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The Religious Freedom Restoration Act: Postmortem of a Failed Statute

Eric Alan Shumsky

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THE RELIGIOUS FREEDOM RESTORATION ACT: POSTMORTEM OF A FAILED STATUTE

Eric Alan Shumsky

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I. INTRODUCTION

On June 25, 1997, in City of Boerne v. Flores, the Supreme Court held the
Religious Freedom Restoration Act (RFRA)\(^2\) unconstitutional.\(^3\) The Court found that in enacting RFRA, Congress had exceeded its Fourteenth Amendment enforcement power.\(^4\) Pursuant to that power, the Court held, Congress could have constitutionally prevented states from infringing on religious free exercise as defined by existing First Amendment jurisprudence. However, RFRA did much more—it worked "a substantive change in the governing law."\(^5\)

Congress saw the overthrow of RFRA as a disaster and immediately sprang into action. Less than three weeks after Boerne was decided, the House held hearings entitled Protecting Religious Freedom After Boerne v. Flores.\(^6\) Witness after witness denounced Boerne; one went so far as to compare it to Dred Scott.\(^7\) Additional hearings followed in late 1997 and early 1998,\(^8\) culminating in the introduction of the Religious Liberty Protection Act of 1998 (RLPA) in the House\(^9\) and the Senate.\(^10\) The point of RLPA was clear—to reenact the religious protections formerly embodied in the Religious Freedom Restoration Act.\(^11\)

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3. See Boerne, 521 U.S. at 512.
4. See id. at 519; cf. U.S. CONST. amend XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
5. Boerne, 521 U.S. at 519; id. at 532 ("RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.").
In the rush to repair the damage supposedly wrought by Boerne, no one stopped to ask whether RFRA in operation had actually contributed to the protection of religious freedom.\textsuperscript{12} It would seem that this inquiry into effectiveness should have been the threshold question—after all, if RFRA had been ineffective, there would be little reason, other than its political appeal, to reenact it. But rather than beginning with this question of efficacy, the hearings—and the surrounding debate—focused almost exclusively on strategies for getting around the Court’s decision in Boerne. Some proclaimed the need for a constitutional amendment.\textsuperscript{13} Others argued that new legislation could be justified under the Commerce Clause\textsuperscript{14} or Congress’ spending power.\textsuperscript{16} One witness even urged Congress to challenge the Court directly, using techniques like “stripping of appellate jurisdiction, impeachment[, or] a ‘court packing’ plan like that almost pursued by President Roosevelt in the 1930s.”\textsuperscript{16} In the academic setting, too, commentators focused on possible responses to Boerne, rather than asking whether RFRA did any good.\textsuperscript{17}

This Article considers the foundational empirical question, and concludes

\footnotesize{Freedom Restoration Act”), available in 1998 WL 318288.}

\textsuperscript{12} This hasty reaction is not so surprising as it might initially seem. One author has argued that the similarly vehement reaction to Employment Division \textit{v. Smith}, 494 U.S. 872 (1990), may be attributed to “innovation to how courts have actually been treating the free exercise claimant.” James E. Ryan, Note, \textit{Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment}, 78 VA. L. REV. 1407, 1408 (1992).


\textsuperscript{16} \textit{July 14, 1998 Hearings, supra note 13} (statement of Michael P. Farris).

that RFRA did far less than promised. Rather than functioning as the robust protector of religious liberty that its proponents envisioned, RFRA provided only marginally greater protection for religious free exercise than what came before. Part I introduces RFRA; Employment Division v. Smith,\(^{18}\) the Supreme Court case to which RFRA responded; and the high hopes surrounding RFRA’s passage. Part II argues that in certain categories of cases, RFRA created no new protection. Some state constitutional provisions already protected religion at least as vigorously as RFRA purported to. Where such state protections were available, RFRA simply provided a further, federal remedy. In other cases—particularly in employment discrimination suits against religious organizations—Smith never changed the standard for free exercise analysis. Thus, RFRA could not institute a higher level of protection, because in these areas, Smith had never lowered protection. Part III analyzes the RFRA case law to show that few courts held for religious claimants. Even in areas (either geographic or substantive) where RFRA could have heightened religious protection, courts narrowly interpreted the Act in ways that minimized its effectiveness. They applied limited constructions to all three prongs of the compelling interest test implemented by RFRA—substantial burden on religion, compelling government interest, and least restrictive means. In the final calculus, even before Boerne killed RFRA, the statute had already failed to live up to its promise.

II. EMPLOYMENT DIVISION v. SMITH, RFRA’S PASSAGE, AND HIGH HOPES

The history of RFRA forms a striking parallel to the recent debates about RLPA. For just as RLPA is intended to undermine City of Boerne v. Flores, RFRA was intended to reverse Employment Division v. Smith.\(^{19}\) In Smith, the Supreme Court considered the free exercise claims of Alfred Smith and Galen Black, drug rehabilitation counselors who were fired because they used the hallucinogen peyote\(^{20}\) during a ceremony of the Native American Church.\(^{21}\) When Smith and Black filed for unemployment compensation, their claims were denied on the ground that they had been fired for “work-related ‘misconduct.’”\(^{22}\)

When Smith reached the Supreme Court, the Court rejected the unemployment counselors’ constitutional claims.\(^{23}\) In so doing, the Court announced and used a new test for evaluating government-imposed burdens on religious free exercise. Since 1963, courts had applied “strict scrutiny” in cases


\(^{19}\) See 42 U.S.C. § 2000bb(b)(1) (1994). For discussion of this reversal, see infra notes 30-31 and accompanying text.

\(^{20}\) The buds of the peyote cactus contain mescaline, a drug with hallucinogenic effects. OXFORD ENGLISH DICTIONARY (2d ed. 1989).

\(^{21}\) See Smith, 494 U.S. at 874.

\(^{22}\) Id.

\(^{23}\) See id. at 890.
involving free exercise claims: If a law imposed a substantial burden on free exercise, it could only constitutionally be justified if the law was necessary to achieve a compelling government interest.\footnote{See Sherbert v. Verner, 374 U.S. 398, 406 (1963). This test was later refined in\textit{ Thomas v. Review Board} to require that the “inroad on religious liberty [be] the least restrictive means of achieving some compelling state interest.” 450 U.S. 707, 718 (1981).} However, in\textit{ Smith}, the Court distinguished and limited this “compelling interest” test on the ground that it had only ever been applied in cases involving denials of unemployment compensation benefits.\footnote{See\textit{ Smith}, 494 U.S. at 883.} Having set aside this seemingly strong line of precedent, the Court concluded that “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”\footnote{\textit{Id. at} 878–79. A broad range of scholars has attacked \textit{Smith} as a drastic reversal from earlier cases. \textit{See}, e.g., Ira C. Lupu, \textit{Statutes Revolving in Constitutional Law Orbits}, 79 VA. L. REV. 1, 52 (1993) ([Smith] dramatically altered the constitutional landscape of religious liberty”); Michael W. McConnell, \textit{Free Exercise Revisionism and the Smith Decision}, 57 U. CHI. L. REV. 1109 (1990).} In short, the tables had been turned. Formerly, the government had to prove that its interest was compelling and its policy was necessary; now, the religious plaintiff bore the heavy burden of proving the government policy to be altogether irrational.

The backlash against\textit{ Smith} was immediate. The \textit{Los Angeles Times} blasted the Court for “pure legal adventurism,” railing that the decision “is more than a sweeping repudiation of nearly a century of humane and enlightened legal precedent. It is an affront both to our society’s hard-won pluralism and to the belief in limited government that distinguishes principled conservatism from mere reaction.”\footnote{\textit{The Necessity of Religion: High Court Says Religious Freedom Is a Luxury—Wrong}, \textit{L.A. Times}, April 19, 1990, at B6.} The legal director of the American Jewish Committee argued that\textit{ Smith} would “virtually eviscerate the free exercise of religion clause of the First Amendment.”\footnote{Samuel Rabinove, \textit{The Supreme Court and Religious Freedom}, CHRISTIAN SCI. MONITOR, June 25, 1990, at 19.} Congress also responded—it passed RFRA.\footnote{Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993). RFRA was not the only congressional reaction to\textit{ Smith}. Five months after\textit{ Smith} was decided, during then-Judge David Souter’s Supreme Court confirmation hearings, Senator Arlen Specter questioned him about \textit{Smith}. Though Souter resisted, he did express “the value of the strict scrutiny test,” and further stated that he did not read \textit{Sherbert v. Verner} so narrowly as Justice Scalia had in \textit{Smith}. Nomination of David H. Souter To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 101st Cong. 156-57 (1991), reprinted in 16 ROY M. MERSKY ET AL., THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1990, at 290-91 (1992). This seems to have pleased Senator Biden, who appended Additional Views to the Committee Report in which he described Souter’s “sensitivity to the problem at the core of\textit{ Smith} and of modern Free Exercise Clause doctrine—the problem of adjusting government action to religious practice in a pluralistic society.” S. EXEC. REP. NO. 101-32, at 31 (1990) (additional views of Joseph Biden, Chairman, Senate Judiciary Committee), reprinted in MERSKY ET AL., supra, at 1363; see also 136 CONG. REC. S14,340 (statement of Sen. Biden) (“Judge Souter suggested that he disagreed with the Supreme Court’s recent and restricted decision in Employment Division versus Smith, a decision that in my view undermines religious freedom in our country. And again I found his
The Religious Freedom Restoration Act was quite explicit in function. It was intended to overturn Smith. The Senate Judiciary Committee Report states that RFRA "responds to the Supreme Court’s decision in [Smith]." Indeed, the text of RFRA itself refers to Smith, noting that "in Employment Division v. Smith . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." In place of the deferential Smith standard, RFRA re instituted the more protective compelling interest test, employing statutory language that mirrored the former constitutional standard.

Reaction to RFRA was generally positive, and often extremely so. Many of the Act's supporters believed that RFRA would have a wide-ranging effect, restoring religious jurisprudence to its proper course. With Thanksgiving close at hand, some sang the praises of RFRA in almost religious terms: "In this Thanksgiving season, Americans of every religious faith can be grateful that their free exercise of religion is suddenly more secure than when the Supreme Court assailed the first of our civil liberties three years ago." Another writer gushed that RFRA "is one of the most important pieces of legislation related to the freedom of religion ever adopted by Congress. It is one thing we surely should be thankful for this season." The Arizona Daily Star lauded President Clinton for signing the Act, saying that he had "struck a blow for the religious liberty of all Americans." And Oliver Thomas, former general counsel of the Baptist Joint Committee and leader of the largest coalition that lobbied for RFRA, said that while "more than 60 cases have been decided against religious claimants [since Smith] . . . [t]oday we celebrate the end of this dark night."
Even those who opposed RFRA agreed that the Act would have a tremendous effect. Prison administrators feared the disruption of prisons. State officials claimed that “[p]risoners could . . . , in the name of religious freedom, compel authorities to supply them with chateaubriand and sherry and even with civilian clothing that would make it easier for them to escape.” Children’s advocacy groups hinted that religious exemptions under RFRA would mean the end of state protections—and the beginning of wicked consequences—for children. And behind all of these specific fears, there loomed Justice Scalia’s general prediction of doom in Smith. In striking down the compelling interest test, Scalia had threatened that implementing such a test would break down our very society:

[I]f “compelling interest” really means what it says . . . , many laws will not meet the test. Any society adopting such a system would be courting anarchy . . . . [W]e cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The [compelling interest test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

37 See S. Rep. No. 103-111, at 25 (1993). Twenty-six state attorneys general wrote to Senator Biden to urge an amendment exempting prisons from RFRA, see id., as did the Executive Director of the Association of State Correctional Administrators, see id. at 35, 36.


RFRA’s strict scrutiny standard [limits to a single “least restrictive” remedy] children who are in the custody of persons whose religious beliefs or practices are contrary to commonly accepted notions of child welfare. The types of religious practices which adversely affect child welfare include reliance on spiritual means for treatment of illness which withhold needed medical care, physical punishment, abuse through exposure to dangerous animals or poison, as well as child sexual practices.

40 Employment Division v. Smith, 494 U.S. 872, 888–89 (1989) (citations omitted). In fairness to Justice Scalia, his primary purpose was probably not to predict a breakdown in the rule of law. Rather, Scalia seems to have stated his true concern in a subsequent footnote: “[i]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.” Id. at 889 n.5. Even so, Justice Scalia does seem concerned that judges might allow such anarchy-inducing exceptions. Id. Either way, this parade of horribles is an eloquent precursor to the courts’ current reluctance to grant religious exceptions, and it continues to be echoed as a warning in articles critical of RFRA. See, e.g., Tania Saison, Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act, 28 COLUM.
Like the most vociferous of RFRA’s proponents and opponents, Justice Scalia apparently believed that a RFRA-style compelling interest test would have a considerable effect. And like them, he was wrong.

But beneath these optimistic predictions and the accompanying rhetoric, there ran a current of concern about the way in which courts would interpret RFRA. Six Republicans on the House Judiciary Committee wrote that even the pre-Smith strict scrutiny that RFRA sought to restore had provided little religious protection in the courts:

In justification of the need for this legislation, proponents have provided the Committee with long lists of cases in which free exercise claims have failed since Smith was decided. Unfortunately, however, even prior to Smith, it is well known that the “compelling state interest” test had proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations. Restoration of the pre-Smith standard, although politically practical, will likely prove, over time, to be an insufficient remedy. . . .

