Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights

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INTRODUCTION

In explaining his veto of a state Religious Freedom Restoration Act ("RFRA"), California Governor Pete Wilson warned that such legislation "would open up the prospect of invalidating laws ranging from the payment of taxes to . . . laws against racial discrimination."[1] With all deference, such a prognosis seems unduly alarmist — especially from a governor who was not usually noted for his support of efforts to curb racial bias. Governor Wilson is, however, hardly alone in expressing such fears. RFRAs can be either angel or devil to proponents of civil rights, depending, in part, on their

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[1] Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 Reg. Sess., 8 ASSEMBLY J. 9647, 9647 (Cal. 1998) (also available at <http://www.leginfo.ca.gov/pub/(1997)98/bill/asm/ab_16011650/ab_1617_vt_19980928.html>) [hereinafter *Governor's Veto Message*].

breadth and scope. More importantly, it depends on one's reading of the constitutional context within which courts must address the inevitable tension between legal protections for religious freedom and for equal opportunity. That tension and its resolution are the focus of this Article.

The conflict between religious liberty and other human rights is hardly new. Courts have for decades had to resolve contending claims of this nature. What is distinctive to the 1990s is the rapidity of change in the applicable constitutional standards. When the decade began, only a "compelling state interest"[2] or an interest "of the highest order . . not otherwise served"[3] would permit government to abridge religious liberty in pursuit of other valid legislative goals. The Supreme Court abandoned that standard in *Employment Division v. Smith*.[4] Congress promptly enacted the Federal RFRA[5] as an effort to revive the "compelling interest" standard — and for a time it did so.[6] From the outset, however, there were grave doubts about the constitutional power of Congress, under Section Five of the Fourteenth Amendment, to enact so broad a "restorative" statute.[7] Those doubts were confirmed when the United States Supreme Court, in *City of Boerne v. Flores*,[8] invalidated RFRA in the summer of 1997[9] — save for its continuing vitality as a regulator of federal action that may abridge religious liberty. A number of states quickly moved into the breach, considering and in a few cases enacting RFRA laws of their own, thus bringing the issue nearly full circle by the end of the decade.

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[2] Sherbert v. Verner, 374 U.S. 398, 406 (1963).

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

[4] 494 U.S. 872 (1990).

[5] 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

[6] *See id.* § 2000bb(a)(5) (stating that "the compelling interest test . . . is a workable test").

[7] *See* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1624-32 (1995) (concluding that RFRA is unconstitutional exercise of power); Christopher L. Eisgruber & Lawrence L. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 460-69 (1994) (constructing challenge to RFRA on federalism grounds); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 370-386 (1994) (arguing that Congress lacked power to enact RFRA); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 212-16 (1995) (questioning congressional authority to enforce RFRA). *But see* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1273 (1992) (arguing that Congress may make rules for religious liberty independent of its Fourteenth Amendment powers).

[8] 521 U.S. 507 (1997).

[9] *See id.* at 511.

I. FREE EXERCISE BEFORE *SMITH*

In order to understand what rights and liberties such laws seek to "restore," we might extend our inquiry back a bit further. Conventional wisdom posits that the higher level of scrutiny for religious freedom claims — call it "compelling interest" or anything similar — traces from the Supreme Court's judgment in *Sherbert v. Verner*.[10] That decision, for the first time, clearly established for adjudication of free exercise claims a standard of review comparable to the standard already recognized for the review of governmental curbs on the content of speech or press.[11]

Earlier suggestions of such a standard long predated *Sherbert*. The Court, in 1940, reversed a religious activist's conviction in *Cantwell v. Connecticut*.[12] The Court held that the state may prevent or punish religious expression when there exists a "clear and present danger" threatening public safety,[13] though invocation of this constitutional standard rested more on freedom of speech than free exercise.[14] In 1943, the Supreme Court struck down a West Virginia statute requiring teachers and pupils to salute the American flag, primarily on free speech grounds but in a religious freedom context.[15] The majority declared that First Amendment liberties were "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[16] The following year, Justice Murphy, dissenting alone in *Prince v. Massachusetts*,[17] argued — with clear focus on free exercise — that government could not, without proof of a "grave and immediate danger," punish parents for religiously motivated use of their own children in proselytizing activity that contravened child labor laws.[18]

The Court reaffirmed that standard a decade after *Sherbert*, in

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[10] 374 U.S. 398 (1963). As the law clerk who in the 1962 Term worked most closely with Justice Brennan on the Court's opinion in the *Sherbert* case, I am unlikely to dispute this assessment. The background is, however, a bit more complex than it appeared at the time or in most of the subsequent analysis.

[11] *See id.* at 412 (Douglas, J., concurring).

[12] 310 U.S. 296 (1940).

[13] *See id.* at 311.

[14] *See id.* at 308 (referring to "clear and present danger" standard during discussion of freedom of speech). The Court's discussion of free exercise did not refer to the "clear and present danger" standard. *See id.* at 303-07.

[15] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[16] *Id.* at 639.

[17] 321 U.S. 158 (1944).

[18] *See id.* at 173-74 (Murphy, J., dissenting).

Wisconsin v. Yoder.[19] In *Yoder*, the Court accepted the Amish community's claimed need to control education of their children beyond a certain age for reasons of religious freedom, despite violations of Wisconsin's compulsory education laws. In so holding, the Court used subtly different terminology, stating that only "interests of the highest order" may outweigh the free exercise of religion.[20] The contrast in constitutional tests leaves open the intriguing question why the "compelling interest" language of *Sherbert* was not simply reiterated as the basis for a similar result.

