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The Religious Freedom Restoration Act

*Douglas Laycock**

I. INTRODUCTION

The proposed Religious Freedom Restoration Act¹ (RFRA) is a legislative response to the Supreme Court's decision in *Employment Division v. Smith*,² which held that federal courts cannot protect the exercise of religion from formally neutral and generally applicable laws. In effect, the Court held that every American has a right to believe in a religion, but no right to practice it. Religion cannot be singled out for discriminatory regulation, but it is fully subject to the entire body of secular regulation.

In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that sometimes claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience.

RFRA would greatly ameliorate these consequences. The bill would enact a statutory version of the Free Exercise Clause. The bill can work only if it is as broad as the Free Exercise Clause, establishing the fundamental principle of religious liberty and leaving particular disputes to further litigation.

Introduced with bipartisan sponsorship in both Houses of Congress, supported by President Clinton, and endorsed by its most influential former opponent, the United States Catholic Conference, RFRA may finally be on the way to passage after

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1. S. 578 & H.R. 1308, 103d Cong., 1st Sess. (1993), available in LEXIS, Legis Library, BLTEXT File.

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

three years of deadlock. This article reviews the need for RFRA, some questions about its interpretation, the disputes that have delayed its enactment for so long, and the constitutional source of congressional power to enact the bill.

II. SOME RELEVANT HISTORY OF RELIGION IN AMERICA

The founding generation of Americans had a vision of a society in which religion would be entirely voluntary and entirely free. People of all faiths and of none would be welcome. Minority religions would be entitled not merely to grudging toleration, but to freely and openly exercise their religion. Even in their largely unregulated society, the Founders understood that the free exercise of religion sometimes required religious exemptions from formally neutral laws.³ Guarantees of free exercise and disestablishment were written into our fundamental law in state and federal constitutions. The simultaneous American innovation of judicial review made those guarantees legally enforceable.

The religion clauses represent both a legal guarantee of religious liberty and a political commitment to religious liberty. The religion clauses made America a beacon of hope for religious minorities throughout the world. The extent of religious pluralism in this country, and of legal and political protections for religious minorities, is probably unsurpassed in human experience. Religious liberty is one of America's great contributions to civilization.

But a counter-tradition also runs through American history; we have not always lived up to our ideals. There has been religious intolerance and even religious persecution. The New England theocracy expelled dissenters, executed Quaker missionaries who returned, and, most infamously, perpetrated the Salem witch trials. Colonial Virginia imprisoned Baptist ministers for preaching without a license. American slaveowners totally suppressed African religion among the slaves, in what one historian has called "the African spiritual holocaust."⁴

Hostility to Catholics produced anti-Catholic political movements, mob violence, and church burnings in the

3. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466-73 (1990).

4. JON BUTLER, *AWASH IN A SEA OF FAITH* 129-63 (1990).

nineteenth century. Catholic children were beaten for refusing to read the Protestant Bible in public schools. In the 1920s, the Ku Klux Klan and other Nativist groups pushed through a law in Oregon requiring all children to attend public schools; the effect would have been to close the Catholic schools.⁵

The Mormons fled from New York, to Ohio, to Missouri, to Illinois, to Utah. They were driven off their lands in Missouri by a combination of armed mobs and state militia. Their prophet was murdered by a mob while he was in the custody of the State of Illinois. The federal government prosecuted hundreds of Mormons for polygamy, it imposed test oaths that denied Mormons the right to vote, and finally it dissolved the Mormon Church and confiscated its property. The Supreme Court upheld all of these laws in a series of cases in the late nineteenth century.⁶

From the late 1930s to the early 1950s, towns all over America tried to stop the Jehovah's Witnesses from proselytizing. These towns enacted a remarkable variety of ordinances, most of which were eventually struck down. The Supreme Court's decision in *Minersville School District v. Gobitis*,⁷ upholding the requirement that Jehovah's Witnesses salute the flag, triggered a nationwide outburst of private violence against the Witnesses.⁸ Jehovah's Witness children were beaten on American school grounds.⁹

This thumbnail sketch of religious intolerance in American history is relevant to RFRA for two reasons. First, history shows that even in America government cannot always be trusted to protect religious liberty. Judicial enforcement of free exercise is not foolproof either, but it is an important additional safeguard.

This history of religious intolerance is also relevant in a more specific way: formally neutral, generally applicable laws—the kind that raise no constitutional issue after *Smith*—were central to three of the worst episodes of religious persecution in our history. The law that would have closed all the Catholic schools in Oregon was a formally neutral,

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

6. *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

7. 310 U.S. 586 (1940).

8. PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 22-23, 31 (1988).

9. *Id.* at 30; see also *id.* at 33.

generally applicable law. The polygamy law that underlay much of the Mormon persecution was a formally neutral, generally applicable law. The flag salute law invoked against Jehovah's Witnesses was a formally neutral, generally applicable law.

The Supreme Court upheld the polygamy law in *Reynolds v. United States*.¹⁰ It upheld the flag salute law in *Gobitis*, although it later struck down a similar law under the Free Speech Clause.¹¹ *Reynolds* and *Gobitis* are the two precedents on which the Court principally relied in *Smith*; the Court was simply oblivious to the shameful historical episodes of which these cases were a part. The law closing Catholic schools was struck down in *Pierce v. Society of Sisters*,¹² a decision cast in serious doubt by *Smith*. If *Pierce* survives, it rests on an unenumerated right of parents to educate their children¹³—a precarious base indeed.

In only one of these three episodes was the formally neutral law originally enacted for the *purpose* of persecuting a religious minority: The law closing private schools in Oregon was enacted to harm the Catholics. But polygamy laws were not enacted to get the Mormons, and flag salute laws were not enacted to get the Jehovah's Witnesses. These laws were originally enacted for legitimate reasons, but when they were enforced against religious minorities, they fanned the flames of persecution.

Congress can find as a fact that formally neutral, generally applicable laws have repeatedly been the instruments of religious persecution, even in America. Formally neutral laws can lead to persecution for a simple reason: Once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point to that demand. Conscientious resistance by religious minorities sometimes inspires respectful tolerance and exemptions, but sometimes it inspires religious hatred and determined, systematic efforts to suppress the religious minority.

III. SOME CONTEMPORARY EXAMPLES

I mention the history of religious persecution because that

10. 98 U.S. 145 (1878).

11. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

12. 268 U.S. 510 (1925).

13. *See Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

possibility cannot be assumed away. But deliberate persecution is not the usual problem in this country. Religious organizations and believers can lose the right to practice their faith for a whole range of reasons: because their practice offends some interest group that successfully insists on a regulatory law with no exceptions, because the secular bureaucracy is indifferent to their needs, or because the legislature was unaware of their existence and failed to provide an exemption. Some interest groups and individual citizens are aggressively hostile to particular religious teachings, or to religion in general. Others are not hostile, but simply cannot understand the need to exempt religion. But whether regulation results from hostility, indifference, or ignorance, the consequence to believers is the same.

All of these problems are aggravated by the reaction to *Smith* in the lower courts, in government bureaus, and among secular interest groups. Many judges, bureaucrats, and activists have taken *Smith* as a signal that the Free Exercise Clause is largely repealed, and that the needs of religious minorities are no longer entitled to any consideration. I briefly discuss some contemporary examples.

Culturally conservative churches, including Catholics, conservative Protestants, Orthodox Jews, and Mormons, are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior. The most aggressive elements of the pro-choice, gay rights, and feminist movements are not content to prevail in the larger society; they also want to impose their agenda on dissenting churches. Sometimes they succeed. St. Agnes Hospital in Baltimore had a residency program in obstetrics and gynecology, but the program lost its accreditation because the hospital refused to perform abortions or teach doctors how to do them.¹⁴ There has been recurring litigation, with mixed results, between churches and gay rights

14. *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990). *Riddick* was decided without reference to *Smith*, on the basis of a seriously diluted version of the compelling interest test. Under *Smith*, the law is valid without regard to the weight of the state's interest. To accomplish its purpose, RFRA must restore the original understanding of the compelling interest test, as set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Thomas v. Review Board*, 450 U.S. 707 (1981). See *infra* part V. RFRA does not codify cases such as *Riddick*, which apply a lower standard and call it compelling interest.

organizations.¹⁵ But the opinion in *Smith* is reasonably clear: Any well-drafted gay rights ordinance would be a facially neutral law of general applicability, and the Free Exercise Clause will not exempt religious organizations. These recurring conflicts over sexual morality are the most obvious examples of interest group attacks on religious liberty.

