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# As the Religious Freedom Restoration Act Turns 30, the "Most Precious of All American Liberties" Is Again at Risk

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## KEY TAKEAWAYS

Government should be able to interfere with religious practice only as a last resort, and no more than necessary, because it is a preferred, inalienable right.

Congress enacted, with wide support, the RFRA to restore protection for religious freedom that the Supreme Court eliminated.

As the RFRA turns 30, a campaign is afoot to again make protection of religious freedom selective and political, rather than universal and consistent.

When unanimously enacting the International Religious Freedom Act[1] in 1998, Congress recognized that "[t]he right to freedom of religion undergirds the very origin and existence of the United States."[2] People began coming to North America to practice their faith without government interference long before the United States was born. By then, writes Professor Michael McConnell, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world."[3]

America's Founders considered the right of conscience, which includes the right to freely exercise religion, to be what McConnell calls a "special case"[4] requiring special protection. The Supreme Court developed a protective legal standard suitable for a right that, it recognized, occupied a "preferred position."[5] Under this standard, often called *strict*

*scrutiny*, the government "may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest."[6]

Strict scrutiny comports with the fact that, as the Senate Judiciary Committee noted in a 1993 report, the United States "was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the *most treasured birthrights* of every American."[7] The right to exercise religion is not merely one of many competing values but, James Madison argued, it "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[8] As a result, Justice Antonin Scalia explained in a 1989 opinion, the Supreme Court held in a series of precedents "that the free exercise clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws."[9]

## *Employment Division v. Smith* and the RFRA

That long historical and legal arc came to an abrupt halt in 1990. In *Employment Division v. Smith*,[10] two Oregon state employees were fired and denied unemployment compensation benefits for using the drug peyote, prohibited under state law, in their Native American religious ceremonies. They sued, arguing that they were entitled to one of the Free Exercise Clause's "religion-specific exemptions" that Scalia referred to a year earlier. Rather than apply strict scrutiny, however, the Supreme Court abandoned that standard in all but the tiny fraction of cases in which government action is "specifically directed at…religious practice."[11] A "generally applicable"[12] government action, however, would never violate the First Amendment, no matter how serious its burden on religious practice.[13]

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA) to once again, this time by statute, require application of strict scrutiny[14] in all Free Exercise Clause cases. The House Judiciary Committee report on the RFRA makes clear that "the definition of governmental activity covered by the bill is meant to be *all inclusive*. All government actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill."[15] The RFRA itself states that courts must apply the strict scrutiny standard "*in all cases* where free exercise of religion is substantially burdened."[16]

Universal application of strict scrutiny, a standard that properly reflects the preferred position of the inalienable right to exercise religion, is the heart of the RFRA. The statute itself insulates neither religious practices

against any limitation nor government actions from any challenge. Rather, as Representative Stephen Solarz (D–NY), who first introduced the RFRA in the House, explained, the RFRA "returns to the courts the role of engaging in this delicate balancing test."[17] The Senate Judiciary Committee report on the RFRA states that it establishes "one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the circumstances in each case."[18]

RFRA supporters in Congress and among grassroots groups would no doubt disagree on how courts should apply strict scrutiny in individual cases. Prior to *Smith*, in fact, the government prevailed in most free exercise cases.[19] But it is the application of strict scrutiny, not whether it applies at all, that must determine winners and losers. Today, however, political party and ideology are doing what they refused to do in 1993. A campaign is underway to do to the RFRA what *Smith* did to the Free Exercise Clause by making application of strict scrutiny selective rather than universal. *Smith* made "generally applicable" laws immune from any Free Exercise Clause challenge; the current campaign would exempt government action that advances certain political interests, such as abortion access or LGBTQ+ rights, from compliance with the RFRA.

To be clear, this campaign does not argue that advancing these interests is sufficiently important to meet the strict scrutiny standard. That traditional approach would at least maintain the general importance of religious freedom. Rather, this campaign would strip disfavored religious practices of *any legal protection at all*, allowing government to undermine, weaken, suppress, or even prohibit them altogether in the name of advancing a political agenda.

Solarz testified about the RFRA before the House Judiciary Subcommittee on Civil and Constitutional Rights in May 1992. He warned against "selecting among potential free exercise claims and choosing a higher level of protection for the ones a majority of Congress approves, and a lower level of protection for the less popular ones."[20] Not only is that, in fact, the objective of the present campaign, but it is being led by Members of Congress and grassroots groups that, for three decades, had been among the RFRA's strongest supporters.

Religious freedom is again at serious risk today because the consensus that it is a preferred and inalienable right that requires the uniform application of strict scrutiny is falling apart. This *Legal Memorandum* will assess how, as the RFRA turns 30 this year, the principles behind this landmark law are being challenged.

## Understanding Religious Freedom

Fully understanding religious freedom requires taking account of both theory and practice. In theory, for example, 47 nations both endorsed the 1948 Universal Declaration of Human Rights (UDHR)[21] and either signed or ratified the 1966 International Covenant on Civil and Political Rights (ICCPR).[22] These documents include the same robust definition of religious freedom as the "freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief in teaching, practice, worship and observance."[23]

This theoretical picture, however, looks very different in practice. Only seven of these 47 nations have low levels of either government restriction or social hostility toward religion, according to the Pew Research Center's annual analysis.[24] Today, while 173 nations have ratified the ICCPR and its strong endorsement of religious freedom, Secretary of State Antony Blinken told the International Religious Freedom Summit in January 2023 that "80 percent of the world's population still cannot practice their faith without serious restrictions or risk."[25]

Religious freedom theory and practice have traditionally been much more aligned in the United States. Those who came to North America seeking to practice their faith without government interference viewed religious freedom as both natural and inalienable. Professor McConnell explains that while most natural rights "were surrendered to the polity in exchange for civil rights and protection...inalienable rights—of which liberty of conscience was the clearest and universal example—were not."[26]

The late Senator Orrin Hatch (R–UT) explained this and other aspects of religious freedom in a series of Senate floor speeches in the fall of 2015. He began with "first principles,"[27] explaining why "[t]here is something inherent in the nature of religious exercise that merits special protection."[28] Because the right of conscience, and the more specific right to freely exercise religion, "go to the very heart of who we are as human beings and how we make sense of our world,"[29] Hatch explained, no decision "is more fundamental to human existence than the decision we make regarding our relationship to the Divine." As such, "[n]o act of government can be more intrusive or more invasive of individual autonomy and free will than the act of compelling a person to violate his or her sincerely held religious beliefs."[30]

Both the UDHR and ICCPR ground the rights they encompass in the "inherent dignity of the human person."[31] The special nature of the right of conscience explains how American Presidents have described or identified religious freedom in their annual Religious Freedom Day proclamations.[32]

It is, for example, "integral to the preservation and development of the United States" (George H. W. Bush); a "fundamental right of all people" (Bill Clinton); one of "the most fundamental freedoms we possess" (George W. Bush); a "critical foundation of our Nation's liberty" (Barack Obama); and a "sacred right from Almighty God" (Donald Trump).