. . . [The Act] will perpetuate, by statute, both the benefits and frustrations faced by religious claimants prior to the Supreme Court’s decision in Smith.41

Likewise, Douglas Laycock and Oliver Thomas, two of RFRA’s primary supporters, wrote that RFRA would only succeed in protecting religious liberty if the courts understood RFRA to signal a jurisprudential shift: “RFRA cannot succeed unless it changes the judicial and bureaucratic climate that Employment Division v. Smith both reflected and aggravated.”42 In short, “The Act will fail unless it serves as a political signal that Congress means to provide serious protection for religious minorities—unless the compelling interest test is reinvigorated in the lower courts.”43 If the results of RFRA cases in the lower courts are taken as the measure of the Act, then that “political signal” was not

J.L. & SOC. PROBS. 653, 655 (1995) (worrying that the compelling interest test could lead to “a flood of exemptions from generally applicable laws [that] would threaten governmental effectiveness” and quoting Scalia’s parade of horribles).


43 Id. at 224; see also Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 FORDHAM L. REV. 883, 901:

QUESTIONS: How far can the Supreme Court go taking the teeth out of [RFRA] by just watering down the compelling interest test to a point where it’s so narrow that it really doesn’t mean anything?

MR. LAYCOCK: I think that’s the principal danger to the bill . . . . There was some fear in the Senate that judges were going to run amok and protect all sorts of crazy stuff. I think the greater risk is that they will be highly deferential and not protect nearly enough.
III. THE STATE OF THE LAW FOLLOWING EMPLOYMENT DIVISION V. SMITH: A STARTING POINT FOR EVALUATING RFRA

To determine the effectiveness of RFRA, two pieces of information are necessary— the background protection of religious free exercise against which RFRA was enacted, and what the statute did in fact accomplish.44 This Part considers the first of those questions.

Employment Division v. Smith was the baseline from which RFRA was to be measured. This was clear from the statutory text and the legislative history.45 Thus, even if the extreme rhetoric regarding the problems with Smith is disregarded,46 it seems clear that Smith is the proper starting point for an analysis of RFRA. And, despite the angry criticism of Smith at the time that decision was handed down,47 Smith may not have had such a negative effect as was feared. This is not necessarily to argue that Smith did not lower the bar on religious protection. Formally speaking it did, and symbolically it was perceived as a major blow to religious liberty.48 However, even before Smith, the Supreme Court’s religious jurisprudence was not particularly solicitous of free exercise.49 As Justice Scalia

44 Throughout this article, I refer to RFRA in the past tense, as though the statute were dead. And while this is largely accurate, RFRA may still have a little life in it. Because Boerne held RFRA unconstitutional as violative of Congress’ Fourteenth Amendment powers, see 521 U.S. at 529-36, some courts have reasoned that RFRA remains in effect for suits against federal government officials, see, e.g., Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 858-59 (8th Cir. 1998), cert. denied, 119 S. Ct. 43 (1998). But see Patel v. United States, 132 F.3d 43, 1997 WL 764570, at *2 (10th Cir. 1997) (unpublished table decision; text available in Westlaw) (reaching the opposite conclusion).

45 See supra notes 30-31 and accompanying text.

46 It is important to recognize that statements made during legislative hearings should not always be taken at face value. Proponents of legislation—both witnesses and legislators—have great incentive to bluster. Exaggeration may help to convince marginal legislators to support the legislation, and it may build support among voters, who in turn pressure their legislators to support the legislation. See generally Reed Dickerson, Statutory Interpretation: Dipping into Legislative History, 11 Hofstra L. Rev. 1125, 1131 (1983) (arguing that committee hearings should be disregarded because they have no adversarial component, and are stacked heavily in favor of the bill at issue).

47 See supra notes 27-29 and accompanying text.

48 See Laycock & Thomas, supra note 42, at 216 (“The formal doctrine [contained in Smith] was bad enough, but the symbolic effect was worse. Government bureaucrats, their lawyers, and many lower court judges took Smith as a signal that the Free Exercise Clause had been generally repealed, that whatever clever argument a church lawyer might make about Smith’s exceptions, the operative rule was that free exercise claims should be rejected.”); see also Steven D. Smith, Losing Jerusalem—RFRA and the Vocation of Legal Crusader, 39 Wm. & Mary L. Rev. 907, 919 (“In retrospect, it seems that the Sherbert v. Vernor ‘compelling state interest’ doctrine was for many religious believers a prize to be fought for and defended. So Smith represented, in effect, the loss of Jerusalem, to be retaken (temporarily as it turned out) by the enactment of RFRA.” (footnotes omitted)).

49 See Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 Vill. L. Rev. 1, 3 (1994) (“While the Court had continued to advert to the ‘compelling interest’ language before Smith, suggesting a highly protective attitude toward religion, its actual decisions had grown more and more deferrential to the government. A statute that simply turns the clock back
noted in Smith, "We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied."\(^{50}\) Indeed, one commentator who catalogued free exercise cases from 1980 to 1990 found that free exercise claimants lost 85 of the 97 free exercise cases decided by appeals courts during that period.\(^{51}\) Thus, it seems that the courts guarded free exercise only minimally, even under the supposedly protective Sherbert standard.

Moreover, at least among reported cases, it appears that Smith caused less damage than was feared. The same author who catalogued the courts' pre-Smith jurisprudence analyzed the cases in which free exercise claims were successful. He concluded that, of the twelve cases won by free exercise claimants, only one or two would have been decided differently under the more restrictive Smith standard.\(^{52}\) This, then, is a problem of baselines. Contrary to the rhetoric surrounding RFRA, the law before Smith was not very protective of religion, and the law after Smith was not a significant change. Thus, a restoration through RFRA of the status quo ante would likely have correspondingly little effect.

A. Religious Employers—RFRA Safeguarded What Already Was Protected

In certain categories of cases, RFRA could not “restore” religious protection because Smith had never lowered the standard. Certain kinds of free exercise were guarded even under Smith. This does not demonstrate, of course, that RFRA was a failure. Rather, it simply shows that Smith was not the across-the-board limitation on free exercise that some feared. As such, RFRA was not the cure-all that some claimed.

The most obvious example of religious protection that remained in place even after Smith occurred in cases involving religiously motivated denials of unemployment benefits. This was the context in which Sherbert v. Verner first established the strict scrutiny standard,\(^{53}\) it was bolstered by three later Supreme Court decisions,\(^{54}\) and it was seemingly left undisturbed by the otherwise across-
the-board rule announced in Smith. But beyond this one exception carved out by Smith itself, there were other areas of religious practice that were recognized as special even before Smith, and that remained largely unaffected by Smith.

This occurred, for instance, in the context of employment discrimination or wrongful termination lawsuits against religious employers. While these suits most obviously implicated the Establishment Clause (because of the potential for excessive government entanglement with internal church governance), they also raised substantial free exercise concerns. After all, to freely exercise their religion, churches must be able to select their spiritual leaders. The Fourth Circuit recognized this in the pre-Smith case of Rayburn v. General Conference of Seventh-day Adventists. Rayburn had been denied a position as an Adventist associate pastor, and sued under Title VII for racial and gender discrimination. Although the court believed that Congress did intend Title VII to govern cases like this one, it held that applying Title VII here would substantially burden free exercise:

The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines... Any attempt by government to restrict a church’s free choice of its leaders thus constitutes a burden on the church’s free exercise rights.

Having found a substantial burden, the court then applied a balancing test, weighing the church’s free exercise right against the government’s interest in prohibiting discrimination. It found that the balance of these factors favored the church, and affirmed summary judgment in its favor.

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55 See Smith, 494 U.S. at 882-84. Like the other cases noted above, Smith involved the denial of unemployment benefits. However, because the plaintiffs’ benefits were terminated for drug use, the majority treated this as a case about generally applicable criminal laws, rather than unemployment benefits. See id. at 884-85.

56 See, e.g., Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (“To subject church employment decisions [regarding employees with spiritual functions] to Title VII scrutiny would... give rise to ‘excessive government entanglement’ with religious institutions prohibited by the establishment clause of the First Amendment.” (citation omitted)).

57 See id. at 1167-69.

58 See id. at 1165.

59 Id. at 1167-68 (footnote omitted) (citation omitted).

60 See id. at 1169 (“While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs. The balance of values thus weighs against Rayburn’s suggestion that the government may question the decision of the Seventh-day Adventist Church to hire another candidate as an associate in pastoral care.”). However, the court did limit this exemption from Title VII to cases “involv[ing] the church’s spiritual functions.” Id. at 1171.

61 See id. at 1165.
This "ministerial exception," established under pre-Smith strict scrutiny, was later followed in a range of cases under the analogous RFRA standard. For instance, in Powell v. Stafford, a federal district court held that applying the Age Discrimination in Employment Act to the employment decisions of a Catholic high school would substantially burden the free exercise of the Archdiocese. Likewise, in Porth v. Roman Catholic Diocese, the ministerial exception was held to bar a suit brought under Michigan law by a teacher fired from a Catholic high school because she was Protestant. Applying strict scrutiny, the court found "no interest, and certainly no compelling interest, in requiring church-operated schools to employ teachers of other faiths or of no faith." And in EEOC v. Catholic University of America, the D.C. Circuit affirmed the dismissal of a Title VII gender discrimination claim brought by a nun who taught at Catholic University. The court followed the analysis employed in Powell and Porth, then pointed to Rayburn to hold that the ministerial exception precluded application of Title VII.

In addition to applying the ministerial exception under RFRA, the D.C. Circuit also held that the doctrine remained valid under the First Amendment, even after Smith. In so doing, it suggested two significant exceptions to Smith. First, the court reasoned that the Sherbert/Smith axis of cases may not govern all free exercise claims. For while some ministerial exception cases had employed the compelling interest test, the court suggested that there existed a separate, relevant line of precedent in which the Supreme Court avoided traditional tiers of scrutiny in favor of a more direct consideration of church autonomy. The court believed that these cases represent a "century-old affirmation of a church's sovereignty over its own affairs." In discussing these cases, the court departed altogether from traditional free exercise and establishment analysis, pointing instead to the courts' general unsuitability to decide who should lead a church. This, too, suggests a limitation in RFRA's application. If certain free exercise claims can be decided

62 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461 (D.C. Cir. 1996).
64 See id. at 1347.
66 See id. at 197.
67 Id. at 200.
68 83 F.3d 455 (D.C. Cir. 1996).
69 See id. at 457.
70 See id. at 461-65.
71 See id. at 462.
72 See id. at 462-63.
73 Id. at 463.
74 See id. at 462-63.
apart from the usual strict scrutiny or minimal scrutiny tests, then the passage of
RFRA may not have affected the outcome of these claims.

Second, the court held that even if Smith did apply, this case fell within the
"hybrid rights" exception discussed in Smith.75 For although Smith had overturned
strict scrutiny in most free exercise cases, it retained the compelling interest test in
cases where "[the] application of a neutral, generally applicable law . . . involved
not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction
with other constitutional protections."76 The court found that just such a hybrid
right exists in the case of the ministerial exception, where both Free Exercise and
Establishment Clause concerns are at issue.77

It is as yet unclear how broadly the hybrid rights exception will be
construed. Some commentators have rejected the exception as so broad that it
would overwhelm Smith, and therefore functionally meaningless.78 So, too, have
some courts.79 On the other hand, some circuits have begun to develop standards
for implementing this test, requiring that the plaintiff make a "colorable claim" of a
constitutional violation in addition to free exercise.80 In the end, it remains clear
that "hybrid rights" is an amorphous term that invites broad judicial application. So
despite the above-noted doubts, it is unsurprising that at least three courts have
used this exception to invalidate neutral laws of general applicability.81

Taken together, these observations suggest that even under Smith—and
therefore regardless of RFRA—the church's free exercise would have been
protected. Either Smith would not have applied, and heightened free exercise

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75 Id. at 467.
77 See Catholic University, 83 F.3d at 467 ("Title VII would both burden Catholic University's right
of free exercise and excessively entangle the Government in religion.").
78 See Laycock & Thomas, supra note 42, at 214-15 ("The hybrid rights exception, which purported
to protect free exercise in association with some other constitutional right (such as speech or association), has
been rejected precisely because it had the potential to swallow the rule.").
79 See Kissinger v. Board of Trustees of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993)
(referring to the hybrid rights exception as "completely illogical;" refusing to apply it without further
direction from the Supreme Court); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508
U.S. 520, 567 (1993) (Souter, J., concurring in part) (describing the hybrid rights exception as "ultimately
tenable": "If a hybrid claim is simply one in which another constitutional right is implicated, then the
hybrid exception would probably be so vast as to swallow the Smith rule . . . .").
80 See Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist.,
135 F.3d 694, 700 (10th Cir. 1998).
81 See Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. ) (invalidating an
Alaskan statute that prohibited housing discrimination on the basis of marital status; reasoning that the
plaintiffs, Christian landlords who refused to rent to unmarried couples, had presented colorable claims that
the statute was a Fifth Amendment "taking" and a violation of their First Amendment speech right to make
statements or inquiries about marital status), reh'g en banc granted & opinion withdrawn, 192 F.3d 1208 (9th
Cir. 1999); People v. DeJonge, 501 N.W.2d 127, 129 (Mich. 1993) (invalidating a Michigan statute that
required teacher certification, but only as applied to families with religious objections; finding violations of
free exercise and the religious parents' right to direct their children's education); First Covenant Church v.
City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc). First Covenant Church is discussed in greater detail
infra in the text accompanying notes 88-96.
protection would therefore have been appropriate, or Smith would have applied, but the case would have fallen under the exception for hybrid rights. Thus, regardless of whether other areas of free exercise fluctuated—and regardless of how much they did—the Catholic University logic suggests that the ministerial exception remained constant.

