HB

387

Representative Eric Croft

HB 387
The Alaska Religious Freedom Protection Act

Sponsor Statement

The Alaska Religious Freedom Protection Act (ARFPA) is a state response to United States Supreme Court decisions that have undermined the religious freedoms of Americans in recent years.

The United States and Alaska Constitutions contain nearly identical provisions stating that governments shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof." For most of the nation's history, the "free exercise" clause of the United States Constitution was interpreted to require that governments make reasonable exceptions to general laws if the implementation of those laws impinged on the religious practice of its citizens.

A good example is the case of Wisconsin v. Yoder, 406 U.S. 205 (1972). Members of the Old Order Amish religion allow their children to attend public school until the eighth grade to learn basic reading, writing, and math skills, but then the Amish religion requires the children begin preparation for adult baptism and life under the religious precepts of their faith. Pennsylvania allows Amish children of high school age to attend special vocational schools for three hours and then go home for religious and other instruction. Wisconsin, however, did not allow any exception to the compulsory school attendance law. Frieda Yoder, a 15-year old member of the Old Order Amish religion refused to attend public high school on religious grounds and her father, Jonas, was convicted of violating the law. The United States Supreme Court ruled that the compulsory attendance law violated the free exercise rights of the Yoder family. The Court ruled that the government may place a substantial burden on the free exercise of religion only if the government can show a compelling state interest and that the government's action is the least restrictive means of accomplishing that interest. This is known as the "compelling state interest" test for religious freedom. The Court noted that because the Amish children attended school until the 8th grade the burden on their education was relatively light and that the burden on the religion was proven to be substantial. The Yoder case and others stood for the proposition that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Yoder, 406 U.S. 221; see also Sherbert v. Verner, 374 U.S. 398 (1963).

The constitutional respect for freedom of religion embodied in the "compelling state interest" test was eliminated in 1990 by the United States Supreme Court in Smith v. Emp. Div., 494 U.S. 872 (1990). Justice Scalia, writing for a court divided 5-4, ruled that government no longer had to provide a religious exemption to general laws. "The Court today . . . interprets the [free exercise clause] to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable." Smith, 494 U.S. at 893 (Justice, O'Conner, dissenting).

The Smith decision met a storm of protest. In 1993, a broad bipartisan majority of both houses of Congress passed The Religious Freedom Restoration Act (federal RFRA) and the bill was signed into law by President Clinton. RFRA attempted to use congressional power to restore the "compelling state interest" test for religious freedom. In 1997, the United States Supreme Court ruled that the federal RFRA statute was an unconstitutional extension of federal power. City of Boerne v. Flores, 521 U.S. 507 (1997). The Flores decision effectively left any protection of religious freedom to the individual states. The Alaska Supreme Court has consistently interpreted the free exercise clause of the Alaska Constitution to require a compelling state interest analysis.
See Frank v. State, 604 P.2d 1068 (Alaska 1979) (allowing a religious exemption for the taking of a moose for an Athabaskan funeral potlatch). There is no present indication that the Alaska Supreme Court intends to follow the direction of the Smith decision in interpreting the Alaska Constitution. However, a change in the composition of the court or judicial philosophy could lead to this change in the future.

HB 387, the Alaska Religious Freedom Protection Act (ARFPA), will provide statutory protection for religious freedom in Alaska by enshrining the compelling state interest test for all state, municipal, and school district actions.

HB 387 is not intended to create an establishment of religion or allow a claim of religious freedom to authorize the infringement of the rights of others. It simply recognizes that Alaskans value their religious liberties and are willing to allow an exception from generally applicable laws for religious freedom unless the government shows a compelling state interest.

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

Advocates for Family & Freedom

To: Members of the Alaska House Community and Regional Affairs Committee

From: Chris Klicka

Date: February 29, 2000

Re: House Bill 387, The Alaska Religious Freedom Protection Act

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By way of introduction, the Home School Legal Defense Association is a national organization which has as its primary purpose the protection of the right of parents to direct the education of their children. We presently have more than 66,000 member families in all 50 states and the District of Columbia, with many member families in Alaska. Because the vast majority of our members choose to home school out of religious convictions, the protection of religious freedom is essential to our cause.

The Alaska Legislature has a tremendous opportunity to restore the protection of religious freedom for all citizens in the state. The U.S. Supreme Court, in 1997, denigrated the right of the free exercise of religious beliefs to a second class right. The Alaska Legislature must act now to protect religious liberty. Below are some commonly asked questions about state Religious Freedom Restoration Acts.

What will HB 387, the Alaska Religious Freedom Restoration Act, do?

The Alaska Religious Freedom Restoration Act (RFRA) reestablishes a test which courts must use to determine whether a person's religious belief should be accommodated when a government action or regulation restricts his or her religious practice. Known as the "compelling interest test," this test requires the government to prove with evidence that its regulation is (1) *essential* to achieve a compelling governmental interest and (2) the *least restrictive means* of achieving the government's compelling interest.

For example, in *People v. DeJonge*, a case argued by the Home School Legal Defense Association (HSLDA), a Michigan couple had the religious belief that they as the parents, although they were not certified teachers, should be teaching their children in their home rather than sending them to school. But the state law requiring all teachers to be certified did not permit

the couple to exercise this religious belief. Using the "compelling interest test," the court required the state to show that (1) teacher certification is *essential* to fulfill the state's compelling interest that children be educated and (2) that teacher certification was the *least restrictive means* to fulfill its interest. The state was able show without much difficulty that it had a compelling interest in seeing that its citizens were educated. But because this couple's children were scoring above the 90th percentile on standardized tests, the state could not prove teacher certification was *essential* for children to be educated and the least restrictive means to achieving that end. Thus, because the state could not satisfy the "compelling interest test," the parents were allowed to continue teaching their children according to their religious beliefs.

Why does Alaska need a RFRA?

Prior to 1990 the U.S. Supreme Court used the above test—the "compelling interest test"—when deciding religious claims. However, in a 1990 decision (*Employment Div. of Oregon v. Smith*) the Court tipped the scales of justice in favor of government regulation. The Court threw out the compelling interest test, which had shielded our religious freedom from onerous government regulation for more than 30 years.

The *Smith* decision reduced the standard of review in religious freedom cases to a "reasonableness standard." In other words, if a state regulation is "reasonable" (which they nearly always are), a religious objector loses. While all other fundamental rights (freedom of speech, press, assembly, etc.) remain protected by the stringent "compelling interest test," the Court singled out religious freedom, reducing its protection to the weak "reasonableness test."

In 1993, Congress attempted to remedy the *Smith* decision by enacting the federal Religious Freedom Restoration Act. This Act simply restored the "compelling interest test" in religious freedom cases. Four years later, the federal RFRA was struck down by the U.S. Supreme Court in the 1997 *City of Boerne* case.

As a practical matter, here are a few real-life examples of government restricting the free exercise of religion that have taken place under the "reasonableness test."

a) the long-standing practice of pastor-laity confidentiality has been repeatedly violated;

b) a Catholic hospital was denied accreditation for refusing to teach abortion techniques;

c) among other zoning ordinance conflicts, a church ministry to the homeless was shut down because it was located on the second floor of a building with no elevator;

d) a church was prohibited by a local city ordinance from feeding more than 50 people per day; and

e) Justice Fellowship reports that a Jewish minimum-security prisoner (CPA in jail for fraud, in 6th year of 8-year term) was denied the right to attend high holy day celebrations.

But Hasn't the U.S. Supreme Court already ruled the RFRA unconstitutional?

The 1993 federal RFRA attempted to use Congress' powers under Section 5 of the 14th Amendment to require both the federal and state governments to use the "compelling interest test" in religious freedom cases.

However, when the Supreme Court struck down the federal RFRA in 1997 (*City of Boerne v. Flores*), the problem wasn't with the "compelling interest test." The test had been used, as mentioned earlier, by the U.S. Supreme Court itself for more than 30 years. Rather, while the Supreme Court recognized the legitimacy of the "compelling interest test," it ruled that Congress could not *require* states to use this test in religious freedom cases.

A widely recognized principle of law is that states are free to protect an individual's right with a much higher standard than the U.S. Constitution itself affords. Under this principle and the *Boerne* decision, states are free to enact their own RFRAs, thereby choosing to apply the higher "compelling interest test" standard in their own religious freedom cases.

Should civil rights laws and ordinances be exempted from application of the Religious Freedom Restoration Act?

No. Religious freedom is one of many civil rights which all Americans should be allowed to enjoy. A civil rights exclusion in the RFRA simply makes religious freedom a "second-class" right, subordinate to all other civil rights. Instead, when a religious freedom right conflicts with another civil right, the two rights should be given the same level playing field by a balancing of interests using the compelling interest test.

In some situations, a civil rights law or ordinance should be upheld even when it conflicts with an individual's religious practice, while in other situations, the religious practice should be accommodated. Using the "compelling interest test" provided by HB 387, a court will be able to properly determine whether the government's interest in enforcing a particular civil rights law is compelling enough to override an individual's religious practice. If, however, civil rights laws are exempted from HB 387, religious freedom will *always* be curtailed when it conflicts with civil rights laws, even if the courts could have made a reasonable accommodation.

Will HB 387 create an increase in litigation?

No. This bill will simply restore the "compelling interest test," which the U.S. Supreme Court established almost 40 years ago as the standard of review for fundamental rights cases.

This "compelling interest test" worked well for over 30 years with no explosion of religious freedom cases. The consistent application of the "compelling interest test" in the courts "evened the playing field," giving people of sincere religious faith a fair chance against state regulations that violated their religious beliefs. Many times, both conservative and liberal religious and civil liberty organizations successfully used the "compelling interest test" to defend individuals' rights to freely exercise their religious beliefs.

As mentioned above, the federal RFRA, which restored the "compelling interest test" in religious freedom cases, was effective from its enactment in 1993 until the U.S. Supreme Court struck it

down in 1997. There is no record of an explosion in religious freedom litigation during this four-year period.

Furthermore, eight states have formally passed RFRAs to specifically restore the application of the "compelling interest test" in religious freedom cases (AL, IL, FL, TX, AZ, CT, RI, and SC). Seven more states, through state court precedents, have established a "compelling interest test" independent of the U.S. Supreme Court's damaging precedence in *Smith* and *Boerne*. (KS, MA, MN, VT, WA, WI, and MI.) None of these 15 states are experiencing an explosion in free exercise litigation.

Based on the lack of examples of excessive litigation during the almost 30 years of experience of using the "compelling interest test" for religious liberty (both before the *Smith* decision and during the federal RFRA years), we believe that restoring this test will generate very little, if any, new litigation. In fact, clarifying the standard for religious liberty under state law may prove to *reduce* the amount of litigation, because a clearly defined legal standard often leads parties to settle disputes before litigation ensues.

Will the passage of HB 387 result in a huge increase in litigation against local governments? Will this also increase the costs for the attorney general's office in defending state officials?

No. The same arguments above apply. The "compelling interest test" is not new. It has been in effect for most of the last 40 years. Local governments and state officials have not been inundated with religious freedom suits.

None of the eight states that have passed state RFRA have experienced any explosion of religious liberty cases, including Rhode Island where the law is seven years old The "compelling interest test" is time-tested.

Furthermore, the "compelling interest test" is simply a "balancing test." It does not give religious claimants an automatic win. It only "evens the playing field" for the little guy.

Is it acceptable to exclude certain people, such as prisoners, from protection under HB 387?

No. As an inalienable right, religious liberty should not be denied to any class of persons. Home School Legal Defense Association urges states not to deny the protections of a state RFRA to anyone (including prison inmates). Religious liberty is diminished for all if it is denied to any. Once the government excludes one politically unpopular group, it is all too easy to exempt others. Of the states that have enacted RFRAs to date, none has found the need to exclude anyone.

But won't HB 387 create an explosion in frivolous cases filed by prisoners?

No. Studies show no sudden surge in religious freedom litigation filed by prisoners during the four years of the federal RFRA demonstrate there was no explosion of cases. Justice Fellowship compiled the following data (provided by the Statistical Division of Administrative Office of the U.S. Courts):

- Prisoner RFRA cases for the years 1995–1996 accounted for about one-tenth of one percent (0.01%) of cases in U.S. courts.

- The National Federal Court statistics show that in 1995, out of 43,158 total U.S. civil cases nationwide (1110 prisoner cases), only 50 of the cases invoking the federal RFRA were filed by prisoners.

- In 1996, out of 48,755 U.S. civil cases, only 51 RFRA cases were filed by prisoners.

A state-by-state breakdown of information was only available for the following three states:

- In New Mexico, out of 407 U.S. civil cases filed in 1995, 0 were filed by prisoners invoking the federal RFRA. In 1996, out of 492 U.S. civil cases filed, 0 were filed by prisoners invoking the federal RFRA.

- According to the Virginia Attorney General's office, out of 1,099 prisoner lawsuits filed against sheriff departments between 1993 and 1997 only 7 were "religious-styled" cases.

- In Florida, only 5 prisoner religious freedom cases invoked the federal RFRA during 1993–1997.

These statistics show that the federal RFRA caused no explosion of cases filed by prisoners—a group considered most likely to take advantage of such a law.

What is HB 387 based on?

The state RFRA model supported by HSLDA is based on other time-tested state Religious Freedom Restoration Acts. It is a combination of the Rhode Island RFRA (the oldest—passed in 1993) and the Illinois RFRA. The substantive provisions of the bill, its heart, are found in all RFRA states. (e.g. Texas, South Carolina, Arizona, Connecticut, Florida, and Alabama). Of course, the "compelling interest test" is patterned directly after the U.S. Supreme Court's description of the test found in dozens of cases over the last 40 years.

Why can't we simply let the Alaska Supreme Court reestablish the "compelling interest test"?

States which have neither an enacted RFRA nor their own body of case law applying the "compelling interest test" have simply followed whatever the current federal standard is. Courts in these states have always relied on the U.S. Supreme Court's religious freedom standard of review and its interpretation and application of the "compelling interest test." The states need to establish their own standard.

Since *Smith* and *Boerne* set the current federal precedent, this means trouble for Christians and other people of sincere religious faith.

Does HB 387 replace all existing remedies to protect religious freedom?

No. It only creates an additional "track" which a religious claimant can use to protect his free exercise of religion. State constitutional and federal constitutional remedies are still available.

Is there a problem with the lack of definition for "religious belief"? For example, what if a group got together (such as a satanic group) and said it was a "religious group" and wanted to meet in a high school gym, but did inappropriate things? Under this law, would the school have to let everyone (including this group) meet in the gym, or let no one do it? Would schools that allow Fellowship of Christian Athletes or Young Life to meet in the gym also be forced to let everyone else in (or no one)?

The first issue is the concern over the absence of a definition of religious belief.

There is a large body of case law relating to the definition of "religion." (For a good summary of the case law see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581, 609-612 (1995)). For example, in *U.S. v. Seeger*, 380 U.S. 163, 176 (1965), the U.S. Supreme Court defined religious belief as "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God."

The drafters of the 1993 federal RFRA considered defining "religion" but decided against it primarily because the U.S. Supreme Court had already done so. Since the U.S. Supreme Court has defined religious belief in dozens of cases with sufficient clarity, it is not necessary to define it in a state RFRA.

Secondly, a response to the school hypothetical:

The hypothetical Satanists who are denied access to a school could make claims under the Free Speech Clause, the Free Exercise Clause, and the Equal Access Act. Their case would likely be considered under the Equal Access Act and the First Amendment's Free Speech Clause—not free exercise law. Under the Equal Access Act (effective since 1984), if a school lets one noncurriculum group meet, it must let all noncurriculum groups meet. When Congress was considering the Equal Access Act, people were concerned that it would lead to an explosion of Satanists, Nazis, and hate groups wanting to meet and organize in schools; however, this "explosion" has not occurred.

