 282, 284, 289 (Minn. 1989), *vacated and remanded*, 495 U.S. 901 (1990) (mem.).

27. *Id.*

28. State v. Hershherger, 462 N.W.2d 393, 397-99 (Minn. 1990).

29. *See, e.g.*, Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc., 968 F.2d 286, 298 (2d Cir. 1992) (holding that, under *Smith*, the First Amendment does not protect religious organizations from liability under antidiscrimination law for refusing to meet in a resort that catered to these organizations but also served a group they viewed as heretical); Munn v. Algee, 924 F.2d 568, 571-74 (5th Cir.) (applying the avoidable consequences doctrine to a Jehovah's Witness's refusal of blood transfusions and permitting defense counsel to cross-examine the plaintiff about unpopular Jehovah's Witness doctrines), *cert. denied*, 112 S. Ct. 277 (1991); Friend v. Kolodzieczak, 923 F.2d 126, 127-28 (9th Cir. 1991) (upholding a prison regulation that prohibited inmates from keeping rosaries and other religious items in their cells); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355, 353-55 (2d Cir. 1990) (upholding the landmark designation of a church even though the law was disproportionately applied to churches and it "drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs"), *cert. denied*, 499 U.S. 905 (1991); Yang v. Sturner, 750 F. Supp. 558, 559-60 (D.R.I. 1990) (vacating, on the basis of *Smith*, an earlier opinion upholding religious objections to an autopsy). For a more extensive list of post-*Smith* cases, see *Senate Hearing*, *supra* note 15, at 50-58 (Appendix II to testimony of Oliver S. Thomas on behalf of Baptist Joint Committee and American Jewish Committee, compiled by J. Brent Walker). For an updated version of that list, see memorandum from J. Brent Walker to NCC Religious Liberty Committee (Mar. 21, 1994) (on file with the *Texas Law Review*).

Circuit expressly held that this exception was so nonsensical that it would not be applied unless the Supreme Court applied it in a holding.[30]

In *Cornerstone Bible Church v. City of Hastings*,[31] the Eighth Circuit rejected a free exercise challenge to a zoning ordinance that excluded churches from commercial zones but permitted secular not-for-profit organizations. This facial discrimination against churches should have triggered the compelling interest test under *Smith*; however, the court ordered a new trial only on an equal protection claim, and it said that the city need show only a rational basis for the discrimination.[32] The effect of the zoning law in *Cornerstone* was to exclude the church from the city for lack of any affordable place to worship.[33] But the district court had held, with perfect doctrinal logic under *Smith*, that this effect was irrelevant because the Supreme Court had held a similar effect irrelevant in a case about the zoning rights of pornographic movie theaters.[34]

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30. Kissinger v. Board of Trustees of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2244-45 (1993) (Souter, J., concurring) (arguing that either the hybrid rights exception is meaningless, because if the other constitutional provision must independently protect the religious conduct, the Free Exercise Clause adds nothing, or it totally swallows the rule, because if the other constitutional provision need only be implicated, all cases will be hybrids). For further analysis of the hybrid rights exception, see Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993).

Kissinger presented the interesting spectacle of Professor Gary Francione—who vigorously argued that the Free Exercise Clause meant nothing when invoked on behalf of an ancient religion in which animal sacrifice is a central ritual—asserting that the Free Exercise Clause should protect a veterinary student with objections to practicing surgery on live animals. *Compare* Brief of People for the Ethical Treatment of Animals et al., as Amici Curiae in Support of Respondent at 3, 7, *Church of the Lukumi* (No. 91-948) (arguing that no religious practice is entitled to exemption from facially neutral laws, that a law that permits secular killings of animals but forbids religious killings is facially neutral, and that contrary argument is "absurdity") *with* Brief for Appellant at 24, 23-37, *Kissinger* (No. 92-3360) (arguing that a rule is not neutral and generally applicable if it is part of a program that is "flexible" or "changing" or capable of being "amended," or if any individual exception has ever been made for any purpose, and also that the compelling interest test applies to a hybrid claim of free speech and free exercise if the plaintiff has been criticized for her religious views or discouraged from expressing them). This is an unusually clear example of the tendency to protect free exercise only for the religions one likes.

31. 948 F.2d 464 (8th Cir. 1991).

32. *Id.* at 471-72, 472 n.13.

33. *See* Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 663 (D. Minn. 1990) (noting the church's argument that a meeting place in the city's residential zones was "truly unavailable as a practical matter"), *aff'd in part, rev'd in part*, 948 F.2d 464 (8th Cir. 1991).

34. *Id.* The district court dismissed the free exercise claim because the plaintiffs had failed to establish a violation of another constitutional right, such as freedom of speech, and thus *Smith*'s hybrid exception did not apply. *Id.* at 670. In its free speech analysis, the district court had relied on City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), for the proposition that the practical unavailability of land zoned for plaintiff's First Amendment use does not make the zoning law unconstitutional as long as some land remains theoretically available for purchase. *Cornerstone*, 740 F. Supp. at 663.

Cases such as these illustrate both the doctrinal and the symbolic impact of *Smith*. The formal doctrine was bad enough, but the symbolic effect was worse. Government bureaucrats, their lawyers, and many lower court judges took *Smith* as a signal that the Free Exercise Clause had been generally repealed, that whatever clever argument a church lawyer might make about *Smith*'s exceptions, the operative rule was that free exercise claims should be rejected.

The extreme example of this symbolic effect was the Eleventh Circuit's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[35] This was as clear a case as one will find in American history of ordinances enacted for the sole purpose of suppressing a particular religious practice, and carefully drafted so as not to inconvenience any analogous secular practice or even any analogous practice of any other religion.[36] The Supreme Court unanimously struck down the ordinances, commenting that they implicated the Constitution's "fundamental nonpersecution principle."[37] Yet the court of appeals had upheld the same ordinances in a four-sentence unpublished order; the decision not to publish supposedly meant that the case was of no precedential value. In defense of its ordinances, the city cited *Williamson v. Lee Optical, Inc.*[38] as the standard for identifying discrimination under *Smith*. *Williamson*, of course, is the classic citation for total abdication of judicial review of economic regnlation. The city claimed that it could proceed one step at a time,[39] regulating the alleged evil of animal killing in its religious manifestation first, even if it never got to the same alleged evil in its secular manifestations.

Hialeah's open attempt to suppress an unpopular religion is not the usual pattern in the cases; groups and individuals can lose the right to practice their faith for many reasons short of open persecution. In some cases, the practice at issue offends some interest group that is able to insist on a regulatory law with no exceptions;[40] in others, the legislative or

35. 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

36. The ordinances are reprinted in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2234-39 (1993). The ordinances forbade "sacrifice," which was defined as follows: "to unnecessarily kill . . . an animal in a . . . ritual or ceremony not for the primary purpose of food consumption." Hialeah, Fla., Ordinance 87-52, Hialeah Code § 6-8(2) (Sept. 8, 1987), *reprinted in Church of the Lukumi*, 113 S. Ct. at 2236.

37. *Church of the Lukumi*, 113 S. Ct. at 2222.

38. 348 U.S. 483 (1955).

39. Brief of Respondent at 22, *Church of the Lukumi*, 113 S. Ct. 2217 (No. 91-948) ("Legislature may select one phase of one field and apply a remedy there, neglecting the others." (quoting *Williamson*, 348 U.S. at 489)).

40. *See, e.g.*, Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (invalidating in part and upholding in part the application of a gay rights ordinance to a Catholic university); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (invalidating the application of a landmark law to prevent the relocation of an altar in aceordance with liturgical reforms); *cf.*

administrative body is unaware of, or indifferent to, minority religious practices.[41] Some interest groups or individual citizens are aggressively hostile to particular religious teachings or to religion in general.[42] Others are not hostile, but simply uncomprehending when confronted with the need for religious exemptions.[43] Whether regulation stems from hostility, indifference, or ignorance, the consequences to religious believers are the same. As illustrated by cases like *Cornerstone*[44] and *Rector of St. Bartholomew's Church v. City of New York*,[45] not even evangelical or mainline churches could count on sympathetic regulation under *Smith*.

There is no way to know whether lower courts would have viewed *Church of the Lukumi* as a signal that they had overreacted to *Smith* or simply as an extreme case that created an insignificant exception to *Smith*. Both the doctrinal and the symbolic consequences of the case will presumably be superseded by the consequences of RFRA.

II. The Generality of the Act

The purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*[46] and *Wisconsin v. Yoder*[47] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[48] Both the lead congressional sponsors and the relevant

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McClellan v. Zavaras, No. 93-B-2365 (D. Colo. 1993) (settling a case in which a prisoner in a work-release program had been permitted to leave the prison facility to attend church, but had been forbidden to take communion, pursuant to a no-exceptions policy forbidding drugs and alcohol). The landmark lobby and the gay rights movement are well-organized interest groups. *McClellan* does not involve prison wardens in their role as an interest group, but it is a classic example of a no-exceptions policy for its own sake.

41. *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) (invalidating a law that required a photograph on a driver's license, as applied to a plaintiff who believed that all photographs were forbidden by the commandment against graven images), *aff'd per curiam by an equally divided court sub. nom.* Jensen v. Quaring, 472 U.S. 478 (1985).

42. *See, e.g.*, Robert Hilferty's film, STOP THE CHURCH, *described in* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 441, 440-42 (1994). This film depicts a gay-rights and pro-choice demonstration that disrupted a Mass at St. Patrick's Cathedral in New York City. Speakers in the film describe the Catholic Church as "hypocrisy and hate," and freedom of religion as "bullshit." *See generally* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (describing a pervasive conflict between "orthodox" and "progressive" views of religious authority).