## Protecting Religious Freedom: The First Amendment

The Free Exercise Clause in the U.S. Constitution "evolved from the longstanding protections for religious liberty in early colonial charters and state constitutions."[33] These governing documents "protected religious liberty as a fundamental, inviolable right."[34] In addition, state constitutions "continued to broaden the protection afforded by the colonial charters—confirming the fundamental, longstanding, and ubiquitous nature of religious protections" by the time the Constitution was drafted.[35]

Three developments in Virginia informed that drafting. The 1776 Virginia Declaration of Rights,[36] authored primarily by George Mason, equated the "duty which we owe to our Creator, and the manner of discharging it" with the "free exercise of religion, according to the dictates of conscience." In 1784, Patrick Henry introduced a bill in the Virginia General Assembly to pay "teachers of religion." His colleague James Madison opposed the bill, presenting his argument in June 1785 in the form of a *Memorial and Remonstrance* against such religious assessments. Madison quoted from the 1776 Virginia Declaration of Rights, arguing that religion and "the right... to exercise it" must be left up to individual "conviction and conscience."[37]

Six months later, the Virginia legislature enacted the Statute for Religious Freedom. Originally authored by Thomas Jefferson in 1777,[38] it held that religious freedom is one of the "natural rights of mankind."[39] The Virginia legislature enacted this statute in 1786, and it became "a foundational principle in the First Amendment to the U.S. Constitution, which preserves an individual's right to belief and to choose and exercise faith without government coercion or reprisal."[40]

In the 20th century, as government's increasing intrusiveness caused more conflicts with religious practice, the Supreme Court identified several principles that informed the First Amendment's protection of religious freedom. In combination, these principles established strict scrutiny as appropriate for application in all Free Exercise Clause cases.

- Only the "gravest abuses, endangering paramount interests," the Court held in 1945, "give occasion for permissible limitation."[41]

- The permissibility of government action burdening First Amendment freedoms must be determined by "the character of the right, not of the limitation" that government tries to place on that right.[42]

- Government action can violate the First Amendment even if it is "general"[43] and not targeted explicitly at religious practice.[44] A regulation may be "neutral on its face" but, "in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[45] "The salient inquiry under the Free Exercise Clause is the burden involved."[46]

## *Employment Division v. Smith*

The long-standing doctrine of constitutional avoidance, Supreme Court Justice Louis Brandeis explained, counsels that, even if a constitutional question is "properly presented by the record," the Court will not address it "if there is also present some other ground upon which the case may be disposed of."[47] *Smith* failed on both counts. First, whether strict scrutiny was the proper standard in Free Exercise Clause cases was not presented at all by the record. Neither party raised that issue and, therefore, neither briefed nor argued it.[48] Second, the obvious "other ground" was the basis on which the case came to the Supreme Court, that is, application of strict scrutiny. Writing for the *Smith* majority, however, Scalia did not explain why the Court instead chose to address a constitutional issue that was hardly "indispensably necessary to the case."[49]

In *Smith*, Scalia insisted that "[w]e have *never* held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[50] The proposition that he claimed the Court had never supported is the one that, just one year earlier, Scalia himself asserted had been well-established by Supreme Court precedent.[51]

The First Amendment protects "the free exercise [of religion]" itself rather than a right limited to certain individuals or to certain kinds of claims. Inserting the artificial distinction between generally applicable and targeted government action into the Free Exercise Clause is particularly damaging to religious freedom in America because government interference with religious practice nearly always occurs in the application of generally applicable laws that *appear* to be religion-neutral.[52]

Justice Sandra Day O'Connor explained in her separate *Smith* opinion what the facts of history clearly show:

> The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.[53]

The Supreme Court's decision in *Smith* contradicted each of its own established Free Exercise Clause principles without even suggesting that the precedents behind them had been incorrectly decided. Nor did it attempt to actually interpret the Free Exercise Clause in reaching its conclusion. Rather, the Court took the consequential step of abandoning strict scrutiny in nearly all free exercise cases based solely on its speculation about the consequences of retaining it.[54]

**Jurisprudential Anarchy?** Even if this were a legitimate approach to deciding cases, the Court's speculation was seriously flawed. It claimed, for example, that applying strict scrutiny would result in "anarchy,"[55] with "each conscience [being] a law unto itself,"[56] and would "open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."[57] The Court, however, had applied strict scrutiny in free exercise cases for at least three decades before *Smith* without any jurisprudential anarchy.

The Supreme Court's observations about its own Free Exercise Clause precedents also undermined its prediction of such mayhem. First, the Supreme Court noted that it had "never invalidated any governmental action on the basis of the [strict-scrutiny] test except the denial of unemployment compensation."[58] Scalia never explained why that narrow pattern would suddenly become an avalanche of "constitutionally required exemptions from civic obligations of almost every conceivable kind." Nor did he address why, since the *Smith* plaintiffs were challenging the denial of employment compensation, applying strict scrutiny would mark any departure from the Court's pattern of precedents.

Similarly, the Court emphasized that it had never granted a religious exemption from "an across-the-board criminal prohibition on a particular form of conduct."[59] Even if that observation were constitutionally relevant,

the Court did not explain why it should lead to abandoning strict scrutiny for all Free Exercise Clause cases involving generally applicable laws, rather than confining its holding to the criminal law context.

Withdrawing any constitutional protection for nearly every exercise of religion would, Scalia acknowledged, "leav[e] accommodation to the political process [and] will place at a relative disadvantage those religious practices that are not widely engaged in."[60] Rather than something to be avoided, however, the Court said that this was an "unavoidable consequence of democratic government,"[61] and that uniformly applying strict scrutiny was a "luxury" that "we cannot afford."[62] The Supreme Court, however, had repeatedly held the opposite. In *West Virginia State Board of Education v. Barnette*,[63] for example, the Court held:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.[64]

Free exercise claims had fared poorly under strict scrutiny prior to *Smith*, and faced even greater resistance after the Supreme Court explicitly abandoned that standard. Less than two years after *Smith*, a Congressional Research Service (CRS) report documented federal and state court decisions rejecting religious exercise claims of all kinds.[65] "In only one instance subsequent to Smith," the report found, "has a court found the government regulation in question to be a religiously neutral law of general applicability but nonetheless held it to violate the free exercise clause."[66] Simply put, applying "the principle of non-exemption stated in *Smith* has resulted in the denial of most free exercise claims."[67]

## Protecting Religious Freedom by Statute

Thirty years ago, with just three negative votes in either the Senate[68] or House of Representatives, Congress passed the RFRA to protect what President Bill Clinton, when he signed it into law, called "the most precious of all American liberties."[69] Congressional unity was matched by the support of a grassroots coalition of unprecedented ideological breadth. Everyone rallied around the RFRA's central principle that, as Clinton put it, "the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion."[70]

The RFRA parallels the Supreme Court's traditional Free Exercise Clause jurisprudence in two ways.

- First, it replicates the strict scrutiny standard, allowing the government to substantially burden the free exercise of religion only when doing so is "the least restrictive means of achieving some compelling state interest."[71]

- Second, it requires that strict scrutiny be applied to all Free Exercise Clause claims. The RFRA states its purpose of "restor[ing] the compelling state interest test...and...guarantee[ing] its application in all cases where free exercise of religion is substantially burdened."[72] It applies "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [the RFRA's enactment]."[73]

Professor Douglas Laycock, a prominent First Amendment scholar who helped draft the RFRA, testified before a House Judiciary Subcommittee prior to the RFRA's enactment that it "will legislate across the board a right to argue for religious exemptions. RFRA treats every faith and every government interest equally. It subjects every claim to the same rule of decision, the compelling interest test, and that equal application of a uniform principle to all faith and government interests is the intent of the bill."[74]

**Prisons.** Congress also demonstrated the RFRA's universal application by refusing to exempt specific contexts. Some Members of Congress, for example, called for an amendment to block the RFRA's application in the prison context. Strict scrutiny, they claimed, would make it more difficult for wardens to run their prisons. The Senate rejected an amendment to this effect offered by Senator Harry Reid (D–NV)[75] for several reasons:

- The Supreme Court had already held that prison inmates retain, subject to some prison-specific limitations, the right to religious exercise.[76] Since *Smith* had withdrawn virtually any First Amendment protection for religious exercise, prison inmates' right to practice their faith would be eliminated altogether if the protection the RFRA was meant to restore was similarly unavailable.