Curiously, Catholic University never discusses the fact that, just as this analysis would predict, at least one court did uphold the ministerial exception during the Smith period. In Scharon v. St. Luke’s Episcopal Presbyterian Hospitals, § heard and decided in 1991, the Eighth Circuit ruled that considering age or gender discrimination charges against a religious employer would violate the Free Exercise Clause. These cases suggest that, in the area of the ministerial exception, RFRA provided no protection that was not already available.

B. RFRA Did Not Matter Where It Did Not Raise the Bar — A Federalist Observation

A second limitation on the damage caused by Smith—and hence, the potential efficacy of RFRA—was the existence of alternate protections in the states. The proponents of RFRA argued that the statute was necessary to prevent Smith from upsetting the country’s religious jurisprudence. This argument, however, ignored the fact that many states already guaranteed a level of religious protection at least as high as that instituted by RFRA. This is the same problem of baselines noted above. As with the exceptions to Smith described in Catholic University, the baseline of protection for religious claims in certain states remained constant.

Reliance on state constitutional law has a long historical pedigree. It is the sort of result envisioned by Justice Brandeis when he observed that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.” This states-qua-laboratories observation was turned to the service of civil liberties in the 1970s and 1980s. Under the pressure of Burger Court conservatism, civil liberties advocates argued that state courts should be the forum for a renewed protection of individual rights. Justice Brennan, one of the primary advocates of this “New Judicial Federalism,” noted

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82 929 F.2d 360 (8th Cir. 1991).

83 See id. at 363; see also Little v. Wuerl, 929 F.2d 944, 950-51 (3d Cir. 1991) (construing broadly Title VII’s exemption from religious employers from discrimination suits, and affirming summary judgment for the Archdiocese of Pittsburgh on that ground; further noting that “constitutional concerns . . . would be raised by a contrary interpretation”). Note that a number of courts did apply antidiscrimination laws against religious employers during the Smith period. However, they did so only when the plaintiff did not have religious duties, a circumstance that would likely permit the application of antidiscrimination law even under strict scrutiny. See, e.g., Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 328, 331 (3d Cir. 1993) (remanding to allow investigation of ADEA claims; declining to decide whether Smith modifies the ministerial exception).

84 See supra text accompanying notes 45-52.

that "federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law." Thus, he concluded that "[t]his rebirth of interest in state constitutional law should be greeted with equal enthusiasm by all those who support our federal system." 67

Just such a reinvigoration of religious civil liberties occurred in state courts in the wake of the Smith decision. As federal courts formally lowered protection for religious free exercise, protection remained constant in many state courts. A striking example of this turn to state constitutions occurred in First Covenant Church v. City of Seattle. 68 In that case, the Washington Supreme Court considered a church's free exercise challenge to a city zoning ordinance. 69 The court had previously held for the church, applying strict scrutiny under Sherbert, but the United States Supreme Court vacated and remanded for "further consideration in light of [Smith]." 70

On remand, the Washington Supreme Court reinstated its previous decision, again holding for the church. It first did so under the Federal Free Exercise Clause. 71 The court went through legal contortions to distinguish Smith, reaching the somewhat odd conclusion that this was a "hybrid rights" case in which the compelling interest test continued to apply. 72 The Washington court then insulated itself from review by ruling for the church under the Washington Constitution. 73 Hearkening back to Brennan and Brandeis, the court noted that "Washington, like all the states, may provide greater protection for individual rights, based on its "sovereign right to adopt in its own Constitution individual


69 See id. at 188-89.

70 Id. at 178 (quoting First Covenant Church v. City of Seattle, 499 U.S. 901 (1991)).

71 See id. at 185.

72 See id. at 179-82. This is a further example of the broad applicability of the "hybrid rights" exception. Cf. supra notes 75-81 and accompanying text. The court held that this was a case of "hybrid rights" because two constitutional rights were at stake: free exercise and free speech. Free speech was involved, the court reasoned, because the city zoning ordinance regulated the exterior appearance of the church: "when the State controls the architectural 'proclamation' of religious belief inherent in its church's exterior it effectively burdens religious speech." 840 P.2d at 182.

73 See generally Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds, we, of course, will not undertake to review the decision.").
liberties more expansive than those conferred by the Federal Constitution."94 The court then compared the state and federal constitutions, and concluded: "Our state constitutional and common law history support a broader reading of [the Washington Constitution], than of the First Amendment."95 As such, it applied a compelling interest test and upheld the statute.96 So during the pre-RFRA period when Smith governed, the Washington Constitution provided greater protection than the Federal Constitution.

Other states went even further. In State v. Hershberger,97 the Minnesota Supreme Court held that the Minnesota Constitution protects free exercise more than the Federal Constitution under Smith, but also more than the Federal Constitution under pre-Smith strict scrutiny.98 In Hershberger, the Minnesota Supreme Court considered the claims of Amish drivers who refused to use the standard slow-moving vehicle (SMV) signs on their horse-drawn buggies, preferring instead to use white reflective tape and lighted red lanterns.99 Much like the Washington Supreme Court in First Covenant Church, the Minnesota court had previously upheld the adherents' claims under the Federal Constitution,100 but that determination was vacated by the Supreme Court after Smith.101 On remand, the Minnesota Supreme Court held that, despite lessened federal protection for religion, the Minnesota Constitution still protected the Amish:

It is unnecessary to rest our decision on the uncertain meaning of Smith II when the Minnesota Constitution alone provides an independent and adequate state constitutional basis on which to decide.

.... Th[e] language [in article I, section 16 of the Minnesota Constitution] is of a distinctively stronger character than the federal counterpart .... Whereas the first amendment establishes a limit on government action at the point of prohibiting the exercise of religion, section 16 precludes even an infringement on

94 840 P.2d at 185 (quoting State v. Gunwall, 720 P.2d 808 (Wash. 1986)).
95 Id. at 186. See generally WASH. CONST. art. 1, § 11: 
Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.
96 See 840 P.2d at 189.
97 444 N.W.2d 282 (Minn. 1989), vacated, 495 U.S. 901 (1990), on remand, 462 N.W.2d 393 (Minn. 1990).
98 See 462 N.W.2d at 397.
99 See 444 N.W.2d at 289.
100 See id.
or an interference with religious freedom.102

The Minnesota Supreme Court then went on to conclude that the Minnesota Constitution protected free exercise even more stringently than pre-Smith federal strict scrutiny. To that end, it stated a highly protective free exercise test under Minnesota law:

Only the government’s interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution. Conversely, the free exercise clause of the first amendment has been interpreted to allow varied government interests to justify such an imposition. Because section 16 precludes an infringement on or an interference with religious freedom and limits the permissible countervailing interests of the government, Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.103

Though this decision spoke of Smith, it had implications for RFRA. For if the Minnesota free exercise standard provided greater protection than pre-Smith strict scrutiny, it must also have been more protective than RFRA.104

Perhaps most significantly, this reliance on state law extended even into the RFRA period. On facts strikingly similar to Hershberger, a Wisconsin court reached a similar result in a case decided after the passage of RFRA.105 Like the Minnesota court, the Wisconsin Supreme Court chose to decide the case under its state constitution.106 Indeed, the court explicitly declined to rely on RFRA.107 In so doing, the court reaffirmed the compelling interest test in Wisconsin state jurisprudence: “We conclude that the guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims and see no need to depart from this

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102 462 N.W.2d at 396-97.
103 Id. at 397 (citations omitted).
104 See S. REP. No. 103-111, at 8 (1993), reprinted in 1993 U.S.C.C.A.N. 1893, 1898 (“The [Senate Judiciary Committee] expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the free exercise of religion has been substantially burdened . . . “).
105 See Smith v. Miller, 549 N.W.2d 235 (Wis. 1996).
106 See id. at 238 (“[O]ur holding in this case is based on the protections embodied in Art. I, § 18 of the Wisconsin Constitution.”) (internal citation omitted).
107 See id. at 240 n.9 (“Because we conclude that the statutory requirement for display of the SMV symbol violates this state’s guarantee of freedom of conscience, we need not further address the federal issues raised in this appeal. Specifically, we do not reach the issue of the constitutionality or applicability of RFRA.”).
time-tested standard.\(^{108}\) On that basis, the court upheld the right of Amish drivers to substitute white reflective tape and red lanterns for the red and yellow SMV symbol.\(^{109}\)

So in states with significant constitutional guarantees of free exercise—and Minnesota and Wisconsin are hardly the only such states\(^{110}\)—RFRA provided a belt-and-suspenders approach to religious liberty, simply adding federal protection where state protection already existed. Of course, the experience of this handful of states does not prove that RFRA had no effect. In fact, commentators have noted that a few states have interpreted their state constitutions to follow Smith, even in states where the constitution had previously been interpreted to mirror Sherbert.\(^{111}\) On the other hand, there is evidence that the dominant trend in the states was and is in the direction of religious protection.\(^{112}\) In addition to the six states noted above,\(^{113}\) four other states have implicitly or explicitly rejected the Smith approach,\(^{114}\) eight states have passed their own statutory or constitutional versions of RFRA,\(^{115}\) and about a dozen more state legislatures are considering such bills.\(^{116}\) RFRA’s supporters perceived the statute to be a national solution to a national

\(^{108}\) Id. at 241.

\(^{109}\) See id. at 242.

\(^{110}\) For instance, the Supreme Judicial Court of Massachusetts ignored the First Amendment altogether in upholding a challenge to the designation of a church as a historical landmark. See Society of Jesus v. Boston Landmarks Comm’n, 564 N.E.2d 571, 573 (Mass. 1990) (interpreting pt. I, art. II of the Massachusetts Constitution far more broadly than the Federal Constitution). Likewise, the Supreme Judicial Court of Maine interpreted the Maine Constitution to require the government to demonstrate a compelling public interest and no less restrictive means of achieving that interest, although the court did reserve the issue of whether Maine’s free exercise guarantee should follow Smith. See Rupert v. City of Portland, 605 A.2d 63, 65 n.3 (Me. 1992); see also State v. Evans, 796 P.2d 178, 179 (Kan. Ct. App. 1990) (quoting KAN. CONST. BILL OF RIGHTS § 7):

The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship.


\(^{112}\) Indeed, one commentator has suggested that RFRA hindered this process. See Lupu, supra note 49, at 808 n.74.

\(^{113}\) See supra note 110 and text accompanying notes 88-109.


problem, but the above-discussed cases suggest that the problem may not have been so national or so severe.

C. Conclusions—Redundancy

The preceding discussion suggests that if RFRA were interpreted like the pre-Smith compelling interest test, it might not have added significant protection of religious liberty. This is because in certain areas of litigation, Smith may not have been much worse than the compelling interest test that preceded it. State court protections took up some of the slack; in other areas, Smith created no additional burdens.

However, it is important not to take this argument for more than it is. In many areas, Smith did heighten burdens on religious free exercise, because the alternate free exercise protections discussed above are not a perfect substitute for federal strict scrutiny. State protections were not always so expansive as the compelling interest test, nor is it certain that they always provided identical remedies. Indeed, the very fact that cases were decided under the Smith standard strongly suggests that the state protections (and alternate doctrines) discussed above did not take the place of the pre-Smith strict scrutiny standard. If these substitutes had maintained protection at the pre-Smith level, those cases would not have been decided under the lower Smith standard.

This leads to perhaps the central question of RFRA: What did it actually accomplish? After all, RFRA was meant to reinvigorate free exercise jurisprudence. Rather than simply reinstating the compelling interest test as it was interpreted before Smith, certain of RFRA’s most prominent supporters hoped to institute the compelling interest test as they thought it should properly be interpreted. More ambitious still, they hoped that the statute would inspire renewed vigor in the protection of religious free exercise. Just as they believed Smith to have been a symbolic blow to religious liberty, they hoped that RFRA would signal the importance of religious free exercise:

The lopsided votes in both houses of Congress should send a strong message to the judiciary that accommodating religious exercise is important. Moreover, the support of sixty-six national religious and civil liberties groups, ranging across the spectrum from conservative to liberal, should lend considerable clout to those who challenge governmental interference with religious exercise.

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117 See A Bill To Protect the Free Exercise of Religion: Hearing on S. 2969 Before the Senate Comm. on the Judiciary, 102d Cong. 50 (1992) (listing cases that had relied on Smith as of June 15, 1992).

118 See Laycock & Thomas, supra note 42, at 227 ("[F]ree exercise claims were losing—even in the Supreme Court and even before Smith—because the cases leading up to Smith were not decided under the compelling interest test at all."); id. at 230 ("Of course, the argument remains that some [pre-Smith] cases in which no burden was found were wrongly decided under the [compelling interest test].").

119 See id. at 216.
RFRA is not a mere technical change from Smith. Rather, it restores a fundamentally different vision of human liberty.\textsuperscript{120}

Indeed, this symbolic function was not just a goal of RFRA; it was the statute’s sine qua non: “RFRA cannot succeed unless it changes the judicial and bureaucratic climate that Employment Division v. Smith both reflected and aggravated.”\textsuperscript{121} As such, to determine whether RFRA met its goals, it is necessary to look at the courts’ interpretation of RFRA. The following analysis of the RFRA case law suggests that the courts did not receive this symbolic message.

IV. THE LIMITED INTERPRETATION OF RFRA

A. Introduction—The Structure of the Problem

In order to evaluate RFRA’s results, it is necessary to look at the cases—unlike those discussed in the preceding section—in which the new RFRA standard was applied. And, despite the above-noted limitations on RFRA’s implementation, RFRA was substantially litigated. At the time the Supreme Court decided Boerne, at least 250 cases had been decided under RFRA that were either officially reported, or unpublished but available on Westlaw.\textsuperscript{122} These cases included over 270 distinct RFRA claims,\textsuperscript{123} about seventy of which were decided in favor of the religious claimant. However, of those seventy claims, approximately forty were denials of the government’s motion to dismiss or motion for judgment as a matter of law—they were not substantive rulings for a claim of religious liberty. And in several cases, despite substantive rulings for the religious practitioner, recovery was barred on the ground of qualified immunity.\textsuperscript{124} In short, fewer than one in six RFRA claims resulted in a remediable judgment for the religious practitioner.

