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REQUIEM FOR RFRA: A PHILOSOPHICAL AND POLITICAL RESPONSE

J. Thomas Sullivan*

The outstanding presentations relating to the Supreme Court's decision in *City of Boerne v. Flores*¹ reflected in this symposium issue of the *University of Arkansas at Little Rock Law Journal* raise a series of fascinating questions concerning the role of Congress in enforcing individual rights and liberties. The arguments focus on questions arising from the Court's apparent reaffirmance of federalism principles and potential legislative response to the holding which strikes down the use of Section 5 of the Fourteenth Amendment² as a vehicle for defining or expanding the First Amendment's guarantee of religious freedom.³ The point of this essay is not to debate constitutional

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I appreciate the thoughtful comments of my colleagues, John M.A. DiPippa and Rod Smith, who disagree with much of what I say on drafts of this essay. The essay represents my political assessment of the Religious Freedom Restoration Act (RFRA) and the Symposium might have benefitted from the shared thoughts of political scientists and sociologists, in addition to the excellent legal thinking displayed by the invited speakers and authors. In order to understand how some citizens might respond to the short but almost explosive history of RFRA, it is important to consider non-legal points of view. The essay reflects personal history and perspective, a peculiar mix of Restoration Christianity and liberal Democratic political ideals. The mix may appear odd because the religious component suggests fundamentalism and certain evangelical values commonly thought to be aligned with the religious right in this country. The political component reflects a general premise that government can operate for the good of society, but is typically compromised by economic influence and political corruption. This mindset has no well-defined place in the current American political spectrum, leading me to vote for Ralph Nader in the most recent Presidential election. For an historical evaluation of the Restoration movement, see C. LEONARD ALLEN & RICHARD T. HUGHES, *DISCOVERING OUR ROOTS: THE ANCESTRY OF CHURCHES OF CHRIST* (1988) and LESTER G. MCALLISTER & WILLIAM E. TUCKER, *JOURNEY IN FAITH: A HISTORY OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST)* (1975).

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

2. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

3. At the heart of Justice Kennedy's opinion for the *Boerne* majority is a strict reading of the nature of the grant of power to Congress by the Fourteenth Amendment, particularly Section 5, as a vehicle for enforcement of existing or prescribed rights, rather than articulation of rights. In this sense, the *Boerne* Court adopted the prior view of Section 5 as "remedial," following *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966):

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.

Boerne, 117 S. Ct. at 2164. The right enumerated in the First Amendment is stated broadly and

principles with scholars of the caliber brought to our law school by this conference. Rather, it is to suggest two alternative, and quite disparate, ways of looking at the Religious Freedom Restoration Act of 1993 (RFRA),⁴ both essentially political and philosophical in nature.

I. RFRA AND BELIEVERS

Professor Douglas Laycock developed a history of RFRA which sets the Act in the context of a concerted legislative struggle by a coalition of pro-religion, pro-liberties groups interested in achieving a comprehensive grant of authority to challenge governmental action unduly burdening the free exercise of religious belief and practice through litigation. The focus of these groups was to produce a statutory vehicle furthering the interests of religious groups and practitioners, as well as individual believers, in the public expression of religious belief. Because the Act was not narrowly tailored to reach state action infringing only upon private exercise of belief or conscience, the broader implications of the legislation clearly carried a public component. This component might lie in terms of general state action which ultimately infringes upon expression of religious freedom in public contexts or in regulation which directly impacts adversely on the operation of religious institutions. *Boerne* must be seen as implicating the latter, since the zoning decision would not have necessarily restricted any believing Roman Catholic from the exercise of their religious beliefs, but instead merely limited the power of the institution to expand its physical plant. In this sense, it is not religious exercise which is impacted by the city's zoning ordinance, but the use of religious facilities for the conduct of religious services that is really in issue.⁵

without precision as to specific practices to be protected or specified intrusions deemed impermissible. The application of the Free Exercise protection has been the subject of judicial interpretation, with the Court defining or explaining the exact nature of the right, rather than relying simply on the text of the Amendment to supply direction for its enforcement. RFRA did little more than recognize a broad right for litigation of claims perceived to properly flow from the general guarantee of the First Amendment's language. It did so by lowering the threshold of proof required for an aggrieved plaintiff to establish a violation of the basic protection afforded by the First Amendment through legislative overruling of the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

4. 42 U.S.C. § 2000bb to bb-4 (1993).

5. See *Boerne*, 117 S. Ct. at 2160. However, my colleague John DiPippa advises that he knows someone who attends St. Peter's Catholic Church in Boerne, Texas, and who assures him that the inadequacy of the facility impairs the ability of the parish to meet the worship needs of its parishoners. This important fact is not apparent in the Court's opinion, which fails to differentiate between governmental action that burdens religious practice directly and indirect imposition which would logically occur anytime a zoning ordinance prevents a local religious group from expanding its physical facility to accommodate its purposes. In the latter case, the

This distinction is significant because it raises the fundamental distinction between matters of personal conscience cast in a religious context which are clearly protected by the Free Exercise Clause and other concerns that may be characterized as secular in nature—the decision to construct a building, whether for worship or parking—which are indistinguishable in significant respects from those decisions made by non-religious entities. In this sense, *Boerne* might be recast as an Establishment Clause case,⁶ in which the principal issue would be whether the exception from the usual application of the city's historic district zoning practice might be seen as furthering the interests of religion in a manner inconsistent with the relative neutrality demanded by the First Amendment.⁷

