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THE FAILURE OF RFRA

Ira C. Lupu*

With the Religious Freedom Restoration Act of 1993¹ (RFRA) all but dead, the time has come to conduct a dispassionate analysis of how and why the Act failed. Indeed, careful lawyers committed to a robust version of religious liberty stand to learn a great deal from RFRA's brief, unhappy life. Efforts are afoot, in both state and federal lawmaking circles, to find alternative mechanisms to achieve RFRA's goals. These efforts include amendments to the U.S. Constitution, revisions of the federal RFRA to enable it to withstand federal constitutional attack,² and state legislation designed to achieve RFRA's purposes within particular states.³ If the proponents of these measures do not understand the RFRA experience, they are doomed to repeat many of the past's mistakes.

RFRA failed in many respects. First, the constitutional planning behind it was inadequate. Its proponents concentrated their energies too narrowly and

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1. 42 U.S.C. § 2000bb (1994). The Religious Freedom Restoration Act was designed to overcome the decision of the United States Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The Act applied to all levels of government in the U.S. and provided, in pertinent part:

SECTION 1. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL. - Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) EXCEPTION. - 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.

Id. at § 2000bb-1. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), invalidated RFRA as applied to the states, and there remains reason for doubt as to its validity against the federal government. For my view of the Court's opinion, see Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Archbishop Flores*, 39 WM. & MARY L. REV. 789 (forthcoming 1998).

2. See, e.g., *Protecting Religious Freedom after Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, (July 14, 1997), available in <<http://www.house.gov/judiciary>>.

3. The California Assembly recently passed a state-level RFRA. See Larry B. Stammer, *Bill Would Implement State Version of Federal Act*, LOS ANGELES TIMES, Oct. 11, 1997, Metro, at B4. New Jersey is considering similar legislation. See David Gibson & Dunstan McNichol, *Both Parties Offer Bills to Extend Religious Rights*, THE RECORD (Bergen County, N.J.), Sept. 18, 1997, at A3.

shortsightedly on hinging RFRA to the Fourteenth Amendment, section five,⁴ when danger signs concerning that path were all about. A constitutional strategy that diversified the underpinnings of RFRA was available and far preferable to what was used; stools always stand better on three or more legs than on one. Yet the proponents of RFRA ignored the need for a well-balanced approach, and members of Congress did not demonstrate enough interest or insight to compensate for the overly narrow view of the interest groups which supported the Act.

Second, RFRA failed as a matter of constitutional discourse. The debate and deliberation one might have expected to surround such a sweeping and unprecedented enactment never occurred. One major reason for the lack of such a conversation about RFRA was the reluctance of states and localities to oppose it, and the apparent indifference of members of Congress to the Act's consequences for administration of state and local government. Had issue been joined in a timely and vigorous way about the likely costs and benefits of RFRA, it would never have emerged in the form it took.

Because of these failures of planning and process, RFRA became law in a way which created a substantial likelihood of judicial evisceration of its goals. The primary dredging tool employed by courts in that project was RFRA's requirement that religion be "substantially burden[ed]"⁵ for RFRA's protections to come into play. In addition, courts found more subtle devices with which to undercut the Act's seeming rigors. Nor did regulators or other government policy makers fill the breach; unless directly confronted with a RFRA challenge, these decision makers tended to ignore the Act. As a result, after three and one-half years, RFRA had accomplished little. At the level of policy achievement, RFRA was a disappointment.

In what follows, I assess these phenomena. Part I analyzes the constitutional deficiencies in the way RFRA took shape, and Part II assesses the patterns of RFRA decisions by various legal actors. In Part III, I offer some thoughts as to the lessons of RFRA, what they suggest about the unique problems of protecting religious liberty, and where advocates of such protection might go from here. In particular, I argue that legislative codification of religious liberty, RFRA-style, is ill-advised, and that courts should be permitted a period in which to work through their own, levelheaded "restoration" of religious liberty.

4. U.S. CONST. amend. XIV, §5.

5. 42 U.S.C. § 2000bb-1(a) (1994).

I. RFRA AS CONSTITUTIONAL FAILURE

RFRA's political sponsors and drafters faced a dilemma. They understood from the outset that simplicity was a virtue. In order to create and maintain a coalition of many different religious groups and civil liberties interests, many of which disagreed strenuously on a variety of other issues, they had to find a simple, all-encompassing formula for statutory protection of religious liberty. As others have emphasized,⁶ RFRA itself had to be generally applicable, protecting religious practice by legal formula which on its face favored or disfavored no particular sect. If any mainstream religious group felt excluded, the political coalition supporting the Act would have unraveled.⁷ If any particular government function, such as public schools or prisons, were exempted, other government agencies would have rushed to argue that they too deserved exemption. Hence, RFRA was drafted in a way that made it constitution-like in its coverage, protecting all who came within its general formulation, and burdening all government.⁸

As sensible as this drafting and political strategy may have been, it does not justify constitutional myopia. Even if RFRA supporters were committed, for reasons of both principle and politics, to the most general formula, uncluttered by exemptions or special treatment for any religious group or government function, they nevertheless might have suggested multiple possible constitutional bases for the Act. The Commerce Power and the Spending Power were prominent among the possibilities. Indeed, while the Act was under consideration in the House, I explicitly recommended to a subcommittee of that body that these sources of power be considered as additional or alternative bases for RFRA as applied to the States.⁹ Neither was ironclad at

6. See, e.g., Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994).

7. The issue of abortion almost caused such an unraveling. See text accompanying footnotes 35-40 *infra*.

8. The political dynamics which explain the need for such statutory generality, coupled with delegation to others of the decision making particulars, are not difficult to understand. After all, could freedom of speech, as currently defined and protected by courts, survive a political referendum in which each of its applications was scrutinized and made subject to a discrete political decision? How many votes would there be, for example, for a legislative proposal to codify the three-part obscenity test of *Miller v. California*, 413 U.S. 15 (1973)?

9. See *The 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. 385-87 (1992) (hereinafter House RFRA Hearings) (statement of Professor Ira C. Lupu). A scholar has recently suggested that RFRA might rest on the Treaty Power, see Gerald I. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33 (1997) (arguing that RFRA is a statutory application to the states of the international human rights commitments of the federal government), but I do not believe that anyone called that to the attention of Congress at the time. Perhaps a basis of congressional power that involves Congress in implementing

the time, and the Commerce Power is a more tenuous source today than it was then, because of the Court's subsequent decisions in *Lopez*,¹⁰ limiting the power's ambit, and *Printz*,¹¹ which protects states against being commandeered under any Article I power. Yet, as RFRA's rehabilitators have recently argued,¹² both the Commerce Power and the Spending Power remain plausible candidates for the source of some reenacted version of RFRA.

Moreover, the legislative history shows absolutely no attention to the problem of justifying RFRA's coverage of the federal government. The Act itself explicitly so applies,¹³ but nothing within it or in its accompanying materials explains the basis for that application. Of course, Congress is under no obligation to identify its power source in imposing RFRA on otherwise valid federal schemes. Congress has authority (up to the limits of the Establishment Clause) to modify any federal program with respect to matters of religious liberty. Nevertheless, it was symptomatic of the strategy of RFRA supporters that the question of RFRA's constitutionality as applied to the federal government was never a matter of explicit focus.

Rather, RFRA's supporters rested the case for congressional power to enact RFRA entirely and exclusively on Section Five of the Fourteenth Amendment. Despite this narrowness of approach, judicial restraint perhaps should have led the Court in *Boerne* to presume that Congress meant to rest RFRA on any source that fit. Such a posture would have at least brought the Commerce Power back into the picture.¹⁴ Indeed, in historic preservation cases

foreign relations decisions cannot be invoked by courts through operation of the general presumption of constitutionality and the deference to Congress which the presumption supports. Congress not having explicitly invoked the Treaty Power when it enacted RFRA, the Court in *Boerne* may have acted quite appropriately in not considering whether to invoke the power on Congress's behalf.

10. *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Commerce Clause does not extend to prohibition on handgun possession in a school zone).

11. *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding that Congress may not commandeer state agents to carry out discretionary federal policy goals).

12. See *Protecting Religious Freedom after Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, (July 14, 1997) (statement of Professor Douglas Laycock), available in <<http://www.house.gov/judiciary>>. For careful analysis of the Spending Power and Commerce Power as possible bases for a new version of RFRA, see Daniel Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L. J. 633, pt. II (1998).

13. See 42 U.S.C. § 2000bb-2(1) (1994).

14. Whatever may be the case with respect to the Treaty Power, see *supra* note 9, the Spending Power must be unambiguously invoked, so that states know what conditions attach to federal grants and know what financial risks they take if they ignore federal law requirements. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). So the Court in *Boerne* could not have presumed that RFRA was an exercise of conditional spending by Congress.

(as *Boerne* itself was), the Commerce Power may be a plausible source for RFRA; government restriction on the rehabilitation of worship facilities limits the development of resources and might have deleterious economic consequences. Nevertheless, it was foolhardy for RFRA's proponents to depend upon the Court's *sua sponte* invocation of the Commerce Power if and when an appropriate RFRA case arose. Congress announced explicitly what it thought it was doing, and the Court quite understandably took Congress at its word.

The contrast between the legislative/constitutional strategy pursued by RFRA's supporters and that pursued by other, innovative civil rights crusaders is illuminating. In the early 1960's, when Congress considered the landmark Civil Rights Act of 1964,¹⁵ constitutional considerations were a centerpiece of the effort. Some proponents of the law wanted to rest the public accommodations provisions upon Section Five of the Fourteenth Amendment; others quite rightly recognized that Supreme Court precedent explicitly limited Congressional power to enforce the Equal Protection Clause to action taken under state rather than private authority.¹⁶ Accordingly, the Act's designers developed a Commerce Power rationale, and a statutory coverage formula that fit that rationale, to support those public accommodations provisions.¹⁷ Moreover, they introduced evidence in Congress that racial discrimination in hotels and restaurants impeded interstate movement by African-Americans.¹⁸ This formula, the evidence in support of a Commerce Power theory of the Act, and the deliberation Congress gave to the constitutional question of the scope of its own power, all proved influential in the Supreme Court's ultimate validation of the public accommodations provisions of the Act.¹⁹

More recently, the proponents of the federal Violence Against Women Act²⁰ (VAWA) demonstrated similar constitutional resourcefulness in the political struggles to enact the scheme. One major provision of the Act makes it unlawful to travel across a state line with the intent to injure a spouse or

15. Civil Rights Act of 1964, Pub. L. No. 88-362, 78 Stat. 241 (codified in scattered sections of 28 U.S.C. & 42 U.S.C.).

16. See G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 201-02 (13th ed. 1997) (reviewing contending positions).

17. See Pub. L. No. 88-352, Title II, § 201, 78 Stat. 241.

18. See Civil Rights Act of 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N. (78 Stat. 241) 2391, 2493-2501.

19. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of the Act to a restaurant which obtained a substantial portion of its food supply through interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding on Commerce Power grounds application of the act to hotels and motels).

20. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994). The Act is part of the larger Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1797 (1994).

intimate partner and, in the course of or as a result of that travel, to “intentionally commit[] a crime of violence and thereby cause[] bodily injury to such spouse or intimate partner”²¹ This provision, the constitutionality of which has been upheld in the lower courts,²² rests entirely on the Commerce Power. Here, VAWA’s drafters took pains to include a carefully drafted jurisdictional hook to commerce – travel across a state line with an illicit purpose – and at least some legislative history focused upon the inadequacy of state and local government to deal with the problem of interstate domestic violence.²³

The Act’s more constitutionally controversial provision is that which creates a federal civil action, for damages and other appropriate relief, against “a person . . . who commits a crime of violence motivated by gender”²⁴ This provision lacks the jurisdictional predicate of the state line crossing required under the criminal provision, and lower courts have divided on its constitutionality.²⁵ There is evidence that VAWA’s proponents fully appreciated the constitutional doubts such a provision might engender. They argued that the civil provision could rest on the Commerce Power, because of the cumulative economic consequences of domestic violence, including lost productivity and the costs of health care required to treat injuries inflicted in such violence.²⁶ They contended as well that Section Five of the Fourteenth Amendment could support this provision.²⁷ As was the case with the 1964 Civil Rights Act, the problem in this regard is state action, or its absence. VAWA’s proponents were able to make out a credible legislative case that state and local law enforcement officers were historically lax in investigating or prosecuting crimes of domestic violence.²⁸ This showing, whether or not

21. 18 U.S.C. § 2261(a)(1) (1994).

22. See *United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997).

23. See *id.* at 87. The district court in *Gluzman* described this history as sparse, but the jurisdictional hook in this provision of VAWA makes the necessity for legislative fact-finding on the subject relatively unimportant. See *id.*

24. 42 U.S.C. § 13981(c) (1994).

25. Compare *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996) (upholding the provision) with *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) (holding the provision unconstitutional) *rev’d* 132 F.3d 949 (4th Cir. 1997) (upholding the provision based on the Commerce Power).