The problem of bureaucratic inflexibility is illustrated by one of the saddest cases since *Smith*, a case involving an unauthorized autopsy. Several minority religions in America have strong teachings against mutilation of the human body, and they view autopsies as a form of mutilation. Faith groups with such teachings include many Jews, Navajo Indians, and the Hmong, an immigrant population from Laos. The Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free.

In *Yang v. Sturner*,¹⁶ a distressed district judge held that *Smith* left him powerless to do anything about an unnecessary autopsy performed on a young Hmong man. The judge movingly described the deep grief of the victim's family, the obvious emotional pain of the many Hmong who came to witness the trial, and his own deep regret at being forced to uphold a profound violation of their religious liberty. He describes an autopsy done largely out of medical curiosity, with no suspicion of foul play, with no authorization in Rhode Island law, and without the slightest regard for the family's religious beliefs.¹⁷ But under *Smith*, the state does not need a good reason, or even any reason at all. There is simply no substantive constitutional right to religious liberty after *Smith*.

An example of old-fashioned religious prejudice is *Munn v. Algee*,¹⁸ a suit for the wrongful death of Elaine Munn. Mrs. Munn was killed in an automobile accident in which the other driver admitted fault. In accord with her Jehovah's Witness faith, Mrs. Munn refused a blood transfusion; the doctors disagreed sharply over whether a transfusion would have done any good. The defendant driver's insurance company

15. See *Walker v. First Orthodox Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987); *Dignity Twin Cities v. Newman Ctr. & Chapel*, 472 N.W.2d 355 (Minn. Ct. App. 1991).

16. 750 F. Supp. 558 (D.R.I. 1990).

17. *Yang v. Sturner*, 728 F. Supp. 845, 846-47, 853-57 (D.R.I.), *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990).

18. 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991).

successfully argued that Mrs. Munn was responsible for her own death, because she refused the blood transfusion. Citing *Smith*, the court of appeals held that she had no right to refuse a blood transfusion.¹⁹

Even worse, the insurance company was permitted to attack a wide range of other Jehovah's Witness teachings as unpatriotic, narrow-minded, or strange. The insurance company forced Mr. Munn to testify about the Jehovah's Witness belief that Christ returned to earth in 1914, their belief that the world will end at Armageddon and that only Jehovah's Witnesses will be spared destruction, their belief that there is no hell, and their conscientious refusal to serve in the military or salute the flag. This case was tried to a mostly white Mississippi jury at the height of the political controversy over flag burning. The Munn family is black, and the insurance company successfully excluded all but one of the black jurors. The jury awarded no damages for Mrs. Munn's death, and only token damages for Mr. Munn's injuries and for Mrs. Munn's pain and suffering prior to death.

Astonishingly, the court of appeals upheld the jury's verdict. One judge thought the attack on Jehovah's Witness teachings was relevant and entirely proper.²⁰ A second judge thought these attacks were so obviously irrelevant that they could not have affected the jury's deliberations.²¹ For these wholly inconsistent reasons, the Munns were left with only token compensation. This trial was surely unconstitutional even after *Smith*, but the Supreme Court denied certiorari. The case illustrates the symbolic consequences of *Smith*: there is a widespread impression that religious minorities simply have no constitutional rights anymore.

Yang and *Munn* illustrate another important point. The Munns were black; the Yongs were Hmong. Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice.

Not even mainstream churches can count on sympathetic regulation. Cornerstone Bible Church in Hastings, Minnesota was zoned out of town and left without a place to worship. Applying *Smith*, the district court upheld the exclusionary

19. *Id.* at 574.

20. *Id.* at 579 (Barksdale, J., concurring).

21. *Id.* at 572 n.6 (opinion of Smith, J.).

zoning, equating the zoning rights of churches with the zoning rights of pornographic movie theaters.²² The court of appeals held that Cornerstone is entitled to a new trial, but its opinion did not solve either Cornerstone's problem or the zoning problems of other churches. The court of appeals held that cities need have only a rational basis for excluding churches from town. In spite of clear evidence of discrimination against churches, the court refused to apply the compelling interest test.²³

Cornerstone's problem with hostile zoning is not unique. Restrictive zoning laws are often enforced with indifference to religious needs—and sometimes with outright hostility to the presence of churches. Zoning laws have been invoked to prevent new activities in existing churches and synagogues, to limit the architecture of churches and synagogues, to exclude minority faiths such as Islam and Buddhism, and to prevent churches and synagogues from being built at all in new suburban communities.²⁴ Most major American religions teach some duty to feed the hungry, clothe the naked, and shelter the homeless; but when a church or synagogue tries to act on such teachings, it is likely to get a complaint from the neighbors and a citation from the zoning board. In the zoning cases, the problem is not that the church has a doctrinal tenet or moral teaching that directly conflicts with the policy of the law. Rather, the problem is simply that the law restricts the church's ability to carry out its mission. Religious exercise is not free when churches cannot locate in new communities, or when existing churches cannot define their own mission. The free exercise of religion under RFRA must include the churches' definition and pursuit of their own religious missions and management of their own internal affairs.

IV. THE DYNAMIC OF INTEREST GROUP POLITICS

The Supreme Court has held that legislatures may exempt religious exercise from formally neutral laws.²⁵ But individual

22. *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654, 663 (D. Minn. 1990), *aff'd in part, rev'd in part*, 948 F.2d 464 (8th Cir. 1991).

23. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991).

24. For accounts of these cases, see R. Gustav Niebuhr, *Here Is the Church; As for the People, They're Picketing It*, WALL ST. J., Nov. 20, 1991, at A1.

25. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-40 (1987).

exemptions, obtained one statute at a time, are not a workable means of protecting religious liberty. In each request for a legislative exemption, churches are likely to find an aroused interest group on the other side, and they will be trying to amend that interest group's statute. Such battles can be endless. The fight over student gay rights groups at Georgetown University resulted in ten published judicial orders and two acts of Congress.²⁶

Churches have to win these battles over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissions, by the city councils, and by the administrative agencies at each of these levels. Churches have to avoid being regulated this year and next year and every year after that. If they lose even once in any forum, they have lost the war; their religious practice is subject to regulatory interference. This is not a workable means of protecting religious liberty.

It is important to understand that every religion is at risk. Every church offends some interest group, and many churches offend numerous interest groups. No church is big enough or tough enough to fight them all off, over and over, at every level of government. The situation is even more hopeless for individual believers with special needs not shared by their whole denomination. Consider the case of Frances Quaring, a Pentecostal Christian who studied the Bible on her own and understood the commandment against graven images with unusual strictness.²⁷ Mrs. Quaring would not allow a photograph in her house. She would not allow a television in her house. She removed the labels from her groceries or obliterated the pictures with black markers. For Mrs. Quaring, it was plainly forbidden to carry a photograph on her driver's license, and when the legislature required photographs, she could not get a driver's license.²⁸

It would be nearly impossible for any legislature to know in advance about a believer like Mrs. Quaring and to enact an exemption for her. The Mrs. Quarings of the world cannot hire lobbyists to monitor the legislature and protect their religious

26. The judicial and legislative history is summarized in *Clarke v. United States*, 915 F.2d 699, 700 (D.C. Cir. 1990).

27. *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided Court sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985).

28. *Id.* at 1122-23.

liberty from any bill that might interfere with their little-known beliefs. The only way to provide for such unforeseeable religious claims is with a general provision guaranteeing free exercise of religion. The Free Exercise Clause was once such a provision, but *Smith* says that it is not such a provision anymore. RFRA would restore such a provision to the United States Code.

RFRA would solve the problem of perpetual religious conflict with interest groups and also the problem of religious minorities too small to be heard in the legislature. It would do so by creating an across-the-board right to argue for religious exemptions and make the government carry the burden of proof when it claims that it cannot afford to grant exemptions. RFRA has a chance to work because it is as universal as the Free Exercise Clause. It treats every religious faith and every government interest equally, granting neither special favors nor exceptions for any group. RFRA is America's only near-term hope to rise above the paralysis of interest group politics and restore protection for religious liberty.