Just as RFRA may be characterized as concerned with the operation of religious institutions as well as protection of the rights of individuals and religious groups to maintain, share, and espouse particular religious beliefs, so may it also be seen as a threat to the latter by some believers. One might assume that the core value of the religious exercise clause of the First Amendment clearly protects activities central to religious faith and practice. In expanding upon the notion of protected activity to permit judicial resolution of disputes in which the activity in issue is merely associated with religious actors, but not central to matters of belief and worship, RFRA demanded too much of secular institutions, reminding of us of Christ's admonition: "Render therefore to Caesar the things that are Caesar's, and to God, the things that are God's."⁸ Moreover, among some believers, including this author, the RFRA concept is hardly reassuring for a series of reasons.

governmental action may not result in any compromise of the ability of the religious entity to fulfill its theological purposes. For example, a zoning regulation may preclude a church from building a parking lot for practitioners who would otherwise park in other areas not owned or controlled by the church.

6. Justice Stevens, concurring in *Boerne*, took this approach in arguing that RFRA was a "law respecting an establishment of religion." *Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring).

7. As Justice Stevens observed, application of RFRA in the *Boerne* factual context permitted the church to utilize the statute as a "legal weapon" which would otherwise be unavailable to an "atheist or agnostic." *Id.* (Stevens, J., concurring) (citing *Wallace v. Jaffree*, 472 U.S. 38, 42-55 (1985)). This presupposes that RFRA precluded reliance by non-religious groups on an alternative philosophical paradigm, such as secular humanism, since virtually anything other than a rejection of religion will apparently qualify as a "religion" for First Amendment purposes unless it is professed by a prison inmate. *See, e.g., Theriault v. Silber*, 453 F. Supp. 254 (W.D. Tex. 1978) (holding claimed religious belief a "masquerade" designed to qualify for First Amendment protection for practices contrary to sound prison management principles).

8. *Matthew* 22:21; *cf. Mark* 12:15-17; *Luke* 20:22-25.

A. Submission of Questions of Conscience to Secular Validation

First, RFRA virtually invites secular regulation of religious belief and practice by investing in the civil judiciary the duty to consider which policies and practices of secular governmental entities unduly or substantially burden the right to free exercise of religious belief ensured by the First Amendment. At first glance, the legislation does no more than recognize the traditional role of the judiciary in protecting religious freedom from governmental action. Traditionally, secular judges have discharged their duties in this regard cautiously and with appropriate deference to individual belief. But RFRA seemingly expanded the potential forum for such claims, encompassing not only claims which would have been brought in the absence of the statute, but offering a vehicle that would encourage even more claims. As Professor Marci Hamilton noted, RFRA provided prison inmates a new forum for litigating the conditions of their confinement in the context of claims of religious oppression. Her observation was confirmed by Professor Chip Lupu's research revealing that 60 percent or more of the total claims filed alleging rights violations cognizable under RFRA were brought by prison inmates. In short, RFRA was likely to encourage religious freedom litigation among one of the most litigious populations in American society.

The threat posed by expanded litigation is that typically associated with all over-litigated types of claims: that the precision and thought with which important issues are studied by judges will be compromised by a flood of frivolous or marginal claims, draining important judicial resources from consideration of meritorious claims. But this complaint about the volume of litigation does not address the more important question of whether decisions of religious, or indeed, moral conscience, should be resolved by officials who serve the civil regime. Typically, elected and appointed judges share a common perspective in which the preservation of order is central to their administration. This perspective often predominates over their philosophical and political views, so that liberals and conservatives alike tend to share a common belief in the need for social stability reflected in orderly governmental process.

It is this sense in which judicial disposition of disagreements in the exercise of religious belief may be so threatening to believers. Because judges are the instruments of secular institutions, committed to furthering an agenda central to secularly-determined values—i.e., commitment to the “rule of law,” as opposed to the “rule of God”—reservation of the role of arbiter to the secular judge is fraught with the danger that the secular arbiter will discount the significance or sincerity of the believer's claim. Decisions about burdens placed upon religious belief, practice or the operation of religious institutions

necessarily suggest that the decisionmaker will evaluate the legitimacy of the claim,⁹ often in a paternalistic fashion.¹⁰

The purest cases of secular involvement in matters of personal conscience arise in two contexts: first, when legislation is discriminatorily directed at a particular religious practice or article of faith; and second, when a matter of conscience compels non-compliance with a statutory directive resulting in criminal prosecution.¹¹ In the first instance, the discriminatory intent provides the basis for the civil complaint and the legitimacy of the practice or belief is not necessarily subject to formal validation by secular judges because the discriminatory intent is unlawful if it violates First Amendment protections. This situation is distinguishable from the assertion of civil claims under a statutory scheme such as RFRA in which validation is essential to an ultimate determination that the believer or practitioner may avoid the burden imposed by law. In this context, the religious practitioner or believer petitions the

9. Secular judges must evaluate the merits of claimed religious belief, at least on some occasions. For example, in *Therault v. Silber*, 453 F. Supp. 254 (W.D. Tex. 1978), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), the court rejected a federal prison inmate's professed adherence to the "Church of the New Song" as a religion, finding that it constituted a "masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as 'religious' and, therefore, presumably protected by the First Amendment." *Therault*, 453 F. Supp. at 260.