26. See *Doe*, 929 F. Supp. at 612-15. The case for upholding this provision is stronger than was the case in *Lopez*, because the VAWA provision focuses on actual violence and its costs, not merely the potential for violence and disruption associated with handgun possession. See *Brzonkala*, 132 F.3d at 964-74 (distinguishing *Lopez*).

27. See *Brzonkala*, 935 F. Supp. at 793. The Court of Appeals in *Brzonkala* did not reach this question. See *id.* at 964 n.8.

28. See *Brzonkala*, 935 F. Supp. at 793.

ultimately successful, tied the provision to portions of the Ku Klux Klan Act which the Court had been willing to uphold on a related theory.²⁹

Finally, VAWA's supporters argued that congressional power to enforce the Thirteenth Amendment – not limited to state action in its prohibition of slavery – also justified the civil damages provision.³⁰ Without question, extending the Thirteenth Amendment to concerns of gender relations will not be easily accepted by courts;³¹ nevertheless, it is certainly a plausible argument that violent spouses attempt to keep their mates in a form of physical and emotional bondage, and that Congress would therefore have a rational basis for finding domestic violence to be an instrument of domination analogous to enslavement.³²

Thus, in a situation in which the constitutionality of coercive federal intervention into historically local matters was certain to be challenged, VAWA's designers took great pains to establish a record showing the consideration and credibility of a variety of sources of congressional power for the scheme. By contrast, RFRA's proponents put all of their eggs in a constitutional basket of highly questionable and uncertain strength. Moreover, they did so in connection with a proposed enactment which threw back to the judiciary an assignment which the Supreme Court in *Employment Division v. Smith* had explicitly rejected as a matter of constitutional law. In such circumstances, judicial resistance to RFRA was certainly to be expected.

Why did RFRA's supporters not carefully consider and diversify their constitutional portfolio? I have not put this question directly to RFRA's architects, but my experience with RFRA suggests a number of possible explanations.

First, RFRA as originally conceived would have been explicitly more limiting of the states than of the federal government.³³ I believe it is symptom-

29. See *United States v. Price*, 383 U.S. 787 (1966) (holding that alleged criminal conspiracy between state officers and private persons sufficient to support federal authority under the Fourteenth Amendment); *United States v. Guest*, 383 U.S. 745 (1966) (ruling that allegations that private persons made false reports to police, as part of a conspiracy to violate civil rights, constitute sufficient state action to support federal authority).

30. See S. REP. NO. 102-197, at 53 (1991).

31. See *Brzonkala*, 935 F. Supp. at 796 n.3.

32. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that Congress had a rational basis to outlaw private racial discrimination in housing as a vestige of slavery). For a creative effort at extending the ambit of the Thirteenth Amendment to matters of intra family domination, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

33. See H.R. REP. NO. 102-2797, § 6(b) explicitly recognizing the authority of federal lawmakers – presumably including agencies as well as Congress – to exempt law from RFRA by explicitly so stating. RFRA as ultimately enacted does not permit federal agencies to so opt out of coverage, though future Congresses of course can limit RFRA's effect against the federal government.

atic of Washington politics – RFRA’s story was inside the Beltway if ever one was – in the late twentieth century that Congress is relatively unmindful of the administrative interests of the states except to the extent those interests are likely to increase demand for federal subsidies. Even when RFRA was redrafted to make its coverage of the federal government less easy to evade, members of Congress may have remained ambivalent about covering federal law and administration. It would thus be in their institutional interest as protectors of the federal government and bureaucracy to make explicit in RFRA a source of power over state and local administration, while identifying no such source of power to impose RFRA upon federal administration.

Second, and I believe closer to the central truth, RFRA was defined by the concerns and focus of its opposition. The early resistance to RFRA was one-dimensional – the issue was abortion. When RFRA was originally introduced in 1990, George Bush was President and opponents of abortion believed they had an excellent opportunity to achieve their long-desired goal of having the Supreme Court overrule *Roe v. Wade*.³⁴ In 1990, the Supreme Court included Chief Justice Rehnquist and Justices Scalia, Kennedy, and O’Connor, all of whom had expressed dissatisfaction with *Roe*.³⁵ By 1992, President Bush had appointed David Souter to replace Justice Brennan and Clarence Thomas to replace Justice Marshall. Hence, abortion foes believed *Roe* was headed for history’s trash compactor.

For reasons that remain obscure, a number of leaders in the anti-abortion movement became concerned that RFRA might become the source of a legal right to an abortion. The grounds for such concern were never very persuasive; few women could credibly claim that their religion motivated them to have an abortion, and far fewer still could claim that their religion compelled them to have an abortion. Of this second group – those with a credible claim of religious compulsion – most or all would be in the situation of having life-threatening pregnancies,³⁶ and hence would be free to abort under whatever state law would exist on the subject. Despite the inherent implausibility of the argument that RFRA would turn out to be a substitute for *Roe*, a number of anti-abortion members of Congress, and a number of religious interests (including the Catholic Conference of the United States) remained opposed to RFRA.³⁷ At this stage of RFRA’s gestation, it was its impact on abortion

34. 410 U.S. 113 (1973).

35. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality).

36. See House RFRA Hearings, *supra* note 9, at 119 (statement of Rep. Solarz that Orthodox Judaism is the only religion in the U.S. which requires abortion in any circumstance, and that that circumstance is a pregnancy which endangers the life of the pregnant woman).

37. See House RFRA Hearings, *supra* note 9, at 39-43 (statement of Mark Chopko, General Counsel, U.S. Catholic Conference); see also House RFRA Hearings, *supra* note 9, at 139 (statement of Hon. Christopher M. Smith, R-NJ).

rights, not seemingly abstract questions about its constitutionality, that monopolized the political debate. RFRA's supporters who favored *Roe* would not agree to support a RFRA with abortion excluded, and RFRA's potential supporters who opposed *Roe* would not support RFRA without such an exclusion.

When the abortion issue collapsed, as it did in 1992 after the Supreme Court's decision in *Planned Parenthood v. Casey*³⁸ and the election of Bill Clinton, the opposition to RFRA among religious groups disappeared with it.³⁹ Convinced that *Roe* would remain vital for a long time to come (and that RFRA would therefore play no part in the creation of abortion rights), the anti-abortion members of Congress and religious groups leaped aboard the RFRA bandwagon. With that issue gone, one would have expected the next and obvious set of political opponents – state and local governments and their administrators – to appear and to raise constitutional as well as policy objections to RFRA. Had a vigorous attack on congressional power to regulate state treatment of religious exemption claims been mounted there and then, perhaps RFRA's supporters would have been moved to expand and rethink their constitutional strategy.

With few exceptions, however, these potential sources of opposition were silent. The National League of Cities, the National Governors' Association, the National Associations of Attorneys General – in short, all of the Washington-based organizations one would expect to appear and to state their concerns about the impact of RFRA on their operations – were nowhere to be seen. The National School Board Association did express some concern about the impact of RFRA on public school administration,⁴⁰ and requested some drafting changes in the Act's text. And, shortly before RFRA's enactment in 1993, a group of state attorneys general and prison administrators attempted to obtain a generic exemption of prisons from RFRA's coverage. Their efforts, backed by Senators Simpson and Reid, proved too little and too late; the Senate rejected by a narrow margin a prison exemption from RFRA, and RFRA then passed both Houses by overwhelming majorities.⁴¹

Why state and local officials did not oppose RFRA sooner and more vigorously, or at least make known their appraisals of the costs RFRA would impose on them, is worth pondering. The most likely reason, by my guess,

38. 505 U.S. 833 (1992).

39. Professor Laycock, an insider throughout the process of RFRA's creation and defense, confirms this view. See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 896 (1994).

40. For further detail, see Ira C. Lupu, *Of Time and the RFRA: A Lawyers Guide to the Religious Freedom Restoration Act*, 56 *MONT. L. REV.* 171, 188 n.74.

41. See *id.* at 191; see also Laycock, *supra* note 39, at 896.

was that elected state and local officials feared that opposition to RFRA would be politically costly. All these officials have religious institutions within their jurisdiction, and a great many of these institutions had national affiliates involved in the RFRA campaign. Religious liberty in the abstract is always popular, and opposing it in the abstract is rarely so. Accordingly, state and local government officials may well have been afraid to speak their mind about the costs of RFRA.

This particular kind of process failure — a relevant set of political interests silenced by their leaders' fear of political repercussions — may well have been aggravated by RFRA's vagueness. As the next section of this paper explores, the Act's key terms were redolent with ambiguity. Most concerned representatives of state and local government may thus have believed that the Act would be construed so as to not impose significant costs on their operations. Perhaps prison administrators finally were able to break through the silence because 1) religious liberty for prisoners is not very popular, 2) the pre-RFRA constitutional law regarding religious liberty in prisons was extremely favorable to government,⁴² and 3) correction officials knew full well of the onslaught of litigation they would face under virtually any interpretation of RFRA.

In any event, the RFRA story surely seems to be one in which the political safeguards of federalism⁴³ failed; the states and localities proved poorly equipped to protect their interests in Congress. In the absence of advocacy from that quarter, the constitutional and policy debate in Congress was one-sided and RFRA's proponents never had to face and respond to, in the legislative arena, the strongest possible anti-RFRA arguments. By the time those appeared in briefs to the Supreme Court, it was too late for RFRA's proponents to cover the constitutional bases adequately.

In addition to this ironic lesson about the potential legal costs of political nonadversity, the story of RFRA's enactment suggests still another insight about the weakness of the political safeguards of federalism. Even if state and local officials did not show up to oppose RFRA, might not members of Congress themselves have noticed and been concerned about the infliction of costs upon the States? The possibility was there, but the experience was to the contrary. Other than the concern from Senator Simpson about the effect of RFRA upon the administration of prisons,⁴⁴ nary a voice was heard in the halls

42. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

43. The phrase is from Herbert Wechsler, *The Political Safeguards of Federalism — The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The most energetic contemporary elaboration of the Wechsler thesis is to be found in JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). Needless to say, the Court has not been listening of late to Professors Wechsler and Choper.

44. See S. REP. NO. 103-111, at 18-38 (1993).

of Congress expressing concern for the impact of RFRA on the states. The expectations of scholars that members of Congress would be aware of and sensitive to the effects of federal enactment upon their districts, including processes of state and local government, are simply not borne out by the RFRA story. Perhaps the Act's substance was so appealing that it overwhelmed considerations of federalism, even for those members of Congress who purport to believe deeply in keeping the federal government out of local affairs.

If substance conquers the principle of federalism whenever majorities of both Houses feel strongly about the matter, however, the political safeguards of federalism will chronically fail. As Marci Hamilton so aptly suggested soon after RFRA's enactment, those who expect the fox to guard the henhouse seem destined for repeated disappointment.⁴⁵

II. RFRA'S RECORD OF ACCOMPLISHMENT

Whether or not RFRA's constitutionality might have been saved, at least in part, through better planning, RFRA did not prove to be the guarantor of religious liberty its proponents promised. Indeed, in the wake of *Boerne*, RFRA's principal defenders were both outspoken on the tragic quality of the Supreme Court's decision and marvelously muted on the particulars of what RFRA had accomplished.⁴⁶ A close look at RFRA's record, which this part undertakes, shows that RFRA failed to produce any substantial improvement in the legal atmosphere surrounding religious liberty in the United States. RFRA's most significant impact has been in prison, and even there RFRA probably did not create any dramatic alteration in the climate of relations between inmates and administrators on matters of religious liberty.⁴⁷ Moreover, the benefits obtained through RFRA victories in prison have to be weighed against the frequency and cost of defending against RFRA prison litigation. However incommensurable these costs and benefits may be, strong claims that RFRA earned its keep in prison are hard to justify.

Outside of prison, the record is not much better. The cases are distributed among various legal contexts, and the costs of defending against RFRA claims are distributed accordingly. To be sure, a few of those cases represent normatively significant victories for religion; keeping open church centers for

45. See Marci Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1995).

46. Virtually every pro-RFRA statement at the post-*Boerne* House Subcommittee Hearings is evidence of this. See Hearings *supra* note 2.

47. See generally Daniel Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459 (1996) (arguing that RFRA has failed to protect the religious needs of prisoners).

feeding the poor⁴⁸ and preserving the inviolability of Catholic confession⁴⁹ are noteworthy indeed. But the overall record of RFRA successes is slim, and at least some of those victories represent highly questionable resolutions of competing social policies.⁵⁰ As analyzed in the pages that follow, RFRA's brief life generated a great deal of work for lawyers and judges, but did not produce systematic gains for religion.

A. Criteria For Measurement

Without question, one cannot render a meaningful judgment concerning RFRA's success or failure without criteria by which to measure. If one believes that a single victory for religious exercise burdened by government policy is sufficient to justify the costs of RFRA, then the Act has been a rousing success. If, at the other extreme, one believes that most protections for religious exercises achieved through RFRA could have been obtained at considerably lower cost, the Act has been dreadfully wasteful.