Religious liberty is popular in principle, but in specific applications it quickly becomes entangled in other issues. Government bureaucrats would never admit that they are against religious liberty, but nearly all of them think their own program is so important that no religious exception can be tolerated. Few interest groups admit that they are against religious liberty, but almost every interest group thinks its own agenda is so important that no religious exception can be tolerated. The religious community itself is divided on many issues raised by secular interest groups, and denominations sometimes find it hard to speak out when a bill pits their commitment to religious liberty against their commitment to some other principle. RFRA's across-the-board feature attempts to cut through all of this special pleading.

In most of these conflicts between religious liberty and secular interest groups, an exemption for religious liberty does little or no damage to any legitimate secular goals. The interest group that succeeds in enacting a bill would get its way in 95% or 98% or 99.9% of the cases; the religious exemption merely creates a small enclave of conscience for religious dissenters. But to get those exemptions statute by statute requires political and legislative battles that can be both enormously divisive and very expensive. Congress is the greatest expert on the legislative process; it knows the practical realities of

interest group politics. Congress can find as a fact that specific exemptions enacted one statute at a time are not a workable means of protecting the free exercise of religion.

V. THE COMPELLING INTEREST STANDARD

RFRA would permit religious liberty to be burdened only when that burden is the least restrictive means to serve a compelling governmental interest. The compelling interest test takes meaning from the Supreme Court's earlier cases, and especially from the congressional finding that "the compelling interest as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* is a workable test for striking sensible balances between religious liberty and competing governmental interests."²⁹ This statement of purpose is important to the bill.

Even before *Smith*, the Court had been criticized for excessive deference to governmental agencies in free exercise cases. But most of these deferential decisions were not decided under the compelling interest test at all, either because the Court found no burden on religious exercise³⁰ or because it created exceptions to the compelling interest test.³¹ These cases cast no light on the meaning of the compelling interest test.

Sherbert and *Yoder*, the two cases expressly mentioned in the bill, were part of a series of free exercise cases that rigorously enforced the compelling interest test. Most legitimate governmental interests are not compelling. "Compelling" does not mean merely a "reasonable means of promoting a legitimate public interest."³² Nor does it mean merely important.³³ Rather, "compelling interests" include only those few interests "of the highest order,"³⁴ or in a similar formulation, "[o]nly the gravest abuses, endangering

29. H.R. 1308, *supra* note 1, § 2(a)(5); see also S. 578, *supra* note 1, § 2(b)(1) (stating that one purpose of the Act is "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*" (citations omitted)).

30. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-53 (1988); *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986).

31. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (military).

32. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (rejecting a test proposed in the plurality opinion in *Bowen*, 476 U.S. at 708 (Burger, C.J.)).

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

34. *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

paramount interests."³⁵ The Supreme Court explains "compelling" with superlatives like "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served,"³⁶ if "no alternative forms of regulation would combat such abuses,"³⁷ if the challenged law is "the least restrictive means of achieving" the compelling interest,³⁸ and if the government pursues its alleged interest uniformly across the full range of similar conduct.³⁹ Even *Smith* cautions against diluting the test: "[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test."⁴⁰

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, which invalidated Wisconsin's compulsory education laws as applied to Amish children.⁴¹ The education of children is important, and the first two years of high school are basic to that interest, but the State's interest in the first two years of high school was not sufficiently compelling to justify a serious burden on free exercise.⁴²

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate, but it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualifies them from employment.⁴³

Moreover, it is not enough for government to point to unconfirmed risks or fears. Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life."⁴⁴ The Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they

35. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

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

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

38. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

39. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 509-11 (1991); *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989).

40. *Smith*, 494 U.S. at 888.

41. *Yoder*, 406 U.S. at 219-29.

42. *Id.*

43. *Sherbert*, 374 U.S. at 406-09 (Seventh-Day Adventist discharged by her employer because she would not work on Saturday).

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

were "doomed to become burdens on society."⁴⁵ Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But the Supreme Court rejected them all for lack of evidence that they were really happening.⁴⁶

The lesson of the Court's cases is that government must show some interest more compelling than saving money or educating Amish children. Such is the compelling interest test of *Sherbert* and *Yoder*, and thus of RFRA. The Supreme Court has found a compelling interest in only three free exercise cases. In each of these cases, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, and the laws at issue were essential to national survival or to express constitutional norms: national defense,⁴⁷ collection of revenue,⁴⁸ and racial equality in education.⁴⁹

The stringency of the compelling interest test makes sense in light of its origins; it is a judicially implied exception to the constitutional text.⁵⁰ The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise of religion.⁵¹ The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. RFRA makes the exception explicit rather than implicit, but the stringent standard for satisfying the exception should not change.

VI. THE ABORTION, TAX, AND FUNDING OBJECTIONS

The principal opposition to RFRA has centered on a demand for provisos stating that the bill would create no cause

45. *Id.* at 224-25.

46. *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 835 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981); *Sherbert*, 374 U.S. at 407.

47. *Gillette v. United States*, 401 U.S. 437 (1971).

48. *United States v. Lee*, 455 U.S. 252 (1982).

49. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

50. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1744-45 (1990) (book review).

51. U.S. CONST. amend. I.

of action to challenge laws restricting abortion, no cause of action to challenge the use or disposition of public funds or property, and no cause of action to challenge the tax status of any other person.⁵² These proposed amendments injected into the RFRA debate highly divisive and mostly irrelevant controversies over abortion, public funding of religious institutions, and tax exemptions for religious institutions. The bill failed to move for nearly three years because of deadlock over these proposed amendments. If those demanding these amendments had deliberately set out to prevent RFRA's enactment, they could not have chosen a better way to succeed.

The deadlock was apparently resolved in March, 1993. The bill was introduced in both Houses of Congress with a new proviso, stating that tax exemptions and public funding do not violate RFRA unless they also violate the Establishment Clause.⁵³ This amendment would recognize that these issues have always been resolved under other law that directly addresses these very questions, and that the other, more relevant law should continue to control. There is also tentative agreement to state in the legislative history that RFRA does not expand any right to religiously motivated abortions that may have existed prior to *Smith*. In return for these provisions, the United States Catholic Conference, by far the largest and most influential group previously opposed, has now endorsed the bill.⁵⁴

In addition, President Clinton has endorsed the bill.⁵⁵ The abortion controversy had kept President Bush neutral, caught between that part of his pro-life constituency that opposed the bill on abortion grounds and that part of his pro-life and evangelical constituency that strongly supported the bill. The bill has long been supported by such staunchly pro-life groups as the National Association of Evangelicals, the Christian Life Commission of the Southern Baptist Convention, the Church of Jesus Christ of Latter-day Saints, and the Home School Legal Defense Fund.⁵⁶ But so long as the bill had strong pro-life

52. These provisos were included in a competing bill in the 102d Congress. See H.R. 4040 § 3(c)(2), 102d Cong., 2d Sess. (1992).

53. H.R. 1308, *supra* note 1, § 7; S. 578, *supra* note 1, § 7.

54. Letter from Frank J. Monahan, Director, Office of Government Liaison, United States Catholic Conference, to Senator Edward Kennedy (March 9, 1993) (on file with the *B.Y.U. Law Review*).

55. Letter from President William Clinton to Senator Edward Kennedy (March 11, 1993) (on file with the *B.Y.U. Law Review*).

56. See, e.g., *The Religious Freedom Restoration Act: Hearing on S. 2969 Before*

opposition, there was a risk of a Bush veto. With the veto threat removed and with powerful new endorsements from President Clinton and the U.S. Catholic Conference, the bill should move. It may even be law by the time this article is published; it passed the House unanimously on May 11, 1993,⁵⁷ and was approved by the Senate Judiciary Committee by a vote of fifteen to one.⁵⁸ But if the compromise falls through, any amendments on abortion, tax exemptions, or public funding should be rejected.

The principle of RFRA is that it enacts a statutory version of the Free Exercise Clause. Like the Free Exercise Clause itself, RFRA is universal in its scope. RFRA singles out no claims for special advantage or disadvantage. It favors no religious claim over any other and no state interests over any other. RFRA simply enacts a universal standard: Burdens on religious exercise must be justified by compelling interests.

Limiting the bill to enactment of the compelling governmental interest standard without the proposed amendments is a principled solution to the practical problem of disagreement over particular claims. If RFRA tries to resolve every possible conflict between a religious claim and a governmental interest, we will be caught up in the same morass of endless political conflict that we now face without RFRA. A bill limited to a statement of universal principle is neutral on all possible claims, including claims about abortion, tax exemption, and public funding. It would return all religious claims to their pre-*Smith* position under the Free Exercise Clause, allowing each side to argue as they would have argued under *Sherbert* and *Yoder*.

