State RFRAs and the Scope of Free Exercise Protection

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INTRODUCTION

Other articles in this symposium address the need for state religious freedom restoration acts ("state RFRAs"), the range of concrete issues to be addressed by them, and the practical issues arising in connection with state RFRAs. These articles provide an ostensive definition of the scope of needed protections, and nothing in this Article can substitute for the rich contributions that they make.

My assignment, however, is not simply to summarize the contours of the topics that have been laid out in the form of concrete problems and issues raised during the course of the symposium. Rather, this Article comments on how fundamental principles of religious freedom ought to be implemented at the state level, and whether the abstract language being crafted in state RFRA legislation is adequate to that challenge. Stated slightly differently, my assignment is to ask how state RFRA legislation is dealing with certain key structural issues faced by any legislative effort at delineating the scope of religious freedom protections. These structural issues include (1) the intractable threshold problems of how "religion" and related terms are to be defined; (2) the range of persons and entities entitled to invoke religious freedom protections; (3) the range of activities covered by such protections; (4) the substantial burden question, which is the problem of determining how great the burden on religious activity must be to trigger free exercise protections; and (5) the strict scrutiny or compelling interest question, which determines the standard for reviewing state action that imposes legally cognizable burdens on the free exercise of religion. State RFRA legislation generally approaches each of these areas in a way that maximizes religious freedom, but there are inevitable borderline questions in each of the foregoing areas.

In the limited space available here, it is not possible to deal with these issues in a comprehensive way. The aim, rather, is to suggest some reflections regarding these fundamental structural issues that may help legislatures craft and pass state RFRAs. Part I discusses a number of more general considerations about the nature of religious freedom that necessarily influence the contours of the protections that state RFRAs provide. With these general considerations as background, Part II then proceeds to a more concrete analysis of current and proposed state RFRA legislation.

I. THE CONCEPTUAL SETTING OF RELIGIOUS FREEDOM DEBATES

A. Religious Freedom and the Social Contract

Whatever philosophical attitude one ultimately adopts toward social contract theories, whether in the classical if divergent forms advanced by Hobbes, Locke, Rousseau, and Kant, or in the form of neo-contractarian theories such as those advanced by Rawls,[1] there can be little doubt that the idea of the social contract played an important role in the thought of the framers of the American Constitution.[2] The power of this idea derives in large part from its ability to model some of our deepest intuitions about the nature of political and legal obligations. The idea is elastic in the sense that it can be interpreted to ground a variety of differing theories, which in turn can be applied to legitimate a wide range of concrete results. Despite this plasticity, however, the social contract model has powerful implications for why religious freedom is accorded a distinctive place in the pantheon of constitutional liberties, and why the heightened protections afforded religious exercise by state RFRAs are legitimate.

Specifically, social contract analysis suggests an answer to what has emerged as the most formidable critiques of both state and federal religious freedom restoration legislation — namely, those that emanate from an equalitarian paradigm. While the rhetoric of this position stresses the purported inequality inherent in exempting religious activity from otherwise applicable laws, it is often associated with an explicit or implicit statism. That is, it assumes that human beings are equal before they are free, and that state authority is assumed to be legitimate so long as it does not violate canons of equality. Given the importance of equality, there is a presumption against differential treatment. Exemptions for religiously motivated conduct are, thus, presumptively questionable, and so long as the state's authoritative demands conform to principles of formal equality, they should be equally enforced against all without regard to religious difference.

The social contractarian picture of religious freedom is quite different. The essence of this position is admirably captured at the

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[1] *See* JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971).

[2] *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 282-91 (1969) (describing influence and development of social contract theory in America between 1776 and 1787).

outset of Madison's *Memorial and Remonstrance*:

> We hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. ***This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.*** Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; ***much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.*** We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.[3]

Madison's analysis is worth quoting at length because it suggests several features of religious obligation that require civil society to accord it special respect and latitude. If one tries to imagine the circumstances under which an individual (or a group) might decide to form or enter a civil society, several things become apparent. Most importantly, religious obligations are prior to other obligations of civil society. They do not emanate from social sovereignty; they have a source that transcends civil society, and already exerts sway in the "state of nature" or "original position."[4] Nonbe-

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[3] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 7 (Marvin Meyers ed., rev. ed. 1981) (emphasis added).

[4] Rawls clearly envisions the "original position" as a situation in which the "veil of ignorance" precludes individuals from knowing in advance what religious positions they may hold. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 206 (stating that individuals must choose principles of integrity and religious freedom behind "veil of ignorance," without

lievers may not understand or agree with the beliefs of sincere religious believers, but they can understand and reason with individuals for whom some obligations take precedence over the normal legitimate claims of society. That is, it is certainly possible for nonbelievers to understand that in the process of negotiating a social contract they will encounter individuals for whom it will be an unassailable starting point that religious obligations by their nature impose higher obligations than any social compact.[5] These obligations are prior, as Madison says, both in order of time and of priority, to any obligations among human beings. For that reason, people experiencing religious claims would never consent to enter into any merely human community unless they could maintain a reservation clause of the type that Madison suggests assuring the right not to violate higher obligations. In this setting, exemptions from ordinary civil legislation do not constitute privileging of religion; they constitute respect for and protection of the fundamental promise society makes to induce religious communities to join the social compact in the first place.[6] At least part of the fallacy of the

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knowing nature of moral convictions they will hold in society); RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 22-28 (proposing that people must reach fair balance of social cooperation to establish rational religious autonomy). But Rawls clearly recognizes that persons in the original position will need to account for the fact that they are likely to have religious views of some kind once the veil of ignorance is lifted, and they must take this into account in choosing principles of justice. *See id.* at 23.

[5] Rawls, with this type of reasoning in mind, uses freedom of conscience as the archetypal example to explain why freedom (equal freedom to be sure) takes priority within his system. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 205-11. The Rawlsian version of the argument runs as follows:

> Now it seems that equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs. Nor on the other hand, could the parties consent to the principle of utility. In this case their freedom would be subject to the calculus of social interests and they would be authorizing its restriction if this would lead to a greater net balance of satisfaction.

Id. at 207.

[6] The contrast between "privileging" and "protecting" of religion is drawn from the work of Professors Eisgruber and Sager, two of the most articulate spokesmen for the equalitarian critique of RFRA. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1260-70 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448-49 (1994). The contrast is

equalitarian paradigm is that it either disputes or does not take seriously the possibility of prior religious commitments and their implication for the meaning of social and legal bonds.[7]

The idea that religious obligations are in some sense outside the social compact requires extensive elaboration in order to justify and defend it in detail. But I think the basic intuition is clear, and that this idea suggests a way of grounding the special treatment for religion proposed by state RFRAs. This is obviously not the kind of theory that is likely to be helpful at the level of sound-bites and day-to-day lobbying or litigating. But work at this basic level is critical to help justify providing heightened protection for religious freedom (as compared with many other liberties).

B. The Eclipse of the Liberty Paradigm

As I consider the topics and discussions of this conference, I have been impressed (and depressed) once again by the extent to which our ability to articulate the appropriate scope, depth, and significance of religious freedom is being eroded by the ascendancy of the equality paradigm over the liberty paradigm in legal thought.[8] "Equality rights generally prevent government from imposing a burden on one person unless it imposes the burden on everyone. Liberty rights generally prevent the state from imposing the burden at all, even if it imposes it on everyone."[9] The equality paradigm restricts more religious action than would be restricted under the liberty paradigm because different religions require different freedoms to practice their beliefs. Under a liberty paradigm, those actions would be accommodated. Under an equality

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grounded in a theory of "equal regard." *See id.* at 449. By interpreting religious freedom claims as enforcement of a "reservation clause" to the social contract, the Madisonian model helps clarify that whether exemptions constitute "privileging" or "protection" depends on starting points. Differential treatment does not constitute privileging where it is simply an inherent aspect of respecting and protecting legitimate differences taken into account at the level of the fundamental structuring of social relationships. Protected conduct always appears privileged when compared with unprotected conduct, but privilege in this sense is innocuous so long as the protection is legitimate.

[7] *See generally* W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71, 79-85 (1992) (arguing that states must be highly deferential to individual and community conscience).

[8] For elaboration of the contrast between the paradigms of liberty and equality as they operate in the domain of Religion Clause analysis, see Angela C. Carmella, *Liberty and Equality: Paradigms for the Protection of Religious Property Use*, 37 J. CHURCH & ST. 573, 576-83 (1995).

[9] Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 568 (1998).

paradigm, as long as those actions are restricted for believers and nonbelievers alike, the actions do not have to be accommodated. The impact on minority religions is obvious. The inequality such "formal equality" engenders is the inequality that arises when only some groups (typically the smaller and less popular groups) feel the brunt of the formally equal restriction.

The tension between liberty and equality is of course a familiar dilemma of political theory.[10] The difference between the *Smith*[11] opinion and the vision of free exercise that motivates RFRA supporters is a classic example of this tension. The Free Exercise Clause is written in the vocabulary of liberty,[12] yet it is becoming increasingly unintelligible unless it is parsed in the language of equality.

My colleague, Professor Frederick Mark Gedicks, thinks the eclipse of the liberty paradigm has proceeded to such an extent that liberty-based arguments appear to be almost totally unpersuasive. For this reason, he has virtually abandoned the enterprise of defending the idea of exemptions based on religion (the key functional outcome of any RFRA legislation) because it seems so difficult to him to come up with respectable arguments that will work in a world dominated by the premises of an ascendant equalitarianism.[13]

In a much less resigned vein, Professor Laycock advised us during the symposium to be sure to buttress any arguments we make with data and information about discrimination, because it is the facts of discrimination (inequality) that will ultimately prove most persuasive. I do not question the wisdom of this practical advice, but simply note what it tells us about dominant intellectual paradigms. Arguing that a liberty right exists is no longer enough and evidence of differing treatment is required to obtain relief.

At a deeper level, Professor Laycock has pointed to the distinction between formal and substantive equality in the field of relig-

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[10] *See* S.I. BENN & R.S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 123-54, 247-74 (1959) (discussing classic tensions between liberty and equality); *see also* RAWLS, A THEORY OF JUSTICE, *supra* note 1, at 54-65 (discussing different principles of justice).

[11] Employment Div. v. Smith, 494 U.S. 872 (1990).

[12] *See* Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191, 1192-93, 1210-13 (1998) (noting that founders recognized religion as positive good, which U.S. Constitution protects as such).

[13] *See* Gedicks, *supra* note 9, at 568-72.

ious freedom.[14] *Smith* exemplifies formal equality; RFRA, by taking religious differences seriously and respecting people equally in light of these differences, affords substantive equality. Here again there is the not-so-subtle counsel to frame our arguments in the language of equality. Substantive equality is an equalitarian name for taking freedom seriously.

Liberty may be translated into the equalitarian paradigm under the name of substantive equality. Liberty, for free exercise of religion purposes, is the right to act in accordance with conscientious beliefs. If one person's beliefs differ in relevant ways from those of another person, substantive equality requires that relevant differences in belief be taken into account. A parent who treats her children equally in the substantive sense may treat them differently by taking into account relevant differences and needs in their personalities. This does not result in unequal treatment provided that the other person's relevant characteristics (beliefs) are also taken into account, even in a way unique to the differing beliefs. In order to protect different beliefs equally, the state must acknowledge the differences. The freedom of religion guarantee is designed to assure that religiously based differences are given their full measure of respect. The hazard of the equality paradigm is that it can too easily mistake formal equality (the assumption that exemptions are evidence of preferential treatment and, therefore, are anathema) for substantive equality. The latter, in contrast, is sensitive to the fact that sometimes the only way to preserve equality is to allow differential treatment (an exemption). To respond otherwise is to penalize the religion asking for the exemption and accord preferential treatment by default to the religion (or nonreligion) not affected by the offending law.

A brief example will illustrate. Assume a student is a member of a Jewish denomination that asks male adherents to wear a yarmulke, although not all of them do. If a dress code at school prohibits headgear, there is an obvious conflict between the state rule and the religiously motivated action of wearing a yarmulke.[15] In

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[14] *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1006 (1990).

[15] This hypothetical is analogous to *Goldman v. Weinberger*, 475 U.S. 503 (1986). *Goldman* involved an Orthodox Jewish rabbi who was a member of the U.S. Air Force. *See id.* at 504. His religious obligation to wear a yarmulke conflicted with the Air Force dress code, which required him to keep his head uncovered while on duty indoors. *See id.* at 505. The Court rejected his application for an exemption, emphasizing the special situation presented by being part of the military. *See id.* at 509-10.

order for the Jewish boy to attend school and obey his conscience at the same time, an exemption is necessary. A Catholic boy at the same school needs no exemption because no rule conflicts with his religious decision to wear a cross. The equality being sought after is the right to participate in state institutions without offending the respective religious beliefs. In order to achieve this equality, the Jewish boy will need an exemption from the dress code, whereas the Catholic boy will not. Under a liberty paradigm, the yarmulke would be allowed as a matter of religious freedom. Under the equality paradigm, the yarmulke would be prohibited because headgear is prohibited for all.

One of the weaknesses in the equality paradigm's assumption that no cognizable harm occurs as long as all are governed equally by a prohibition is that it forgets that religion often permeates every aspect of the adherent's life. A casual adherent, who is content to practice his religion only on church-owned property during a time specifically set aside for religious worship, will encounter few conflicts with state laws. An adherent that believes his religion should affect every aspect of his life, such as his dress, eating habits, and conduct in the workplace, will obviously run into more conflict when the state attempts to regulate dress, eating habits, or workplace behavior.

This explanation illustrates the religious adherent's need to be able to vary his behavior from norms specified in state regulations. Proponents of the equality paradigm label such accommodation "preferentialism" and claim that it violates equal treatment. Two other papers presented during the symposium addressed such concerns. As I understood Professor O'Neil, state RFRA laws will not cause undue conflict with civil rights legislation by preferring religious treatment to the detriment of others because, in any cases of significance, equalitarian concerns will be sufficiently compelling to trump religious claims.[16] Professor Brownstein's article implies a similar moral: state RFRA laws cannot create religious exemptions from otherwise valid speech regulation because equality or neutrality paradigms have come to dominate our freedom of speech analysis.[17] A question from the audience during the conference about the apparent preferencing of religious speech in *Mur-*

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[16] *See* Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785 (1999).

[17] *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999).

dock[18] parried by analysis suggesting how it might be brought within the equality paradigm (the speech in question was being made equal, not being privileged). The question evoked echoes of an older paradigm in which religious freedom was genuinely a first freedom at the center of all human liberties and most highly insulated from the reach of the state. But the echoes seem to be growing faint.

Equalitarian proponents quite understandably do not want to allow religious free exercise exemptions to swallow civil rights rules.[19] But fear of slippery slopes in this area is not warranted by a study of the religious exemptions granted in the years before *Smith*.[20] Courts have been, if anything, underprotective of religious liberty in distinguishing between situations when an exemption would inappropriately undermine a legitimate or compelling state interest and when it would not.