10. This paternalism is often evident when political liberals, tending to share a skeptical perspective on religion, critically focus on publicly-religious figures who typically represent the views or factions associated with the religious right. Liberals often attack the sincerity of the religious belief espoused by these figures or the underlying beliefs themselves, even though they would never apply the same standards to views espoused by African-Americans such as Dr. Martin Luther King. For a political liberal to challenge Dr. King's belief system would be to engage in political, if not religious, blasphemy. Some political conservatives who espouse fundamentalist religious views, including the view that all humans are prone to sin, appear to take particular pleasure in the suggestion that Dr. King was, in fact, prone to the same temptations as other men.

11. For instance, the question of an individual's religious conscience was of foremost concern in *Clay v. United States*, 403 U.S. 698 (1971) where the claim to conscientious objector status by the heavyweight boxing champion, Muhammad Ali, was considered by the Supreme Court. Ali's devotion to Islam was the basis for the claim, even though Islamic theological principles do not prohibit participation in "war." In fact, the specific claim asserted by Ali was that he was morally opposed to engaging in a war prosecuted by "non believers" based on his allegiance to the Holy Qur'an. Ali's argument prompted an interesting discussion on the concept of the "jihad," or holy war, by Justice Douglas, concurring. See *id.* at 706 (Douglas, J., concurring).

Justice Douglas' conclusion demonstrates one problem posed by RFRA: "[W]hat Clay's testimony adds up to is that he believes only in war as sanctioned by the Koran, that is to say, a religious war against nonbelievers. All other wars are unjust." *Id.* at 709 (Douglas, J., concurring). He concluded that the claim was valid under the First Amendment, while observing that "those schooled in a different conception of 'just' wars might find it quite irrational." *Id.* at 710 (Douglas, J., concurring).

secular authority for an exemption from the burdens claimed to flow from operation of law based upon the validation of the belief or practice. While the burden of satisfying the validation process may not be particularly great, some cases will be lost because the secular court is not convinced that the believer makes a compelling case for a finding of discrimination in fact, if not in intent.

In the context of criminal prosecutions, the accused does not solicit secular validation of belief or practice preemptively through the filing of an action seeking a declaration that the law imposes an unconstitutional burden. Rather, the defendant asserts a defense which rests on his reasonable deference to religious belief.¹² Or the accused may elect to present no defense at all, suffering the burden of discrimination or prejudice without advancing an argument that religious faith dictates a course of action in violation of the law. This may occur because the criminal law recognizes no defensive theory accommodating the believer's need to violate law. However, the acceptance of the necessity or choice of evils line of defense may afford some defendants an option of asserting their religious belief or practice as a defensive theory to prosecution. Alternatively, the believer may be able to plead lack of criminal intent as a defensive theory where the actor's intent was motivated by religious faith rather than by criminal culpability.

B. RFRA and Trivialization of Matters of Faith

Not only is the RFRA concept troubling because of its legislatively imposed submission of matters of personal religious—and perhaps, non-religious-conscience—to secular scrutiny, the broad sweep of the Act promised secular consideration of a number of issues not constituting matters of religious belief, faith or practice as matters protected by the First Amendment. *Boerne* represents such an issue—whether the building plan for a church is subject to First Amendment protection when in conflict with a general city zoning scheme designed to achieve a secular aim.

If the fact-finder does not engage in an assessment of the authenticity of a religious belief held by a litigant claiming impermissible government infringement, as the Supreme Court's holding in *Fowler v. Rhode Island*¹³

12. For example, in the prosecution of Christian Scientists for negligent criminal acts in failing to secure conventional medical care for their ailing children, the defendants may assert lack of criminal intent based upon deference to the tenets of their system of belief. See, e.g., *Hermanson v. State*, 570 So. 2d 322 (Fla. Dist. Ct. App. 1990) (upholding convictions for murder of Christian Science practitioners despite defense based on exercise of religious freedom). The Church has set forth a defense of its practice in resorting only to spiritual healing in a collection of essays. See *THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, FREEDOM AND RESPONSIBILITY* (1989).

13. 345 U.S. 67 (1970).

apparently precludes, then all claims are, in a sense, equally meritorious.¹⁴ The secular judicial system, having been admonished not to evaluate the doctrinal merits of a claim, would be left to consider whether the claim was sincerely held by the claimant. As Professors Beiner and DiPippa have noted, this results in sincerity assessments performing a surrogate function for the consideration of the merits of the tenet, belief, or practice claimed to be embraced by the religion or religious group of which the claimant asserts membership or affiliation.¹⁵ Thus, in avoiding a determination on the philosophical or doctrinal validity of the tenet, belief or practice giving rise to the claim being litigated, the secular court merely assumes the facial validity of all such claims of tenet, belief, or practice. This position of neutrality devalues some religious expression by equating it with *all* religious expression. RFRA extended this devaluation process by equating religious expression with secular considerations which happened to be appended to preferences held by religious groups within the meaning of the Act.

C. RFRA and the Specter of Religious Persecution

For some religious conservatives, evangelicals and fundamentalists, the promise of RFRA rests not in the benefits of federally-imposed protection of religious freedom, but rather, in the potential hastening of persecution of religious practitioners from over-zealous enforcement of the Free Exercise Clause at the expense of sound public policy. *Boerne* represents this type of conflict, with the Church's desire for expansion in conflict with an otherwise legitimate, or at least historically legitimate, exercise of the state's police power to protect the integrity of property rights through zoning.