The proposed amendments would take a very different approach, codifying *Smith* insofar as it cut off the last shred of argument for certain claims that supporters of the amendments

the Senate Comm. on the Judiciary, 102d Cong., 2d Sess. 154 (Restoring Religious Liberty in America: An Analysis of the Religious Freedom Restoration Act by Coalitions for America) (full text on file with the *B.Y.U. Law Review*); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 10 (1992) [hereinafter *House Hearings*] (statement of Robert Dugan, Jr., Director, Office of Public Affairs, National Association of Evangelicals); *id.* at 23 (statement of Elder Dallin H. Oaks, Quorum of the Twelve Apostles, The Church of Jesus Christ of Latter-day Saints).

57. 139 CONG. REC. H2356-63 (daily ed. May 11, 1993).

58. 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

do not like. The amendments would provide that most religious claims are restored to where they would have been under the Free Exercise Clause, but that these three sets of claims are left subject to *Smith*. Whatever the merits of these amendments, they cannot be defended on the ground that they are neutral toward the three excluded sets of claims.

These three amendments are enormously divisive, but the divisions are almost entirely symbolic. Each of the three amendments relates to an issue that has always been litigated and decided under some other clause of the Constitution. The right to abortion has been principally litigated under the Due Process Clause, and most challenges to church tax exemption and to public funding for churches have been brought under the Establishment Clause. In each case, free exercise theories have been around for a long time, but the Supreme Court has rejected them.

As the Court became more and more conservative, challenges to abortion laws, church tax exemptions, and public funding for religious agencies received an increasingly hostile reception under any clause. As the litigants who brought these challenges became increasingly desperate, they experimented with alternative legal theories—and were unwilling to give up on any theory, however tenuous. Then, to everyone's great surprise, pro-choice forces won a dramatic victory in *Planned Parenthood v. Casey*.⁵⁹ But win or lose, the reality is that changing the legal theory in their pleadings is not going to make the Court any more or less receptive to their claims. With or without *Smith*, putting a free exercise label on a warmed-over abortion or Establishment Clause claim is quite unlikely to make any difference.

The tax exemption issues have been largely resolved by cases already decided. The public funding issues will continue to be litigated under the Establishment Clause with or without RFRA; and abortion rights are being defined in continuing due process litigation and in legislative debate over the pending Freedom of Choice Act. If the Court overrules *Casey* and *Roe v. Wade*,⁶⁰ it will be because of a fundamental jurisprudential judgment that the abortion issue is not appropriately resolved by judges—that “the answers to most of the cruel questions posed are political and not juridical.”⁶¹ It is extraordinarily

59. 112 S. Ct. 2791 (1992).

60. 410 U.S. 113 (1973).

61. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J.,

unlikely that the Court's judgment on that question would be affected by RFRA.

A. *Abortion*

Parts of the pro-choice movement have persistently asserted that restrictions on abortion violate the religion clauses of the First Amendment. It would follow from that argument that religiously motivated abortions are also protected by RFRA. But a claim to abortion rights under RFRA would matter only if other legal protections for abortion were eliminated. *Casey* and the election of a pro-choice President have dramatically changed predictions about the future of abortion law, but the issue for RFRA has not changed. Questions about the right to abortion will be decided on their own terms, and not under RFRA.

Planned Parenthood v. Casey is an emphatic reaffirmation of the basic right to abortion. For the foreseeable future, there is a constitutional right to abortion and nothing in RFRA will affect that. If pro-life legislators kill RFRA, they will be compounding their defeat on abortion with a terrible defeat for religious liberty. Even from a single-issue pro-life perspective, RFRA is now more necessary than before, to protect pro-life hospitals and medical personnel from being forced to participate in abortions.⁶²

The bitterly divided opinions in *Casey* make the long-term future of abortion law dependent on legislation or future appointments to the Court. The *Casey* dissenters will probably adhere to their dissent, and perhaps some future Justice will provide the fifth vote to overrule *Casey* as well as *Roe*. But one of the four dissenters has announced his retirement,⁶³ so it now seems more likely that they will never get a fifth vote, and that the constitutional right to abortion will be a permanent part of our law. Either way, RFRA can add nothing to the right to abortion.

The groups demanding an abortion amendment to RFRA are worried about a most unlikely sequence of events: they fear that the Court might overrule *Casey* and *Roe*, and then re-

concurring).

62. See *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990); *supra* note 14 and accompanying text.

63. Linda Greenhouse, *White Announces He'll Step Down from High Court*, N.Y. TIMES, Mar 20, 1993, at 1.

create abortion rights as a matter of free exercise under RFRA. These fears are groundless for several reasons.

First, religion clause objections to restrictions on abortion are not new; they were presented to the Supreme Court in *Harris v. McRae*.⁶⁴ There, the Court rejected the claim that abortion laws that coincide with religious teachings violate the Establishment Clause.⁶⁵ It also held that no plaintiff in that case had standing to assert a free exercise claim because no plaintiff alleged that her religious beliefs compelled or motivated her desire for an abortion.⁶⁶ The Court also held that a free exercise claim to abortion would depend on the religious beliefs of individual women, and that such a claim could not be asserted by an organization.⁶⁷

In the thirteen years since *Harris*, there has been no judicial movement toward a free exercise right to publicly funded abortions. If free exercise were a viable route for evading decisions upholding restrictions on abortion, someone should have come forward with plaintiffs who could satisfy the standing requirements laid down in *Harris*. Even though *Harris* does not formally resolve the free exercise issue, it has effectively resolved the larger issue: the Court does not recognize any constitutional right to public funding for abortions. A decision overruling *Casey* and *Roe* would be equally effective in resolving the larger issue of any right to abortion.

The standing rule in *Harris* is also a major victory for pro-life forces and a serious obstacle to pro-choice forces. The rule that organizations lack standing to bring free exercise claims would logically apply to RFRA claims, and it would preclude broad-based RFRA challenges to abortion laws. Any RFRA challenge would have to proceed one woman at a time, with judicial examination of her individual beliefs.

Second, a decision overruling *Casey* and *Roe* would almost certainly preclude a right to abortion under the Free Exercise Clause or RFRA. If *Casey* and *Roe* are overruled, the reason will be the government's interest in protecting unborn life. If the state's interest in protecting unborn life overrides reproductive liberty under the Due Process Clause, that interest will be equally compelling under RFRA. Thus, even if the Court were

64. 448 U.S. 297, 318-21 (1980).

65. *Id.* at 319-20.

66. *Id.* at 320-21.

67. *Id.*

to hold that abortion can sometimes be religious exercise, the states' compelling interest in unborn life would override that right.

It would make no difference if the Court said that the Constitution simply does not protect the right to choose abortion, thus distinguishing abortion from other constitutionally protected choices about family, reproduction, or bodily integrity. The basis for such a distinction could not be that abortion has nothing to do with reproduction or bodily integrity; rather, the only plausible reason for distinction is that the state's interest in unborn life changes the balance of competing interests. The four dissenters in *Casey* were explicit about this: "Unlike marriage, procreation and contraception, abortion 'involves the purposeful termination of potential life.' The abortion decision must *therefore* 'be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.'"⁶⁸

It has been suggested that the Court might read RFRA as codifying the rule that the interest in unborn life is not compelling, on the ground that this was the law at the time Congress acted. This outcome is implausible as well. The bill takes no position on whether any particular government interest is compelling. This silence is appropriate; Congress should not attempt to resolve particular controversies in a bill about religious exercise generally.

The latest version of the abortion argument against RFRA is that it might be used to evade the restrictions on abortion upheld in *Casey*. Like all the earlier versions, this argument depends on the fear that the Court will twice reverse its position on abortion, upholding new restrictions in *Casey* and then reversing that position on the basis of a statute that never mentions abortion. The argument further assumes that the Court will complete this double reversal even though its opinion in *Casey* gave extraordinary weight to *stare decisis* in the abortion context.⁶⁹

Such a double reversal is not a plausible outcome unless the statute clearly speaks to abortion and unambiguously directs the Court to reverse its position. RFRA does not do that;

68. *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., dissenting, joined by White, Scalia & Thomas, JJ.) (first emphasis added) (citations omitted).

69. *Id.* at 2814-16 (majority opinion) (fearing that any overruling on such a controversial issue would be perceived as caving in to political pressure).

it does not mention abortion, and its general language leaves the Court many escape routes. In *Harris v. McRae*, the Court was skeptical that many abortions are religiously motivated, and it can only be far more skeptical that many women have religious objections to twenty-four hour waiting periods or informed consent rules.