Under the Free Speech Clause of the First Amendment, religious expression receives the same level of protection as nonreligious expression. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951) (meeting permit). Free speech rights are essentially a ceiling on free exercise rights. The standard of review for free speech cases is the "compelling interest test" giving individuals who exercise their right to free speech the highest level of protection. See *Heffron v. Int'l Society of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981) (solicitation on state fair grounds).

Thus, once the school lets the Fellowship of Christian Athletes meet after hours, it must let in other groups. This is the case regardless of the standard of free exercise law. The school cannot discriminate among groups except to the extent it needs to regulate disruptive speech. See, e.g., *Tinker v. Des Moines*, 393 U.S. 503 (1969).

In state offices, if a person, because of a religious belief, wanted to have something distasteful on his desk, could his supervisor—under this law—ask for it to be removed?

It depends. If the item was on a teacher's desk, it could probably be removed under the Establishment Clause. If the item was on a desk not open for public view, it may be protected by the employee's free speech rights.

Free speech, the prohibition of establishment of religion, and Title VII considerations all would come into play here. However, like the school example, this scenario is likely going to be considered under the Free Speech Clause. Under U.S. Supreme Court precedent, when government regulates its employees' speech, a different test applies than when government regulates its citizens' speech. It's an easier test for the government to satisfy.

If the dispute over the object on the desk could not be resolved, the state RFRA could be invoked and the courts would have to balance the state's interest with the free exercise claim through application of the "compelling interest test."

CENTER FOR LAW AND RELIGIOUS FREEDOM

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TRANSMITTAL MEMORANDUM

DATE: February 29, 2000

TO: Representative John Harris

FAX: 907 465 3799

FROM: Betty L. Dunkum

RE: **Alaska Religious Freedom Protection Act**

Total Number of Pages (including this cover sheet): 8

COMMENTS:

Attached are some materials regarding the Alaska Religious Freedom Protection Act, HB 387, which is scheduled for a hearing before the Community and Regional Affairs Committee this Thursday, March 2, 2000. Please have someone insert copies of these materials in each committee member's packet. Please call me if you have any questions.

Sincerely yours,

Betty L. Dunkum

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MEMORANDUM

To: Members of the Alaska House Standing Committee on Community and Regional Affairs

From: Betty L. Dunkum, Esq.

Date: February 29, 2000

Re: **Religious Freedom St ate For Alaska**

For the reasons set out below, religious liberty in many states of the United States lacks adequate legal protection. As the first freedom guaranteed in the First Amendment to the U.S. Constitution, religious liberty should be fully enjoyed by Americans regardless of their state of residence. The Coalition For The Free Exercise Of Religion (presently consisting of over 70 religious faith groups and civil rights organizations) is seeking to enact federal legislation that would provide uniform legal protection in every state. However, because such a federal bill cannot cover as broad a spectrum of religious exercise as state law can, the Coalition is simultaneously assisting with legislation in states, such as Alaska, that appear committed to protecting all their residents and other persons that come within their jurisdiction.

1. Why Alaska Needs Its Own Religious Freedom Restoration Act

Prior to 1990, courts generally found an infringement of the First Amendment's clause protecting the free exercise of religion whenever a law or actions by a government official had the effect (intended or not) of substantially burdening a person's religious belief or practice. For example, pursuant to a state autopsy law, a state medical examiner could order the performance of an autopsy on a person who would have objected to the autopsy because of conflicting religious beliefs. Performance of the autopsy would substantially burden the religious freedom of the individual and his/her family. In another case, a city ordinance designating a church building as an historic landmark meant that the church could not alter its own property (*e.g.*, to expand the sanctuary or social hall or to establish a day-care ministry) without approval by the city landmark preservation board. This substantially burdened the church's collective religious freedom. Whenever courts found such a "free exercise" burden, they generally required that the government (the state medical examiner or the city, in these examples) give the religious person or body (here, the individual or the landmarked church) an exemption from the law.

The only exception to the general rule of free exercise was where the government could prove that denying religious accommodations was the least restrictive means of furthering a compelling government interest. In the historic preservation example above, the city would have

to prove that architectural preservation is a vitally important role for government and that there is no less onerous way to further this interest than to deny religious accommodations. Unlike landmark preservation cases, cities routinely met this "strict scrutiny" when churches sought exemption from fire and safety regulations applicable to their buildings.

But in 1990, the U.S. Supreme Court unexpectedly dropped the "compelling interest" test for most Free Exercise Clause claims. *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court held that the test did not apply to cases where the burden on religion was the result of a law that was generally applicable to all persons and groups. So, using the autopsy example above, the individual's family could not invoke the First Amendment to prevent the autopsy.

This 1990 turnabout by the Court so threatened religious liberty for all faiths that a national coalition of over 65 religious denominations and civil rights groups was formed. They drafted and, in 1993, Congress passed (almost unanimously) the Religious Freedom Restoration Act, which restored the "compelling interest/least restrictive means" test. RFRA required a religious exemption from any government action that substantially burdened the complainant's religious exercise.

However, in 1997, the Supreme Court held that RFRA unconstitutionally exceeded Congress' authority under Section 5 of the Fourteenth Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[1] Consequently, disparate impacts on religious liberty have no meaningful federal statutory protection against state or municipal law, policy, or practice. The First Amendment Free Exercise Clause is triggered only in the rare case where the state action intentionally discriminates against religious practice.

2. What Alaska Can Do To Restore Religious Liberty Protection

Friends of religious freedom should regularly check on the progress of our federal legislation and be ready to rally local support for a federal "RFRA II"--a bill that would uniformly (albeit less broadly) restore meaningful legal protection in every state.[2]

In addition, a state should enact its own RFRA, such as the Alaska Religious Freedom Protection Act, HB 387, because a state RFRA will affirm the state's commitment to protecting religious liberty. Indeed, eight states—Alabama, Arizona, Connecticut, Florida, Illinois, Rhode Island, South Carolina, and Texas—have already passed their own RFRAs, and a number of other states are in the same process.

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[1] While the high court has not addressed the issue, most scholars (and the Clinton Administration) agree that RFRA still applies against federal law or federal action. *See In re Young*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 43 (1998) (mem.).

[2] *See* Religious Liberty Protection Act, H.R. 1691, 106th Cong., 1st Sess. (1999) (utilizing federal Commerce Clause and spending power, rather than Section 5 of the Fourteenth Amendment).

The RFRA Coalition urges any state considering enactment of its own law to include the following essential elements.

a) **The Compelling Interest/Least Restrictive Means Test.** State RFRAs should apply this test to any government action that places a substantial burden on a person's religious exercise.

b) **Broad Definition For The "Exercise Of Religion".** The test should be triggered when government burdens an act, or a refusal to act, that is motivated by religious belief, whether or not the burdened religious exercise is compulsory or central to a larger system of religious belief. Reference to the First Amendment and/or the state constitution's religious liberty clauses should be avoided, so as not to imply that previous case law interpreting "the exercise of religion" under those provisions is being incorporated into the bill.

c) **Universal Protection.** As an inalienable right, religious liberty should not be denied to any class of persons. The Coalition urges states not to deny the protections of a state RFRA to anyone. Religious liberty is diminished for all if it is denied to any. And once a law omits one politically unpopular group it will be all too easy to exempt others. The Coalition opposes efforts to pass a state RFRA unless it is free of exemptions for prison inmates, land use claims, civil rights ordinances, etc. In some cases, suitable language can be framed on specific issues; please contact the Coalition if such language is required.

The Alaska Religious Freedom Protection Act, HB 387, presently includes all of the above elements. Please support this bill and oppose any amendments that would create "carveouts" for any group of people.

Please tell the Center for Law and Religious Freedom (703-642-1070, x3501) how we can assist you.

Examples Demonstrating Why Alaska Needs a Religious Freedom Restoration Act

In this document, several leading authorities on religious freedom in this country provide examples of why state RFRAs are needed.

MARK CHOPKO, General Counsel, U.S. Catholic Conference:

- During the years that the federal RFRA was still valid law, the Ninth Circuit found that RFRA had been violated when prison **personnel deliberately intercepted confessional communication**. *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997). Absent a religious freedom law, it is debatable that a prison regulation dictating that all conversations between prisoners and outsiders will be intercepted would have to excuse religious communications.

- The real power in RFRA "lay in its use in negotiation and persuasion in numerous local and administrative disputes . . . **The ability to have some legal basis on which religious persons and organizations could depend** as a starting point in negotiations was an enormous benefit[.]"

- Many dioceses report conflicts over the **loss of land by eminent domain for such things as creation of bicycle paths** or parking lots. In addition, St. Michael's Abbey in Orange County, California, sued the civil authorities to set aside a plan approving large-scale private development on land adjacent to the Abbey's land which had been, until recently, dedicated to private and quiet religious services.

- Officials in Arapahoe County, Colorado, have placed **numerical limits on the number of students that may be enrolled in religious schools**, and indeed, on the size of congregations of various churches as a way of limiting growth.

- In Douglas County, Colorado, administrative officials initially proposed **limiting the operational hours of a church** the same way they do any "commercial" facility. Limiting its operational hours means that a church could not lawfully engage in any act of service of devotion during those prohibited hours.

- In the Grand Teton area of Wyoming, local officials have proposed **limiting the number of persons who may seek spiritual consolation** and retreat at the Camp St. Malo owned by the Archdiocese of Denver. The camp was used by Pope John Paul II during his visit to the United States in 1993 for a day of quiet reflection.

MARC STERN, Senior Counsel, American Jewish Congress:

- A Muslim child won a judgment for injuries which left him physically and, to some degree, mentally handicapped. The child's lawyer sought to invest the judgment in an interest-bearing account as required by stated law, and as would appear, in the child's best interest. The parents objected that their religious beliefs forbid the taking of interest. **The judge ordered the parties to show cause why the lawyer should not be appointed guardian with the obligation, over the parents' objections, to invest the monies in an interest-bearing account.** While there are many financial arrangements that would provide the same "return" and would not violate Islamic law, the state law did not permit alternative investments of this sort.

- The director of an Immigration and Naturalization Service **detention facility refused to provide detainees--some of whom were seeking asylum for religious persecution—pork-free diets.** Because the President ordered federal officials to comply with the federal RFRA (part of which is no longer available) when threatened with a lawsuit, the manager agreed to provide a pork-free diet.

- A school district in **South Carolina banned the wearing of hats in school. The rule applied to a Jewish boy who wished to wear a yarmulke in school** as Orthodox Jewish practice requires. When threatened with a suit under the federal RFRA (an option now unavailable), the school board accommodated the student.

- A Jewish man was killed in an accident involving a commuter train. **The coroner insisted on an autopsy certifying the cause of death. The family of the deceased objected on religious grounds to the performance of an autopsy.** An MRI or CAT scan was offered in compromise. Once a lawsuit was threatened under the federal RFRA (an option now unavailable), the state attorney general advised the coroner to accommodate such a request.

- The **Illinois Athletic Association requires ball players to play bare-headed. This precluded any Orthodox Jewish boys that would wear yarmulkes.** The league defended its rule on grounds of safety. It argued that if players wore hats, the hats might fall of and other players trip over them. When an Orthodox school sought to play in the league and have its students wear yarmulkes, it was told no. The school offered to make the boys attach the yarmulkes to their hair with clips so that they would not fall off, and the Seventh Circuit held that the alternative had to be explored. Today, such a case would likely be dismissed at the initial motions stage, because it is a "facially neutral" law, and it is reasonable.

VON KEETCH, Church of Jesus Christ of Latter Day Saints:

- One city adopted an entirely new Comprehensive Plan covering development within its city. The Plan was based on the "overwhelmingly residential aspect of the City," and limited any new development within the city to single family unit dwellings. **The City's plan set up an "Educational and Religious Zone (ER) " for schools and churches that already existed within the city.** Although any entity could make a request for such a zone change, the zoning would be changed only if *the applicant* seeking the change *could prove* that (1) "the city made a mistake in zoning the property" in the first place; or (2) "a change in condition has occurred making the property more suitable for ER use than for residential use." *See Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn., Jan. 27, 1998).

- **A religious mission for the homeless operated by the late Mother Teresa's order has been shut down because it was located on the second floor of a building without an elevator.**

- **Adult children with strong religious convictions about serving their feeble parents have been prevented form volunteering to care for their elderly parents** housed in government-regulated nursing homes. *See Greater New York Health Care Facilities v. Axelrod*, 770 F. Supp. 183 (S.D.N.Y. 1991).

- **One district court held that an unnecessary autopsy on a young Hmong man did not constitute a violation of the Free Exercise Clause,** despite the religiously-based belief of his family that the autopsy condemned the spirit of the deceased. The court had originally ruled in favor of the family, but after Smith, felt compelled to reverse its earlier ruling. The judge, when issuing its order against the family, remarked that "I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed." *You Vang Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990); *see also Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt, conservative Jewish beliefs).

- **The strict confidentiality of communications between member and clergy has come under strong attack,** with litigants attempting to gain information or otherwise discover sacred confessional information for use in pursuance of their civil claims. *See, e.g., Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992); *Scott v. Hammock*, 870 P.2d 947 (Utah 1994).

- Local governments have attempted to impair or altogether eliminate proselytizing by Church missionaries by passing "generally applicable" laws that happen to place **severe restrictions on the times and places that missionaries may contact door-to-door.** Local officials have attempted to curtail church proselytizing in such cities as Mundelein, Illinois; Dover, New Jersey; Flemington, New Jersey; Chester, Connecticut; Valencia, California; Media, Pennsylvania; Downers Grove, Illinois; Marin County, California; and Seven Hills, Ohio.

STEVE McFARLAND, former director of the Center for Law and Religious Freedom at the Christian Legal Society:

- **An Orthodox Jewish rabbi was threatened with criminal prosecution for leading morning and evening prayers in a converted garage in one of Miami's single-family residential areas.** The U.S. Court of Appeals for the Eleventh Circuit held that the city's interest in an exception-free zoning plan outweighed the rabbi's interest, because the services "are not integral to [his] faith" and because the burden on the rabbi and his friends of having to relocate "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit [unemployment compensation]."

- **A federal judge in Philadelphia granted judgment for the city against a Seventh-Day Adventist church to which the city had issued a building permit and then revoked it *after construction had commenced*** when the city discovered it had erred in calculating the number of parking spaces its code would require.

- **Religious student groups or clubs are penalized if they require that their student leaders share a particular religious belief.** Many campuses deny official charter status to any group that discriminates in its leadership selection based on religion. This means that the chapter cannot meet on campus, use campus media to announce their activities, or distribute literature to their peers. Legal battles have taken place at: University of Arizona, University of Minnesota, University of Kansas, University of Toledo, Texas Institute of Technology, Johnson State University (VT), California State University - Monterey Bay, and Georgia Institute of Technology.

Without SH

By Lee Boothby

In 1991 the archbishop of San Antonio was denied a permit to enlarge St. Peter's Catholic Church in Boerne, Texas. The archbishop's challenge of the denial led to *City of Boerne v. Flores*,[1] in which the U.S. Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act (RFRA) of 1993. As a result, many religious people are like the homeless—without shelter.

As with many church-state cases, the real issue here isn't the particular; it's the universal behind it. In *Flores* the problem wasn't the denial of the building permit per se, but the rationale the Court used in upholding the denial, which was that RFRA was unconstitutional.

RFRA arose in response to the Supreme Court's decision in *Employment Division v. Smith*,[2] which eradicated what many court observers believed to be bedrock constitutional principle first established in *Sherbert v. Verner*[3] and amplified in *Wisconsin v. Yoder*.[4] Under *Sherbert/Yoder*, when a governmental requirement conflicted with an individual's religious practices, in order for the requirement to prevail over the individual's religious practices the government had to demonstrate a compelling state interest that showed why the practice should not be allowed. Then, even if the government was able to demonstrate that interest, it had to prove further that there was no less restrictive means by which to achieve its secular purpose. In other words, the onus and burden was on the government to show that it had a very good reason to restrict a religious practice; if not, then those seeking an exemption or accommodation to a law that restricted their practice should, ideally, have gotten it.