Finally, as a vital element in the equation, there is the *Sherbert* Court's insistence that government need show, beyond a compelling or high order interest, "that no alternative forms of regulation would combat . . . abuses without infringing First Amendment rights."[21] Whatever uncertainty the *Boerne* case[22] may have created regarding the role of the least restrictive alternative, there can be no doubt the Court consistently applied that standard in the religious freedom context during the pre-*Smith* period.[23]

So momentous a doctrine might well have had a more majestic debut. The *Sherbert* Court said little about precedents or antecedents, and the *Yoder* majority said even less. The only source invoked to support the "compelling interest" standard in the religious liberty context was *Thomas v. Collins*,[24] a much earlier free speech case, in which the Court held that a speaker could not be required to obtain a permit from a local official to engage in expressive activity.[25] The crucial language in *Thomas* was slightly different from *Sherber*'s "compelling interest," though clearly compatible — "Only the gravest abuses, endangering paramount interest."[26] When it came to *Yoder*, nine years later, the governing standard emerged in yet another formulation — "interests of the highest order . . . not otherwise served."[27] Thus, one potentially complicating factor in defining just what RFRA laws seek to restore is the absence of a single, uniform, First Amendment standard con-

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[19] 406 U.S. 205 (1972).

[20] *Id.* at 215.

[21] Sherbert v. Verner, 374 U.S. 398, 407 (1963).

[22] City of Boerne v. Flores, 521 U.S. 507, 533-34 (1997).

[23] *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993); Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

[24] 323 U.S. 516 (1945).

[25] *See id.* at 540.

[26] *Id.* at 530.

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

sistently applied in the pre-*Smith* period. Whether such uniformity or consistency would have made a difference is of course now no longer problematic, because legislatures will presumably declare the governing standard with clarity. Nevertheless, the variance in terminology seems worth noting among the unsettling elements in this complex constitutional drama.

During the quarter century between *Sherbert* and *Smith*, the evolution of the free exercise doctrine was in fact somewhat less smooth than one might have expected. Professor James Ryan correctly noted that "despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test."[28] A number of the apparent departures from the teaching of *Sherbert/Yoder* can be explained away — the cases dealt with government property,[29] or with management needs internal to government,[30] or with discipline within the military[31] or in prisons,[32] or with religious practices unfamiliar to the Court.[33] However, such exceptions came uncomfortably close to swallowing the rule, even before *Smith* eviscerated it — or at least implied that the rule could be honored mainly in the breach.

In fact, one can cite surprisingly few clear free exercise victories during this period, apart from the obviously persuasive *Sherbert* and *Yoder* decisions themselves. An equally divided Court[34] affirmed an Eighth Circuit judgment favoring a religiously based refusal to have

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[28] James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992).

[29] *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that U.S. Forest Service need not state compelling justification for action interfering with religious practices if effect of action is only incidental and has no coercive tendencies).

[30] *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986) (rejecting free exercise challenge by Native Americans to federal statute requiring welfare program participants to provide their Social Security number, where Native American applicants had refused to obtain number).

[31] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that First Amendment does not require Air Force to accommodate individuals' religious beliefs as expressed through dress).

[32] *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that prison policy preventing Muslims from attending religious services did not violate Free Exercise Clause because policy was reasonable and did not deprive inmates of all forms of religious expression).

[33] *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (stating that although withholding Social Security taxes from Amish employees may violate Amish religious beliefs, it is necessary to maintain Social Security system).

[34] *See* Jensen v. Quaring, 472 U.S. 478 (1985), *aff'd by an equally divided court*, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

one's picture imprinted on a driver's license because such an act would "create a graven image" in violation of the motorist's religious conviction.[35] The Court was also clear in holding that states could not bar members of the clergy, as such, from holding public office.[36] Though many states had enacted such provisions for the laudable purpose of ensuring separation of church and state, the Free Exercise Clause did not permit government to make ordination the occasion for forfeiture of public trust. For the most part, however, use of the *Sherbert/Yoder* test to strike down laws of general application (or to create free exercise exceptions) occurred in lower courts, where religious liberty interests occasionally prevailed.[37] The Supreme Court, which so confidently fashioned the standard of higher scrutiny, more readily applied *Sherbert* to protect religious free exercise.

The *Sherbert* case dealt specifically with unemployment compensation claims. The Court's holding — that a lifelong Seventh-day Adventist could not be denied unemployment benefits because she was deemed unavailable for suitable work by reason of her religiously compelled refusal to labor on Saturdays — went well beyond the facts.[38] The Court would later, and relatively uncritically, extend *Sherbert* to several situations that were analytically more challenging. The Justices took a fairly bold leap in 1981, ruling in favor of an unemployed worker from a pacifist sect, whose faith kept him from making goods with military potential, even though few of his coreligionists spurned such jobs.[39] Six years later, when a Seventh-day Adventist made a claim similar to Sherbert's, save for the fact that she had become a Sabbatarian some time after taking the job that created the problem, the Court readily extended *Sherbert* to protect her claim.[40] The Court noted simply that it saw "no meaningful distinction among the situations."[41]

The boldest leap of all was to come, curiously, the year before the Supreme Court's *Smith* decision abandoned the "compelling

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[35] *See Quaring*, 728 F.2d at 1124 (1984).

[36] *See* McDaniel v. Paty, 435 U.S. 618 (1978).

[37] *See, e.g.*, Frank v. State, 604 P.2d 1068 (Alaska 1979) (holding that state did not demonstrate compelling interest for preventing use of mouse meat in religious funeral ceremony); People v. Woody, 61 Cal. 2d 716, 727-28, 394 P.2d 813, 821-22 (1964) (holding that prohibiting Native Americans from using peyote in religious ceremonies violated Free Exercise Clause).

[38] *See* Sherbert v. Verner, 374 U.S. 398, 408-09 (1963).

[39] *See* Thomas v. Review Bd., 450 U.S. 707, 713-20 (1981).

[40] *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140-41 (1987).