It is difficult to know how to respond to something as powerful as the grip of an intellectual paradigm. Among other things, the difficulty is compounded because one agrees with so much of the paradigm. Human beings do deserve equal treatment. Achievements in the field of civil rights mark some of the most fundamental accomplishments of this century in furthering the cause of justice. Moreover, the "cloak of religion" should not be allowed to

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[18] *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943). The question was posed by John Stevens.

[19] *See* Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1473 n.10 (1997) (citing Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989) (stating that "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe")).

[20] Many religious exercise claims failed, even under the strict scrutiny applied before 1990. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 683-84 (1989) (holding that taxpayers may not deduct charitable contributions made to Church of Scientology); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988) (holding that Free Exercise Clause does not prohibit government from permitting timber harvesting in forest used for American Indian religious purposes); Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983) (holding that nonprofit private schools that enforce racially discriminatory admissions standards on basis of religious doctrine do not qualify as tax-exempt organizations); United States v. Lee, 455 U.S. 252, 263 (1982) (imposition of Social Security taxes on employer who objected to payment on religious grounds was not unconstitutional). Granting religious exemptions has not resulted in prohibitive expense to the government or to reformulating government programs. The parade of horribles suggested by the phrase "permit every citizen to be a law unto himself" has not and will not materialize under a regime that utilizes the compelling state interest test. *See* Reynolds v. United States, 98 U.S. 145, 167 (1878).

provide a cover or an excuse to circumvent just equalitarian demands. But while all civil rights raise issues of equality, all civil rights are not created equal. There are some situations in which freedom, particularly religious freedom, should trump equalitarian concerns. Respecting religious freedom in such contexts is not necessarily privileging it; it is simply giving religious freedom its due.

The force of the equalitarian paradigm constantly erodes religious freedom at its edges. It unravels exemptions and discourages difference in the name of substantive equality. Moreover, it is not easy to alter the power of the equalitarian paradigm. Part of that power is that the paradigm filters and alters perceptions, reinterpreting and assimilating contested cases.[21] But unlike the one-way paradigm shifts in Kuhnian scientific revolutions,[22] contrasting legal paradigms remain permanent possibilities of human imagination that can be invoked if the legitimacy of the alternative vision can be made clear.[23]

In order to reassert the legitimacy of the liberty paradigm, we must not only argue on the plane of equalitarianism, but in addition, we must be vigilant in upholding the validity of the liberty claims. So, just as it is important to highlight discrimination, it is also important to remind people that religious freedom is an intrinsic value that should be respected in its own right. Society should not wait until religion can point to a history of discrimination as egregious as the history of racial discrimination before religion becomes entitled to protection.[24] The dignity of human beings

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[21] The *Smith* case cited several cases in which free exercise exemptions were denied as examples supposedly proving that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law." Employment Div. v. Smith, 494 U.S. 872, 878-79 (1989). *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish exempted from obeying mandatory school attendance law).

[22] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 18-20, 111-35 (2d ed. 1970).

[23] *See* W. Cole Durham, Jr., *Religion and the Criminal Law: Types and Contexts of Interaction*, *in* THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION — A TRIBUTE TO HAROLD J. BERMAN 193, 207 (John Witte Jr. & Frank S. Alexander eds., 1988).

[24] *See* City of Boerne v. Flores, 521 U.S. 507, 529-36 (1997) (suggesting that religion deserves no special protection simply because it has not historically been discriminated against on same level as racial discrimination).

> In contrast to the record [of widespread and persisting racial discrimination] which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry . . . in the past 40 years . . . . It is difficult to maintain that they are examples of legislation enacted or enforced due to animus

responding to the call of conscience, either as individuals or as religious organizations, deserves respect in itself. Instances that show state action unnecessarily encroaching on conscience are often as persuasive, if not more persuasive, than instances that show intentional discrimination. That is, as narratives are gathered that help clarify the concrete needs for state RFRAs, it is sound strategy to sift them to bring out compelling, often discriminatory harms while assuring that those cases deployed in political arguments do not stir up negative sensitivities. At the same time, however, it is vital and possibly even more important to find narratives that can help us revivify a freedom paradigm within which both freedom and equality can be secure. Freedom is better at safeguarding equality than equality is at safeguarding freedom.

C. The Self-Limiting Character of Religious Freedom

A third abstract point has more practical implications. For lack of a better phrase, I refer to this as the self-limiting character of religious freedom. It is as though religious freedom is elastic, but elastic with a drawback. As you try to expand the scope of its coverage it becomes attenuated at the edges, and simultaneously grows thinner (and weaker) even in more central domains of its coverage. Thus, for example, there is an almost ineluctable tendency to provide infinitely elastic definitions of religion, but as the range of covered groups and activities broadens, the range of problems at the periphery multiplies. In addition, it becomes more and more difficult to separate religious liberties from "normal" liberties, and it becomes more and more natural to accept "normal" rational basis scrutiny in evaluating state regulation of religion — not only at the periphery, but at the core.

Stated differently, if religious liberty claims sweep too broadly, it is virtually impossible to avoid situations where most reasonable people would agree that secular concerns trump arguably religious claims.[25] This helps explain Professor Laycock's comments to the effect that while there are many land use situations in which seri-

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or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country.

Id. at 530-31.

[25] *See generally* United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968) (holding that Religion Clause did not exempt member of Neo-American Church from compliance with drug laws).

ous violations of religious freedom are occurring, there are also many situations where it is reasonable to expect religious groups to respect and be willing to accommodate the needs of surrounding society.[26] Excessive insistence on strict scrutiny in these areas is likely to lead to distorted assessment of state interests in an effort to justify rational solutions. In this area, bad cases generate bad compelling state interests, which can then come back to haunt religious liberty claims in more sensitive contexts.

The counsel here is to be cautious about making excessive religious freedom claims. This is why, though I am not in love with the substantial burden test for setting the threshold trigger for state RFRA protection, such a test is probably necessary. I will return to this point later.[27]

Whether we like it or not, religious freedom cases come down to a balancing of competing interests. But of course, the balancing occurs on scales that are at best metaphorical and that lack any metric for quantifying what is being measured on a common scale. This means that it is vital to assure that the religious claims are characterized in ways that bring out their full implications and that state interests are not hyperinflated. In some respects, European "proportionality" approaches to borderline issues of religious freedom,[28] while seemingly weaker than insistence on a "compelling

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[26] *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 756 (1999).

[27] *See infra* Part II.D.

[28] *See generally* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 45-46 (2d. rev. ed. 1997). Kommers explained the German notion of proportionality, which is representative of European analysis in this area, as follows:

> [C]onstitutionally protected legal values must be harmonized with one another when such values conflict. One constitutional value may not be realized at the expense of a competing constitutional value. . . . Both values must be preserved in creative unity. . . . "The principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values."
>
> In its German version proportionality reasoning is a three-step process. First, whenever parliament enacts a law impinging on a basic right, the means used must be appropriate . . . to the achievement of a legitimate end. . . . Second, the means used to achieve a valid purpose must have the least restrictive effect . . . on a constitutional value. This test is applied flexibly and must meet the standard of rationality. As applied by the Constitutional Court, it is less than the "strict scrutiny" and more than the "minimum rationality" test of American constitutional law. Finally, the means used must be proportionate to the end. The burden on

state interest," may be more realistic. A functional equivalent may be to recognize, as Professor Berg has, that because compelling interest tests in religion contexts have to assess conduct, they are in fact more likely to yield outcomes substantially less automatic (and more flexible) than the results of strict scrutiny where racial classifications are involved.[29] Expecting too strong of a win ratio by ratcheting the test for religious freedom infractions too high may spread social tolerance for religious freedom thin, resulting in a loss of crucial leverage at the bargaining table with low level bureaucrats where day-to-day problems are encountered.

D. The Need to Minimize the External Costs of Requested Accommodations

One of the recurrent themes at this conference is that courts are particularly hesitant to require accommodation where the cost of doing so is visited on innocent third parties. To the extent that protecting religious freedom has costs, it is much easier to obtain protection of the freedom if those costs are not externalized. In this regard, it is worth remembering that sometimes state officials can legitimately object to the costs of accommodation.

While in general I have strong sympathies with an accommodationist approach, I have become increasingly sensitive to the need for what could be called "responsible accommodationism" — to accommodationism that does its best to mitigate third party costs. Let me give you a practical example that has quite literally brought this issue home to me. A few years ago, the Utah legislature passed legislation that in effect constituted an educational RFRA. The act provides that "[a]ny limitation . . . on student expression, practice or conduct [motivated by religious belief or right of conscience] shall be by the least restrictive means necessary to satisfy the school's interests [as specifically spelled out in the statute] . . . or to satisfy another specifically identified compelling governmental interest."[30] The law provides that a student or parent may request that a student be exempted from a particular requirement, or al-

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the right must not be excessive relative to the benefits secured by the state's objective.

Id. at 45-46 (citation omitted).

[29] *See* Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531, 533-34 (1999).

[30] UTAH CODE ANN. § 53A-13-101.3(3) (1998).

ternatively, may request a "reasonable alternative that requires reasonably equivalent performance by the student of the secular objectives of the curriculum or activity in question."[31] The school may reject this request only if the educational RFRA's compelling state interest test is satisfied.

With respect to this particular provision, the state official with whom I have had the most frequent discussions is my wife, who teaches English at a local public high school. She is regularly confronted with requests from students or parents that have conscientious objections to being exposed to material she has included in the curriculum. At least some of the requests come from students engaging in strategic behavior: their proposed alternatives are generally shorter and easier than the regular texts. More typically, parents object to literature that most of us would find totally unobjectionable. (*Grapes of Wrath* has been a target of a great deal of parental opposition lately, and my wife is convinced that if some of the same parents really understood Shakespearean innuendo, Shakespeare would have to go as well.) The question my wife asks me most often is, "how much can parents and students legitimately request of me?" My wife typically departs for school no later than 6:30 a.m., and often stays until 10 or 11 p.m. She works incredibly hard, carrying the typical Utah course load of five classes with thirty or more students per class. She genuinely tries to teach writing, which generates horrendous grading burdens. Pay is clearly not commensurate with the work. How much special tailoring can she reasonably be expected to provide? By thinking of my wife, I am reminded that in a large range of circumstances even bureaucrats have human faces. Sometimes accommodation costs are unfairly visited upon them, especially in a world in which budgets are ever tighter and public officials are often underpaid.

One response is to say (correctly I think) that Utah should put more resources into its educational system so it can provide more alternatives without visiting the costs on "state officials" like my wife. But because of family size in Utah, we face the dilemma of having one of the highest per-household tax burdens in the country, although this consistently yields one of the lowest per-pupil outlays on education of any of the states. The point is that state resources for bearing accommodation costs are genuinely finite.

More generally, it is fair to say that one of the major sources of

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[31] *Id.* § 53A-13-101.2(1).

growth of the welfare state is that we are much better at generating entitlements than the resources to implement them. Sometimes by creating new remedies, we intensify litigation, polarization, and barriers to cooperation that in the last analysis do more damage than good. At a minimum, the proliferation of entitlements and unfunded mandates is rapidly exhausting any unexpended reserves that might otherwise be available to cover accommodation costs.

What does this mean as a practical matter? It is often reasonable to expect that those claiming accommodation for religious freedom should be expected to internalize the costs of doing so, either by bearing the costs directly or by providing some reasonable quid pro quo. It is fair enough to ask the state and third parties to accommodate them if this does not result in forced imposition of costs on others (at least without any offsetting direct or indirect compensation). In identifying less restrictive alternatives, it is obviously helpful if religious groups seeking accommodations can describe measures that will help minimize externalization of the costs of accommodation. Given the importance of the religious freedom interests at stake, state officials should at least be open to recommendations that would both reduce perceived burdens on religion and attempt to minimize the accommodation costs that are imposed on others. This is not only responsible accommodation, it is good strategy for those seeking the accommodation as well. My wife is much more receptive to requests for alternative treatment that are well thought out and credible than to pushy demands that she generate a special alternative curriculum in her nonexisting spare time.

E. The Problem of State Interpretive Context

As a final general point, it is extremely important to pay attention to the interpretive context into which state RFRA language will be injected. Part of the appeal of the original RFRA language is that it could capitalize on familiar language that had reasonably settled (if not totally predictable) meanings in light of fairly extensive prior federal case law.[32] Given the varieties of state constitutional language and case law, one cannot necessarily assume that

[32] *See generally* Seeger, *supra* note 19, at 1477 (noting that RFRA defined "exercise of religion" with reference to First Amendment in order to incorporate case law in years before *Smith*).

federal language will operate in exactly the same way in state settings. The development of an independent, state free exercise jurisprudence has already begun as some states reject the *Smith* standard.[33] In the years before 1990, many states simply adopted the federal standards for free exercise, which at the time was the compelling interest standard of *Sherbert* and *Yoder*. After the federal standard was lowered by *Smith*, several state courts have chosen to continue the higher *Sherbert/Yoder* standard.[34]

Early in the 1990s in Utah, an unfortunate lower court decision[35] prompted some to consider revising the religion provisions of Utah's Constitution. One proposal of simply reverting to language that would track the Federal First Amendment had to be abandoned because of fears that this would risk picking up the then prevailing interpretation of federal "free exercise" enunciated in *Smith*.

Another question is the extent to which interpretation of parallel state language will be affected in unpredictable ways by decisions in federal and surrounding state cases.[36] As states continue to develop

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[33] *See* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 243-62 (1998).

[34] *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994); King v. Village of Waunakee, 517 N.W.2d 671, 683 (Wis. 1994); First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992); *see also* Crane, *supra* note 33, at 250 & n.100. As Daniel Crane has noted, state supreme courts have not followed every wind of U.S. Supreme Court doctrine in interpreting state provisions:

> [A] declaration of allegiance to the *Sherbert/Yoder* formulation should be understood as a commitment to that particular jurisprudential standard and not as a promise to follow the Supreme Court down whatever bunny trails it may decide to visit. Almost all of the state supreme courts, when addressing free exercise issues since *Smith*, have apparently assumed that following *Smith* would require a reversal of state court precedents rather than simple adherence to *stare decisis*.

Id. at 250.

[35] The lower court decision, described in the Utah Supreme Court's opinion calling for reversal, *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), had held that city council prayer ran afoul of very strict Utah nonestablishment provisions. *See id.* at 917, 919. Among other things, this was because the city paid for the electricity in the microphone used during the prayer and for the time of an official that called representatives of various churches to assure that the city council prayer practice was balanced and open. *See id.* at 919. The implications of this rather wooden opinion were that there was room for virtually no accommodation of religion of any kind in public settings in Utah. This decision led to a spate of proposals for state constitutional reform, which were ultimately rendered moot by the Utah Supreme Court's decision in *Whitehead*. *See id.* at 940.