\textsuperscript{120} Id. at 244.

\textsuperscript{121} Id. (footnote omitted).

\textsuperscript{122} Search of Westlaw, ALLCASES Database for records containing the terms “Religious Freedom Restoration Act” or “RFRA,” or “Right for Response Action” or “Request for Response Action” (June 1997). Such a search produced about 450 cases, many of which refer to RFRA but have no RFRA cause of action; others of which were decided on grounds other than RFRA; and still others of which merely discuss RFRA’s constitutionality. When a decision was affirmed or dismissed in a later reported case, the different dispositions are counted as one case.

\textsuperscript{123} Particularly within the context of prison litigation, one case often included several different claims. For instance, in Diaz v. Collins, 872 F. Supp. 353 (E.D. Tex. 1994), aff’d, 114 F.3d 69 (5th Cir. 1997), an American Indian prisoner claimed that his free exercise had been burdened because 1) he was not allowed to grow his hair long; 2) he was limited in his ability to acquire a medicine pouch; and 3) he was limited in his ability to wear a religious headband.

\textsuperscript{124} This occurred largely in prison litigation. In the typical scenario, injunctive relief was barred because the prisoner had been transferred to another prison, and the prison officials were protected by qualified immunity because the court found that the law surrounding RFRA was not firmly established at the time they took the actions in controversy. See, e.g., Craddock v. Duckworth, 113 F.3d 83, 85 (7th Cir. 1997); Show v. Patterson, 955 F. Supp. 182, 194 (S.D.N.Y. 1997); Owen v. Horsely, No. C-95-4516 EFL, 1996 WL 478960, at *2-4 (N.D. Cal. Aug. 9, 1996); Woods v. Evatt, 876 F. Supp. 756, 771-72 (D.S.C. 1995), aff’d, 68 F.3d 463 (4th Cir. 1995).
On the surface, these numbers suggest a gap between the promise of RFRA and its actuality. Of course, other explanations are possible. First, these numbers can only provide a rough guess at what happened in the courts. It is possible that many RFRA claims were unreported, and it is impossible to know whether the unreported claims were decided in similar fashion to the reported cases. If anything, however, it stands to reason that the unreported cases were skewed even more heavily against religious claimants, because the rejection of a religious claim that would also have been denied under Smith seems generally less printworthy than novel religious protection under recent legislation.\textsuperscript{125}

Second, this methodology cannot account for RFRA’s effect on the government’s willingness to accommodate religion, nor for its willingness to settle free exercise claims on terms more favorable to religious plaintiffs. In civil litigation generally, the vast majority of cases settle before trial.\textsuperscript{126} If that pattern holds true for free exercise claims, then reported cases tell only part of the story. While it is impossible to state a definitive conclusion about RFRA’s effect on accommodation or settlement in the absence of an extensive survey of court dockets, a tentative prediction seems safe. It stands to reason that the passage of RFRA and the re-implementation of strict scrutiny would initially lead to more favorable treatment of religious claimants. In some cases, religious claimants and their attorneys would claim likely victory under RFRA’s protective language where they could not have under Smith, and this stronger claim would likely lead to more favorable settlements.\textsuperscript{127} However, if it is true – as I argue below – that the RFRA case law was less protective than initially hoped, then claimants and government attorneys would adjust their predictions of likely trial outcomes accordingly, and the effect of RFRA on accommodation and settlement would be tempered.

Finally, it is possible that the low number of victories for religious claimants was the proper result, because many or most of these claims were frivolous or unmeritorious and the courts properly weeded them out. In a few cases, this was certainly true. For instance, it is hard to imagine that Congress intended RFRA to allow the president of the Israel Zion Coptic Church to bring forty pounds of marijuana across the border from Mexico in the trunk of his car, regardless of the drug’s value as a religious sacrament.\textsuperscript{128} But this was neither the usual case nor the

\textsuperscript{125} See Letter from Tristi J. Wilson, West Group Director of Judicial Relations (Aug. 1999) (writing that judicial opinions should be published, \textit{inter alia}, when “dealing with issues of first impression” or “establishing, altering, modifying or explaining a rule of law”) (on file with author).

\textsuperscript{126} Estimates of settlement rates vary, but most agree that well over half of all cases settle. Even Marc Galanter and Mia Cahill, who dispute the “offt-cited figures estimating settlement rates of between 85 and 95 percent,” agree that about two-thirds of cases settle. See Marc Galanter & Mia Cahill, \textit{" Most Cases Settle"}: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1339 (1994).

\textsuperscript{127} See Laycock & Thomas, \textit{supra} note 42, at 244 (“Bureaucrats may be more likely to accommodate religious exercise when they know that a federal statute requires them to do so in most cases, and by giving religious claimants the bargaining leverage of a viable claim in court, RFRA encourages out-of-court settlements.”).

\textsuperscript{128} See People v. Peck, 61 Cal. Rptr. 2d 1, 2 (Cal. Ct. App. 1996). In evaluating the outcomes of the RFRA cases, it is important to recognize that there are a number of cases in which the plaintiffs lost, and where they would almost certainly have lost under any free exercise analysis that has ever been applied by the
typical problem. In most cases, the religious practice was — often by stipulation — important and sincerely held, and did not contravene a government interest perceived to be compelling so obviously as does drug smuggling. Consider the cases of the American Indian who needs feathers for religious ceremonies and kills protected golden eagles to obtain them; the Amish man, hunting on his father’s private land, who objects to wearing blaze orange because it is worldly and ostentatious; or the Muslim inmate who changes his name and believes that the prison’s use of his old name violates his faith. In each of these cases, the court held that there was no RFRA violation. The question remains: Why did RFRA not protect more claims of religious free exercise?

The answer lies in the structure of the compelling interest test. As set forth in the statute, the test requires that:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest, and
(2) is the least restrictive means of furthering that compelling governmental interest.

So to consider a RFRA claim, the court had to make three determinations. First, was the adherent’s religious exercise substantially burdened? Second, if the burden was substantial, did the government have a compelling interest that justified the infringement? Finally, even if there was such a compelling interest, did the government accomplish it through the least restrictive means?

These three questions granted courts tremendous interpretive leeway. In answering them, courts favored interpretive schemes that provided only limited protection for free exercise. To find a substantial burden, courts frequently demanded that a religious practice was forbidden by the government — as opposed to merely burdened — and that the practice was required by or central to the religion, not merely a part of it. In applying the compelling interest test, courts tended to define the government interest in the broadest possible terms. In other cases, courts gave great deference to interests defined by government actors themselves. Finally, courts proved unwilling to apply the least restrictive means

courts. See, e.g., Storm v. Town of Woodstock, N.Y., 944 F. Supp. 139, 146 (N.D.N.Y. 1996) (finding no substantial burden on the free exercise of town residents who challenged a regulation that forced them to park one-half mile from the Magic Meadow where they celebrated full moon gatherings); Padilla v. South Harrison R-II Sch. Dist., No. 94-6208-CV-SJ-6, 1995 WL 244405, at *1, *5 n.10 (W.D. Mo. Apr. 25, 1995) (finding no substantial burden on the free exercise of a high school teacher who was dismissed for answering affirmatively when asked whether it is ever appropriate for a teacher to have a sexual relationship with a minor).

See, e.g., United States v. Hugs, 109 F.3d 1375, 1377 (9th Cir. 1997).


See, e.g., Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996).

criterion or, when they did, concluded that the policy allowed for no possible exceptions, thereby severely undermining that part of the test.

B. The "Substantial Burden"—A Tremendous Burden of Proof

Faced with the difficult task of determining what constitutes a substantial burden on religion, courts used a series of techniques that misunderstood the nature of religious practice, thereby underprotecting religion.

1. Judicial Dismissiveness

In a number of cases, judges seem not to have taken RFRA claimants seriously; they simply dismissed the claims out of hand. This reaction is surprising – if nothing else, RFRA’s implementation of heightened judicial scrutiny suggests that judges should have considered free exercise claims carefully. Such seriousness was hinted at by the august language surrounding RFRA’s passage,133 was implicit in the fact that Congress imposed the most stringent level of constitutional scrutiny, and was explicit in the hopes of RFRA’s supporters.134 But in a number of cases, courts baldly asserted that there was no substantial burden, without any further examination.

This occurred in a California proceeding arising out of a bankruptcy claim. Jim Snyder, the preparer of a bankruptcy petition, argued that he should not be required to identify himself by his Social Security number (as was required by statute) because he believed that number to be “the mark of the beast” described in the New Testament.135 Although the court did not challenge Snyder’s sincerity, it summarily concluded that there was no substantial burden on his religious practice: “The fact that Snyder must provide his [Social Security number] if he wants to prepare bankruptcy petitions simply does not rise to the level of a substantial burden on his free exercise of religion . . . “136 In short, although the court assumed that Snyder was forbidden by religious belief from using a Social Security number,137 it nonetheless concluded that forcing Snyder to choose between his livelihood and his religious practice would not substantially burden his religious free exercise. It reached this conclusion with no factual discussion (for instance, of whether Snyder had an adequate, alternative job), and with no discussion of relevant law (for instance, when and how financial conditions may be placed upon the exercise of statutory rights, or the related doctrine of unconstitutional

133 See, e.g., S. REP. NO. 103-111, at 4 (1993) ("Many of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one’s faith, free from Government interference, is among the most treasured birthrights of every American."); reprinted in 1993 U.S.C.C.A.N. 1892, 1893-94.
134 See Laycock & Thomas, supra note 42, at 224.
136 Id. at 555.
137 See id.
conditions).\textsuperscript{138} Of course, it was not always the case that further examination would have led a court to find a substantial burden. Even so, this approach seems overly dismissive in light of the spirit of religious accommodation that RFRA was intended to foster. If this dismissive writing style truly reflects a dismissive attitude on the part of judges, then such an attitude must certainly have limited the number of free exercise claims to succeed under the substantial burden prong of the test. And, one wonders, if this was the prevailing attitude of the courts, how many more decisions were affected by this sort of dismissiveness without the dismissive attitude evidencing itself on the face of the opinion?

2. Requiring a Greater-Than-Substantial Burden

More common than this sheer dismissiveness, many courts limited RFRA claims by requiring free exercise claimants to demonstrate a tremendous level of state interference with their religious practice. One of the most onerous of these proof requirements was implemented in Bryant v. Gomez:\textsuperscript{139}

In order to show a free exercise violation using the "substantial burden" test, the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates.\textsuperscript{140}

In other words, only if the government prevented a practice mandated by a religion could the substantial burden test be satisfied. A showing of mere hardship would be insufficient to meet the test, as would burdens on a practice commonly engaged in but not required. This standard takes a cramped view of the nature of religious experience. Many religions have no central authority that "requires" practice;

\textsuperscript{138} For another example of a case in which a court concluded without discussion that there was no substantial burden, see Blandino v. State, 914 P.2d 624 (Nev. 1996). In that case, the criminal defendant believed that he was required by God to represent himself without the assistance of counsel. The court rejected Blandino's claim, stating only that "this court's practice of requiring counsel on direct appeal from a conviction does not substantially burden appellant's right to free exercise of religion." \textit{Id.} at 626.

\textsuperscript{139} 46 F.3d 948 (9th Cir. 1995).

OTHERS TEND NOT TO PHRASE RELIGIOUS OBLIGATIONS IN TERMS OF MANDATES.\textsuperscript{141} AND EVEN IF A GIVEN RELIGION DOES REQUIRE CONDUCT, THIS PROVIDES NO DOCTRINAL EXPLANATION FOR EXCLUDING ALL NON-OBLIGATORY RELIGIOUS PRACTICES FROM THE SCOPE OF RELIGIOUS PROTECTION. TO DO SO FAILS TO PROTECT MANY IMPORTANT RELIGIOUS PRACTICES.\textsuperscript{142}

Moreover, this standard runs squarely against RFRA's legislative history. The House Report accompanying RFRA stated that "in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity. . . . Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion."\textsuperscript{143} RFRA's chief sponsor recognized exactly the problem inherent in a substantial burden test like that adopted in \textit{Bryant}:

Were Congress to . . . specifically confin[e] the scope of this legislation to those practices compelled or proscribed by a sincerely held religious belief in all circumstances, we would run the risk of excluding practices which are generally believed to be exercises of religion worthy of protection. For example, many religions do not require their adherents to pray at specific times of the day, yet most members of Congress would consider prayer to be an unmistakable exercise of religion.\textsuperscript{144}

Despite this clear message from Congress, the \textit{Bryant} test was widely used.

Even under the chief alternative to \textit{Bryant}—an alternative that appeared on its face to be more generous to religious claimants—plaintiffs were still obliged to

\textsuperscript{141} See Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("In the case of nonhierarchical religions, . . . such as Islam, Judaism, and a multitude of Protestant sects, the process [of determining what practices the plaintiff's religion obligates him to follow] is infeasible, or at least very difficult and attended with a high degree of indeterminacy."); vacated & remanded, 522 U.S. 801 (1997) (mem.).