[41] *Id.* at 141.

interest" standard.[42] An unemployed claimant named Frazee had been denied benefits when he refused to work on Sundays — something he said he could not do, not because of any explicit sectarian constraint, but simply because, "as a Christian, he could not work on 'the Lord's Day.'"[43] Once again the Justices almost casually extended *Sherbert*'s protections to a situation that is both factually and legally quite different, and did so at a time when there must already have been a nascent majority prepared to abandon the strict scrutiny of *Sherbert* and *Yoder*. When the time came for the coup de grace, in the *Smith* case, that new majority dismissed *Sherbert* and *Yoder* as "hybrid" situations, both involving religious freedom plus another distinct constitutional liberty — even though no Justice had ever before so characterized those cases, nor grounded the higher level of scrutiny on any interest other than free exercise of religion.[44]

The persistence, indeed the expansion, of *Sherbert* in the employment area, as well as its extension to other quite different legal claims, deserved a far better explanation than the *Smith* majority offered. While this is not the time or the place to provide that explanation, we should bear well in mind the anomalous state of First Amendment law that RFRA legislation seeks to restore. It reflected, on one hand, *Sherbert* and *Yoder* extended to embrace the eclectic "I cannot work on the Lord's Day" objector in *Frazee*. It was also, at the same time, a long litany of judgments which, while giving literal deference to the "compelling interest" test, went on to find such an interest under questionable conditions, as well as ruling that government lacked less restrictive means by which to serve that interest — whether in the management of Social Security, or of national forests, or of military garb, or of prison regulations. Thus, one might well ask whether, by the time of *Smith*, how much remained in practice of strict scrutiny for free exercise claims, whatever remained in principle. Of course the proponents of RFRA believed there was enough of value left in place to be restored, and that belief may be more important to the events of the 1990s than the rather bleak reality with which the 1980s closed.

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[42] *See* Employment Div. v. Smith, 494 U.S. 872, 886 (1990); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 830 (1989).

[43] *Frazee*, 489 U.S. at 830.

[44] *See Smith*, 494 U.S. at 882.

II. STATE RFRAS AND ANTIDISCRIMINATION LAWS

We turn now to a troubling issue that any state must consider if it seeks on its own to do what Congress apparently may do only with respect to federal government action — to restore the standard of religious freedom that the Supreme Court declared in *Sherbert* and *Yoder*. While states have approached that task in different ways, we posit here a statute substantially identical to the one that Congress adopted in 1993. A state RFRA law would, in short, declare that under the state constitution, government may not abridge religious belief or practice without proof of a "compelling interest," and that even where such an interest exists government must use the means least restrictive of free exercise. Other elements (such as remedies) might well also be addressed through such legislation, but those variants are of no major importance to our analysis.

The specific issue before us is the degree to which RFRA laws of this type might inhibit enforcement of state civil rights laws, such as those barring discrimination on grounds of race, gender, age, nationality, or sexual orientation. Some such safeguards are unlikely to be troublesome; it is difficult, for example, to imagine ways in which age bias laws would run afoul of religious belief or practice.[45] But the same cannot be said for laws that address discrimination on the basis of race, gender, or sexual orientation. Thus, one must at least recognize a plausible basis for Governor Wilson's fear that the California RFRA law he vetoed might have been at odds with "laws against racial discrimination."[46] Such fears have been voiced by other opponents of RFRA legislation, and are surely not groundless.[47]

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[45] Compare, for example, *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), for a clear rejection of parental claims that prescribed public school teaching materials abridged religious freedom because of possible conflict with inherited spiritual values. "Distinctions must be drawn," said the court, "between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion." *Id.* at 1068 (citing Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1986)).

[46] *Governor's Veto Message*, *supra* note 1, at 9647.

[47] Indeed, several courts have recognized that such religiously based claims conflict with comprehensive antidiscrimination statutes. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990). *See generally* Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1073-91 (1992) (describing conflict between states' antidiscrimination laws and court rulings supporting individual religious beliefs).

One might, however, offer two initial responses. For one, a legislature could easily and expressly avoid such a potential conflict, presumably by creating an exemption from RFRA protection of the type that many employment bias laws contain to permit hiring by religious organizations in positions crucial to the faith. It is for that reason that a male non-Catholic typically may not go to court for redress after being rejected for the priesthood — though such exemptions would not normally bar a nun's sex-discrimination suit following a similar rejection. Putting aside the thorny question (addressed elsewhere in this symposium) of when such exemptions may pose Establishment Clause problems,[48] it is enough to note that such conflicts are not beyond lawmakers' capacity to anticipate and partially resolve in advance.

The second response is that such conflicts are hardly new, nor are they creatures of *Smith*, or of RFRA, or of the 1990s. While the Supreme Court's only direct encounter with the issue came in *Bob Jones University v. United States*,[49] where the conflict was resolved in the government's favor even under the compelling interest standard, lower courts have had substantial experience with such conflicts before, during and even after the RFRA period.[50]

We focus here on three such potential conflicts — between religious freedom/RFRA based claims on one hand and nondiscrimination, respectively in education, employment, and housing — three areas that admirably illustrate the problems and tensions that may arise across the board. Following this analysis, we examine several options that may have growing appeal if state RFRAs provide a viable medium for reconciliation in the absence of comprehensive federal legislation of a kind that now seems unlikely.

A. Religious Freedom and Nondiscrimination in Education

The *Bob Jones* case provides a useful starting point. A private, church-related university claimed that the federal government had

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[48] *Cf.* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (holding state statute granting absolute right not to work on Sabbath violates First Amendment Establishment Clause).

[49] 461 U.S. 574 (1983).

[50] *See generally* Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996) (analyzing cases addressing conflict between RFRA and fair housing laws); *Recent Cases*, 108 HARV. L. REV. 763 (1995) (discussing Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994)).

abridged free exercise by denying a tax exemption on the basis of racially discriminatory policies that reflected sincerely held religious views.[51] The Supreme Court was unanimous in rejecting that claim, though one Justice doubted that Congress meant to authorize such action.[52] Assuming that *Sherbert* and *Yoder* supplied the applicable standard, the Court concluded: "The Government has a fundamental, overriding interest in eradicating racial discrimination in education [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[53] The Court added that no less restrictive means existed by which to serve such interests.[54] The *Bob Jones* case thus reflected the easiest paradigm; the government's interest was manifestly compelling and could not be otherwise met, while the countervailing interests of the institution and its members came only marginally within the ambit of free exercise.