[36] Alabama, for one, has avoided this problem by defining freedom of religion in reference to its state constitution, thereby expressly distinguishing state and federal law in this area. *See* S.B. 604, 1998 Reg Sess. (Ala. 1998). The proposed constitutional amendment contains the following definition: "Freedom of Religion. The free exercise of religion under

their own free exercise jurisprudence, rather than looking to the federal standard, these state definitions will become more reliable.[37]

Ultimately, such concerns call for caution and thought in developing findings and clarifying statements of legislative intent. But there are unavoidable limits on how clear one can be in delineating the precise scope of religious freedom. It is also vital to make certain that state RFRA laws are given the broadest possible application. Among other things, they should apply to pre-existing legislation and should contain provisions stating that RFRA will apply to future legislation except insofar as later legislation expressly disclaims RFRA applicability.[38] It is more important at the state level to attend to such issues because state RFRAs do not have the benefit of the Federal Supremacy Clause, which would have significantly enhanced the clout of the Federal RFRA in state contexts.

II. THE SCOPE OF RELIGIOUS FREEDOM UNDER STATE RFRAS

With these general reflections as background let me turn to more concrete reflections on the scope of free exercise that state RFRAs ought to afford. The scope of free exercise needs to be thought of along a series of different continua. As listed above, these include (1) a determination of what falls within the definition of religion (and related terms); (2) the range of persons or entities covered; (3) the range of activities covered; (4) the question of what threshold burden is necessary to trigger protection; and finally, (5) the formulation of the standard of review itself. In what follows, I will comment briefly (and unfortunately, rather nonexhaustively) on each of these topics.

A. The Problem of Definition

The problem with defining religion (and related terms such as "religious," "church," "clergy," and other like terms dealing with

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Article I, Section 3, of the Constitution of Alabama of 1901." *Id.* (amending 1901 Constitution of Alabama and pending approval by voters).

[37] *See generally* Crane, *supra* note 33, at 263-64 (examining how several state supreme courts treat their states' freedom of religion provisions). Crane asserted that "[i]t is high time that the states be encouraged to explore some of the unique history and potential of their own religion clauses." *Id.* at 264.

[38] *See* FLA. STAT. ANN. § 761.05(1)-(2) (West Supp. 1999). Florida's Religious Freedom Restoration Act of 1998 includes such a provision. *See id.*

ecclesiastical structure) is, I am convinced, theoretically insoluble for at least two reasons. First, wherever one attempts to set the definitional line, there is always some new organization or group (or belief or activity) that falls outside the definition but is functionally analogous to something included in the definition and cries out for equal treatment. This equalitarian argument is either resisted, in which case one is left with difficult problems of unequal treatment, or one yields to it by progressively broadening the definition so that its periphery is pushed out further and further until almost no group would be excluded. At that point, the definition becomes vacuous because of excessive inclusion. "[A] definition [that does] not exclude, [does] not define."[39] Second, even if one did not face this intractable continuum problem, there is something profoundly troubling about secular institutions trying to make pronouncements about an incommensurable realm that is beyond the purview of merely secular experience.

Having said this, except in systems that have no scruples about employing definitions to exclude a wide array of social groups that are generally viewed by sociologists, historians, anthropologists, and others as religious, the problem is not overly serious as a practical matter. The overwhelming majority of cases in which courts and administrators face religious claims involve groups with respect to which there is no serious doubt about the bona fides of the claim's being religious. In this sense, the approach suggested by the U.N. Human Rights Committee's handling of the definition problem in its official interpretation of the religion provision of the *International Covenant on Civil and Political Rights*[40] seems fairly workable:

> The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the

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[39] Val D. Ricks, *To God God's, To Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1061 (1993).

[40] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 178 (*entered into force* Mar. 23, 1976) [hereinafter Civil & Political Covenant].

subject of hostility by a predominant religious community.[41]

Obviously, this provision does not provide either a definitive criterion or a set of factors that can be used to distinguish religion from nonreligion, but it makes it clear that limitation to traditional or familiar forms of religion does not suffice and that the notion of religion is to be broadly construed to avoid discriminatory impacts. This approach is obviously vague at the boundaries but relatively clear as a procedural matter. If a group claiming to be religious is a traditional religion, or is similar to a traditional religion, that is a sufficient (though not a necessary) condition for treating the group as religious. From the international perspective at which the U.N. interpretation applies, the fact that a dominant religion in a country would prefer not to recognize another religion would seem to be an obviously suspect way of trying to delimit religions. Similarly, if a number of countries with acknowledged stature in respecting religious freedom have conceded that a particular organization is religious, particularly those that have had substantial experience with the religion in question, there would seem to be little justification for other countries to withhold such recognition. Countries that dispense subsidies to religious organizations may have legitimate reasons for limiting the range of organizations eligible for such treatment (although this will obviously raise discrimination issues).[42] Nonetheless, status as a religion eligible for fundamental religious freedom protections should be made widely available, and definitional gambits should not be used to artificially restrict the scope of such protections. Thanks to the strength of the United States's Establishment Clause, many of the questions about which groups should be subsidized simply do not arise in American states; the stakes of the definitional issue are, accordingly, much lower. But the same notion — that definitions should not be manipulated to exclude groups that are reasonably close to traditional patterns of religiosity — ought to apply.

There are, of course, difficult questions having to do with the boundaries between what is religious on the one hand and what is

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[41] Human Rights Committee, General Comment No. 22 (48), concerning article 18 CCPR/C/21/Rev.1/Add. 4 (1993).

[42] Many European countries with respected traditions of religious freedom have two-tier church-state systems that guarantee broad protections of religious freedom, but restrict state cooperation and direct or indirect subsidies in ways that benefit a more restricted subset of religions. *See generally* GERHARD ROBBERS, EUROPEAN CONSORTIUM FOR STATE AND CHURCH RESEARCH, STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 1996).

merely a matter of personal, commercial, political, or philosophical activity or belief on the other. In the last analysis, I believe the most credible approach to this problem takes into account, and accords great deference to, the self-concept of the person or organization as to whether it is religious or religiously motivated, but the deference is not unlimited.[43] Thus, the fact that Scientology regards itself as a religion should count heavily in favor of its being regarded as such by others, whereas the fact that Marxism would be distressed by being labeled as a religion should count against its being so treated. It may well be that worldviews should receive equal treatment, whether they are religious or not.[44] But this does not imply that all worldviews are necessarily religious. Where it is unclear that a worldview that claims to be a religion deserves in fact to be so categorized or where there is clear evidence to suggest that a claim of religious status may be being made for strategic or bad faith reasons, courts can resolve disputes by making analogical comparisons with functionally similar organizations or beliefs where there are some indicia of religiosity. The presence of certain beliefs, such as the belief in a supreme being or a spiritual domain, clearly identifies a group as religious and would constitute sufficient conditions for recognizing a religious status. The fact that the beliefs held are unpopular or extreme should not be allowed to disqualify a group as being religious.[45] At bottom, this use of analogy amounts to identifying functionally similar characteristics or factors that point toward or away from religious status, with no single factor being required. The difference between the limited deference approach I advocate and a more strictly analogical

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[43] *See* Ricks, *supra* note 39, at 1100-07 (outlining approach that partially defers to organization's characterization of itself while allowing courts to consider other facts if necessary to determine organization's status). A sophisticated version of the deference model, which draws on the model of respect that one jurisdiction shows another in the field of conflict of laws, is worked out in an impressive student note published in the *Yale Law Journal*. *See* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 362-76 (1980).

[44] For this reason, international instruments speak of freedom of "religion or belief." *See, e.g.*, Civil & Political Covenant, *supra* note 40, at 178. In a similar vein, article 4 of the German Basic Law provides that "Freedom of faith and conscience as well as freedom of creed, *religious or ideological*, are inviolable." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (official translation published by the Press and Information Office of the Federal Government, revised and updated 1995) (emphasis added).

[45] Kent Greenawalt appears to favor such an analogical approach. *See* Kent Greenawalt, Five Questions About Religion Judges Are Afraid to Ask (Oct. 18, 1996) (unpublished manuscript, on file with *DePaul Law Review*), *described in* Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 137-39 & nn.401-03 (1997).

approach lies essentially in the fact that the former has a stronger presumption that a belief or belief system that views itself as being religious counts as such. Where the analogical approach automatically qualifies an outlook or activity as religious if certain "sufficient condition" factors are present, the partial deference approach goes further by giving presumptive recognition to claims of religious status. The presumption need not be questioned unless substantial doubts arise in society about the legitimacy of the presumptive claim. Only at that point would the more intrusive analogical approach be invoked. Its application might result in defeating the presumption of religious status, but the analogical approach itself should be applied in an even-handed manner that is not unduly biased toward weighting factors present in traditional religions. Of course, if traditional factors are present, there is a strong likelihood that the presumption of religiosity should be confirmed.

The rationale for the partial deference approach is that claims of religious freedom deserve presumptive respect unless there is something about the claim or claimant that raises suspicion. Stated differently, there is something disrespectful about assuming as a general matter that claims to religious status need to be scrutinized. In case of doubt, respect for religious freedom suggests that the presumption should be in favor of recognizing a religious freedom claim, but some outer limits are necessary to weed out fraudulent, strategic, or otherwise illegitimate claims. This basic position obviously needs to be worked out in more detail.[46] But I need to stress again, the problematic definitional cases are comparatively rare and do not give rise to untenable slippery slope problems. The problem of definition is theoretically insoluble, but does not constitute a massive practical issue.

I confess being troubled by how to deal with profoundly antisocial groups such as one might imagine Satan worshipers to be. My sense is that one of the reasons we believe religious freedom should be protected is that, in general, religious organizations contribute in positive ways to society[47] (even though a religious group may be sharply critical of society as it exists). Over time, religious organizations have proven themselves as particularly fruitful gen-

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[46] A fuller version of my position is scheduled to appear in a volume being published under the auspices of the DePaul Center for Church-State Studies, provisionally entitled THE STRUCTURES OF AMERICAN CHURCHES.

[47] *See generally* John H. Garvey, *All Things Being Equal . . .*, 1996 BYU L. REV. 587, 588-609 (discussing effect of proposed Religious Equality Amendment on First Amendment law).

erators of salutary ideas and normative structures.[48] I admit I do not have a neat way of ruling out extreme antisocial groups in a principled way, but this seems to be a more general problem of pluralist theory. The practical solution is to rely on normal criminal laws to address bad actions perpetuated by members of such groups. At this point, because I do not have a way of ruling out extremist or fundamentalist groups, I would not do so at the definitional level. Definitional constraints should not be used to deny free exercise protections by definitional fiat. Such groups are entitled to prima facie religious liberty protections, subject to the caveat that antisocial actions of the group's members may be subject to legal regulations that pass applicable standards of heightened scrutiny. At least in part, this reflects a belief that all too often groups are extreme and become increasingly radicalized precisely because they have been systematically marginalized.[49]

But again, for the structure of state RFRAs, these are largely symbolic problems that can be resolved as a practical matter by simply leaving religion undefined, except to state either directly in the text or in documents articulating legislative intent that the term "religion" and religious terminology should be broadly construed in the interest of protecting religious freedom. Efforts to bring about the adoption of state RFRAs will encounter enough controversy; the definitional issues may appropriately be left to later resolution by courts.

B. The Range of Persons Covered

Typical state RFRAs protect the free exercise rights of "persons."[50] It is probably clear that this extends beyond natural to

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[48] *See* Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 19-25 (1983) (using biblical texts to illustrate creation of normative legal system); Mary Ann Glendon, *General Report: Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 385, 405-09 (exploring notions of individualism and communitarianism behind religion language of First Amendment to U.S. Constitution). Sir Patrick Devlin expressed the contrary worry, that too much liberty could unleash far more asocial than socially constructive activity: "[P]imps leading the weak astray far outnumber spiritual explorers at the head of the strong." PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 108 (1965).

[49] Part of John Locke's genius was recognizing this dynamic. Locke also recognized that the elimination of this dynamic through the practice of tolerance could exert a stabilizing force on society. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION 68-69 (Prometheus Books 1990) (1689).

[50] *See, e.g.*, FLA. STAT. ANN. §§ 761.01-.05 (West Supp. 1999); R.I. GEN. LAWS §§ 42-80.1-3 to 42-80.1-4 (1998); S.B. 604, 1998 Reg. Sess. (Ala. 1998) (amendment to 1901 Constitution

legal persons. The California RFRA,[51] passed last year by the legislature but subsequently vetoed, defines "person" to include "an individual, partnership, association, corporation, organization, or any other combination thereof."[52] Presumably this language includes unnamed organizational forms such as trusts, as well as entities such as churches, synagogues, mosques, and in general, any religious community regardless of the legal structures they use to organize their affairs before the law. In defining "person," state RFRAs should clearly use language such as "includes" to make it clear that the list of entities covered is not strictly limited to an enumerated set.

Significantly, coverage is not limited to groups that are primarily religious; coverage may extend to organizations such as schools, hospitals, or other entities that may be infused with or that may act from a sense of religious mission. As one moves away from traditional religious organizations such as churches or synagogues to entities that perform functions that closely resemble those carried out by counterpart secular organizations, the claim that the organizations should be exempt from normal secular regulations declines.[53] Still, state RFRA coverage ought to apply where there is a credible link to religion. Religious organizations ought to be granted broad latitude in structuring the way they carry out their internal affairs.[54]

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of Alabama pending approval by voters); H.B. 2370, 90th Gen. Assembly, 1998 Reg. Sess. (Ill. 1998) (enacted); H.B. 2, 1998 Reg. Sess. (Ky. 1998) (enacted); CONN. GEN. STAT. ANN. § 52-571b (West 1997).

[51] *See* A.B. 1617, 1998 Reg. Sess. (Cal. 1998) (vetoed).

[52] *Id.* § 6403(d).

[53] *See* Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343, 355-61 (1992) (discussing governmental regulations that benefit and burden religious organizations).

[54] *See, e.g.*, Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) (holding that Congress intended to minimize governmental interference into religions' decision-making process); NLRB v. Catholic Bishop, 440 U.S. 490, 502-03 (1979) (noting that NLRB's inquires into religious schools' labor practices may impinge on schools' rights under Religion Clauses); *see also* Esbeck, *supra* note 53, at 360 (suggesting that legislatures should refrain from burdening noncommercial aspects of religious organizations); 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, 1403-09 (1981) (discussing church autonomy with respect to church's internal affairs).