Ultimately, step-by-step subordination of the police power to the peculiar needs of particular religious groups would likely have engendered an adverse secular response.¹⁶ This is precisely what has happened with the use of court-ordered school busing to achieve desegregation of the nation's public schools. Regardless of the merits of forced busing as a means to further the goal of *Brown v. Board of Education*,¹⁷ one can hardly deny the consequences of white

14. See *id.* at 70.

15. See Theresa M. Beiner & John M.A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 599 (1997).

16. The *Boerne* Court noted the broad stroke with which Congress had painted the scope of RFRA: "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Boerne*, 117 S. Ct. at 2170.

17. 347 U.S. 483 (1954); 349 U.S. 294 (1955). In the second *Brown* decision, the Court ordered that desegregation be accomplished with "all deliberate speed." *Brown*, 349 U.S. at 301.

flight and destruction of the tax base funding public services, including public education, in many urban areas attributable to the clear rejection of forced busing by white families.¹⁸ The impact, perhaps originally attributable to white racism, has been the compromise of family education decisions for many white and black parents who oppose segregation, but who choose suburban or private schools out of concern that the educational mission of the public schools has been compromised in furtherance of a national political agenda. These parents may support integration but are not prepared to subject their children to inferior schools fraught with the perception of increasing problems of drugs, violence and interracial conflict to make a marginal contribution to the achievement of an agenda for which they may feel no culpable responsibility.

Fundamentalist and evangelical Christians often argue that the American political system oppresses the practice of the Christian faith, contrasting intolerance for fundamentalist or evangelical Christianity with open acceptance of virtually all other religious activity. They may also suspect that official persecution of the Christian church will eventually foreshadow fulfillment of prophecy concerning the second coming of Jesus Christ.¹⁹ The widespread use of RFRA as a means of interjecting secular authority to promote the interests of religious groups or believers would lead to the backlash of rejection that might transform negative public opinion into oppression.²⁰

18. See Robert R. Wright, *On its Anniversary: A Look Back at Brown v. Board of Education*, ARK. L., Summer 1994, at 51. Professor Wright argued that the forced desegregation through busing not only served to drive majority families from the public schools, but also resulted in a wealth-based segregation in which majority and minority families with sufficient economic resources abandoned the public schools in favor of private schools, leaving poorer families to rely on public education for their children. The potential for jeopardizing educational opportunities of minority children inherent in implementation practices which may compromise the quality of educational experience has been recognized by other commentators. See, e.g., Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

19. See, e.g., HAL LINDSEY, *PLANET EARTH—2000 A.D.* 267-80 (1994). Lindsey, the popular fundamentalist Christian author of *THE LATE GREAT PLANET EARTH* published some 25 years earlier, predicts a time when the Christian church will be subjected to official oppression. Lindsey draws support for his perception of growing hostility toward basic Christian beliefs within the secular community in 2 *Timothy* 3:12: "All that will live Godly in Christ Jesus shall suffer persecution." Other fundamentalists view much of the prophecy of oppression of the Christian church, including the book of Revelation, to refer to violent treatment of Christians by the Roman state in the centuries following the execution of Jesus.

20. Equally troubling from this perspective is the determination of a secular judge to display the Ten Commandments in his Alabama courtroom. This reference to Judeo-Christian heritage is not immediately offensive to believing Jews and Christians, but it sends a troubling message to litigants who might reasonably question whether the court's commitment is to administering the law under the Constitution, or to imposing justice drawn from the judge's personal understanding of the Commandments. If the judge permits the Commandments to predominate over application of positive law, then the litigant may be deprived of a just ruling promised by the Constitution. If, on the other hand, the judge subordinates his fidelity to the

Moreover, the accommodation of theological and secular interests of all potential groups who might seek the broad protection afforded by RFRA would lead to disenchantment within the religious community once the initial victories established the preeminence of religious belief and practice in the formulation and implementation of public policy. Within the community that would self-identify as "religious," there is significant disagreement that seldom erupts into strife precisely because the government is not actively involved in protecting the individual interests of groups within that broader community.²¹ Once public policy would be shaped by RFRA-based litigation, those interests might well surface in terms of competing interests within individual lawsuits as some religious actors seek to intervene in opposition to the result sought by other groups having conflicting theological or social agendas.

For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,²² the Court struck down governmental regulation which targeted the religious group's practice of animal sacrifice by imposing public health regulations designed to limit this practice to licensed, inspected slaughterhouses. The decision turned on the Court's assessment of the motivation for adoption of the regulation as discriminatory in intent, essentially "targeting" the religious belief and practice of the group and concluding that such discrimination is never permissible.²³ Presumably, had the regulation been void of evidence of discriminatory intent, it would have withstood challenge under the prevailing rule of *Employment Division, Department of Human Resources of Oregon v. Smith*,²⁴ as justified by its "generally applicable prohibition[s] of socially harmful conduct."²⁵ However, under RFRA, the test imposed for consideration of religious liberty claims would have required the courts to uphold the church's right to continue the practice of animal sacrifice if the

Commandments in rendering a decision dictated by the secular law, he may suggest supremacy of secular law in matters of conscience which serve to undermine the very display of the Commandments in the courtroom. In the courtroom, every litigant should be assured that decisions are rendered in accordance with the secular law and Constitution, rather than the trial judge's personal allegiance to any other source of law. See Mark Hansen, *Decalogue Debate Back to Square One: Alabama High Court Refuses to Decide Case on Ten Commandments in Courtrooms*, A.B.A. J., March 1998, at 22; *State v. ACLU of Alabama*, No. CV-95-919, 1998 WL 21985 (Ala. 1998) (dismissing declaratory judgment action as lacking controversy).