43. *See, e.g.*, Laycock, *supra* note 15, at 57-58 ("Proponents of landmarking seem genuinely unsble to comprehend why churches object to maintaining their houses of worship as permanent architectural museums, at the expense of those who worship there, for the aesthetic pleasure of those who do not.").

44. *See supra* notes 31-34 and accompanying text.

45. 914 F.2d 348, 355 (2d Cir. 1990) (upholding a law that "drastically restricted" the ability of an Episcopal Church "to carry out its . . . programs").

46. 374 U.S. 398 (1963) (citation relocated from statutory text).

47. 406 U.S. 205 (1972) (citation relocated from statutory text).

48. 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993).

The statute also sets out the following congressionsl findings:

congressional committees repeatedly made it clear that their intention in passing RFRA was to restore the traditional compelling interest test for all cases in which religious practices are substantially burdened by government, whether intentionally or unintentionally, whether through laws specifically aimed at religion or through laws of general application.[49]

However, Congress did not intend to codify the results of any particular free exercise cases, including those cited in the Act's statement of purpose.[50] Rather, judges are still to decide future cases after considering all the relevant facts and circumstances. Thus, RFRA does not dictate specific results; it simply codifies the standard of review to be applied in all cases.

Congress might have provided more guidance about the standard, but it could not supplement the standard with legislative resolutions of specific cases. There were both principled and political reasons for legislating only

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> (a) FINDINGS.—The Congress finds that—
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> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
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> (3) governments should not substantially burden religious exercise without compelling justification;
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> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
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> (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.

Id. § 2000bb(a)(1)-(5).

49. Both of the lead Democratic sponsors in the House made it clear that RFRA's purpose was to restore a familiar legal standard rather than to create a new, untried standard of review: "The bill simply restores the compelling governmental interest test." *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 1 (1992) [hereinafter *House Hearings*] (statement of Rep. Edwards, Subcommittee Chairman).

> [T]his legislation . . . simply restorea the constitutional status quo—it recstablishes the compelling interest test which existed prior to the *Smith* decision, and . . . puts the burden of proof on the State or government jurisdiction involved to establish a fact that they had a compelling interest in requiring compliance, and that they had chosen the least restrictive method of doing so.

Id. at 118 (statement of Rep. Solarz, RFRA's chief sponsor in the House); *see also* 139 CONG. REC. S14,351 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy, the lead Democratic sponsor in the Senate) ("The act creates no new rights . . . . [It] simply restores the long-established standard of review . . . ."). Similarly, both the House and Senate committees stated their intention that prior court decisions concerning the Free Exercise Clause be used to provide guidance in applying RFRA. HOUSE REPORT, *supra* note 11, at 6-7; SENATE REPORT, *supra* note 11, at 8-9.

50. The House Judiciary Committee stated:

> Furthermore, by enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions.

HOUSE REPORT, *supra* note 11, at 7. The Senate Judiciary Committee made a similar statement. SENATE REPORT, *supra* note 11, at 9.

a general standard. Legislating generally made it possible for a broad coalition of Senators, Representatives, and organizations to support the bill. The bill was enacted unanimously in the House[51] and nearly so in the Senate,[52] yet the vote would not have been similarly unanimous on many applications of the bill. Most of those who would find a compelling interest in protecting fetuses would probably not find a compelling interest in requiring hospitals to perform abortions. Most of those who would find a compelling interest in distributing condoms to students would probably not find a compelling interest in distributing military recruiting literature to students. These examples could be multiplied. Many activists—and many legislators—are much quicker to protect the religions they like than to protect religions they reject. The cynical explanation for RFRA's generality is that enacting only a general standard was a political necessity.

But it was not *merely* a political necessity; it was also an act of high principle. The Act is only a statute, not a constitutional amendment, but it is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted. As a replacement for the Free Exercise Clause, the Act had to be as universal as the Free Exercise Clause. It had to protect all religions equally against all assertions of regulatory interests. The only way to draft such a protection was in the manner of the Free Exercise Clause itself—as a general principle of universal application.

Congress was not being irresponsible in refusing to legislate about particular religious practices or particular governmental interests. The logical conclusion of doing that would have been a committee report evaluating every known religious practice in light of every imaginable governmental interest, and a bill listing which religious practices are permitted and to what extent, and which may be forbidden. Instead of a charter of religious liberty, the bill would have become a religious licensing act. As the lead sponsor in the House put it:

> If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed[ed] in codifying rather than reversing *Smith*. Under those circumstances, it would probably be better to do nothing and hope that subsequent Administrations will appoint more enlightened Justices.[53]

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51. *See supra* note 3.
52. 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993) (reporting a 97-3 vote).
53. *House Hearings*, *supra* note 49, at 124 (statement of Rep. Solarz).

Of course, it would be impossible for Congress to legislate both universally and in detail. But Congress could have enacted a general principle plus two short lists of religious practices—those that were specifically protected and those that were unprotected. Such lists would be as inappropriate in RFRA as they would have been in the Free Exercise Clause itself. A list of protected religious practices might have been relatively harmless, except to the extent that it raised a negative inference about practices not listed. But a list of unprotected religious practices would have departed from the bill's core principle, because it would have allowed these practices to be suppressed without judicial review. Any lawmaking body—Congress, state legislatures, city councils, county commissions, or administrative agencies—could have suppressed any religious practice on the unprotected list, and the list itself would have been a standing invitation to do so.

Because Congress enacted only a general principle, no religious practice can be suppressed without the concurrence of both some lawmaking body and the judiciary. Taking the final decision away from judges in hard or controversial cases might seem to be more democratic or politically responsible, although even that is doubtful when the final decision would be made by an administrative agency. But here, as in other contexts, the question is whether we want democratic votes to have the last word with respect to core personal liberties. This issue is not unique to RFRA: The American constitutional system has consistently relied on judicial review as an essential additional protection for those personal liberties written into the Constitution. We think there are good reasons for this choice,[54] but for better or worse, it has been the American constitutional choice. Given *Smith*, RFRA was the only way to implement that choice with respect to religious practice.

Two congressional judgments thus determined RFRA's substantive outlines. First, Congress decided that the free exercise of religion should include the right to practice one's religion, which required that religious practices receive legal protection as similar to constitutional protection as Congress could enact. Second, Congress decided that this right could not be absolute, but must instead be subject to limitation for sufficiently compelling reasons. Having made those two decisions, the proper course

54. *See* 1 ANNALS OF CONG. 455-57 (Joseph Gales ed., 1834) (remarks of Rep. Madison, June 8, 1789) (predicting that judicial review would change constitutional rights from "paper barriers" to an "impenetrable bulwark"); Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711 (1990) (reviewing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989)) (arguing that judicial review has, in fact, been an essential means of protecting liberty and implementing the Constitution).

was to enact the compelling interest test as a general principle, leaving the judiciary to apply the test in individual cases.

To move application of the test from the courts to lawmaking bodies would defeat the goal of Constitution-like protection. It would maximize the risks of underprotecting small or unpopular faiths and overprotecting large, well-accepted faiths. If Congress had set out to codify a list of unprotected religious practices, religious practices would have been protected or unprotected based largely on whether each religious minority or the interest group that disliked its practices had the most effective lobbyists and brought the most political pressure to bear. Factual disputes would have been decided on a record only partly developed, untested by the adversary process, and wholly unknown to most Senators and Representatives. The list of unprotected practices would have been subject to last-minute amendments, filibusters and other parliamentary maneuvers, vote trading, and other political dealmaking. Whatever the theoretical virtues of republican deliberation, the reality of the legislative process is totally unsuited to principled decisions about whether one faction's desire to suppress an annoying religious practice is really the least restrictive means of serving a compelling government interest.

So Congress in 1993 did what the First Congress had done in 1789. It enacted a general principle of religious liberty, saying nothing about individual cases, and it authorized enforcement by the judiciary, leaving application of the principle to case-by-case determinations. After two hundred years of experience with judicial review, and in an era of far more burdensome government, Congress in 1993 anticipated a larger number of cases than did Congress in 1789. But the basic mechanisms for protecting liberty remain the same: separation of powers, legal guarantees of liberty stated at the level of broad principles, and judicial enforcement of those guarantees. The generality of RFRA was essential to the congressional purpose.

III. The Statutory Standard

The standard of review is set forth in Section 3 of the Act: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[55] The future of the Act depends principally on judicial interpretation of three terms: "compelling interest," "substantially burden," and "exercise of religion."

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55. 42 U.S.C. § 2000bb-1(b) (Supp. V 1993).

A. *Compelling Interest*

One recurring issue about the compelling interest test in free exercise cases is resolved in the statutory text. It is not enough that the government's regulation or program as a whole serves a compelling interest. Rather, the "*application of the burden to the person*" must be the "least restrictive means" of furthering a compelling interest.[56] Put the other way around, it is not enough that repeal of the law would defeat the government's compelling interest. Rather, government must make the much more difficult showing that an exception for religious claimants would defeat its compelling interest.[57]

There remains the question of what interests are compelling. The compelling interest test has fallen into disarray, especially in the lower courts. Lawyers representing the government tend to claim that every detail of every law serves a compelling interest. Surveys of cases show that free exercise claims were losing even before *Smith*, often because lower courts were quick to find a compelling interest.[58] In *Church of the Lukumi*, the district court held that protecting animals is a compelling interest because the Florida Supreme Court had held it to be "a valid exercise of the police power."[59] The federal court thus effectively equated compelling interest with rational basis. In the District of Columbia, zoning officials seeking to shut down a church breakfast program for the homeless initially asserted that they had a compelling interest in socio-economic apartheid—in excluding the homeless from affluent neighborhoods.[60]

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56. *Id.* (emphasis added).

57. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 1261 (2d ed. 1988) (discussing the constitutional standard prior to United States v. Lee, 455 U.S. 252 (1982): "The Court's opinions made clear that the only constitutionally relevant factor was the state's interest in denying the claimant's exemption, *not* the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases." (emphasis in original)). In *Lee*, the Court "discussed both interests—the . . . program as a whole, and the importance of uniform participation in it. To the degree that the state's interest is defined to include the program as a whole, the state will find it easier to present a compelling interest and thereby to pass [this] hurdle." *Id.* (footnotes omitted). I believe that the shift that Professor Tribe sees in *Lee* was not a change in the general standard, but rather a necessary adjustment to the risk of many false claims in tax cases. *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 55 MONT. L. REV. (forthcoming Summer 1994).

58. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 627-29 (9th Cir. 1988) (Noonan, J., dissenting) (listing courts of appeals decisions considering free exercise challenges to state or federal legislation, with cases sustaining the laws greatly outnumbering cases invalidating them), *cert. denied*, 489 U.S. 1077 (1989); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) ("A survey of the decisions in the United States courts of appeals over the ten years preceding *Smith* reveals that, despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test.").

59. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1486 (S.D. Fla. 1989) (citing C.E. America, Inc. v. Antinori, 210 So. 2d 443, 444 (Fla. 1968)), *aff'd mem.*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

60. *See* Karen De Witt, *Cold Shoulder to Churches That Practice Preachings*, N.Y. TIMES, Mar. 27, 1994, at A1 (describing a local zoning decision to bar a church's program for feeding the homeless

In a bankruptcy system so generous that most bankrupt consumers get to keep all their assets along with all their future income and pay nothing to their unsecured creditors,[61] bankruptcy trustees are asserting a compelling interest in forcing debtors' churches to return past contributions for a token distribution to those creditors.[62] There are sound reasons for generous bankruptcy laws, and we do not mean to debate whether the present law strikes the right balance between debtors and creditors. Our point is comparative: if the interest in protecting creditors is not important enough to nullify debtors' nonfraudulent secular transactions or to override their secular interests in retaining exempt assets and income for future consumption, then it cannot be important enough to nullify their religious act of contributing to their church.

California authorities are arguing,[63] and the Supreme Court of Alaska has held,[64] that states have a compelling interest in forcing conscientiously objecting landlords to rent apartments to unmarried couples. Neither opinion mentions any evidence that unmarried couples were actually having difficulty finding housing; without such evidence, this claim of compelling interest is utterly frivolous. The stakes are entirely symbolic: sex outside of marriage has gone from misdemeanor to compelling interest in one generation, and religious believers who resist the change must be crushed. The Alaska court referred to this symbolic interest as a "transactional" compelling interest.[65]

If any such deferential view of compelling interest is read into RFRA, the congressional goal of protecting religious practice will be wholly

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in a "neighborhood of Government offices and expensive apartments"). The zoning board later abandoned that argument in court and argued—so far unsuccessfully—that closing the program would not substantially burden the church. Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 545 (D.D.C. 1994), *notice of appeal filed*, No. 94-7189 (D.C. Cir. Sept. 20, 1994).

61. In cases arising under Chapter 7 of the Bankruptcy Code, 96 or 97% result in no distribution to creditors. Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. RICH. L. REV. 303, 310-11 & n.30 (1988) (reporting their own data from the Eastern District of Virginia and citing national data from U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY REFORM ACT OF 1978—A BEFORE AND AFTER LOOK (1983)).

62. *See, e.g.*, Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886 (Bankr. D. Minn. 1992) (ordering that the contributions be repaid), *aff'd*, 152 B.R. 939 (D. Minn. 1993), *appeal argued*, No. 93-2267 MNMI (8th Cir. Sept. 15, 1994). Professor Laycock represents amici supporting the church.

63. *See* Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 404-08 (Ct. App.), *review granted*, 880 P.2d 111 (Cal. 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 44-46 (Ct. App. 1991), *review dismissed*, 859 P.2d 671 (Cal. 1993) (both rejecting the state's argument).

64. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282, 280-84 (Alaska) (interpreting the free exercise clause of the Alaska Constitution and ruling that the state had a compelling interest in preventing housing discrimination based on "irrelevant characteristics" such as marital status), *cert. denied*, 115 S. Ct. 460 (1994).

65. *Id.* at 283.

defeated. The Act will fail unless it serves as a political signal that Congress means to provide serious protection for religious minorities—unless the compelling interest test is reinvigorated in the lower courts. The textual and precedential basis for such a reinvigoration is in the statutory declaration of purpose and in the Supreme Court's cases on compelling interest. The lower court cases do not reflect the Supreme Court's stated views, especially in free exercise cases, and they certainly do not reflect the stated congressional purpose.

Congress did not define "compelling interest." Rather, it referred to existing case law. In its findings, Congress referred generally to pre-*Smith* cases.[66] But the congressional statement of purpose is more specific: to restore the standard set forth in *Wisconsin v. Yoder*[67] and *Sherbert v. Verner*.[68] The standard thus incorporated is a highly protective one. *Yoder* subordinates religious liberty only to "interests of the highest order,"[69] and *Sherbert* only to avoid "the gravest abuses, endangering paramount interests."[70] The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served,"[71] if "no alternative forms of regulation would combat such abuses,"[72] or, as the Court put it in the next case in this series, if the challenged law is "the least restrictive means of achieving [the] compelling interest."[73] More recent Supreme Court cases clarify that a governmental interest cannot be compelling unless the government pursues it uniformly across the full range of similar conduct.[74]

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66. 42 U.S.C. § 2000bb(a)(5) (Supp. V 1993); *see also supra* note 48 (quoting the statutory text).

67. 42 U.S.C. § 2000bb(b)(1) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

68. *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)). The House Committee substituted "Federal court cases before . . . *Smith*" in the statement of purpose, and the minority report asserted that this change was meant to lower the standard of justification. HOUSE REPORT, *supra* note 11, at 15 (additional views of Rep. Hyde, *et al.*). This change was reversed before final enactment, and the express statement of purpose to restore the standard of *Yoder* and *Sherbert* was restored.

69. *Yoder*, 406 U.S. at 215.

70. *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

71. *Yoder*, 406 U.S. at 215.

72. *Sherbert*, 374 U.S. at 407.

73. Thomas v. Review Bd., 450 U.S. 707, 718 (1981). The Act does not cite *Thomas*, but it codifies the requirement of "least restrictive means." 42 U.S.C. § 2000bb-1(h) (Supp. V 1993).

74. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2234 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 511, 510-11 (1991) (holding that although "the State has a compelling interest in compensating victims from the fruits of [a] crime," it has "little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime"); Florida Star v. B.J.F., 491 U.S. 524, 540, 540-41 (1989) (holding that a statute that punished the publication of a rape victim's name in an "instrument of mass communication" did not serve a compelling interest in protecting the victim's privacy when the statute did not forbid reporting

"Compelling" does not mean merely a "reasonable means of promoting a legitimate public interest."[75] "Compelling" does not mean "important."[76] In *Church of the Lukumi*, the last Supreme Court free exercise case before RFRA, a unanimous Court said:

> To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says."[77]

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*,[78] which invalidated Wisconsin's compulsory education law as applied to Amish children. The education of children is important, and the first two years of high school are important—but not sufficiently compelling to justify the substantial burden on the Yoders' religious exercise.[79]

Sherbert v. Verner[80] and the other unemployment compensation cases[81] also illustrate the stringency of the test. The government's interest in saving money is legitimate, but the potential "burden on the fund" used to pay unemployment benefits was not compelling enough to justify refusing compensation to those whose religious faith disqualifies them from employment.[82]

Morcover, it is not enough that the government point to unconfirmed risks or fears. Defending the compulsory attendance law at issue in *Yoder*, Wisconsin argued the plausible fear that some Amish children might later choose to leave the Amish community and would be "ill-equipped for life" without a high school education.[83] The Court rejected this fear as "speculative," demanding specific evidence both that Amish adherents were leaving their community and that they were "doomed" to become burdens on

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the name by other means). For an earlier formulation of this idea, see Smith v. Daily Mail Publishing Co., 443 U.S. 97, 105, 104-05 (1979) (holding that even if protecting the anonymity of juvenile offenders is an "interest of the highest order," a statute prohibiting publication of their names did not serve that interest because it did not apply to all forms of publication).

75. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (quoting the "reasonableness" standard as articulated in Bowen v. Roy, 476 U.S. 693, 707-08 (1986)).

76. *Thomas*, 450 U.S. at 717.

77. *Church of the Lukumi*, 113 S. Ct. at 2233 (citations omitted).

78. 406 U.S. 205 (1972).

79. *Id.* at 219-29. The Amish feared that their children would become worldly if they attended a conventional high school.

80. 374 U.S. 398 (1963).

81. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

82. *See Thomas*, 450 U.S. at 718.

83. *Yoder*, 406 U.S. at 224.

society.[84] Similarly, various states have feared that a culmination of false claims and honest religious objections to work would diminish employment compensation funds,[85] hinder the scheduling of weekend work,[86] increase unemployment,[87] encourage employers to make intrusive inquiries into the religious beliefs of job applicants,[88] and produce economic "chaos" on Sundays.[89] Some of these fears were plausible; some were not. The Supreme Court rejected them all for lack of evidence that they were actually happening.[90]

The lesson of these cases is that the government must show something more compelling than saving money, more compelling than educating Amish children. That is the compelling interest test of *Sherbert* and *Yoder* and, therefore, of RFRA. Under this standard, most governmental interests are not compelling. In fact, the Supreme Court has found a compelling interest in only three situations in free exercise cases. In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to express constitutional norms or to national survival: racial equality in education,[91] collection of revenue,[92] and national defense.[93]

The stringency of the compelling interest test makes sense in light of its origins: it began as a judicially implied exception to an absolute constitutional text.[94] The Constitution does not say that government may

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84. *Id.* at 224, 225.