\textsuperscript{142} See Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1 ("It is probably the case that most religious practice is religiously motivated but not religiously mandated."); id. at 23-28 (describing the problems with a test that protects only religiously-mandated practices); Laycock, supra note 43, at 893-94 (listing examples of religiously motivated practices); Steven C. Seeger, Note, Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act, 95 MICH. L. REV. 1472, 1498-1502 (1997); see, e.g., Wynn v. McManus, 76 F.3d 391, 1996 WL 32110, at *2 (9th Cir. 1996) (unpublished table decision; text available in Westlaw) ("[Wynn, a Christian inmate] failed to establish that any tenet of his religious faith mandated attendance at services every Sunday. Accordingly, the district court did not err by concluding that Wynn failed to establish that prison officials substantially burdened his free exercise of religion."). See generally Seeger, supra (discussing the three principal substantial burden tests: religious motivation, religious compulsion, and centrality).

\textsuperscript{143} H.R. REP. No. 103-88, at 6 (1993); see also Laycock & Thomas, supra note 42, at 230 ("[I]n general, if an exercise of religion is prohibited, penalized, discriminated against, or made the basis for a loss of entitlements, courts should find a substantial burden.").

prove that a required practice had been forbidden. This other test was established by *Werner v. McCotter*\(^{145}\) in the context of prison litigation:

To exceed the "substantial burden" threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs, must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.\(^{146}\)

On its face, the *Werner* test established a significantly lower threshold than *Bryant* for demonstrating a substantial burden. Under *Werner*, religious conduct need not be absolutely prohibited; it need only be sufficiently limited. This test, in theory, should have protected religious free exercise better than *Bryant*. As the Seventh Circuit observed:

[The *Werner* test is] more sensitive to religious feeling [than *Bryant*]. Many religious practices that clearly are not mandatory, such as praying the rosary, in the case of Roman Catholics, or wearing yarmulkes, in the case of Orthodox Jews (optional because while Jewish men are required to cover their heads, the form of the head covering is not prescribed), are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty.\(^{147}\)

But while this test appears protective, its results were little different than those under *Bryant*.

*Collins v. Scott*\(^{148}\) demonstrates the point admirably. In that case, Kenneth Collins, a Muslim prisoner, refused to submit to a strip search by a female guard because the Koran encourages modesty and discourages public nakedness. Even after explaining his beliefs to guards, and despite the presence of male guards who could have performed the search, he was placed in a holding cell, shocked until his body went limp, placed in ankle and wrist restraints, and his underwear was removed in front of a female guard.\(^{149}\)

The court held that because the Koran discourages *all* nakedness, and

\(^{145}\) 49 F.3d 1476 (10th Cir. 1995).

\(^{146}\) *Id.* at 1480 (citations omitted). A similar test was adopted in the Eighth Circuit, where a substantial burden occurred if a worshipper was required "to refrain from religiously motivated conduct." Brown-*el v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994). The Seventh Circuit approved of the Eighth and Tenth Circuit tests. *See* Mack *v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996).

\(^{147}\) *Mack*, 80 F.3d at 1179.


\(^{149}\) *See* *id.* at 1011-12.
because Collins was willing to be strip searched on some limited occasions—by male guards, and by female guards under extraordinary circumstances—his unwillingness to be strip searched on this occasion did not manifest a central tenet of his religion.\(^{150}\) In reaching its conclusion, the court pointed to Collins’ belief that Allah would not punish him for his immodesty since he had resisted the strip search.\(^{151}\) Because Collins would not be punished by his deity for disobedience—a roundabout way of saying that he was not “really” required to engage in this practice—the court found no substantial burden. Thus, Collins suggests that while the language of the Werner test differed from Bryant ("central tenet" instead of "mandated" practice), the test was functionally the same: A religious claimant would still have to prove that a required religious practice was forbidden.\(^{152}\)

This same limited interpretation of Werner was applied in Weir v. Nix,\(^{153}\) a case decided under the same limited Werner test in which the Eighth Circuit found no substantial burden because the claimant’s religious practice was not “mandated” by his church. In Weir, the court considered the claims of a fundamentalist, separatist Christian inmate who sought four hours of weekly group worship, rather than the three hours then allowed by the prison, and asked that the services be held on Sunday, rather than on Friday, the day then designated by the prison.\(^{154}\) Although the court purported to rely on Werner,\(^{155}\) it nonetheless refused to allow the additional hour of congregate prayer, stating: “We are not convinced . . . that Weir’s faith mandates any minimum number of hours of congregate worship each week, and we believe that three hours of group worship per week provided Weir with a reasonable opportunity to exercise his religious freedom.”\(^{156}\)

Similarly, the court concluded that Weir’s religion did not require Sunday prayer, and thus created no substantial burden: “The evidence indicates that Sunday worship, albeit traditional, is not a doctrinal necessity for fundamentalists. Two fundamentalist pastors testified that fundamentalists could worship on any day and that they often worship on Wednesdays.”\(^{157}\) This conclusion is troubling. The court asked whether Sunday worship is “a doctrinal necessity,” a piece of analysis that runs squarely against the language of Werner.\(^{158}\) The chief difference between the

150  See id. at 1014.
151  See id.
152  See also Reese v. Coughlin, No. 93 Civ. 4748 LAP, 1996 WL 374166, at *7 (S.D.N.Y. Jul. 3, 1996) (mem.) (holding that there was no substantial burden in confiscating a Wiccan inmate’s tarot cards, despite the claimant’s belief that the cards “are to him as the Bible is to those who use and rely upon it as their source of religious authority”).
153  114 F.3d 817 (8th Cir. 1997).
154  See id. at 821.
155  See id. at 820.
156  Id. at 821 (emphasis added).
157  Id. (emphasis added).
158  Weir, 114 F.3d at 821. As a logical matter, too, this conclusion seems dubious. After all, the fact that fundamentalists often worship on Wednesdays does not prove that there is no need for Sunday worship.
Werner and Bryant tests, it seemed, was the fact that Werner did not inquire into whether religiously-mandated requirements were violated. But in practice, even under Werner, courts put a heavy weight on religious claimants to prove substantial burdens on their religion.

Of course, the substantial burden prong of the compelling interest test was not uniformly applied. Some courts defined substantial burden leniently, fearing that to do otherwise would entangle the court in defining religion. Indeed, for the Seventh Circuit, this was the greatest benefit of adopting the Werner standard. 159 However, many of the courts to take this more generous approach did so only because they found the challenged restrictions to be justified by a compelling government interest, rendering the substantial burden prong of the test functionally irrelevant in those cases. 160 In the end, one can only conclude that the courts’ tests for interpreting the term “substantial burden” found many heavy burdens to be less than substantial.

3. The Backward Results of the Substantial Burden Prong

Finally, a simple survey of the RFRA cases suggests that the courts’ substantial burden analysis was flawed. Look, for instance, at prison cases. 161 On the one hand, religious prisoners fared best when they challenged restrictions on symbolic religious practice, particularly where that practice created little administrative burden for the prison. For instance, inmates prevailed in nine of twenty challenges to restrictions on headgear 162 or small religious items (such as beads or jewelry), 163 and six of sixteen challenges to restrictions on hair or beard

Consider the case of a Jew who says morning prayers daily, but also observes the Sabbath. The existence of the former hardly disproves the need for the latter. 159

See Mack v. O’Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("[T]he decisive argument in favor of the generous definition of ‘substantial burden,’ it seems to us, is the undesirability of making judges arbiters of religious law, as required by the alternative approach." (citations omitted)), vacated & remanded, 522 U.S. 801 (1997) (mem.); see also Sasnett v. Sullivan, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995), aff’d, 91 F.3d 1018 (7th Cir. 1996), vacated & remanded, 521 U.S. 1114 (1997) (mem.).


length. As RFRA goes, these were fantastic results.

Conversely, prisoners had little success challenging the way in which religious services were conducted. They lost every case in which they asked for religious leaders different than those provided by the prison. Likewise, prisoners lost seven of the eight cases in which they argued for services separate from other sects of the same religion. Overwhelmingly, courts rejected these claims on the ground that there was no substantial burden.

Take, for instance, Davidson v. Davis. In that case, Davidson challenged the conditions of his confinement at the Metropolitan Correctional Center, the facility to which he had been transferred so that he could pursue a civil lawsuit. Among other alleged violations, Davidson complained that he was unable to consult with the prison’s Jewish chaplain. The court quickly rejected Davidson’s claim. After briefly setting forth the restrictive Bryant test described above, the court concluded—without analysis—that Davidson did not have the right to a Jewish chaplain. (It is interesting—and troubling—to note that the court cited three cases to support this conclusion. All were post-Smith and pre-RFRA, and therefore employed the wrong standard.) The court did not even mention Davidson’s reasons for seeking a rabbi. It did not ask whether Judaism generally, or Davidson’s religious practice specifically, involved spiritual consultation. It simply rested on past, inapposite precedent.

These results—in Davidson and in the case law generally—are perplexing. Courts protected the individual, tangible appurtenances of religion, while paying little heed to restrictions on prayer service itself. But is this what religion is about? I would argue that for most people, the symbolic practices that the courts did

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165 See, e.g., Werner v. McCotter, 49 F.3d 1476, 1481 (10th Cir. 1995) (finding that the prison’s provision of a Lakota Sioux spiritual advisor foreclosed the existence of a substantial burden on a Cherokee inmate’s religious practice); Muhammad v. City of New York Dep’t of Corrections, 904 F. Supp. 161, 189-90 (S.D.N.Y. 1995) (finding no substantial burden in the failure to provide a Nation of Islam ( NOI) minister because there were orthodox Muslim imams, and because inmates who were members of the NOI could receive visits from NOI ministers), appeal dismissed, 126 F.3d 119 (2d Cir. 1997).
167 See supra notes 165-66.
169 See id. at *1.
170 See id. at *5.
171 See id.
172 See id. at *5-6.
173 See Davidson, 1995 WL 60732, at *5-6.
174 See id.
protect are somewhat less important than attendance at religious services. Given the choice, most people would prefer to be restricted in their ability to wear a cross, a kufi or a medicine pouch, rather than to suffer restrictions on attending religious services. This is not to suggest that symbolic practices are unimportant. Quite the contrary. These practices often fulfill religious commandments and, even when not required by the religion, express religio-cultural identity. But prayer is something different altogether. It is the mechanism through which people communicate with the Divine. It seems perverse that courts protected outward markers of religion, while allowing fundamental restrictions on expressions of religious devotion.

A final, important caveat is in order. In making this argument about backward results, I do not contend that restrictions on religious services are never warranted, although my disapproving tone may so suggest. On the contrary, particularly in the prison context, it seems clear that restrictions are often necessary. But that determination is irrelevant to substantial burden—it is part of the compelling interest prong of the test. My point is simply this: In many cases where the government appeared to have imposed significant burdens on religion, courts reached the opposite conclusion.

C. Compelling Interest

Equally important in evaluating RFRA’s efficacy is the way in which courts applied the compelling interest prong of the test. For even if courts employed the substantial burden analysis in a manner solicitous of religious claimants, the outcome of RFRA cases would still depend on how courts construed the compelling interest prong of the test. If courts were skeptical or demanding in reviewing the state interests put forward by government actors, then many free exercise claims would likely prevail; conversely, if courts deferred to government actors, then few free exercise claims would survive. Likewise, broader or narrower definitions of “compelling interest” would allow more or fewer government policies to survive. In short, a soft compelling interest standard—just like an unduly high substantial burden standard—would act as a trump card. Either would spell failure for many religious claims. As shown above, a high threshold for substantial burdens did limit the test’s application. And, as this Section will demonstrate, so too did a deferential compelling interest standard.

Courts limited RFRA by means of two permissive standards, and a bit of foggy analysis. The first limitation is rooted in the compelling interest test itself. The test provided courts no guidance in identifying the appropriate government interest to be analyzed. Left with this discretion, courts often identified the broadest possible interest and, predictably, found this interest compelling. Second, in certain contexts—particularly prisons—courts accorded tremendous deference to administrators’ assessments of what constitutes a compelling interest. Finally,

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176 See Werner v. McCotter, 49 F.3d 1476, 1481 (10th Cir. 1995) (“We recognize that religious symbols often play an important role in expressing an individual’s adherence to a particular faith; possession of the symbol in and of itself manifests belief in one’s religious creed.”).

176 These two problems—generality and deference—often overlap. For instance, courts often
courts tended to blend the substantial burden and compelling interest prongs of the analysis, substituting a vague balancing approach for the proper statutory test. As a practical matter, this blending technique meant that when courts perceived highly compelling interests, they paid less attention to burdens on religion.