C. The Range of Activities Covered

The range of activities covered should also be broad. Case law affirms that religious beliefs, observances, and practices are covered regardless of whether they are the precise beliefs that would be articulated by the religious group with which a person is affiliated[55] and even when the person in question is not affiliated with any organized religious group.[56] In general, only sincerely held religious beliefs qualify for protection, although that requirement raises concerns about proper evidentiary assessment of sincerity.[57]

One of the most important issues that needs to be resolved by state RFRAs is how strongly a religious imperative must be grounded in order to invoke religious freedom protections. There are two dimensions to this concern: first, the degree of compulsoriness of a religious belief, and second, the relative centrality of the belief. These two considerations may overlap, but they may also be independent. A particular practice could be classified as a command, but could be relatively peripheral to the religious life of a community. On the other hand, a religious activity could be totally voluntary (such as accepting a call to the ministry), and yet be extremely central to religious life. Most state RFRAs take a broad view of the protections that are needed in both of these dimensions by defining exercise of religion as activity "that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[58]

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[55] *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (holding that Jehovah's Witness was entitled to unemployment benefits after quitting work in armaments factory because of objections to participating in war industry even though another Jehovah's Witness testified that he would not have quit); *see also* Pielech v. Massasoit Greyhound, Inc., 668 N.E.2d 1298, 1303-04 (Mass. 1996) (declaring that courts should not get entangled in assessing individualized understandings of specific practices, such as holiday observances).

[56] *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834-35 (1989) (holding that state could not deny unemployment benefits to man that would not work on Sunday due to religious convictions, even though he did not adhere to any particular religion).

[57] *See generally* Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461, 462-63 (1998) (discussing issue of sincerity in free exercise law); Horwitz, *supra* note 45, at 143-50 (discussing fraud with respect to religious groups); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 105 (1995) ("[T]he Court's hostility to investigation of the reasonableness of a claimant's religious beliefs and its willingness to credit the claimant's own interpretation of the behavioral requirements of those beliefs in fact [has] made any inquiry into sincerity problematic.")

[58] FLA. STAT. ANN. § 761.02(3) (West Supp. 1999); *see also* H.B. 1041, 1998 Reg. Sess. (Md. 1999); S.B. 1391, 44th Leg., 1st Reg. Sess. (Ariz. 1999); S.B. 370 90th Gen. Assembly, 1st Reg. Sess. (Mo. 1999); H.B. 601, 76th Leg., 1st Reg. Sess. (Tex. 1999); H.B. 2370, 90th Gen. Assembly, 1998 Reg. Sess. (Ill. 1998) (enacted); S.B. 321, 208th Leg. (N.J. 1998). *But cf.*

This approach is both sound and vital to assure full protection to legitimate religious freedom claims. Failure to include such language in state RFRAs unnecessarily opens religious freedom to the risk of undue narrowing by judicial interpretation. Many courts in the past have found it necessary to protect only religious commands or central religious practices[59] even though this would appear to violate clear constitutional constraints barring secular courts from assessing the nature, content, and relative importance of religious beliefs.[60]

1. Compulsoriness of the Religious Conduct

Cursory reflection on the nature of religious belief and observance is sufficient to make it clear that religious exercise can be substantially burdened by state action even if the practice in question is not strictly a commandment. Examples are legion, but a few cases should suffice. In most religious traditions, the call to the ministry is not a command applicable to all members; depending

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CONN. GEN. STAT. ANN. § 52-571b (West Supp. 1999); R.I. GEN. LAWS §§ 42-80.1-2 to 42-80.1-3 (1998) (not defining "exercise of religion" in statute); S.B. 604, 1998 Reg. Sess. (Ala. 1998) (amending the 1901 Constitution of Alabama pending approval by the voters). Four proposed state RFRA statutes define exercise of religion by referring to the clause in the state constitution. *See* H.B. 3158, 113th Gen. Assembly, 1st Reg. Sess. (S.C. 1999); S.B. 242, 222d Leg., 1st Reg. Sess. (N.Y. 1999); H.B. 4376, 89th Leg., Reg. Sess. (Mich. 1997); S.B. 105, 181st Gen. Ct., Reg. Sess. (Mass. 1997) (enacted).

[59] *See, e.g.*, Johnson v. Horn, 150 F.3d 276, 282 (3rd Cir. 1998) (noting that religious commandment is more central than mere positive expression of belief); Forest Hills Early Learning Ctr., Inc. v. Lukhard, 728 F.2d 230, 240 (4th Cir. 1984) (commenting that only laws which impede sincere or central religious belief impinge on free exercise rights); Wilson v. Block, 708 F.2d 735, 744 (D.C. Cir. 1983) (ruling that First Amendment also protects beliefs that are not central, but plaintiffs must prove land is indispensable to religious ritual); Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 306 (6th Cir. 1983) (noting that centrality of belief is court's primary consideration); International Soc'y for Krishna Consciousness v. Barber, 650 F.2d 430, 443 (2nd Cir. 1981) ("ISKCON") (holding that members of ISKCON can distribute tracts and solicit donations because both practices are central to their religion); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980) (finding that Native Americans did not prove lands were central and indispensable to religious ritual); Lewis v. Scott, 910 F. Supp. 282, 287 (E.D. Tex. 1995) (discussing centrality to determine if there is substantial burden); Edwards v. Maryland State Fair and Agric. Soc'y, 476 F. Supp. 153, 163-65 (D. Md. 1979) (holding that distributing literature is not central to ISKCON faith and, therefore, may be restricted and regulated). Generally, courts refer to centrality only in dicta, but the fact that the topic keeps coming back is proof that courts still consider centrality of beliefs. Carefully drafted legislation will ensure that courts steer clear of making such judgments.

[60] *See* Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990); Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446-47 (1969).

on the tradition, the call might be experienced as a personal command, but it may also simply be a religiously motivated choice. Nonetheless, governmental authority has traditionally shown respect for this particular kind of religiously motivated choice in a variety of ways, including the exempting of ministers from military service[61] and granting of parsonage exemptions from tax requirements.[62]

Similarly, in the spate of bankruptcy cases that sought to recapture prebankruptcy tithing payments and other religious contributions under the Federal Fraudulent Conveyance Act,[63] bankruptcy trustees contended that such contributions did not constitute protected religious activity because church membership did not turn on making tithing payments.[64] That is, because tithing and other forms of religious contributions were voluntary, free exercise protections did not apply.[65] Congress plainly disagreed when it passed the Religious Liberty and Charitable Donation Protection Act of 1998,[66] thus solving this specific problem in field of religious contributions.

But the issue is a more general one: conduct that is motivated by religious belief is as deserving of protection as conduct that is religiously mandated. Among other things, beyond the relatively narrow circle of commandments, there is a vast range of supererogatory conduct (benevolent and charitable activity, for example) that may not be commanded in the narrow sense of strict prohibition or required performance, but may be extremely important to an individual's religious standing. Within religious traditions, there are subtle gradations between core commands and other types of

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[61] *See* 50 U.S.C.A. § 456(g)(1) (West 1990) (effective 1948).

[62] *See* I.R.C. §§ 265(a)(6), 1402(a)(8) (West 1998).

[63] *See* 11 U.S.C.A. § 548 (West Supp. 1999).

[64] *See, e.g.*, Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1414-15 (8th Cir. 1996); Martvig v. Tri-City Baptist Temple (*In re* Gomes), 219 B.R. 286, 294 (Bankr. D. Or. 1998); Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (*In re* Hodge), 220 B.R. 386, 389 (Bankr. D. Idaho 1998); Waguespack v. Rodriguez (*In re* Rodriguez), 220 B.R. 31, 32 (Bankr. W.D. La. 1998); *In re* Andrade, 213 B.R. 765, 768 (Bankr. E.D. Cal. 1997); Geltzer v. Crossroads Tabernacle (*In re* Rivera), 214 B.R. 101, 107 (Bankr. S.D.N.Y. 1997); Morris v. Midway S. Baptist Church (*In re* Newman), 203 B.R. 468, 471-72 (Bankr. D. Kan. 1996); *In re* Tessier, 190 B.R. 396, 399 (Bankr. D. Mont. 1995). *See generally* David Lynn Mortensen, Note, In re Young: *A Correct but Unnecessary Constitutional Decision*, 1998 BYU L. REV. 647, 654 (considering whether church members receive reasonably equivalent value for their tithe); Oliver B. Pollak, *"Be Just Before You're Generous": Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527, 543-53 (1996) (discussing issue of whether tithing is "reasonably necessary expense").

[65] *See, e.g.*, *In re Gomes*, 219 B.R. at 294.

[66] 11 U.S.C.A. § 548(a)(2) (West Supp. 1999).

religiously motivated conduct, and it is inappropriate for secular courts to engage in line drawing exercises within this sensitive domain. Moreover, differing religious traditions may have rather different views about what is commanded and what is done voluntarily. The scope of religious freedom protection should not vary across religions in accordance with the degree to which differing theologies view religious norms as calling for strict obedience or voluntary response. Free exercise protections should not be construed in a manner that affords differential protection for differing religions in accordance with their religious "stringency" quotient.

At the other extreme, the fact that a religious tradition explicitly permits conduct does not seem sufficient to trigger religious freedom protections. During the early 1990s in Utah, prochoice groups sought to assert free exercise challenges against legislation that imposed some restrictions on access to abortion.[67] The legislation in question was ultimately struck down in the aftermath of *Casey*[68] on privacy grounds. In the interim, however, Utah's federal district court rejected the free exercise claims that were brought by adherents of liberal faiths who contended that their religions taught them to cultivate conscience, and in their minds conscience permitted abortion.[69] This approach to free exercise would transform all permitted action in a person's life into religiously protected conduct. That would plainly go too far. By protecting "religiously motivated conduct," the state RFRA provisions strike the appropriate middle ground. They recognize that religious life consists of far more than mere commands, but do not seek to transform all activity in the life of a believer into protected conduct.

Many of the state RFRAs have language to the effect that activity that is "substantially motivated by a religious belief" is to be protected.[70] While the use of "substantially" here narrows the scope of

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[67] *See* Jane L. v. Bangerter, 61 F.3d 1493, 1496 (10th Cir. 1995).

[68] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[69] Jane L. v. Bangerter, 794 F. Supp. 1537, 1546-47 (D. Utah 1992). This same concern also appeared during the congressional debates before the passage of RFRA. *See generally* Seeger, *supra* note 19, at 1478-82 (tracking legislative history of RFRA when pro-life/prochoice concern was discussed in context of actions motivated by religious beliefs as contrasted to actions permitted by religious beliefs).

[70] *See, e.g.*, FLA. STAT. ANN. §§ 761.01-.05 (West 1998); S.B. 1391, 44th Leg., 1st Reg. Sess. (Ariz. 1999) (introduced); S.B. 38, 1st Reg. Sess. (Cal. 1999) (introduced); H.B. 1696, 20th Leg. (Haw. 1999) (introduced); H.B. 2370, 90th Gen. Assem. (Ill. 1998) (enacted); H.B. 1041, 1999 Reg. Sess. (Md. 1998) (introduced); H.B. 4376, 89th Leg., 1997 Reg. Sess. (Mich. 1997) (introduced); S.B. 321, 208th Leg. (N.J. 1998) (introduced); S.B. 242, 222d

protection to an undetermined extent and introduces some vagueness as to exactly where the outer boundary of religious freedom should be located, the limitation is probably not unreasonable, particularly if it is used primarily to sort out cases where the motivation for conduct is mixed and the religious component of the motivation is minor. Thus, for example, if someone requested an accommodation in the work place claiming Sabbatarian status, but consistently went to football games instead of worship services on Saturdays, some questions could arise as to whether the accommodation requested is "substantially motivated" by religious concerns. Note that concerns about substantial motivation may overlap with concerns about sincerity. To the extent that sincerity imposes a legitimate constraint on which religious claims are entitled to protection, determination that conduct is "substantially motivated" by religion is equally appropriate.

2. The Centrality of the Belief

Courts should not get involved in weighing centrality as a factor in eligibility for free exercise protection. This rule has been enunciated in an extended series of cases, beginning with the church-property dispute cases[71] and continuing in some of the post-*Yoder* cases[72] including *Smith* itself, which make it clear that courts should not get entangled in assessing doctrinal issues. Indeed, the centrality issue was one of the few issues in *Smith* that Justice Scalia managed to get right. Rejecting centrality as a possible constraint that could make the compelling state interest test acceptable, he stated:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. . . . Judging the centrality of dif-

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Leg., 1999-2000 Reg. Sess. (NY 1999) (introduced); H.B. 3158, 113th Gen. Assem. (S.C. 1999) (introduced); H.B. 601, 76th Leg., 1st Reg. Sess. (Tex. 1999) (introduced).

[71] *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602-06 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-20 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449-52 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 120-21 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679, 710-11 (1872).

[72] *See, e.g., Jones*, 443 U.S. at 608-09; Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989).

> ferent religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.[73]

It is true that in *Yoder*, the Court attached considerable significance to evidence in the record of the importance and centrality of Amish beliefs about educating their youth,[74] but in the years since, the Court has clearly recognized the hazards of leading courts into the doctrinal morass of assessing the relative importance or centrality of religious beliefs. Indeed, in light of the strength of precedent and the soundness of the reasons for avoiding centrality analysis, it is puzzling why the issue continues to resurface at all.

Allowing secular judges to make centrality assessments can lead to profoundly inappropriate results. In the first place, a doctrine or practice may not be central to a religious tradition, but it may nonetheless be very important. Within the Mormon tradition, for example, I would not necessarily claim that beliefs proscribing use of alcohol, tobacco, tea, coffee, and drugs are central, but they are clearly very important. Similarly, I can imagine that issues associated with wearing religious clothing might not be regarded as central, and yet such matters may be extremely important to religious believers.[75]

Defenders of a centrality test might respond to these cases by suggesting that all that is really meant by "centrality" is "importance," so that all the "important cases" would receive adequate protection. But if this is true, it may merely mean that there is no functional difference between a substantial burden test and a centrality test, in which case the latter is pointless and unnecessarily

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[73] Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990) (citations omitted).

[74] *See* Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972).

[75] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (upholding military regulation that prohibited Jewish soldier from wearing yarmulke); Cheema v. Thompson, 67 F.3d 883, 886 (9th Cir. 1995) (holding that RFRA requires school district to make accommodations for children whose religious beliefs require wearing ceremonial knives); Sasnett v. Sullivan, 908 F. Supp. 1429, 1433 (W.D. Wis. 1995) (holding that RFRA protects the right of prisoners to wear religious jewelry).

steers analysis in the wrong direction. Moreover, interference even in "unimportant" religious matters may be violative of religious freedom rights where the interference is recurrent, gratuitous in the sense that there is no compelling need for the state encroachment in question, or where there are obvious and less intrusive measures that could be taken, particularly where the interference is blatantly discriminatory or sends signals of disrespect for the religious group in question. Further, state regulation of seemingly minor matters may have indirect effects that inhibit central worship activities.