But in a radical departure from precedent, the *Smith* Court stated that the free exercise clause of the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[5]

According to *Smith*, the only time the *Sherbert/Yoder* test applies is in the hybrid situation in which the free exercise claim is raised (1) "in conjunction with other constitutional protections, such as freedom of speech and of the press"[6] or (2) "where the state has in place a system of individual exemptions," such as in unemployment compensation cases. In the latter situation, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[7]

Thus *Smith* relegated the Free Exercise Clause to only an antidiscrimination provision leaving unprotected individuals whose religious beliefs may be somewhat different from society's mainstream. The *Smith* justices reduced free exercise protection while completely aware that their action might have a disparate effect on those who are members of minority religions. The Court stated:

"It may fairly be said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[8]

This diminished understanding of free exercise protection was not shared by much of the American religious community, the Congress, or the president. The result was RFRA, which mandated that federal, state, and local government be subject to the compelling state interest/least restrictive alternative test

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ILLUSTRATION BY RALPH BUTLER

when free exercise claims were raised by an individual who found his or her religious practices were in conflict with governmental law, regulation, or action.

When Congress enacted the RFRA, it relied primarily on its Fourteenth Amendment enforcement power. The Fourteenth Amendment provides in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

So for now, Americans are withou it comes to free exercis

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The courts have repeatedly held that the religion clauses of the First Amendment are applicable to the states by reason of the Fourteenth Amendment to the United States Constitution. Thus those who argued that under Section 5 of the Fourteenth Amendment Congress had the right to enact RFRA contended that "Congress . . . is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's due process clause, the free exercise of religion, beyond what is necessary under *Smith*."[9]

However, the Court held that in adopting RFRA, Congress went beyond its Fourteenth Amendment authority. Because the *Smith* Court had decided the scope of the Establishment Clause, when Congress enacted RFRA, it went too far:

"Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[10]

Also, the Court concluded that "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."[11] As the Court noted, "in most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."[12]

In summary, the Supreme Court instructed that "when the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles."[13] The Court argued that once interpretation of the Free Exercise Clause was made by the courts, "it is this Court's precedent, not RFRA, which must control."[14]

The *Flores* decision, of course, did not settle the argument or end the problem. On the contrary.

First, it was argued that although RFRA has been held unconstitutional as far as the federal legislation may be applied to state and local governments, it is not unconstitutional with reference to federal agencies. This is because the Fourteenth Amendment, the basis of the *Boerne* decision, does not apply to the federal government. In a recent case, *In re: Young Christians v. Crystal Evangelical Free Church*,[15] the Eighth Circuit Court of Appeals held that the Bankruptcy Act also violated RFRA. (In these cases, bankruptcy trustees recovered from churches the tithes paid by bankruptcy debtors.) The court concluded that RFRA was an appropriate means by which Congress could modify the United States bankruptcy laws.

Second, in *Flores* three of the justices dissenting from the majority argued *Smith* itself should be reexamined. Justice O'Connor, joined by Justice Breyer, concluded that the Court in *Flores* may well have been correct in ruling that Congress did not have the power under the Fourteenth Amendment to enact RFRA in light of the Court's earlier *Smith* deci-

sion. But she observed that the *Flores* decision "is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause."[16] Justice O'Connor then stated that "this is an assumption that I do not accept."[17] She continued, explaining that the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."[18]

In his *Flores* dissent, Justice Souter had "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."[19] He stated he was "not now prepared to join Justice O'Connor in rejecting it [*Smith*] or the majority in assuming it to be correct."[20] But he called for "a full adversarial consideration" of the issue. Justice Souter stated that "this case should be set down for reargument permitting plenary examination of the issue."[21]

shelter when of religion.

The *Flores* case continues to generate much heat. Professors Eisgruber and Sager argued that RFRA was "practically unworkable" and that in *Flores* the Court "was renouncing a congressional vision of religious liberty that was at radical odds with its own."[22] In contrast, Oliver Thomas, special counsel for religious and civil liberties of the National Council of Churches, compared *Flores* with the century-old *Dred Scott* decision, saying the "decision . . . is a blow not only to the sovereignty of the Congress but to the American people as well."[23]

In June of this year federal legislation was introduced to reinstate the compelling state interest/least restrictive alternative test as part of federal law applicable not only to the federal government but also to state and local governments. But the new legislation, called the Religious Liberty Protection Act, is limited to situations that involve or affect interstate commerce, when the burdensome state program is a recipient of federal funds, and when the accommodation is aimed at avoiding religious discrimination. Nor is it without detractors (see pp. 10-14). Besides this law, a broad-based coalition of religious organizations is currently asking state legislatures to pass legislation requiring the application of the *Sherbert/Yoder* test in each state.[24]

The bottom line in this free exercise mess is that though the *Sherbert/Yoder* test was hardly perfect, it did provide some level of judicial protection for the free exercise of religion. After *Smith* and now *Boerne*, that protection, with rare exceptions, is all but gone. Even worse, among many scholars who oppose the jurisprudence behind *Smith*, and who see a need for greater free exercise protection, much disagreement exists on the best way to reinstate these protections.

So for now, Americans are without shelter when it comes to free exercise of religion. A sad state of affairs, especially for a nation that views the free exercise of religion as one of the most basic of all human rights, to be protected.

FOOTNOTES

[1] 117 S. Ct. 2157 (1997).

[2] 494 U.S. 872 (1990).

[3] 374 U.S. 398 (1963).

[4] 406 U.S. 205 (1972).

[5] *Smith*, 494 U.S. 879.

[6] *Ibid.*, p. 881.

[7] *Ibid.*, p. 884.

[8] *Ibid.*, p. 890.

[9] *Flores*, 117 S. Ct. 2163.

[10] *Ibid.*, p. 2164.

[11] *Ibid.*, p. 2171.

[12] *Ibid.*

[13] *Ibid.*, p. 2172.

[14] *Ibid.*

[15] __ F.3d __, No. 93-2267 (8th Cir. 1998).

[16] *Flores*, 117 S. Ct. 2176 (O'Connor, J., dissenting).

[17] *Ibid.*

[18] *Ibid.*, p. 2177.

[19] *Ibid.*, 2186 (Souter, J., dissenting).

[20] *Ibid.*

[21] *Ibid.*

[22] Eisgruber and Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 83.

[23] Clarence Page, "Keeping the Faith: Religious Freedom Act Could Turn Into Worthy Amendment Scheme," Chicago *Tribune*, July 2, 1997, p 19.

[24] See *Liberty*, July/August 1998, p. 8.


Mrs Campbells
FREE
SOUP
Special EXE
A Compelling Case AGAINS

MPTIONS?

"Compelling State Interest"?

By
CHRISTOPHER L. EISGRUBER
and
LAWRENCE G. SAGER

Imagine living in a quiet residential neighborhood when a nearby homeowner (call her Mrs. Campbell) starts running a soup kitchen from her garage. Some neighbors object, fearful that the soup kitchen will increase traffic and attract "undesirables" to the area. They persuade town officials to enforce their zoning ordinance and stop Mrs. Campbell.

Mrs. Campbell sues, seeking to exempt her charitable project from the zoning ordinance. At the hearing the judge says, "Now, Mrs. Campbell, I need to know whether you are running this soup kitchen because of your religious beliefs. If you are, then I'll permit you to go ahead. If you're not, I won't."

Surely the judge's question is an affront to religious liberty. Perhaps one can sympathize with Mrs. Campbell, and believe that charitable endeavors ought to enjoy special exemptions from zoning laws. Or perhaps one sympathizes with the unhappy neighbors, and believes that Mrs. Campbell ought to move her otherwise laudable project to a more suitable location. But either way her right to do good works and her right to use her property as she wishes ought not to depend upon her religious beliefs.

Consider the bizarre and uncomfortable questions that would arise in the colloquy between the judge and Mrs. Campbell. Suppose Mrs. Campbell has long felt it intolerable for people to go hungry as a matter of simple justice, but also felt that her religion counsels that people should aid the needy. Does it matter whether she has more than one reason for doing good works? Or suppose, while Mrs. Campbell's faith requires her to care for the needy, it recognizes that there are many forms such care can take. Or suppose that within her faith charitable acts are regarded as good but not requisite for leading a religious life. Does it matter just how specific and how demanding Mrs. Campbell's religion is? Does it matter whether Mrs. Campbell attends regular church services? Would she be religious in the right way if she were moved to a life of good works by what she called "Christian ethics," even if she had little or no interest in Christian theology? And suppose Mrs. Campbell shared responsibility for the soup kitchen with her husband, an avowed secular humanist. Would the kitchen be legally permissible on days that she ran it, but not on days when he alone was present?

Is it preposterous to imagine—in a nation that loves liberty and especially prizes freedom of belief—that Mrs. Campbell could be called to account for her beliefs and commitments in this way? No. In fact, it has become fashionable for the government to make rights contingent on religious belief in just this manner, and thus to require judges to act like the judge in Mrs. Campbell's case. The paradigmatic example of this is the Religious Freedom Restoration Act (RFRA).[1] As its name indicates, RFRA was enacted in the service of religious liberty. Yet it was a misguided attempt to achieve a laudable purpose.

Under RFRA some churches were able to duck zoning laws and operate soup kitchens in residential neighborhoods when everyone else was prohibited from the same.[2] Some bankrupt religious debtors were able to circumvent bankruptcy laws and make charitable contributions when all other debtors were prevented from doing so.[3] Some religious landlords claimed that they should be able to defy civil rights laws that prohibited everyone else from discriminating against unwed couples.[4] It was even the case that some religious men who flouted child-support obligations were excused from contempt sanctions imposed upon other "deadbeat dads."[5]

In *City of Boerne v. Flores*,[6] the Supreme Court held that RFRA was unconstitutional, at least insofar as it purported to constrain state and local governments. But the era of RFRA has not

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ILLUSTRATION BY RALPH BUTLER

necessarily passed. RFRA itself may continue to apply to federal legislation like the bankruptcy laws, since *Flores* focused on Congress's power to apply the act to state and local laws. Meanwhile, many states are considering statutes patterned upon RFRA, and some members of Congress are considering legislation that would reproduce the effects of RFRA but would try to circumvent *Flores.*

What explains RFRA's popularity? Its defenders point out that laws that are neutral on their face can nevertheless impair the ability of religious believers to practice their faith. That is true, and it's a problem of great concern. RFRA's supporters accordingly believe that this leaves Americans in a kind of Free Exercise dilemma. Special privileges to disobey otherwise valid and reasonable laws, reserved for the truly religious alone, may be awkward—but such privileges are the only way to accommodate the needs of religious believers.

There is, however, a better way to promote a strong version of free exercise. First, judges and legislators should take a generous view of personal liberty, not just for religious believers, but for all people. Second, when the government carves out special exceptions for the benefit of secular interests, it should be required to do the same for comparable religious interests. And finally, when the government imposes broad, generally applicable restrictions on conduct, it should show the same sensitivity to minority religious interests that it shows to mainstream religious and secular interests.

Start with the idea that the Constitution should be understood to guarantee a generous share of liberty for all people. It's easy to see how that liberty will benefit religious believers. For example, in the famous case of *West Virginia v. Barnette,*[7] some schoolchildren refused to comply with a state law requiring them to salute the flag. They had religious grounds for their choice: they were Jehovah's Witnesses, and their faith forbade them from honoring any graven image. The Supreme Court upheld the children's right to opt out of the flag salute ceremony, but it did so without creating any special privilege for religious believers. The Court declared that the state simply had no power to compel anybody to salute the flag.

As a second example, consider one of the more appealing claims that arose under RFRA. Orthodox Jews have sought relief from zoning decisions that prohibited them from using their homes as *shteebles*—that is, from using them for small regular worship services. Orthodox Jews should have the right to conduct such services. They should have it, though, not as the result of any special privilege unique to religious believers, but because the Constitution protects the right of all people to invite friends, acquaintances, and neighbors to gather with them in their homes for peaceful purposes. One might even construe this right broadly enough to encompass Mrs. Campbell and her soup kitchen (and, of course, if Mrs. Campbell enjoys such a right, so too should any church operating in a residential neighborhood).

Home schooling provides a third illustration. Religious parents may have special reasons for wishing to educate their children at home. They may, for example, want to protect their children from influences that might damage their faith. Or they may think it desirable to provide a pervasively religious learning experience of a kind that is, in their judgment, not available from any school in their area. Such parents should have the right to school their children at home. But it should be recognized that their religious interests are a specific version of a more widely shared interest—the interest that all parents have in providing the best possible education and upbringing for their children. And the constitutional right protecting them should be equally broad: it should respect the autonomy of all parents, not merely those who have religious motives for their decision.

Consider now the second prong of this approach to religious liberty, which demands that government not turn a blind eye to religious interests when it crafts exemptions for secular ones. A recent First Amendment case from Newark, New Jersey, nicely illustrates the point. Newark's police department requires that its officers be clean-shaven. Two Islamic policemen sought an exemption on religious grounds; their faith required that they wear beards. The police department refused to relax its rule, but a federal district court granted relief. The court pointed out the police department made an exception for police officers with sensitive skin, who would suffer a rash if forced to shave. Since the department was willing to accommodate the special interests of officers susceptible to skin rashes, it was obliged to be equally receptive to the religious interests of the Islamic officers.[8]

So far these recommendations have been quite consistent with the Supreme Court's cur-

rent reading of the Free Exercise Clause. The third suggestion makes a departure from the Court's free exercise doctrine. In *Department of Employment Services v. Smith*,[9] the Court addressed a claim from practitioners of a Native American religion who sought exemption from an Oregon law. The Native American faith involved the ritual consumption of peyote. Oregon law prohibited the possession or use of peyote.

In *Smith* the Supreme Court distinguished sharply between laws such as Newark's police department regulation, which included exceptions, and laws such as the Oregon peyote regulation, which did not. The Court announced a broad per se rule to deal with any exemption claim directed at laws such as Oregon's: "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[10]

The justices did not want the impossible task of deciding which religious people deserved what privileges in cases about zoning, bankruptcy, education, and virtually every other imaginable topic of legal regulation. The Court's unease is understandable. But it does not justify a stark distinction between laws that include exceptions and laws that do not.

For example, the Oregon law against peyote consumption may have looked like a clean, bright-line rule with no exceptions. Suppose, though, one steps back and looks at the law in its larger context. Oregon had a host of laws dealing with drug abuse. Among these was a law permitting counties to prohibit alcohol consumption. That law, however, contained an interesting provision: it required dry counties to make exceptions for the benefit of religious faiths (notably, Christian faiths) that use alcohol in religious rituals. Thus Oregon's laws may have reflected a failure to show equal regard for the practices of minority religious believers. Just as Newark made special exceptions to benefit those with special health problems but not those with special religious needs, Oregon's controlled substance laws included exceptions for the benefit of mainstream faiths but not minority ones.

Though it's possible to offer good reasons that peyote and alcohol should be treated differently, the basic point is clear: neutral and generally applicable laws may reflect a failure by the government to show equal regard for minority religious interests. Insofar as the Court in *Smith* was insensitive to the problem, its free exercise doctrine is unsatisfactory.

RFRA was passed in reaction to *Smith*, and the most generous way to view the statute is as an effort to cure the insensitivity of the *Smith* decision toward the requirement of equal regard for the needs of all citizens, including members of minority religious faiths. So understood, the goal of RFRA was impartiality, not special privilege. But so understood, RFRA was doomed from the outset. It incorporated the toughest test known to constitutional law, "the compelling state interest test." To defeat an exemption claim, the government had to show either that its law imposed no "substantial burden" on religious practices, or that it had a "compelling interest" to justify the burden. In the law's eyes, few interests count as "compelling." As a result, whatever RFRA was aiming at, it produced a stark, inequitable privilege available only to those who were religious, and religious in the right way.

The justices did not want the impossible task of deciding which religious people deserved what privileges....

This claim is not mere conjecture or academic argument. In one area after another courts found that RFRA demanded that some religious persons be excused from obeying reasonable and evenhanded laws, while secular persons who were otherwise in exactly the same position and religious persons who were acting on the basis of secular motives—however lofty and altruistic their motives might be—were required to obey those laws.