Far more difficult, and more helpful for our purposes, is a federal appeals court case that sharply poses the conflict of constitutional interests. *Brown v. Dade Christian Schools, Inc.*[55] shortly predated *Bob Jones*, but went beyond the issues that were soon to reach the Supreme Court. African-American parents brought suit, under federal civil rights laws,[56] against a Florida religious school after their children had been refused admission for indisputably racial reasons. The district court ordered admission, finding that the school's exclusionary policy reflected social and not religious precepts.[57] The old Fifth Circuit split sharply, agreeing in the end with the district judge, but with several variant perspectives on the case. The plurality shared the district court's view of the rationale for the racial barrier, and summarily rejected the school's claimed religious freedom interest.[58] Several dissenters took a sharply different view of the case, insisting that a private church-related school not only could establish but in this case had established a valid relig-

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[51] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 577-82 (1983).

[52] *See id.* at 612-23 (Rehnquist, J., dissenting) (arguing that Congress has simply failed to take action denying tax-exempt status to educational institutions that promote racial discrimination).

[53] *Id.* at 604.

[54] *See id.*

[55] 556 F.2d 310 (5th Cir. 1977).

[56] Specifically, 42 U.S.C. § 1981 (1994), the applicability of which to private school admission policies seemed relatively clear to this court. *See Brown*, 556 F.2d at 312.

[57] *See Brown*, 556 F.2d at 311.

[58] *See id.* at 312-14.

ious basis for refusing admission on racial grounds.[59]

The key to the broader import of this case lies in Judge Goldberg's long and thoughtful concurrence.[60] For him, the religious freedom claim was far more difficult than the plurality's casual rejection might suggest. There seemed little doubt of the sincerity of the school's view that racial mixing of students contravened basic religious tenets. While that policy might not rest on expressly scriptural grounds, Judge Goldberg concluded that the school's "leadership [had] adopted the rule in response to religious tenets."[61]

Thus, court-ordered admission of other-race children would abridge free exercise because the principal's "beliefs are sufficiently 'religious' to invoke free exercise scrutiny."[62] Had the basis for those beliefs been "biblical interpretation," there would have been little doubt about the presence of such a conflict. The less formal premise for this school's racial barrier did not, in the concurring judge's view, permit the easy assumption (which the district court and the plurality had indulged) that admission could be compelled without First Amendment concerns. So long as the basis for the policy was sincere, and reflected clearly religious tenets, strict scrutiny was appropriate.

In the end, even applying such a level of scrutiny, the government's interest in ensuring equal access to education — free from racial discrimination — persuaded Judge Goldberg that the plurality was correct, albeit partly for the wrong reasons. Equal access to educational opportunity was indeed a "compelling interest," sufficient to overcome even a clearly religiously based racial barrier to the admission of minority applicants. No less restrictive options existed by which government could achieve that goal. Ordering the school to admit students without regard to race was the only means by which equal access could be ensured.

The value of the *Dade Christian* case to the issue now before us should be clear. At least for the concurring judges, the religious freedom issue could not be sidestepped, as the plurality had done, by treating racial bias in admitting or rejecting students as the product of a social or political judgment. If an explicit scriptural ban on racial integration would have compelled strict scrutiny — as

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[59] *See id.* at 324-26 (Roney, J., dissenting).
[60] *See id.* at 314-24 (Goldberg, J., concurring).
[61] *Id.* at 320 (Goldberg, J., concurring).
[62] *Id.* at 318 (Goldberg, J., concurring).

presumably it would have even for the plurality, or for the *Bob Jones* Supreme Court — then a less explicit but equally sincere religious belief deserved comparable deference. Strict scrutiny, thus, had to be the appropriate standard under *Sherbert* and *Yoder*. Nonetheless, the parents' countervailing interest in equal educational opportunity was sufficiently compelling to carry the day. In the end, one reaches the same result by either route.

The implications of that parallel should be equally clear for RFRA purposes. Overcoming racial discrimination, practiced by private church-related schools, is almost certain to be seen as a sufficiently compelling governmental interest to overcome virtually any religiously based claim. Even a clear scriptural command to separate the races — should one exist — would not protect a racially exclusionary admission policy.

The balance might, however, be closer in regard to less urgent manifestations of public policy — if, for example, a state were to mandate equal access of students to private schools without regard to gender or sexual orientation, or even religion. In such cases, the governmental interest might be viewed as less compelling — though, in the absence of any actual cases, we are left largely to speculation. The status of such other types of public policy emerges in the two other areas to which we now turn, employment and housing.

B. Religious Freedom and Nondiscrimination in Employment

The classic case on employment discrimination also involved a private Christian school, this time in Dayton, Ohio.[63] The contract of Linda Hoskinson, a married and wholly satisfactory teacher in the elementary grades, was not renewed soon after she told the principal she was pregnant. The reason for her termination was the school's religiously based "desire to have a mother home with preschool age children."[64] Hoskinson sought relief from the Ohio Civil Rights Commission, which shared her view that terminating a teacher solely for becoming pregnant violated the state law against gender bias. The Commission found probable cause to pursue the claim, and strongly suggested the administration enter a concilia-

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[63] *See* Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985).

[64] *Id.* at 934.

tion agreement and accept a consent order in the teacher's favor.[65]

The school and several elementary-grade parents went to federal court to enjoin the Commission's inquiry on First Amendment grounds. The district court, finding that the Ohio antibias law governed the case and should be enforced, promptly dismissed.[66] But the school and the parents took their plea to what would prove a far more sympathetic Sixth Circuit Court of Appeals. That court agreed that the state gender discrimination law covered this case, however tempting it might have been to avoid a constitutional collision through narrow statutory construction.[67] While some states had created exemptions for such situations, Ohio clearly had not, and the court, therefore, squarely faced the tension between free exercise and gender equity.