These considerations may help explain the need for free exercise protection in the field of land use regulation. Few religious traditions attach grave importance to the size of a parking lot next to a church or to other traffic-related issues. Yet, requirements of this kind can be manipulated to exclude worship facilities for a particular religious group from a particular site and if applied repeatedly can have the functional effect of excluding a group from an entire community.[76] Similarly, the amount that should be paid for a place of worship is not typically a central or important belief, but zoning or landmarking regulations can make the cost of building or continuing operations at a particular location so prohibitive that they effectively prevent a religious group from carrying out what they regard as a central religious mission.[77] Thus, even if courts were competent to assess matters of relative centrality and importance, allowing them to focus on this issue may cause them to ignore vital religious freedom issues.

But of course, as already noted, there is extensive authority for the proposition that secular judges lack competence (in the strong sense of jurisdiction) to address such issues. Doing so inevitably

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[76] *See, e.g.*, Islamic Ctr. v. City of Starkville, 840 F.2d 293, 294 (5th Cir. 1988) (holding that city violated Free Exercise Clause when it denied Islamic Center building permit).

[77] Professor Laycock's contribution to this symposium addresses this type of concern in much greater depth, *see* Laycock, *supra* note 26, at 769-83, as does his testimony before Congress last summer. *See The Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Douglas Laycock, scholar). This was obviously a significant contention in *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996) (reversing district court's holding that struck down constitutionality of RFRA), *rev'd*, 521 U.S. 507 (1997), as it was in *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 351 (2d Cir. 1990) (holding that city's Landmarks Law did not impose unconstitutional burden on free exercise of religion), and in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 309 (6th Cir. 1983) (holding that city's zoning ordinance did not violate congregation's religious freedom nor offend Due Process Clause).

puts the heavy hand of the state behind one or another of the competing religious views behind a dispute.[78] It results in the impermissible entanglement of state authorities in internal religious affairs and violates fundamental imperatives of state neutrality.[79]

Judges may also lack competence in the weaker sense that they simply do not know enough about the beliefs of other traditions to assess them fairly. Thus, there is a substantial risk that even the best intentioned judges may simply misperceive religious issues as they grapple with the religious claims of others. This has been a significant challenge when courts have been forced to grapple with Native American religious beliefs,[80] which often lack the equivalent of religious commandments governing daily life and which tend to attach more significance to sacred spaces than to temporal or extra-temporal considerations.[81]

Moreover, centrality analysis may simply not fit some traditions. Concern with centrality makes sense within religious traditions that have hierarchically structured norms, some of which are central (either in the sense of being virtually axiomatic or in the sense of being absolute commands) and others of which are more peripheral (norms that are derivative or merely encouraged). Centrality

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[78] *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449, 451-52 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 120-21 (1952); *see also* Dallin H. Oaks, *Trust Doctrines in Church Controversies*, 1981 BYU L. REV. 805, 897-904.

[79] *See generally* Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (stating that use of neutral-principles approach helps prevent courts from entanglement in religious affairs); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (stating that First Amendment requires state neutrality in relation to religious believers and nonbelievers).

[80] For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Native Americans protested the Forest Service's plan to build a road and cut timber on land considered sacred by several tribes. *See id.* at 442. In ruling against the Indian Cemetery Protective Association, the Court justified its holding by pointing out that the Indians were not being coerced into violating their religious beliefs, nor were they being penalized for exercising their religious rights. *See id.* at 450-51. The point the Court missed is that the Native Americans considered the land itself to be sacred. *See id.* at 451. More accustomed to religions that focus on actions and commandments, the Court failed to adequately protect a religion that is oriented more toward space than procedure. *See id.* at 453; *see also* Wilson v. Block, 708 F.2d 735, 743-45 (D.C. Cir. 1983) (holding that Native American plaintiff failed to prove that land at issue was indispensable to religious practice).

[81] Because the Christian and Native American religions are so dissimilar, Native Americans often find it difficult to persuade judges that their claims are religious in nature, rather than cultural. *See, e.g.*, Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 805-33 (1997) (discussing religious and cultural link in Native American religion); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1294-1302 (1996) (comparing differences between Christianity and Native American religions).

notions are much harder to apply in religions where these features are absent or receive much less emphasis.

For all of the foregoing reasons, state RFRAs should make it clear that compulsoriness and centrality are not necessary to establish religious freedom claims. Given the strength of authority for not allowing courts to invoke these notions, it is actually puzzling why they continue to recur in opinions. Increasingly, since 1990, such arguments are raised only to be rejected.[82] But the two conceptions also appear to slip back into analysis of the scope of religious freedom in the context of determining whether a state-imposed burden on religion is substantial, the assumption being that a burden on a compulsory or central religious practice may be more substantial than a burden on a peripheral practice or on activity that is merely motivated by religion.[83] Such analysis appears to confuse assessment of the magnitude and intensity of state interference in religious conduct (the proper focus of burden analysis) with evaluation of whether the activity being burdened is sufficiently important as a religious matter to deserve protection. While burden analysis in the first sense is an inevitable aspect of defining the scope of freedom of religion, this cannot be used as an excuse for state authorities to get into the business of second guessing religious judgments. While one can understand the relevance of compulsoriness and centrality to assessing the importance of a religious issue, it is not clear how analysis of relative compulsoriness or centrality becomes any more legitimate in the context of burden analysis than in any other setting.

D. Substantial Burden

Most state RFRAs echo the substantial burden requirement of the Federal RFRA.[84] That is, only government action that "substantially burden[s] a person's exercise of religion" must withstand strict scrutiny by demonstrating that it is the "least restrictive means

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[82] *See, e.g.*, Al-Amin v. City of New York, 979 F. Supp. 168, 171 (E.D.N.Y. 1997) (describing defendants' argument, ultimately rejected by court, that perfume oils and incense are not required in Muslim religion); *cf.* Horen v. Commonwealth, 479 S.E.2d 553, 558-59 (Va. Ct. App. 1997) (discussing plaintiffs' argument that owl feathers are necessary to Native American religion).

[83] *See infra* Part II.D (discussing "substantial burden" test).

[84] *See infra* note 89 (surveying states' RFRA statutes and proposals using "substantial burden" language).

of furthering . . . [a] compelling governmental interest."[85] The term "substantially" was added as a qualifier to the Federal RFRA as an eleventh hour revision by the Senate, possibly as a counter to pressures to exempt prisons from RFRA's coverage.[86] The House, which had initially passed RFRA without the term "substantially," acquiesced in the Senate's change, although fears were expressed that the amendment made the statute more vague and indefinite.[87] An even greater worry is that this change gave up an uncertain but potentially extensive area of legitimate free exercise protection. That is, the right to free exercise of religion is arguably a right to protection against any burdens on freedom of religion, not merely against "substantial" burdens. From this perspective, I am sympathetic to provisions such as that in the proposed constitutional amendment in Alabama, which drops the "substantial" requirement and returns to RFRA's original structure prior to the last minute amendment.[88]

At this point, however, rescinding the "substantially burdens" language may be extremely difficult as a practical matter. Most state RFRA statutes and proposals use this phrase.[89] Moreover, accepting the "substantial burden" requirement may help avert some of the self-narrowing risks that could be raised by overly expansive

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[85] 42 U.S.C. § 2000 bb-1(b) (1994).

[86] *See* 139 CONG. REC. S14,352-53, S14,468 (daily ed. Oct. 26-27, 1993) (statement of Sen. Kennedy) (discussing Senator Kennedy's amendment that inserted "substantially" into RFRA and tallying rollcall vote). The Senate adopted the amendment without much discussion. *See id.* at S14,352. Senator Reid proposed an amendment to deny RFRA coverage to prison inmates at approximately the same time. *See id.* at S14,354-56 (statement of Sen. Reid). The Senate discussed the "prisoners" amendment at length and rejected it by a vote of 58 to 41. *See id.* at S14,353-68 (discussing Sen. Reid's amendment); *id.* at S14,468 (tallying rollcall vote).

[87] *See* 139 CONG. REC. H8714 (daily ed. Nov. 3, 1993) (statement of Rep. Hyde).

[88] *See* S.B. 604, 1998 Reg. Sess. (Ala. 1998) (amending 1901 Constitution of Alabama and currently pending approval by Alabama voters).

[89] *See* FLA. STAT. ANN. § 761.03(1) (West Supp. 1999); H.B. 2370, 90th Gen. Assembly, 1997-98 Reg. Sess. (Ill. 1998) (enacted); H.B. 966, 1999 Reg. Sess. (Md. 1998) (introduced); S.B. 1391 44th Leg., 1st Reg. Sess. (Ariz. 1999) (introduced); H.B. 1696, 20th Leg. (Haw. 1999) (introduced); H.B. 3158, 113th Gen. Assembly, 1st Reg. Sess. (S.C. 1999) (introduced); H.B. 601, 76th Leg., 1st Reg. Sess. (Tex. 1999) (introduced); S.B. 242, 222d Leg., 1st Reg. Sess. (N.Y. 1999) (introduced); S.B. 38, 1st Reg. Sess. (Cal. 1999) (introduced); S.B. 321, 208th Leg. (N.J. 1998) (introduced); H.B. 4376, 89th Leg., Reg. Sess. (Mich. 1997) (introduced). *But see* CONN. GEN. STAT. ANN. § 52-571b (West 1997); R.I. GEN. LAWS § 42-80.1-3 (1998) (using "restrict" instead of "burden"); H.B. 2, 1998 Reg. Sess. (Ky. 1998) (enacted) (using "restrictions" instead of "burdens"); S.B. 370, 90th Gen. Assembly, 1st Reg. Sess. (Mo. 1999) (introduced) (using "restrict" interchangeably with "burden"); S.B. 604, 1998 Reg. Sess. (Ala. 1998) (amending the 1901 Constitution of Alabama and pending approval by voters).

state RFRAs.[90] Kent Greenawalt has argued fairly persuasively that without a meaningful "substantial burden" requirement, courts would end up finding other ways to water down religious freedom protection.[91] Thus, in his view, if all that was required for free exercise protection is the presence of sincere religious motivation, courts would be all too likely to do one of three things: (1) treat the religious aspect of motivation as so marginal or trivial as to not count as being sufficiently religious; (2) resort to categorical analysis disqualifying claims of certain types (e.g., claims involving proprietary governmental interests as in *Lyng v. Northwest Indian Cemetery Protective Association*[92]); or (3) shift the burden analysis into the compelling state interest analysis, disposing of unappealing cases with a conclusion that the government was serving a compelling state interest.[93] If Greenawalt is right that the substantial burden analysis would creep back in some other form, it is probably better to be content with the "substantial burden" limitation on the scope of free exercise.

Having conceded this much, however, much remains to be said about what constitutes a substantial burden. Unfortunately, there is relatively little direct case authority from the period prior to the *Smith* decision to elucidate the "substantial burden" standard, because the threshold was formulated at that time merely as a "burden" requirement. Burden analysis in some form dates back at least to *Braunfeld v. Brown*,[94] which held that Sunday closing laws did not impose a legally cognizable burden on an Orthodox Jewish store owner,[95] and to *Sherbert v. Verner*,[96] which held that denial of unemployment benefits did impose an impermissible burden on a Sabbatarian who was unemployed because she refused to accept employment that required Saturday work.[97] Neither of these cases use the language of substantial burdens, though one would hope that as a matter of statutory interpretation burdens in both cases would be deemed to meet that requirement. In *Sherbert*, the claimant was being put to the impermissible choice of following her religious beliefs or being eligible for unemployment compensation

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[90] *See supra* Part I.C.
[91] *See* Greenawalt, *supra* note 57, at 469.
[92] 485 U.S. 439 (1988).
[93] *See* Greenawalt, *supra* note 57, at 469.
[94] 366 U.S. 599 (1961).
[95] *See id.* at 609.
[96] 374 U.S. 398 (1963).
[97] *See id.* at 403-04.

benefits. Braunfeld faced the arguably greater burden of being deprived of revenues from both Saturday and Sunday — no doubt the heaviest shopping days — thereby facing not merely a 22-week loss of unemployment benefits but a permanent loss of revenues and the potential loss of his business.[98] At the symposium, Professor O'Neil provided a Supreme Court insider's perspective on the obvious inconsistency of affording Braunfeld less free exercise protection than Sherbert. According to Professor O'Neil, when he (as Justice Brennan's law clerk in 1963) told Justice Brennan that Justice Stewart was claiming in concurrence that *Sherbert* overruled *Braunfeld*, Justice Brennan responded by smiling and saying, "If Potter has said that, then we don't need to."[99] Thus, apparently, the author of the *Sherbert* opinion agreed sub silentio with both Justice Stewart's concurrence[100] and with the dissent of Justices Harlan and White,[101] insofar as all of them believed that the decision in *Sherbert* was inconsistent with the holding in *Braunfeld*. The moral of Professor O'Neil's account should not be lost on us: the harshness of *Braunfeld* should be left behind in state RFRAs.

Some of the language in the Supreme Court's opinion in *Thomas v. Review Board*[102] begins pointing toward the substantiality of burdens in free exercise analysis, although there was no indication that meeting a substantiality threshold was necessary for free exercise protection. There, the Court sustained arguments for free exercise protection of conscientious refusal to engage in manufacturing armaments. The Court articulated the basis for protection as follows:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies

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[98] As Justice Brennan stated in his dissent in *Braunfeld*,

> "Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment." In other words, the issue in this case — and we do not understand either appellees or the Court to contend otherwise — is whether a State may put an individual to a choice between his business and his religion.

Braunfeld, 366 U.S. at 611 (Brennan, J., dissenting); *accord Sherbert*, 374 U.S. at 421 (Harlan, J., dissenting).

[99] Robert M. O'Neil, Statement during symposium on Restoring Religious Freedom in the States at Georgetown University Law Center (Jan. 22, 1999).

[100] *See Sherbert*, 374 U.S. at 417-18 (Stewart, J., concurring).

[101] *See id.* at 421 (Harlan, J., dissenting).

[102] 450 U.S. 707 (1981).

> such a benefit because of conduct mandated by religious belief, thereby putting *substantial pressure* on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless *substantial*.[103]

Governmental pressure aimed at modifying behavior in ways that conflict with conscientious beliefs in substantial ways was clearly held to violate the Free Exercise Clause.

The burden issue came into sharper relief with the decisions in *Bowen v. Roy*,[104] and *Lyng v. Northwest Indian Cemetery Protective Association*.[105] These cases each raised difficult questions about the extent to which free exercise claims can be used to dictate internal questions of government administration. *Bowen* challenged the practice of using Social Security numbers in administering state welfare programs; *Lyng* challenged administration of federal public lands. In *Bowen*, Chief Justice Burger's opinion appeared to acknowledge that a coercive burden on religion was involved,[106] but held that the burden associated with conditioning welfare benefits on governmental use of Social Security numbers was not legally cognizable under the Free Exercise Clause. In the Court's view, "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[107]

In *Lyng*, the Court arguably went even further. There, it denied any legally cognizable burden on free exercise even though it acknowledged that the challenged government road-building activities on forest service property near Native American sacred sites "could have devastating effects on traditional Indian religious prac-

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[103] *Id.* at 717-18 (emphasis added), *quoted in* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987).