- Prior to *Smith*, strict scrutiny proved workable in balancing religious freedom and the government's interest in proper prison administration.[77]

- The Coalition for the Free Exercise of Religion, which included many conservative groups that strongly supported law enforcement, opposed the Reid Amendment[78] because, as Senator Hatch argued, it would "set a bad precedent for religious liberty. The real danger lies not so much in the exemption of prisoners, but in the choice we are making about *exempting anyone* from the principle of the free exercise of religion."[79]

**Abortion.** Scholars had been speculating about theories and arguments that pro-life laws violate the Constitution even before the *Roe v. Wade* decision in 1973.[80] Swift and serious criticism only highlighted the need, especially if the Supreme Court one day overruled *Roe*, for an alternative constitutional foundation for abortion rights. Abortion advocates such as Ruth Bader Ginsburg, for example, argued that the Fourteenth Amendment's Equal Protection Clause would serve that purpose better than the Due Process Clause that the Supreme Court had chosen in *Roe*.[81] Another theory was that pro-life laws violate the First Amendment by burdening "individuals who wish to [obtain an abortion] in a manner consistent with their religious beliefs."[82]

After extensive debate and hearings, Congress chose to maintain the RFRA's universal application.[83] The Coalition for the Free Exercise of Religion included groups on both sides of the abortion issue. An exception favoring the pro-life side would set the same bad precedent for religious liberty that Hatch warned about in the prison context, inviting demands for exceptions on other issues.[84] It would also undermine support for the RFRA by the many organizations in the coalition that favored abortion rights.

Pro-life coalition members accepted this position after concluding that the likelihood of success for a religion-based challenge to pro-life laws was very remote. Free exercise challenges to pro-life laws face both procedural and substantive hurdles. In *Harris v. McRae*,[85] for example, the Supreme Court dismissed a free exercise challenge to the Hyde Amendment, which restricted the use of Medicaid program funds for abortion. The plaintiffs lacked standing to raise the free exercise issue because "none alleged, much less proved, that she sought an abortion under *compulsion of religious belief*."[86] In other words, to constitute an exercise of religion, a woman's religious beliefs had to affirmatively motivate or compel, not simply passively permit or inform, the decision to obtain an abortion. Representative Henry Hyde (R–IL), then the leading pro-life member of the House, agreed that "the standing rule in *Harris* precludes any broad-based religious challenge to abortion laws."[87]

Substantively, Professor Laycock argued that "in a world where *Roe* has been overruled, the State's interest in preserving unborn life will be a compelling interest, and a compelling interest will be a complete defense to any claim under RFRA. And interest in unborn life will be compelling even if *Roe* is overruled on the ground that the constitutional right to privacy does not extend to abortion."[88] Advocates for an abortion exception to the RFRA conceded that "it is highly unlikely that any protective abortion statute would be enacted without an exception to preserve the life of the mother, so that religions requiring abortions would have their concerns met even with an abortion-neutral RFRA."[89]

Several legal analyses by RFRA supporters also concluded that the difficulty of establishing standing and the fact that state laws prohibiting abortion consistently contain an exception when the mother's life is threatened make religion-based challenges to pro-life laws unlikely to prevail. Professors McConnell and Laycock, joined by Valparaiso School of Law Dean Edward Gaffney, provided a memo to Congress in February 1991 concluding:

> [T]he free exercise of religion does not encompass the right to engage in any conduct that one's religion deems *permissible*. It protects only conduct that is motivated by religious belief. The only instance of which we are aware where a sizable religious group teaches that abortion is religiously compelled confines that teaching to circumstances so extreme (such as endangerment of the life of the mother) that any anti-abortion statute likely to be passed by a state would already exempt it.[90]

In November 1991, 10 national pro-life groups issued a letter stating that "[b]ased on our own independent analysis, we do not believe that this legislation could be used to secure a broad, new right to abortion."[91] Leaders of pro-life organizations such as the National Association of Evangelicals, Concerned Women for America, Traditional Values Coalition, Coalitions for America, and the Christian Legal Society endorsed an analysis concluding that the "RFRA is already abortion neutral."[92]

Congress and grassroots RFRA supporters refused to withhold its application from any category of free exercise claims. They embraced the principle that, as Laycock explained in a House RFRA hearing, uniformly applying strict scrutiny means that everyone has "a right to argue for religious exemptions"[93] under the same standard. "RFRA treats every faith and every governmental interest equally."[94]

The principle that the exercise of religion is an inalienable right that should be protected uniformly by a robust standard like strict scrutiny is not only consistent with the preferred status of the right of conscience but, as a practical matter, is important in times, like today, of social and cultural flux. In Gallup polls, the percentage of Americans who say that religion is "very important" in their own lives has been declining for more than 20 years; the percentage who say it is "fairly important" has remained unchanged; and the percentage who say it is "not very important" has more than doubled,[95] as has the percentage who disclaim any religious affiliation.[96] The same percentage of Americans describe themselves as "born-again" or evangelical Christians as the percentage that hardly ever attend a religious service.[97] In fact, the same percentage of U.S. Christians believe that "being patriotic" is as "'essential' to what being a Christian means to them" as regularly attending religious services.[98]

Americans' understanding and beliefs about religious freedom are also changing. There continues to be strong support for the general *idea* of religious freedom. The Becket Fund for Religious Liberty's latest *Religious Freedom Index* reveals that more than 90 percent of Americans "completely" or "mostly" support the freedom to choose a religion, worship without fear of persecution, and practice a religion in daily life without facing discrimination.[99] Similarly, in a 2020 poll by the Associated Press and the NORC Center for Public Affairs Research, for example, 81 percent said that issues related to religious freedom are important to them, and 80 percent believe that freedom of religion is important for a healthy society.[100]

At the same time, many have an increasingly selective attitude toward recognizing, and protecting against, concrete threats to religious freedom. For example:

- Forty-four percent say *their own* rights or freedoms are being threatened "by others' claims about their freedom of religion," while 60 percent deny that religious freedom claims by religious groups threaten the freedoms or rights of *others*.[101]

- The percentage who see a violation of religious freedom in a hypothetical scenario varies considerably based on the religious affiliation of the individuals involved.[102]

- A majority see no threat to religious freedom in the government forcing religious businesses, colleges and universities, and even houses of worship to provide insurance coverage for birth control over their religious objections.[103]

## Abandoning Religious Freedom: A Timeline

For an inalienable and preferred right, religious freedom has been on something of a legal roller coaster ride for the better part of a century.

- From 1940, when the Supreme Court applied the Free Exercise Clause to the states by incorporating it into the Fourteenth Amendment, until *Smith* in 1990, the Constitution set a high bar for any state or federal government action burdening the free exercise of religion.

- *Smith* eliminated that protection altogether for all but the tiny fraction of Free Exercise Clause claims that challenged government actions explicitly targeting religious practice.

- The RFRA restored the universal application of strict scrutiny to all state and federal government burdens on religious practice.

- The Supreme Court in *City of Boerne v. Flores*[104] limited the RFRA's application only to federal government actions.

- Some states have enacted their own version of the RFRA to apply strict scrutiny to state government actions.