If such rules are attacked not for their own religious significance, but because they burden the right to a religiously motivated abortion, the Court is likely to hold that the compelling interest test is not triggered unless the burden on religion is substantial or undue. The plurality in *Casey* did not create its undue burden test out of thin air; rather it said that the right to abortion had been an unjustified exception to the general rule that only significant burdens on rights require justification. "As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."⁷⁰ The Court is quite likely to read this general principal into RFRA, especially given *Jimmy Swaggart Ministries v. Board of Equalization*, where the Court assumed that burdens on religion are of no constitutional significance unless they require the church or the believer to violate a particular doctrinal tenet.⁷¹ The states' argument would be that waiting periods, informed consent requirements, and the like do not violate religious tenets and do not unduly burden any right to abortion, religiously motivated or otherwise. This is not the best interpretation of the statute—*Swaggart's* emphasis on violation of specific doctrinal tenets permits gross violations of religious liberty⁷²—but this is a possible interpretation generally, and almost certainly the Court's interpretation in the abortion context. If the Court thinks that waiting periods, consent requirements, and the like are only minor burdens on abortion under the Constitution, there is no reason for it to suddenly think they are undue burdens under RFRA.

There is a better way to reach the same result. The Court should not say that minor burdens on constitutional rights require no justification. Rather, it should say that minor bur-

70. *Id.* at 2818 (plurality opinion).

71. 493 U.S. 378, 391-92 (1990).

72. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 23-28; see also the discussion of zoning cases *supra* notes 22-24 and accompanying text.

dens require justification proportionate to the burden—that the state’s interest must compellingly outweigh the burden on the constitutional right. If the restrictions upheld in *Casey* are minor and easily justified burdens on abortion in general, they are equally minor and easily justified burdens on religiously motivated abortions. An implicit example of this sort of compelling-interest-balancing analysis appears in *Burson v. Freeman*, where a relatively modest restriction on political speech was upheld on the basis that a relatively modest state interest was compelling.⁷³

It is only common sense to recognize that a minor burden on a right may be justified by a less compelling interest than a total prohibition of the same right. Recognizing this point eliminates the need to draw arbitrary lines between major and minor burdens, or between central and peripheral religious practices, and it eliminates the need for *Swaggart’s* complete denial of protection to non-mandatory aspects of religious observance. Requiring that the government’s interest compellingly outweigh the burden on the protected right is the best interpretation of RFRA, and it would be the best interpretation of the compelling interest test in constitutional law generally.

All doctrinal variations on the argument over abortion are subject to the overriding fact that Congress is explicitly considering abortion in another bill. If Congress codifies anything about abortion, it will be in the Freedom of Choice Act.⁷⁴ The Court knows full well that Congress is as divided over abortion as the American people. It would be absurd to read a statute that never mentions abortion as somehow codifying the law of abortion, and more so when Congress in the same session votes on an express codification of the law of abortion. What is more, RFRA has both pro-life and pro-choice sponsors, making the argument even more absurd. A bill supported by a broad range of pro-life groups cannot sensibly be read as creating a right to abortion.

If I were a pro-life legislator, I would turn out the largest possible pro-life vote for RFRA, and the largest possible pro-life vote against the Freedom of Choice Act, thereby unambiguously making the record clear that the two bills are very

73. 112 S. Ct. 1846, 1851-58 (1992) (plurality opinion) (upholding ban on political solicitation within one hundred feet of polling place, to prevent fraud and intimidation of voters).

74. H.R. 25, H.R. 1068, & S. 25, 103d Cong., 1st Sess. (1993).

different—that one takes a position on abortion and the other does not. And in working to turn out the pro-life vote on RFRA, I would emphasize one simple point: *St. Agnes Hospital* is a real case.⁷⁵ A Catholic hospital has been forced to choose between teaching and performing abortions or abandoning obstetrics. By contrast, successful abortion claims under RFRA are imaginary—a theoretical possibility that depends on an extraordinarily unlikely combination of circumstances.

Pro-life legislators must also understand that not all resistance to an abortion amendment comes from the pro-choice side. Agudath Israel, the Orthodox Jewish group that has been an active part of the pro-life movement, insists that Jewish teaching mandates abortion in certain narrowly defined and exceptional cases.⁷⁶ Any state prohibitions of abortion likely to be enacted will have exceptions for the cases that matter to Agudath Israel; its members do not expect to rely on RFRA. But neither can they accept their Christian coalition partners' dismissal of their sincere religious teachings as officially unworthy of respect. Their loyal support for the pro-life movement, over the objection of most other Jewish organizations, entitles them to consideration in return from pro-life legislators.

Even though there is little merit to claims of a free exercise right to abortion, there are pro-choice groups supporting the bill. They cannot be forced to accept language precluding their arguments, any more than pro-life groups can be forced to accept language precluding pro-life arguments. The way for the bill to be abortion-neutral is not to mention abortion at all. The legislative history should simply say (1) that the pro-life side can make its arguments that no abortions are religiously motivated and that in a world without *Casey*, *Roe*, or the Freedom of Choice Act, protecting unborn life is obviously a compelling interest; (2) that the pro-choice side can make its arguments that at least some abortions are religiously motivated and that protection of fetuses is not a compelling interest; and (3) that Congress has merely enacted the standard for decision and has not codified either set of answers.

In a world with *Casey*, *Roe*, or the Freedom of Choice Act,

75. *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990); see *supra* note 14 and accompanying text.

76. See, e.g., *House Hearings*, *supra* note 56, at 411, 416-17 (memorandum of Agudath Israel of America (May 14, 1992)).

those arguments are irrelevant. In a world without *Casey*, *Roe*, or the Freedom of Choice Act, the pro-life side will win those arguments. But neither side should be able to say that Congress codified its position. The bill as drafted is abortion-neutral, and unless there is a compromise with broad support, Congress should keep the bill as it was originally introduced.

B. Tax Exemption

The law regarding tax exemption is relatively settled. Religious organizations cannot be given tax exemptions exclusively for religion, but they can be included in broader tax-exempt categories such as the religious, charitable, scientific, and educational organizations mentioned in the Internal Revenue Code.⁷⁷

With respect to any particular organization's eligibility for a tax exemption, a safe generalization from the cases is that no plaintiff has standing to litigate the tax liability of another taxpayer.⁷⁸ Cases challenging tax exemptions of churches, schools, and hospitals have had multiple plaintiffs with resourceful lawyers; if none of them could find a plaintiff with standing, it probably cannot be done. The Second Circuit's opinion in *In re United States Catholic Conference* holds out the possibility of an exception someday,⁷⁹ but that theoretical possibility would not be a free exercise exception and it is not relevant to RFRA. The *Catholic Conference* litigation imposed an enormous burden on the Catholic Church; I joined with other lawyers in filing an amicus brief supporting the Church, and I fully support the Church's desire never to repeat that experience. But the fact is that the Church won, and there is no need to re-fight that war. The opinions that so burdened the Church in that litigation relied on the Establishment Clause and the Equal Protection Clause; no court at any stage of that litigation relied on the Free Exercise Clause. RFRA would not be a basis

77. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

78. *Allen v. Wright*, 468 U.S. 737, 750-66 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-46 (1976); *In re United States Catholic Conference*, 885 F.2d 1020, 1024-31 (2d Cir. 1989), *cert. denied sub nom. Abortion Rights Mobilization, Inc. v. United States Catholic Conference*, 495 U.S. 918 (1990).

79. *In re United States Catholic Conference*, 885 F.2d at 1031; see also *Simon*, 426 U.S. at 36-37 (in the first of this series of cases, reserving the question whether to announce an absolute rule that only the taxpayer and the government could have standing).

for litigation over tax exemptions.

C. Public Funding

Challenges to public funding of religious institutions have always been litigated under the Establishment Clause. The Establishment Clause directly addresses the funding issue, and the Court has created a special standing rule for Establishment Clause claims to facilitate that litigation.⁸⁰ An occasional litigant has asserted in the alternative that such expenditures also violate the Free Exercise Clause, but the Supreme Court has twice summarily rejected those claims.⁸¹ The Court considered an analogous claim at greater length in *United States v. Lee*, and held unanimously that the Free Exercise Clause gives taxpayers no right "to challenge the tax system because tax payments were spent in a manner that violates their religious belief," and that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."⁸² This conclusion was based on the compelling interest test, the same defense that is written into RFRA.