My own view is between these poles. Like the First Amendment itself, RFRA invites weak claims and imposes costs of defense on the government. If we are to be true to our commitment to civil liberties, this phenomenon is unavoidable. Accordingly, the measure of RFRA's success must be somewhat subjective. Appraisal must include sensitive assessment of the gains to religion and the costs to government which the Act generated, and must as well be mindful of the difficulty of making comparisons between the intangible benefits religion may obtain and the economic and other costs which government must bear. Moreover, the world of RFRA may have been filled with barely visible benefits, included increased bargaining leverage for religious interests and an increased feeling of security among the deeply religious, as well as hard-to-calculate costs, including social resentment over particular RFRA claims and the civic stresses caused by the necessity to defend against them. In addition, the project of appraising RFRA is complicated

48. *See, e.g.*, *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996); *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994); *Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996).

49. *See Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997) (District Attorney's secret taping of confession to priest by murder suspect in county jail violated RFRA).

50. *See, e.g.*, *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (holding that RFRA protects right to wear Sikh warrior daggers, sewn to sheath, in public school); *United States v. Gonzales*, 957 F. Supp. 1225 (D.N.M. 1997) (ruling that RFRA protects right to kill a bald eagle to obtain material for use in religious ritual); *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994) (explaining that RFRA precludes contempt citation for father who refuses on religious grounds to support child).

further by the difficulty of determining how many results, in matters in which claimants raised RFRA issues, might have been identical in its absence.⁵¹

Whatever the appropriate measure of "success" or "failure," it should be evident from what is reported below that RFRA did not fulfill the expectations of its sponsors and proponents. From the day of the Supreme Court's decision in *Smith* in 1990, lobbyists for religion bewailed the gap in religious liberty law, and cried out for legislation to fill it.⁵² The legislation they obtained purported to return the law of religious liberty to its point of greatest vigor. However large the chasm between that point and the regime of *Smith*, RFRA has done much less to bridge it than its proponents hoped or expected.

B. A Note on Methodology and its Limitations

My research on RFRA is essentially limited to the databases of federal regulatory actions, opinions of state attorneys general, and reported judicial decisions. How big the iceberg of which these are the tip is simply unknown to me. An exhaustive analysis of the effects of RFRA of course would include regulatory actions under consideration as well as 1) the layer of cases filed in which no reported opinions had been rendered, 2) cases settled after the initiation of RFRA litigation, and 3) RFRA matters resolved without resort to litigation. RFRA may well have added leverage to the claims made in the name of religious liberty since late 1993, and one cannot be certain that RFRA was unsuccessful in achieving gains for religious liberty as a result of that leverage being exercised.⁵³

Moreover, *Boerne* has reduced, and perhaps signaled the elimination of, the possibility of Supreme Court construction of RFRA. As this paper will detail below, some of the failure of RFRA is attributable to government-favorable constructions of some of its crucial terms. Had the Supreme Court

51. It would be helpful to be able to compare the results of RFRA with those obtained under other civil rights statutes. Unfortunately, most empirical studies of such results have focused on win-loss records for cases that go to trial, *see, e.g.*, Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L. J. 1567 (1989), rather than the overall win-loss record for claims filed under a particular statute. And RFRA was distinctive in being an attempt to restore constitutional rights, rather than to create wholly new statutory ones. One might expect a true restoration to have a very high record of success in the courts and elsewhere.

52. *See, e.g., Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1990) (statements of Rev. John Buchanan, Rev. Robert P. Dugan, Jr., Rev. Dean M. Kelley, American Jewish Congress, Anti-Defamation League).

53. The leverage was increased by RFRA's provision for attorney's fees to be paid by government to lawyers presenting successful RFRA claims. *See* 42 U.S.C. § 2000bb-1(c) (1994).

upheld the Act as applied to the states and construed it in religion-friendly ways, the lower court record of RFRA claims would presumably yield a somewhat different set of results. In addition, *Boerne* resulted in the termination of a great deal of RFRA litigation in progress; in some of these cases, RFRA claims had survived dispositive motions and might ultimately have prevailed.⁵⁴

Nevertheless, there are a number of reasons to believe that a survey of regulatory actions, attorney general opinions explicitly influenced by RFRA, and reported judicial opinions are useful measures of RFRA's potential. Regulatory actions and attorney general opinions show the extent to which public officials have begun to internalize the norm that RFRA attempted to impose on all of government in the United States.

Litigation results are even more revealing. The Act is sufficiently vague and elastic that government officials may well have resisted and litigated against RFRA claims rather than settle them in costly ways. Moreover, the Supreme Court might well have succumbed to the same pressures lower court judges experienced in deciding how generously to construe RFRA's operative language.⁵⁵ And, to the extent lower court judges were hostile to RFRA claims — as I believe they were and are — even relatively generous Supreme Court construction of RFRA might not have altered significantly the pattern of RFRA victories and defeats. Because RFRA claimants and government officials would have been (or, for federal officials for the moment, will be) bargaining in the shadow of RFRA's gloss rather than RFRA pure, the judicial treatment of RFRA is the key determinant of RFRA's long-term success.

C. Federal Regulatory Actions and State Attorney General Opinions

Electronic databases make this information readily available. Moreover, both of these categories reveal something about the quantity of RFRA-consciousness among public officials, and their early interpretations of the Act. In fact, the results demonstrate how little religion-protecting impact RFRA had in either setting.

In the category of federal regulation, one might have expected significant amounts of RFRA influence. After all, RFRA is federal law, supported by a near unanimous House and Senate⁵⁶ and an enthusiastic President.⁵⁷ After

54. See, e.g., *Hinkle v. Arizona Dep't of Corrections*, 50 F.3d 14 (9th Cir. 1995).

55. This is what I predicted in my testimony to the House subcommittee considering RFRA in 1992. See *House RFRA Hearings*, *supra* note 9, at 380-85.

56. See *Signing of Religious Freedom Act Culminates 3-year Push*, THE WASH. POST, Nov. 20, 1993 at C6, available in 1993 WL 2087505.

57. See *id.*

1993, as Professor Paulsen so aptly put it in Montana, a RFRA ran through the entire U.S. Code.⁵⁸

A search of the Federal Register, in which proposed and final rules of federal agencies must be published in order to have legal effect, reveals how little the agencies of the federal government paid heed to RFRA. As of February, 1998, RFRA had been cited in the Federal Register a grand total of ten times. One of the ten was a general reference in a Presidential Proclamation announcing Religious Freedom Day.⁵⁹ Three of the ten were laundry list references to RFRA in regulations concerning agency proceedings governed by the Equal Access to Justice Act.⁶⁰

The remaining six concerned possible substantive impacts of RFRA. Two involved outright denials of relief requested under RFRA.⁶¹ The remaining four (three of which involved federal policy toward Native Americans) made reference to RFRA, but not a single one suggested that the existence of RFRA had altered federal policy in the slightest degree.⁶² To put the matter bluntly, there is absolutely no evidence that RFRA did anything to protect religion in decision making by the agencies of the United States.

The state attorney general opinions, typically triggered by formal requests from state legislators, offer little more. As of early September, 1997, eleven AG opinions had cited RFRA. In only two did an Attorney General decide that

58. See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

59. See Proclamation No. 6646, 59 Fed. Reg. 2925 (1994).

60. See 62 Fed. Reg. 19233 (1997) (to be codified at 49 C.F.R. pt. 6); 61 Fed. Reg. 28831 (1996) (to be codified at 49 C.F.R. pt. 6); 60 Fed. Reg. 12668 (1995) (to be codified at 42 C.F.R. pt. 1262).

61. See 62 Fed. Reg. 4890 (1997) (to be codified at 28 C.F.R. pts. 543 & 553) (RFRA adds nothing to right of federal prison inmates to give one another legal advice or materials); 60 Fed. Reg. 45258 (1995) (to be codified at 36 C.F.R. pts. 251 & 261) (requiring a permit for distribution of religious materials in the public forests is not a substantial burden within the meaning of RFRA).

62. See 62 Fed. Reg. 26909 (1997) (announcing FAA consultation with Indian tribes on effect upon sacred sites of proposed Grand Canyon overflight air routes); 61 Fed. Reg. 41424 (1996) (announcing policy toward climbing Devil's Tower National Monument and referencing an Executive Order which "supplements" RFRA); 61 Fed. Reg. 29424 (1996) (discussing federal policy on tribal sovereignty and making passing reference to RFRA); 60 Fed. Reg. 66491 (1995) (to be codified at 15 C.F.R. pt. 2301) (announcing new policy towards telecommunications services in cases involving sectarian transmissions; policy remarks on commenter Fordham University's reference to RFRA, but policy rests on revised Establishment Clause interpretation). The recently promulgated guidelines on religious speech in the federal workplace also refer to RFRA but do not depend upon it; i.e., these rules would have been promulgated in identical fashion in RFRA's absence, and will survive any invalidation of RFRA as applied to the federal government. See *Memorandum on Religious Exercise and Religious Expression in the Federal Workplace*, 33 Weekly Comp. Pres. Doc. 1246 (Aug. 14, 1997); see also Peter Baker, *Workplace Religion Policy Due; Clinton Plans to Issue Executive Guidelines for Federal Employees*, WASH. POST, Aug. 14, 1997, at A-01.

RFRA required an exemption from state law of general applicability. In Nebraska, the Attorney General concluded that RFRA required an exemption from a law against bonfires for Native Americans who made fires as part of a sweat lodge ceremony.⁶³ And, in a carefully reasoned Maryland opinion on historic preservation, that state's Attorney General suggested that RFRA compelled an exemption for religious structures from preservation orders concerning elements of buildings "grounded in religious belief and practice."⁶⁴ In another opinion, the Maryland Attorney General indicated that RFRA reinforced a recommendation that would have been reached on federal and state constitutional grounds alone.⁶⁵ Four opinions, three of which concerned religious speech by students on public school premises, made reference to RFRA without indicating its legal significance in the context addressed.⁶⁶ Four other attorney general opinions, in widely disparate contexts, denied outright the possibility that RFRA would produce any relief for religious exercise in the circumstances covered by the opinion.⁶⁷

The volume of state attorney general opinions is not surprising. Here too, of course, there may have been more in the works at the time of *Boerne*. As was the case with respect to federal regulation, however, decisions giving RFRA dispositive religion-protective weight are rare. If *Smith* created a legal gap, RFRA did little to fill it in this context.

D. Results of RFRA Litigation

The information which follows in this section was obtained from searching in the Westlaw and Lexis databases for reported cases which mention the Religious Freedom Restoration Act. Prior to *Boerne*, the federal and state courts combined had produced 168 RFRA decisions (excluding decisions

63. See Op. Att'y Gen. 94049 (Neb. 1994).

64. See 79 Op. Att'y Gen. 94-037 (Md. 1994). The opinion declares that the Maryland constitution tracks the federal constitution on matters of religious liberty, and that the federal constitution has been effectively revised by RFRA. See *id.* The Supreme Court's opinion in *Boerne* of course repudiates the latter point.

65. See Op. Att'y Gen. 93-050 (Md. 1993) (noting First Amendment to U.S. Constitution and RFRA both may protect student distribution of religious literature and wearing of religious symbols on school property).

66. See 29 Op. Att'y Gen. 95-07 1995 (N.D. 1995) (discussing public payment for cremation but not burial of indigents); Op. Att'y Gen. 97-083 (Tenn. 1997) (discussing student religious liberty); Op. Att'y Gen. 97-079 (Tenn. 1997); and Op. Att'y Gen. 3 (Wash. 1995).

67. See Op. Att'y Gen. 94-104 (Ark. 1994) (advising RFRA does not protect otherwise illegal drug use in worship service); Op. Att'y Gen. 93-414 (Ark. 1994) (advising proposed AIDS curriculum in public schools does not violate RFRA); Op. Att'y Gen. 94-4 (Ind. 1994) (advising RFRA does not compel preferential treatment for churches in the assessments of storm water fees); 79 Op. Att'y Gen. 94-027 (Md. 1994) (advising RFRA does not exempt motor vehicle operators from requirement to have photograph on operator's license).

purely on RFRA's constitutionality).⁶⁸ Of these, 144 were federal court decisions, and the remaining twenty-four were state court decisions.

These 168 decisions, cited in the attached Appendix to this article, break down as follows:

1. Of the 144 federal court decisions, ninety-four involved prisoner litigation (virtually all arising in state prison), and fifty involved contexts other than prisons.

2. Of the twenty-four state decisions, five involved prisoner litigation and nineteen involved other contexts.

3. Of the ninety-four federal court decisions involving claims by prisoners, courts denied relief in eighty-five. Only nine cases involve orders granting relief under RFRA.

4. Of the fifty federal court RFRA claims not involving prisoners, RFRA claimants suffered forty-one denials of relief and won nine grants of RFRA relief.

5. Of the twenty-four state cases (prison and non-prison combined), RFRA claimants were denied relief in seventeen and granted relief in seven.