- Under *Smith*, Americans have no constitutional protection against "generally applicable" federal government action that interferes with religious practice. Based on 2022 data, 170 million Americans—more than half the nation's population—also lack any protection from state government interference because the federal RFRA does not apply to the states, and the states in which these Americans live do not have their own versions of the RFRA.

And now, as the RFRA turns 30 years old, a campaign is underway to limit it even further by blocking its application entirely from substantial areas of federal statutory and regulatory law.

**The Equality Act.** The Equality Act[105] would amend seven federal statutes[106] to prohibit discrimination on the basis of sexual orientation and gender identity in areas such as places of public accommodation, employment, housing, credit, and jury service. It provides that the RFRA "shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application of enforcement of a covered title."

If the Equality Act becomes law, therefore, no one could claim that any federal government action under any of these statutes burdened their exercise of religion. *The government could, either intentionally or incidentally, limit, restrict, or even prohibit religious practices without any regard for religious freedom whatsoever*.

Legislation to prohibit this category of discrimination has been introduced in Congress since the 1990s. The earliest versions, titled the Employment Non-Discrimination Act, were limited to amending Title VII of the Civil Rights Act and exempted religious organizations.[107] Since becoming the Equality Act in the 114th Congress,[108] however, the bill itself includes no language protecting religious freedom and, as noted, would now block any protection that the RFRA might have provided far beyond the employment context. Religious organizations would have no recourse to being required to hire individuals who neither shared nor would abide by their beliefs or teachings on sexuality. Professor Laycock writes that the Equality Act "goes very far to stamp out religious exemptions.... This would be the first time Congress has limited the reach of RFRA. This is not a good-faith attempt to reconcile competing interests. It is an attempt by one side to grab all the disputed territory and to crush the other side."[109]

**The Women's Health Protection Act.** The Women's Health Protection Act (WHPA)[110] purports to prohibit any government, down to the level of towns or villages, from doing anything that might even "implicitly...single out abortion" for regulation in any way different than it treats "medically comparable procedures." Yet the Supreme Court, in *Roe v. Wade* itself, acknowledged that "the developing young in the human uterus" makes the right to abortion "inherently different" from other privacy rights.[111] Even while creating a right to abortion, Justice Harry Blackmun's opinion in *Roe* refers to "unborn children,"[112] the "mother," or "women" dozens of times. The WHPA, in contrast, contains only two references to "women" (one of them in the title of bill), ignores "child" entirely, and replaces "mother" with "pregnant person."

The WHPA would prohibit any government from imposing 10 specific types of limitations or requirements or taking any other step that might "make abortion services more difficult to access." This includes anything that, for example, could "deter a patient in accessing abortion services" or "indirectly increase the cost of providing [or] obtaining abortion services."

Under the WHPA, the government could not take any of these actions even after viability, which the bill defines as "the point in a pregnancy at which...there is a reasonable likelihood of sustained fetal survival outside the uterus," if the abortionist says an abortion is necessary "to protect the...

health of the patient." And the WHPA provides that it "supersedes any inconsistent Federal or State law...whether adopted *prior to* or after the date of enactment of this Act." This appears not only to prohibit new pro-life laws, but to require repeal of any existing ones. Finally, the WHPA would prohibit any government official from enforcing "any law, rule, regulation, standard, or other provision having the force of law that conflicts with any provision of this Act...including the Religious Freedom Restoration Act."

Litigation over the birth control mandate in the Patient Protection and Affordable Care Act[113] (ACA) provides stark examples of how, by blocking the RFRA's application, the WHPA would have a devastating impact on religious freedom. The ACA, for example, required employers to provide, at no cost to employees, insurance coverage for "preventive" care, including FDA-approved birth control in the form of 16 contraceptives, and four abortifacients.[114] In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that, as applied to religious business owners, the mandate did not meet the strict scrutiny standard under the RFRA. Had the WHPA been enacted, it would have blocked any protection that the RFRA provided and employers such as Hobby Lobby and religious organizations such as the Little Sisters of the Poor[115] would have been required to provide abortion-related services as part of their health care plans.

The WHPA would prohibit any limitation or requirement that is "reasonably likely to result in a decrease in the availability of abortion services in a given State or geographic region." Since reducing the number of health care personnel available to facilitate abortions would have this effect, the WHPA would block any law or regulation that would protect religious health care workers from participating in abortions, and doctors and nurses who have religious objections to participating in abortions could be compelled to do so.

**The Do No Harm Act.** The Do No Harm Act[116] would amend the RFRA itself to block its application to "any provision of law or its implementation that provides for or requires a protection against discrimination or the promotion of equal opportunity." The full impact of this legislation is difficult to grasp. It does not define what constitutes "promotion of equal opportunity," but does single out the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Violence Against Women Act for exemption from the RFRA. It also provides that the RFRA would not apply to "protecting collective activity in the workplace" or any law requiring "access to, information about, a referral for, provision of, or coverage for, any health care item or service." If the Do No Harm Act were enacted into law, for example, the RFRA would provide no protection for parents who are denied access to information about what their minor children are being taught about sexuality in public schools.

Each of these bills would do exactly what Congress and the Coalition for the Free Exercise of Religion rejected in 1993. Some government burdens on the free exercise of religion would be evaluated under strict scrutiny, while others would not. Some government actions would be insulated from any RFRA challenge, while others would not. Individually, and especially in combination, these bills would carve exceptions into the RFRA that dwarf those, such as for prisons and abortion, rejected in 1993.

The Equality Act's legislative findings include the assertion that it "furthers the compelling government interest in providing redress" for the harms "that result from discrimination" and does so "in the least restrictive way." If this is true, then RFRA challenges within the contexts defined by the Equality Act would meet the requirements of strict scrutiny. Instead, like the other bills, the Equality Act would deny Americans the opportunity even to raise the claim that their right to exercise religion had been burdened. They would establish an *absolute*, rather than a *compelling*, government interest.

When the Senate Judiciary Committee hearing on the RFRA opened on September 18, 1992, Senator Edward Kennedy (D–MA) emphasized that the RFRA created "no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail. It simply restores the long-established standard of review...that requires courts to weigh free exercise claims against the compelling State interest standard."[117] Grassroots groups and Members of Congress who professed agreement with Kennedy in 1993 openly reject that principle today.

**Grassroots Groups.** In a letter on behalf of the Coalition for the Free Exercise of Religion dated October 20, 1993, less than one week before Congress passed the RFRA, the coalition chairman wrote Senators to encourage their support of the RFRA and to oppose exemptions such as the Reid amendment. "No right of American citizenship," the letter stated, "is more precious than religious liberty."[118] Coalition members were endorsing what the RFRA had been about all along—the preferred status of religious freedom, protected uniformly by strict scrutiny.

Today, at least 15 of the organizations[119] listed on the coalition's letterhead have abandoned religious liberty by publicly endorsing one or more of the bills described above. They opposed RFRA exceptions in 1993, but demand them now, preferring their political objectives to what they once stated is one of the most precious rights of American citizenship.

The American Civil Liberties Union (ACLU), for example, was a prominent early member of the coalition, and also signed a separate letter strongly opposing any amendment to the RFRA.[120] ACLU President Nadine Strossen

testified before both the House Judiciary Subcommittee on Civil and Constitutional Rights and the Senate Judiciary Committee, telling both bodies that the "rights enshrined in the First Amendment have traditionally been considered *preferred* rights."[121] The RFRA, Strossen asserted, would restore "religious liberty to its rightful place as a *preferred* value and a fundamental right."[122] That status was secured by strict scrutiny and maintained by its uniform application. Further, Strossen stressed that "by definition, the nature of a fundamental right is that it should be one that is not dependent on the good graces of the legislature."[123]

Today, however, the ACLU has abandoned religious liberty by endorsing the Equality Act,[124] the Women's Health Protection Act,[125] and the Do No Harm Act.[126] Each would create much broader exceptions to the RFRA thanthe ACLU strongly opposed in 1993.