The school had actually invoked two religiously based interests — the conviction that a mother's place is in the home with young children, and the policy that an aggrieved staff member must pursue an internal chain of appeal. The first claim, in the appeals court's view, "was founded on religious precepts" and, thus, deserved strict First Amendment scrutiny.[68] Even though the preference for maternal abstention from the workforce had never been codified in school policy, it clearly reflected scriptural precepts on the nature and role of the family. The court reached a similar conclusion about the other claim; the nonrenewal "was consistent with the Board's expressed and established religious belief that disputes be resolved internally and in accord with the Biblical Chain of Command."[69]

One added factor seems to have weighed in the school's favor. The religious freedom interests asserted in court were not solely institutional. Since parents were among the plaintiffs, the court felt obligated also to assess the right of families to choose a nonpublic education for their children — an interest the Supreme Court had recognized as a constitutional imperative sixty years earlier.[70] To this court, the parental-choice interest was at least as persuasive as the school's claim. Indeed, it was comparable in stature to the parental claim which the Supreme Court recognized in *Yo-*

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[65] *See id.* at 935.

[66] *See id.*

[67] *See id.* at 942-43.

[68] *See id.* at 939.

[69] *Id.* at 940.

[70] *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (holding states may not force children to be taught only by public school teachers).

der. Thus, the plaintiffs entered the balance with two convergent sets of religious freedom interests, which undoubtedly raised the stakes and helped shape a surprisingly sympathetic view of this novel religious freedom claim.

The school and parents eventually prevailed on their First Amendment claims — not only because of free exercise concerns both about the diminution of parental choice and about the "the highly intrusive nature" of the Commission's inquiry, but also because the court saw in that inquiry a potential entanglement that might also violate the Establishment Clause.[71] The court recognized how far its solicitude for a private school's religious freedom interest extended beyond the Supreme Court's view in *Bob Jones.* Yet, to the Sixth Circuit, the potential impact of the Ohio Commission's role here was substantially more coercive; while Bob Jones University could undoubtedly fulfill its religious mission without a federal tax exemption, the options seemed far narrower for a Christian elementary school constrained on a matter of principle in its employment of teachers. The threatened action of the state agency would, in effect, put the school and the parents to a *Sherbert*-like choice which crossed the free exercise threshold.[72]

Finally, the Sixth Circuit viewed less sympathetically the government side of the equation. Though conceding that states may have compelling reasons for barring gender as well as race bias, the court found that interest somewhat attenuated when it came to regulating the hiring policies of private schools.[73] Moreover, the court suggested states had at their disposal several less onerous alternatives — for example, the very withdrawal of tax exemptions that the *Bob Jones* Court had sustained, or conditioning or withholding other forms of public subvention to private schools. Thus, a thorough *Sherbert/Yoder* analysis seemed to vindicate the parental and institutional claims in this novel case.

What would happen to such a case under RFRA? State antidiscrimination laws might exempt from RFRA coverage (as some did even at the time of the *Dayton Christian School* case) religiously important elements in the hiring of secular employees by church

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[71] *See Dayton*, 766 F.2d at 943.

[72] *See id.* at 951-52 (describing school's options as "abandon[ing] their religious beliefs by placing their children in public schools, compromis[ing] their hiring practices to conform with the state's secular interests . . ., or leave[ing] Ohio").

[73] *See id.* at 954 ("Certainly, denial of public support to discrimination is a more compelling interest than eliminating discrimination in the private sector . . . .").

schools. Absent such an exemption, courts would need to face the conflict that the Sixth Circuit found inescapable. Under RFRA statutes, the religious freedom claim would presumably be at least as persuasive as it was in the *Dayton* case. The probable difference would come in analyzing the countervailing interests. Surely a state antibias agency could today show a compelling interest in the continuing employability of highly competent pregnant teachers, however strongly the school might believe a mother's place was in the home.

Such an antibias agency ought also to be more persuasive than Ohio's commission seems to have been on the issue of alternatives. While various public benefits for which private schools are eligible could indeed be conditioned upon nondiscriminatory hiring practices, and could be withdrawn as a sanction if discrimination occurred, that approach would be circuitous and indirect at best. Moreover, it would surely offer no solace to an individual teacher whose otherwise exemplary career was terminated because of her pregnancy. Only the authority to order her reinstatement would adequately vindicate a state's compelling interest in ensuring gender equity. Thus, the very same issue, arising under RFRA, should certainly yield a different result in the 1990s. Only a failure to assess properly the powerful government interests would lead a court to reject the claims of a latter day Linda Hoskinson.

C. Religious Freedom and Nondiscrimination in Housing

The rental housing field is the most recent battleground between free exercise and antibias laws, and has generated much litigation in the 1990s. The prototype case can be simply stated: An unmarried couple seeks to rent an apartment, but the owner refuses to rent because his or her religious beliefs preclude condoning or even fostering what appears to be sinful cohabitation. The couple seeks recourse from the appropriate state agency under the fair housing laws. The landlord raises a religious freedom defense. If the agency and a reviewing court find (as most have to date) that the law applies to refusal to rent to unmarried couples, the conflict is inescapable.

At this stage, courts have responded in several quite disparate ways. At least one state court[74] and one federal court[75] have denied enforcement of marital status bias claims because of a landlord's colorable claim of infringement upon religious liberty. Elsewhere, courts have enforced such claims, though trumping the free exercise interest on different rationales. At least two state courts (one during the RFRA period and the other post-RFRA) have accepted marital status bias claims, finding that a compelling government policy of barring marital-status discrimination is an interest that both overrides an arguable interest in religious freedom and is incapable of being served by less intrusive means.[76] The California Supreme Court, in *Smith v. Fair Employment and Housing Commission*,[77] recently reached the same result by a rather different route, finding that neither federal or state constitutional law nor the Federal RFRA (still in force and presumably applicable to such state action) sufficiently protected the landlord's interest.[78] Such a ruling mooted the issues of the strength of the government interest and the availability of less restrictive alternatives.

To complete the spectrum, Massachusetts' Supreme Judicial Court found that the agency's order imposed a substantial burden on the landlord's religious freedom, but remanded for more detailed analysis of the compelling interest and available alternatives issues, both of which received cursory attention from the lower courts because of the procedural posture of the case.[79]

More helpful as a source of guidance on issues that state RFRAs might pose in the rental housing area is *Smith*, the California Supreme Court's most recent such case.[80] In an earlier case,[81] California courts had reached a quite different view, holding that under RFRA landlords had a protected religious freedom interest in

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[74] *See* State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990).