RFRA's defects were not merely the product of clumsy legislative drafting. They emanated from a profoundly mistaken view of what it means to be "strong on free exercise." That view supposes that religious exercise is free only if religious conduct is presumptively and uniquely immune from any form of government regulation—and hence only if religious believers are presumptively entitled to special exemptions not available to others.

Professor Michael McConnell, an exponent of this idea, says that constitutional law should aspire to match a "hypothetical world in which individuals make decisions on the basis of their own religious conscience, without the influence of government."[11] Government should, of course, stay out of church affairs, and it should not manipulate people's religious beliefs. But government cannot help having an enormous influence on the activities of churches and religious individuals, just as it has an enormous impact on all groups and individuals within any modern society. Government provides the security, resources, and stability without which religious faith and activity would be resoundingly difficult, if not impossible, to pursue. It inculcates and enforces principles of morality—such as, for example, the principle that persons enjoy equal status regardless of their race, faith, or sex, or the principle that speech should be free—which are more congenial to some religions than others. And it doles out ownership rights without which it would be impossible even to conceptualize questions about whether Mrs. Campbell can use her house to run a soup kitchen, whether for religious reasons or any other reason.

Churches and religious individuals live within a society permeated by law. They cannot help benefiting from the existence of the legal regime that surrounds them; indeed, it would be deeply unjust to deny them any of the benefits that are available to everyone else. So too, churches and religious individuals must respect the boundaries set by reasonable, even-handed rules that everyone else is required to obey. That is the inevitable price that accompanies the benefits of the rule of law. Any law drafted in service of a conception of free exercise that fails to accept this simple proposition is likely to do far more harm than good to religious believers and to religious liberty itself.

RFRA is a case in point. Far from reducing the impact of government upon religion, RFRA overtly manipulated religious belief. Imagine Mrs. Campbell's reaction when she learned, from the judge or her lawyer, that the fate of her soup kitchen depended upon whether her motives were religious and religious in just the right sort of way. She would have an obvious incentive not just to characterize her motives in the most favorable way but to reconceive them in order to justify her characterization of them. There is something deeply insidious about a law that puts well-motivated persons in the position of giving skewed witness to their own beliefs, under penalty of denying them the license to pursue those beliefs.

RFRA's demise has sparked a new round of legislative activity, including the so-called Religious Liberty Protection Act. Unfortunately, this bill, like nearly all the statutes now percolating in Congress and in the legislatures of many states, repeats RFRA's central error: they invoke the "compelling state interest" test. That is a great misfortune. Religious liberty is a laudable legislative concern, but it can be furthered only by legislation that expands the liberties available to everybody, or legislation that seeks to ensure that all interests (religious and secular, mainstream and minority) are treated impartially. Until legislators are ready to leave the mistakes of RFRA behind them, the legislation they produce will be ill conceived, counterproductive, and unconstitutional.

FOOTNOTES

[1] 42 U.S.C. §§ 2000bb (1994).

[2] *Western Presbyterian Church v. Board of Zoning Adjustment of D.C.*, 862 F. Supp. 538 (D.D.C. 1994); *Stuart Circle Parish v. Board of Zoning Appeals of Richmond*, 946 F. Supp. 538 (E.D. Va. 1996).

[3] See, eg., *In re Young*, 82 F. 3d 1047 (8th Cir. 1996), vacated and remanded, 117 S. Ct. 2502 (1997), reinstated, 1998 U.S. App. LEXIS 7348 (8th Cir. 1998).

[4] In *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 913 P. 2d 909 (Cal. 1996), the California Supreme Court rejected this claim by a 4-3 vote; an intermediate appellate court had granted the claim.

[5] *Hunt v. Hunt*, 162 Vt. 423, 648 A. 2d 843 (1994).

[6] 117 S. Ct. 2157 (1997).

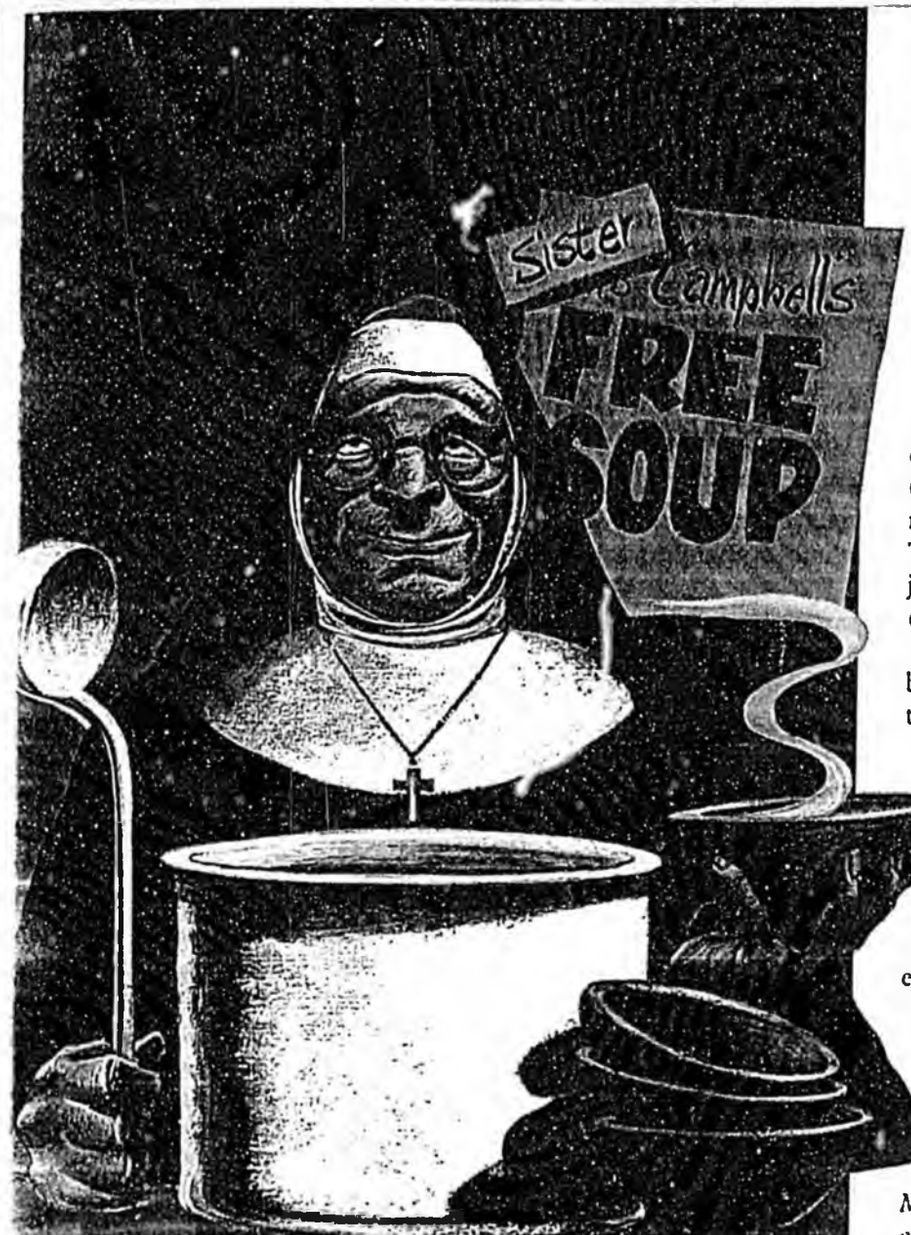
[7] 319 U.S. 624 (1943).

[8] *Fraternal Order of Police v. City of Newark*, No. 97-2672 (D.N.J., July 29, 1997) (unpublished decision). The *Newark* case is remarkably similar to a hypothetical discussed in Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1264-65 (1994).

[9] 494 U.S. 872 (1990).

[10] 494 U.S. 879 (internal quotation marks omitted).

[11] Michael W. McConnell, "Religious Freedom at a Crossroads," *University of Chicago Law Review* 59 (1992): 115, 169.



In the wake of the U.S. Supreme Court's invalidation of RFRA, Congress is considering legislation (The Religious Liberty Protection Act) that would once again enable religious believers and institutions to challenge, in court, government interference with religious practice. Under this bill, believers could obtain exemptions, or accommodations, if the government lacks a sufficiently strong justification (a "compelling state interest") for hindering religious practices that conflict with the law. This has been the principal free exercise jurisprudence for the latter half of the twentieth century.

Some people, however, oppose the principle behind the bill, which they believe is unconstitutional. What are their arguments—and why are they wrong?

To begin, until 1990 the Supreme Court had interpreted the Free Exercise Clause of the First Amendment of the United States Constitution as protecting the free exercise of religion from governmental burden, subject to the "compelling state interest" test. A new conservative majority on the Court, however, overruled prior decisions and held that the Free Exercise Clause provides no shield against "neutral laws of general applicability," no matter how severely they may trench upon religious freedom. Additional

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PROTECTING *Free* EXERCISE

A Compelling Case for "Compelling State Interest"

By MICHAEL W. MCCONNELL

protection for religious freedom, the Court held, is left to the political process.

By overwhelming bipartisan majorities, Congress responded in 1993 with legislation under its power to "enforce" the provisions of the Fourteenth Amendment (including the Bill of Rights). But the Supreme Court held last year that Congress's Fourteenth Amendment enforcement power does not go so far. In response, Congress is considering more modest legislation that would accomplish much the same objective.

The problem arises from the fact that few infringements on religious freedom in this country result from deliberate bigotry or persecution, but occur rather when thoughtless legislators and zealous bureaucrats insist on applying restrictions across the board, without regard to their special consequences for religious practice.

If Eisgruber and Sager are correct, then i
tutional to recognize a priest-penitent privilege i
without also recognizing privileges for new

For instance, almost all citizens can be required to give evidence in court if they have information relating to a criminal act. But if applied without exception, this requirement means that information a Roman Catholic priest obtains in the confessional must be divulged in a court, a move that would destroy the confidentiality of a sacrament considered holy by the church. Since the first cases began, in the early 1800s, courts have uniformly recognized that the free exercise of religion requires an exception—the "priest-penitent" privilege—from the otherwise generally applicable requirement to testify.

Another example involved a Seventh-day Adventist denied unemployment compensation benefits because she refused to work on Saturday. Without an exception, based on religious belief, for refusing otherwise suitable work, citizens who observe the Sabbath would be forced to choose between forfeiting benefits or violating their faith.

Absent exceptions, churches that limit some or all clergy positions to men could be forced to hire female priests or ministers. In a case in San Francisco, which prohibits discrimination on the basis of sexual orientation, a church would have been forced to hire an openly gay organist, contrary to its moral teaching. In Maryland officials tried to force a Catholic hospital to provide training in abortions. A Presbyterian church in Washington, D.C., had to go to court when zoning administrators ruled that churches cannot perform their age-old function of feeding the poor if located in residential neighborhoods. Because of religious dietary restrictions, Muslim and Jewish prisoners require special food; Hindu girls sometimes need special gym uniforms in school; and churches of every denomination need exceptions from employment discrimination laws to be able to hire clergy of their own religious faith.

In many cases religious freedom claims can be protected by appealing to legislatures or other political bodies. But as the Supreme Court candidly admitted, small and unpopular churches will be at a "relative disadvantage" if their rights are dependent on the political process. For this reason Congress is attempting to establish a procedure wherein every person or institution whose religious freedom is threatened by "neutral and generally applicable" laws can go to court, and the government will bear the burden of showing that the imposition on religious exercise is necessary to a "compelling" (meaning genuinely important) governmental interest.

Of course, the "compelling state interest" standard doesn't guarantee victory. Because the exercise of religion involves conduct, and conduct often affects other people, the government will frequently have a legitimate right to interfere. Religious motivation doesn't justify child sacrifice, stealing, or refusal to pay taxes. But persons of all religions—small as well as large, unfamiliar as well as mainstream—will have an

equal chance to protect their rights before an impartial tribunal. This process, in turn, will make it far more likely that government officials will be willing to work out reasonable accommodations without the need to go to court.

This protection is what the proposed Religious Liberty Protection Act is supposed to reinstate. The bill enjoys widespread support—from the ACLU to the Southern Baptist Convention.

In testimony before the House and Senate Judiciary Committees, however, several constitutional law professors have asserted that under Establishment Clause jurisprudence it is unconstitutional for Congress to protect the rights of religious conviction unless Congress extends similar protections to nonreligious conviction. Professors Chris Eisgruber and Larry Sager, for example, testified that it violates the Establishment Clause for the government to favor religious commitments over "other deep concerns and interests of members of our society," such as "political," "professional," "artistic or creative," and "family" commitments.

would be unconsti- the law of evidence paper reporters.

If Eisgruber and Sager are correct, then it would be unconstitutional to recognize a priest-penitent privilege in the law of evidence without also recognizing privileges for newspaper reporters. It would mean that it is unconstitutional to excuse Sabbatarians from unemployment compensation requirements (such as willingness to work on Saturday) unless we also excuse workers who wish to spend time with their families. It would mean that prisons cannot provide kosher or hallel meals unless they supply special diets to those who wish to engage in political boycotts of certain foods. Dry counties could not permit the serving of sacramental wine without also allowing alcoholic beverages for "artistic" purposes. If the Equal Employment Opportunity Commission allows churches free rein to choose their priests and ministers on religious grounds, without governmental interference under the discrimination laws, then it must similarly exempt labor unions and secular charities from the discrimination laws.

If these results sound outlandish, it is because the constitutional argument is outlandish. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Whatever protection the Free Exercise Clause provides, that protection is applicable only to "religion," and not to moral, political, professional, artistic or creative, or family commitments. "Religion" is singled out for special treatment. If professors Eisgruber and Sager were correct that the First Amendment forbids "singling out" the exercise of religion for special protections that are not given to "the other deep concerns and interests of members of our society," then the First Amendment violates itself.

The decision to single out religion—to treat religion differently from "other deep concerns and interests"—was deliberate. The framers considered a number of different formulations of what is now the First Amendment, some of which protected the "free exercise of religion," and some of which protected the "rights of conscience." Indeed, at one point the House of Representatives adopted a version that would have protected both: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

In dictionaries of the day the word "conscience" applied to secular as well as religious moral judgments. Samuel Johnson's great dictionary defined "conscience" as "[the] knowledge or faculty by which we judge of the goodness or wickedness of ourselves." Noah Webster's first dictionary defined it as "the faculty that decides on the right or wrong of actions in regard to one's self." Had the framers adopted the "liberty of conscience" formula, the First Amendment would have come closer to resembling the Eisgruber-Sager First Amendment. (It would still have been narrower. "Conscience" does not apply to all "deep concerns and interests," but only those rooted in the distinction between right and wrong.)

But the First Congress rejected the "conscience" language in favor of the free exercise of "religion," making clear that the protections of the amendment were applicable to religious commitments only. That did not prevent

Congress or the state legislatures from protecting other forms of conscience as appropriate, but the Constitution itself gives "religion" special protection. James Madison explained the reason:

"The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. The right is in its nature an unalienable right. . . . It is unalienable also because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of civil society."

This did not—and could not—mean that religious believers are exempt from law. But it did mean, in Madison's words, that a liberal state should make generous provision for the freedom of religion "in every case where it does not trespass on private rights or the public peace."

It was common for the 13 original states, even before passage of the First Amendment, to exempt believers from obligations known to be inconsistent with their religious convictions. The most common forms of accommodation had to do with military service, oath taking, and mandatory tithing. Even in the most desperate hours of the American Revolution, when the fate of the nation depended on its supply of young soldiers, the Continental Congress exempted religious pacifists (such as Quakers and Anabaptists) from military service, while calling upon them to serve the nation in ways "consistent with their religious principles." As George Washington wrote to the Quakers, "in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."