1. Broad Government Interests

In a RFRA case, once a religious claimant successfully demonstrated a substantial burden on her religious practice, the court then evaluated whether the government had shown a compelling interest to justify the burden. Evaluating compelling interests requires two steps—identifying the appropriate government interest to evaluate and, only after that initial determination, judging whether that interest was "compelling." I consider the latter issue below. Here, I wish to focus on the question of what government interest to evaluate. This is a crucial issue, because defining a government interest broadly makes it sound weighty—i.e., compelling—whereas a narrowly-defined interest sounds far less important.\footnote{Interest definition is not a new concept, at least in the realm of individual rights. Courts and commentators have long debated the proper scope of disputed rights in substantive due process cases. Bowers v. Hardwick\footnote{Bowers v. Hardwick} paints just such a dispute in stark contrast. Writing for the majority, Justice White stated that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." In dissent, Justice Blackmun perceived the issue to be far broader: This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, ante, at 2844, than Stanley v. Georgia, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or Katz v. United States, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, unthinkingly accepted a government administrator's definition of an extremely broad interest. I have separated these two problems analytically in order to highlight the ways in which each limits free exercise claims.}

\footnote{See J. Morris Clark, Guidelines for the Free Exercise Clause, 83 HARV. L. REV. 327, 330-31 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense revenue. To measure an individual interest directly against one of those rarified values inevitably makes the individual interest appear the less significant.").}

\footnote{See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057 (1990) (discussing the problem of generality manipulation in rights definition).}

\footnote{478 U.S. 186 (1986).}

\footnote{Id. at 190.}
J., dissenting).\textsuperscript{181}

This sort of dispute over generality is quite common. Even when such a debate is not clear on the face of an opinion, it often simmers below the surface, where the court must implicitly have determined what right was at issue. For instance, in\textit{Griswold v. Connecticut},\textsuperscript{182} the Supreme Court might have identified Ms. Griswold’s right as the “right to buy contraception,” the “right to prevent pregnancy,” the “right to control procreative sex,” the “right to plenary sexual freedom,” or the “right to autonomous self-determination.”\textsuperscript{183}

However, despite the attention to generality manipulation in the realm of individual rights, “generality is hardly ever discussed in the context of government interests.”\textsuperscript{184} This is a critical omission. For just as a court’s designation of a broad \textit{individual} interest often leads that individual right to be upheld in a substantive due process case, the identification of a broad \textit{government} interest made a ruling for the government more likely in a RFRA case.\textsuperscript{185} Simply put, “Courts possess enormous discretion over how broadly or narrowly government interests are defined. . . . In the absence of any theoretical guide, judges have used their control over generality to strike down government policies that they just as easily could have upheld.”\textsuperscript{186} Conversely, in the absence of proper limits, courts might define an interest broadly, thereby ensuring its success. In the context of religious free exercise, broad definition has been the norm.

Since long before RFRA, courts have upheld state impositions on religious free exercise by identifying exceptionally broad governmental interests. In\textit{Reynolds v. United States},\textsuperscript{187} the first case decided under the Free Exercise Clause, the Supreme Court upheld a Utah anti-polygamy law as necessary to protect “the

\textsuperscript{181} Id. at 199 (Blackmun, J., dissenting).

\textsuperscript{182} 381 U.S. 479 (1965).


\textsuperscript{184} Green, \textit{supra} note 183, at 445. When religious commentators do deal with this issue, it tends to be in passing. \textit{See}, e.g., Laurence H. Tribe, \textit{American Constitutional Law} § 14-13, at 1261 (“Before \textit{United States v. Lee}, the Court’s opinions made clear that the only constitutionally relevant factor was the state’s interest in denying the claimant’s exemption, \textit{not} the state’s usually much greater interest in maintaining the underlying rule or program for nonexceptional cases.”); Stephen Pepper, \textit{Taking the Free Exercise Clause Seriously}, 1986 \textit{B.Y.U. L. Rev.} 299, 310-12; Douglas Laycock, \textit{A Survey of Religious Liberty in the United States}, 47 \textit{Ohio St. L.J.} 409, 436 (1986).

\textsuperscript{185} \textit{See} Green, \textit{supra} note 183, at 454-59.

\textsuperscript{186} \textit{See id.} at 447; \textit{see also id.} at 447-49 (pointing to \textit{Romer v. Evans}, 517 U.S. 620 (1996), as an example of narrow definition).

\textsuperscript{187} 98 U.S. 145 (1879).
social condition." In *State v. Massey*, the North Carolina Supreme Court upheld a statute that prohibited religious snakehandling because it protected "the public safety." The Tennessee Supreme Court upheld a similar statute based on "the right to guard against the unnecessary creation of widows and orphans," reasoning that "[o]ur state and nation have an interest in having a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower."

This pattern continued under RFRA. Consider two examples. In *Blandino v. State*, the defendant—who had been charged with a violation of custody rights—wanted to represent himself during his criminal appeal because "his religious beliefs precluded him from relying on the advice of persons who do not share his beliefs." The court found no substantial burden, then considered the compelling interest prong of the test. Its entire reasoning was this: "[W]e consider the state's interest in insuring an adequate appellate review of judgments which deprive individuals of their liberty to be compelling."

The second example concerns a health insurance system that included coverage for abortions. A group of students at the University of California at Davis sued to be exempt from a required student fee, part of which funded the insurance program, on the ground that it violated their free exercise. The court found no substantial burden, then considered the interests served by the insurance system as a whole. The court concluded simply "that the University's interest in the health and well-being of its students, advanced by its mandatory fee policy, is compelling."

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188 Id. at 166.
189 51 S.E.2d 179 (N.C. 1949).
190 Id. at 180.
191 *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 113 (Tenn. 1975). It is important to recognize that the courts in *Reynolds* and *Massey* did not apply strict scrutiny of the sort mandated by RFRA. As such, those courts were not searching for a "compelling interest." However, while the formal mechanism of analysis was not the same, the goal was identical—to search for a government interest that could justify the infringement on religious free exercise. *Cf. Berg*, supra note 49, at 32 ("The 'compelling interest' language alone has failed to provide sufficient guidance for concrete decisions. It has proven too subjective, requiring courts to gauge the abstract 'importance' of a government purpose.").
193 Id. at 625.
194 See id. at 626-27.
195 Id. at 627.
196 See *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996).
197 See id at 1297.
198 See id. at 1300.
199 Id.
It is hard to dispute the importance of the interests described by these courts. It is true, of course, that the criminal justice system depends on effective appellate advocacy. Likewise, U.C. Davis' university health insurance system does serve the interests described in Goehring. Even so, Blandino and Goehring evince a disturbing trend. To see why, compare the ways in which courts characterized substantial burdens and compelling interests. On the one hand, when courts evaluated the burden on the religious plaintiff, they tended to consider only the plaintiff's specific religious practice. So in Goehring, for instance, the Ninth Circuit engaged in a highly fact-specific analysis of the burden. It noted that, although the registration fee was mandatory for all students, the health insurance subsidy paid out of registration fees "is not a substantial sum of money" and, "[f]urthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services." In other words, despite the university's "stipulation] that the plaintiffs' sincerely held religious beliefs prohibit them from financially contributing to abortions," the court concluded that, since not much of the plaintiffs' money went to abortions, there was not much of a burden.

On the other hand, courts looked at governmental interests in the broadest possible terms. Thus, in Goehring, the plaintiff's indirect subsidy of abortions was weighed against the health of the entire student body. By using these nearly opposite methods to identify interests, courts heavily stacked the analytical deck. For just this reason, this methodology has been roundly criticized:

[B]y failing to use the same level of generality on both sides of the balance, courts violate an essential premise of the method. If, in fact, a single scale describes the intersection of individual liberty and government interests, the factors must be measured in the same units. To do otherwise is akin to comparing the weight of an apple in ounces to the weight of an orange in grams. The comparison is possible, but a conversion table would be necessary to understand the result.

It is jurisprudentially unfair to manipulate the generality of government and

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200 Cf. supra Section IV.B. (discussing courts' reluctance to find substantial burdens).
201 See Goehring, 94 F.3d at 1299-1300.
202 Id. at 1300.
203 Id. at 1299 n.5.
204 See id. at 1300.
205 Faigman, supra note 183, at 780; see also Pepper, supra note 184, at 310 ("For a balancing test to make any sense, relatively equal levels of generality or abstraction must be chosen for each side of the balance."); id. at 312 (criticizing the arguments of Solicitor General Charles Fried in two cases in which he "inflated the governmental interest to a high level of generality while confining the interest in religious freedom to a narrow focus, in effect taking the thumb off the religious freedom side of the balance and moving it to the governmental interest side of the balance").
individual interests, amplifying the importance of the government curtailment of religion while using the same technique to mute the interests of the individual religious claimant. Whatever outcome might be desired as a normative matter, this uncalibrated scale is sure to skew the result.

In fact, a less slanted alternative to this broad interest definition did exist. Instead of merely identifying a broadly-stated interest, a court could perform a fact-specific investigation to determine whether limited religious exceptions to the general statutory rule were feasible. 206 For instance, in Jasniowski v. Rushing, 207 an Illinois court analyzed whether RFRA protected a landlord’s religiously-motivated refusal to rent an apartment to an unmarried couple, thereby mandating an exception to the city’s fair housing ordinance. 208 The court identified a substantial burden in the fact that Jasniowski was “forced to choose between his religious convictions and compliance with the Chicago housing ordinance.” 209 As in Blandino and Goehring, the court found the burden to be justified by a compelling government interest. However, instead of identifying a broad interest—such as “protecting privacy,” for instance—the court felt compelled to take a narrower approach: “The City of Chicago has an interest in prohibiting housing discrimination generally. For free exercise analysis, however, the courts consistently explain that the state’s interest must be narrowly defined. Thus, the narrower question is whether specifically prohibiting housing discrimination against unmarried cohabiting couples is a compelling governmental interest.” 210

After some further analysis, the court found a compelling interest. 211

This is not to say that such “case-specific and fact-intensive analysis” is necessarily the best approach. 212 In fact, it has been criticized for “indeterminacy and subjectivity,” and for setting an unduly high burden for the state to show a compelling interest. 213 But regardless which approach one prefers as a normative matter, it is essential to recognize that alternatives to generality manipulation did and do exist. Many claims were dismissed based on an analytically faulty methodology that weighed the broadly-stated interests of society against the rights of individuals. This need not have been so.

206 See Eugene Gressman & Angela C. Carmella, _The RFRA Revision of the Free Exercise Clause_, 57 Ohio St. L.J. 65, 78-81 (1996) (discussing “ad hoc balancing” as a standard that is highly protective of free exercise).


208 See id. at 745.

209 Id. at 749.

210 Id. at 750 (citations omitted).

211 See id. at 750-51. The analysis of compelling interest used in Jasniowski is an interesting study. Even though the court identified a fairly narrow compelling interest—the point for which I cite this case—it nonetheless found the interest to be a necessary component of a far broader societal goal (the operation of the housing market).

212 Gressman & Carmella, supra note 206, at 80-81.

213 Id.
2. Compelling Interest Deference—Accepting the Government’s Say-So

Complementing and enhancing broad interest definition was the way in which courts deferred almost completely to government actors. In many RFRA cases, government defendants stated broad compelling interests to justify the burdens they placed on religion, and courts accepted—and adopted—those rationales, sometimes seemingly unthinkingly. The issue is posed most starkly in the context of prisons.

Deference to prison administrators has long been the norm. In Turner v. Safley,\(^{215}\) the Supreme Court established a highly deferential test for analyzing prison regulations: “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”\(^{216}\) Later, in O’Lone v. Shabazz,\(^{217}\) the Court imported this same standard into the consideration of prisoners’ religious claims.\(^{218}\) These cases were both decided under pre-Smith strict scrutiny. Thus, if anything, the harsher standard in Employment Division v. Smith\(^ {219}\) fortified this deference.

During the legislative debates on RFRA, this issue arose again. Indeed, one of the chief criticisms of RFRA was its application to prisoners.\(^ {221}\) Perhaps in response to prison officials’ strong objections to RFRA,\(^ {222}\) the Senate Report

\(^{214}\) In this Subsection, I discuss only deference to prison administrators. The reason is a practical one. In judicial opinions concerning prison conditions, courts often rehearsed the compelling interests recited by prison administrators. Thus, it is easy to tell when the court merely adopted the government’s position and, as a result, these cases provide the clearest evidence of the courts’ deference to the government.


\(^{216}\) Id. at 89.


\(^{218}\) See id. at 349.


\(^{220}\) Even Justice O’Connor, who concurred in the Smith result but bitterly contested its reasoning, see 494 U.S. at 891, would have preserved special solicitude for prison officials. In Smith, she wrote that there exist “narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest.” Id. at 900-01. According to O’Connor, these areas include the government’s conduct of its internal affairs, the military—and prisons. See id. at 901. Certain justices have occasionally argued against this blanket deference, but they have been in the minority. See, e.g., Block v. Rutherford, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring) (cautioning against the tendency to “substitute the rhetoric of judicial deference for meaningful review of constitutional claims in a prison setting”).

\(^{221}\) See S. Rep. No. 103-111, at 18-24 (1993) (separate statement of Senator Alan Simpson) (opposing RFRA because it would place an additional burden on prisons), reprinted in 1993 U.S.C.C.A.N. 1892, 1906-12; see also supra notes 37-38 and accompanying text. In fact, two years after RFRA’s passage, Senator Reid introduced a bill to render RFRA inapplicable to prisons. See S. 206, 105th Cong. (1997) (“A bill to prohibit the application of the Religious Freedom Restoration Act of 1993, or any amendment made by such Act, to an individual who is incarcerated in a Federal, State, or local correctional, detention, or penal facility, and for other purposes.”).

\(^{222}\) See S. Rep. No. 103-111, at 25-38. The Senate report reproduced four letters that opposed the
instructed courts to defer to prison administrators: "[T]he committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." But this deference was not intended to be unqualified. On the contrary, both the House and Senate Reports criticized O'Lone. The Senate Report could not have been clearer: "[T]he intent of [RFRA] is to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in O'Lone v. Estate of Shabazz." So while courts should give deference to prison administrators, the Senate Judiciary Committee stated that such deference must be limited: "[I]nadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." From the beginning, the level of deference to be accorded by courts applying RFRA was uncertain.

But while the message from Congress was unclear, its application in the courts was not—courts were extremely deferential to prison administrators. When officials articulated any interest more specific than just "security" or "penological interests," judges accepted those officials' explanations with the most minimal of scrutiny. Indeed, sometimes just "security" was enough. In the leading analysis of RFRA in prisons, Daniel Solove referred to the courts' approach as "nonskepticism." This approach, Solove argued, "has led to decisions based on intuition and conjecture rather than on empirical data and facts. As a result, prison regulations of dubious validity and narrowness have easily passed muster . . . ."