85. *Sherbert*, 374 U.S. at 407.

86. *Id.*

87. Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981).

88. *Id.*

89. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989).

90. *Id.* (stating that nothing in the case suggested that secular Sunday activity would "grind to a halt" because of the Court's decision); *Thomas*, 450 U.S. at 719, 718-19 ("There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment . . . ."); *id.* at 719 ("[A]lthough detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur . . . ."); *Sherbert*, 374 U.S. at 407 (noting that there was no proof to warrant the fears that "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might . . . dilute the unemployment compensation fund [or] hinder the scheduling by employers of necessary Saturday work").

91. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (finding a compelling interest in denying tax exemption to a religious college with racially discriminatory rules).

92. Hernandez v. Commissioner, 490 U.S. 680, 699-700 (1989) (finding a compelling interest in denying a tax deduction for payments made in exchange for religious services); United States v. Lee, 455 U.S. 252, 258-60 (1982) (finding a compelling interest in forcing the Amish to pay social security taxes).

93. Gillette v. United States, 401 U.S. 437, 461-62 (1971) (finding a compelling interest in requiring military service from men who conscientiously objected only to unjust wars).

94. *See* Laycock, *supra* note 54, at 1744, 1744-45 (characterizing a compelling state interest as "a governmental need so important that it justifies an implied exception to an expressly absolute constitutional right").

prohibit free exercise for compelling reasons; rather, it says that there shall be "no law" prohibiting free exercise.[95] The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. RFRA makes the exception explicit rather than implicit, but the standard for satisfying the exception should not change.

These stringent formulations of the compelling interest test are consistent with the fact that free exercise claims were losing—even in the Supreme Court and even before *Smith*—because the cases leading up to *Smith* were not decided under the compelling interest test at all. The Court had carved out exceptions for prisons[96] and the military,[97] holding that the compelling interest test did not apply to restrictive environments. RFRA rejects these exceptions; the Act is fully applicable to such environments.[98]

The Court had also refused to apply the compelling interest test to internal operation of government programs.[99] Thus, the Court held that the government could develop its own land, even if that land were sacred to certain Native Americans,[100] and that it could use Social Security numbers in its own records, even if the subject of the records had religious objections.[101] These cases hold, in effect, that government does not prohibit the free exercise of religion unless it regulates or penalizes a religious practice. This rule, which goes to the definition of burden rather than compelling interest, is generally unaffected by RFRA.[102] In still another case that failed to apply the compelling interest test, the Court found no burden in the nondiscriminatory taxation of churches.[103]

These cases from the eighties, especially those concerning prisons and the military, reflect the reluctance to protect free exercise that culminated in *Smith*. But the Court did not write any of these opinions by watering down the compelling interest test. Instead, it repeatedly held that the test did not apply, finally making this the general rule in *Smith*. It is this refusal to apply the rule that RFRA reverses. Under RFRA, the

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95. U.S. CONST. amend. I.

96. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.").

97. Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

98. *See infra* text accompanying notes 188-206 (discussing RFRA's application to prisons).

99. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986).

100. *Lyng*, 485 U.S. at 453.

101. *Bowen*, 476 U.S. at 699-700.

102. *See infra* text accompanying notes 105-12 (discussing the term "substantially burden" in the context of the internal operation of government).

103. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990).

compelling interest test applies, and it applies in the full rigor of *Sherbert*, *Yoder*, and the other cases that actually applied the test.

B. Substantially Burden

The level of scrutiny under RFRA is strict, but that scrutiny applies only to government action that "substantially burdens" the exercise of religion.[104] Insignificant burdens on religious exercise, as well as significant burdens on activities that are not religious exercise, fall outside RFRA's protections.

Some government actions, though devastating to religions in which believers may suffer for the acts of others,[105] may not "burden" religious exercise. For example, both *Bowen v. Roy*[106] and *Lyng v. Northwest Indian Cemetery Protection Ass'n*[107] suggest that RFRA would have little effect on cases that involve the use of government property. *Lyng* held that the construction of mining or logging roads over public lands, sacred to a Native American religion but owned by the government, did not burden the Native Americans' free exercise rights.[108] *Bowen* held that using Social Security numbers when administering food stamps and other welfare benefit programs does not burden the free exercise rights of Native Americans who believe that using such numbers will harm their spirits.[109] In sharp contrast, there were five votes for the proposition that the believer herself could *not* be required to use the Social Security number when applying for benefits.[110]

The simplest way to understand the holdings in *Bowen* and *Lyng* is the Court's statement that plaintiffs "may not demand that the Government join

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104. *See* HOUSE REPORT, *supra* note 11, at 7 ("The compelling . . . interest test should be applied to all cases where the exercise of religion is substantially burdened."); SENATE REPORT, *supra* note 11, at 9 ("[O]nly governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act.").

105. *See* David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 776-97 (1991) (distinguisbing volitional and nonvolitional religions). "Nonvolitionists acknowledge the possibility that some religious consequences for individuals may be caused by activities or events over which they had no free choice or control." *Id.* at 777.

106. 476 U.S. 693 (1986).

107. 485 U.S. 439 (1988).

108. *Id.* at 447-53.

109. *Bowen*, 476 U.S. at 699-701.

110. *See id.* at 713-16 (Blackmun, J., concurring in part) (voting to remand for a determination whether the refusal to furnish the number was moot in light of the holding that the government could use a number it had already assigned, but stating that if the issue were not moot, the government could not withhold benefits because of a religiously motivated refusal to furnish a Social Security number); *id.* at 726-33 (O'Connor, J., joined by Brennan and Marshall, J.J., dissenting in part) (arguing that the government could not withhold benefits because of a religiously motivated refusal to furnish a Social Security number); *id.* at 733 (White, J., dissenting) (arguing that the case was controlled by Thomas v. Review Bd., 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963)).

in their chosen religious practices."[111] That is, government does not have to preserve its property for religious use or itself refrain from using numbers that some religions forbid. In the Court's view, government's refusal to practice a religion places no cognizable burden on that religion. Regardless of one's opinion about these cases, the Senate Committee said that RFRA does not affect them.[112] Native Americans have recognized this limit on the reach of RFRA and have included an explicit provision about land use and sacred sites in the proposed Native American Free Exercise of Religion Act.[113]

In general, RFRA applies when the government burdens religious organizations or the religiously motivated behavior of believers. However, the language in the *House Report* is more general: "All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill."[114] This and similar language in the report[115] is apparently designed to cover an unusual set of cases that played a prominent role in the committee hearings: cases of autopsies performed on decedents who held, or whose families hold, religious objections to mutilation of the body of the deceased.[116] The government does not actually regulate or coerce the behavior of either the decedent or his family in the autopsy cases, yet it was plain to anyone who attended the hearings in either house that the committee members were moved by these cases and meant to subject them to the Act.[117] By

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111. *Lyng*, 485 U.S. at 448 (quoting *Bowen*, 476 U.S. at 699-700).

112. SENATE REPORT, *supra* note 11, at 9; *see also* 139 CONG. REC. S14,365 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch); 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993) (colloquy of Senators Hateh and Grassley) (both repeating the point).

113. S. 1021, 103d Cong., 1st Sess. tit. I (1993).

114. HOUSE REPORT, *supra* note 11, at 6.

115. [T]he definition of governmental activity covered by the bill is meant to be all inclusive. . . . In this regard, in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefita and privilegea enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.

Id.

116. *See* Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (withdrawing an opinion granting summary judgment to the plaintiffs on a First Amendment challenge and ruling instead that, under *Smith*, the plaintiffs had no basis for a free exercise claim), *reprinted in Senate Hearing*, *supra* note 15, at 10; *House Hearings*, *supra* note 49, at 112; *Senate Hearing*, *supra* note 15, at 14-17 (statement of William Yang); *House Hearings*, *supra* note 49, at 107 (statement of William Yang) (both explaining the Hmong community's religious objections to autopsies and relating instances of autopsies performed on his own nephews); *see also* Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990) (rejecting a free exercise claim based on Jewish objections to autopsy), *aff'd mem.*, 940 F.2d 661 (6th Cir. 1991).

117. *See, e.g.*, *House Hearings*, *supra* note 49, at 116 (remarks of Rep. Edwards) (noting that William Yang's testimony had provided "new insight into the importance of the legislation").

performing an autopsy, the government had acted in a tangible and temporal way on the believer's body or on a body to which believing next of kin were entitled. This temporal and external impact distinguishes the autopsy cases both from *Lyng*, in which the government physically changed its own property, and *Bowen*, in which the feared effect was spiritual and supernatural. The House committee's distinction between internal and external impact seems designed to capture this distinction.

On other "burden" issues, courts are again encouraged to look to prior free exercise cases for guidance.[118] Burden issues arise in many contexts. But in general, if an exercise of religion is prohibited, penalized, discriminated against, or made the basis for a loss of entitlements, courts should find a substantial burden.[119]

Of course, the argument remains that some cases in which no burden was found were wrongly decided under the general standard. For example, the holding in *Mozert v. Hawkins County Board of Education*—that there was no burden from mere exposure to portions of a textbook that implicitly rejected students' religious views[120]—disregarded the court's own statement of the facts: the parents' religion forbade them to permit their children to read these books.[121] Similarly, it has been suggested that the plaintiffs in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[122] might have prevailed, even within the Court's property rights analysis, by showing that they had been deprived of a common-law easement to use the land for religious purposes.[123]

C. *Exercise of Religion*

A third set of issues grows out of underlying questions about what is meant by "exercise of religion." The Act defines "exercise of religion" as "the exercise of religion under the First Amendment,"[124] but prior constitutional cases provide no single or comprehensive definition.[125]

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118. HOUSE REPORT, *supra* note 11, at 6-7; SENATE REPORT, *supra* note 11, at 8-9.