The modern Supreme Court has continued this tradition of religious accommodation. Although in recent years the Court has held that the First Amendment does not create a *legal right* to religious accommodation, it has consistently encouraged legislatures to do so—whether or not other nonreligious concerns and interests are similarly protected. In an important decision called *Corporation of Presiding Bishop v. Amos*, the Court unanimously upheld a federal statute exempting religious organizations from the religious nondiscrimination requirements of the Civil Rights Act. According to the Court, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious

missions." Specifically rejecting the constitutional argument now made against the Religious Liberty Protection Act, the Court stated that "where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."

In the face of this clear evidence from constitutional text, history, and precedent, opponents of the Religious Liberty Protection Act nonetheless claim that it is "unfair" to protect religious liberty without protecting other concerns. And of course, there are some specific cases where it *would* seem unfair—usually because there is a strong constitutional tradition for protection independent of religious motivation. Most would agree, for example, that parents should have a right to home-school their children, whether for religious reasons or not. That is because most of us believe in a right of parental control over education. Even most supporters of abortion rights would agree that doctors should not be forced to perform abortions, whether their objection is religious or secular. This is because they believe that the status of the fetus is a matter for individual judgment. But these examples should not be generalized into a rule requiring religious accommodations of all sorts to be extended to secular concerns. The state should be able to protect the confidentiality of communications made to a priest or minister without having to extend the privilege to your next-door neighbor.

In its broad form, the claim that religious commitments may not be given special protection overlooks the deep logic of the First Amendment. The religion clause of the First Amendment has two parts: the Free Exercise Clause, which protects religious freedom, and the Establishment Clause, which prevents government support for religion. Those who complain that the Free Exercise Clause singles out religion for special protection rarely note that the Establishment Clause also singles out religion—this time, preventing religious institutions and commitments from receiving governmental advocacy and support. The two halves of the religion clause create a balance.

By the same token, religious concerns would be protected by the Religious Liberty Protection Act while artistic and creative concerns would not. But art can be subsidized through the National Endowment for the Arts. A National Endowment for Religion would—and should—be unconstitutional. Religion is "singled out" in two ways—with respect to burdens *and* with respect to benefits.

That is the logic of the First Amendment. This logic could not be extended to all "other deep concerns and interests of members of our society." Churches would be protected by the Religious Liberty Protection Act and environmentalist groups (for example) would not. But environmentalist groups can go to Congress and obtain passage of environmental legislation. Comparable laws promoting religion would be flatly unconstitutional. Similarly, public schools can—and do—inculcate environmental beliefs and values in schoolchildren, in ways that would be unthinkable for religious beliefs and values.

Government is free to pass legislation promoting or disadvantaging most political, professional, or other interests in our society. That's politics. But government is not free to pass legislation promoting or disadvantaging religion. As nearly as is possible, consistent with its neutral and secular objectives, government should leave decisions about whether and how to practice religion to individuals and groups. The government should neither induce nor penalize the practice of religion.

Critics of the Religious Liberty Protection Act would preserve the Establishment Clause limits on the power of government to promote religion, while rejecting the Free Exercise Clause limits on the power of government to burden religion. This would produce a lopsided, antireligious constitutional regime wholly unlike the benevolent neutrality toward religion envisioned by the framers. From the beginning this nation has recognized that each person's duty to God is a matter committed to his or her own conscience. Religion is exempt from the power of civil society except when interference is necessary to protect "private rights or the public peace." From the beginning, therefore, the states and the federal government have found ways to accommodate the free exercise of religion, insofar as "the protection and essential interests of the nation may justify and permit." The Religious Liberty Protection Act stands in this great tradition, protecting religious freedom from government imposed burdens unless the government can show those burdens serve a compelling interest. The suggestion that protections for religious conscience can go no further than protections for political or professional concerns is contrary to a constitutional understanding as old as the nation itself.

Why We Need State RFRA Bills: A Panel Discussion

Alan Reinach[*]

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INTRODUCTION

The most pressing issue facing proponents of Religious Freedom Restoration Acts ("RFRAs") when confronting legislators is their importance and necessity. Legislators want to know the problems RFRAs are designed to remedy; they want to know of particular horror stories they can claim to fix. However, one practical problem for advocates is that neither legislators nor the general public are overly sympathetic to the worst violations of religious liberty, which tend to involve either minority faiths or religious practices

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that are feared, hated, or both.

For instance, just before scheduled hearings in the Arizona Senate Judiciary Committee, the Arizona Republic ran a column concerning an inmate's fifteen year battle to obtain kosher meals.[1] The article derided the inmate's religious freedom claim, and doubted that it was "kosher" for a rapist to demand kosher food. It did not matter that the Arizona prisons routinely serve kosher food to those who require it. No one asked why the prison establishment was willing to fight for fifteen years to deny this prisoner kosher meals when it provides them routinely to others. The damage was done. When it comes to a convicted rapist, the media knows no possibility of redemption or forgiveness.

Conscious of this rapist story, while preparing to testify before the Arizona Senate Judiciary Committee, I tried to find the most appealing free exercise example to cite. I decided to showcase the problem that many Seventh-day Adventist public school students encounter when they try to enroll in a band class. They are typically told that if they cannot participate in concerts on Friday nights for religious reasons, they might as well not enroll, for they will receive a failing grade. I argued that schools should be more accommodating, permit religious students to participate in band, and excuse them from the occasional concert that might conflict with religious obligations. Surely the Senators would be solicitous of our youth, and realize the need to avoid creating a situation in public schools that would make some students feel like second class citizens because of their faith. Alas, this example failed to heighten interest and the Arizona RFRA bill met with stiff opposition.[2]

Another basic problem that advocates confront is that many legislators are surprisingly ignorant concerning religious freedom. They have never heard of *Employment Division v. Smith*[3] or *City of Boerne v. Flores*.[4] They labor under the common misperception that the law protecting religious freedom works well and does not require legislative action. Legislators also labor under the misconception that state supreme courts are more willing to interpret

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[1] *See* David Leibowitz, *Is Catering to a Rapist Kosher?* ARIZ. REPUBLIC, Feb 3, 1999, at B1.

[2] The opposition was led by a Senator from Tucson, Arizona, who asserted that if any such problems arise in her district, she sees that they are worked out. A Jewish mother testified about the ongoing problem of schools scheduling field trips and other activities on the High Holy Days. This was met with the same response. Ironically, the Senator leading the opposition to the bill was herself, Jewish.

[3] 494 U.S. 872 (1990).

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

state constitutional provisions in a manner that provides greater religious freedom than similar provisions in the U.S. Constitution, as the Supreme Court has so interpreted.

Again, the Arizona Senate hearings offer a fitting example. The RFRA bill fell into a constitutional catch twenty-two as Senators asserted inherently contradictory reasons for objecting to the bill. Senators argued both that the Arizona Constitution already protected against facially neutral laws of general applicability, and that a state RFRA might open the door to a litigation explosion should they adopt the bill. Ultimately, the fact that there had been only six reported RFRA decisions in Arizona in five years fell on deaf ears, as the bill was voted down in committee. Assumptions about the adequacy of the Arizona Constitution were contradicted by legal analysis supplied to the committee, but to no avail.

Since legislators may have many and varied reasons fo ambivalence and opposition to RFRA bills, advocates must be prepared to effectively address why we need such bills. Answers to this question fall into two general categories: those that deal with legal explanations — the erosion of constitutional protection for free exercise rights; and those that document actual cases or problems. Part I of this Article will address the legal erosion of free exercise rights. Part II of this Article is a refined version of a panel discussing why state RFRAs are needed. Panelists represent two unique faith perspectives, Jewish and Seventh-day Adventist; the views of two leading activist organizations, Justice Fellowship and the Council on Religious Freedom, and; one prominent law professor/activist, Doug Laycock. The intent of the panel was to compile the sort of practical experiences that legislators crave in order to justify legislation. Of course, this task is an ongoing one, as those advocating for state RFRAs continue to network, to exchange horror stories, and to refine advocacy techniques.

I. A Good Metaphor Is Worth a Thousand Pictures

If a picture is worth a thousand words, a good metaphor is worth a thousand pictures. Other legal commentators have analyzed the relevant Supreme Court decisions. I would prefer to assume a basic familiarity with *Smith* and *Boerne*, and propose some metaphors that not only capture the reality of these decisions, but may have some utility for advocacy purposes.

A. The Property Rights Metaphor — No Balance

The Seventh-day Adventist Church is involved in litigation with Solano County, California, over the issue of whether a local congregation can locate radio broadcast facilities in office space on church premises.[5] The County Board of Supervisors denied the church a conditional use permit for the radio station, which required only office facilities, since actual broadcast would be from an existing tower on a nearby mountain.[6] At oral argument of the appeal, the assistant county attorney made a shocking statement: "no property owner has any right to the use of his land, unless that use is permitted by government."[7] While I am no expert on property rights, I doubt that this statement is literally true. But more to the point, I suspect that most Americans still have enough residual commitment to individual liberty that they would recoil with horror at the suggestion that they were entirely dependent on government to tell them what they can or cannot do with their land.

Yet, when it comes to the free exercise of religion, that is precisely the status of the law. We are entirely dependent on government in cases where religious exercise is in conflict with a facially neutral law of general applicability.[8] Religious exercise is utterly bound by whatever government determines in such cases. There is no necessity of compromise or balance.

Anyone even remotely familiar with the land use process understands that the process seeks to achieve a balance between the rights of the landowner to the use of her land, and the rights of the community to avoid the unwanted impact a particular use may cause. The process relies heavily on compromise to achieve that balance. Yet, when it comes to similar conflicts between the general goals of society as expressed in facially neutral laws of general applicability, and unique religious beliefs and practices, no such process of compromise or balance is now required.[9] Government wins and religion loses.[10] Government power to infringe on free exercise is almost unfettered by meaningful constitutional limita-

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[5] *See* Vacaville Seventh-day Adventist Church v. Solano County Bd. of Supervisors, No. L01955 (Cal. Super. Ct. April 14, 1998).

[6] *See id.*

[7] *Id.*

[8] *See Smith*, 494 U.S. at 872.

[9] *See id.*

[10] Litigators will assert legal theories, such as hybrid rights, or a scheme of individualized exemptions, to avoid the harshness of this rule. Nevertheless, the observation above accurately describes the general rule.

tion. Contrast the current Supreme Court's disdain for religious freedom with the sentiments of George Washington, our nation's first president, as expressed in a letter of reassurance to Quakers. Washington's statement captures the essence of the strict scrutiny concept:

> I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit."

Washington would jealously protect free exercise as one of the "conscientious scruples of all men," as balanced against compelling community interests, or the "essential interests of the nation," in Washington's own words. His expression is consistent with the strict scrutiny standard advocated by state RFRA supporters. He would require a balancing that puts an appropriately heavy burden on government to justify an infringement upon religious freedom. Current law requires no such balancing.

B. The Road Runner Metaphor

If you've seen it once, you've seen it a thousand times. Wile E. Coyote is chasing the Road Runner. The Road Runner steps aside, just before going over the cliff. The Coyote, meanwhile, keeps going. As long as Wile E. Coyote keeps looking ahead, he zooms forward, oblivious to the fact that he is no longer on solid ground, but in thin air. As soon as he looks down – well, you know what happens.

This aptly illustrates the state of free exercise law. The constitutional foundation has crumbled, leaving free exercise hanging in thin air, waiting to crash. Although the foundation has crumbled, we have not yet experienced a flood of free exercise cases. In comparison with, for example, sexual harassment or employment discrimination claims, or some other civil rights problem, free ex-

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" A DOCUMENTARY HISTORY OF RELIGION IN AMERICA 278 (Edwin Gaustad ed., 2d ed. 1993).

ercise cases are statistically insignificant.[12] We have not yet crashed.

Perhaps the reason we have yet to crash is that America has a long tradition of respect for religious freedom. To some extent, we are living on borrowed cultural and constitutional capital. Since the constitutional foundation has already been destroyed, how long can religious freedom endure?

C. Free Exercise as a Cripple

A recent Ninth Circuit decision has invigorated discussion of the theory of "hybrid rights" as a basis for protecting free exercise.[13] The theory arises from Justice Antonin Scalia's characterization, in *Smith*, that the vast body of religious free exercise cases that appeared to adopt strict scrutiny were really hybrid cases, involving both free exercise plus another constitutional right.[14] The theory is that free exercise claims recover their constitutional strength only if accompanied by another, hybrid, right. The Ninth Circuit engaged in a lengthy discussion of hybrid rights, and considered just how strong a hybrid claim must be to trigger the protection of the strict scrutiny test.[15] No doubt, at some point the Supreme Court will consider this issue and determine whether the hybrid-rights theory is valid or not, and if so, how to apply it.

Until then, we are left with the distinct impression that free exercise has become a paraplegic, a cripple, who must be wheeled into court by a hybrid right. Free exercise claims have no legal leg to stand on, unless a hybrid right serves as the wheelchair, thus giving them a legal basis.

Some may hope that the hybrid-rights theory will adequately blunt the worst edges of the *Smith* decision. This is unlikely. Instead, the hybrid-rights theory illuminates the absurd state of the law: that religious exercise warrants the protection of strict scrutiny only when it can stand on the basis of some other right. The hy-

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[12] To determine whether a state RFRA bill was needed, I searched all reported free exercise cases in California, Arizona, and Hawaii. In California, for example, I found eight reported free exercise cases, not counting RFRA cases. Additionally, I found more than 10 cases, including RFRA cases, in Arizona and Hawaii.

[13] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999). This case applied the hybrid-rights theory to sustain the right of Christian landlords to refuse, on religious grounds, to rent to unmarried couples, notwithstanding a statute forbidding discrimination on the basis of marital status.

[14] *See Smith*, 494 U.S. at 881.

[15] *See Thomas*, 165 F.3d at 702-09.

brid-rights theory demonstrates that free exercise has become a cri ople.

D. Gimme Shelter!

Songwriters and poets have waxed eloquent about home. They sing and write about a sense of belonging, a sense of communal intimacy, seeking protection from the storms of life. Home is a particularly potent symbol for what religious freedom is now lacking in America. One of the foremost religious freedom litigators of our generation, Lee Boothby, commenting on *Boerne*, put it this way: "As a result, many religious people are like the homeless — without shelter."[16] Indeed, it is not only religious people, but the right of religious freedom itself, that is without shelter. Writing in dissent in *Smith*, Justice Blackmun declared: "This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.'"[17]

Historically, religious freedom is a home-grown American product. We were the first country on earth to adopt the principle that everyone is truly equal in the eyes of the law, regardless of their faith. We were the first country to fully protect religious freedom as a matter, not of discretion, but of constitutional right. Religious freedom is the single most significant contribution our nation has made to the world.

Yet, religious freedom has now become a "luxury." It is a stranger in its own home. Unlike the prodigal son in the parable, who left home of his own free will, religious freedom has been cast out of the house.[18]

E. A Beggar

The plight of the beggar is another fitting metaphor for those seeking protection for religious free expression. Not only has religious freedom been quite literally cast out of its home, denied

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[16] *Without Shelter: Life in Post- RFRA America*, LIBERTY, Nov./Dec. 1998, at 89.

[17] *Smith*, 494 U.S. at 908-09 (Blackmun, J. dissenting) (citations omitted).

[18] *See Luke* 15:11-32.

legal shelter, and treated as a stranger, and a cripple, but religious freedom has also become a beggar. Said the majority in *Smith*:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all law against the centrality of all religious beliefs.[19]

Many arguments could be brought to bear to refute this contention. Most obvious is the language of the First Amendment itself: "Congress shall make no law . . . . ."[20] By its terms, the very purpose of the Amendment was to remove the rights protected therein from the sphere of legislative activity.

In the midst of World War II, when America was battling for the life and soul of the free world, the Supreme Court declared that freedom was more important than patriotism, ruling that Jehovah's Witnesses students with religious objections to saluting the flag could not be required to violate their faith.[21] That courageous Court recognized what the current Court has forgotten:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[22]

Religious freedom has become a beggar, because it must now beg for protection at the mercy of legislatures. Contrary to the implied contention of the Supreme Court, religious freedom values rarely, if ever, really do command the majority. It is not just that minority

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[19] *Smith*, 494 U.S. at 890.
[20] U.S. CONST. amend. I.
[21] *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
[22] *Id.*

religious practices are at the mercy of the legislature. Instead, all religious practices that are taken seriously enough to require some from of exemption or accommodation are likely to be minority practices. Hence, the image of a beggar seeking alms is all too apt.