To recapitulate and summarize: In three and one-half years, RFRA generated a significant quantity of litigation. Over 85% of the decisions were in the federal courts. About 60% of the RFRA decisions occurred in prison cases.⁶⁹ We will never know how many RFRA victories these cases might have produced had *Boerne* not terminated their RFRA claims, as it did for all cases involving state law (i.e., the huge majority of them). But we do know that 143 of the 168 produced denials of relief, only twenty-five claims produced grants of relief (for an overall win percentage of 15% of cases decided on the merits), and that nine of these twenty-five were in prisoner litigation, which typically involved the most basic infringements of religious liberty.

The most intriguing aspect of RFRA's record is the number and wide variety represented by the losses, particularly outside of prison. Of the non-prison cases that have reached merits decisions, over 75% have produced denials of relief. Of course, some cases appear more sympathetic than others; one expects that reliance on RFRA as a defense to marijuana charges will be treated less respectfully than RFRA claims regarding building a highway

68. This count includes only those cases in which courts considered some aspect of RFRA merits and either granted or denied relief. It excludes cases in which courts did no more than order a RFRA claim to proceed. For each category, I have counted only the last, pre-*Boerne* disposition of each case.

69. Examination of RFRA filings and interim orders, as distinguished from case dispositions, might well show that prisoner litigation made up an even higher frequency of all RFRA claims.

through an area where a child had been buried.⁷⁰ When one recalls, however, that RFRA had been trumpeted as the protection of religion against all the religion-neutral, generally applicable rules that would beset it, and that RFRA's terms appeared to widely and stringently protect religious exercise, this record of success seems surprisingly tepid. Indeed, it is difficult to look at this record and conclude that RFRA has made any significant contributions to religious liberty outside of prisons. Even within prisons, the protection for religious liberty has been limited to matters of bodily autonomy (hair and beards,⁷¹ symbol-wearing,⁷² medical-test avoiding⁷³), and has not been extended to matters of prison space allocation.⁷⁴ Moreover, RFRA has proven dear in its demands of time and energy on prison officials and state lawyers engaged to defend them.⁷⁵

E. Analysis of Why RFRA Claims Did Not Succeed at a Greater Rate

I believe there are several interrelated causes for the infrequency of RFRA victories. First, judges are uncomfortable with *any* claim of exemption from general law. The law of free speech and free press have been generally unsympathetic to such claims; courts often reject them as a form of special pleading by the press, even when the challenged general policy touches communications⁷⁶ and especially when it does not.⁷⁷ The symbolic speech

70. See *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996) (holding Church of Marijuana not a religion within meaning of RFRA); *Thirty v. Carlson*, 78 F.3d 1491 (10th Cir. 1996) (holding RFRA does not require alteration of highway route to avoid interference with child's burial place), *cert. denied*, 118 S. Ct. 78 (1996).

71. See *Estep v. Dent*, 914 F. Supp. 1462 (W.D. Ky. 1996), *aff'd without op. sub nom.*, 82 F.3d 417 (6th Cir. 1996); *Lewis v. Scott*, 910 F. Supp. 282 (E.D. Tex. 1995), *rev'd*, 127 F.3d 33 (5th Cir. Oct. 2, 1997) (No. 96-40301); *Luckette v. Lewis*, 883 F. Supp. 471 (D. Arizona 1995).

72. See *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997); *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994).

73. See *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (requiring Rastafarian prison inmate to undergo tuberculosis screening violates RFRA).

74. See *Johnson v. Baker*, 67 F.3d 299 (6th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995); *Woods v. Evatt*, 876 F. Supp. 756 (D.S.C. 1995), *aff'd without op.*, 68 F.3d 413 (4th Cir. 1995).

75. See statement by Jeffrey Sutton, *Hearings, supra* note 2. The Prison Litigation Reform Act, Pub. L. No. 04-134, 110 Stat. 1321 (1996) (codified at 28 U.S.C. § 1915), has resulted in more streamlined and less costly litigation by prisoners.

76. See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979) (holding media defendant in libel case has no first amendment privilege against discovery into research for the story); *but see Brown v. Socialist Workers '74 Comm.*, 459 U.S. 87 (1982).

77. See, e.g., *Associated Press v. NLRB*, 301 U.S. 103 (1937) (holding press has no first amendment immunity from National Labor Relations Act); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (holding press has no immunity from the Fair Labor Standards Act).

cases, like *U.S. v. O'Brien*,⁷⁸ are only rhetorically supportive of pro-exemption arguments; when claims of free speech privilege are pressed against speech-neutral, generally applicable laws, speech loses.⁷⁹

Courts seem especially uncomfortable with claims of religious exemption. Perhaps this is a simple case of a slippery slope, the slick surface of which leads judges to fear that cases will be difficult to distinguish from one another, with bad results ultimately appearing at the bottom of the incline. But I think the prevailing tendencies are more religion-specific than that; after all, many legal slopes are steep and slick, and judges take footholds when they must.

Religion cases may be different for a variety of reasons. First, judges, drawn from America's highly educated elite, may be skeptical about intensely held religious commitments. Second, they may be sensitive to the possibility of religious fraud, difficult for government to uncover without using intrusive measures. Third, some judges perceive a danger of Establishment Clause violations hanging over the project of religious exemptions. Fourth (and related to the first three), judges may sense the dangers of bias in whatever they do; they will have their own feelings, positive and negative, about various religious traditions and movements, and they will know that it is very difficult to separate those biases from the project of judging exemption claims. Better no exemptions, they might well say, than a pattern of exemptions riddled by religious favoritism.⁸⁰

These forces, I believe, explain the pre-*Smith* pattern of denial of free exercise exemption claims in the Supreme Court and elsewhere,⁸¹ and explain *Smith* itself. Congress, misled as to the pre-*Smith* law, enacted RFRA in the teeth of these judicial sentiments. Even though Congress was, to some uncalculated extent, trying to alter these trends, the Act's poorly defined terms permitted them to continue.

The most significant, and least well-defined, term in RFRA is its action trigger. RFRA comes into play if, and only if, government "substantially burden[s]"⁸² religious exercise. If government does so, the tests of compelling

78. 391 U.S. 367 (1968) (holding First Amendment does not provide a defense against crime of wilful destruction of draft card in a political protest).

79. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (holding First Amendment is no defense to charge of public indecency against nude barroom dancers); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (holding First Amendment is no defense to violation of regulation prohibiting overnight camping in specified federal parks).

80. This, of course, is one of the grounds of *Smith* itself. See *Smith*, 494 U.S. at 872 (1990).

81. See *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 625-29 (9th Cir. 1988) (Noonan, J., dissenting) (surveying religious liberty decisions in the federal courts), *cert. denied*, 489 U.S. 1077 (1989); see also James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992).

82. See 42 U.S.C. § 2000bb-1(a) (1994).

interest and least restrictive means come into play.⁸³ These latter standards have enough bite that judges seeking to limit exemptions will be inclined to rely upon the "burden" requirement as the primary obstacle to RFRA claimants.

Nor did Congress do anything to make it difficult for judges to so proceed. With respect to this Act-triggering requirement of "substantial burden," Congress did not purport to change the law. Rather, RFRA's history reflects an effort to codify prior judge-made law on the subject.⁸⁴ As students of religious liberty well know, however, the prior law was poorly defined and subject to pro-government manipulation.⁸⁵ Consequently, as catalogued below, judges in the earliest RFRA cases were not well-guided by pre-RFRA law and launched out on their own, typically in ways which limited the scope of RFRA. And, later RFRA cases built upon the earlier ones to develop a body of RFRA "burdens" law that placed the bar very high for RFRA claimants. Indeed, so effective was this RFRA-limiting device that a stunningly high proportion of all RFRA claims decided on the merits prior to *Boerne* involved rejection of claims as presenting insubstantial burdens.⁸⁶

Judges have used a variety of interpretive moves to disqualify RFRA claims on the grounds of insufficient burden on religion. The most common device has been to limit RFRA's coverage to claims of unavoidable conflict between religious and legal duty; that is, to those cases in which government required action forbidden by religion or prohibited action compelled by religion.⁸⁷ Limiting cognizable burdens to cases of compulsion excludes from statutory coverage a huge amount of behavior which is motivated, in whole or in part, by religious belief.⁸⁸ The judicial impulse to exclude from RFRA activity discretionary with the believer (and, in some cases, with possible

83. See *id.* at § 2000bb-1(b) (1994).

84. See H.R. REP. NO. 88, 103d Cong., 1st sess. at 6-7 (1993); S. REP. NO. 111, 103d Cong., 1st sess., at 9 (1993).

85. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

86. One hundred one of the 143 denials of RFRA relief in the courts, see text accompanying *supra* notes 69-70, involved a holding that the burden presented was insubstantial within the meaning of RFRA. The burden requirement thus accounted for over 70% of the RFRA defeats in court.

87. See *Goodall v. Stafford County*, 60 F.3d 168, 172-73 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 706 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995). For an even more restrictive standard, see *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (limiting RFRA to cases of religious compulsion with respect to a practice central to the claimant's belief system). See generally, Steven Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472 (1997).

88. For defense of the proposition that all religiously motivated conduct is covered by RFRA, see *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1443-44 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997).

material as well as religious motivation) is understandable, but its consequences for RFRA were widespread and negative.

Judge Posner has suggested a second device for limiting RFRA's scope. In his attempt to synthesize the law of RFRA burdens in *Mack v. O'Leary*,⁸⁹ Judge Posner reasoned that the quality of the impact of the government action upon religion also affected judicial determinations of whether a government practice substantially burdened religion. Prohibitions, in his view, are more troublesome than inhibitions, which tend to make religion more expensive yet still possible.⁹⁰ A great deal of the regulation of the activities of religious institutions, including land use and fundraising, inhibit without prohibiting religious exercise. In *Mack*, Judge Posner concluded that RFRA made actionable all prohibitions on religiously motivated behavior, while inhibitions had to fall upon central religious practices in order to fall within RFRA's scope.

However reasonable the prohibition-inhibition distinction may seem at first glance,⁹¹ this is a gloss which nothing in RFRA or its history directly supports. Moreover, the distinction is actually quite elusive, as one would expect a judge trained in economics to perceive; for a person or worship community with very few resources, making religious practice considerably more expensive is a way of effectively prohibiting it. In addition, as Judge Posner himself says elsewhere in *Mack*,⁹² the problem of deciding whether a practice is central to a religious tradition seems highly inappropriate as a judicial inquiry. Thus, however reasonable the *Mack* approach may appear, it serves to highlight the intractable difficulties created by the burden requirement.

Third, courts frequently excluded cases of sectarian discrimination from RFRA. Most of these arose in prison, and typically involved prison authorities providing time and space for worship to sects on a generic basis.⁹³ Unavoid-

89. 80 F.3d 1175, 1179 (7th Cir. 1996) *cert. granted and judgment vacated by*, *O'Leary v. Mack*, 118 S. Ct. 36 (1997).

90. Land use regulation imposed on places of worship tend to have this effect. *See, e.g.*, *Germantown Seventh-Day Adventist Church v. City of Philadelphia*, 54 F.3d 768 (3d Cir. 1995) (finding no RFRA exemption from requirement to add parking spaces as part of church expansion project).

91. For examples of case law in which this distinction operates to exclude claims from RFRA coverage, *see* *Smith v. Fair Emp. & Hous. Comm'n.*, 51 Cal. Rptr. 2d 700, 913 P.2d 909 (1996), *cert. denied*, 117 S. Ct. 2531 (1997); *In re Faulkner*, 165 B.R. 644 (Bankr. W.D. Mo. 1994); *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994).

92. *See Mack*, 80 F.3d at 1179.

93. *See, e.g.*, *Weir v. Nix*, 114 F.3d 817 (8th Cir. 1997) (upholding limitation of worship opportunities of fundamentalist separatist Christian); *Woods v. Evatt*, 876 F. Supp. 756 (D.S.C. 1995) (holding Muslims need not be afforded worship opportunities equal to Christians; inequality not a "substantial burden"), *aff'd without op.*, 68 F.3d 463 (4th Cir. 1995).

ably, these practices (however justified by prison resource limitations) led to favoritism for the relatively mainstream version of the sect and disadvantage for dissenting versions. Nevertheless, courts held that such discrimination did not constitute a RFRA burden, and upheld such practices under the deferential constitutional standards applicable to prison authorities.