People for the American Way was also an original coalition member and its president, John Buchanan, testified in support of the RFRA before the House Judiciary Subcommittee on Civil and Constitutional Rights.[127] He explained that the RFRA would "effectively reestablish the standard that's been used by the Court for decades when reviewing government restrictions on religious activity."[128] The strict scrutiny standard guaranteed "that a thoughtful balancing test had been applied."[129] Buchanan emphasized that the RFRA would not show "favoritism toward any particular faith or practice, neither endorsing or opposing any particular faith or practice."[130] In addition, People for the American Way joined the ACLU in the letter specifically opposing any amendments or exceptions to the RFRA.

Today, however, People for the American Way has abandoned religious liberty by endorsing each of the bills that would show the very favoritism that the organization opposed in 1993. They would, in effect, prohibit any balancing test, thoughtful or otherwise, and guarantee that the right to exercise religion would always lose out to certain political interests.

**Current Senators.** Members of Congress who supported the RFRA in 1993 are similarly abandoning religious freedom. The bill that President Clinton signed into law, H.R. 1308, was introduced by then-Representative Charles Schumer (D–NY), the current Senate Majority Leader. Eight other current Democratic senators were also serving in the House when it passed the RFRA in October 1993: Sherrod Brown (D–OH), Ben Cardin (D–MD), Tom Carper (D–DE), Mike Crapo (R–ID), Richard Durbin (D–IL), Jack Reed (D–RI), Bernie Sanders (D–VT), and Ron Wyden (D–OR). Several of them co-sponsored the RFRA and, as the House passed it without objection, each of them supported the RFRA without exception or amendment.

Some went even further, advocating the RFRA in House floor speeches. Cardin, for example, co-sponsored the RFRA and spoke "in strong support" of it in a May 1993 speech.[131] He explained that the RFRA would "restore the requirement that the government demonstrate a compelling interest in order to restrict the free exercise of religion."[132] He offered examples of cases that, under *Smith*, were decided under the "lesser valid government purpose standard." Cardin argued that strict scrutiny was the appropriate standard for all free exercise cases.

Since joining the Senate, each of the Democrats in this group of former RFRA supporters have co-sponsored one or more of the bills that would selectively apply the RFRA. Each of them, including Cardin himself, reject what Cardin endorsed in 1993, that strict scrutiny should be uniformly applied to every claim that government has burdened the exercise of religion.

Three current Republican Senators were serving there in 1993: Charles Grassley (R–IA), Mitch McConnell (R–KY), and Patty Murray (D–WA). Each of them voted against the Reid Amendment to keep the RFRA free of exceptions and voted for the RFRA's final passage. Today, however, Murray has co-sponsored all three of the bills that would gut the RFRA.

One other current Senator has direct ties to the RFRA. When he was Attorney General of Connecticut, Richard Blumenthal (D–CT) signed a letter dated October 19, 1993, opposing the Reid Amendment and "advocating RFRA *without amendment*."[133] As a Senator, however, Blumenthal has several times introduced the Women's Health Protection Act[134] and co-sponsored both the Equality Act and the Do No Harm Act. He argued in 1993 that strict scrutiny would strike "a proper balance between the right to exercise religion" and government objectives. Today, he opposes trying to seek a balance at all.

When President Joe Biden served in the Senate, he introduced the RFRA on October 26, 1990,[135] and chaired the September 18, 1992, Senate Judiciary Committee hearing on the bill. He voted against the Reid Amendment and for the RFRA's final passage. As President, however, Biden called for passage of the Equality Act in his 2022 State of the Union address[136] and criticized the Senate for failing to pass the Women's Health Protection Act.[137] He has turned his back on the very legislation that he introduced.

**Current House Members.** On the House side, 17 current Members were serving there in 1993.[138] Each of them supported the RFRA's passage, and nine of the 14 Democrats in this group were also co-sponsors. Today, each of these 14 Democrats has co-sponsored or voted for one or more of the bills that would gut the RFRA.

## Conclusion

The steps taken to protect something indicate its value. Strict scrutiny is the most rigorous standard in American law. Requiring that government may interfere with the exercise of religion only as a last resort and, even then, only as much as necessary identifies it as a preferred inalienable right.[139] Applying strict scrutiny to all claims that government has burdened religious practice prioritizes the "character of the right" rather than the limitation government seeks to impose on it.[140]

Applying instead what Cardin called the "government purpose" standard, or applying strict scrutiny selectively to some free exercise claims but not others, devalues what for centuries has been "among the most treasured birthrights of every American."[141] Rather than the exercise of religion taking precedence "over the demands of civil society," as the Founders designed it, this approach subjugates religious freedom to the government's political or ideological objectives. Religious freedom becomes whatever the government *allows*—the opposite of what making the free exercise of religion the first individual freedom in the Bill of Rights was intended to achieve.

This is what the Supreme Court accomplished in *Employment Division v. Smith*, creating "two separate standards for the protection of religious freedom."[142] It is also what, despite political and ideological differences, Members of Congress and grassroots groups sought to change by enacting the RFRA. They rejected the balkanization of religious freedom.

When People for the American Way president John Buchanan testified in support of the RFRA in a September 1990 House hearing, he asked what could unite "people who are not often united in this society."[143] His answer: "We are united in support of this legislation because it seeks to protect the fundamental principle of religious freedom"[144] and application of strict scrutiny to all free exercise claims.

Today, a campaign is underway to do to the RFRA what *Smith* did to the First Amendment, selectively applying strict scrutiny to some free exercise claims while withholding that protection from others. Members of Congress who once called for the RFRA's application of strict scrutiny to all government action now want to prevent that application to government action that furthers their political agenda. And organizations—including Buchanan's People for the American Way—are today endorsing legislation that would do what they rejected in 1993, allowing government to restrict or even prohibit religious practices that might be inconsistent with that same agenda.

Representative Hyde argued in May 1993 that neither the First Amendment prior to *Smith*, nor the RFRA since then, guarantee "that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight."[145] The campaign today would deny any chance to defend what was once considered a preferred inalienable right when doing so might resist certain political interests. As the RFRA turns 30, the very threat to religious freedom that it was enacted to address is once again rising and threatening this most fundamental of rights.