119. *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) (proposing a test of loss of entitlement or government action analogous to that which would be actionable at common law if done by a private citizen).

120. 827 F.2d 1058, 1070 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

121. *Id.* at 1061.

122. 485 U.S. 439 (1988), *discussed supra* notes 107-08, 111 and accompanying text.

123. Lupu, *supra* note 119, at 973-74.

124. 42 U.S.C. § 2000bb-2(4) (Supp. V 1993).

125. The Congressional Research Service elaborated on this point in a memorandum collecting all the various language used by the Supreme Court to describe constitutionally protected religious exercise. Letter from the American Law Division of the Congressional Research Service to the Honorable Stephen J. Solarz (June 11, 1992) [hereinafter CRS Letter], *in House Hearings*, *supra* note 49, at 131, 131-33 ("The cases indicate that the Court, although frequently finding the religious practice in question to have been compelled or commanded by religious belief, has not been limited to any particular formula in describing what constitutes religious exercise for First Amendment purposes.").

Probably no such definition is possible. Different religions have different views of what constitutes religious exercise; the scope of the religious mission is itself a religious question. But the legislative history provides some insight into the congressional understanding of religious exercise.

1. Religious Motivation.—Congress debated the scope of religious exercise principally in terms of a side issue about abortion. Pro-life opponents of the original bill feared that RFRA would create a statutory right to abortion if *Roe v. Wade*[126] were overruled.[127] The plausibility of that fear depended on whether abortion could be presented as a religious choice. In a few narrow circumstances, mostly involving threats to the mother's life, some religions teach a duty to abort.[128] A somewhat larger group of women might claim that their religious beliefs somehow contributed to their decision to seek an abortion.[129] More alarming still to pro-life groups, many religious groups teach that abortion is permissible, and some of them argue that choosing abortion is a matter of religious liberty, either because different faiths disagree about the permissibility of abortion, or because there is a duty to act conscientiously.[130]

For example, in *Smith*, the majority spoke of the exercise of religion in terms of "acts or abstentions . . . engaged in for religious reasons, or . . . because of the religious belief that they display," Employment Div. v. Smith, 494 U.S. 872, 877 (1990); "an act that his religious belief forbids (or requires)," *id.* at 878; "religiously motivated action," *id.* at 881; "conduct . . . accompanied by religious convictions," *id.* at 882; and "actions thought to be religiously commanded," *id.* at 888. CRS Letter, *in House Hearings*, *supra* note 49, at 133. In a concurrence, Justice O'Connor spoke of the exercise of religion as including "conduct motivated by sincere religious belief," *Smith*, 494 U.S. at 893, 897 (O'Connor, J., concurring); "conduct mandated by an individual's religious beliefs," *id.* at 893 (O'Connor, J., concurring); "religiously motivated conduct," *id.* at 893, 894, 898 (O'Connor, J., concurring); and "religious duties," *id.* at 901 (O'Connor, J., concurring). CRS Letter, *in House Hearings*, *supra* note 49, at 133. The Congressional Research Service also quoted the following language from Supreme Court cases that refer to religious exercise more in terms of motivation than compulsion: "motivated by a religious belief," Cleveland v. United States, 329 U.S. 14, 20 (1946); "action . . . in accord with one's religious convictions," Braunfeld v. Brown, 366 U.S. 599, 603 (1961); "following the precepts of her religion," Sherbert v. Verner, 374 U.S. 398, 404 (1963); "rooted in religious belief," Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). CRS Letter, *in House Hearings*, *supra* note 49, at 131-32. All ellipses in this footnote are by the Congressional Research Service.

126. 410 U.S. 113 (1973).

127. *E.g.*, *House Hearings*, *supra* note 49, at 7-8 (remarks of Rep. Hyde); *Senate Hearing*, *supra* note 15, at 106-10 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference).

128. *See House Hearings*, *supra* note 49, at 134 (remarks of Rep. Solarz); *id.* at 416-17 (statement submitted by David Zwiebel, Director of Government Affairs, Agudath Israel of America) (both reporting that Judaism requires abortion when it is necessary to preserve the life of the mother).

129. *See id.* at 137 (remarks of Rep. Hyde, quoting the plaintiff in Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992) (reporting Jane L.'s claim that "it would be wrong for me to have another baby at this point")); *id.* at 454-55 (reprinting the "affirmation" that includes Jane L.'s statement).

130. *See id.* at 287-89 (James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc., collecting statements of various denominational organizations and of the Religious Coalition for Abortion Rights).

It was principally the abortion debate that made it impossible to draft a more specific definition of "exercise of religion." But the legislative history is relatively clear. In both the House and Senate hearings, supporters and opponents agreed that the bill would protect conduct that was religiously "motivated."[131] Pro-life witnesses opposed to the bill urged an amendment that would restrict coverage to conduct "compelled" by religion.[132] But witnesses supporting the bill successfully opposed such an amendment. One of us testified in the House that "limiting the bill to conduct that is religiously compelled would impose serious costs on religious liberty,"[133] citing cases[134] in which it had been argued that claimants were not "compelled" to pray,[135] become a minister,[136] lead a group of laypeople within the church,[137] or orient an altar so that the

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131. The following colloquy occurred between Rep. Henry J. Hyde, the leader of the pro-life opposition to the bill, and Rep. Stephen J. Solarz, the bill's lead sponsor:

> Mr. HYDE. We are drawing a statute now, and legislative intent is important. As the chief sponsor, your views on this are critical; and therefore, I would like to know your view rather than just pass the ball to the court. . . .
>
> Does H.R. 2797 protect conduct compelled by religious belief or conduct motivated by religious belief? You see the difference. . . .
>
> Mr. SOLARZ. . . . I would be reluctant to limit it to actions compelled by religion, as distinguished from actions which are motivated by a sincere belief. . . .
>
> Mr. HYDE. Now we are getting to it. All of this stuff about being compelled is really beside the point. It is, someone who says my religion nudges me toward—I think it is compatible with my religion to have an abortion. That is motivated. And that is protected by your bill.
>
> Mr. SOLARZ. No, it isn't.

House Hearings, *supra* note 49, at 136. For similar statements that the standard was meant to be religious motivation and not religious compulsion, see *Senate Hearing*, *supra* note 15, at 108-09 & n.2 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 204 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.); and *House Hearings*, *supra* note 49, at 327-28 (statement of Prof. Douglas Laycock). Mr. Bopp repeatedly quoted a letter from Professors Michael W. McConnell, Douglas Laycock, and Edward McGlynn Gaffney in support of a motivation standard, describing them as "the driving scholarly force behind the RFRA coalition." *Id.* at 285; *Senate Hearing*, *supra* note 15, at 221. Rep. Solarz also quoted the McConnell, Laycock, and Gaffney letter about religious motivation. *House Hearings*, *supra* note 49, at 129 (remarks of Rep. Solarz).

132. *House Hearings*, *supra* note 49, at 285 (statement of Jamea Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.) ("Supporters of the RFRA could, of course, easily resolve this problem by inserting 'compelled by' language in the RFRA."); *Senate Hearing*, *supra* note 15, at 204, 239 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.) ("I challenge members of this Committee and Senator Hatch to suggest that this be limited to 'compelled' and 'forbidden' . . . .").

133. *House Hearings*, *supra* note 49, at 370 (Appendix 2 to statement of Prof. Douglas Laycock).

134. *Id.* at 327-28, 370-71 (statement of Prof. Douglas Laycock and Appendix 2 to that statement).

135. Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

136. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1123 (Wash.), *cert. denied*, 493 U.S. 850 (1989).

137. Dorr v. First Ky. Nat'l Corp., unreported (W.D. Ky.), *rev'd*, 41 Fair Empl. Prac. Cas. (BNA) 421 (6th Cir.), *vacated*, 42 Fair Empl. Prac. Cas. (BNA) 64 (6th Cir. 1986).

priest could face the people.[138]

The example of noncompulsory prayer was included in the most complete explanation of legislative intent on this issue—a written submission for the House hearing record by Representative Stephen J. Solarz, the bill's lead sponsor:

> Were Congress to go beyond the phrasing chosen by the drafters of the First Amendment by specifically confining the scope of this legislation to those practices compelled or proscribed by a sincerely held religions belief in all circumstances, we would run the risk of excluding practices which are generally believed to be exercises of religion worthy of protection. For example, many religions do not require their adherents to pray at specific times of the day, yet most members of Congress would consider prayer to be an unmistakable exercise of religion.
>
> To say that the "exercise of religion" might include acts not necessarily compelled by sincerely held religious belief is not to say that any act merely consistent with, or not proscribed by one's religion would be an exercise of religion. As I pointed out in my testimony, it would not be reasonable to argue, for example, that a person whose religion did not proscribe the possession of a machine gun had a free exercise right to own one notwithstanding the applicable federal laws.
>
> The Religious Freedom Restoration Act avoids codifying either extreme by protecting the "exercise of religion," a term sufficiently familiar to the courts to provide a useful framework for application of the Act. RFRA follows the sensible approach of the First Amendment by leaving to the courts the job of determining, on a ease-by-ease basis, whether or not a particular practice is indeed an exercise of religion.[139]

Problems of mixed motivation were left to case-by-case decisions; however, the abortion debate suggested that the religious motive must be an important or substantial part of the motivation. The bill's opponents feared that women would offer religious rationalizations for abortions that were principally motivated by economics, career opportunities, or personal convenience.[140] In both the House and Senate, opponents offered the example of a plaintiff who claimed that she "could not, morally, continue in school and have too little time to devote to a newborn."[141] One of us

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138. Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990).