21. One unresolved question which would have been posed by RFRA litigation is the extent to which its protections would have been available to non-religious or anti-religious individuals asserting claims based on matters of conscience. These individuals have been afforded protection for their beliefs in certain contexts, such as employment. See Charlotte Elizabeth Parsons, *Doing Justice and Loving Kindness: A Comment on Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 643 n.2 (1997).

22. 508 U.S. 520 (1993).

23. See *id.* at 533.

24. 494 U.S. 872 (1990).

25. *Id.* at 885.

health regulation could not be supported by a compelling justification or if a less restrictive means of furthering that interest was available to government. Presumably, the local health authorities could have imposed less intrusive inspections of the church facility to protect against spread of disease if their interest in regulating the activity was compelling and not directed at the church or its practitioners in a discriminatory manner.

The question is whether religious groups that do not recognize animal sacrifice as theologically valid would be more concerned about the Court's treatment of the practice in *Church of Lukumi Babalu Aye* if intervention to protect such practices was, in fact, the norm rather than the exception. RFRA was designed to aggressively foster the claims of both non-traditional and traditional religious groups and practitioners. Consequently, reliance on the courts would have affirmatively interjected government into the enforcement of religious claims by competing groups. Ultimately, where these interests conflict, the secular judicial system, rather than individual conscience, would be the primary vehicle for resolving that conflict. The free marketplace of belief Americans have traditionally enjoyed might well become the type of over-regulated market that threatens religious and personal autonomy.

True religious strife involving violence invites government repression of that religious expression which supports violence. That is apparent in the recent governmental investigation into political bombings suspected to be linked to the Christian Identity Movement, a racist and violently anti-abortion, anti-homosexual fundamentalist group.²⁶ So long as violence or mass disturbance is reflected in the doctrine of extremist groups alone, systematic governmental repression of religious practice remains unlikely. But the increasing heterogeneity of the American religious community suggests greater

26. The Christian Identity Movement has a documented history of relationship to radical, and often violent, political activity in opposition to established government. Most recently, it has been identified as a potential source of support for a suspect wanted in the bombing of a Birmingham abortion clinic which resulted in the death of an off-duty police officer working as a security guard at the clinic. See Sylvester Monroe et al., *Mountain Manhunt: The FBI names a suspect in the bombing of an Alabama abortion clinic. But can he be found?* TIME, Feb. 23, 1998. The movement has previously been linked to other incidents involving ultra-fundamentalist right-wing religious groups, such as the seizure of arms and ammunition from the Covenant, the Sword and the Arm of the Lord group operating in Arkansas in the mid-1980's. See Richard N. Ostling, *A Sinister Search for "Identity": Far-Right Groups use Theology to Justify Violence and Racism*, TIME, Oct. 20, 1986. The Identity Movement is also linked to the Posse Comitatus, whose leader, Gordon Kahl, was killed in an explosion in Arkansas in 1983, during a gun battle with federal officers following the death of two federal marshals who had attempted to serve him with a warrant in North Dakota. See Robert T. Zintl, *Dreams of a Bigot's Revolution; Heavily Armed Fringe Groups act out Violent Fantasy*, TIME, Feb. 18, 1985.

potential for strife, particularly if some groups come to believe that the government favors competing religious doctrines or groups of practitioners.²⁷

Thus, in inviting further governmental intrusion into the uneasy relationship between the state and religion, RFRA expanded the role of government in a way that has the potential to disturb an inherently conflict-laden but generally stable relationship. To the extent that the intent of the Act was propounded as beneficial to religion, the benefit of further governmental protection or official sanction of religious belief and practice could have led to anti-religious reaction demanding repression of the expanded liberty accorded religious groups by RFRA, or intra and inter-religious conflict. This latter conflict has generally not been a feature of American political life under pre-RFRA legal doctrine enforcing a flexible tradition of separation of secular activities of the state and religious belief and practice of the subscribing citizenry.

II. RFRA'S DISTORTED POLITICAL AGENDA

The popularity of RFRA as a legislative enterprise suggests its potential for political currency outside the Congress. The overwhelming vote favoring its passage is indicative of more than bi-partisan support for religious belief. In fact, one might readily assume that a vote against RFRA was tantamount to a vote against the flag, although even the history of the flag-burning cases reflects a more even public debate and Congressional vote demonstrating serious concern for the wisdom of legislating against free speech.

For politically-skeptical believers, RFRA appears to have been designed to serve the political interest of conservatives appealing to believing voters rather than as a necessary or even desirable legislative vehicle for affirming the role of religion in our national life.

A. The "Payoff" for Religious Conservatives

One political reality hidden in the RFRA history is that the statute satisfied an important political debt to well-organized conservative Christian voters and interests groups once the conservative Republican party expanded its influence in Congress in 1992.²⁸ Despite the substantial electoral mandate

27. One might note the violence which has strained other national populations as a result of strife between Sikhs and Hindus (India), Moslems and Jews (Israel and the semi-autonomous Palenstinian territory) and Protestants and Catholics (Northern Ireland) to suggest that religious co-tolerance is not necessarily the norm, even in democratic states.

28. For example, note one political scientist's observation:

Over the past two decades[,] . . . the political evolution of evangelical Protestants

enjoyed by Presidents Reagan and Bush during the decade of the 1980's, their power was not translated into national policy favoring the positions of many Christian conservatives on two key issues: abortion²⁹ and school prayer.