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## Endnotes

1. Pub. L. 105–292, 112 Stat. 2787 (Oct. 27, 1998).
2. 22 U.S.C. § 6401(a)(1).
3. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990).
4. Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of* Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 823 (1997).
5. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115 (1943).
6. Thomas v. Review Board, 450 U.S. 707, 718 (1981).
7. Religious Freedom Restoration Act of 1993, Senate Comm. on the Judiciary, Rep. 103–111, 103rd Cong., 1st Sess. 4 (July 27, 1993) (emphasis added) (hereinafter *Senate RFRA Report*).
8. *Memorial and Remonstrance Against Religious Assessments, [Ca. 20 June] 1785*, Nat'l Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163.
9. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting).
10. 494 U.S. 872 (1990).
11. *Id.* at 878.
12. *Id*.
13. *See* David M. Ackerman, Cong. Rsch. Serv. 92–366A, The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis 1 (1992) ("So long as a law is religiously neutral on its face…the government may uniformly apply it to all persons, regardless of any burden or prohibition that may be placed on particular religious practices.").
14. 42 U.S.C. § 2000bb–1.
15. Religious Freedom Restoration Act of 1993, H. Comm. on the Judiciary, H.R. Rep. No. 103–88, 103rd Cong., 1st Sess. 6 (May 11, 1993) (emphasis added) (hereinafter *1993 House RFRA Report)*. *See also* Ackerman, *supra* note 13, at 1 (The RFRA would "reimpose [the strict scrutiny test] on all government action burdening the exercise of religion").
16. 42 U.S.C. § 2000bb(b)(1) (emphasis added). *See* 139 Cong. Rec. H2357 (daily ed. May 11, 1993) (statement of Rep. Jack Brooks) ("The legislation will guarantee that *all Americans*, regardless of their particular creed or oath, are able to enjoy the right to worship and practice their faith, [free] from unnecessary Government intrusion.") (emphasis added).
17. 137 Cong. Rec. E2422 (daily ed. June 27, 1991) (statement of Rep. Stephen Solarz).
18. *Senate RFRA Report*, *supra* note 7, at 9.
19. One study found that federal appeals courts declined to grant religious exemptions in 90 percent of Free Exercise Clause cases. See *Religious Freedom Act of 1991, Hearings Before the H. Subcomm. on Civil and Const. Rights*, 102nd Cong. 33 (1992) (statement of Mark Chopko) (hereinafter *1992 House RFRA Hearing*). *See also* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1110 (1992) (in the two decades prior to *Smith*, the Supreme Court "rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent."); Robert F. Drinan and Jennifer I. Huffman, *The Religious Freedom Restoration act: A Legislative History*, 10 J. Law & Rel. 531, 535 (1993–94) ("before *Smith*, the Court applied [strict scrutiny] in many cases and did not find for the plaintiffs.").
20. *1992 House RFRA Hearing*, at 126 (statement of Rep. Solarz).
21. U.N. G.A. Res. 217(III)A, Universal Declaration of Human Rights (Dec. 10, 1948), (hereinafter UDHR), https://www.ohchr.org/en/resources/educators/human-rights-education-training/universal-declaration-human-rights-1948.
22. U.N. G.A. Res. 2200A, International Covenant on Civil and Political Rights (Dec. 16, 1966), (hereinafter ICCPR), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.
23. Article 1 of the 1981 U.N. Declaration on the Elimination of all Forms of Intolerance or Discrimination Based on Religion or Belief incorporates the same broad definition of religious freedom. The General Assembly adopted this declaration by voice vote on November 25, 1981. Doing so committed each nation to "promot[ing] respect for these rights and freedoms and…to secur[ing] their universal and effective recognition and observance." U.N. G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51), U.N. Doc. A/36/684 (1981), http://hrlibrary.umn.edu/instree/d4deidrb.htm.
24. *Religious Restrictions Around the World*, Pew Research Center (Nov. 29, 2022), https://www.pewresearch.org/religion/interactives/religious-restrictions-around-the-world/.
25. U.S. Dep't. State, Secretary of State Antony J. Blinken Remarks to International Religious Freedom Summit, Jan. 31, 2023, https://www.state.gov/secretary-of-state-antony-j-blinken-remarks-to-international-religious-freedom-summit/#:~:text=Yet%2C%20some%2080%20percent%20of,has%20consequences%20for%20us%20all.

26. McConnell, *supra* note 4, at 823.
27. 161 Cong. Rec. S6873 (daily ed. Sept. 22, 2015).
28. *Id*. at S6874.
29. *Id*.
30. *Id*. *See also* Robert George, *What Is Religious Freedom?* Pub. Discourse (July 24, 2013), https://www.thepublicdiscourse.com/2013/07/10622/.
31. *See* UDHR preamble, *supra* note 21; ICCPR preamble, *supra* note 22.
32. Presidential proclamations are published in the *Federal Register* and may be found at https://www.federalregister.gov/presidential-documents.
33. Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J. L. & Pub. Pol. 971, 973 (2019).
34. *Id*. at 974.
35. *Id*. at 976.
36. *The Virginia Declaration of Rights*, Nat'l Archives, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.
37. *Memorial and Remonstrance Against Religious Assessments*, Nat'l Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr.
38. On his gravestone, Jefferson listed the Statute for Religious Freedom, drafting the Declaration of Independence, and founding the University of Virginia as his proudest accomplishments. *See Jefferson's Gravestone*, Monticello, https://www.monticello.org/site/research-and-collections/jeffersons-gravestone.
39. *See Virginia Statute for Religious Freedom*, Monticello, https://www.monticello.org/site/research-and-collections/virginia-statute-religious-freedom#:~:text=We%20the%20General%20Assembly%20of,suffer%2C%20on%20account%20of%20his.
40. Press Release, U.S. Agency for International Development, Religious Freedom Day (Jan. 16, 2021), https://web.archive.org/web/20210318020423/https://www.usaid.gov/news-information/press-releases/jan-16-2021-religious-freedom-day.
41. Thomas v. Collins, 323 U.S. 516, 530 (1945).
42. *Id*. *See also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 144 (1987).
43. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).
44. *Id*. *See also* Sherbert v. Verner, 374 U.S. 398, 404 (1963); *Murdock*, 319 U.S. at 108.
45. *Yoder*, 406 U.S. at 220. *See also Hobbie*, 480 U.S. at 141.
46. *Hobbie*, 480 U.S. at 144.
47. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Brandeis listed seven "rules" the Court uses "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.* at 346. *See* Andrew Nolan, Cong. Rsch. Serv. R43706, The Doctrine of Constitutional Avoidance 2, 9 (2014).
48. In *Citizens United v. Federal Communications Commission*, 558 U.S. 310 (2010), the plaintiffs initially challenged application of the Bipartisan Campaign Reform Act's (BCRA's) ban on "electioneering communication" by arguing that a video they wanted to produce did not meet the statutory definition. The Supreme Court concluded, however, that it could not decide the case on that limited basis, but had to address whether the BCRA restriction violated the First Amendment. The Court directed the parties to brief that constitutional issue and rescheduled the case for another oral argument. *Id*. at 322. The Supreme Court did not explain why it did not take the same course in *Smith*.
49. Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (opinion of Marshall, C.J.). *See also* Blair v. United States, 250 U.S. 273, 279 (1919) (courts should refrain from addressing constitutional issues unless "obliged to do so…when the question is raised by a party."); Nolan, *supra* note 48, Summary (The "constitutional avoidance doctrine…discourage[s] a federal court from issuing broad rulings on matters of constitutional law.").
50. *Smith*, 494 U.S. at 878–79 (emphasis added).
51. *Texas Monthly*, 489 U.S. at 38.
52. See Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1,4 ("the obvious forms of persecution are not the ones a contemporary American majority is likely to use. The scope of regulation in the modern administrative state creates ample opportunity for facially neutral religious oppression.").
53. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment).
54. In this respect, *Smith* is similar to *Roe v. Wade*, 410 U.S. 113 (1973), in which the Supreme Court created a right to abortion without attempting to interpret the Fourteenth Amendment's Due Process Clause, but by speculating about the "detriment" caused by not creating such a right. *Id*. at 152.
55. *Smith*, 494 U.S. at 888.
56. *Id*. at 890