The argument for a public funding amendment is, therefore, even more bizarre than the argument for an abortion amendment. The Court has repeatedly limited public funding to religious bodies under the Establishment Clause; it has squarely rejected free exercise complaints about the expenditure of tax funds to support religion or any other program to which a taxpayer has religious objections. The fear was that the Court will change its mind—on both issues—in opposite directions. Perhaps the Court will overrule its Establishment Clause cases and permit more public funding for religious bodies, and also overrule its Free Exercise Clause cases and say that RFRA forbids the public funding that the Court just permitted under the Establishment Clause. It is hard to imagine a less plausible pair of doctrinal developments.

D. The Establishment Clause Proviso

The bill's erstwhile opponents also objected to RFRA's section seven, which provides that nothing in the bill "shall be

80. *Flast v. Cohen*, 392 U.S. 83, 102-06 (1968).

81. *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion); *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968).

82. 455 U.S. 252, 260 (1982).

construed to affect, interpret, or in any way address" the Establishment Clause. The reason for this proviso is the same as the reason for not saying anything about particular free exercise claims. The supporters of the bill agree on the principle of free exercise, but disagree on particular applications, and disagree even about the basic principle of the Establishment Clause. Those disputed issues are carefully excluded from a bill designed simply to enact the one fundamental principle on which nearly everyone agrees.

All sides to Establishment Clause disputes can continue to argue their positions. Those so inclined can continue to argue that the Establishment Clause is merely a redundant appendage to the Free Exercise Clause. This bill does not reject that argument any more than it rejects the argument of strict separationists. RFRA is quite explicit; it says nothing about the Establishment Clause. The fear that this proviso will codify current interpretations of the Establishment Clause borders on the irrational. That is plainly not what section seven says; a bill cannot codify something that it does not affect, interpret, or even address.

VII. CONGRESSIONAL POWER

A. *The Reach of Congressional Power*

Congress has power to enact RFRA under Section Five of the Fourteenth Amendment.⁸³ Repeated majorities of the Supreme Court have upheld analogous exercises of congressional power to enforce the Reconstruction amendments. Section Five gives Congress, with respect to the Fourteenth Amendment, "the same broad powers expressed in the Necessary and Proper Clause" with respect to Article I.⁸⁴ "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view," is within the power of Congress, unless prohibited by some other provision of the Constitution.⁸⁵ Similar enforcement provisions in Section Two of the Thirteenth and Fifteenth Amendments have been given similar interpretations, and the cases are often cited interchange-

83. For a more detailed analysis of congressional power to enact RFRA, see Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993).

84. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

85. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).

ably.⁸⁶

Power to enforce the Fourteenth Amendment also includes power to enforce the Free Exercise Clause and other provisions of the Bill of Rights that are applied to the states through the Fourteenth Amendment. Congress has enacted other legislation to enforce the provisions of the Bill of Rights, most obviously 42 U.S.C. §§ 1983 and 1988; these provisions have been used to enforce the First, Fourth, Fifth, and Eighth Amendments, as incorporated through the Fourteenth, in thousands of cases. The Supreme Court has routinely decided these cases, usually without even noting the source of congressional power. The Court did note the source of congressional power in *Hutto v. Finney*,⁸⁷ an Eighth Amendment case in which the Court relied on Congress's Section Five power to override state sovereign immunity.

What may make RFRA seem anomalous at first blush is that it appears to attempt to overrule the Supreme Court's decision in *Smith*. But RFRA would not overrule the Court; rather, it would create a statutory right where the Court declined to create a constitutional right. This distinction is not a mere formality; it has real consequences that are explored below. Furthermore, there is nothing unusual about Congress exercising its Section Five power in this fashion.

The express congressional power to "enforce" the Fourteenth Amendment is independent of the judicial power to adjudicate cases and controversies arising under it. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."⁸⁸ Thus, Congress may sometimes provide statutory protection for constitutional values that the Supreme Court is unwilling or unable to protect on its own authority. The Court agreed unanimously on this point in *Metro Broadcasting, Inc. v. FCC*.⁸⁹

This power is clearly illustrated by the various Voting Rights Acts, in which Congress has forbidden discriminatory practices that the Supreme Court had been prepared to toler-

86. See *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (plurality opinion); *id.* at 500 (Powell, J., concurring); *City of Rome v. United States*, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting).

87. 437 U.S. 678, 693-99 (1978).

88. *Katzenbach*, 384 U.S. at 649.

89. 497 U.S. 547, 563-66 (1990) (majority opinion); *id.* at 605-07 (O'Connor, J., dissenting).

ate. The Supreme Court has held that literacy tests for voting do not violate the Equal Protection Clause,⁹⁰ but that Congress may ban literacy tests for voting.⁹¹ Similarly, the Court has held that electoral practices with racially discriminatory effect do not violate the Constitution,⁹² but that Congress may forbid such practices pursuant to its Section Five powers.⁹³

Similarly, much of the law of private racial discrimination depends on Congress's analogous powers under Section Two of the Thirteenth Amendment. No one would suggest that the Supreme Court could, on its own authority to adjudicate cases arising under the Thirteenth Amendment, prohibit all private discrimination in the making of contracts or in the sale and ownership of property. There is no case rejecting such a claim because no one has been bold enough to present it. But Congress has banned all such discrimination pursuant to its power to enforce the Amendment.⁹⁴

These holdings were not limited—indeed, they were implicitly reaffirmed—by *Patterson v. McLean Credit Union*.⁹⁵ *Patterson* unanimously reaffirmed earlier holdings that the Reconstruction civil rights acts forbid private discrimination, which necessarily assumes that Congress has power to forbid private discrimination not forbidden by the Constitution itself. The controversial holding in *Patterson* went only to the range of private conduct covered by the statute; the case cast no doubt on the constitutional rule that Congress can reach private discrimination pursuant to its power to enforce the Thirteenth Amendment. Congress overrode the statutory holding in the Civil Rights Act of 1991,⁹⁶ and this legislation is also based on the congressional power to enforce the Reconstruction amendments.

A conservative majority also reaffirmed congressional pow-

90. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-54 (1959).

91. *Oregon v. Mitchell*, 400 U.S. 112, 118, 131-34, 144-47, 216-17, 231-36, 282-84 (1970) (five separate opinions, collectively joined by all nine Justices); *Gaston County v. United States*, 395 U.S. 285, 293-97 (1969); *Katzenbach v. Morgan*, 384 U.S. 641, 649-58 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966).

92. *City of Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980).

93. *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980).

94. *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968).

95. 491 U.S. 164, 171-75 (1989).

96. 42 U.S.C. § 1981(b) (Supp. II 1991).

er to go beyond the Court's own interpretations in *City of Richmond v. J.A. Croson Co.*⁹⁷ Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justice White stated: "[T]he power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."⁹⁸ Justices Kennedy and Scalia recognized the accuracy of the plurality's account,⁹⁹ but questioned its application to racial preferences. As Justice Kennedy put it, "[T]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me."¹⁰⁰ Justices Brennan, Marshall, Blackmun, and Stevens did not reach the Section Five issue.

Most recently, in *Metro Broadcasting, Inc. v. FCC*,¹⁰¹ the Court relied on Section Five of the Fourteenth Amendment to explain why Congress may, but state and local governments may not, authorize preferences for racial minorities without a finding of past discrimination.¹⁰² The Court has never said that the Constitution requires such preferences of its own force. All nine Justices in *Metro Broadcasting* recognized Congress's Section Five powers to go beyond the limits of Supreme Court decisions; the Justices' only disagreement was over the relevance of that power to a law that applied only to the work of a federal agency. The majority relied on Section Five to uphold racial preferences in the award of broadcast licenses. The four dissenters thought that Section Five was irrelevant to the case because the Fourteenth Amendment applies only to the states. But they recognized that "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers under § 5.'"¹⁰³

97. 488 U.S. 469 (1989).

98. *Id.* at 490.

99. *Id.* at 518 (Kennedy, J., concurring); *id.* at 521 (Scalia, J., concurring).

100. *Id.* at 518.

101. 497 U.S. 547 (1990).

102. Compare *Metro Broadcasting*, 497 U.S. at 563-66 and *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (plurality opinion) with *Croson*, 488 U.S. at 486-91 (plurality opinion) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

103. *Metro Broadcasting*, 497 U.S. at 605 (quoting *Croson*, 488 U.S. at 488 (plurality opinion)).