[75] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999).

[76] *See* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998) (holding that state's interest in providing equal access to housing outweighed defendant's religious beliefs); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 284 (Alaska), *cert. denied*, 513 U.S. 979 (1994) (holding that prohibiting discrimination against unmarried couples did not violate landlord's right to religious freedom).

[77] 12 Cal. 4th 1143, 913 P.2d 909 (1996).

[78] *See id.* at 1161, 1176-77, 913 P.2d at 919, 929-30.

[79] *See* Attorney General v. Desilets, 636 N.E.2d 233, 240-41 (Mass. 1994).

[80] *See Smith*, 12 Cal. 4th at 1143, 913 P.2d at 909 (deciding whether landlord violated antidiscrimination laws by refusing to rent to unmarried couple).

[81] *See* Donahue v. Fair Employment and Housing Comm'n, 13 Cal. App. 4th 350, 2 Cal. Rptr. 2d 32 (Ct. App.), *rev'd*, 182 Cal App. 2d 117, 5 Cal. Rptr. 2d 781 (Ct. App. 1992), *and rev dismissed*, 23 Cal. Rptr. 2d 591, 859 P.2d 671 (1993).

refusing to rent to unmarried couples if such action would compel them unacceptably to condone or foster sinful cohabitation. *Smith*, however, fundamentally rejected that view. After dismissing possible federal free exercise claims because of the Supreme Court's *Smith* doctrine, the California Supreme Court focused on the still presumptively valid Federal RFRA.

This court invoked several factors to support its judgment that a fair-housing order did not impermissibly burden religious freedom. On one hand, the degree of compulsion imposed upon the landlord seemed substantially lower than in cases like *Sherbert*, where a religious objector's livelihood was at stake.[82] Here, as with Sabbatarian merchants whose religious challenge to Sunday-closing laws the Supreme Court long ago rebuffed,[83] the cost of adhering to one's faith was not potential destitution, but "simply making religious exercise more expensive" for the recalcitrant rental property owner.[84] Moreover, "investment in rental units [is not] the only available income-producing use of her capital."[85]

At the same time, creating a religiously based exemption for the devout landlord might (unlike *Sherbert* and *Yoder*) have a deleterious effect on the interests of third parties — a factor implicit throughout the U.S. Supreme Court's analysis. Thus, taking these various elements fully into account, the California high court concluded that no substantial burden existed. The remaining issues of governmental interest and alternatives thus need not be reached; the court implied no views on either issue, nor on any possible Establishment Clause concern that a contrary holding might create.

The *Smith* court simply made it too easy to reach a tenable result. It will not do to say, as the California majority did, that religious freedom is not burdened by an order compelling a landlord to rent his property to a person whom his faith deems unacceptable. The potential impact is much deeper than simply making adherence to faith "more expensive."[86] Suggesting that rental property owners could find other lucrative investments has a callous ring, quite at variance with *Sherbert*'s solicitude for the conscientious Sabbatarian. And continued reliance on the Supreme Court's Sunday Law decisions, long after *Sherbert* and *Yoder*, seems unwar-

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[82] *See* Sherbert v. Verner, 374 U.S. 398 (1963).
[83] *See* Braunfeld v. Brown, 366 U.S. 599, 609 (1961).
[84] *See Smith*, 12 Cal. 4th at 1173, 913 P.2d at 926.
[85] *Id.* at 1175, 913 P.2d at 928-29.
[86] *Id.* at 1173, 913 P.2d at 927.

ranted.

The California Supreme Court could surely, and comfortably, have reached the same result by accepting the legitimacy of the landlord's religious freedom claim, but then finding that claim trumped by the state's declared interest in not permitting marital status (or lack of it) to disqualify otherwise acceptable tenants. That is essentially what the Alaska Supreme Court did, RFRA notwithstanding, and seems to provide a more acceptable resolution of concededly difficult contending claims.[87]

In two very recent non-RFRA cases, a state supreme court and a federal appeals court reached diametrically opposing results. In late December 1998, the Michigan Supreme Court rejected a religious freedom defense to a marital-bias housing charge, finding the alleged burden insufficient under both federal and state free exercise clauses.[88] In mid-January, however, a panel of the Federal Ninth Circuit sustained such a claim solely under the Free Exercise Clause.[89] Though neither case involved RFRA issues — the federal statute was dead by that time and neither state had such a law of its own — these cases obviously deserve the close attention of those that wonder how RFRA legislation might affect the tension between tenants' marital-bias claims and landlords' religious liberty interests.

Both courts in these most recent cases found that state antidiscrimination law protected unmarried couples that sought rental housing and, thus, created a potential conflict for the property owner who objected on grounds of faith or conscience to accepting such tenants. Both courts also ruled that, post-RFRA, the applicable constitutional standard must be that of the *Smith* case.[90]

There the paths parted. The Michigan Supreme Court found the antidiscrimination statute to be a neutral law of general applicability, and its enforcement thus wholly compatible with *Smith*.[91] The presence in the law of certain nonreligious exemptions in no

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[87] *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-84 (Alaska 1994).

[88] *See* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998).

[89] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 717 (9th Cir. 1999).

[90] The Ninth Circuit briefly considered, but rejected, the landlords' claim that the proper test should be derived from *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). The appeals court rightly ruled that the Alaska statute's exceptions and incomplete coverage presented a departure from "general applicability" very different from the one that caused the Supreme Court to invalidate the municipal ordinances in *Lukumi*. *See Thomas*, 165 F.3d at 701.

[91] *See McCready*, 586 N.W.2d at 728.

way undermined its generality or its neutrality. The court went on to reach the same result under the religious freedom clause of the Michigan State Constitution — a provision that the court applied under the *Sherbert/Yoder* compelling interest test. Despite a potential burden on conscientious landlords' religious liberty, the state's interest in ensuring equal access to rental housing was sufficiently compelling to outweigh any interest in religious liberty in this setting.[92] Two dissenting justices disagreed with their colleagues on the interpretation of state antibias law, finding Michigan's signals with regard to cohabitation insufficiently clear and consistent to sustain such a ruling.[93] The dissenters, therefore, had no occasion to reach the constitutional issues, on which they implied no views.