[104] 476 U.S. 693 (1986).

[105] 485 U.S. 439 (1988).

[106] *See Bowen*, 476 U.S. at 704. The Court stated,

> while we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

Id.

[107] *Id.* at 700.

tices"[108] and might "virtually destroy the . . . Indians' ability to practice their religion."[109] The *Lyng* opinion is particularly concerned to avoid implications that religious freedom allows believers to dictate internal management decisions of government, particularly when those decisions relate to administration of lands owned by the government. The Court stated that the "government simply couldn't operate if it were required to satisfy every citizen's religious needs and desires."[110] The case may be distinguishable on that ground. The opinion also attempts to contrast adverse "impact" on religious life from government and interference with religious fulfillment from governmental action that coerces or penalizes action inconsistent with beliefs.[111] But these distinctions either ratchet the burden requirement to impossible heights, or make the idea of "practice of religion" excessively (and formalistically) narrow. The fact that religious freedom should not be interpreted in a way that allows unusual (or even conventional) religions to hold absolute veto power over the structuring of government programs does not imply that the burden requirement should be notched so high that government becomes simply immune from religious freedom claims. States are free to take a different course and provide more protection of religious freedom.

In *Hernandez v. Commissioner of Internal Revenue*,[112] the Court addressed the issue whether denial of the deductibility of payments for auditing and training within the Church of Scientology violated the Free Exercise Clause. On its face, the Court's opinion appears to articulate a substantial burden test very close to that ultimately incorporated in RFRA. Thus, in the formulation of the *Hernandez* Court, "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[113] There are two considerations suggesting the standard is not as clear as it appears on its face. First, within a few lines, the Court makes it clear that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants'

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[108] *Lyng*, 485 U.S. at 451.
[109] *Id.* (alteration in original).
[110] *Id.* at 452.
[111] *See id.* at 449, 456-57.
[112] 490 U.S. 680 (1989).
[113] *Id.* at 699.

interpretations of those creeds." [114] That is, the requirement that the substantial burden is to be on a "central religious belief or practice" is immediately retracted. Second, the Court goes on to make it clear that it is not necessary for the Court to resolve the substantial burden issue because the state's interest in a sound tax system is sufficiently compelling to override the religious claims even if the substantial burden requirement was met. Thus, the language about substantial burden in the case is merely dictum.

What review of the foregoing cases makes clear is that the Supreme Court precedents have left a less than lucid account of what a "substantial burden" is and whether more than a burden per se as opposed to a "substantial" burden is required to trigger free exercise rights. Moreover, to the extent the precedents are clear, they are far from inspiring. Yet, the cases are obviously grappling with a serious problem. Burdens on religion can be either be direct and intentional, or indirect and either inadvertent or at least undesired collateral consequences of intended action. That is, burdens can be classed as either direct or incidental.[115] As Professor Dorf has noted,

> [f]rom the perspective of a rightholder, the severity of a law's impact has no necessary connection to whether the law directly or incidentally burdens the right's exercise. Direct burdens can be trivial — for example, a one-penny tax on newspapers that publish editorials critical of the government — whereas conversely, incidental burdens can be extremely harsh — for example, applying a prohibition against wearing headgear in the military to an Orthodox Jew.[116]

Since direct burdens are imposed on religion by government relatively rarely, but then in ways that are relatively obvious and typically blatantly discriminatory, they can be subjected to a regime of strict scrutiny without undue difficulty.[117] Incidental burdens, by

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[114] *Id.*

[115] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179 (1996) (arguing that Supreme Court should treat direct and incidental burdens equally). The taxonomy of burdens here follows Dorf's analysis. *See id.*

[116] *Id.* at 1177.

[117] The decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), can be understood as imposing such a regime. *See id.* at 878. That is, direct burdens on religion remain subject to strict scrutiny, but "incidental burdens imposed by neutral laws are constitutional." Dorf, *supra* note 115, at 1210.

contrast, are legion. Virtually every law will impose incidental burdens in some sense, if only in the indirect sense of imposing additional indirect costs for life in society. Accordingly, incidental burdens create a "floodgates" problem, especially in modern regulatory states, and some mechanism is needed to set limits on the extent to which incidental burdens trigger strict scrutiny review.[118] The substantial burden test can be understood as a necessary expedient aimed at addressing this unavoidable problem.

Inevitably, substantial burden analysis will be sensitive to the facts of particular cases. Courts under the Federal RFRA already had considerable experience in assessing substantial burdens before that act was struck down in *City of Boerne v. Flores*.[119] Unfortunately, these decisions left a mixed legacy, and it is important that state RFRAs be designed to preclude some of the more questionable interpretations. Ironically, despite the demise of the Federal RFRA, interpretations of the notion of substantiality that started to grow up before *Flores* are continuing to feed into general burden analysis under the Free Exercise Clause of the First Amendment.[120] For good or ill, the eleventh hour introduction of "substantial burden" language in RFRA may result in the crystallization of a much more determinate substantial burden requirement in First Amendment case law.

The federal circuits developed a range of approaches to the substantiality issue prior to *Boerne*.[121] The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as forbidding what is required or requiring what is forbidden by central religious beliefs.[122] A line of cases in the Ninth Circuit has followed this maximally stringent

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[118] *See* Dorf, *supra* note 115, at 1178 (discussing difficulty in determining when incidental burdens become substantial).

[119] 521 U.S. 507, 510 (1997).

[120] Thus, in *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999), the court relied on substantial burden language from *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), and engaged in RFRA-like substantial burden analysis. *See Thomas*, 165 F.3d at 712. On the other hand, in *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998), the Michigan Supreme Court referred to the term "substantial" in the burden portion of a free exercise decision under Michigan's state religion clause. *See id.* at 729.

[121] *See* Hicks v. Garner, 69 F.3d 22, 26 n.22 (5th Cir. 1995) (noting range of definitions of "substantial burden").

[122] *See* Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172-73 (4th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995).

burden requirement.[123] In *Goehring v. Brophy*,[124] for example, the court held that "the plaintiffs in the present case must establish that [the state program in question] . . . imposes a substantial burden on a central tenet of their religion."[125] The court also cited *Bryant v. Gomez*[126] for the proposition that a free exercise claim cannot prevail without "evidence to show that [religious practices] . . . are mandated by [the claimant's] faith."[127]

The Sixth Circuit has adopted a slightly less stringent test. In *Abdur-Rahman v. Michigan Department of Corrections*,[128] the test seemed to be whether the religious practice burdened was "essential" or "fundamental." This language is slightly broader in coverage in that it is not strictly limited to mandatory requirements and prohibitions. That is, something could be essential to a religion without being a commandment. Native American sensitivity to sacred space in *Lyng* would be an example. Similarly, a doctrine can be fundamental without being a focus of obedience. The account of the crucifixion is obviously fundamental in Christianity, but it is hard to think of it as a command or prohibition. On the other hand, these terms may be even narrower in coverage than centrality. The Amish educational practices in *Yoder* were found to be central,[129] but they were not necessarily essential or fundamental to Amish beliefs (though the differences here are probably small). It would be dangerous to make too much of the distinctive language, however, because the Sixth Circuit has linked religious freedom protection to "a substantial burden on the observation of a central religious belief or practice."[130]

The Seventh, Eighth, and Tenth Circuits take a position that places the burden threshold still lower. For them, the issue is whether governmental action compels believers "to refrain from religiously motivated conduct,"[131] or whether it "significantly in-

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[123] *See, e.g., Thomas*, 165 F.3d at 713 (stating that interference with religious beliefs must be more than inconvenience, amounting to substantial burden); Stefanow v. McFadden, 103 F.3d 1466, 1471 (9th Cir. 1996) (noting that to satisfy substantial burden test, burden must amount to interference with belief central to religious doctrine).

[124] 94 F.3d 1294 (9th Cir. 1996), *cert. denied sub nom.*, 520 U.S. 1156 (1997).

[125] *Goehring*, 94 F.3d at 1299.

[126] 46 F.3d 948 (9th Cir. 1995).

[127] *Goehring*, 94 F.3d at 1299 (citing *Bryant*, 46 F.3d at 949).

[128] 65 F.3d 489, 491-92 (6th Cir. 1995).

[129] *See* Wisconsin v. Yoder, 406 U.S. 205, 210 (1972).

[130] Wilson v. NLRB, 920 F.2d 1282, 1289-90 (6th Cir. 1990) (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).

[131] Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994) (quoting United States v. Means,

hibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs."[132]

In *Thiry v. Carlson*,[133] the Tenth Circuit rejected a RFRA claim seeking to block condemnation of an individual grave site for highway purposes. The court held that in order to

> exceed RFRA's "substantial burden" threshold, government regulation . . . "must significantly inhibit or constrain conduct or expression that manifests some central tenet of . . . [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion."[134]

The court's analysis noted that while the parents of the child buried at the gravesite would be "distressed and inconvenienced over the relocation of their daughter's grave," they would "still continue their religious beliefs and practices even if the condemnation proceeds as planned," and that "they have worshipped, prayed, and drawn near to God in places other than the gravesite area."[135] That is, the court found indicia that the affected religious belief was not a mandatory command. In the court's view,

> incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute substantial burdens on the exercise of religion.[136]

The Seventh Circuit accepted this "more generous definition" of substantial burden,[137] reasoning that it was "more faithful both to the statutory language and to the approach that the courts took before *Smith*."[138] Specifically, the Seventh Circuit held that

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858 F.2d 404, 407 (8th Cir. 1988)).

[132] Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995).

[133] 78 F.3d 1491 (10th Cir. 1996).

[134] *Id.* at 1495 (quoting *Werner*, 49 F.3d at 1480).

[135] *Id.*

[136] *Id.* (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988)).

[137] *See* Mack v. O'Leary, 80 F.3d 1175, 1178 (7th Cir. 1996).

[138] *Id.*

> a substantial burden on the free exercise of religion, within the meaning of the [RFRA], is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.[139]

The court indicated that it thought that the "more generous definition" was also "the one more sensitive to religious feeling."[140] More importantly, it found the decisive argument in favor of this reading to be "the undesirability of making judges arbiters of religious law."[141] In its view, the approach of the Fourth, Ninth, and Eleventh Circuits would inevitably involve them in analyzing issues of religious law and imperatives which would be wholly inappropriate for a neutral judiciary.

Surprisingly, the Seventh Circuit's sensitivity to the risks of entangling the judiciary in resolution of religious questions did not extend to the centrality issue. It conceded that centrality analysis "requires the court to separate center from periphery in religious observances,"[142] but concluded that this is

> an inquiry sociological rather than legal in character and the risk of taking sides in religious controversies is less. A court should be able to figure out, usually from its own observations ("common knowledge") but if need be from evidence, which religious practices are important to their practitioners and which are not without having to determine who in the religion is authorized to lay down dogma and what the content of that dogma is.[143]

It is not at all clear why the court thinks that judgments of religious law are beyond the judicial ken, while assessments of the significance and relative importance of various religious practices are mere "sociology" that a court can normally "figure out" — usually without the need for evidence. This is particularly puzzling because immediately prior to reaching this conclusion, the court cited favorably the discussion in *Smith* about the dangers of getting

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[139] *Id.* at 1179.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

embroiled in theological controversies. But it was precisely centrality analysis that the *Smith* Court found to be so problematic.

The final position along the continuum is that adopted by the Second Circuit. In its view, a substantial burden exists "where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[144] This interpretation of the test altogether avoids keying burden analysis to centrality and mandatoriness issues and suggests a standard that may be particularly helpful under state RFRA statutes that abjure reliance on those issues.

The differing verbal formulae suggest a range of possible ways that the substantiality threshold can be analyzed, some of which afford appreciably less protection to religious freedom than others. Recognizing this, state RFRAs to date have generally insisted, as discussed in Part II.C above, that religious freedom protections extend to activity "that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[145] Experience in the various circuits underscores the need for statutory clarity on this point, both to assure adequate sensitivity to religious feelings and to restrain judges from becoming impermissibly entangled in sensitive religious questions. The same constitutional considerations that make it constitutionally impermissible for courts to intervene in internal religious affairs with respect to substantive religious disputes also deny courts the authority to assess centrality and mandatoriness in the guise of assessing substantial burden. As important as substantial burden analysis may be for limiting the range of incidental burdens that may be challenged on religious freedom grounds, it cannot be allowed to become a back door through which otherwise impermissible assessments of centrality and of the requirements of religious law can be smuggled back into free exercise analysis.

Several additional points need to be addressed to assure that the substantial burden requirement does not become an undue obstacle to protection of religious freedom. A first point in this regard is that it is vital to assess the burden with sensitivity and respect for religious beliefs. For example, in *Mozert v. Hawkins County Board of*

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[144] Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996) (citing Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981)).

[145] *Supra* note 58 and accompanying text (listing state RFRAs that include this language).

Education,[146] a strong argument can be made that the Sixth Circuit failed to give adequate credence to the claims of religious believers that objected to exposing their children to certain matters within the curriculum of public schools. In *Mozert*, the district court held that a public school curriculum requirement that conditioned access to free public education on student willingness to read certain texts, even though the complaining students' religious beliefs "compel them to refrain from exposure" to the texts in question, constituted a cognizable harm warranting free exercise protection.[147] The Sixth Circuit reversed, holding that plaintiffs had "failed to establish the existence of an unconstitutional burden,"[148] because students were not compelled "to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion."[149] The court obviously displayed little sensitivity to the burden many sincere religious believers feel if they are required to engage in activities that run counter to their interpretation of an important biblical definition of religion: "Pure religion and undefiled before God and the Father is this, To visit the fatherless and widows in their affliction, and *to keep himself unspotted from the world*."[150] Use of burden analysis to foreclose protection of religious claims seems particularly opprobrious when it appears to reflect willful blindness to a burden that the religious believer clearly sees.

A second point is that in determining whether a burden is substantial, courts should be realistic and fair in assessing the weight of the burden being imposed. Among other things, when the burdens in question are economic, wooden analysis needs to be made more sensitive. As noted above,[151] at a minimum, it suggests that it is time to redress at the state level the recurrent litany of cases citing *Braunfeld* for the overstated and underqualified proposition that "[a]n economic cost . . . does not equate to a substantial burden for purposes of the free exercise clause."[152] Financial burdens

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[146] 827 F.2d 1058 (6th Cir. 1987).

[147] *See* Mozert v. Hawkins County Pub. Sch., 647 F. Supp. 1194, 1200 (E.D. Tenn. 1986).

[148] *Mozert*, 827 F.2d at 1070.

[149] *Id.* at 1069.

[150] *James* 1:27 (emphasis added).