While pro-choice advocates and strong proponents of separation and state may have correctly anticipated well-organized assaults on judicial pronouncements reinforcing a "right" to seek an abortion and a preclusion of Christian prayer in the public schools, the assault did not threaten the Court's consistent positions in these two areas. Instead, political observers might well have concluded that the conservative agenda, as reflected in the Reagan and Bush presidencies, effectively promoted strong national defense and a general limitation on federal power, relegating the questions of abortion and school prayer to a secondary concern. The more cynical view would be that conservatives deliberately avoided major battles on abortion and school prayer for fear of splitting their power base, or impeding the numerical growth of the conservative movement by emphasizing policies restricting personal autonomy instead of the more appealing issues of defense and promised tax relief achieved through a diminished domestic role of the federal government.

Whether unable or unwilling to deliver on the promise of a change in national policy on abortion and school prayer—the two most visible political

has forced political scientists to reconsider those conclusions [about the increasing secularization of American society]. Evangelicals are members of theologically conservative, white, Protestant denominations, such as the Baptists, Pentacostals, Church of God, Assemblies of God, and Church of Christ. They tend to see the Bible as uniquely authoritative in matters of religious faith, to see adult conversion experiences as necessary for salvation, and to be committed to evangelizing or "spreading the word." Once nominally Democratic but largely apolitical, evangelicals have become the most consistent supporters of the Republican Party, and their political movement—the Christian right—has taken over the G.O.P. in many parts of the country.

Geoffrey C. Layman, *Religious Beliefs and Politics: Better Measures are Needed*, THE CHRONICLE OF HIGHER EDUCATION, Mar. 13, 1998, at B4-5.

However, the description of these church groups as "white" is clearly incorrect. Within some communities, congregations remain essentially segregated but all of the denominations cited are informally integrated and none espouses a doctrine of segregation in worship.

29. The abortion controversy which raged through the last two decades was highlighted by two significant events in the history of the UALR School of Law. In 1988, while visiting the campus during a Jurists-in-Residence program, then Associate Justice Harry A. Blackmun told the press that he feared an increasingly conservative Supreme Court would eventually overrule the decision in *Roe v. Wade*, 410 U.S. 113 (1973), which he had authored. See George Wells, *Jurist Sees Threat to Abortion Ruling*, ARK. GAZETTE, Nov. 14, 1988, at 1B. During his presidential campaign three years later, then-Governor Bill Clinton made his dramatic announcement in the law library of the Old Federal Building, then a part of the UALR Law School campus, that if elected he would nominate only pro-choice justices to the Supreme Court. See Noel Oman, *'One Justice Away' from past, Clinton warns*, ARK. DEMOCRAT-GAZETTE, June 30, 1992, at 7A; *Governor Clinton's Litmus Test*, WASH. POST, July 9, 1992, at A22.

objectives of the Christian right-the growing conservative bloc in Congress instead substituted RFRA, a statute designed to appeal to most believing voters. The timing of the bill forced Congressional representatives and senators facing re-election in 1994 to consider the likely impact of a negative vote on the legislation. While liberals in either party were unlikely to experience dramatic opposition based on a favorable RFRA vote, a negative vote would have provided an additional emotional issue for conservative challengers seeking to tie incumbents to an "anti-religion, anti-First Amendment, secular" philosophical position. The potential for misuse of an anti-RFRA vote would have been dramatic, while a vote in favor of the Act would have defused the issue with fewer unfavorable consequences.

This is not to suggest that many proponents of RFRA did not undertake their legislative duties with unimpeachable integrity. However, the political sensitivity to matters important to the Religious Right certainly offered the patina of "good politics" to legislation which might have inspired more debate, particularly from representatives concerned about the potential burdens RFRA held for state and local governments. That concern was not reflected in the final vote, even if it surfaced earlier in Congressional debate. Curiously, the overwhelming Congressional vote in favor of RFRA is never mentioned in the opinions filed in the case.³⁰ Only judges and lawyers would conclude that the vote is irrelevant to a consideration of the constitutionality of the measure.

B. Prisoners' Rights Under RFRA: The Lightning Rod

If RFRA were intended to serve as a vehicle for affirming First Amendment principles, rather than as a careful manipulation of the Christian right, one might suppose its proponents would have insulated the legislation from its greatest potential vulnerability.³¹ That vulnerability was its inherent potential

30. See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994). The overwhelming Congressional support for RFRA is summed up by the authors:

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

Id. at 210 nn. 2-5.

31. RFRA is not the only "rights affirming" federal legislation that runs into trouble in the prisoner's rights context. The Supreme Court granted certiorari in *Pennsylvania Department of Corrections v. Yeskey*, 118 S. Ct. 876 (1998), to review the Third Circuit's holding that the Americans with Disabilities Act is applicable to state prison programs. The inmate had been denied admission to a prison boot camp program because of a history of hypertension. See *Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3d Cir. 1997).

for misuse in generating frivolous litigation concerning the virtues of religious freedom. Professor Chip Lupu suggested the problem in documenting the dispositional success of actions undertaken under the Act.