Barely had the Michigan judgment appeared than a starkly contrasting view emerged from the Ninth Circuit. By a two to one margin, the panel sustained an unreported district court ruling that had vindicated the religious liberty claims of two Alaskan landlords.[94] Since the suit was a facial challenge to a local fair housing ordinance and the parallel state statute, the court first had to address serious doubts about ripeness and justiciability. Over the vigorous dissent of one judge, the panel found the case ready for decision, and proceeded to the merits. Since neither federal nor state law provided any special protection for religious liberty claims, *Smith* supplied the standard. But the *Smith* Court had distinguished several judgments — notably *Yoder* — as "hybrid" situations in which religious liberty was reinforced or enhanced by another constitutional interest, thus taking the case beyond simply free exercise.[95] In the Alaska case, the requisite evidence of "hybrid" status came from two distinct sources — taking of private property on the one hand and (because of curbs on advertising and promotion of rental property) free expression on the other. By either route, the appropriate level of scrutiny rose to the strict standard of "compelling interest," which had predated *Smith*.

Two key issues remained, and on both of them the landlords prevailed. The requirement that they rent to unmarried tenants,

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[92] *See id.* at 730 ("A compelling state interest in eradicating discrimination in real estate transactions justifies the burden on [the landlords'] beliefs. In addition, a less obtrusive form of regulation has not been shown to be available to the state.").

[93] *See id.* at 730-31 (Boyle, J., dissenting) (pointing to legislature's failure to repeal criminal statute against cohabitation as clear evidence that it would not burden religious beliefs in order to protect cohabitation rights).

[94] *See Thomas*, 165 F.3d at 718.

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

ruled the court, clashed not merely with deeply held conviction, but with their view of scriptural commands.[96] The "Hobson's choice" between honoring such religious beliefs and compromising those beliefs by renting to unmarried tenants created for this court a burden sufficient to trigger strict scrutiny — despite the absence here of government benefits of the type that had invited such analysis in the unemployment compensation cases. Options that were theoretically available to the conscientious landlord — getting out of the real estate business, for example, as the California Supreme Court had suggested — were unacceptable to the Ninth Circuit. Though the burden was mainly economic, the *Sherbert* line of cases had recognized monetary sacrifice or foregone fiscal opportunity as legally sufficient to sustain a First Amendment challenge.

Finally, there was the matter of the governmental interest, an issue that no court has found entirely comfortable. For the Ninth Circuit panel, neither the municipal nor state interest was sufficiently "compelling" to overcome the landlord's religious liberty claim. That left before the court only one other issue — a possible Establishment Clause concern the Alaskan officials had raised about creating such an exemption — but that doubt was easily and quickly allayed, leaving this judgment to herald a new and different approach not only to real estate rental bias cases, but much more broadly across the whole post-RFRA landscape.[97]

Whether that judgment will survive en banc review by the court of appeals, and whether it is likely to be followed by other courts, remain matters for speculation. Its force is surely limited by its pejorative view of the asserted governmental interest; the court itself recognized that protecting equal access against racial bias had been accorded a high degree of deference in comparable situations. Meanwhile, the two post- or non-RFRA rental housing cases could not possibly be more different in approach or outcome. Presumably other courts will find guidance in the broad spectrum between these two early rulings.

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[96] *See, e.g., Genesis* 2:24 (King James) ("Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."); *Hebrews* 13:4 (King James) ("Marriage is honourable in all, and the bed undefiled: but whoremongers and adulterers God will judge.").

[97] The broader implications of the *Thomas* case are addressed elsewhere in this symposium. *See* W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 704 n.120 (1999); Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 828 n.13, 845 (1999).

III. STRIKING A BETTER BALANCE: RELIGIOUS FREEDOM AND NONDISCRIMINATION

There has now been enough litigation to invite broader conclusions and suggestions for the cases that may follow. Several points may be helpful for the undoubtedly contentious period that lies ahead.

Most basically, state RFRA laws ought not to contain exemptions or exceptions for antibias laws. Such exemptions are neither wise nor necessary. They are unwise for several reasons, not least because exempting any conduct from the reach of such legislation undermines its force. Moreover, it seems unlikely that the exemption process, once begun, would stop with antidiscrimination. In this complex environment, many groups would undoubtedly seek and claim comparable dispensations In the end, if a legislature makes a commitment to restore legal protection for religious freedom, that commitment should be comprehensive, not partial or piecemeal. Thus, the removal of antidiscrimination laws from the reach of state RFRAs seems unwise

Exempting antibias laws from state RFRAs also seems unnecessary. The central fact, dominant throughout the nearly three decades between *Sherbert* and *Smith*, is that courts are fully capable of addressing and resolving even the most difficult tensions between religious liberty and equal opportunity. If the statutory RFRA standard is the one that courts applied during that period — a "compelling government interest" incapable of being served by "less restrictive means" — there is a substantial reservoir of experience from which future courts could and should draw in addressing such tensions. Several guidelines may shape that process.

First, not all governmental antidiscrimination interests may be equally "compelling." While it is not the role of courts to prioritize such interests, the source of equal opportunity claims may well be relevant. Certain interests, notably racial equality, reflect a clear constitutional imperative. Other antibias claims may be of statutory and more recent origin. Moreover, the clarity of state policy may vary across the range of such policies; in the marital-status area, for example, both the dissenting judge in the Michigan case[98] and a commentator on the Alaska case[99] have pointed to seemingly conflicting state laws and rulings as a basis for a lower level of def-

[98] *See McCready*, 586 N.W.2d at 730.

[99] *See Recent Cases*, *supra* note 50, at 767.

erence than an unambiguous state policy would deserve. Such evidence may bear centrally on the government side of the equation — even though courts have no business second-guessing the "importance" or "substantiality" of a clearly expressed and consistently enforced state antibias policy.