Even outside of prison, courts at times held that discrimination against religion generally did not constitute a "substantial burden" under RFRA. In *Fordham University v. Brown*,⁹⁴ the district court upheld a Commerce Department policy which excluded Fordham from government aid in building a radio transmitter on the ground that the station would broadcast a weekly Mass for shut-ins. The government defended its policy on Establishment Clause grounds, which the court held sufficient to justify an exclusion from RFRA's coverage; i.e., that government compliance with a reasonable view of non-establishment could not be held to be an actionable burden under RFRA.⁹⁵

For those claims that cleared the hurdle of "substantial burdens," the statutory tests of compelling interests and least restrictive alternative came into play. Here, too, however, judges found ways to undercut the rigors of these statutory requirements. One might expect that the obvious method for doing this was dilution of the compelling interest portion of the standard; that is, recognizing garden variety state interests as being of overriding importance. The most common instrument of standard-weakening, however, turned out to be more subtle; it involved smuggling in some unspecified measure of expedience or practicality into the calculation of "least restrictive means." Rather than ask whether the state's means were *least* restrictive (and upholding RFRA claims when the means could not be so characterized), some courts asked whether the alternative, less religion-restrictive means were so expensive, cumbersome, or inconvenient that the state could not reasonably be expected to use them.⁹⁶ If the alternative means failed this inquiry, these courts upheld the challenged practice, even though it was demonstrably not the least restrictive.

94. 856 F. Supp. 684, 700-01 (D.D.C. 1994).

95. The government revised its policy of nonestablishment-based exclusion of such aid while the case was pending appeal. See 60 Fed. Reg. 66491 (1995) (to be codified at 15 C.F.R. pt. 2301) (1995). To my knowledge, no one has challenged the revised policy on Establishment Clause grounds, nor would they be likely to prevail if they did. See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995) (invalidating nonestablishment-based exclusion of religiously oriented journal from subsidy for journals of student opinion at state university).

96. See *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996); *Harris v. Chapman*, 97 F.3d 499, 501 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997); *Diaz v. Collins*, 872 F. Supp. 353 (E.D. Tex. 1994), *aff'd*, 114 F.3d 69 (5th Cir. 1997). Similar techniques for weakening the least restrictive means requirement also appeared in non-prison cases. See *In re Newman*, 203 B.R. 468 (Bankr. Kan. 1996).

Thus, whether the device involved a narrow interpretation of “substantial burden” or a state-generous construction of the means-ends requirements of RFRA, courts made it considerably more difficult than they might have for RFRA claims to prevail. As a result, at least insofar as the litigation record demonstrates, RFRA resulted in surprisingly little protection for religion. And, as the caselaw developed that way, the leverage of RFRA claimants in settlement or pre-litigation negotiations with government presumably diminished as well. If the goal of RFRA was to empower religious believers and institutions, it accomplished far less than its backers hoped and promised.

III. THE LESSONS OF RFRA AND THE FUTURE OF RELIGIOUS LIBERTY

The pre-*Smith* law, *Smith* itself, and the RFRA gloss all suggest strongly that a crisply codified doctrine of free exercise exemptions cannot be made to work. Judges could not effectively administer such a doctrine under the Constitution, legislatures could not adequately define the standards to govern such exemptions, and even with a federal statute calling for the reinstatement of the doctrine, judges undermined it in a variety of ways.

Law reformers should keep this history in mind. It suggests that state level RFRA's (should any be enacted) will likely fare no better than the federal RFRA. Although the success rate of nonprison RFRA claims was considerably higher in state courts than in federal courts,⁹⁷ the total number of state cases was small. In any event, the higher success rate in state courts may well have been a function of state courts taking federal law more seriously than federal courts, rather than greater respect in state courts for the claims of religion. State courts construing and applying state level RFRA's would be a new and different phenomenon, driven in part by whatever legislative formulation and history each state produced.

Even if Congress were to enact a new federal RFRA, based perhaps on the spending power, the judicial tendencies analyzed above would make it no more likely than its predecessor to succeed as a policy matter.⁹⁸ At either the state or federal level, special attention to prisons would be salutary. Prisoner litigation is frequent and costly to defend. Moreover, because judges are especially unwilling to impose a strict version of RFRA on prison administrators, such litigation generates interpretations of any general religious liberty

97. See text accompanying *supra* note 69 and attached Appendix.

98. If enforcement is limited to federal agencies monitoring the use of federal funds which they dispense, I predict it will achieve even less than its predecessor. Private enforcement is necessary, though obviously insufficient, to keep the states honest.

statute that in turn will tend to weaken the Act in non-prison litigation.⁹⁹ At the very least, prison cases should be made subject to an explicitly different standard than non-prison cases, so that the results in the latter are not dragged down by the interpretations in the former. Given the pattern of RFRA cases in prison, discussed above,¹⁰⁰ limiting RFRA rights in prison to matters of bodily autonomy might be the soundest solution.

Perhaps a full-scale federal constitutional amendment, designed to enshrine a doctrine of free exercise exemptions into the constitutional text itself, could accomplish the task of robustly protecting religious liberty.¹⁰¹ Were such an amendment to be politically feasible, it might have sufficient force to overcome judicial reluctance to create a robust doctrine of exemptions. Surely courts would take more seriously the command of the entire polity, as represented by an enactment that has successfully completed the debate and deliberation one would expect from the amendment process, than courts took RFRA, which never attracted the kind of rigorous policy debate it deserved.¹⁰² That sort of debate, however, would highlight what politicians fear most; sharp conflicts between intensely held values. Such an amendment is therefore extremely unlikely, precisely because of the conflicts among the forces which would have to support it in order for it to become law. And, if my analysis is correct, even such an amendment would not solve the problem of judicial narrowing by construction, a process I would expect to begin immediately after ratification.

Does this analysis mean that religious liberty in America is in peril, standing as it does at the mercy of a subversive or (at best) unsympathetic judiciary? A more refined view suggests otherwise. I believe that religious liberty will be more than adequately protected in the near future, and for a variety of reasons.¹⁰³ First, and most important, American political culture is sympathetic to the basic idea of freedom from government-backed persecution on religious grounds. Correspondingly, the legal system is already sensitive

99. While I do not think this is inevitable, I do believe it has occurred in the RFRA cases, especially those involving the meaning of "substantial burden," which presumably should be identical in and out of prison.

100. See text accompanying *supra* notes 71-75.

101. This has been proposed, with the operative language being identical to RFRA's. See Nathan Lewin, *It's Time For a Religious Freedom Amendment*, THE WASH. POST, July 3, 1997 at A19 (op-ed calling for a constitutional amendment to overturn the result in *Boerne*).

102. For a more elaborate and general discussion of the difference between constitutional amendments and statutes with similar, constitution-like designs, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993).

103. That RFRA may yet be valid against the federal government counts for little among them.

to outright and intentional state-backed religious oppression, which under current law presumptively violates the First Amendment.¹⁰⁴

Second, *Smith* has engendered active and continued opposition among Justices still on the Supreme Court,¹⁰⁵ including in *Boerne* itself,¹⁰⁶ and may yet be overruled. The Court without question will be far more willing to reconsider its own judgment than to permit Congress to overturn a judicial interpretation of the Constitution. Judicial overruling of *Smith* respects judicial prerogative in declaring the meaning of the Constitution; RFRA, by sharp contrast, directly challenged that prerogative. Longstanding dynamics of power separation and institutional self-protection suggest that the Court is far more likely to overrule itself than to permit another Branch to dictate to it the meaning of the Constitution.

More immediately, the presence of active and continued commitment from judges, lawyers, and academics will invite the discovery of *Smith*'s affirmative potential. That decision, disingenuously or otherwise, suggested that some religious liberty claims might yet prevail. In particular, the *Smith* opinion said that so-called "hybrid" claims (those involving the convergence of religious and secular constitutional rights), and claims involving individualized factual assessment, remain viable candidates for favorable treatment, even if claims for exemption from religion-neutral, generally applicable laws were not.¹⁰⁷ *Lukumi* holds actionable under the First Amendment religious gerrymanders, laws which, upon close inspection, are designed intentionally to disadvantage religion. Moreover, other constitutional doctrines, unchallenged in *Smith*, may occasionally lend support to the claims of religious institutions and religiously motivated actors.¹⁰⁸

104. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

105. See *id.* at 564-77 (Souter, J., concurring); see *Smith*, 494 U.S. at 894-901 (O'Connor, J., concurring).

106. See *Boerne*, 117 S. Ct. at 2176-2185 (O'Connor, J., dissenting); *Id.* at 2185-86 (Souter, J., dissenting).

107. See *Smith*, 494 U.S. at 895. The "individualized assessment" exception in *Smith* is quite promising. It rests on a concern that official discretion, once in exercise, not underweight or discriminate against religion. Professors Sager & Eisgruber have sketched a provocative and innovative theory of constitutional protection for religion around this notion, which they conceptualize as a requirement of "equal regard" for religion. See Lawrence Sager & Christopher Eisgruber, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994). My colleague Bob Tuttle, in a forthcoming piece, will analyze the ways in which religious institutions may rely on this theme of discretion and its abuse in challenging adverse land-use planning decisions. See Robert Tuttle, *Religious Institutions and Land Use Decisions* (manuscript on file with the author).

108. See, e.g., *Bessard v. California Community Colleges*, 867 F. Supp. 1454 (E.D. Cal. 1994) (RFRA and the First Amendment bar application of compulsory loyalty oath to public employee with religious objections to the oath); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455

Even before *Boerne* undid RFRA, courts had already begun to build on these suggestions in a series of decisions which grant relief for religious liberty claims under the state or federal constitutions rather than RFRA. For example, in *Rader v. Johnston*,¹⁰⁹ a district court gave relief to a state university student who wanted to live off-campus for reasons motivated by religion. The court found that the pattern of exemptions in the rules governing off-campus living was not religion-neutral. In *Keeler v. Mayor and City Council of Cumberland*,¹¹⁰ a district court judge who had ruled RFRA unconstitutional nevertheless gave relief to a church opposing historic preservation orders on grounds that the orders constituted an uncompensated taking of private property. And, in some states, state constitutions have been read to provide a platform for religious exemptions.¹¹¹ In *Attorney General v. Desilets*,¹¹² for example, the Supreme Judicial Court of Massachusetts ruled that the state constitution presumptively protected a landlord against being compelled to rent an apartment to unmarried cohabitants; the landlord had refused to do so on religious grounds. Similar claims by landlords under RFRA had twice been rejected by state supreme courts.¹¹³

What most of the judicial victories for religious liberty in the past five years have in common cannot be reduced to any simple, RFRA-type formula. Instead, what they seem to reveal is judicial capability to assess the competing equities and protect religion when it is suffering a significant harm and the state's interest in inflicting that harm is weak. Whether one calls such a process common law constitutionalism, ad hoc interest balancing, or doing equity under the Constitution, these cases reveal that judges are as likely to rule favorably for religion in "truly sympathetic" cases as they were to undercut RFRA by construction in "truly unsympathetic" ones. Moreover, the claims most likely to receive favorable treatment are those which (following Dean

(D.C. Cir. 1996) (holding RFRA and anti-entanglement concerns of the Establishment Clause bar gender discrimination suit against religiously affiliated university by a female denied tenure in the canon law department); *see also* *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (Establishment Clause and RFRA bar inquiry into employment relations between church and its clergy). *Bessard, Catholic University*, and *Powell* may themselves be "hybrid rights" decisions.

109. 924 F. Supp. 1540 (D. Neb. 1996).

110. 940 F. Supp. 879 (D. Md. 1996).

111. *See generally* Angela Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275. The enactment of RFRA had tended to undercut the development of state constitutional law; the invalidation of RFRA may reinvigorate that process.

112. 418 Mass. 316, 636 N.E.2d 233 (1994).

113. *See* *Smith v. Fair Emp. & Hous. Comm.*, 51 Cal. Rptr. 2d 700 (1996), *cert. denied*, 117 S. Ct. 2531 (1997); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 S. Ct. 979 (1994).

Rodney Smith) demonstrate strong claims of individual conscience,¹¹⁴ or (following Professor Laycock) institutional survival and autonomy,¹¹⁵ especially when such claims are opposed by weak state interests.

The idea that religion will fare better under constitutional standards, unarticulated in any sweeping and general way, than under the strict codification presented by RFRA, needs some explaining. Perhaps religious exemption claims fare best when the law that governs them is deeply rooted in common law methodology, fact-specific and only weakly attached to overarching norms. Such a method permits courts to locate sympathetic claims without excessive fear that one favorable result for religion will loose the horrible parade. Moreover, a methodology of this sort permits religion-favoring decisions to be grounded in closely woven tapestries of religious practice, institution, history, and community.¹¹⁶ Such a grounding may permit subtle distinctions, and reduce anti-religious resentment by making special treatment more palatable in individual cases.

Without question, dangers of invidious discrimination attend constitutional adjudication conducted on these terms. The absence of accessible public rules to govern disputes between religion and the state aggravates that very possibility. Nevertheless, such a process is superior to disingenuous codifications of religious liberty, and to more particularistic accommodations by legislatures, in which only politically influential sects will

114. See *Bessard v. California Community Colleges*, 867 F. Supp. 1454 (E.D. Cal. 1994) (holding state may not force loyalty oaths on Jehovah's Witnesses in public employment); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding University cannot insist that students who object to dorm life on religious grounds live in dormitory in light of the pattern of other exemptions from the requirement); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994) (holding state constitution presumptively protects landlord who refuses to rent to unmarried cohabitants); see generally Rodney Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993).