F. The California Experience

Today's Court has forgotten the meaning of America. It has forgotten that our love of freedom means that fundamental freedoms are constitutionally secured from the tyranny of the majority. Today, religious freedom has been reduced to the status of a beggar. No longer constitutionally protected, it must go, hat in hand, asking the majoritarian legislative bodies to provide some form of relief. This is what RFRA is all about: welfare for a once proud and noble constitutional right that has been reduced in circumstances, lost its estate, and is now out on the street.

Our experience in advocating a RFRA bill in California demonstrates just how difficult it is to protect a fundamental right by statute. The majoritarian body, the legislature, is a place of compromise. Various interests are balanced against each other in an effort to soften the harshest impact a given bill may have for some interest. This is proper.

When religious freedom advocates went to the California legislature in 1998, seeking statutory protection, they encountered a wide variety of opposition. The most serious issue was the perceived conflict between religious freedom and other civil rights. Other interests were asserted on behalf of prisons, land use, the environment, and child welfare. The legislature responded with specific amendments to clarify that religious freedom would not undermine other specified commitments. With great difficulty, the California bill endured the legislative process, faithful to its initial objective of reestablishing religious freedom as a fundamental right.[73]

In retrospect, many who supported the RFRA bill, AB 1617,[74] now admit that the final draft that cleared the legislature was overly

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[73] AB 1617, The Religious Freedom Protection Act, introduced by Joe Baca (D-San Bernadino), passed both the Assembly and the Senate but was vetoed by Governor Pete Wilson.

[74] AB 1617 was supported by the California Coalition for Free Exercise, uniting a wide range of Christian, Jewish, Muslim, Sikh, and other faith groups, as well as civil rights groups like the American Civil Liberties Union.

complex and poorly drafted.[25] The political process burdened the fundamental right of free exercise with numerous explanations and qualifications, although outright exemptions were avoided. Thus, there is a good reason why fundamental rights should be constitutionally protected, rather than subjected to the political process and its compromising tendencies.

That is a moot point, for now. Whether we like it or not, religious freedom must seek protection from a legislature that may be ambivalent, or even hostile. The advocate's task is to adequately justify the need for legislation. What follows are the remarks of various advocates of state RFRA bills on this precise issue. It has now been almost a decade since the Supreme Court's decision in *Smith*. During that decade, five years have gone by without the protection of RFRA. For most casual observers, it does not look like much has changed. In other words, the post-*Smith* era to the casual observer looks very similar to the pre-*Smith* era. The question, then, that the panelists addressed is the practical significance of *Smith* and that of the protection RFRAs provide.

II. PANEL DISCUSSION

A. Pat Nolan[26]

With all deference to the litigators here, I think the greatest significance that the Federal RFRA held was in bargaining. It gave a person a seat at the table with any government official whose conduct impeded one's ability to practice their faith. It gave us a chance to ask the official: "what is it you are actually trying to protect?" Then it allowed us to engage in a dialog as to whether there was a way to protect that interest in such a way as to minimize the infringement on our ability to practice a religion. The numbers of those situations that occurred while RFRA was law are legend. It happened many times a day.

With the *Smith* standard, the bureaucrat wins and says "take us to court." Most people who have had their faith infringed upon do

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[25] Coalition members would be reticent to publicly declare that AB 1617 was flawed, having invested so much energy in passing it. Despite its flaws, the Coalition still hoped that it would achieve its goal. Nevertheless, some Coalition members acknowledged that fundamental principles had been battered and bruised by the legislative process, and that amendments taken out of political necessity posed a risk to the bill's integrity.

[26] President of the Justice Fellowship and former member of the California State Assembly for 15 years. For four of those years, Mr. Nolan served as the Assembly Republican leader.

not have the resources to file a legal claim in court. So a state RFRA will once again permit the individual to at least engage in a dialog: "Is there a way to protect your interest, Mr. Bureaucrat, while not abridging my ability to practice my faith?"

I want to address the issue of the RFRAs applying to prisons. The public has little sympathy for the religious freedom rights of prisoners. However, prisoners have absolutely no ability to practice their faith except at the sufferance of officials. Everything they do requires the permission of those that are in charge of the facilities. Not only does this mean they need permission to attend a religious service or Bible study, but their ability even to possess a Bible or any religious literature in their cells is left to the discretion of the administration. This is a political issue that must be confronted in every single state where there is an effort to pass a RFRA.

First, Professor O'Neil pointed out that we already have a track record. RFRA's legal standards were in place for many years and there was no parade of horribles. No court in the country required a prison official to allow any practice that endangered the safety of any prison personnel or of the inmates. Those seeking prison exemptions try to find examples where prisoners with access to law libraries bring esoteric claims. The prisoner who claims to belong to the Church of Filet Mignon, in which it is a religious sacrament to have steak every night, and where the denial of steak every night is a denial of religious liberty, makes a great story. Then there is the prisoner who claims that the Bible requires him to be fruitful and multiply, and that he must have conjugal visits from his wife. These make great stories in the legislature and the legislators all chuckle and say, "Yeah those darn prisoners are filing these lawsuits." The reality is that none of those lawsuits have gotten anywhere. No court has ever ordered a prison official to give conjugal visits in order to respect a prisoner's religious freedom, nor has a court recognized the Church of Filet Mignon or compelled officials to serve its adherents steak.

The reality is that, during RFRA's existence, Jewish prisoners used the law to obtain permission to wear yarmulkes in prison when a warden said it was evidence of gang attire. RFRA was used to allow a Catholic to wear a crucifix when the prison official argued that it was a weapon. In that case, prison officials provided inmates with four inch long plastic toothbrushes, but claimed that a one inch long plastic crucifix was more dangerous.

RFRA was very useful as a tool when prison officials canceled

evening bible study. We could ask whether there was a way to accommodate the Bible study while still protecting the officers and inmates involved. The fact is we have a track record of years where allegedly frivolous prisoner claims were neither numerous, successful, nor burdensome.

Those advocating prison exemptions also claim there will be a flood of lawsuits, or that there have been a flood of lawsuits. We have gathered the statistics on the number of lawsuits filed under RFRA, and the numbers are unspectacular.[27] For example, in Virginia, there have been seven cases.[28] Mark Early, the Virginia Attorney General, said it is difficult to argue that these seven prisoner RFRA lawsuits constitute a great burden on the state of Virginia.[29] But our opponents consistently make that argument. Presenting the statistics can destroy their arguments.

I would like to emphasize, though, that as we have dealt with the effort to pass state RFRAs, what is most lacking is that those with the most at stake — those who belong to religious congregations — have no sense of urgency. They do not feel that their religious liberty is threatened. That is the biggest hurdle we have. If they did, they would rise up and the legislators would respond.

Instead, legislators are faced with Deputy Attorneys General claiming to be overwhelmed by an increasing caseload. Zoning officials warn of the repercussions, maintaining that RFRA soon will require permitting the building of slaughter houses next to residential facilities. The historic preservationists argue that RFRA will neutralize legal protections that exist for historic buildings. Professor Douglas Laycock has said that every interest group in society comes forward to protect their interests, which stand in opposition to the goals of RFRA. Legislators tend to respond in their favor, given the absence of vocal support from religion. It is important we get the word to the members of our congregations. We need to present compelling examples that will convince not only legislators, but the very people who need RFRA's protection the most. Until we do, it will be very difficult to pass State RFRA bills.

Everett Dirkson once described the legislator's mentality by saying: "When I feel the heat, I see the light." Right now there is no heat. Instead, we have relied on the good will and understanding

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[27] Justice Fellowship maintains records of RFRA decisions on a state-by-state basis.

[28] *See* Letter from Virginia Attorney General (May 11, 1998) (on file with author).

[29] *Id.*

of legislators. We have been able to pass some bills on this basis. But if we are to build on these early successes, we will have garner significant support from our own constituents, and through them, their legislators.

B. Nick Miller[30]

I would like to share a compelling story. I spoke on the telephone last week with a Baptist minister in Southern California, Wiley Drake. This story puts a human face on the land use and zoning issues that Professor Laycock is going to address. I think it also shows that it is not just about money and economics or whether to build in one place or another — these issues can affect the heart of the religious mission of an organization.

Pastor Wiley Drake is a pastor of a small Southern Baptist Church in the City of Buena Park, which is right next door to Anaheim and Disneyland in Southern California. His congregation helps those less needy in his neighborhood. They have a rehabilitation program for the homeless on the streets of Buena Park, processing nearly two thousand homeless individuals a year. The congregation has three goals — two of them mandatory, one of them encouraged — for the homeless individuals it helps. First, those who are using or abusing alcohol or other drugs must get into a substance abuse program and become dry. Second, they need to enter a rehabilitation program to get back into the workforce. Finally, the congregation encourages the homeless to attend their Bible studies and prayer meetings, and to grow spiritually.

The city fathers of Buena Park took a different view of this ministry than did Pastor Drake's church. They called Pastor Drake into City Hall and met with him to discuss the impact of his ministry on their community. The mayor, the city manager, and the chief of police attended the meeting. They informed him that the city was an entertainment corridor. His church's activities with the homeless were having a negative impact on the city's image.

Pastor Drake explained to them the effectiveness of the ministry and its importance to the life of the church. It was not something tangential to their beliefs but, rather, ran to the heart of their faith.

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[30] Executive Director, Council on Religious Freedom. Mr. Miller was instrumental in organizing this symposium.

The city fathers were not interested. They warned him to stop the homeless activities or face the consequences. When Pastor Drake and his congregation continued, the city responded by filing eleven criminal charges against the church, the pastor in his individual capacity, and the church treasurer. The case went to trial and seven of the charges were dismissed.[31] I think the treasurer turned state's evidence and the charges against him were ultimately dropped. Four charges against the pastor and the church were sustained and convictions were obtained. These convictions were for violations not related to health, safety or fire hazards, but with use permits. The church had obtained permits for a hall for recreational use, and were now using that same facility for storing food and clothing which was given to the needy. This was regarded as a commercial use and the church's continued insistence on such use was considered a violation of the permit. Pastor Drake was convicted on four counts. At the sentencing hearing the judge said he was eligible for two years of prison time as well as a $2000 fine.

The judge, who must have had some sense of justice and possibly a sense of humor, sentenced the pastor to 1500 hours of community service — time already served.[32] The church was put on probation for three years. The police in Buena Park have permission to enter church property and monitor to assure there are no homeless people that should not be there. If so, the city can shut down the entire program.

The case is currently on appeal. The church's First Amendment claim failed because these were neutral, generally applicable laws which, in the post-RFRA era, are unactionable.[33] Moreover, California courts, like those in many states, do not apply constitutional standards to land use issues. In this case, land use is at the heart of what this Baptist church is all about — to the heart of its mission. The land use issue has a very human face in Pastor Wiley Drake. Clearly, this case would have come out very differently if a California RFRA had been in effect.

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[31] This report is largely based on an interview with Pastor Wiley Drake.

[32] Pastor Drake believes that press attention moderated the judge's previously harsh view of this case. The judge had refused to charge the jury on a religious liberty defense.

[33] The *Smith* standard holds that facially neutral laws of general applicability are not subject to strict scrutiny, and do not give rise to First Amendment free exercise claims. Alternatively, some courts will apply a rational basis test, e.g., *Brunson v. Department of Motor Vehicles*, 72 Cal. App. 4th 1251, 85 Cal. Rptr. 2d 710 (Ct. App. 1999), which amounts to the same result — dismissal of the free exercise claim.

C. Alan Reinach[31]

It is a real privilege to be here with all of you for this historic conference. The question we are dealing with in this panel is perhaps the most crucial if we are to succeed in passing state RFRAs. We have been aggressively pursuing RFRA bills in three states so far, California, Arizona and Hawaii. The question we hear most from legislators is why this bill is needed. They do not want to hear legal jargon. They want to know who is getting hurt and what needs fixing.

I have been asked to provide some concrete examples, from the perspective of my own faith, of the kinds of free exercise problems we experience. Seventh-day Adventists adhere to historic Biblical faith, so we share many religious liberty problems with other Christians. Like other churches, we also have distinctive teachings that lead to unique challenges. First, as an example common to many believers, recently we assisted an Adventist nurse who refused, for religious reasons, to participate in providing abortion services. This case arose in a private hospital setting, thus raising only Title VII religious accommodation issues. However, had it arisen in a public hospital, it would have also raised constitutional concerns.

The largest volume of free exercise problems for Seventh-day Adventists, by a wide margin, arise from observance of the Seventh-day Sabbath, from sundown Friday to sundown Saturday. Adventist students attending public schools are routinely denied opportunity to participate in band and athletic programs, because concerts or games are scheduled on Sabbath. Only occasionally do school districts make any attempt to compromise or accommodate the Adventist students. Most frequently, parents simply accept such exclusion as a cost of their faith. However, those students who are excluded do not universally respond with a sense of pride over maintaining their faithfulness. Such painful experiences lead some students to resent and eventually abandon their faith.

In the school context, RFRA ought to protect the right of students to engage in activities, such as band, where Sabbath activities are only a part of the whole. A student can participate in band throughout the week, and perform in those concerts that are not held during Sabbath hours. The fact that the student will refrain from participating in all concerts should not exclude that student.

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[31] *See supra* note *.

The band has no interest sufficiently compelling to justify excluding the student entirely. After all, the band would not be better off by excluding the student altogether than by permitting the student to partially participate.

Sabbath problems arise most often in the context of employment. Government employers account for a disproportionate share of cases. This may be attributable to the fact that government employers have no economic incentive to negotiate a Sabbath accommodation. Corporations are generally myopically focused on profits and, therefore, have every fiscal incentive to avoid costly litigation. Accountability in government does not operate as it does in the private sector. Rather, government officials are much less concerned about the costs of litigation.[35] The last major Ninth Circuit Title VII case, in 1996, involved a government employer, the California Department of Food and Agriculture. Kwasi Opuku-Boateng had applied for a permanent position with the agency.[36] When he informed the agency he could not work on the Sabbath, the agency terminated the hiring process.[37] The Ninth Circuit found that Opuku-Boateng had established a prima facie case of religious discrimination and that the state had not demonstrated that it would suffer undue hardship if forced to accommodate.[38] An important Title VII case currently pending in the Ninth Circuit also involves a government employer, *Balint v. Carson City*.[39]

Working on the Sabbath, or otherwise violating one's religious faith, should not be a condition of government employment. Indeed, government employers should be held to a higher standard than that standard established by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*.[40] In *Trans World Airlines*, the Court held that requiring an employer to bear more than a de minimus cost in accommodating an employee's religious practices amounted to an undue hardship.[41] The compelling interest test, if applied to government employment, would certainly negate the de

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[35] Even in cases where we have dealt with top management of a government agency, there was no apparent sense of fiscal imperative to negotiate. In fact, government agencies are far less willing to negotiate, generally, than their corporate counterparts, although there are always those fair-minded or sincere officials who prove exceptions to the rule.

[36] *See* Kwasi Opuku Boateng v. California, 95 F.3d 1461, 1466 (9th Cir. 1996).

[37] *See id.*

[38] *See id.* at 1472-73.

[39] 180 F.3d 1047 (9th Cir. 1999).

[40] 432 U.S. 63 (1977).

[41] *See id.* at 85.

minimus rule established in *Hardison*. However, it would not require courts to disregard important governmental interests. The employer must be able to perform its necessary functions. Religious accommodation cannot undermine those functions. However, under current law any de minimus burden on an employer is enough to permit government to abridge religious liberty.[42] This is wholly inadequate when applied to government. A constitutional standard ought to apply, and one that adequately respects religious freedom.