Professor Lupu stressed that the majority of actions relying on RFRA had been filed by prison inmates and that at least 60 percent of RFRA decisions had been rendered in these cases.³² In state court litigated claims, prisoners lost in all five reported actions, while the win/loss ratio in federally litigated actions stood at nine to eighty-five.³³ Professor Lupu attached less significance to the fact that the win/loss ratios in non-prisoner cases stood at seven to eleven in state tried actions and nine to forty-one in federally tried cases.³⁴

Far from demonstrating RFRA's lack of impact, the victory totals seem impressive for actions commenced under relatively new legislation not blessed by a history of prior judicial review or favorable Supreme Court decisions. In contrast, Professor Lupu suggested that RFRA served primarily to afford inmates a new litigation strategy. This point was affirmed anecdotally by Professor Marci Hamilton, who noted the complaint of an inmate correspondent that her opposition to RFRA might cost him a theory for recourse to the courts to challenge the conditions of his confinement.³⁵

One important issue is why Congress would have jeopardized the legislative enterprise by not excluding prisoner actions from the broad protections afforded by RFRA.³⁶ In fact, such a move was rejected during the

The ADA, like RFRA, poses significant accommodation problems for local, state and federal government, because of its broad sweep. Application to state prisons, which might be exempted from coverage by the Eleventh Amendment, could galvanize public support for significant legislative retrenchment in this area, given the significant economic costs related to compliance with the Act's requirements in both public and private sectors.

32. See Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998).

33. *Id.*

34. *Id.*

35. See Professor Marci Hamilton, Address at the University of Arkansas at Little Rock, Symposium (Sept. 19 & 20, 1997).

36. Congressional failure to exclude or limit prisoner litigation aimed at prison administration would appear to have undone much of the judicially-imposed limitation on inmate claims achieved by the Court in several of its decisions. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (requiring proof of "deliberate indifference" on part of prison officials to establish Eighth Amendment claims based on deprivation of medical treatment); *Parratt v. Taylor*, 451 U.S. 527 (1981) (holding negligent failure of prison officials to follow procedures resulting in loss of inmate property does not create § 1983 claim if a state tort remedy is otherwise available); *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding inmate has no right to expectation of privacy in cell under Fourth Amendment); *Turner v. Safley*, 482 U.S. 78 (1987) (holding prison regulations may infringe on protected rights if reasonably related to legitimate penological interests); *Washington v. Harper*, 494 U.S. 210 (1990) (holding state may forcibly administer antipsychotic medication if necessary to maintain institutional safety); *Wilson v. Seiter*, 501 U.S. 294 (1991) (holding claim that institutional punishment violates Eighth Amendment requires showing of "deliberate indifference"); *Lewis v. Casey*, 518 U.S. 343 (1996) (requiring states to provide access to basic legal materials for inmates, rather than prison

discussion of the bill. A RFRA proponent might argue that the Act would have little value if its benefits were denied to a substantial segment of the population, one often in need of religious expression.

The denial of prisoner access to the courts to vindicate claims under RFRA should have proved philosophically fatal to the Act because it would suggest nothing less than that protection of First Amendment values could be arbitrarily denied on the basis of one's status as a prisoner. Yet, imprisonment does entail acceptable curtailment on civil rights and liberties in a variety of constitutional contexts. One might argue that exclusion of prisoner claims would exact no greater burden than recognition that inmates suffer loss of liberty when imprisoned. Moreover, while imprisonment may compromise an individual's right to engage in religious practices consistent with the need for institutional security, it does not entail an impairment of the power to believe in a particular doctrine or world-view.

The problem with this analysis is that RFRA created no substantive rights; instead, it is a procedural vehicle for validating claims brought under the Free Exercise Clause.³⁷ Unlike other losses of liberties suffered by inmates, preclusion of inmate claims under RFRA would not have resulted because of the need to adjust liberty expectations for the loss occasioned by imprisonment, but in a denial of an equal opportunity to litigate the substantive issues.

In a political sense, the failure to preclude prisoner litigation should compromise the long-term viability of the Act. The statistics cited by Professor Lupu are precisely those likely to be relied upon by opponents of RFRA to criticize its wide sweep. At a point in history when most of the electorate appears ready to support the concept of incarceration as the primary device for securing public safety, any legislative enactment empowering inmates to challenge the operation of prison systems would hardly be expected to be favorably received.

Religious exercise rights claimed by inmates could be accommodated without recourse to RFRA as they had been in pre-RFRA prisoner rights litigation.³⁸ That option would have recognized a distinction between "core"

law libraries). These decisions are representative of a steady trend of cases in which prison litigation has been restricted either through imposing rigorous burdens of proof or limiting access to litigation tools.

37. The district court observed: "RFRA only mentions the First Amendment as the empowering provision to change the burden of proof standard to compelling interest." *Flores v. City of Boerne*, 877 F. Supp. 355, 357 n.1 (W.D. Tex. 1995). The district court nevertheless struck the Act as unconstitutional in violating the doctrine of Separation of Powers in Congress' effort to overturn the Court's decision in *Employment Division v. Smith*. See *id.*

38. See, e.g., *Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Fed. Bureau of Prisons*, 620 F.2d 648 (7th Cir. 1980). The Seventh Circuit described the individual plaintiff as follows:

Harry W. Theriault, the founder and chief exponent of the Church of the New Song,

rights protected by the First Amendment which might be the focus of inmate litigation and "peripheral rights" recognized under RFRA but not available to inmates because of statutory preclusion of that particular class of plaintiffs.