115. See *Keeler v. Cumberland*, 951 F. Supp. 83 (D. Md. 1997) (holding constitutional limits on church destroying historic preservation order); *EEOC v. The Catholic Univ. Of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (holding church controlled university is not subject to gender discrimination suit by disappointed female denied tenure in Canon Law department); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (holding church not subject to Age Discrimination suit by high school theology teacher). See generally Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). I have more doubt as to the appropriateness of special treatment for religious institutions as distinguished from claims of personal religious conscience. See Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L. REV. 391 (1987).

116. For the best example of this sort of justification for religious exemptions, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

be heard. Of our public decision-making practices, only adjudication imposes obligations to decide and give public reasons for the decision.¹¹⁷

IV. CONCLUSION

All along, RFRA supporters have held out the Act as the backstop for religion in America. The Act would take over the task of the Free Exercise Clause, i.e., block all of the horrible things that government might inadvertently do to religious practice and community.¹¹⁸ The results of RFRA in action, however, suggest that RFRA was such a backstop in a most happenstance way, and hence did not constitute the source of security its proponents claimed. The backstop against state oppression of religion has been, and remains, the Constitution.

The RFRA story demonstrates that blunt and codified rules are poor tools for the task of locating those special occasions when different and favorable treatment for religion is warranted. What made good political strategy in enacting RFRA, the high road of generality and vigorous statutory language, made perfectly bad legal strategy in implementing it. In the end, RFRA was too strenuous for judges to stomach; desiring to reach results they thought reasonable, they gutted RFRA by construction. Only in prisons, in which the constitutional doctrines are highly deferential to authority¹¹⁹ where RFRA was to be otherwise, did RFRA systematically outperform the Constitution itself (and not by much). RFRA has been a disappointment for many reasons, but among them was its unfulfillable promise that judges would construe it as written and protect religion across the board. The results included diverse and dubious interpretations of RFRA, and crushed expectations concerning its protection of religious liberty in actual practice. RFRA demonstrated that more may indeed be less, and that the process of constitutional adjudication should be allowed to work itself out on questions of religious liberty after *Smith*.

General legislation to "help" religion is politically tempting, but it inevitably will prove to be a mistake. Such legislation will foment litigation and aid religion little. Indeed, to the extent that the litigation and costs of its defense generate anti-religious backlash, as is entirely possible, such legislation has the potential to hurt religion more than it helps. Accordingly, I have simple advice for legislators, especially for the short run. Trust the courts to reach

117. For elaboration of this view, see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 599-609 (1991).

118. See House RFRA Hearings, *supra* note 9, at 14 (statement of Rep. Solarz that RFRA is needed because, under *Smith*, government could bar the use of wine in religious sacraments).

119. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S. Ct. 2400 (1987).

reasonable results under existing state and federal law. Recognize that religious liberty is not broken, and that legislatures cannot fix it. At the very least, be sure that any new enactment will produce results more religion-favorable than current law. In brief, for most lawmakers, my recommendation is simply to let it be.

CITATION APPENDIX – RFRA CLAIMS IN WHICH RELIEF WAS GRANTED OR DENIED (PRE-*BOERNE*)

I. FEDERAL COURTS – NON-PRISON CLAIMS

A. Relief Under RFRA Granted (Including Preliminary Relief)

1. *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (prohibitions on military chaplains lobbying Congress imposes a substantial burden on chaplains' free exercise rights under RFRA).

2. *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997) (RFRA violated by district attorney's action in taping a suspect's intended confession to priest while suspect was in county jail).

3. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (RFRA precludes enforcement of weapons ban against students whose religious beliefs required them at all times to carry ceremonial knives).

4. *United States v. Gonzales*, 957 F. Supp. 1225 (D.N.M. 1997) (regulations governing Native Americans seeking to kill bald eagles for religious purposes did not constitute least restrictive means by which to further government's compelling interest in propagation in survival of bald eagle and thus violated RFRA).

5. *Stuart Circle Parish v. Board of Zoning Appeals of Richmond*, 946 F. Supp. 1225 (E.D. Va. 1996) (zoning code which limited feeding and housing programs for homeless within churches to no more than 30 homeless individuals for up to seven days between October and April violates RFRA).

6. *Western Presbyterian Church v. Board of Zoning Adjustment of D.C.*, 862 F. Supp. 538 (D.D.C. 1994) (enforcement of zoning regulations and decision of zoning administrator and board that prohibited church from feeding homeless persons on its premises violates RFRA).

7. *Rourke v. New York State Dep't of Correctional Servs.*, 915 F. Supp. 525 (N.D.N.Y. 1995) (prison regulation barring long hair on corrections officer violates RFRA as applied to a member of Mohawk Nation who practiced traditional Longhouse religion).

8. *Bessard v. California Community Colleges*, 867 F. Supp. 1454 (E.D. Cal. 1994) (requiring loyalty oath of Jehovah's Witnesses as condition

precedent to consideration for employment at community college violates RFRA).

9. *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (RFRA precludes recovery as fraudulent transfers of pre-petition tithing contributions to churches by debtors in bankruptcy), *vacated and remanded*, 117 S. Ct. 2502 (1997).

B. Relief Under RFRA Denied¹²⁰

1. *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878 (N.D. Ill. 1996) (denial of special use permit to build a new church on land zoned for business and commercial use only is not a substantial burden within the meaning of RFRA).

2. *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (denial of church request that a piece of land be denoted as semi-public use in order for it to build a church and other buildings to serve homeless men does not constitute substantial burden).

3. *Germantown Seventh Day Adventist Church v. City of Philadelphia*, 1994 WL 470191 (E.D. Pa. 1994) (*mem.*) (denial of permission to Church to build addition because Church had not complied with city requirements for parking spaces for nonresidential use in residential district does not constitute substantial burden).

4. *Thirty v. Carlson*, 78 F.3d 1491 (10th Cir. 1996) (RFRA action to enjoin condemnation of real estate to be used in connection with highway construction project, on grounds that plaintiffs' stillborn baby was buried within parcel rejected for lack of substantial burden).

5. *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996) (restrictions in Freedom of Access to Clinic Entrances Act on impeding access do not substantially burden the religious beliefs and practices of abortion protesters).

6. *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (same as *Terry*).

7. *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994) (same as *Terry*; alternatively holding that government has compelling interest in protecting access to abortion clinics).

8. *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 55 (1995) (same as *Council for Life Coalition*).

9. *Planned Parenthood Ass'n of Southeastern Pa., Inc. v. Walton*, 949 F. Supp. 290 (E.D. Pa. 1996) (same as *American Life League*).

120. This enumeration excludes decisions in which relief under RFRA was denied because the court held RFRA unconstitutional. *See, e.g., Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591 (D. Md. 1996).

10. *United States v. Dinwiddie*, 885 F. Supp. 1286 (W.D. Mo. 1995) (same as *Cheffer*).

11. *United States v. Brock*, 863 F. Supp. 851 (E.D. Wis. 1994); *mandamus denied sub nom.*, *Hatch v. Stadtmueller*, 141 F.3d 1510 (7th Cir. 1994); and *aff'd sub nom.*, *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996), *cert. denied*, *Hatch v. United States*, 117 S. Ct. 507 (1996) (same as *Cheffer*).

12. *Riely v. Reno*, 860 F. Supp. 693 (D. Ariz. 1994) (same as *Council for Life Coalition*).

13. *In re Bloch*, 207 B.R. 944 (Bankr. D. Colo. 1997) (recovery by trustee in bankruptcy of tithes to church is not a substantial burden and least restrictive means of achieving a compelling government interest).

14. *In re Newman*, 203 B.R. 468 (Bankr. D. Kan. 1996) (recovery by trustee in bankruptcy of tithes to church is not a substantial burden on debtor's religion).

15. *In re Scroggins*, 209 B.R. 727 (Bankr. D. Ariz. 1997) (bankruptcy court order requiring parochial school to release transcripts of students filing for bankruptcy does not substantially burden religion).

16. *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997) (government has compelling interest in removing human rights commissioner for making anti-gay statements).

17. *Helland v. South Bend Community Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996) (public school's removal of teacher from substitute teacher list because of his improper interjection of religion into classroom is least restrictive means of furthering a compelling government interest), *cert. denied*, 117 S. Ct. 769 (1997).

18. *Silk v. City of Chicago*, 1996 U.S. Dist. LEXIS 8334 (N.D. Ill. 1996) (denial of adjustment of shift time to attend church does not create a substantial burden on religion).

19. *Blanken v. Ohio Dep't of Rehabilitation and Correction*, 944 F. Supp. 1359 (S.D. Ohio 1996) (Ohio prisons have compelling interest in applying grooming policy requiring short hair to prison employee).

20. *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997) (government has compelling interest in protecting bald eagles sufficient to overcome RFRA claim by Native Americans seeking eagle feathers and parts for religious use).

21. *United States v. Lundquist*, 932 F. Supp. 1237 (D. Or. 1996) (same as *Hugs*).

22. *United States v. Jim*, 888 F. Supp. 1058 (D. Or. 1995) (same as *Hugs*).

23. *United States v. DeWitt*, 95 F.3d 1374 (8th Cir. 1996) (RFRA defense to drug charges rejected on grounds that defendant's beliefs were not religious).

24. *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996) (same as *DeWitt*).

25. *Klemka v. Nichols*, 943 F. Supp. 470 (M.D. Pa. 1996) (arrest of mother, on grounds of child endangerment, in church did not substantially burden her religious exercise).

26. *Levinson-Roth v. Parries*, 872 F. Supp. 1439 (D. Md. 1995) (forcing Orthodox woman to remove wig as part of search incident to arrest does not violate RFRA).

27. *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (*per curiam*) (laws against growing marijuana and manufacturing peyote are least restrictive means of fulfilling a compelling government interest, and therefore do not violate RFRA as applied to defendant with religious motivation for drug use), *cert. denied*, *Brown v. United States*, 116 S. Ct. 1581 (1996).

28. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), *cert. denied*, *Goehring v. del Junco*, 117 S. Ct. 1335 (1997) (mandatory student registration fee, used in part to cover abortion services, does not substantially burden religion of students forced to pay the fee).

29. *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995) (requiring parents to pay for cued speech transliterator for their child in private sectarian school, when the state would pay if the child were enrolled in public school, does not constitute substantial burden), *cert. denied*, 116 S. Ct. 706 (1996).

30. *Swanson v. Guthrie Indep. Sch. Dist. No. I-1*, 942 F. Supp. 511 (W.D. Okla. 1996) (refusing request of child, home schooled for religious reasons, to take part-time classes at public school does not constitute a substantial burden).

31. *Harless v. Darr*, 937 F. Supp. 1339 (S.D. Ind. 1996) (refusing to permit first-grader to distribute religious tracts to other first-graders in his public school class does not constitute substantial burden).

32. *Battles v. Anne Arundel County Bd. of Educ.*, 904 F. Supp. 471 (D. Md. 1995) (Maryland rule requiring parents to consent to state monitoring of home schooling does not constitute substantial burden), *aff'd without op.*, 95 F.3d 41 (4th Cir. 1996).

33. *Trinity United Methodist Parish v. Board of Educ. of City Sch. Dist. of City of Newburgh*, 907 F. Supp. 707 (S.D.N.Y. 1995) (city school district refusal of permission to group to perform magic show which includes religious service in school during nonschool hours does not implicate matter central to group's beliefs and therefore does not constitute substantial burden).

34. *Bauchman v. West High Sch.*, 900 F. Supp. 254 (D. Utah 1995) (public high school student, who is Jewish, forced to choose between singing explicitly religious songs in school choir or voluntarily resigning during the Christmas season and accepting an A and honors is not substantially burdened in her religious exercise).

35. *Gospel Missions of Am. v. Bennett*, 951 F. Supp. 1429 (C.D. Cal. 1997) (city and county ordinances which reasonably regulate financial solicitations for religious mission does not constitute substantial burden).

36. *Storm v. Town of Woodstock*, 944 F. Supp. 139 (N.D.N.Y. 1996) (prohibition on evening parking near site of spiritual meetings does not constitute substantial burden).

37. *Ellis v. Graves*, No. 95-C-6800, 1996 WL 411469 (N.D. Ill. Jul 18, 1996) (complaint of local conspiracy against church and its minister does not present a substantial burden).

38. *Dickerson v. Stuart*, 877 F. Supp. 1556 (M.D. Fla. 1995) (state's midwifery practice law does not present substantial burden on religious exercise of woman who, in accordance with her religious beliefs, prays for, encourages, and assists parents in giving birth to their children at home).

39. *Fordham Univ. v. Brown*, 856 F. Supp. 684 (D.D.C. 1994) (denial of funding for University radio transmitter, on grounds that radio station will broadcast Catholic Mass, does not constitute substantial burden).

40. *In re Turner*, 193 B.R. 548 (Bankr. N.D. Cal. 1996) (requiring use of social security number on bankruptcy forms does not constitute substantial burden on form preparer with religious objections to use of the number).