The case of R. Tim Phipps is illustrative. Phipps, a Hasidic Jewish prisoner, was forced to undergo a "burr" haircut despite his religious objections. He brought a challenge under RFRA, but the court summarily disposed of his claim. It noted the Biblical passage containing the relevant commandment, assumed that the haircut created a substantial burden, and moved on to a compelling interest analysis:

application of RFRA to prisoners: a letter from 26 state attorneys-general, see id. at 25-34; two letters from the Executive Director of the Association of State Correctional Administrators, see id. at 35-36; and a letter from 12 Republican members of the House of Representatives, see id. at 37-38.

223 Id. at 10, reprinted in 1993 U.S.C.C.A.N. 1892, 1900.
227 Solove, supra note 161, at 460.
228 Id.
230 See id. at 734.
The court finds the safety concerns offered by the defendants to be sufficiently compelling to satisfy the RFRA standard. The ability of prison officials to quickly identify inmates and protect prison guards and inmates from hidden contraband are matters of paramount concern sufficient to justify small intrusions on prisoners' free exercise rights.\textsuperscript{231}

Two short sentences later, the court had finished its compelling interest analysis.

To fully appreciate the extent of the court's deference, it is useful to briefly consider the alternative. A second action brought by Phipps places the issue in contrast.\textsuperscript{232} Ten months after Phipps' first claim was denied, he filed a preliminary injunction in the same federal judicial district. That court reached the opposite conclusion as the first court. It was more skeptical of the prison's justifications, and looked slightly more carefully at the circumstances surrounding Phipps' haircut:

The record shows that Phipps was placed in segregation on March 10, 1994. Apparently, defendants waited three months until they cut his hair. Waiting three months to cut Phipps' hair weakens defendants' argument that their governmental interest is compelling. If defendants' security concerns were as compelling as they claim, then they would have cut Phipps' hair as soon as he entered the cellhouse.\textsuperscript{233}

But the court did not rely solely on this circumstantial evidence. It also considered whether cutting Phipps' hair was necessary to meet the prison's stated goals:

Further, shaving [Phipps'] earlocks may not be the least restrictive means of furthering [defendants'] interest. For example, while Phipps' hair is short, defendants could photograph him for security reasons. Finally, Phipps only asks that defendants be prohibited from cutting his earlocks. It would be difficult for Phipps to hide contraband in this small amount of hair and it would not create an undue hardship on defendants to search his earlocks.\textsuperscript{234}

The court granted Phipps' motion for a preliminary injunction, thereby preventing the prison from cutting Phipps' payess (earlocks).\textsuperscript{235}

However, given the choice between these two approaches, courts adopted

\textsuperscript{231} \textit{Id.} at 736.
\textsuperscript{233} \textit{Id.} at 1467.
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} See \textit{id.} at 1468.
the former. Deference to prison administrators prevailed. Indeed, some courts did not merely adopt, but actually enforced, deference to regulations. One case in particular, Hamilton v. Schriro,236 suggests that too much judicial scrutiny of prison policies was cause for reversal. In that case, a district court considered the claims of a Native American prisoner who wished to grow his hair long, and to use a sweat lodge and other religious items.237 The district court did not give the prison total deference, but neither did it dispute any prison administrator’s claim that was supported by evidence.

In considering the prisoner’s free exercise claim, the district court examined whether the prison had presented sufficient evidence of a compelling interest. Even this limited inquiry proved to be reversible error. The court’s analysis bears repeating in full, to illustrate the sort of limited judicial investigation that could be overruled:

Defendants state long hair can be used to conceal drugs, weapons and contraband, and can be changed to alter appearance and make identification more difficult. Female prisoners in Missouri, however, are allowed to wear long hair although the hair can be used to conceal drugs, weapons and contraband. Likewise, identification photographs of some male prisoners taken when the inmates had long hair were not retaken after the hair was cut, suggesting identification problems are not real. Further, there was no evidence presented of identification problems with those inmates as a result of their photographs and altered hairstyles, and only minimal evidence of any problems with contraband concealed in long hair. The deposition testimony from other maximum security institutions which allow long hair reported no significant problems with hair length.238

On the one hand, this analysis was thorough. It highlighted the inconsistencies between the defendants’ claims and their prior actions. These were serious inconsistencies—as a logical matter, it seems odd to categorize the hair regulations as compelling if they were not enforced against women. Moreover, the court noted the lack of evidence to support the prison’s supposed compelling interest, an observation that seemed to place an evidentiary burden on prisons.

On the other hand, the district court in Hamilton did not judge the validity of the officials’ claims. To the contrary, it suggested areas in which further evidence might have convinced the court. Because of the lack of evidence presented by defendants, and because the prison had taken “substantial steps to accommodate Christians, Jews and Muslims in providing facilities and opportunities to meet and pray,” the court found that defendants’ “reluctance to do

237 See id. at 1021.
238 Id. at 1023.
the same for Native Americans is based on lack of information, speculation, exaggerated fears and post-hoc rationalizations, not on real evidence of problems.\textsuperscript{239} Then, sensitive both to Hamilton's religious needs and the prison's security interests, the court ordered the parties to "meet and arrive at a compromise acceptable to each of the parties."\textsuperscript{240}

This decision was overturned on the ground that the district court had not given the prison officials due deference.\textsuperscript{241} In overturning the district court, the Eighth Circuit first considered the issue of long hair. It noted prison officials' testimony that long hair could be used to conceal contraband and weapons, and as a gang marker.\textsuperscript{242} After noting that the Eighth Circuit had previously upheld the validity of similar penological concerns, the court emphasized the need for wide-ranging deference to prison administrators:

The safety and security concerns expressed by prison officials were based on their collective experience of administering correctional facilities. These are valid and weighty concerns. Moreover, there is no viable less restrictive means of addressing these concerns. Therefore, we conclude that the district court erred in its interpretation and application of the least restrictive means prong of the compelling interest test in RFRA. The district court failed to give due deference to the prison officials' testimony that long hair presented a risk to prison safety and security and that no viable less restrictive means of achieving that goal existed.\textsuperscript{243}

The court ignored the lack of evidence presented by the prison, and did not consider the actions taken by the prison that belied the testimony of its administrators. Particularly in light of the lower court's analysis, this portion of the decision suggests that a court was required to yield to a prison administrator who identified an interest as compelling.

The court's analysis of the religious items requested by Hamilton was similar. It noted that prison administrators had described the security concerns posed by the various religious items. In the end, the Eighth Circuit concluded that "the district court failed to give due deference to prison officials who testified as to the necessity of the prison hair length regulation and prohibition against a sweat lodge to maintain prison safety and security. . . . [T]he prison officials' justifications for the hair length regulation and prohibition of a sweat lodge

\textsuperscript{239}Id. at 1024.
\textsuperscript{240}Id. at 1020.
\textsuperscript{241}See Hamilton, 74 F.3d at 1557.
\textsuperscript{242}See id. at 1554.
\textsuperscript{243}Id. at 1555.
ceremony were sufficient."\textsuperscript{244}

Naturally, courts were not uniformly deferential across the many types of RFRA claims. Courts tended to be less deferential to prison administrators when an inmate’s symbolic practices were at issue—growing long hair,\textsuperscript{245} wearing religious headgear,\textsuperscript{246} or carrying small religious items such as beads or jewelry.\textsuperscript{247} But these practices made up only a fraction of prisoners’ free exercise claims. And while courts were less deferential when these sorts of claims were at issue, their inquiry was far from searching in most cases. This near-total acquiescence to government actors seems at odds with RFRA’s goal of enhancing religious liberty. For in many cases a prison administrator’s primary concern is not the religious liberty of the prisoner, but how to keep a prison running safely and smoothly. Thus, it was left to the courts to ask whether the chosen method of operating prisons was improperly at odds with religious liberty. To defer this task entirely to the very actor whose policy was being challenged runs counter to the intent of Congress and the goal of the Act. And in practical terms, by refusing to consider even whether there existed evidence to support prison administrators’ claims, courts guaranteed that most claimants would lose.

3. Analytical Sloppiness

In addition to these poor structural devices for determining what constitutes a compelling interest, courts often failed to isolate the substantial burden from the compelling interest prong of the test. Formally speaking, the existence of a compelling governmental interest should have been irrelevant to whether the plaintiff demonstrated a substantial burden. Only after evaluating the nature of the burden should the court have considered the government’s interest. But in a number of opinions, it appears that courts mixed the two analyses.

In some cases, instead of using the three-part test mandated by the statute, it appears that the court simply weighed the burden on the religious claimant against the social value of the policy. This seems to have been the case in \textit{Morris v. Midway S. Baptist Church}.\textsuperscript{248} In the context of considering whether religious tithes were “fraudulent transfers” for purposes of Title 7 bankruptcy, the court employed the following analysis: “In comparison to this modest burden on the debtors’

\textsuperscript{244} \textit{Id.} at 1557.


\textsuperscript{246} \textit{See, e.g.}, Hall v. Griego, 896 F. Supp. 1043 (D. Colo. 1995) (denying prisoner’s motion for summary judgment on prisoner’s claim that his free exercise was burdened by restrictions on headgear); Muslim v. Frame, 891 F. Supp. 226 (E.D. Pa. 1995) (same).


practice of religion, the government’s significant interests in maintaining an equitable system for protecting creditors, for permitting debtors to obtain a ‘fresh start’ from overwhelming debt, and in avoiding excessive entanglement with religious matters are compelling.”\textsuperscript{249} This seems squarely at odds with the statutory formulation.

In a second sort of sloppiness, courts gave short shrift to substantial burden analysis, and moved quickly to compelling interest. Often, the opinion proceeded as follows. After introducing the facts of the case, the court contemplated whether the plaintiff demonstrated a substantial burden. After some slight analysis, the court stated that there may be—in fact, probably was—a substantial burden but, either way, the state had shown a compelling interest. At that point, the court then considered compelling interest. For instance, in \textit{Winburn v. Bologna},\textsuperscript{250} the court considered a federal prison inmate’s claim that he was wrongfully deprived of racist religious materials.\textsuperscript{251} After briefly describing the strict scrutiny standard, the court engaged in a perfunctory analysis, slipping easily from substantial burden into compelling interest:

\begin{quote}
Plaintiff has failed to establish that his right to exercise his faith was substantially burdened by the rejection of his mail. Plaintiff’s affidavit demonstrates, in fact, that some of the material that was rejected was available to him in the prison library. Further, even if the rejection of the mail substantially burdened his ability to exercise his faith, the interest in maintaining prison security constitutes a compelling interest which would justify the burden on Plaintiff’s rights.\textsuperscript{252}
\end{quote}

These three sentences represent the court’s entire consideration of the RFRA claim.

It is essential to note that, although the type of analysis used in \textit{Winburn} and \textit{Morris} was sloppy, it might nonetheless reach the proper result. In the final calculus, the substantiality of the burden is irrelevant if the government’s interest is compelling. Even so, the blurring of the test is problematic. Leave aside the inappropriateness of a conclusory discussion like that in \textit{Winburn}, a point that I discussed earlier.\textsuperscript{253} My concern is this: A mushy transition from substantial burden to compelling interest points to similarly mushy underlying analysis. Rather than adequately considering the burden on religion on its own terms, the court seems to have been blinded by a massive government interest. This has several likely consequences.

First, it sets the table for an inequitable weighing of the burden on the

\textsuperscript{249} \textit{Id.} at 477.
\textsuperscript{251} \textit{See id.} at 533.
\textsuperscript{252} \textit{Id.} at 535.
\textsuperscript{253} \textit{See supra} Subsection IV.B.1.
individual against the interest of the government. As discussed earlier, courts have a tendency to take into account only the burden suffered by a particular plaintiff while considering a policy’s broad social ends.\(^\text{254}\) This has the effect of making the claimant’s burden seem slight. To then weigh the one against the other (instead of asking whether the burden on the plaintiff was substantial and the government’s interest was compelling, as required by the statute) could only exacerbate this dwarling effect.

Second, neglecting the substantial burden analysis because of an important government interest may mean that the claimant’s burden received insufficient attention. To skip over this part of the analysis—on the ground that this piece of the inquiry was unnecessary to reach the correct result—is to suggest that legal proceedings are only about result. Process matters, particularly for these plaintiffs. In light of RFRA’s purpose, it seems important—indeed, essential—for courts to consider the claims of plaintiffs like these carefully, diligently, and respectfully. Even if a court did decide that the government’s interest was compelling, it should have taken the time to recognize the fact that society burdened the plaintiff’s religious practice. Indeed, such a recognition was probably more important in a case that the plaintiff was going to lose; that portion of the judicial opinion might have been the only formal recognition by the government of the burden placed on that plaintiff. To slide rhetorically past religious burdens because of the existence of government interests is to give short shrift to the plaintiffs’ claims. It exhibits exactly the lack of solicitude that RFRA was designed to correct.

The final problem with this analytical sloppiness is that it may have led to bad outcomes. By focusing on the overwhelming nature of the government interest, courts often ignored the “least restrictive means” prong of the test. I turn now to that piece of the analysis.

\section*{D. Least Restrictive Means}

Under the compelling interest test, even if a court found a substantial burden on religious free exercise and concluded that the burden was justified by a compelling government interest, it still had to determine whether the chosen means to that end was the least restrictive one. That is, the court had to consider whether there existed alternative means of effectuating the government’s policy that would burden religion less. On its face, this task was an expansive one. Justice Blackmun observed this fact in expressing his disapproval of the least restrictive means prong of the compelling interest test:

“[L]east drastic means” is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less “drastic” or a little less “restrictive” in almost any situation, and thereby enable himself to vote to strike legislation

\(^{254}\) See supra Subsection IV.C.1.
down.\textsuperscript{255}

But even if it is true that the "least restrictive means" inquiry is subject to judicial abuse, it does not follow that courts should ignore this part of the test. Not only was it part of the statutory standard, but least restrictive means could serve a critical balancing function by allowing courts to protect religious interests while simultaneously providing legislatures with alternative means to effectuate their policy goals. However, courts applying RFRA largely ignored the least restrictive means analysis. This rejection took two forms.