Sabbath testing problems are also prevalent. Most testing agencies are reasonable, and are willing to provide for non-Sabbath testing. But some public schools, colleges, or testing agencies instead force Adventist students to choose between their religion and their educational progress.[43]

Aside from the Sabbath, other aspects of Adventist faith encounter problems absent RFRA. Publishing work has been an important part of the Adventist ministry since our inception as a church. For many years, we have employed a sales force to market literature directly to the public, including in-home presentations. In addition, every year many churches conduct a fund raising drive for community service and disaster relief ministry. In many places this involves door-to-door solicitation. These activities frequently lead to conflicts with local government authorities over licensing or permitting.

A very current concern involves our teaching that church members and institutions abstain from involvement with labor unions. In the small town of Ukiah, California, about two hours north of San Francisco, an Adventist hospital is involved in litigation with the California Nurses Association over their effort to unionize the nurses. The hospital objects to recognizing a labor union on religious freedom grounds. First and foremost, the very act of recognizing a labor union violates the hospital's religious convictions. In addition, such recognition could easily lead to the hospital being forced to negotiate over faith-based policies.

The hospital has raised a jurisdictional defense, arguing to the National Labor Relations Board ("NLRB") that, because of the First Amendment and RFRA, the NLRB lacks jurisdiction to im-

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[42] *See id.*

[43] I am currently preparing to seek an injunction against the State of California because one of its professional graduate programs has scheduled all required coursework on Saturdays.

pose a labor organizing process against the religious scruples of the hospital. Although RFRA has of course been invalidated as to the states, several courts have held that it is still in effect with respect to the Federal government.[44]

Free exercise claims can and do arise because of state labor laws as well. In a pending lawsuit, two former employees are suing Loma Linda University and Medical Center, an Adventist institution, claiming in part that they were discharged in violation of state labor laws for seeking to organize a labor union.[45] If they really were trying to organize a labor union, this would itself have been grounds for discharge, since the Adventist faith prohibits such activity. A state court will have to decide whether Loma Linda has a right to discipline employees for violating church teachings against participating in labor unions. Clearly, Loma Linda is on uncertain constitutional ground without the benefit of RFRA.

The right to discipline employees for violating church teachings often arises in cases of sexual misconduct. Frequently, disgruntled former employees bring discrimination lawsuits, asserting claims based on age, gender, or race, regardless of the faith-based reason for the discharge. Title VII permits religious institutions to discriminate on the basis of religion. However, state law may provide an independent basis for a discrimination suit in such cases. California currently exempts religious nonprofits from its discrimination laws.[46] However, this exemption is under attack, and may well be repealed this year.[47] If so, religious institutions may be required to retain faculty, administrators, ministers, or other employees who uphold neither the doctrinal nor behavioral standards of the church. Obviously, this would devastate the church's ability to carry on its religious mission.

Another pending case involves land use in Vacaville, California, where an Adventist church is seeking to establish a Christian radio station on church property, utilizing a donated mobile home. The Board of Supervisors held that the radio station was not an accessory use to an Adventist Church, since no other church in the county operated a radio station. They also held that a radio station

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[44] The hospital insists that recognizing a labor union would force it to negotiate.

[45] *See* Shankel v. Loma Linda Univ., No. SCV272520 (Cal. Super. Ct. 1994).

[46] *See* CAL. GOV'T CODE § 12926(d)(1) (West Supp. 1999).

[47] The expected language has not yet been introduced. AB 1541, however, contains language repealing the exemption only for religious hospitals that serve the public. As introduced, there is no provision to exempt religious hospitals with respect to the right to discriminate on the basis of religion.

is not a communication facility. This latter ruling was necessitated by the fact that communication facilities are permitted in any zone.[48]

The county's view of this case is that it has the right to restrict the proclamation of the gospel, which is central to the church's very reason for existence, without regard for whether the radio station will adversely impact the community.[49] In fact, the record was silent as to any real impact on the community. Sure, there were the usual assortment of a few neighbors who complained, but their complaints lacked any substance. One neighbor even complained that the station, not yet in existence, was already interfering with his television reception.

On appeal, the church's attorney, Fred Blum, argued that determining whether a radio station is an accessory use by reference to the conduct of most churches is blatant discrimination against minority faiths. The majority's activities determine the scope of minority conduct, Blum concluded.[50] This is the worst sort of majoritarianism which our constitution intended to prevent. This reasoning, according to Blum, would permit the county to say to the Catholic Church: "a confessional is not an accessory use to your church, since no other church in the county has a confessional."[51] Using this reasoning, the county could say to a synagogue: "a mikvah[52] is not an accessory use since no other faith group has one."[53]

California has a public accommodation law, the Unruh Civil Rights Act,[54] that makes no exemption for religious institutions.

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[48] The county interprets this as relating to unmanned facilities only. This would mean that one could locate an unmanned tower in a residential zone, but not an actual radio station, which can fit into one or two rooms of a house.

[49] The premise of this case is that a radio station is not an accessory use to a church. Such determination is independent of whether that use will adversely impact the community. Thus, the county argued findings by the Planning Commission such as: "it is not common or necessary for radio stations to be associated with churches," and "the establishment, maintenance and operation of the radio broadcasting station is a professional office use which is not in conformity with the County General Plan goals, policies and objectives regarding the intended land uses in rural residential areas." Respondent's Opposition to Petition at 11-12, Vacaville Adventist Church v. Solano County Bd. of Supervisors (Cal. Super. Ct. 1998) (No. L010935).

[50] *See* Petitioner's Memorandum at 9-10, *Vacaville Seventh-day Adventist Church* (No. L010935).

[51] *Id.*

[52] A Mikvah is a bath used for ceremonial cleansing.

[53] Petitioner's Memorandum at 9-10, *Vacaville Seventh-day Adventist Church* (No. L010935).

[54] *See* CAL. CIV. CODE § 51 (West Supp. 1999).

Under current law, religious institutions lack a free exercise defense to claims filed under Unruh. For example, suppose an Adventist school like Loma Linda University permits a local Girl Scout chapter, unaffiliated with the school, to meet on campus. Loma Linda could be held liable for discrimination if it failed to equally permit a Satanist group to meet.[55] Indeed, it could be compelled to permit the Satanists to meet on campus.

Because Unruh makes no exception for religious institutions, in the absence of a viable free exercise or RFRA defense, religious schools could be sued for discriminating in admissions on the basis of religion.[56] Although Adventist schools generally do admit students of all faiths, and do not discriminate, the freedom to define the student body is central to the religious mission. This freedom also extends to the ability to discipline students for violating lifestyle standards, a freedom that church schools currently lack.[57]

In closing, I would like to put the effort to pass State RFRAs in historical context. For hundreds of years before the American Revolution, Englishmen believed that Parliament protected their rights against usurpation by the crown.[58] The need to protect those rights against abuse by the legislative power first became an issue in colonial America. Thomas Jefferson was seeking a solution to this problem when he drafted the Virginia Statute Establishing Religious Freedom.[59] Evidently, he had not yet discovered the solution, as evidenced by the text, which admonishes future legislatures not to restrict or repeal the freedoms secured thereby.[60] Americans have taken for granted the solution that the founders finally adopted — to protect fundamental rights in a constitution that would bind future legislatures.

Our state RFRA battles are evidence that the Supreme Court has

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[55] The Unruh Civil Rights Act has been interpreted to apply to schools, which are considered "business establishments" and required to accommodate the public without discrimination. *See* Nichole M. by and Through Jacqueline M. v. Martinez Unified School Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

[56] Once the principle is established that schools are "business establishments" covered by the Unruh Civil Rights Act, the admissions and discipline policies of religious schools become legally actionable.

[57] Thankfully, I am unaware that the lack of de jure protection has had a chilling effect on student discipline, but it is only a matter of time before some disgruntled, disciplined student learns that his rights may have been violated.

[58] *See* JACK M. RAKOVE, ORIGINAL MEETINGS: POLITICS & IDEALS IN THE MAKING OF THE CONSTITUTION 35 (1996).

[59] *See* A DOCUMENTARY HISTORY OF RELIGION IN AMERICA, *supra* note 11, at 259.

[60] *See id.*

effectively reversed two centuries of progress, taking us back to pre-constitutional colonial America. We can no longer rely on constitutional protection, but must ask majoritarian legislative bodies to protect what has been, and should be, a fundamental right, protected against abuse by the majority. We face the difficult, but not impossible task, of convincing a deliberative body, accustomed to compromise, to accept that free exercise of religion is a fundamental right which cannot be compromised. In this effort, we join the illustrious company of Madison and Jefferson.

So perhaps we can learn a lesson from Madison's efforts to pass the Virginia Statute for Religious Freedom. Being a skilled legislative captain, Madison undertook a very successful petition drive to obtain grassroots support for the bill.[61] If religious liberty is to be protected by the majoritarian branch of government, the most important court in the land becomes the court of public opinion. The legislature reflects, however imperfectly, the public will. If the people do not cherish religious freedom, we have little hope of preserving its legal status.

D. Professor Douglas Laycock[62]

A key part of the political problem, in Congress and especially in the state legislatures, is this question of what difference RFRAs will make. In Congress, we have not handled that question very well, in part because everyone is busy and we have not done the kind of nitty gritty homework that it takes to uncover compelling stories. But more fundamentally, most of the good stories from my perspective as a civil libertarian turn out not to be good stories politically. What counts as an appealing example in this room does not begin to count as an appealing example in most legislatures. Steve Solarz, who sponsored the first Federal RFRA bill, said: "Religious liberty is popular in the abstract but it is controversial in its specific applications."[63] That is the heart of the problem. Too many examples invade the turf of some interest group on the other side who says, "Well of course they shouldn't be able to do that! Who do they think they are?"

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[61] *See* WILLIAM LEE MILLER, THE FIRST LIBERTY (1985).

[62] Alice McKean Young Regents Chair in Law, The University of Texas at Austin.

[63] This insight was commonly quoted among RFRA supporters in the debates over that bill in 1991-93, but it does not appear to have previously been recorded in the written record.

In addition, many examples that seem central from inside a religious tradition do not seem so important to someone who is outside the tradition. Many people — legislators among them — may not take their own religious tradition very seriously and have not spent more than a few minutes thinking about these problems. Unfortunately, many compelling stories often fail to arouse the interest of legislators.

In addition, there is ambiguity about what the various standards mean. What was the pre-*Smith* standard, and how many religious liberty claims succeeded under that standard? How many would succeed under RFRA? These cases are tough to win because courts often have the same reaction as politicians. The pre-*Smith* record was bad in reported cases in the lower courts, but it was not so bad in the Supreme Court[64] or in settlements.

I want to reinforce what Pat Nolan said. The common understanding of the meaning of *Smith* among government lawyers is: "We don't have to talk to you anymore. All laws are neutral and generally applicable. So we win. We do not have to justify our actions. We do not have to have a reason for not making exceptions; therefore we do not have to talk about not making an exception. Simply put, we do not have to talk to you." Bargaining and negotiating prove very difficult from this perspective. Threats to sue lack force because they believe they always win.

In the pre-*Smith* era and under RFRA, government officials had to justify a burden on religious liberty with a compelling governmental interest. While the exact standard was unclear, it certainly seemed high. At the very least, it provided a basis to begin a conversation. The threat to file a lawsuit was viable. Victories were difficult, and lawsuits expensive. But they were expensive for both sides, and both sides had a legal basis for their position, which provided a basis for meaningful discussion. Often these problems can be resolved in mutually acceptable ways with good faith negotiation. But there is no basis on which to negotiate if one side holds all the bargaining power. Before *Smith*, negotiated solutions were often possible; after *Smith* and without RFRA, they usually are not.

Negotiation was becoming more difficult even with RFRAs. Government officials are beginning to understand that a compelling

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[64] *See* Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 74 TEX. L. REV. 209, 222-28 (1994) (reviewing the Supreme Court's interpretation of the compelling interest test in free exercise cases).

interest does not mean much to many judges. Government officials are beginning to understand that they can abridge religious liberty and argue that they have not imposed a substantial burden. So it may be that, even with state RFRAs, some bureaucrats will refuse to talk and the threat to file a lawsuit will not be as effective as in the past. We not only have to get these bills passed, we must win some cases. State RFRAs provide a basis for a lawsuit and, therefore, a basis for settlement discussions, but unless religious claimants win some cases, their basis for discussion will remain weak.

I also think we have been too quick to concede that all laws are neutral and generally applicable. In fact, they often are not. A law forbidding discrimination on the basis of religion may not be a neutral and generally applicable law. It may apply to everyone, but it is a law dealing explicitly with religion — making religion a regulatory category — and I would challenge that even under the *Smith* standard. Many courts believe that zoning laws are neutral and generally applicable, but I do not think we should let that assumption stand unchallenged. Zoning laws are the antithesis of generally applicable laws. With anything as big as a church, zoning officials decide parcel by parcel. Every piece of land is regulated individually and with particularity. There is nothing generally applicable about zoning laws in most jurisdictions.

The recent Ninth Circuit case shows that it is possible to protect religious exercise with the hybrid-rights theory.[65] But I am not very optimistic about that; few courts have relied on this theory, and others have expressed serious doubts.[66]

Finally, only some of the battles over religious freedom involve legislatures and statutes. More often, such battles emerge from bureaucratic and administrative practice. They are fact specific, often not recurring patterns. The opponent of religious liberty often is not a legislator, but a career bureaucrat or a single-issue regulator.

Two early cases under the Florida RFRA provide appealing

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[65] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702-11 (9th Cir. 1999) (finding hybrid rights in landlord-tenant dispute).

[66] *Compare id.*, *and* People v. DeJonge, 501 N.W.2d 127, 134 (Mich. 1995) (finding hybrid right to home school), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (finding hybrid-rights doctrine "ultimately untenable"), *Thomas*, 165 F.3d at 722-26 (Hawkins, J., dissenting) (doubting existence of hybrid-rights doctrine), Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting hybrid-rights doctrine as illogical), *and* Salvation Army v. Department of Community Affairs, 919 F.2d 183, 199-200 (3d Cir. 1990) (holding that hybrid freedom of association claim adds nothing to free exercise claim).

examples of why we need such acts. In the first, the plaintiff lost his driver's license for ten years because he is a lay communion minister in a Lutheran church.[67] He had prior convictions for DWI and drug abuse; his license was probated for ten years on condition that he abstain from drugs and alcohol. He has been through a detoxification clinic. He is now clean. He mentioned to his probation officer that he was serving at the Lutheran church as a lay minister. The officer pulled his license because he was handling wine and taking communion. The state prosecutor defended the revocation in state court and promised to appeal if he lost. Cooler heads eventually prevailed; the case settled, and the state has promised not to revoke licenses over communion wine.[68] If this example of a state RFRA's benefits does not evoke sympathy from legislators, it is hard to know what example will.

In a second Florida case, the city of Boca Raton wants to bulldoze the tombstones in the municipal cemetery and begin enforcing a clause that has been buried in city's cemetery ordinance, never before enforced, and retroactively amended from time to time.[69] The clause says that tombstones (1) must be flat to the ground, and (2) can have only identifying information.[70] The clause thus prohibits religious inscriptions, crosses, stars of David, and Bible verses, permitting only names and dates. I thought that was a good example, but it had no impact in Washington, and the trial judge ruled for the city.[71] An appeal is pending.[72]

Often, if one looks beneath the surface, there is discrimination, hostility, and uneven enforcement of statutes and regulations. For example, the Mormons are the majority in Utah and my guess is that Utah and its local governments do not often infringe on their religious activities. If Mormons cannot protect their religious

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[67] *See* Noreen Marcus, *State: Communion During Probation a Sin; Churchgoer Fighting Driver's License Suspension*, FORT LAUDERDALE SUN-SENTINEL (Jan. 4, 1999) (available, for a fee, at <http://sun-sentinel.com/archive.htm>).

[68] *See* Noreen Marcus, *Communion Wine Won't Bar Minister from Driving*, FORT LAUDERDALE FLORIDA SUN-SENTINEL (Feb. 26, 1999) (available, for a fee, at <http://sun-sentinel.com/archive.htm>).