41. *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994) (police department investigation of its Assistant Police Chief, triggered in part by his socially conservative religious views, does not constitute substantial burden).

II. FEDERAL COURTS—PRISON CLAIMS

A. Relief Under RFRA Granted (Including Preliminary Relief)

1. *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996) (application of prison regulation banning wearing of jewelry to religious crucifixes violates RFRA), *vacated and remanded*, 117 S. Ct. 2502 (1997).

2. *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (requiring Rastafarian prison inmate to undergo screening test for latent tuberculosis violates RFRA).

3. *Carty v. Farrelly*, 957 F. Supp. 727 (D.V.I. 1997) (officials' strip searches impermissibly burdened pretrial detainees' right to exercise freely their religion in violation of RFRA).

4. *Estep v. Dent*, 914 F. Supp. 1462 (W.D. Ky. 1996) (likelihood of success on merits of prison inmate's claim that prison policy requiring him to cut his earlocks violated RFRA), *aff'd without opinion sub. nom.*, *Estep v. O'Dea*, 82 F.3d 417 (6th Cir. 1996).

5. *Alameen v. Coughlin*, 892 F. Supp. 440 (E.D.N.Y. 1995) (correctional facility policy prohibiting display of black dhikr beads by Sufi Muslim inmates to aid in reciting or recalling of names of Allah is not least restrictive means of preventing use of beads to signal gang affiliation, and violates RFRA).

6. *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994) (Likelihood of success on RFRA merits of challenge to prison rule prohibiting inmates from wearing Orisha beads in conformity with Santeria religion).

7. *Rodriguez v. Coughlin*, No. 94 Civ. 2290(55), 1994 WL 174298, (S.D.N.Y. May 4, 1994) (sister case to *Campos*).

8. *Luckette v. Lewis*, 883 F. Supp. 471 (D. Ariz. 1995) (likelihood of success on merits of RFRA challenge to prison policies involving prisoners' attempts to maintain kosher diet, keep facial hair at certain length, and wear head covering of particular color).

9. *Lewis v. Scott*, 910 F. Supp. 282 (E.D. Tex. 1995) (enforcement of prison grooming policy, to extent that it prevented Orthodox Muslim inmate from growing 1/4 inch beard for religious reasons, violated RFRA), *rev'd*, 127 F.3d 33 (5th Cir. 1997) (post-*Boerne*).

B. Relief Under RFRA Denied

1. *Malik v. Kindt*, 107 F.3d 21 (10th Cir. 1997) (Table, Text in Westlaw), Unpublished Disposition, 1997 WL 39429 (10th Cir. 1997) (denying prisoner the right to attend Friday night Muslim religious services while placed in the Special Housing Unit is least restrictive means to achieve compelling state interest).

2. *Haff v. Cooke*, 923 F. Supp. 1104 (E.D. Wis. 1996) (seizure of prison inmate's white supremacist reading materials does not constitute a substantial burden under RFRA).

3. *Lemay v. Dubois*, No. CIV. A. 95-11912-PBS, 1996 WL 463680 (D. Mass. July 29, 1996) (denying Native American prisoner access to spiritual necklace and medallion, deer tail hair tie, feathers, sage, and cedar, does not constitute substantial burden under RFRA).

4. *Weir v. Nix*, 114 F.3d 817 (8th Cir. 1997) (series of restrictions on prison inmate who is fundamentalist separatist Christian, including rules limiting range of Protestant services available and number of books in a cell do not constitute a substantial burden).

5. *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997) (prison ban on length of hair and possession of sacred items does not constitute substantial burden under RFRA).

6. *Bruton v. McGinnis*, 110 F.3d 63 (6th Cir. 1997) (denial of prison inmate's right to have a Christian identity pin or wear specific Christian identity T-shirt does not constitute a substantial burden under RFRA).

7. *May v. Baldwin*, 109 F.3d 557 (9th Cir. 1997) (requiring Rastafarian inmate to unbraided dreadlocks is least restrictive means to compelling interest) *cert. denied*, 118 S. Ct. 312 (1997).

8. *Canell v. Jacobson*, 108 F.3d 336 (9th Cir. 1997) (limitations on arrangements for ritual washing by Sunni Muslim do not constitute substantial burden).

9. *Brock v. Carroll*, 107 F.3d 241 (4th Cir. 1997) (confiscation of inmate's prayer pipe did not constitute substantial burden), *cert. denied*, 118 S. Ct. 320 (1997).

10. *Bowman v. Department of Corrections*, 108 F.3d 336 (9th Cir. 1997) (official refusal to photocopy announcement of prayer meeting does not constitute substantial burden).

11. *Bailey v. Ignacio*, 106 F.3d 406 (9th Cir. 1997) (failure to provide nutritionally adequate diet during the Holy Week of Ramadan does not constitute a substantial burden).

12. *Mollie v. Ward*, 106 F.3d 414 (Table, Text in Westlaw), Unpublished Disposition, 1997 WL 22525 (10th Cir. 1997) (series of complaints about inadequate opportunity to follow dictates of Islam; no substantial burden).

13. *Werner v. McCotter*, 106 F.3d 414 (10th Cir. 1997) (officials' failure to provide to Native American shamanist either 1) Cherokee Native American spiritual advisor or 2) religious literature or religious symbols does not constitute substantial burden), *cert. denied*, 117 S. Ct. 1852 (1997), *reh'g denied*, 118 S. Ct. 6 (1997).

14. *Arguello v. Duckworth*, 106 F.3d 403 (7th Cir. 1997) (government has compelling interest in prohibiting prisoner from possessing medallions, bandanas, and sacred herbs claimed central to his native American religion).

15. *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996) (confiscation of religious book that advocated violence against Jews and government does not constitute a substantial burden).

16. *Sunni Muslim Community of Or. State Penitentiary v. Jacobson*, 100 F.3d 964 (9th Cir. 1996) (permitting inmates, considered by other inmates not to be true Sunni Muslims, to attend Sunni service does not violate RFRA).

17. *Dyer v. Stevens*, 99 F.3d 1138 (6th Cir. 1996) (denial of pork-free diet to county jail inmate does not violate the Act), *cert. denied*, 117 S. Ct. 1266 (1997).

18. *Harris v. Chapman*, 97 F.3d 499 (11th Cir. 1996) (state has compelling interest in cutting inmate's hair), *cert. denied*, 117 S. Ct. 2422 (1997).

19. *Cubero v. Burton*, 96 F.3d 1450 (7th Cir. 1996) (denial to Native American inmates of religious materials, permission to "smudge" in their rooms, and maintenance of sweat lodge does not constitute substantial burden).

20. *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996) (state has compelling interest in denying inmate's religiously-motivated request to have same-race inmate).

21. *Dugger v. Copeland*, 89 F.3d 845 (9th Cir. 1996) (similar to *Ochs*).

22. *Boyd v. Arizona*, 87 F.3d 1317 (9th Cir. 1996) (prison regulations that limit inmate's physical contact with his wife do not constitute a substantial burden).

23. *Rust v. Clarke*, 89 F.3d 841 (8th Cir. 1996) (compelling interest in denying religious accommodations sought by practitioners of Asatru religion), *cert. denied*, 117 S. Ct. 398 (1996).

24. *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996) (compelling interest in requiring inmates to use religious names and commitment names on incoming mail).

25. *Ali v. Denver Reception & Diagnostic Ctr.*, 82 F.3d 425 (10th Cir. 1996) (refusal to provide Orthodox Muslim inmate with meat prepared according to requirements of Halal diet does not constitute a substantial burden).

26. *Smith v. Beatty*, 82 F.3d 420 (7th Cir. 1996) (denial of right to engage in communal worship while in segregation for assault does not constitute substantial burden).

27. *Flick v. Leonard*, 81 F.3d 160 (6th Cir. 1996) (denial of access to particular dietary program does not constitute a substantial burden).

28. *Hunter v. Baldwin*, 78 F.3d 593 (9th Cir. 1996) (returning Christian identity pamphlet to publisher without showing it to inmate does not constitute substantial burden).

29. *Prins v. Coughlin*, 76 F.3d 504 (2d Cir. 1996) (prisoner transfer did not constitute substantial burden).

30. *Miller-Bey v. Schultz*, 77 F.3d 482 (6th Cir. 1996) (denial of inmate's religious documentation or "nationality" card does not constitute substantial burden).

31. *Wynn v. McManus*, 76 F.3d 391 (9th Cir. 1996) (policy of sign up for and rationing attendance at religious services does not constitute substantial burden).

32. *Coronel v. Hawaii*, 76 F.3d 385 (9th Cir. 1996) (database does not contain information beyond denial of RFRA claim).

33. *Dickinson v. Herman*, 85 F.3d 635 (9th Cir. 1996) (state has compelling interest in mandatory tuberculosis test for inmates).

34. *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (state is using least restrictive means to compelling interest in denying to Native American inmate the right to wear his hair long and have access to a sweat lodge), *reh'g en banc denied*, 74 F.3d 1545 (8th Cir. 1996); *cert. denied*, 117 S. Ct. 193 (1996)

35. *Shabazz v. Parsons*, 73 F.3d 374 (10th Cir. 1996) (denial of access to magazine Muhammad Speaks does not constitute substantial burden), *cert. denied*, 116 S. Ct. 1834 (1996).

36. *Abate v. Walton*, 77 F.3d 488 (9th Cir. 1996) (denial of special religious diet to claimed member of Ethiopian Orthodox Tewahido Church does not constitute substantial burden).

37. *Hall v. Sullivan*, 73 F.3d 373 (10th Cir. 1995) (denial of rights to specific literature and separate meetings of Islamic sect does not constitute substantial burden).

38. *Treff v. Cook*, 70 F.3d 123 (10th Cir. 1995) (rejecting claim of insufficient access to Jewish services within prison).

39. *Johnson v. Baker*, 67 F.3d 299 (6th Cir. 1995) (denial of separate services for specific Islamic sect does not constitute substantial burden).

40. *Dickinson v. Austin*, 60 F.3d 832 (9th Cir. 1995) (denial of right to wear a swastika medallion does not constitute substantial burden).

41. *Miller v. Fields*, 56 F.3d 78 (10th Cir. 1995) (refusal of Kosher diet does not violate the Act).

42. *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (refusal to provide full Pentecostal services does not constitute substantial burden).

43. *Ingalls v. Florio*, 968 F. Supp. 193 (D.N.J. 1997) (rationing inmate opportunity to attend religious services does not violate the Act).

44. *Rojas v. Cambra*, No. C96-2990 VRW, 1997 WL 294409 (N.D. Cal. May 20, 1997) (obligation to identify self and others as gang members as condition of release from administrative segregation does not constitute substantial burden).

45. *Collins v. Scott*, 961 F. Supp. 1009 (E.D. Tex. 1997) (strip search and use of force on Muslim inmate does not constitute substantial burden).

46. *Franklin v. District of Columbia*, 960 F. Supp. 394 (D.D.C. 1997) (failure to provide Spanish-speaking staff to Spanish-speaking inmates does not constitute substantial burden).

47. *Williams v. Muhammad*, No. 96 C- 4291, 1997 WL 136270 (N.D. Ill. Mar. 20, 1997) (refusal to release religious cassette tapes to inmate does not constitute substantial burden).

48. *Davie v. Wingard*, 958 F. Supp. 1244 (S.D. Ohio 1997) (prison grooming policy is least restrictive means to achieve compelling state interest).

49. *Abdul-Malik v. Goord*, No. 96 CIV. 1021-DLC, 1997 WL 83402 (S.D.N.Y. Feb. 27, 1997) (failure to provide Muslim inmates with Halal meat does not constitute substantial burden).

50. *Austin v. Guarini*, No. 95-5447, 1997 WL 47566 (E.D. Pa., Feb. 3, 1997) (discriminatory requirement of request form to attend religious service and arbitrary removal of name from list of those so requesting do not constitute substantial burden).

51. *Gholson v. Murry*, 953 F. Supp. 709 (E.D. Va. 1997) (prison transfer and its impact on inmate diet does not constitute substantial burden)

52. *Jones v. Roth*, 950 F. Supp. 254 (N.D. Ill. 1996) (refusal to accommodate particular needs of Muslim prisoner with respect to Ramadan is least restrictive means to achieve compelling state interest).

53. *Africa v. Vaughn*, No. CIV 96-649, 1996 WL 677515 (E.D. Pa. Nov. 21, 1996) (denial of visitation rights for spouse of inmate who was segregated for tuberculosis serves compelling governmental interest).

54. *Counts v. Newhart*, 951 F. Supp. 579 (E.D. Va. 1996) (denial of request for particular religious service does not violate Act), *aff'd without op.*, 116 F.3d 1473 (4th Cir. 1997).

55. *Metheney v. Anderson*, 953 F. Supp. 854 (N.D. Ohio 1996) (confiscation of inmate's religious materials concerning Aryan Nation does not constitute substantial burden).