57. *Id*. See also *Religious Freedom Restoration Act, Religious Freedom Restoration Act, Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 4 (1992) (hereinafter *Senate RFRA Hearing*).
58. *Smith*, 494 U.S. at 890.
59. *Id*. at 884.
60. *Id*. at 890. See also Ackerman, *supra* note 13, at 12 ("[I]n *Smith* the Court substantially constricted the use of the strict scrutiny test for free exercise cases and relegated most religious claims for exemption from statutes of general applicability to the political process.").
61. *Smith*, 494 U.S. at 890.
62. *Id*. at 888.
63. 319 U.S. 624 (1943).
64. *Id*. at 638. *See also* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2334 (Breyer, J., dissenting); Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1917 (Alito, J., concurring in the judgment) ("*Smith*'s treatment of the free-exercise right is fundamentally at odds with how we usually think about liberties guaranteed by the Bill of Rights."); Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S.Ct. 2448, 2486 n. 28 (2018); Obergefell v. Hodges, 576 U.S. 644, 677 (2015); McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 8984 (2005) (O'Connor, J., concurring); Republican Party of Minnesota v. White, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting).
65. Ackerman, *supra* note 13, at 13–17.
66. *Id*. at 17–18
67. *Id*. at 20. *See also* Drinan & Huffman, *supra* note 19, at 532.
68. The Senate vote on the RFRA was 97–3. See 139 Cong. Rec. S14471 (daily ed. Oct. 27, 1993).
69. See *Remarks on Signing the Religious Freedom Restoration Act of 1993*, Amn. Presidency Project (Nov. 16, 1993), https://www.presidency.ucsb.edu/documents/remarks-signing-the-religious-freedom-restoration-act-1993.
70. *Id.*
71. *Thomas*, 450 U.S. at 718 (emphasis added).
72. 42 U.S.C. § 2000bb(b)(1).
73. *Id*. at § 2000bb-3(a). Hatch made this point shortly before the Senate voted on the RFRA's passage: "There is no exemption in the first amendment's guarantee of religious liberty. There should be no exemption in this liberty statute we are about to enact." 139 Cong. Rec. S14465 (Oct. 27, 1993).
74. *1992 House RFRA Hearing*, at 326–27 (1992).
75. 139 Cong. Rec. 26414 (daily ed. Oct. 27, 1993).
76. *See, e.g.*, Turner v. Schlafly, 482 U.S. 78 (1987).
77. *See also* 139 Cong. Rec. S14362 (daily ed. Oct. 26, 1993) (statement of Senator Orrin Hatch) (courts "are well suited to detect the abusive tendencies of our litigious prisoners.").
78. See 139 Cong. Rec. S14362 (daily ed. Oct. 26, 1993).
79. 139 Cong. Rec. S14465 (daily ed. Oct. 27, 1993) (emphasis added).
80. *See, e.g.*, Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. Rev. 730, 730 (1968); Cyril Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. Forum 411 (1968).
81. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185 (1992).
82. Joseph S. Oteri et al., *Abortion and the Religious Liberty Clauses*, 7 Harv. C.R.-C.L. L. Rev. 559, 594 (1972).
83. The Senate voted 41–58 against the Reid amendment. 139 Cong. Rec. W14468 (daily ed. Oct. 27, 1993).
84. *See, e.g.*, 139 Cong. Rec. 26413 (daily ed. Oct. 27, 1993) (statement of Sen. Kennedy) (argument that the RFRA would "limit a State's ability to enforce laws banning animal cruelty").
85. 448 U.S. 297 (1980).
86. *Id.* at 320 (emphasis added). The district court held that the right to abortion extended to "individual decisions of *religiously informed conscience* to terminate pregnancy." McRae v. Califano, 491 F.Supp. 630,742 (E.D. N.Y. 1980) (emphasis added).
87. *Harris*, 448 U.S. at 327.
88. *Id*. at 328.The Supreme Court did just that in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that the RFRA's requirement of strict scrutiny could not be applied to state government action. As a result, 24 states have enacted their own RFRA statutes. Anticipating that the Supreme Court would overrule *Roe v. Wade*, plaintiffs began challenging pro-life

laws under state constitutions. *See generally* Thomas Jipping, *The Attack on Legal Protection for the Unborn Moves to State Courts*, Heritage. Found. *Legal Memorandum* No. 322, Jan. 5, 2023, https://www.heritage.org/life/report/the-attack-legal-protection-the-unborn-moves-state-courts. After the Supreme Court overruled *Roe* in June 2022, plaintiffs also began challenging pro-life laws under state RFRAs. The Congressional Research Service (CRS) anticipated this and, in its 1992 RFRA analysis, addressed whether religion-based challenges to pro-life laws would succeed after *Roe* had been overruled. It concluded that while "it seems likely that claims could be made…it seems doubtful that most such claims would have any likelihood of success." Ackerman, *supra* note 13, at 28. The standing hurdle identified in *Harris v. McRae* would remain. On the merits, the CRS concluded, if "the States subsequently legislate abortion restrictions on the express or implied rationale that they have a compelling interest in protecting fetal life, then a religion-based claim…could not be successful." *Id*. at 29.

89. *1992 House RFRA Hearing*, at 300 (prepared statement of James Bopp and Richard Coleson).

90. Letter from M. McConnell, E. Gaffney, and D. Laycock to Reps. Stephen Solarz and Paul Henry (R–MI), dated February 21, 1991 (emphasis in original). The CRS came to the same conclusion several months later, noting that the Free Exercise Clause "operates to protect a person who performs an act *required* by his religion to be performed or who declines to perform an act because his religion *forbids* the doing of that act…. There are religions in which one's decision to have an abortion is consistent with doctrine or not forbidden by it, but that is quite a different matter than being compelled to do or not to do something. So far as we are aware, only within the Jewish faith is there a religious tenet, under which it would be an obligation compelled by her faith for a pregnant woman whose life would be endangered if she carries her baby to term to have an abortion in order to save her life." Johnny Killian, Cong. Rsch. Serv. Impact of Proposed Free Exercise of Religion Bill on Access to Abortion 2 (1991).

91. Letter from Michael McConnell, Edward McGlynn Gaffney, and Douglas Laycock to Reps. Stephen Solarz and Paul Henry, dated February 21, 1991, at 2.

92. *Senate RFRA Report, supra* note 7, at 170.

93. *1992 House RFRA Hearing*, at 326.

94. *Id*.

95. *See Religion*, Gallup, https://news.gallup.com/poll/1690/religion.aspx. The percentage of people who say religion is "very important" has declined from 60 percent in 2002 to 46 percent in 2022, while the percentage who say it is "fairly important" has remained constant at approximately 25 percent. An AP/NORC poll in 2020 found that 77 percent consider religion to be extremely (22 percent), very (21 percent), or somewhat (24 percent) important to them.

96. *Examining Americans' Views on Religious Freedom and Its Limits*, NORC (Feb. 2020), https://apnorc.org/wp-content/uploads/2020/08/Divinity-School_Topline.pdf.

97. *Id*.

98. *45% of Americans Say U.S. Should Be a "Christian Nation,"* Pew Rsch. Ctr. (Oct. 27, 2022), https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation/.

99. *Religious Freedom Index 2022*, Becket Fund for Religious Liberty, https://becketnewsite.s3.amazonaws.com/20221123190631/RFI-One-Pager-2022.pdf.

100. Respondents in this group were evenly divided in saying that these issues were somewhat (26 percent), very (27 percent), and extremely (28 percent) important.

101. *Examining Americans' Views*, *supra* note 96.

102. *Id*.

103. Rob Boston, *New Poll Shows Most Americans Don't Believe Religious Freedom Is Under Assault*, Americans United (Feb. 16, 2021), https://www.au.org/the-latest/articles/new-prri-poll/. This poll was conducted by the Public Policy Research Institute for Americans United for Separation of Church and State.