139. Letter from Rep. Stephen J. Solarz to Rep. Don Edwards (June 22, 1992), *in House Hearings*, *supra* note 49, at 128, 129-30.

140. *See House Hearings*, *supra* note 49, at 136 (colloquy between Rep. Hyde and Rep. Solarz), *quoted supra* note 131.

141. *Senate Hearing*, *supra* note 15, at 107 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference, quoting the plaintiff in Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah

responded directly to this example as well as to Representative Hyde's concern that the bill would protect someone whose religion merely "nudges"[142] her toward an abortion:

> [W]hat does motivated mean? It means because of her religion. It is not enough to say permitted by her religion. It is not enough to say abortion is consistent with her religion. Religion has to be the reason for her abortion. It has to be the motive, not nudged by, not a lot of personal reasons and a little bit of a religious reason, not I wanted a career so I talked to my minister and he said go ahead.
>
> . . . [T]he dominant motive has to be religious.[143]

The hearings in the 102d Congress contained the last major debate over the choice between "religiously compelled" and "religiously motivated" as the meaning of religious exercise. The abortion issue that drove this debate had become substantially moot after *Planned Parenthood v. Casey*[144] and the election of President Clinton removed the prospect of overruling *Roe*,[145] so the debates in the 103d Congress did not retrace this ground.

2. *Institutional Free Exercise.*—"Exercise of religion" also has a corporate element. RFRA protects the rights of any "person,"[146] and under the terms of the Dictionary Act, this term includes organizations.[147] A burden on the operation of a religious institution, or an interference with the institution's internal operation, is a burden on the exercise of religion. But a religious institution, such as a church, synagogue, school, or social service agency, should not have to prove that every detail of its operation has an independent religious motivation. Rather, it should be enough to prove that the institution as a whole has a primary religious motivation and that the government is burdening or interfering with an integral part of the institution's operation. When government interferes with a church's control of its own employees,[148] when zoning laws make it difficult or impossible for a church to find a place to worship,[149] or when the demands

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1993)); *see also House Hearings*, *supra* note 49, at 272 (testimony of James Bopp, Jr., General Counsel, National Right to Life Committee, Inc.) (slightly misquoting the same claim).

142. *House Hearings*, *supra* note 49, at 136.

143. *Id.* at 327 (testimony of Prof. Douglas Laycock).

144. 112 S. Ct. 2791 (1992).

145. HOUSE REPORT, *supra* note 11, at 8; SENATE REPORT, *supra* note 11, at 12.

146. 42 U.S.C. § 2000bb-1 (Supp. V 1993).

147. 1 U.S.C. §1(b) (1988).

148. *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 499-507 (1979) (holding that the NLRB does not have jurisdiction over the lay faculty members at church-operated schools).

149. *See, e.g.*, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (remanding for trial a challenge to a city zoning ordinance that excluded churches from a central business district).

of a government agency force Mother Teresa to close a homeless shelter,[150] religious exercise is burdened.

The legislative history addresses this issue only indirectly, in the recurring examples used to illustrate the need for the Act. Legislators in both houses repeatedly offered examples of burdensome regulation of churches in which the burden fell on the religious institution generally and not on a specific doctrinal tenet. The lead sponsor's testimony in the House cited four examples, two involving specific doctrinal tenets and two involving institutional burdens.[151] The institutional examples were the use of "zoning regulations to exclude houses of worship from certain areas,"[152] and a Massachusetts case in which landmarking laws were applied to a church interior.[153] The *House Report* cites a case in which landmark laws were applied to a church exterior as an example of a law that "burden[s] religion."[154] The zoning example is cited both in the *Senate Report*, quoting from hearing testimony,[155] and in the opening floor statement by Senator Orrin Hatch, one of the two lead sponsors in the Senate.[156] At the signing ceremony, Vice President Albert Gore offered the examples of zoning, landmarking, and autopsies.[157] Finally, one of the first RFRA cases litigated to final judgment struck down a zoning board order to close a church program for feeding the homeless, expressly finding a substantial burden on the institution's religious exercise.[158]

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150. *See* Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, N.Y. TIMES, Sept. 17, 1990, at B1 (reporting that Mother Teresa abandoned a proposed homeless shelter due to a regulation that required the installation of elevator access for people with disabilities). *Compare* First Assembly of God v. Collier County, 20 F.3d 419, 422-24 (11th Cir. 1994) (holding that an order to close a church shelter for the homeless does not violate the Free Exercise Clause), *opinion modified on petition for rehearing*, 27 F.3d 526 (11th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3388 (U.S. Nov. 1, 1994) (No. 94-791) *with* Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 545-47 (D.D.C. 1994) (holding that an order to close a church feeding program for the homeless substantially burdens religion and violates RFRA), *notice of appeal filed*, No. 94-7189 (D.C. Cir. Sept. 20, 1994).

151. *House Hearings*, *supra* note 49, at 122 (statement of Rep. Solarz).

152. *Id.* (citing *Cornerstone*, 948 F.2d at 464).

153. *Id.* (citing Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990)).

154. HOUSE REPORT, *supra* note 11, at 6 n.14 (citing Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990)).

155. SENATE REPORT, *supra* note 11, at 8 (quoting the statement of Oliver S. Thomas on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee).

156. 139 CONG. REC. S14,353 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

157. "Those whose religion forbids autopsies have been subjected to mandatory autopsies. Those who want churches close to where they live have seen churches zoned out of residential areas. Those who want the freedom to design their churches have seen local governments dictate the configuration of their building." Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18 (quoting Vice President Gore).

158. Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 545-47 (D.D.C. 1994), *notice of appeal filed*, No. 94-7189 (D.C. Cir. Sept. 20, 1994).

"Exercise of religion" thus has two main components: the religiously motivated conduct of individuals and the operations of religious organizations.

IV. Concerns Raised About the Act

A. Abortion

The most significant criticism directed toward RFRA concerned abortion.[159] The United States Catholic Conference[160] and the National Right to Life Committee maintained that if *Roe v. Wade*[161] were overturned (an event many experts believed to be imminent from 1990 to 1992[162]), RFRA could be used to challenge subsequent restrictions on abortion.[163] Specifically, it was alleged that a woman might, after consulting with her minister or rabbi, claim that her religious convictions led her to seek an abortion and, therefore, that an anti-abortion law burdened her religious exercise under RFRA. Critics of the Act cited the decision in *McRae v. Califano*,[164] in which the district court upheld a free exercise challenge to the Hyde Amendment, a ban on federal funding for abortions. Although this decision was reversed on appeal,[165] and no other reported decisions had recognized such a right, both the Catholic Conference and the National Right to Life Committee argued that the risk of such a claim under RFRA was sufficient to warrant opposition to the bill.[166]

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159. For another manifestation of the abortion debate, see *supra* notes 126-32, 140-45 and accompanying text (discussing abortion's role in the debate over the scope of religious exercise).

160. The United States Catholic Conference is the public policy arm of the National Conference of Catholic Bishops. *House Hearings*, *supra* note 49, at 33 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference).

161. 410 U.S. 113 (1973).

162. By 1989, five Justices had appeared to say that the state had a compelling interest in protecting fetal life during all stages of pregnancy. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 519 (1989) (plurality opinion of Rehnquist, White, and Kennedy, JJ.); *id.* at 532 (Scalia, J., concurring); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., concurring). President Bush, who had campaigned on a pro-life platform, thereafter appointed Justices Souter and Thomas, which might have been expected to make as many as seven votes against *Roe*.

163. *House Hearings*, *supra* note 49, at 33-35, 40-43 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 270-307 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.); *Senate Hearing*, *supra* note 15, at 99-115 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 203-37 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.).

164. 491 F. Supp. 630, 741-42 (E.D.N.Y.), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).

165. The Supreme Court found that the plaintiffs lacked standing to assert such a challenge. Harris v. McRae, 448 U.S. 297, 320-21 (1980).

166. *See supra* note 163. The Congressional Research Service concluded that it was "improbable" that the enactment of RFRA could lead to a successful challenge to state limitations on abortion. Memorandum from the American Law Division, Congressional Research Service to Honorable Bill McCollum 1 (July 2, 1991) (on file with the *Texas Law Review*); *accord* David M. Ackerman, *The*

As a result of this opposition, lead Republican sponsors Representative Paul Henry of Michigan and Representative Henry Hyde of Illinois withdrew their support for the bill.[167] At the same time, Representative Chris Smith, a New Jersey Republican, introduced the Religious Freedom Act.[168] Although identical in most respects to RFRA, Smith's bill included a provision stating that "[n]othing in this Act shall be construed to authorize a cause of action by any person to challenge . . . any limitation or restriction on abortion, on access to abortion services or on abortion funding."[169]

The abortion argument was premised on the assumption that *Roe* would be overturned.[170] When the Supreme Court's decision in *Planned Parenthood v. Casey*[171] made it clear that *Roe* would remain viable for the foreseeable future, the way was paved for a compromise acceptable to the Catholic bishops.[172] The compromise language, agreed to by all of the bill's lead sponsors, appears in both the House and Senate reports and reads as follows:

> There has been much debate about this bill's relevance to the issue of abortion. Some have suggested that if *Roe v. Wade* were reversed, the bill might be used to overturn restrictions on abortion. The Congressional Research Service is unpersuaded that this would be the case, and the Committee is similarly unpersuaded. In short, the abortion debate will be resolved in contexts other than this legislation. Furthermore, the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which describes how to resolve claims relating to abortion under the Constitution, renders discussions about the bill's application to abortion increasingly academic. To be absolutely clear, the bill does not expand,

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Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis, CRS REPT. FOR CONGRESS (Congressional Research Service, Washington, D.C.), Apr. 17, 1992, at 28-29. Pro-life scholars W. Cole Durham, Jr., Edward McGlynn Gaffney, and Michael W. McConnell reached a similar conclusion. Letter from Michael W. McConnell, Professor of Law, University of Chicago, et al., to Concerned Members of Congress 3-4 (Dec. 10, 1991) (on file with the *Texas Law Review*). Finally, many pro-life groups actively supported the bill, including Christian Action Council; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Coalitions for America; Concerned Women for America; Church of Jesus Christ of Latter-day Saints; Home School Legal Defense Association; National Association of Evangelicals; and Traditional Values Coalition. *See Senate Hearing*, *supra* note 15, at 152 (statement of Michael P. Farris, President, Home School Legal Defense Association). The Christian Action Council supported the bill, but did not join the Coalition.