[151] *See supra* notes 94-101 and accompanying text.

[152] Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1172, 913 P.2d 909, 927 (1996); *see* Braunfeld v. Brown, 366 U.S. 599 (1961). The *Braunfeld* Court held that a Sunday closing law "d[id] not make unlawful any religious practices of [shopkeepers]; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

such as those encountered in *Sherbert* (and *Braunfeld*) should qualify as substantial burdens for purposes of invoking free exercise protections, and the fact that *Braunfeld* has not been formally overruled does not obligate the states to set the threshold for free exercise protection at such a painfully high level. It will no doubt remain true that in many contexts, the fact that incidental burdens associated with legitimate regulation impose some incremental economic costs on religious activity will not be sufficient to trigger religious freedom protections. But where the economic burdens are sufficiently burdensome that they exert a substantially coercive affect on conscientious activity, they pass the substantial burden threshold.

A third point is to remember that coerced disobedience is not the only form that substantial burdens can take. By equating a substantial burden with governmental action that coerces disobedience of sincere belief, courts unduly narrow the range of potential impacts on religious life that religious freedom ought to protect. To say that state action does not constitute a cognizable burden unless it interferes with obedience to religious norms, as opposed to merely impinging on religious feelings, converts the burden requirement into a barrier against protecting religious sensitivities.

Some attention can be paid in evaluating substantiality to the extent to which alternative forms of activity are available to satisfy religious obligations and sensitivities. For example, if the religious claimant in *Sherbert* had easy access to alternative employment that did not require Saturday work, the unemployment compensation scheme that deemed Sabbatarians ineligible for benefits may not have been sufficiently burdensome to trigger strict scrutiny.[153] Similarly, an isolated land use regulation that prevents building a religious structure at a particular sight may not impose a substantial burden, but at some point, a pattern of exclusionary requirements has cumulative effects which makes the regulatory scheme as a whole substantially burdensome.

Where incidental burdens have a substantially greater impact on some than on others, significant unequal treatment may indicate that a substantial burden is involved. One of the reasons *Braunfeld* ought to be overruled is that the economic burden of Sunday Closing statutes fell so disproportionately on observant Sabbatarians.

In conclusion, drafters of state RFRAs should take advantage of

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[153] *See* Dorf, *supra* note 115, at 1217.

the experience federal courts have already had with substantial burden analysis, and should take steps to assure that substantial burden language cannot be used to undermine the broader objectives of the legislation.

E. Strengthening Strict Scrutiny: The Importance of Rigorous Justifications for Violations of Religious Freedom

Finally, let me make a few concluding comments regarding the strict scrutiny test as the final measure of the scope of free exercise of religion. These are divided into three comments regarding compelling state interests and a final reflection on the importance of least restrictive alternative analysis.

1. Assessing Compelling State Interests

The first comment is that, while the compelling interest test generally works well to tell us when state interests are simply so strong that even the preeminent value of religious freedom should give way, there are at least some cases when this test may be insufficiently protective of religious freedom. Consider the following situation. A Roman Catholic priest hears the confession of a father who confesses that he has molested his daughter. Assume this occurs in a state where there is a statute that requires anyone learning of a child abuse situation to notify state child welfare authorities. No exception is carved out for clergy. I have no doubt that there is a compelling state interest supporting the statute and that the state arguably has a compelling interest in not allowing exceptions to the policy.[154] Yet, I still believe there would be something profoundly troubling about punishing the priest for refusing to break the sanctity of the confessional. In part I am troubled by the glib assumption that secular authorities have the "real" answer to the problem.[155] But most fundamentally, I believe that there is

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[154] That is, the statute would survive the double compelling interest requirement of *Yoder*, which requires not only that the state interest behind the burdensome state action be compelling, but also that the state's interest in not granting exemptions meet this test. *See* Wisconsin v. Yoder, 406 U.S. 205, 214, 221 (1972); GEDICKS, *supra* note 57, at 104; Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 310-11 (discussing imprecise balancing of state interests with person's Free Exercise right).

[155] This is implicit in the structure of the statute. In effect, the legislation says that only secularly trained social welfare workers to whom the matter will be referred have competence to deal with the problem, discounting that a religious leader may be able to effectuate solutions by drawing on religious and spiritual resources. Mandatory reporting require-

simply something that is deeply wrong about putting the sincere priest to such a crisis of conscience. At a minimum, this suggests that statutory provisions covering the clergy-penitent privilege should be broadly construed to protect this privilege[156] and that state RFRAs should be applied in ways to help maximize such protection. But the point is a more general one: there appear to be cases where even compelling state interests are not sufficiently strong to justify a particular kind of encroachment on conscience. Obviously, some will disagree with my judgment on this point, possibly because of the particular example I have chosen, or possibly due to a deeper faith in compelling state interest tests and the secular state itself.

To the extent that there are religious freedom claims that are stronger than compelling state interests, there may be three overlapping but slightly different explanations. First, the point may simply be that not all compelling state interests are equally strong, and only some very narrow set of compelling state interests are sufficiently strong that they will always trump free exercise claims. Second, where state interests are strong, it is virtually impossible to avoid subjective balancing questions, and there are at least some cases where religious claims will prevail in the balance even against very strong state interests. Third, it is significant to note that our legal system pays at least lip service to the notion that there are areas where the Free Exercise Clause asserts absolute sway and where ever-compelling state interests do not justify intervention. Thus, courts frequently reaffirm the statement that the Free Exercise Clause "embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[157] This "belief-action" distinction has turned out to be vacuous in practice because, for reasons of impracticality, legal regulations rarely target pure matters of internal

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ments that do not exempt religious leaders tend to undercut voluntary resort to religious solutions, because the penitent abuser will be deterred from seeking religious counsel if he knows the person from whom he seeks religious help is bound to turn him over to state authorities.

[156] *See* Commonwealth v. Stewart, 690 A.2d 195 (Pa. 1997) (reading scope of state's clergy-penitent privilege statute as doubly objectionable). The *Stewart* court failed to construe the statute in the expansive manner the free exercise values require, and failed to recognize adequately a realm that deserves virtually absolute protection. *See id.* at 200-01.

[157] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (citing Reynolds v. United States, 98 U.S. 145, 166 (1878)); *see* Davis v. Beason, 133 U.S. 333, 344 (1890).

belief. Somewhat more meaningful is the Supreme Court's holding in the flag salute context (formally predicated on freedom of speech but arguably supportable on free exercise grounds as well) that there is a right to refrain from speaking[158] and that

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or force citizens to confess by word or act their faith therein.* If there are any circumstances which permit an exception, they do not now occur to us.[159]

Part of the force of the confessional hypothetical is that state-mandated disclosure in this area comes very close to regulating pure belief (nondisclosure, after all, is arguably not conduct) and to forced confession of a belief (through the action of bowing to state power) that state interests take priority over religious beliefs about disclosure. In the post-*Smith* world, it may be significant to explore arguments that broaden the domain within which even compelling state interests cannot reach.

The second comment is that there is a growing danger that compelling state interest analysis is becoming meaningless because of the range of state interests that count as compelling. This danger is compounded if every interest that has somewhere been labeled as "important" or "significant" is deemed to be compelling. The state has legitimate and important police power interests in health, safety, welfare, morals, and so forth, but not every police power interest is sufficiently compelling to override the preeminent right to freedom of religion. More generally, in a day when government budgets are limited, it is increasingly difficult for programs to survive that cannot make credible claims to being important. This reality is compounded by the natural tendency for state bureaucrats to assume that their own programs are vital and have compelling justifications. But religious freedom will become largely meaningless in the most vital settings if such inflated claims are accepted. The aim of state RFRAs is to restore the understanding of religious freedom articulated in *Yoder*, that "only those inter-

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[158] *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (striking down state requirement that car license plates must display motto, "Live Free or Die").

[159] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

ests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[160] For state RFRAs to effectively restore this vision of the importance of religious freedom, compelling interest inflation needs to be fought.

Professor Laycock, relying on key cases such as *Sherbert* and *Yoder*, has argued that the compelling state interest test should be read very strictly so that it reaches only "the gravest abuses" that endanger "paramount" interests "of the highest order."[161] In his view, only laws "essential to national survival or to express constitutional norms"[162] would meet this test. This view coincides with international religious freedom standards such as those enunciated in article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which insists that any limitations on freedom of religion, in addition to being "prescribed by law" in the furtherance of legitimate police power interest, must be "necessary in a democratic society."[163]

Professor Berg suggests that this may go somewhat too far. He suggests what is in effect a Millian harm principle tightened so that only "direct harms to specific, nonconsenting third parties"[164] justify encroachment on religious freedom. In contrast, "abstract harms that filter throughout society" of the kind often addressed by welfare state regulation should not meet this test. This approach has the benefit of limiting compelling state interests to substantial tangible harms and ruling out state paternalism, speculative causal chains, and "generalized assertions about effects on public safety or order" as justifications for limiting religious freedom.[165] The difficulty is that the Millian approach, even tightened as Professor Berg suggests, is fundamentally designed to assess when state

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[160] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[161] *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 231-32 (citing *Wisconsin*, 406 U.S. at 215, and Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

[162] *See Laycock*, *supra* note 161, at 233.

[163] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222, 230 (entered into force Sept. 3, 1953), as amended by Protocol Nos. 3 & 5; *see also* Civil & Political Covenant, *supra* note 40, at 178 (stating that all persons have right to freedom of religion).

[164] *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 38 (1994) (citing Stephen Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 370-73 (advocating intermediate alternative because some acts do not warrant shelter from governmental interference)).

[165] *See* Berg, *supra* note 164, at 39.

action encroaching on general liberties is legitimate. General police power concerns rooted in harms such as public health, safety, order, and morals are sufficient to justify encroachments on general liberties, but encroachments on freedoms such as religion and speech that are expressly recognized by the constitutional text as having a preferred status require much stricter scrutiny. For this reason, the more stringent approach suggested by Professor Laycock seems preferable.

The third comment is that compelling state interests must not be skewed by manipulating characterizations of rival religious and state interests. The government's interests must be assessed "at the margin" — by reference to the harm associated with exempting the religious claimant alone and not by assessing the total damage if the exemption were somehow universalized or turned into a precedent that somehow unraveled the entire governmental program.[166] Similarly, defenders of governmental programs should not be allowed to characterize the governmental interest at the highest level of abstraction (e.g., a threat to the integrity of the Social Security system) and contrast it to the isolated harm suffered by the religious claimant.[167] Interconnections between and realistic assessments of difficulties on both the public and private sides need to be fully and fairly taken into account.

2. The Special Importance of Least Restrictive Alternative Analysis in the Context of Free Exercise of Religion

Compelling state interests are typically the primary focus of strict scrutiny analysis, but particularly in the context of freedom of religion, least restrictive alternative analysis is arguably even more important. Contrary to the Supreme Court's assertion in *Boerne* that this requirement "was not used in the pre-*Smith* jurisprudence,"[168] versions of the test can be found as early as *Braunfeld* and possibly even earlier.[169] The test was prefigured in Justice Black's concurrence in *West Virginia Board of Education v. Barnette*,[170] where he indi-

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[166] *See, e.g., id.* at 40.

[167] *See, e.g.*, Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 316-25 (discussing cases where Supreme Court inconsistently uses *Sherbert/Yoder* doctrine in regards to religious beliefs toward governmental programs).

[168] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[169] *See* Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573, 582 (1999).

[170] 319 U.S. 624, 643-44 (1943) (Black, J., concurring).

cated that "religious faiths, honestly held, do not free individuals from responsibilities to conduct themselves obediently to laws which are . . . *imperatively necessary to protect society as a whole from grave and pressing imminent dangers.*"[171] The reference there to "imperative necessity" is simply another way of communicating the "least restrictive alternative" idea. *Braunfeld* held that general secular laws imposing indirect burdens on religion are valid "unless the State may accomplish its purpose by means which do not impose such a burden."[172] The essential idea is again expressed in *Sherbert v. Verner*,[173] where the Court held that the state "must demonstrate that no alternative forms of regulation would [accomplish the State's interests] without infringing First Amendment rights."[174] The test was fully crystallized by the time of *Thomas v. Review Board*,[175] where the Court held that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[176] Later, Justice O'Connor's opinion in *Bowen v. Roy*[177] reaffirmed that

> [t]his Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," or represents "the least restrictive means of achieving some compelling state interest." Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.[178]

Four other Justices apparently agreed in *Roy* with O'Connor's view that the *Sherbert/Yoder* standard for protecting religious liberty should not be relaxed.[179] In short, from at least 1961 until *Smith* was decided in 1990, the least restrictive alternative test was a defi-

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[171] *Id.* (Black, J., concurring) (emphasis added).
[172] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
[173] 374 U.S. 398 (1963).
[174] *Id.* at 407.
[175] 450 U.S. 707 (1981).
[176] *Id.* at 718.
[177] 476 U.S. 693 (1986).
[178] *Id.* at 728 (citations omitted).
[179] *See id.* at 712-16 (Blackmun, J., concurring in part); *id.* at 733 (White, J., dissenting on grounds that *Thomas* and *Sherbert* controlled). Justices Brennan and Marshall joined Justice O'Connor's opinion directly. *See id.* at 724.

nite part of strict scrutiny analysis in the religion area. Each time the Court's analysis called for an exemption, it in effect identified a least restrictive alternative — exempting the regulated conduct from the force of the law in order to respect religious freedom.

Perhaps Justice Kennedy's claim in *Boerne* is not that the least restrictive alternative test has not been present in the case law, but that if it is taken literally, it is somewhat too strong. That is, it would be troubling if this phrase required the absolute least restrictive alternative in all possible worlds. Alternatively, because exemption from responsibility for complying with a particular requirement is always a least restrictive alternative (how can the state structure its requirements in a manner that requires less than nothing?), a literalist reading of the least restrictive alternative test would seem to compel granting exemptions in every case. While this point has some superficial plausibility, a more reasonable reading of the test has less drastic consequences than the literalist interpretation would suggest.

The difficulty, of course, is determining how least restrictive alternative analysis applies when exempting or accommodating religious conduct imposes substantial increased costs or other problems for government. After all, as Dean Bice has pointed out, a least restrictive alternative test that invalidates only "legislation which advances the government's legitimate goals if there are less costly ways of advancing these same goals to the same extent"[180] is merely a form of rational basis review. Surely, those who object to use of a least restrictive alternative test in the religion context cannot be arguing that religious freedom deserves less than rational basis review, not even in the somewhat more rigorous version proposed by Dean Bice.