B. *The Limits of Congressional Power*

Only a few opinions suggest limits to the reach of congressional power to enforce the Fourteenth Amendment. The most obvious limit is that Congress may not "restrict, abrogate, or dilute" the protections of the Bill of Rights in the guise of enforcing them.¹⁰⁴ Thus, Congress cannot evade Supreme Court decisions protecting constitutional rights, although it can supplement Supreme Court decisions refusing to protect constitutional rights. It is this limitation that fuels Justice Kennedy's doubts about congressionally mandated racial preferences. If racial preferences actually violate the Equal Protection Clause, as he apparently believes, then mandating these violations of the Clause is not a means of enforcing the clause. Similar concerns appear to underlie the dissenters' insistence in *Metro Broadcasting* that Congress may mandate racial preferences only to remedy past discrimination.¹⁰⁵ In the dissenters' view, any broader rationale for racial preferences would violate the Clause rather than enforce it.

Second, congressional power under Section Five is subject to other express allocations of power in the Constitution. Thus, in *Oregon v. Mitchell*¹⁰⁶ a majority of the Court invalidated a provision requiring states to extend voting rights to citizens age eighteen and over.¹⁰⁷ The Justices in the majority concluded that the text of the Constitution or the clear intent of the founders reserved to the states the power to determine the qualifications of their own electors, subject only to the express amendments concerning race, sex, and poll taxes.

Third, Congress may not assert its Section Five powers as a sham to achieve ends unrelated to the Fourteenth Amendment. Congress may not act under Section Five where it does not believe that a constitutional right is at stake, or perhaps where no plausible claim could be made that a constitutional right is at stake. This is the point of the dissenting opinion in *EEOC v. Wyoming*,¹⁰⁸ which rejected congressional power to

104. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

105. *Metro Broadcasting*, 497 U.S. at 607-08 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia & Kennedy, JJ.).

106. 400 U.S. 112, 117-18 (1970).

107. *Id.* at 124-31, 154-213, 293-96 (three opinions joined by Burger, C.J., & Black, Harlan, Stewart & Blackmun, JJ.).

108. 460 U.S. 226, 259-63 (1983) (Burger, C.J., dissenting, joined by Powell, Rehnquist & O'Connor, JJ.).

prohibit mandatory retirement for state employees. The dissent said: "Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one—not the Court, not the Congress—has determined that mandatory retirement plans violate any rights protected by these Amendments."¹⁰⁹ The opinion pointed to congressional enactment and retention of mandatory retirement for several classifications of federal employees to show that Congress did not think that mandatory retirement was unconstitutional. But the dissent recognized that the Court's decisions "allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards."¹¹⁰ The majority upheld the statute on Commerce Clause grounds and did not speak to the Section Five issues.

RFRA does not run afoul of these limitations. First, there is no plausible claim that the Act would violate the Court's interpretation of the Establishment Clause or any other right incorporated into the Fourteenth Amendment. *Smith* reaffirms that legislative exemptions to protect religious exercise are "expected, . . . permitted, or even . . . desirable."¹¹¹ The Court unanimously rejected an Establishment Clause challenge to legislative exemptions in *Corporation of the Presiding Bishop v. Amos*.¹¹²

Second, RFRA would not interfere with any other express allocation of power in the Constitution. The Federal Constitution does not recognize or preserve any specific state power to burden the exercise of religion. The state regulatory powers that would be affected by the proposed Act are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

Third, RFRA does not assert Fourteenth Amendment power where there is no plausible Fourteenth Amendment claim. For some members of Congress, this is a critical distinction between RFRA and the proposed Freedom of Choice Act. If you believe that the Constitution properly interpreted protects a woman's right to choose abortion, then both RFRA and the Freedom of Choice Act are within congressional power under Section Five. But if you believe that the Constitution properly

109. *Id.* at 260 (footnote omitted).

110. *Id.* at 262.

111. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (citations omitted).

112. 483 U.S. 327, 334-40 (1987).

interpreted simply says nothing about abortion, or that the Constitution protects the unborn child's right to life, then you believe that there is no Fourteenth Amendment violation lurking for Congress to address in the Freedom of Choice Act. Thus, pro-life legislators can with complete intellectual consistency support RFRA and oppose the Freedom of Choice Act on constitutional grounds.

There *is*, however, a constitutional violation to be remedied by RFRA. RFRA would enforce the constitutional rule against laws prohibiting the free exercise of religion. Congress can act on the premise that the exercise of religion includes religiously motivated conduct. Even the Supreme Court recognizes that much. The Court interprets the Constitution of its own force to protect religiously motivated acts from regulation that discriminates against religion and from regulation motivated by hostility to religion in general or to a particular religion. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts."¹¹³

From the perspective of believers whose religious exercise has been prohibited, it makes little difference whether the prohibition is found in a discriminatory law or in a neutral law of general applicability. Either way, they must abandon their faith or risk imprisonment and persecution. Either way, it is undeniably true that their religious exercise has been prohibited. RFRA would protect the right to free exercise against inadvertent, insensitive, and incidental prohibitions as well as against discriminatory and hostile prohibitions.

Thus RFRA parallels important provisions of the Voting Rights Acts, also enacted under Section Five. The Supreme Court construed the constitutional protection for minority voting rights to require proof of overt discrimination or racial motive on the part of government officials. Congress dispensed with the requirements of overt discrimination or motive, and required state and local governments to justify laws that burden minority voting rights. Similarly here, the Court requires proof of overt discrimination or anti-religious motive to make out a free exercise violation; RFRA would dispense with those requirements and require government to justify any burden on religious practice. RFRA is within the scope of congressional power for the same reasons that the Voting Rights Acts are

113. *Smith*, 494 U.S. at 877.

within the scope of congressional power.

Congress can find as a fact that judicial review of legislative motive is an insufficient protection against religious persecution by means of formally neutral laws. Legislative motive is often unknowable. Legislatures may be wholly indifferent to the needs of a minority faith, and yet not reveal overt legislative hostility. When a religious minority opposes a bill, or seeks an exemption on the ground that a bill requires immoral conduct, it is hard to distinguish religious hostility from political conflict. Even when there is clear religious hostility, courts are reluctant to impute bad motives to legislators. Religious minorities are no safer than racial minorities if their rights depend on persuading a federal judge to condemn the government's motives.

In the Voting Rights Acts, Congress found that facially neutral laws could be used to deprive minorities of the right to vote or to dilute their vote, and that legislative motives were easily hidden so that proof of discriminatory motive was not a workable means of protecting minority voting rights. Similarly, Congress can find that facially neutral laws are readily used to suppress religious practice, that at times such laws have been instruments of active religious persecution, that proof of anti-religious motive is not a workable means of protecting religious liberty, and that legislating individual exemptions in every statute and at every level of government is not a workable means of protecting religious liberty.

C. *The Complementary Roles of the Separate Branches*

The Supreme Court's reason for not requiring government to justify all burdens on religious practice is institutional. The opinion in *Smith* is quite clear that the Court does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which *judges* weigh the social importance of all laws against the centrality of all religious beliefs."¹¹⁴ To say that an exemption for religious exercise "is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."¹¹⁵

114. *Id.* at 890 (emphasis added); see also *id.* at 889 n.5.

115. *Id.* at 890 (emphasis added).

These institutional concerns do not apply to RFRA. Congress, rather than the Court, will make the decision that religious exercise should sometimes be exempted from generally applicable laws. And Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of that decision.

Of course, the courts would apply the compelling interest test under the Act, and judges would be required to balance the importance of government policies against the burden on religious exercise. But striking this balance in the enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation. Congress may amend RFRA to add specific protection for certain religious practices despite the Court's finding of a compelling interest, or to repeal statutory protection for certain religious practices despite the Court's finding of no compelling interest.

Thus, RFRA would protect religious exercise that the Court felt unable to protect on its own authority, and it would solve the institutional problem that inhibited the Court from acting independently. The difficulties the Court identified in *Smith* are a perfect illustration of the need for independent power, in both the judiciary and the Congress, to enforce the Bill of Rights.