167. *See* H.R. 2797, 102d Cong., 1st Sess. (1991), *reprinted in House Hearings*, *supra* note 49, at 2 (listing 42 sponsors, not including Henry or Hyde).

168. H.R. 4040, 102d Cong., 1st Sess. (1991).

169. *Id.* § 3(c)(2)(C).

170. *See supra* notes 160-63 and accompanying text.

171. 112 S. Ct. 2791 (1992).

172. Letter from Frank J. Monahan, Director, United States Catholic Conference, to Senator Edward M. Kennedy (Mar. 9, 1993) (on file with the *Texas Law Review*).

> contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudenee, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*.[173]

As a result of this agreed-upon language, Representative Henry Hyde—Congress's most notable abortion opponent[174]—endorsed the bill.[175]

B. Tax Exemption and Government Funding for Religious Institutions

The United States Catholic Conference also feared that RFRA could be used to challenge both tax exemptions and government funding for religious organizations. With respect to tax exemptions, the bishops feared a repeat of the protracted litigation that had culminated in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*,[176] in which pro-choice groups had challenged the tax-exempt status of all organizations connected with the Roman Catholic Church.[177] With respect to government funding, they feared that the Act would threaten the Church's participation in programs funding social services.[178]

The Coalition for the Free Exercise of Religion and the bill's lead sponsors, not wishing to enact legislation that could be used offensively as a weapon against religious institutions, sought to alleviate these concerns by including in Section 3(c) a provision on standing: "Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."[179] Because Article III standing has never been conferred upon plaintiffs wishing to assert free exercise challenges to tax exemption[180] or government funding,[181] it

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173. HOUSE REPORT, *supra* note 11, at 8 (citation omitted). Substantially identical language appears in SENATE REPORT, *supra* note 11, at 12.

174. Rep. Hyde is most famous for the Hyde Amendment, which precludes federal funding for medieally necessary abortions. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding the amendment); *id.* at 302-03 (describing the amendment).

175. *See* 139 CONG. REC. H2357-58 (daily ed. May 11, 1993).

176. 487 U.S. 72 (1988).

177. *Id.* at 74-75; *see also* Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982), *reconsideration denied*, 603 F. Supp. 970 (S.D.N.Y. 1985), *rev'd sub nom. In re* United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 495 U.S. 918 (1990).

178. *Senate Hearing*, *supra* note 15, at 110-14 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference).

179. 42 U.S.C. § 2000bb-1(c) (Supp. V 1993).

180. *Cf.* Allen v. Wright, 468 U.S. 737, 752-66 (1984) (holding that black plaintiffs lack standing to challenge the tax exempt status of segregated private schools); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37-46 (1976) (holding that indigent plaintiffs lack standing to cballenge the tax exempt status of a hospital that refuses nonemergency care to indigents); *In re* United States Catholic Conference, 885 F.2d 1020, 1024-31 (2d Cir. 1989) (holding that pro-choice clergy, taxpayers, voters, and advocacy organizations all lack standing to challenge the tax exemption of Roman Catholic organizations), *cert. denied*, 495 U.S. 918 (1990).

181. *See* Flast v. Cohen, 392 U.S. 83, 104 n.25 (1968) (refusing to decide whether the plaintiffs had standing to challenge government spending under the Free Exercise Clause). *Compare*

was thought that the bishops' concerns had bcen successfully addressed.[182]

But Catholic leaders continued to express concern that the Act might be misinterpreted to permit such challenges.[183] In order to clarify the matter once and for all, the bill was amended prior to being marked-up in the 102d Congress.[184] The amendment stated: "Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter."[185] This provision supplements language that states, "Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the 'Establishment Clause')."[186] As a result of these changes, along with the House and Senate compromise language concerning abortion, the United States Catholic Conference endorsed the bill.[187]

C. *Prisons*

The final dispute about RFRA concerned the Act's application to prisons. In a letter dated May 5, 1993, Florida Attorney General Robert Butterworth, along with numerous other state attorneys general, wrote each member of the Senate Judiciary Committee to express concern that the bill would jcopardize order and security if applied to prisons.[188] The letter proposed amending the bill to exempt prisons.[189] This amendment would have provided that prison restrictions burdening a prisoner's exercise of religion would be upheld if "reasonably related to a legitimate penological interest."[190] However, even this limited protection would apparently have bcen superseded by the further provision that "all aspects of the

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Massachusetts v. Mellon, 262 U.S. 447, 486-89 (1923) (holding that taxpayers lack standing to challenge the expenditure of federal funds) *with Flast*, 392 U.S. at 104, 101-06 (holding that taxpayers can challenge expenditures under the Establishment Clause, because that Clause "operates as a specific constitutional limitation upon the . . . taxing and spending power").

182. The Congressional Research Service concluded in its April 17, 1992 memorandum that the concerns expressed about the tax exemption of religious bodies and about their participation in government funding programs were unwarranted. Ackerman, *supra* note 166, at 25-27.

183. *House Hearings*, *supra* note 49, at 39 (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference).

184. HOUSE REPORT, *supra* note 11, at 15-16 (additional views of Rep. Hyde, et al.).

185. 42 U.S.C. § 2000bb-4 (Supp. V 1993).

186. *Id.*

187. *See supra* note 172.

188. Letter from attorneys general (May 5, 1993), *in* SENATE REPORT, *supra* note 11, at 25 (appended to additional views of Sen. Simpson).

189. *Id.* at 27-28.

190. *Id.* at 27.

administration and operation of local, state, and federal correctional facilities constitute a 'compelling state interest.'"[191]

The bill's sponsors, as well as the Coalition supporting the bill, took issue with these attorneys general. First, they felt strongly that Congress had no business picking and choosing which religious claims should be protected and which should not. They insisted instead on a unitary standard for evaluating all free exercise claims.[192] Although context was important, the Coalition argued that no group or institution should be completely exempted from the compelling interest test. The congressional sponsors agreed.[193] Second, the religious wing of the Coalition believed that religion plays a vital role in the rehabilitative process for some inmates and therefore that prisons—above all other governmental institutions—should accommodate religious exercise when possible.[194]

Finally, the bill's supporters feared that an exemption for prisons would lead to other exemptions, possibly jeopardizing the bill's passage.[195] Similar exemptions had already been demanded by pro-life groups, public schools, landmark commissions, and other interest groups.[196] For that reason, the bill's supporters felt that a blanket exemption for prisons was politically untenable.

However, the most significant opposition to the proposal of the state attorneys general came not from the Coalition, but from Janet Reno, Attorney General of the United States. Because she oversees the nation's largest prison system, numerous senators and representatives solicited her opinion on the issue. In a May 5 letter to Senator Joseph Biden, Chairman of the Senate Judiciary Committee, and a May 11 letter to Representative Jack Brooks, Chairman of the House Judiciary Committee, Reno made clear that an exemption for prisons was both unnecessary and unwarranted.[197] Her

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191. *Id.* at 28.

192. *See* SENATE REPORT, *supra* note 11, at 9 (stating that RFRA "would establish one standard for testing claims of Government infringement on religious practices").

193. *See id.* at 9-10.

194. *See* 139 CONG. REC. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch).

195. Letter from Douglas Laycock, Professor and Associate Dean, University of Texas Law School, to Senator Edward M. Kennedy 2-3 (June 15, 1993); Letter from Douglas Laycock, Professor and Associate Dean, University of Texas Law School, to Senator Orrin Hatch 2-3 (June 15, 1993) (both on file with the *Texas Law Review*).

196. *See, e.g.*, Letter from Michael W. McConnell et al., to Concerned Members of Congress, *supra* note 166, at 2 (discussing demands in Congress for amendments with respect to taxation, public funding, and abortion, and demands within the Coalition for amendments with respect to prisons, the military, sex discrimination, public schools, animal rights, and land development); Letter from Richard Noe, President, National Trust for Historic Preservation, to Senator Edward M. Kennedy (July 13, 1993) (on file with the *Texas Law Review*) (seeking legislative history or an amendment that could lay the basis for later arguing that the Act has no effect on landmark laws).