104. 521 U.S. 507 (1997). The Supreme Court had applied the Free Exercise Clause to the states by incorporating it into the Fourteenth Amendment's Due Process Clause. Congress initially applied the RFRA to the states pursuant to its power under Section 5 of the Fourteenth Amendment to enforce the Due Process Clause. In *Boerne*, the Supreme Court held that the RFRA did more than enforce the Free Exercise Clause by "alter[ing] the meaning of the Free Exercise Clause" that it purported to enforce. "Congress does not enforce a constitutional right," Justice Anthony Kennedy wrote for the majority, "by changing what the right is." *Id*. at 519.

105. Senator Jeff Merkley (D–OR) introduced S. 5 on June 21, 2023, and it currently has 49 Democrat co-sponsors. Representative Mark Takano (D–CA) introduced the parallel H.R. 15 on the same day, and it currently has 214 Democrat co-sponsors.

106. These are the Civil Rights Act of 1964, Government Employee Rights Act, Congressional Accountability Act, Civil Service Reform Act, Fair Housing Act, Equal Credit Opportunity Act, and 28 U.S.C. § 1862.

107. *See, e.g.*, S. 2238/H.R. 4636 in the 103rd Cong. (1994); H.R. 1863 in the 104th Cong. (1995); S. 869/H.R. 1858 in the 105th Cong. (1997); S. 1276/H.R. 2355 in the 106th Cong. (1999); S. 1284/H.R. 2692 in the 107th Cong. (2001); S. 1705/H.R. 3285 in the 108th Cong. (2003).

108. S. 1858/H.R. 3185 in the 114th Cong. (2015); S. 1006/H.R. 2282 in the 115th Cong. (2017); S. 788/H.R. 5 in the 116th Cong. (2019); S. 393/H.R. 5 in the 117th Cong. (2021); S. 5/H.R. 15 in the 118th Cong. (2023).

109. John McCormack, *A Liberal Law Professor Explains Why the Equality Act Would 'Crush' Religious Dissenters*, Nati'l Rev. Online (May 17, 2019), https://www.nationalreview.com/2019/05/law-professor-explains-why-the-equality-act-would-crush-religious-dissenters/.
110. Senator Tammy Baldwin (D–WI) introduced S. 701 on March 8, 2023, and it currently has 48 Democrat co-sponsors. Representative Judy Chu (D–CA) introduced the parallel H.R. 12 on March 30, 2023, and it currently has 212 Democrat co-sponsors.
111. *Roe*, 410 U.S. at 159. See also Planned Parenthood v. Casey, 505 U.S. 888, 852 (1992) (abortion is "a unique act"); *Dobbs* at 2258 (the life of an unborn human being "sharply distinguishes" abortion from other rights).
112. 410 U.A. at 162
113. Pub. L. No. 111–148, 124 Stat. 119–1025.
114. See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697 (2014).
115. See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367 (2020).
116. Senator Cory Booker (D–NJ) introduced S. 1206 on April 19, 2023, and it currently has 29 Democrat co-sponsors. Representative Bobby Scott (D–VA) introduced the parallel H.R. 2725 on the same day, and it currently has 125 Democrat co-sponsors.
117. *Senate RFRA Hearing*, at 2.
118. This letter appears in a booklet titled *The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom*, published by the Baptist Joint Committee for RFRA's 20th anniversary in 2013. It can be found at https://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf.
119. These are the American Civil Liberties Union, American Humanist Association, Americans United for Spearation of Church and State, Anti-Defamation League, Central Conference of American Rabbis, The Episcopal Church, Evangelical Lutheran Church in America, National Council of Churches, National Council of Jewish Women, People for the American Way, Presbyterian Church (USA), United Methodist Church, Unitarian Universalist Association, United Church of Christ, and United Synagogue of Conservative Judaism.
120. See 139 Cong. Rec. S14362 (daily ed. Oct. 26, 1993) (statement of Sen. Orrin Hatch).
121. *1992 House RFRA Hearing*, at 73; *Senate RFRA Hearing*, at 184. See also McConnell, *supra* note 19, at 1153 (religious exercise had traditionally been "treated as a preferred freedom"); *1992 House RFRA Hearing*, at 13 ("Abundant scholarship on the origins and historical understanding of the Free Exercise Clause clearly indicates that religious liberty was to be a preferred freedom") (statement of Robert Dugan); *id*. at 23 ("religious freedom was to have a preferred position") (statement of Dallin H. Oaks).
122. *1992 House RFRA Hearing*, at 65; *Senate RFRA Hearing*, at 176.
123. *1992 House RFRA Hearing*, at 64.
124. A list of organizations endorsing the Equality Act can be found at *655 Organizations Endorsing the Equality Act*, Human Rts. Campaign, https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/Orgs-Endorsing-Equality-Act-4-16-21-1.pdf.
125. A list of organizations endorsing the women's Health Protection Act can be found at *132 Faith-Based, Religious, & Civil Rights Organizations Express Support for the Women's Health Protection Act*, Nat'l Council of Jewish Women, https://www.ncjw.org/news/whpa-interfaith-letter-feb-2022/.
126. A list of organizations endorsing the Do No Harm Act can be found at *Do No Harm Act Endorsing Organizations*, Ofc. of Corey Booker, https://www.booker.senate.gov/imo/media/doc/do_no_harm_act_endorsing_organizations.pdf.
127. Religious Freedom Restoration Act of 1990, Hearing Before the H. Subcomm. on Civil and Const. Rights 49–55 (1990).
128. *Id*. at 50.
129. *Id*. at 51.
130. *Id*. at 58.
131. 139 Cong. Rec. E1234 (daily ed. May 12, 1993).
132. *Id*.
133. 139 Cong. Rec. 26179 (daily ed. Oct. 26, 1993) (emphasis added).
134. S. 1975 in the 117th Cong. (2021); S. 1645 in the 116th Cong. (2019); S. 510 in the 115th Cong. (2017); S. 217 in the 114th Cong. (2015).
135. See 136 Cong. Rec. 35804 (daily ed. Oct. 26, 1990).
136. *State of the Union Address*, White House (Mar. 1, 2022), https://www.whitehouse.gov/state-of-the-union-2022/.
137. Statement From President Biden on the Senate Vote on the Women's Health Protection Act, May 11, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/statement-from-president-biden-on-the-senate-vote-on-the-womens-health-protection-act/.
138. These are Hal Rogers (R–KY), Chris Smith (R–NJ), Steny Hoyer (D–MD), Marcy Kaptur (D–OH), Nancy Pelosi (D–CA), Frank Pallone (D–NJ), Richard Neal (D–MA), Rosa DeLauro (D–CT), Maxine Waters (D–CA), Jerrold Nadler (D–NY), Sanford Bishop (D–GA), Ken Calvert (R–CA), James Clyburn (D–SC), Anna Eshoo (D–CA), Robert Scott (D–VA), Nydia Velazquez (D–NY), and Bennie Thompson (D–MS).
139. *Murdock*, 319 U.S. at 115; *Smith*, 494 U.S. at 895 (O'Connor, J., concurring in the judgment).

140. *Collins*, 323 U.S. at 530.
141. See *supra* note 7, at 4.
142. Cong. Rec., Oct. 27, 1993, at S14462 (statement of Sen. Joe Lieberman).
143. *Religious Freedom Restoration Act of 1990*, *supra* note 127, at 49.
144. *Id*.
145. 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (statement of Rep. Henry Hyde). *See also 1992 House RFRA Hearing*, at 326–27 (testimony of Professor Laycock) (The RFRA provides "across the board a right to argue for religious exemptions.... [E]qual application of a uniform principal to all faith and government interests is the intent of the bill.").