Even when accommodating religious convictions entails some costs for government, however, not all possible alternatives need to be considered, but only feasible and otherwise permissible ones. An initial problem with the claim that the least restrictive alternative test automatically yields exemptions whenever a substantial burden on religion is found is that it ignores these feasibility and

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[180] Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 38 (1980). Technically, Bice equates less restrictive alternative analysis that is construed in this way with "marginal rationality," which is arguably somewhat more demanding than classical rational basis scrutiny. But it seems clear that Bice believes that where there is a less restrictive alternative that is equally efficient from the government's standpoint, insisting on the more restrictive approach would violate a reasonable rational basis test. *See id.*

permissibility constraints. A prohibitively expensive approach to furthering the state's interests is not feasible, and, thus, fails to satisfy the least restrictive alternative test because it does not qualify as a genuine alternative at all. Note that this feasibility constraint also covers some situations in which granting an exception in one case would open up a demonstrable (as opposed to a merely speculative) flood of indistinguishable cases.[181]

Other possible alternatives may not qualify as alternatives that satisfy the test because they are impermissible on some other ground. For example, a particular exemption may "go beyond protecting independent religious decisions and . . . create significant incentives to practice religion."[182] Alternatives of this kind may be unavailable because of Establishment Clause concerns.[183] State RFRAs, like their federal counterpart, take no position on the future evolution of Establishment Clause doctrine with respect to such questions. In a similar vein, alternatives that would infringe on the rights to life, liberty, and property of third parties may be impermissible, at least where these rights are not themselves being construed in ways that are inconsistent with religious freedom requirements.[184]

A third limiting factor is that in practice, government officials

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[181] *See* Berg, *supra* note 164, at 42 (noting that court must closely examine government's claim that new approach would create flood of cases).

[182] *Id.* at 45 (arguing that RFRA should not be interpreted as providing incentive to practice religion).

[183] Some have argued that exempting religiously motivated conduct from general and neutral legislation under federal and state RFRAs may run afoul of the Establishment Clause. *See, e.g.*, David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 127-29 (1991) (arguing that providing exemption based on philosophical opposition to legal purposes would change democracy into anarchy). However, the Supreme Court has long recognized that there is substantial latitude to accommodate religion without encountering Establishment Clause constraints. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

[184] That is, private rights can be used to define the boundaries of impermissible alternatives only to the extent that they are themselves being construed in ways that afford appropriate respect to religious freedom. Otherwise, the boundaries of private rights could be manipulated to narrow the scope of religious freedom. This fundamental insight has been worked out with great sophistication in German constitutional theory. *See generally* KOMMERS, *supra* note 28, at 361-68 (translating *Lüth* 7 BVerfGE 198 (1958)) (holding that private law norms must be construed to respect fundamental constitutional rights that might otherwise be narrowed by enforcement of private law remedies). "[T]he 'general laws' set bounds to the basic right, but, in turn, those laws must be interpreted in the light of the value-establishing significance of this basic right in a free democratic state, and so any limiting effect on the basic right must itself be restricted." *Id.* at 365; *see also* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 258-65 (1989) (discussing distinction in *Lüth* between private and public rights).

and courts are typically not confronted with abstract hypotheticals but with reasonable alternative proposals. It is not unreasonable to suggest that those requesting an exemption have some responsibility to at least suggest alternatives, and in fact (as suggested above in Part I.D), both for reasons of principle and sound strategy, this is a fairly typical scenario. Taking this into account, the inquiry that the least restrictive alternative test often prompts as a practical matter is consideration of the alternative requested by the claimant (even though some other approach may theoretically be less burdensome still).

Within the range of feasible and permissible alternatives suggested by religious freedom claimants, it might be argued that the state is required to consider only less restrictive alternatives "capable of serving the state's interest as efficiently as it is served by the regulation under attack."[185] That approach veers too far toward unduly favoring the state. It effectively assumes that the state does not need to give any special weight to respecting the religious freedom of its citizens in formulating its policies. Any reduction in government efficiency would constitute sufficient grounds for ignoring a religious claim. But it has generally been assumed that at a minimum, protecting religious freedom weighs more heavily in the balance than mere administrative convenience,[186] and surely the same would be true with respect to de minimis costs.[187] At the other extreme, it is now well-settled that religious freedom claims do not entitle claimants to dictate how public programs will be run.[188]

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[185] Dorf, *supra* note 115, at 1203 (*citing* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-85 (1975)). This appears to be what narrow tailoring requires in the context of expressive conduct.

[186] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 730-31 (1986) (O'Connor, J., concurring in part and dissenting in part); Sherbert v. Verner, 374 U.S. 398, 408-09 (1963).

[187] *Cf.* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). In *Hardison*, the plaintiff did not want to work on his Sabbath. *See id.* at 67-68. Although TWA tried to accommodate him, it failed. *See id.* The Court found that requiring accommodation in these circumstances would impose an undue burden on TWA because of contract and seniority issues, as well as necessitating overtime pay to cover Hardison's shift. *See id.* at 76-85. The Court held that TWA was not required by Title VII to accommodate more than de minimis costs. *See id.* at 77. State RFRAs should consider imposing a stiffer obligation to accommodate in domains where federal law leave them free to do so.

[188] *See, e.g., Bowen*, 476 U.S. at 699-700 (holding that government cannot conduct its affairs in way that comports with individual citizen's beliefs); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (stating that Free Exercise Clause describes what government cannot do to persons, and not what persons can exact from government). These particular cases may have gone too far in removing any constitutional

Between these two poles, two further considerations ought to come into play. First, the least restrictive alternative test should require the state to prove that particular proposed alternatives would actually be unduly costly or burdensome. Where the risks to the government remain speculative or in doubt, the least restrictive alternative creates a presumption in favor of protecting religious freedom. Second, the least restrictive alternative test would appear to require the government to go substantially beyond de minimis costs and mere inconvenience to accommodate religious freedom claims. At a minimum, less restrictive alternatives should be sustained that do not unduly increase state costs. In *Muslim v. Frame*,[189] the court, construing the Federal RFRA's free exercise requirement in a prison context, expressly noted that RFRA's least restrictive alternative requirement does not require the state "to make accommodations to religion at any cost."[190] Rather, the court indicated that it "must determine whether the governmental interest could be accomplished by less restrictive means without unduly increasing prison expenses."[191] If the state defendants were required to demonstrate that an alternative entailed undue costs in the prison setting, surely that is the minimum that should be required in other less restrictive settings.

In general, least restrictive alternative analysis reflects the perception that even where there is some cost to the state, that cost is generally a lower price to pay than sacrificing religious freedom. If statutory policies aimed at protecting the environment or endangered species are sufficiently strong to impose substantial costs on the state,[192] and if constitutional policies of protecting property rights may impose substantial costs on state policies in the form of just compensation requirements,[193] it is not unreasonable to expect

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pressure on the government to accommodate alternatives, but the fundamental point is sound. If for no other reason than that different religions might otherwise be able to dictate contradictory governmental policies, it is evident that free exercise cannot authorize religion to dictate government policy. Establishment considerations clearly do not allow free exercise to intrude this far into the state's domain.

[189] 891 F. Supp. 226 (E.D. Pa. 1995).

[190] *See id.* at 233.

[191] *Id.*

[192] The Clean Water Act, 33 U.S.C. § 1344(a) (1994), and The Endangered Species Act, 16 U.S.C. § 1538(a)(1) (1994), impose costs on both the state and on private landowners. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153, 192-95 (1978) (holding up completion of Tellico Dam because it would endanger habitat of snail darter); Christy v. Hodel, 857 F.2d 1324, 1331 (9th Cir. 1988) (denying compensation to rancher whose sheep had been eaten by grizzly bears because grizzly bear was endangered species).

[193] *See, e.g.*, Yancey v. United States, 915 F.2d 1534, 1541 (Fed. Cir. 1990) (holding that

that protecting freedom of religion, one of the preeminent constitutional values, may justify imposition of some accommodation costs with respect to religious values that by their nature are beyond price. At some point, alternatives may become so exorbitant or prohibitive in cost to the state that courts may conclude that the alternative is inadequate or unreasonable, even taking into account the extremely high value that society assigns to religious rights. There is probably no alternative to determining the point at which alternatives become inadequate or unreasonable except on a case-by-case basis. This interpretation obviously reads an adequacy or a reasonableness requirement into the least restrictive alternative test, but given the self-limiting character of religious freedom, this seems unavoidable. In the last analysis, it is virtually impossible to prevent balancing of the religious freedom claim against the government's interests, and this balancing cannot be kept hermetically sealed in the compelling state interest analysis. But by insisting that the government (1) consider feasible and permissible alternatives suggested by the religious claimant, (2) compare the costs of such alternatives (in the broad sense) with the costs of its original law or program, and (3) go beyond its comfort zone in attempting to accommodate religious claims, balancing under this interpretation of the least restrictive alternative test is likely to be much more sensitive to religious freedom claims.

Understood in this way, the least restrictive alternative test is a powerful tool for assuring free exercise protection. Assessing compelling state interests is inevitably subjective, and it is altogether too easy to come up with arguably compelling interests. But where a claimant suggests in good faith a feasible, permissible, and reasonable alternative to a governmental action that substantially burdens its religion, one has a fairly objective indication that an otherwise legitimate state norm should give way to a religious freedom claim. The real force of the test lies where a religious claimant can suggest a reasonable alternative that will substantially achieve the government's objective in a less burdensome way. Particularly where the suggested alternative does not visit unreasonable or grossly disproportionate costs on the government or third parties,

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reduction in value of turkey breeding stock due to quarantine imposed by Department of Agriculture was compensable taking); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that Commission could not, without paying compensation, condition permission to rebuild house on property owners' transfer of public easement across beachfront property).

it seems unreasonable at best and gratuitously insensitive to religious freedom at worst for the state to bull-headedly insist on having its original way. If the state's burdening of religion was inadvertent prior to being apprised of least restrictive alternatives understood in this way, it becomes intentional discrimination (at least in the sense of knowing and probably in the sense of purposeful discrimination) if the unnecessarily burdensome approach is insisted upon.[194] At that point, continuing the discrimination ought to be permissible only if there is a justification sufficiently compelling to meet the strict scrutiny test. Religious freedom is simply far too great a value to allow nonaccommodation without justification in such contexts.

CONCLUSION

Following in the wake of *Smith* and *Boerne*, state legislatures and courts have responded admirably to the necessity of safeguarding religious free exercise rights. The quality and amount of discussion on the subject in this symposium and elsewhere is evidence of the complexity and importance of what states are undertaking. In structuring and interpreting the provisions of state RFRAs governing the scope of review, legislatures should include provisions making it clear that religious freedom provisions should be available for the full range of religiously motivated conduct, whether or not it is compulsory or central to a larger system of religious belief. Limiting protection to activities that are substantially burdened by governmental action seems virtually inevitable at this point, and the self-limiting features of religious freedom would probably result in protections being limited to this range of coverage through manipulation of other statutory language at the level of definition or more likely at the level of compelling state interest analysis if express substantial burden language is omitted. It is important that the threshold for religious freedom claims set by the substantial burden test should not be set so high as to unduly restrict the scope of religious freedom, and in particular, this test should not be converted into a back door through which valid religious claims are equated with those in which religious demands are compulsory

[194] *See* Dorf, *supra* note 115, at 1202-03 (stating that narrow tailoring of test does not require regulation be least restrictive means of achieving state interest). This idea is analogous to the notion in free speech law that gratuitous inhibition of expression should not be allowed, even where expressive conduct is at stake. *See id.*

or central.

Some areas are probably best left by legislatures to be worked out by courts, whether for practical or political reasons, or for the obvious reason that it is simply impossible to make norms any more concrete at the statutory level. This applies to matters such as defining "religion" and related terms, specifying the substantial burden test in more detail, and articulating the standards of strict scrutiny. Practical consideration of various dangers also needs attention. These dangers include diluting religious protection by stretching it too far, overburdening the system of protections by pressing for levels of accommodation that are unsustainable either because of excessive cost or because of unfair impacts on third parties, and failing to pay sufficient attention to the specific legal context in each state. While each state will inevitably develop its own unique jurisprudence, consensus on fundamental issues will help maximize the likelihood that strong and consistent patterns of religious freedom protection will result from the passage of state RFRAs.

At a broader level, the long-term viability of meaningful religious freedom norms depends on responding to two broad tendencies: the rise of the equalitarian paradigm in political and legal thought, and the growth of the affirmative regulatory state and the concomitant phenomenon of compelling state interest inflation. The point is neither that equality is not a legitimate social ideal, nor that the modern leviathan state is likely to wither away any time soon. Rather, it is that care must be taken not to lose sight of the countervailing values of the liberty paradigm which in the last analysis are even more significant to human well-being. The equalitarian paradigm has certain areas of blindness. So long as the state grows in ways that distribute benefits and burdens equally, the equality paradigm is indifferent to freedom risks of a burgeoning state. Indeed, by insisting on ever more refined standards of equalitarian treatment, the paradigm may be a major contributor to the growth of state regulation. The equalitarian paradigm can also be blind in another sense, particularly if it pays more attention to form than substance. The equality paradigm tends to misinterpret the granting of religious exemptions, in the absence of compelling state interests that can be furthered in no less restrictive way, as a violation of equality principles. What this overlooks is that there are compelling reasons of the highest order, namely respect for religious differences and the intrinsic value of religious freedom itself,

that justify differential treatment in these settings.

The corrective at the level of rival intellectual paradigms involves proceeding on two fronts. The first involves appealing to equalitarian instincts by showing how failure to apply RFRA-type religious freedom principles results in substantive unequal treatment. Where state justifications for rigid, nonaccommodating rules are not compelling, or where less burdensome alternatives are evident, the claims that exemptions will result in unequal treatment turn out in most cases to be a thin veneer that masks ignorance about legitimate religious differences, bureaucratic inflexibility, or excessive concern for bureaucratic convenience. In short, inflexible state action defended under the banner of equality turns out to be discriminatory at its core — at least in the types of situations that state RFRAs are designed to address.

The second front appeals directly to our deeply held intuitions of the importance of freedom. Worry about the expansion of the state is one side of this analysis. As the state expands, protection of religious freedom grows ever more critical. It is all too easy for state authorities to forget that as they occupy new fields with regulation, they often constrict areas of religious activity that had hitherto (and rightly) been left unfettered. More concretely, care needs to be taken to deflate exaggerated state interests so that they are not given excessive weight in the balance against religious freedom claims. Exemptions are necessary to buffer religious freedom from an expanding state.

On a more theoretical plane, elaboration of a social contract theory along Madisonian lines — in a manner that takes the obligations of religious individuals and groups seriously as higher order obligations that individuals and groups must be left free to obey — could help clarify the significance of accommodating religious liberty. Such a theory could help to explain the priority of religious liberty in a world that also takes equality seriously.

At the practical level, it will ultimately be concrete narratives highlighting the intrinsic value of religious freedom that are likely to be most telling. Whether such narratives are encountered in courts, in the media, in history, or in private life, Americans have always understood that religious freedom is more than a specialized equal protection principle. State RFRAs will be both a response to such narratives and a guarantee of their continuation.