56. *Manley v. Fordice*, 945 F. Supp. 132 (S.D. Miss. 1996) (prohibition against use of television and radios does not constitute substantial burden), *aff'd. by* 132 F.3d 1455 (5th Cir. 1997).

57. *Jenkins v. Angelone*, 948 F. Supp. 543 (E.D. Va. 1996) (refusal to accommodate dietary and other religious needs of African Hebrew Israelite does not violate the Act).

58. *Clark v. Stotts*, No. 93-3258- DES, 1996 WL 583454 (D. Kan. Sept. 9, 1996) (prohibition on head gear does not constitute substantial burden).

59. *Turner-Bey v. Lee*, 935 F. Supp. 702 (D. Md. 1996) (removal of crown from inmate does not constitute substantial burden).

60. *Emel v. Mensinger*, No. CIV.A. 95-5197, 1996 WL 468673 (E.D. Pa. Aug. 15, 1996) (prohibition on burning candles or paper during prayer does not constitute substantial burden and in any event achieves compelling interest).

61. *Owen v. Horsely*, No. C-95-4516-EFL, 1996 WL 478960 (N.D. Cal. Aug. 9, 1996) (denial of Kosher diet during jail incarceration is related to compelling governmental interest).

62. *Cockrell-El v. District of Columbia*, 937 F. Supp. 18 (D.D.C. 1996) (inability to get to and from religious service without harassment does not constitute substantial burden).

63. *Karolis v. New Jersey Dept. of Corrections*, 935 F. Supp. 523 (D.N.J. 1996) (requiring Christian Scientist to submit to tuberculosis screening is least restrictive means to achieve compelling state interest).

64. *Reese v. Coughlin*, No. 93 CIV 4748LAP, 1996 WL 374166 (S.D.N.Y. July 3, 1996) (denial of tarot cards and pentagram to Wiccan inmate does not constitute substantial burden).

65. *Watson v. Ivester*, No. 4:95 CV 588, DDN, 1996 WL 288994 (E.D. Mo. Mar. 19, 1996) (order from corrections officer not to pray does not constitute substantial burden).

66. *Lucero v. Hensley*, 920 F. Supp. 1067 (C.D. Cal. 1996) (refusal of animal skins and Native American spiritual leader do not constitute substantial burden).

67. *Abdul-Akbar v. Department of Corrections*, 910 F. Supp. 986 (D. Del. 1995) (refusal of permission to wear Kufi does not constitute substantial burden), *aff'd without op.*, 111 F.3d 125 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 144 (1997).

68. *Muhammad v. New York Dept. of Corrections*, 904 F. Supp. 161 (S.D.N.Y. 1995) (refusal to provide Nation of Islam with chaplains, religious services, texts, and holiday accommodations does not constitute substantial burden).

69. *Crosley-El v. Berge*, 896 F. Supp. 885 (E.D. Wis. 1995) (refusal to supply religious services for Moorish prisoner does not constitute substantial burden).

70. *Ishmawiyl v. Vaughn*, No. CIV. A. 94-7544, 1995 WL 461949 (E.D. Pa. Aug. 1, 1995) (requiring inmate's mother to lift facial veil in presence of male non-family members, as condition of visitation, is least restrictive means of achieving a compelling state interest).

71. *Reimann v. Murphy*, 897 F. Supp. 398 (E.D. Wis. 1995) (refusal to deliver religious newspaper, published by Church of the Creator, to inmate does not constitute substantial burden and is least restrictive means for achieving compelling state interest).

72. *George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (denial of access to religiously oriented reading materials is least restrictive means of achieving compelling state interest).

73. *Rhinehart v. Gomez*, No. 93-Civ. 3747, 1995 WL 364339 (N.D. Cal. June 8, 1995) (compulsory tuberculosis test performed on Muslim inmate does not constitute substantial burden).

74. *Best v. Kelly*, 879 F. Supp. 305 (W.D.N.Y. 1995) (removal of prisoner from alternative diet, denial of his right to attend the Jewish congregation services, and refusal of his right to wear yarmulke does not constitute substantial burden and is least restrictive means to achieve compelling state interest).

75. *Phipps v. Parker*, 879 F. Supp. 734 (W.D. Ky. 1995) (requiring claimed Orthodox Hasidic Jew to cut his hair short is least restrictive means to compelling governmental interest).

76. *Loden v. Peters*, No. 92 C.20209, 1995 WL 89951 (N.D. Ill. Mar. 1, 1995) (prohibition on inmate's worshiping in the nude and withholding of spiritual documents he received in the mail do not constitute substantial burden and are least restrictive means to achieve compelling governmental interest).

77. *Davidson v. Davis*, No. Civ. 4040 (SWK), 1995 WL 60732 (S.D.N.Y. Feb. 14, 1995) (denial of access to Jewish chaplain does not constitute substantial burden).

78. *Woods v. Evatt*, 876 F. Supp. 756 (D.S.C. 1995) (refusal to accommodate Muslim faith equivalently to accommodations made to Christian faith does not constitute substantial burden), *aff'd by*, 68 F.3d 463 (4th Cir. 1995).

79. *Robinson v. Klotz*, No. CIV. A. 94-1993, 1995 WL 27479 (E.D. Pa. Jan. 23, 1995) (loss of opportunity to pursue faith to inmate in administrative segregation does not constitute substantial burden).

80. *Boone v. Commissioner of Prisons*, No. CIV. A. 93-5074, 1994 WL 383590 (E.D. Pa. July 21, 1994) (confiscation of documents and fifteen-day cell restriction did not constitute substantial burden).

81. *Allah v. Beyer*, No. Civ. 92-0651 (GEB), 1994 WL 549614 (D.N.J. Mar. 29, 1994) (interstate transfer of inmate is least restrictive means of accomplishing compelling governmental interest).

82. *Sardon v. Romero*, No. 95C. 5084, 1997 WL 285496 (N.D. Ill. May 21, 1997) (refusal to allow inmate to receive certain religious materials does not constitute substantial burden).

83. *Williams v. Roberts*, No. 96C. 4290, 1997 WL 136268 (N.D. Ill. Mar. 20, 1997) (failure to receive Jehovah's Witness publications does not constitute substantial burden).

84. *United States v. Marks*, 947 F. Supp. 858 (E.D. Pa. 1996) (state has compelling interest in refusing to release from jail an inmate who wished to participate in religious ritual commemorating his mother's death).

85. *Eskew v. Baker*, No. Civ. N-94-2822, 1996 WL 807889 (D. Md. May 2, 1996) (withholding inmate's Ku Klux Klan newspaper does not constitute substantial burden).

III. STATE COURTS—NON-PRISON CLAIMS

A. Relief Under RFRA Granted (Including Preliminary Relief)

1. *Horen v. Commonwealth*, 23 Va. App. 735, 479 S.E.2d 553 (1997) (statute criminalizing possession of wild bird feathers and parts, as applied to Native American couple, violates RFRA).

2. *State v. Singh*, No. C-950777, 1996 WL 932930 (Ohio Ct. App. Dec. 31, 1996) (statute criminalizing the carrying of concealed weapons, as applied to member of Sikh religion carrying kirpan, or symbolic sword, sheathed and sewn fast to the waistband of his undergarment violates RFRA).

3. *The Jesus Ctr. v. Farmington Hills Zoning Bd.*, 215 Mich. App. 54, 544 N.W.2d 698 (1996) (zoning board's refusal to permit church to operate homeless shelter as an "accessory use" violates RFRA).

4. *Porth v. Roman Catholic Diocese of Kalamazoo*, 209 Mich. App. 630, 532 N.W.2d 195, (Mich. Ct. App. 1995) (RFRA bars application of anti-religious discrimination provision in state civil rights law).

5. *State v. Miller*, 196 Wis. 2d 238, 538 N.W.2d 573 (Wis. Ct. App. 1995) (RFRA, and state constitution, prohibit application to members of the Old Order Amish of state law requiring display of red and orange triangular slow-moving vehicle emblem on horse-drawn buggies).

6. *Hunt v. Hunt*, 162 Vt. 423, 648 A.2d 843 (1994) (father who has failed for religious reasons to pay child support may be held to the support order, but RFRA precludes contempt order and incarceration for nonpayment).

7. *Fence v. Jackson County*, 135 Or. App. 574, 900 P.2d 524 (1995) (County's prohibition of "outdoor mass gatherings," as applied to Native American ceremonies, violates RFRA).

B. Relief Under RFRA Denied

1. *Gallo v. Salesian Soc., Inc.*, 290 N.J. Super. 616, 676 A.2d 580 (Super Ct. App. Div. 1996) (application of state law prohibiting age and gender discrimination to Catholic high school does not constitute substantial burden).

2. *Adoption of Brooke*, 42 Mass. App. Ct. 680, 679 N.E.2d 569 (1997) (placement of child for adoption in non-Christian home, despite request to the contrary by Catholic biological mother, does not constitute substantial burden and accomplishes compelling interest), *review denied*, 425 Mass. 1105 (1997).

3. *Jasniewski v. Rushing*, 287 Ill. App. 3d 655, 678 N.E.2d 743 (1997) (prohibition on discrimination against unmarried cohabitants, as applied to lessor who wished to discriminate for religiously motivated reasons, is least restrictive means to achieve compelling interest), *vacated*, 174 Ill. 2d 563, 685 N.E.2d 623 (1997) (post-*Boerne*).

4. *People v. Peck*, 52 Cal. App. 4th 351, 61 Cal. Rptr. 2d 1 (1996) (prohibition's on transportation and possession of marijuana do not constitute substantial burden on defendant's religion), *review denied*, 1997 Cal. LEXIS 1795 (Cal. Mar. 26, 1997).

5. *Commonwealth v. Stewart*, 547 Pa. 277, 690 A.2d 195 (1997) (requiring Roman Catholic Diocese to comply with defendant's subpoena in criminal case is least restrictive means to accomplish compelling governmental interest).

6. *Moran v. Moran*, 188 Ariz. 139, 933 P.2d 1207 (Ariz. Ct. App. 1996) (obligation to obtain marriage license to legitimate marriage does not constitute substantial burden), *cert. denied*, 118 S. Ct. 78 (1997).

7. *South Jersey Catholic Sch. Teachers Ass'n. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 290 N.J. Super. 359, 675 A.2d 1155 (Super. Ct. App. Div. 1996) (application of state collective bargaining law to Catholic elementary school achieves compelling governmental interest), *aff'd by*, 150 N.J. 575, 696 A.2d 709, (1997).

8. *Smith v. Fair Emp. & Housing Comm'n.*, 12 Cal. 4th 1143, 913 P.2d 909, 51 Cal. Rptr. 2d 700 (1996) (application of state law prohibiting discrimination based on marital status does not constitute substantial burden on landlord who wishes to so discriminate for religious reasons), *cert. denied*, 117 S. Ct. 2531 (1997).

9. *Blandino v. State*, 112 Nev. 352, 914 P.2d 624 (1996) (requiring counsel on direct appeal from criminal conviction does not constitute substantial burden), *cert. denied*, 117 S. Ct. 208 (1996).

10. *Swanner v. Anchorage Equal Rights Comm'n.*, 874 P.2d 274 (Alaska 1993) (compelling state interest supports application of prohibition on housing discrimination based on marital status to broker who wishes to discriminate for religious reasons), *cert. denied*, 513 U.S. 979 (1994).

11. *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (App. Div. 1997) (RFRA does not insulate Diocese against suit for negligent hiring, supervision, and retention of priest), *cert. denied*, 118 S. Ct. 413 (1997).

12. *State v. Bontrager*, No. 6-95-17, 1996 WL 612374 (Ohio Ct. App. 1996) (RFRA does not preclude requiring member of Old Order Amish to wear orange clothing while hunting).

IV. STATE COURTS—PRISON CLAIMS

A. Relief under RFRA Granted (Including Preliminary Relief)

None

B. Relief under RFRA Denied

1. *Bartley v. Mamoulides*, 694 So. 2d 1050 (La. Ct. App. 1997) (refusing inmate's petition for name change on religious grounds does not constitute substantial burden).

2. *Abdur-Ra'oof v. Department of Corrections*, 221 Mich. App. 585, 562 N.W.2d 251 (Mich. Ct. App. 1997) (forbidding inmates from leaving work assignments to attend Friday Muslim services does not constitute substantial burden).

3. *Akbar-el v. Muhammed*, 105 Ohio App. 3d 81, 663 N.E.2d 703 (1995) (denying inmate a worship service apart from the general Islamic worship service and a right to wear a "fez" rather than a "tarbush" did not constitute substantial burden), *dismissing appeal*, 74 Ohio St. 3d 1456, 656 N.E.2d 950 (1995) (discretionary appeal not allowed).

4. *Schuch v. Rogers*, 113 Ohio App. 3d 718, 681 N.E.2d 1388, (1996) (denial of religious paraphernalia to Native American inmates does not constitute substantial burden).

5. *Winters v. State*, 549 N.W.2d 819 (Iowa 1996) (disciplining white inmate's refusal, on religious grounds, to share cell with black inmate does not constitute substantial burden).