C. *Boerne* as a Preemptive Assault on Homosexual Rights Initiatives

One final question remains with regard to understanding the Court's holding in *Boerne*: what does the majority's position suggest with regard to other legislative initiatives to protect First Amendment rights? Will the decision remain a definitive statement of the Court's sentiment only with respect to this particular type of legislation, or does it signal a broader concern? The current Court has demonstrated some willingness to embark on new thresholds of review, only to delay or retreat in expansion of its position to reconsider other legislative directives. The most significant example is its treatment of federal firearms legislation in *United States v. Lopez*,³⁹ in which a close majority of the Court voided a provision criminalizing possession of a firearm in proximity to a school.⁴⁰ *Lopez* suggested a new perspective on Congress's authority to use the Commerce Clause power to criminalize activity traditionally dealt with under state law.⁴¹ While litigants rushed to rely on *Lopez* to review a broad variety of claims, neither the Supreme Court nor the circuits have demonstrated a willingness to engage in a broader discourse on the legitimacy of commerce-based federal criminalization of street crimes or reversal of lengthy histories of affirmance of convictions under those statutory provisions.⁴²

is a federal prison inmate who has a protracted history of litigation in the federal courts concerning the exercise of his faith in prison. Indeed, it appears that almost all of the followers of his faith are prison inmates.

Id. at 649. In rejecting the plaintiff church's claim to protection under the First Amendment, the court relied on a prior determination by the United States District Court, Western District of Texas, that concluded that the church was actually a "sham religion." *Id.* at 652 (citing *Theriault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978)).

The circuit court also observed that the individual plaintiff had extensive experience in challenging the operation of the prison system through litigation, noting: "In addition to the cases discussed in this opinion, Theriault has been involved in numerous lawsuits as either a plaintiff complaining of prison conditions or as a defendant being prosecuted for unruly prison conduct." *Id.* at 655 n.5 (citations omitted).

39. 514 U.S. 549 (1995).

40. See Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4844 (codified at 18 U.S.C. § 922(q) (1994)).

41. See, e.g., *Symposium, The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 633 (1997) (participants characterizing *Lopez* as landmark decision with far-reaching federalism implications).

42. See Brent E. Newton, *Lopez in the Fifth Circuit: Watershed or Aberration?*, 15 FIFTH CIRCUIT REP. 209 n.1 (Feb. 1998) (analyzing Fifth Circuit's treatment of *Lopez*-based claims following the Supreme Court's affirmance of its holding in *United States v. Lopez*, 2 F.3d 1342

However, *Boerne* might have preemptively spoken to the issue of protection of homosexual rights through Congressional enactment of new civil rights legislation furthering the protections afforded by the First Amendment. The Court would have been aware that the issue of legislative or constitutional recognition of sexual preference was on the table of public discussion in many states.⁴³ The Court's decision in *Romer v. Evans*⁴⁴ addressed the issue in a related context, in considering whether state constitutional action could serve to preclude protection for sexual preference as a matter of legal and public policy. At the same time, the Court recognized that efforts of gay rights advocates would undoubtedly focus on congressional protection of sexual preference in the future.⁴⁵

A conservative Court, concerned that pressure on the legislative branch might result in a response seeking to institutionalize sexual preference as an actional basis in anti-discrimination litigation, could have viewed *Boerne* as a relatively safe opportunity to preempt the field with precedent that superficially represents a morality-neutral view of legislative power. Thus, any future attempt to legislate protection for sexual preference could be linked with *Boerne's* theme of limitation in any attempt to expand upon the express guarantees of the Bill of Rights without the need to directly address the question of homosexual rights. When the Court confronted that question in *Bowers v. Hardwick*,⁴⁶ a bare numerical majority upheld the right of states to criminalize homosexual activity, even though it did so on the basis of a Georgia statute which did not purport to differentiate between homosexual and heterosexual sodomy.⁴⁷ A more conservative *Boerne* Court, concerned about being perceived as too out-of-line with national sentiment on this issue, might have viewed *Boerne* as an opportunity to craft a position which could ultimately be used to preclude protective legislation favoring less conservative elements in American society than those which supported RFRA.⁴⁸

(5th Cir. 1993) (declaring 18 U.S.C. § 922(q) unconstitutional)).

43. See *Romer v. Evans*, 517 U.S. 620 (1996) (Scalia, J., dissenting) (noting political activity favoring recognition of sexual preference as subject for political protection). The *Romer* majority observed that the Colorado constitutional amendment under review had been adopted in apparent response to municipal ordinances in Aspen, Boulder and the City and County of Denver banning discrimination based upon sexual orientation. See *id.* at 623-24.

44. 517 U.S. 620 (1996).

45. See *id.* at 653 (Scalia, J., dissenting) (noting prior attempts to include sexual preference as basis for protection in federal civil rights legislation rejected by Congress).

46. 478 U.S. 186 (1986).

47. Because the Court focused on the homosexual element of the case, rather than the constitutionality of the proscription of sodomy, the dissenting justices in *Bowers* were highly critical of the way in which the majority reached the issue ultimately decided. See *id.* at 199, 200 (Blackmun, J., dissenting); *id.* at 214, 218-20 (Stevens, J., dissenting).

48. However, this conclusion might be tempered by noting that Justice Kennedy authored

III. CONCLUSION

Things are not always what they appear to be.⁴⁹

both the majority opinions in *Romer* and *Boerne*, which may suggest that he would be adverse to a legislative attempt aimed at protection of sexual orientation within the context of broad civil rights legislation. On the other hand, his opinion in *Romer* might also indicate his commitment to a neutral position on this point in which neither discrimination nor preference based upon orientation would be appropriate.

49. Jesus warned: "And many false prophets will arise, and will mislead many." *Matthew* 24:11.