The quest for guidance in applying a "compelling interest standard" may draw comfort from other sources. There were, as we noted earlier, a fair number of pre-*Smith* decisions in which lower federal and state courts invoked this test and explained its meaning. Only during the brief period between *Smith* and RFRA was the compelling interest standard dormant, and even then (as the recent Michigan judgment indicates) some state courts would have construed their own religious liberty clauses to demand a far stronger case than *Smith* would require. Moreover, in the free expression setting, there is much potentially useful analogous experience. Thus the process should prove more familiar and less daunting than some skeptics may have implied during debate over state RFRAs.

Second, moving to the religious liberty side of the equation, the facts of individual cases may guide disposition. While it is never permissible for courts to probe the legitimacy or validity of religious liberty claims, the probable effect of a decree upon such liberty is a different and permissible inquiry. While courts may demand proof that the burden threatened by antidiscrimination policy would indeed be substantial, the requisite evidence may come from various sources specific to the case. One need not dismiss all religiously based objections to recognize, for example, a meaningful difference between a devout entrepreneur whose holdings include a chain of apartment houses, and a retired couple of similar conviction who seeks suitable tenants for a single guest bedroom in their small house. Both landlords would face a substantial hurdle under a clear state policy of protecting equal access to rental property regardless of marital status. But a court would surely recognize that the extent of the burden imposed on the retired couple differs in degree from that imposed upon the entrepreneur — even without invoking the California Supreme Court's rather callous "find some other investment option" rationale. Varying degrees of burden, and of severity of impact upon religious faith and belief, are surely relevant and may guide courts in difficult cases.

Third, the potential effect of a judgment upon other persons and groups may play a greater part in the equation than it has of-

ten played in the past. The Sixth Circuit, in the *Dayton Christian School* case, was concerned about the potential impact of an anti-discrimination inquiry not only on the school and its administration, but also upon parents of elementary age children, some of whom had chosen such a school environment for deeply religious reasons that might be impaired by forcing reinstatement of a pregnant teacher.[100] However one may feel about that disposition, and however unlikely it seems that courts would reach the same conclusion today, consideration of parents' religiously based concerns may enhance the school's interest. Conversely, in the marital status rental housing context, courts have properly assessed the potential impact of refusing relief not only upon the immediate would-be tenants, but also on other unmarried applicants whose access to apartments would be diminished. In both situations, potential implications beyond the immediate parties deserve a place in the equation.

Fourth, the issue of alternatives may play a role on both sides, though mainly with regard to governmental interest. The Supreme Court was quite clear in *Sherbert* and ensuing cases that where government could achieve its goal — even a compelling one — by means less restrictive of religious liberty, it must prefer such means. Despite a suggestion in the *Boerne* opinion that so rigorous a standard was not part of the pre-*Smith* approach to free exercise claims, the evidence of its presence (and its importance to Supreme Court analysis) is overwhelming. It seems likely that state RFRAs will contain (as did the federal statute) an explicit requirement that government use the least restrictive means. Even in the absence of such a provision, that standard seems sufficiently embedded in the jurisprudence which a RFRA would restore and would, thus, deserve consideration even without specific mention.

Finally, something should be said about free exercise claims that will now arise in the absence of RFRA laws. The two most recent discrimination cases — in the Michigan Supreme Court and Ninth Circuit — were non-RFRA cases, for which the applicable standard was, thus, free exercise. For the Ninth Circuit, that meant *Smith* alone; for the Michigan court, it meant *Smith* in part, but also a *Sherbert*-like standard derived from state constitutional law. Since

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[100] *See* Dayton Sch., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 947-49 (6th Cir. 1985) (analyzing potential effect of teacher's reinstatement on school children, their parents, and school administrators).

most such cases, at least in the near future, are likely to arise apart from RFRA laws, the relevance of these two judgments (and their vastly disparate approach to balancing religious freedom against antidiscrimination) should be apparent. While there are likely to be many more such cases falling somewhere between these two on the constitutional spectrum, the end points have been helpfully defined in the early post-RFRA era.

CONCLUSION

Let us, by way of conclusion, return to Governor Wilson's veto message. The California *Smith* judgment — in fact, virtually all the cases to date — strongly suggests ways in which lower courts might allay the governor's fear that such legislation could "invalidat[e] laws . . . against racial discrimination."[101] Such a concern seems hyperbolic in at least one respect; even if courts were to do as the Ninth Circuit has done and recognize a religious freedom exemption from general laws that bar certain forms of discrimination, such a ruling could hardly be said to "invalidate" the antibias law.[102] Moreover, the recent decisions suggest how difficult it will be to make the case for such an exemption — as difficult under RFRA as it always has been even under *Sherbert*'s and *Yoder*'s view of the Free Exercise Clause. Even where the choice compelled by conscience may be a painful and costly one, as it undoubtedly has been for some landlords that find renting to unmarried couples abhorrent, the courts rightly demand more as the basis for finding that religious freedom has been "substantially burdened."

Even where such a burden has been proved, as the Alaska court believed it had been, and the Michigan Supreme Court was quite willing to assume, the state's interest in deterring discrimination may nonetheless be compelling. When the bias is racial, that is almost certain to be the case, as *Bob Jones* and many other cases have found. Where acts of discrimination are less egregious, the compelling interest case may be harder to establish, but as the unmarried housing cases indicate, far from impossible. Of the state courts that have thus far passed on this issue, only in Massachusetts was the government's interest problematic — and there only because the case arose in such a way that evidence about that interest

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[101] *Governor's Veto Message*, *supra* note 1, at 9647.

[102] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 717 (9th Cir. 1999).

had not been needed or provided.

If, therefore, government can demonstrate a compelling interest in protecting unwed couples from being denied rental housing because of their marital status, proof of the requisite "interest" in more traditional contexts — especially those with clear constitutional implications — should be possible. Governor Wilson and others that may share his concerns should repose greater faith in the capacity of courts to accommodate, as they have for decades, conflicts between religious freedom and nondiscrimination.