[69] *See* Warner v. Hanson, No. 98-8054-Civ-Ryskamp (S.D. Fla. Mar. 31, 1999).

[70] *See* Boca Raton City Council Resolution 185-82, § 1(9), as amended by City Council Resolutions 182-88 and 119-96 (quoted and paraphrased in Verified Complaint 4-6, and in Plaintiff's Response to Defendants' Motion to Dismiss Complaint 5 n.3).

[71] *See* Ben Anderson, *Judge Mows Down Cemetery Religious Symbols*, CONSERVATIVE NEWS SERVICE (April 2, 1999) (available at <http://www.conservativenews.org/InDepth/archive/1999904/IND19990402c.html>).

[72] *See* ACLU Press Release, *Florida ACLU to Appeal Ruling on Religious Symbols in Cemetery* (Mar. 31, 1999) (available at <http://www.aclu.org/news/1999/n0331991.html>).

exercise in Utah, what church can protect itself anywhere?

In much of the rest of the country, Mormons are a small minority, poorly understood. Most Americans associate Mormons with polygamy, which they no longer practice. Another common misperception is that they are not really Christian. This also is not true; the full name of the church commonly called Mormon is the Church of Jesus Christ of Latter-day Saints. Dennis Rodman is probably not the only person who thinks they are a cult. People who call religions cults tend to use the term pejoratively. So when an administrative official with discretionary governmental authority outside Utah must make a decision to grant or deny a permit, a waiver, an exception, or license, or take some other action affecting a Mormon church or Mormon organization, it seems likely that, in his relatively unbounded discretion, these common misperceptions will affect the official's decision.

One of the cases described in the federal hearings on land use occurred in Forest Hills, Tennessee, a fairly well-to-do suburb of Nashville that historically has had four churches sitting near a big intersection — Methodist, Presbyterian, and two Churches of Christ. One of those churches closed. The Mormons bought the property and applied for a land use permit. The city denied the application, citing aesthetic reasons. A state trial judge affirmed the city's action.

The trial judge said that she could not find any actual discrimination of the sort she understood the *Smith* standard to require.[73] She though this was a neutral and generally applicable rule that just happened to prohibit new churches. The city's zoning code prohibited churches on any site except where the three existing churches were already located. Such a law is neither neutral nor generally applicable. It was in fact a total ban on new churches, with a grandfather clause for three familiar denominations.

I also fear that religious liberty is losing its status as a universal human right. Instead, many now perceive it to be only one of many special interests, and other special interest groups will take stands against religious liberty. Many factors, including the secularization of society, have reinforced this view of religious liberty as special interest rather than fundamental right. That view is further reinforced by the fact that other important social and political issues now line up to some extent on religious grounds. The national ACLU, which

[73] *See* Corporation of the Presiding Bishop v. Board of Comm'rs, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998).

previously supported RFRAs, is now outside the coalition.[74]

If we are to succeed, we must restore the sense that religious liberty is for everyone, that it is a fundamental right. We must help government officials, special interest groups, state legislators, and the general public to understand that religious liberty is not just for conservatives, not just for Protestants or Christians, but for believers and nonbelievers of every variety. And even should we accomplish this, we are fighting an uphill battle.

E. Richard Foltin[75]

I was asked to speak about the Jewish community's perspective on RFRA. In most circumstances, I would approach with great trepidation any effort to speak on behalf of the Jewish community. In fact, we are a very diverse community in terms of belief, observance, and political viewpoint. There are public policy issues that split many of the Jewish groups that are part of the coalition and which support RFRA. Yet RFRA is one issue where one can speak for the entire Jewish community. The need for comprehensive legislation that protects free exercise of religious principles has achieved unanimous support among Jewish people.

The Coalition for the Free Exercise of Religion includes some twenty Jewish organizations, which run the gamut from The Agudath Israel to the Reform Movement and to all the nonaffiliated Jewish organizations in between. This unanimity reflects a profound and long standing recognition that we are a religious minority. As a religious minority we have all prospered in this great nation because of the profound and innovative notion encapsulated in the First Amendment: that the right of religious free exercise is fundamental and it is not to be abrogated by the majority's will. A deeper value that the First Amendment reflects is that members of the religious majority and minority alike are full and equal mem-

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[74] *See Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (forthcoming) (statement of Christopher Anders) (available at <http://www.house.gov/judiciary/ande0512.htm>). The Florida ACLU, by contrast, lobbied hard for Florida's RFRA and is appealing the judgment in *Warner v. Hanson*. *See supra* note 72 and accompanying text.

[75] Legislative Director and Counsel of the American Jewish Committee's Office on Governmental and International Affairs. Mr. Foltin has been active in the passage of a number of civil rights bills, including RFRA, the Religious Violence Act, and the Hate Crimes Statistics Act. In addition, he serves as co-chair of Committee on First Amendment Rights of the American Bar Association's Section on Individual Rights and Responsibilities.

bers of society. We are not guests; we do not enjoy our religious liberty at the will of others and at the sufferance of the majority. Practicing our religion is our fundamental right as human beings in this society.

This is why *Smith* and *Boerne* were such a profound shock to our community. *Smith*, especially, suggested that the protection of the free exercise of religion can be subject to the will of the majority.[78] It suggested we must lobby for legislation to protect religious liberty in the same way one lobbies for a greater share of an appropriations bill or for regulatory change.

There are three broad areas of concern that have developed with respect to particular observances of the Jewish community. While the impact is greatest on the orthodox community, because of stricter practice, these are important issues for all of the Jewish community, and for members of all religious communities. Moreover, although these issues do impact the orthodox most heavily, many other segments of our community also observe some or all of these practices as well. We are all victims of laws of general application to which no exceptions can be made.

The first issue I want to discuss is land use regulation. In traditional Jewish practice, one does not drive or take transportation on the Sabbath or on holidays. At the same time, there is an obligation on the Sabbath or on holidays to participate in communal worship. This means that one must live within walking distance of a synagogue in order to be a regular attendant at services on Sabbath or on a holiday.

Zoning laws that prohibit houses of worship from building in certain areas or otherwise place unreasonable restrictions on the building of those houses of worship, can effectively exclude Observant Jews from practicing their faith. This has the force of segregation for Jews within those communities comparable to the Jim Crow laws of an earlier time. The impact of these so-called laws of general applicability is that members of a particular religious community are not able to live in a particular community.

During the last couple of decades we have witnessed numerous instances where Jewish communities have battled these ostensibly neutral land use laws. Such laws substantially burden their communities' religious practices by not allowing Jews to worship within close proximity to where they live. Professor Douglas Laycock

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[78] *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

spoke this morning about the notion that a rule prohibiting a church from building in a certain location does not amount to a substantial burden. Courts reason that this is only a financial burden and nothing but money prevents the church from building elsewhere. However, given the religious context, a rule prohibiting the building of a church in close proximity to its members' residences should amount to a substantial burden. The clearest possible case is that of Orthodox observant Jews who are simply unable to practice as a community if those houses of worship cannot be built in reasonable proximity.

Sometimes clear evidence of animus in decisions against religious groups prompts courts to grant relief. I want to talk about a case that is relevant in the zoning context. The town of Airmont in upstate New York was carved from the larger village of Ramapo. The new town enacted a zoning law forbidding synagogues in private homes. Airmont was very close to a community where a great many Orthodox Jews lived. The impact of this new incorporation of a separate village was that orthodox Jews could not move into this adjacent community. The U.S. Attorney and affected residents filed a lawsuit challenging the village's zoning policy as discriminatory, enacted for the purpose of making it impossible for Orthodox Jews to live in Airmont.[11] Ultimately, a court found discrimination and steps were taken to remedy that situation. The record in that case clearly demonstrated the animus that was involved and the village's intention to prevent members of a particular faith from moving into the community.

More often, however, these zoning decisions are cloaked in neutrality. Zoning boards promulgate rules, now increasingly aware of the need to compile a record that does not betray animus. Such conduct can only be addressed by a legal framework that considers adverse impact as well as discriminatory intent.

Another similar case involved an attempt to get a zoning variance for religious prayer in a rented house in residential Los Angeles. A special use permit was sought to allow a prayer to take place in a home. The city council denied the permit. One neighbor testified against the permit, saying: "If you permit this illegal use, how do you rationally prevent Muslims from setting up their

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[11] *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (reinstating jury verdict finding liability); LeBlanc-Sternberg v. Fletcher, 1996 WL 699018 (2d Cir. 1996) (unpublished disposition) (granting injunctive relief).

things, Hindus from having their temples. Once you open the door you will ruin a beautiful asset."[78] So I think we have enough of these cases, enough anecdotal information and statistical evidence, to show that there is a very real problem. We must work to prevent municipalities from promulgating zoning rules, seemingly neutral, but which serve as a means of excluding houses of worship.

I would like to mention one other case in the zoning area that involves a personal experience. Before I moved to Washington, D.C., I lived on Long Island close to a synagogue in North Woodmere. The synagogue was in a house that was being used as a synagogue. Although the synagogue had never really caused any traffic problems, it did not adhere to the local zoning regulations that required minimum parking for houses of worship. When the local zoning board considered an application for a variance, it did not consider that this house of worship was an Orthodox synagogue, or even that on the High Holidays there was no tangible increase in vehicular traffic. The board, of course, denied the variance.

Thankfully, the Appellate Division found a free exercise interest that the zoning board had not adequately taken into account, and the case was remanded and ultimately resolved on terms favorable to the synagogue.[79] However, this is not a typical result. Such cases are difficult to win, although courts in the northeast tend to be more favorably inclined towards houses of worship.

Another area I want to discuss involves religious ritual practices. Laws of general applicability have tremendous potential to impact various aspects of Jewish ritual observance. By the very nature of general rules, they accommodate behavioral norms, not the ritual religious practices of minorities. Consider the case of *Goldman v. Weinberger*,[80] where an officer was disciplined for wearing a yarmulke while on duty in a military hospital.[81] He was told he could not do that because it was a violation of military regulations that forbade the wearing of any head coverings while indoors. Aside from the issue of great deference to the military, the subtext of this case was the rule of general applicability. The regulation applies to

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[78] Congregation Etz Chaim v. City of Los Angeles No. 97-5042 HLH (Ex) (C.D. Cal. 1997).

[79] *See* Young Israel of North Woodmere v. Town of Hempstead Board of Zoning Appeals, 634 N.Y.S.2d 199 (App. Div. 1995).

[80] 475 U.S. 503 (1986).

[81] *See id.* at 504-05.

all military personnel, of all religions.

Alan Reinach spoke earlier about the need for Sabbath accommodation by government employers. This holds true for any government controlled facility whether one is in a school, a courtroom, in the military, or in a prison. There is a real potential for conflict between the government rules regarding administration of its facilities and how one is to behave in terms of the ability to observe Shabbat, to wear a yarmulke, or to receive kosher food.

Another area that has come into conflict — and this is one of the classic cases for those who have followed the history of RFRA — is the issue of the right of the family of those who are killed in traffic accidents or other nonsuspicious events to be free of religiously prohibited autopsies or other "routine" postmortem procedures. One famous Rhode Island case involved a member of the Hmong faith who was killed in a traffic accident.[82] State authorities performed an autopsy despite the fact that this was a traffic accident in which there was no suspicion of foul play, nor any compelling law enforcement need why an autopsy should have been required. Nevertheless, following the *Smith* decision, a court said there was nothing it could do — the family simply had no remedy under federal civil rights law against the state for this violation of a deeply held religious belief.[83]

Given these examples, one can easily anticipate other situations. A state, for example, might decide to amend its humane slaughter laws, to prohibit kosher slaughter. Observant Jews would no longer be able to obtain meat to eat in any such state, on the grounds that this is ostensibly not a form of humane slaughter. Or suppose a state decided that circumcision was a harmful and inappropriate procedure and outlawed the practice. Once again there would be no legal recourse to challenge such a ruling.

These are not really hypothetical circumstances. At one point the U.S. Department of Agriculture proposed meat and poultry processing regulations which were designed to remove harmful bacterial pathogens. There was potential that those rules could create a serious problem for the kosher preparation of meat because they were inconsistent with the processing that was required when meat is salted and soaked in order to make it kosher. Had those rules been enforced it might well have meant that observant

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[82] *See* Yoo Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

[83] *See id.*

Jews could not eat meat or poultry processed in the United States. This was brought to the attention — and I have to congratulate my colleagues at the Agudath Israel for doing this — of the Department of Agriculture. The regulations were amended because the Department of Agriculture was sympathetic. They found a way to amend the regulations to address the safety issue without precluding kosher slaughter. A less sympathetic administration could easily have led to a different result.

The final issue that I want to touch upon is that of discrimination. It is crucial to understand that while the anti-discrimination laws are of great importance to all of us — and many of our organizations continue to fight for additional laws to protect against discrimination — we must be cognizant of the fact that these laws sometimes conflict with the needs and beliefs of religious institutions. Orthodox rabbinical schools ordain men only. Sexes are separated during prayer services in orthodox synagogues. Many Orthodox Jewish schools are single sex institutions. Further, for some Jews, the religion is understood to proscribe a woman from teaching a class of boys. Neutral and generally applicable sex discrimination rules would seriously hamper the ability of some to adhere to religious practice in the operation of their religious schools.

I want to conclude with two brief thoughts. First, we have talked about the lack of horror stories to evoke support in legislatures. Part of that is due to a lack of research. But I also think there are still people in government who are not instinctive bureaucrats, and who recoil at the idea of discrimination and are willing to accommodate. Nevertheless, the longer we continue with a legal regime in which religious practice is not protected, the more danger we are in that hostile and discriminatory attitudes will increase and permeate society at large. So, we really have to be vigilant. The fact that we do not have enough horror stories yet should only impress upon us the urgency of this effort, so that such horror stories do not ever occur.

Finally, there have been many reasons suggested this morning for why we are seeing an increase in the number and kinds of cases and conflicts between the religiously observant and government regulation. In my view, this is attributable both to the increased religious diversity in our society, and to the growth of the regulatory state. As government promulgates more regulations, there is a greater risk of conflict between these regulations and the needs of

those who are members of a minority faith, who march to a different drum than the majority. If we are to be a truly pluralistic and diverse society, we have to insure that religious conscience is respected and that the regulatory state does not unduly infringe on religious belief.

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REPRESENTATIVE ERIC CROFT

MEMORANDUM

TO: Rep. John Harris, Chair
House Community and Regional Affairs Committee

FROM: Rep. Eric Croft

DATE: 2/22/00

RE: HB 387

I am requesting a hearing for House Bill 387, the Alaska Religious Freedom Protection Act at your earliest convienence.

Enclosed for your information:

1. Copy of the Bill
2. Sponsor Statement
3. Article regarding the need for ARFPA

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The Alaska Religious Freedom Protection Act - HB 387 - by Rep. Croft

The Legislature finds that the First Amendment to the United States Constitution and Article I, Section 4 of the Alaska Constitution recognizes and protects the fundamental right of free exercise of religion. In 1990, the United States Supreme Court retreated from over 200 years of respect for the right to free exercise of religion. In Smith v. Emp. Div., 494 U.S. 872 (1990), an opinion written by Justice Scalia, the Court held that the government no longer had to make reasonable exceptions to general laws in order to accommodate the religious beliefs of its citizens. While the Alaska Supreme Court has not chosen to follow this retreat from protection for religion, the Legislature finds that the free exercise rights of Alaska citizens are so vital and fundamental that it is in the public interest to provide a statutory guarantee of these rights to secure against a change in judicial interpretation. While it is improper for the Legislature to tell the Judiciary how to interpret the Alaska Constitution, it is proper for the Legislature to establish different rights or to secure established rights in a different manner or to a different degree than the minimum set by the Constitution as long as such legislative action does not interfere with the rights of other persons. By protecting the individual free exercise of religion, the Legislature does not intend to create an establishment of religion or an official state religion.