First, courts often accepted broad statements that no less restrictive means existed. This seems unsurprising in light of the preceding discussion of judicial deference.\textsuperscript{256} Consider again Hamilton v. Schriro,\textsuperscript{257} in which the Eighth Circuit found insufficient deference to prison officials to be grounds for reversal.\textsuperscript{258} As they had with compelling interest, the district and appellate courts did battle over least restrictive means. The prison had prohibited Native American inmates from having long hair, and from using a sweat lodge and other religious items. It contended that the restrictions were justified by considerations of "safety, security and cost."\textsuperscript{259} However, the district court found that the prison administrators had made little attempt to protect these interests in a manner less restrictive than the absolute prohibitions that the prison did adopt:

In denying plaintiff's request, corrections personnel in Missouri did not (1) make any inquiry of problems encountered by personnel at institutions which allow the practice of Native American religions; (2) contact any Native American religious leader to determine the feasibility of plaintiff's requests, or to determine whether other acceptable alternatives existed; or (3) do a cost analysis or make inquiry regarding the availability of funds or the amount of funds that would be required. Instead, Missouri corrections personnel relied on their experience in corrections work and on a belief that such practices would interfere with the safety and security of the institution. They made absolutely no effort to determine whether the religious practices could be accommodated while still taking care of safety and security concerns.\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{256} See supra Subsection IV.C.2.
\item \textsuperscript{257} 863 F. Supp. 1019 (W.D. Mo. 1994), rev'd, 74 F.3d 1545 (8th Cir. 1996).
\item \textsuperscript{258} See 74 F.3d at 1557; see also supra text accompanying notes 236-44.
\item \textsuperscript{259} 863 F. Supp. at 1024.
\item \textsuperscript{260} Id. at 1023.
\end{itemize}
Thus, the district court concluded:

Although safety, security and cost concerns may be shown to be compelling governmental interests in the prison setting, defendants have not shown that the regulations and practices used by the Missouri Department of Corrections are the least restrictive means of furthering that interest. Defendants have not even shown a willingness, after enactment of the statute, to implement less restrictive means in the absence of a court order to do so. 261

On appeal, the Eighth Circuit took the opposite approach. After briefly noting that “[u]nder RFRA, the prison officials bear the burden of demonstrating that the regulation is the least restrictive means of achieving a compelling interest,”262 the court then engaged in a two-and-one-half page exposition of the need for deference to prison administrators.263 It emphasized pro-deference citations from RFRA’s legislative history,264 while relegating to a closing footnote the Senate’s clear instruction that deference to prison administrators should be limited.265 It then engaged in the following abbreviated inquiry into a less restrictive alternative: “Moreover, there is no viable less restrictive means of addressing these concerns.”266 That one sentence was the court’s entire analysis. Interestingly, the court supported this conclusion with a footnote to the first disposition in Phipps v. Parker (in which a court upheld a prison regulation that required a Jewish prisoner to cut his earlocks),267 but ignored the contrary conclusion in the later case involving the same plaintiff.268 As in the context of compelling interest, unqualified deference regarding the least restrictive means analysis meant that religious claimants were almost certain to lose.

The least restrictive means test was curtailed by a second form of limitation. Courts refused to consider exemptions for religious adherents as a less restrictive means. Or, more precisely, when courts did consider such exemptions,
they almost inevitably found them unacceptable. As an historical matter, this approach predates RFRA; indeed, it has been used by the Supreme Court, particularly in cases contesting forced participation in social insurance systems. The effect, however, is to eliminate a potentially effective means of allowing religious claimants and neutral government policies to exist simultaneously.

This methodology was employed by the Supreme Court in *United States v. Lee.* In that case, decided long before the enactment of RFRA, the Court considered the claims of an Amish farmer who failed to withhold Social Security taxes because the Amish "believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national Social Security system." The Court accepted that the "compulsory participation in the Social Security system interferes with [the] free exercise rights [of the Amish]." Even so, exemptions were not warranted because "it would be difficult to accommodate the comprehensive Social Security system with myriad exceptions flowing from a wide variety of religious beliefs." Several years later, in *Hernandez v. Commissioner,* the Supreme Court extended *Lee* to the federal income tax, concluding it was "of no consequence" that "these cases involve federal income tax, not the Social Security system." Again, the Court stated that "myriad exceptions" could not be accommodated.

This same analysis was imported into the RFRA cases. Recall *Goehring v. Brophy,* in which students who opposed abortion on religious grounds requested exemptions from otherwise-mandatory student fees because those fees helped to subsidize a university health care system that paid for abortions. The Ninth Circuit held that RFRA did not require these exemptions. Pointing to *Lee,* among other cases, the court concluded that "the fiscal vitality of the University's fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds. Mandatory uniform participation by every student is essential to the insurance system's survival." The court analogized to a case in which claimants who

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270 *Id.* at 255.
271 *Id.* at 257.
272 *Id.* at 259-60.
274 *Id.* at 700; see also *Droz v. Commissioner,* 48 F.3d 1120 (9th Cir. 1995) (evaluating the government's compelling interest in maintaining an exemption-free social security system); *Kennedy v. Rubin,* No. C 95-1270 SBA, 1995 WL 552148 (N.D. Cal. Sept. 7, 1995) (exemption-free tax system).
276 94 F.3d 1294 (9th Cir. 1996).
277 See *id.* at 1298. See generally *supra* text accompanying notes 196-205 (discussing *Goehring* in the context of the compelling interest test).
278 94 F.3d at 1301 (citing *Lee,* 455 U.S. at 258).
opposed war on religious grounds unsuccessfully sought tax exemptions equal to the portion of their taxes that would support the Vietnam War:

[If every citizen could refuse to pay all or part of his taxes on religious grounds, the government’s ability to function would be severely impaired or destroyed because there are few, if any, governmental activities to which one person or another would not object. This logic applies to the facts of the present case as well. If the students at the University could refuse to pay a portion of their registration fee on religious grounds, the University’s fee system would be seriously undermined. There are few, if any, University funded activities to which one student or another would not object."

This is a puzzling bit of logic. As a threshold matter, it is unclear that so many students would object to so many university activities. But even if these myriad objections did arise, it is unclear that such objections would be relevant here. RFRA speaks only to religiously-motivated objections. It is irrelevant for an analysis of RFRA that some student would object to nearly every student activity, unless such objections were motivated by religion. In other words, there is a clear limit to the slippery slope suggested by the court.

But even assuming a flood of religiously-motivated objections, it seems curious to insulate the university from attack on the grounds that its policies will create "too many" burdens on religion. Indeed, in cases like Goehring, exemptions for religious claimants could serve as an ideal form of less restrictive means. That case concerned the health insurance system at the University of California at Davis, a university of approximately 25,000 students. Insurance systems, of course, distribute risk and cost across populations, rather than concentrating them in

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279 Id. at 1301-02 (citation omitted).

280 See Berg, supra note 49, at 40 ("Because the government must show it is pursuing the 'least restrictive means' to its end, the government's interests must generally be examined 'at the margin,' that is by the harm from exempting religious objectors alone."); Clark, supra note 177, at 331 ("The importance of a law should be measured not by all the benefits it confers on society, but by the incremental benefit of applying it to those with religious scruples."); Pepper, supra note 184, at 311 ("[H]arm to governmental interests must be measured at the margin—the effect of excepting religious claimants from the legal provision at issue is the measure, not the importance of the provision in general.").

281 See generally Frederick Schauer, Slippery Slopes, 99 HARV. L. REV. 361, 376 (1985): [T]he slippery slope claim may be premised on something more than undifferentiated risk aversion. Some subjects may involve a greater than normal likelihood of mistakes. . . . A slippery slope claim implicitly or explicitly urges that the instant case distorts or skews the normal risk functions so that the descent from this decision to the danger case may be more slippery than the normal passage from one case to the next.

unfortunate individuals.\textsuperscript{283} One wonders whether removing religious adherents from this insurance pool would significantly increase costs for other participants. Nowhere did the \textit{Goehring} court consider this question.

Moreover, even assuming that religious exemptions would lead to substantially higher insurance rates, these exemptions might nonetheless be appropriate. Particularly if granting these exemptions would not seriously undermine the university’s stated interests, an indirect subsidy for religious free exercise might mediate between undermining religious freedom and the state’s policy objectives.\textsuperscript{284} When dealing with administrative bureaucracies, it is no answer to summarily conclude that it might be expensive to monitor exemptions. In many of these cases, as the courts noted, exceptions already existed.\textsuperscript{285} Why not allow these exceptions?

Furthermore, contrary to what the \textit{Goehring} court seemed to suggest, one could argue that this is no “subsidy” at all. The mere fact that exemptions would lead to an increased regulatory cost—whether presumed, as in \textit{Hernandez, Lee}, and \textit{Goehring}, or actually demonstrated—does not mean that this is a “subsidy.” As Cass Sunstein has observed, “[t]he notion of subsidy is of course incoherent without a baseline from which to make a measurement.”\textsuperscript{286} To term this exemption a “subsidy” begs the question of the appropriate baseline of funding by assuming that funding is inappropriate. But why should the assumption be that the religious claimant, rather than the government or the polity, assume extra costs occasioned by religious practice? Indeed, it could be argued that this assumption is at the core of the distinction between \textit{Employment Division v. Smith} and the compelling interest test enacted by RFRA. Whereas \textit{Smith} held that incidental burdens on religion were constitutionally permissible,\textsuperscript{287} \textit{Sherbert v. Verner} — the case that instituted the compelling interest test upon which RFRA was modeled — held that incidental burdens on religious free exercise were impermissible penalties.\textsuperscript{288} \textit{Smith} upheld neutral laws of general applicability; \textit{Sherbert} put them to heightened scrutiny. In light of this vigorous debate, it is troubling that the \textit{Goehring} court assumed without discussion that the claimants should bear the burden of additional cost. And in light of RFRA’s stated goal of restoring \textit{Sherbert}, it appears to be the


\textsuperscript{284} Although my phraseology invites an Establishment Clause objection, no court has held that religious exemptions violate the Establishment Clause. Indeed, it seems paradoxical to conclude that making religious practice more expensive is appropriate under the Free Exercise Clause while simultaneously concluding that making it less expensive would be inappropriate under the Establishment Clause.


\textsuperscript{287} See \textit{Smith}, 494 U.S. 872, 878 (1990) ("It is a permissible reading of the text [of the First Amendment] . . . to say that if prohibiting the exercise of religion . . . is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

\textsuperscript{288} See 374 U.S. 398, 403-04 (1963).
wrong result.

V. CONCLUSION

The promise of RFRA was that it would mark a sea change in the protection of religious freedom. It was touted as the answer to the crisis of religious liberty brought on by Employment Division v. Smith. But it was not to be. As a threshold matter, Smith did not affect free exercise cases as much as had been anticipated. The pre-Smith compelling interest test was not particularly friendly to religious free exercise, so the new Smith test lowered the bar less than it otherwise would have, and RFRA’s restoration of pre-Smith strict scrutiny accomplished less than it otherwise might have.

But apart from this free-floating analysis of tiers of scrutiny, it is essential to examine what happened under RFRA. It was said from the start that for RFRA to succeed, the statute must have symbolic value above and beyond the formal test that it sought to implement. It must be perceived as a congressional attempt to reinvigorate the protection of religion. The results of the RFRA cases suggest that no such reinvigoration occurred, and that no such symbolic message was received. True, a few courts went far in protecting free exercise, sometimes in the face of biting criticism. But this was the exception, not the rule. The bulk of RFRA results were in the other direction. Thin definitions of burdens, thick definitions of interests, and no apparent consideration of least restrictive means combined to gut the statute that was meant to resurrect the protection of free exercise. While it is difficult to speculate why this came about—the potential unconstitutionality of RFRA? institutional uncertainty brought about by rapid changes in the free exercise test? judges’ own preferences for the “banquet religions”?

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289 See, e.g., Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (upholding the right of a Sikh child to bring a kirpan—a ceremonial dagger—to school, provided that it was sewn into a sheath, worn under his clothes, and subject to inspection). See generally Amajeeet S. Bhachu, Note, A Shield for Swords, 34 AM. CRIM. L. REV. 197 (1996) (discussing Cheema).


remains clear that few religious plaintiffs won under RFRA. The attempted political signal was lost, and with it, the goals of RFRA and its supporters.

I borrow this term from Judge Guido Calabresi, who uses it to refer to religions that are sufficiently ensconced in society's mainstream that their religious leaders are permitted to deliver the benediction at public events. Of course, this refers generally to Catholics, Jews, and certain groups of Protestants. These religions dominate the federal judiciary. From President Roosevelt to the present, 50%-85% of every president's appointees have been Protestant, 10%-30% Catholic, and 2%-18% Jewish. See Sheldon Goldman, Picking Federal Judges—Lower Court Selection from Roosevelt Through Reagan 348-50, 354-56 (1997); Sheldon Goldman, Bush's Judicial Legacy: The Final Imprint, 76 Judicature 282 (1993). Indeed, from President Truman to the present, no more than 4% of judicial appointees have fallen into Goldman's catch-all "other" category, and even those appointees are not far outside of the religious mainstream—they have been Mormon or Baha'i, rather than adherents of Wicca, the white separatist Church of Jesus Christ Christian, or the Moorish Science Church.