197. Letter from Janet Reno, Attorney General of the United States, to Senator Joseph Biden, Jr., Chairman of the Senate Judiciary Committee (May 5, 1993) (on file with the *Texas Law Review*); Letter from Janet Reno, Attorney General of the United States, to Representative Jack Brooks, Chairman of

letter, critical to the unanimous vote in the House of Representatives,[198] read as follows:

> Dear Mr. Chairman:
>
> As you know, I strongly support H.R. 1308, the Religious Freedom Restoration Act of 1993 and urge its swift enactment. . . .
>
> Concerns have been expressed that the standard of review of H.R. 1308 will unduly burden the operation of prisons and that the bill should be amended to adopt a standard more favorable to prison administrators when confronted with the religious claims of prisoners. These concerns have been presented by knowledgeable and sincere individuals for whom I have great respect, but I respectfully disagree with their position and urge the Committee to approve the bill without amendment.
>
> . . . .
>
> Prisons had operated under *Sherbert* for a number of years before *O'Lone* and *Turner* adopted a standard that is plainly less accommodating to the prisoners' exercise of religious rights. . . .
>
> In my view the four dissenters in *O'Lone* had the better of the argument. They would have required prison administrators to demonstrate that the restrictions imposed in the case—preventing certain Muslims from attending a religious service central to their faith—furthered a compelling government interest and were no greater than necessary to achieve legitimate penological objectives. This standard parallels that incorporated in H.R. 1308.
>
> Certainly, the strong interest that prison administrators and society in general have in preserving security, order, and discipline in prison will receive great weight in the determination whether the government meets the compelling interest test when there is a claim that exercise of religious rights is burdened and whether it has pursued the least restrictive means of doing so. Activities that are presumptively dangerous or carry a demonstrable likelihood of jeopardizing discipline within a prison will continue to be subject to regulation after enactment of H.R. 1308.
>
> Likewise, prison administrators will retain authority, in many instances, to regulate the time, place, and manner of an inmate's exercise of religion. Restrictions that do not deny inmates the opportunity to engage in otherwise permissible religious practice, but merely require them to pursue such activities within the context of

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the House Judiciary Committee (May 11, 1993), *in* 139 CONG. REC. H2358-59 (daily ed. May 11, 1993).

198. *See* 139 CONG. REC. H2359-61 (daily ed. May 11, 1993) (statements of Representatives Hughes, Schumer, and Hoyer) (all thanking Reno for her support). The judgment that her support was critical is Mr. Thomas's.

> prison life, likely will not substantially burden inmates' free exercise rights and will be permissible.[199]

The dispute over RFRA's application to prisons was ultimately resolved through legislative history rather than through an explicit statutory exemption. This legislative history indicates that the Senate Judiciary Committee expected context to play an important role when applying RFRA to specific cases. Although the Committee recognized that threats to safety and security pose a unique risk in prisons, and that the government has a compelling interest in responding to bona fide dangers,[200] it nevertheless insisted that prison authorities prove the existence of actual dangers when religious liberty is at stake.[201] The Committee also recognized that prisons are uniquely likely to produce frivolous and insincere claims and that courts must recognize such claims for what they are and be quick to dismiss them.[202] But neither the Committee nor Congress was willing to give prisons a blanket exemption or to dismiss the serious claims along with the frivolous ones.

Despite the Committee's recognition of prisons' special problems, some senators and state attorneys general continued to maintain that RFRA would impose undue hardships on prison authorities. Consequently,

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199. Letter from Janet Reno to Senator Joseph Biden, Jr., *supra* note 197; Letter from Janet Reno to Representative Jack Brooks, *supra* note 197 (both citing Sherbert v. Verner, 374 U.S. 398 (1963) (applying the compelling interest test to free exercise cases); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (announcing a test requiring a reasonable relationship to legitimate penological objectives in prison free exercise cases, and upholding a prison practice whereby work assignments prevented Muslims from attending weekly worship services); Turner v. Safley, 482 U.S. 78 (1987) (announcing a similar standard for prisoners' rights cases generally)).

200. SENATE REPORT, *supra* note 11, at 10 ("[T]he committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.").

201. *Id.* ("At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the Act's requirements."). The *Senate Report* also stated:

> As applied in the prison and jail context, the intent of the act is to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone v. Estate of Shabazz*. Prior to *O'Lone*, courts used a balancing test in cases where an inmate's free exercise rights were burdened by an institutional regulation; only regulations based upon penologieal concerns of the "highest order" could outweigh an inmate's claims.

Id. at 9-10; *see also id.* at 10 (stating that even in the prison context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" (quoting Weaver v. Jago, 675 F.2d 116, 119 (6th Cir. 1982) (quoting Kennedy v. Meacham, 540 F.2d 1057, 1061 (10th Cir. 1976) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972))))).

202. *See id.* at 10 ("Whether in the context of prisons or outside it, courts have considered a myriad of claims made under the umbrella of religious rights which are, in reality, designed to obtain special privileges."); *see also id.* at 11 ("The Act has no effect on this settled jurisprudence, thus permitting the courts to make these assessments as they have in the past.").

Senator Alan Simpson and Senator Harry Reid sponsored the following proposed amendment in the Senate:

> Notwithstanding any other provision of this Act, nothing in this Act or any amendment made by this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion, with respect to any individual who is incarcerated in a Federal, State, or local correctional, detention, or penal facility (including any correctional, detention, or penal facility that is operated by a private entity under a contract with a government).[203]

Taken at face value, this amendment would have accomplished nothing—it was a truism.[204] Nothing in RFRA *could* "affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion" with respect to prisoners or any other person. Short of amending the Constitution, Congress simply lacks the constitutional authority to override the Court's interpretation of the First Amendment. RFRA creates a statutory cause of action—nothing more. However, the prison amendment was understood by both sides in the Senate as a blanket exemption—the Act would not apply to prisoners. So understood, it failed by a vote of forty-one to fifty-eight.[205] Even so, RFRA's lead sponsors reassured members that context is important when applying the bill and that prisons generally will have a compelling interest in eliminating nonspeculative risks to safety or security.[206]

V. Conclusion

The Religious Freedom Restoration Act is the most important congressional action with respect to religion since the First Congress proposed the First Amendment. It resembles the great civil rights acts both in its sweep and in its restatement of fundamental principles. Apart from the various laws based on nondiscrimination models, there is no civil liberties statute of comparable importance.

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203. 139 CONG. REC. S14,353 (daily ed. Oct. 26, 1993).

204. The language was apparently borrowed from Section 7 of RFRA, which provides that nothing in the Act would "affect, interpret, or in any way address" the Establishment Clause. 42 U.S.C. § 2000bb-4 (Supp. V 1993). *This* proviso was intended to be a truism; the Act did not affect the Establishment Clause, and Section 7 merely repeated that fact for greater caution. This proviso was supplemented by a more specific provision that "government funding, benefits, or exemptions" permitted by the Establishment Clause were also permitted by the Act. *Id.*

205. 139 CONG. REC. S14,468 (daily ed. Oct. 27, 1993).

206. *See, e.g., id.* at S14,465 (statement of Sen. Hatch, lead Republican sponsor) ("Contrary to what some have suggested, prison officials clearly have a compelling interest in maintaining order, safety, security, and discipline."); *id.* at S14,470 (statement of Sen. Hatch) ("[P]rison administrator's interest in order, safety, security, and discipline [is] going to be deemed compelling, and that is certainly my intention.").

RFRA increases the likelihood of success for religious claims, because government will find it far more difficult to justify restrictions on religious exercise under RFRA's compelling interest test than under *Smith*'s nondiscrimination standard. Bureaucrats may be more likely to accommodate religious exercise when they know that a federal statute requires them to do so in most cases, and by giving religious claimants the bargaining leverage of a viable claim in court, RFRA encourages out-of-court settlements.

RFRA does not appear to have changed the political climate of hostile resistance to religious activity from secular interest groups with competing agendas or from the government agencies that share these agendas. These interest groups and agencies will work diligently to pull the teeth from the Act, urging narrow interpretations of "burden" and "religious exercise" and sweeping, deferential interpretations of "compelling interest." Some of them will challenge the constitutionality of the Act. Whether RFRA achieves its purpose, becomes a dead letter, or results in something in between largely depends on the judicial response to these challenges.

Scott Idleman appears to believe that hostility to religious liberty today is as deep and pervasive as hostility to racial equality in 1871, so that RFRA has no more chance of success today than the Civil Rights Act of 1871 had then.[207] We are not so pessimistic. The contemporary culture wars are real, but they do not look much like race relations in 1871. Unlike the situation in 1871, all the political and economic resources are not on the same side, and enforcing RFRA will not require a sustained military commitment to overcome widespread violence. RFRA does not require anyone to change his way of life; the statutory goal is not to impose religious faith or practice on nonbelievers, but simply to allow believers to practice their various faiths themselves without government interference.

We do agree that RFRA cannot succeed unless it changes the judicial and bureaucratic climate that *Employment Division v. Smith*[208] both reflected and aggravated. The lopsided votes in both houses of Congress should send a strong message to the judiciary that accommodating religious exercise is important. Moreover, the support of sixty-six national religious and civil liberties groups, ranging across the spectrum from conservative to liberal, should lend considerable clout to those who challenge governmental interference with religious exercise.

RFRA is not a mere technical change from *Smith*. Rather, it restores a fundamentally different vision of human liberty. Religious believers acting on their faith are not suspicious characters seeking unprincipled

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207. Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 259-60 (1994). Idleman goes on to develop a worst case scenario of all the possible arguments for invalidating RFRA or construing it into meaninglessness, all the while protesting that he thinks the arguments he develops are incorrect. We agree with his protests.

208. 494 U.S. 872 (1990).

special treatment. They are exercising a fundamental human right, and the American commitment is to let them exercise it unless there is an extraordinary reason to interfere—not a rational reason, or even a substantial reason, but a compelling reason. What is suspicious is not the believer practicing his faith, but the government seeking to stop him. RFRA can achieve its purpose only if the courts enforce this vision.