Our Constitution addresses the Madisonian dilemma of protecting the minority from the majority without subjecting the majority to control by the minority. The Court's insulation from the normal political processes is an essential virtue in protecting the minority. But in the difficult balancing of interests required by some free exercise cases, the Court now feels the need for a majoritarian voice. Because of the size and diversity of the national polity, Congress can provide more reliable majoritarian protection for individual rights than the states can.¹¹⁶

By creating judicially enforceable statutory rights, Congress can call on judicial powers that the Court feared to invoke on its own. Because the rights created would be statutory,

116. For a recent judicial explanation of this essential Madisonian idea, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522-24 (1989) (Scalia, J., concurring).

Congress can retain a voice that it could not have retained had the Court acted on its own. By legislating generally, for all religions, instead of case by case for particular religions, Congress can reduce the danger that it will not respond to the needs of small or unpopular faiths. If the Court and Congress cooperate in this way, then the oppression of small faiths need not be, as the Court feared, an "unavoidable consequence of democratic government."¹¹⁷

VIII. THE DANGER OF RFRA

The possibility of amendments to RFRA should be reassuring to a Court that doubts its own capacity to authoritatively balance competing interests, but it is also the weak spot of the legislation. Protection for religious liberty was placed in the Constitution in order to insulate religious liberty from shifts in political majorities. Making the protection statutory necessarily subjects religious liberty to shifting political majorities. The great danger is that in some time of public excitement, Congress may amend RFRA to deny protection to an unpopular religious practice, or that some interest group may successfully demand an amendment denying protection to any religious practices that inconvenience or offend it. Congress should resist such amendments; it should recognize that RFRA is a quasi-constitutional statute that should not be lightly amended. But the danger of such amendments is real. This danger is not a consequence of RFRA; it is a consequence of *Employment Division v. Smith*.¹¹⁸ Religious liberty was committed into the hands of shifting political majorities precisely to the extent that the Court withdrew judicial protection under the Constitution.

But RFRA may aggravate the problem in one way. Once RFRA is enacted, all cases will be litigated under the statute, and the Court will have no occasion to reconsider *Smith*. If the religious claim prevails under the statute, there will be no need to reach the constitutional issue. If the religious claim does not prevail under the statute, it cannot prevail under any plausible constitutional test—not under *Smith* and not under the compelling interest test—so there is still no need to reconsider *Smith*. RFRA may eliminate whatever chance exists of correcting the constitutional law of free exercise.

117. *Smith*, 494 U.S. at 890.

118. 494 U.S. 872 (1990).

This is a cost to the proponents of religious liberty. But it is not a large cost, because there is little near-term prospect that the Court will reconsider *Smith*. All five members of the *Smith* majority are still on the Court,¹¹⁹ although one has announced his retirement.¹²⁰ Two of the dissenters have retired,¹²¹ and a third has announced his intention to retire soon.¹²² Chief Justice Rehnquist¹²³ and Justices White,¹²⁴ Stevens,¹²⁵ and Scalia¹²⁶ have voted for *Smith* or something very like it more than once. Lawyers with religious liberty claims have so far sought to fit within *Smith* rather than ask the Court to overrule it. In the one free exercise case decided since *Smith*,¹²⁷ the Court found flagrant anti-religious discrimination, and therefore had no need to reconsider *Smith*. The two remaining Justices from the *Smith* minority adhered to their positions,¹²⁸ and Justice Souter wrote a long scholarly concurrence, arguing that *Smith* had little precedential value and that it should be reconsidered on the next appropriate occasion.¹²⁹ But six Justices appeared to treat *Smith* as settled law, without even a perfunctory acknowledgment that this was not the occasion to address the issues raised in Souter's concurrence.¹³⁰ This dictum should not be accepted as legitimately resolving the issue, or even as necessarily predicting the future votes of all who joined it. But it appears that *Smith* has six votes for now, and that it will still have five after Justice White's retirement.

President Clinton's nominees to the Court might be more sympathetic to civil liberties claims generally, and to religious

119. Rehnquist, C.J., and Scalia, White, Stevens, & Kennedy, JJ.

120. Greenhouse, *supra* note 63.

121. Brennan & Marshall, JJ.

122. *Blackmun Sees an End of His Career on Court*, N.Y. TIMES, Mar. 13, 1993, at 7.

123. *Bowen v. Roy*, 476 U.S. 693, 703-12 (1986) (plurality opinion); *Thomas v. Review Bd.*, 450 U.S. 707, 722-23 (1981) (Rehnquist, J., dissenting).

124. *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting).

125. *United States v. Lee*, 455 U.S. 252, 262-63 & n.3 (1982) (Stevens, J., concurring).

126. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463, 2467 (1991) (Scalia, J., concurring).

127. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993).

128. *Id.* at 2250 (Blackmun, J., joined by O'Connor, J., concurring in the judgment).

129. *Id.* at 2240 (Souter, J., concurring).

130. *Id.* at 2226.

liberty claims in particular, but there is no guarantee. As Justice Stevens' vote in *Smith* illustrates, some civil libertarians have a blind spot for religious liberty. Moreover, not all Justices who think *Smith* was wrong would necessarily vote to overrule it; a vote to overrule also depends on a Justice's theory of stare decisis, and probably on just how obviously wrong he or she thinks *Smith* is. Even assuming no blind spots, no stare decisis, and no Presidential mistakes, it will take several Clinton appointments to move the center of the Court, and it might take several appointments to produce a majority for overruling *Smith*. RFRA may cut off this speculative prospect of overruling *Smith*, but that is a small cost to pay for certain and immediate statutory protection for religious liberty.

The cost is merely theoretical until and unless RFRA is amended to exclude some set of claims from the statute. But such an amendment would make the cost real and perhaps onerous. Suppose for example that Congress amended RFRA to exclude its application to any public school. Lawyers representing school children and their parents would then base their arguments on the Constitution. To prevail, they would have to persuade the Court to overrule *Smith*, and also persuade the Court that the school's restriction on their clients' religious exercise served no compelling interest. But the school would argue that Congress's specific exclusion of schools from the statute indicated a considered judgment by a co-equal branch that suppression of religious minorities in the public schools is necessary to the states' compelling interest in education. If the Court treated this argument as plausible, the religious minorities might be worse off under RFRA as amended than they would have been without RFRA at all.

The danger of precluding reconsideration of the constitutional question is a strong reason for Congress to reject proposed amendments that would exclude religious claims. And if Congress does enact such an amendment, courts should be alert to the danger that the constitutional question will not be fully considered in either branch. Courts should not assume that an amendment to RFRA represents a considered judgment about the scope of religious liberty or about the government's compelling interest in a particular context. Depending on its political context, such an amendment may represent a wholly unprincipled expression of temporary political passion, a tactical victory by some interest group or bureaucracy that placed no value on the costs to religious liberty, or even a concession

to such forces by legislators who hoped the courts would do the right thing and turn to the Constitution to protect the affected religious minorities.

Any such controversy is far in the future, and its circumstances cannot be anticipated now, but two points are indisputable. First, RFRA does not repeal the Free Exercise Clause. Second, the issue decided in *Smith* was neither presented nor briefed by any party or amicus. If at some point in the future a free exercise issue arises that is not covered by RFRA, the constitutional issue will be open, and the Court should give it full consideration.

IX. CONCLUSION

The generation that came of age in roughly the quarter-century after *Brown v. Board of Education*¹³¹ has too readily assumed that only courts can protect constitutional liberty. But part of the genius of separation of powers is that all three branches can protect liberty when motivated to do so.¹³² For the last ten years or so, Congress has been more interested in protecting liberty than the Court has been, and this pattern may continue for some time into the future. One reading of the current Court is that it is not hostile to liberty, but that it is deeply committed to the view that Congress should take the lead.

RFRA would be an exercise of congressional power to protect liberty in default of the Court's doing so on the direct authority of the Constitution. This protection would be applied to cases in which the states, federal agencies, or even Congress itself have burdened religious exercise without compelling necessity. Such a statute should not be viewed as an oddity. Rather, it would be our constitutional and political system at its best.

The Constitution embodies some of our highest ideals. It makes those ideals judicially enforceable for fear that the political majority, in pursuit of self-interest or in succumbing to baser motives, will not always live up to its ideals. The nation's history of religious liberty and pluralism shows that the ideal of religious liberty runs deep, and the history of religious bigotry and intermittent persecution shows that the tendency to

131. 347 U.S. 483 (1954).

132. For historical examples, see Laycock, *supra* note 50, at 1728-29.

violate the ideal also runs deep. RFRA would be an example of the majority acting to enforce a constitutional ideal, and that could only be good for the constitutional system.