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The Religious Freedom Restoration Act: History, Status, and Threats

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KEY TAKEAWAYS

The Founders saw religious freedom, which undergirds America's origin and existence, as a natural and inalienable right with a preferred position over other rights.

Decades of Supreme Court precedent established that government burdens on religious practice must be the least restrictive means of furthering a compelling purpose.

The RFRA reasserted this "strict scrutiny" standard after the Supreme Court's abandonment, but it is now threatened by cultural, legislative, and legal trends.

The First Amendment to the U.S. Constitution opens with these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Because religious freedom is "based on the inviolability of conscience,"[2] writes Professor Michael McConnell, it is both natural and inalienable. 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."[3] This makes religious freedom—including not only personal belief or private worship but the "free exercise" of religion—a "special case."[4]

Most conflicts between religious exercise and government action in America involve "governmental rules of general applicability which operate to place substantial burdens on individuals' ability to practice

their faiths."[5] Between 1940 and 1990, the Supreme Court established a standard for courts to resolve these conflicts that reflected both the inalienable nature of religious exercise and the different ways that government could interfere with that right. Under this standard, often referred to as *strict scrutiny*, the government may interfere with the exercise of religion no more than absolutely necessary. In legal terms, such interference must be the least restrictive means of achieving a compelling purpose.

The Supreme Court changed course in *Employment Division v. Smith*.[6] Even though neither party in the case had raised, briefed, or argued whether strict scrutiny should remain the applicable standard, the Supreme Court, by a 5–4 vote, abandoned the strict-scrutiny standard in all but a narrow category of cases. Government action that is not "specifically directed at...religious practice" but burdens that practice only as an "incidental effect of a generally applicable" law,[7] the Court said, never violates the Free Exercise Clause.

Congress responded to the *Smith* decision in 1993 by enacting the Religious Freedom Restoration Act (RFRA), restoring the strict-scrutiny standard and applying it to all claims that government action burdens the exercise of religion. Organizations across the ideological spectrum came together to form the Coalition for the Free Exercise of Religion to support the passage of the RFRA, which received a total of only three negative votes in either house of Congress.

The principle that every American has a natural and inalienable right to practice his or her faith without all but the most necessary government burdens, was again established firmly in law. But while this principle was built over four centuries of experience and conviction, it is deteriorating after less than three decades since the RFRA's passage. This *Legal Memorandum* examines the RFRA's history, status, and the threats to its continued viability.

Origins of Religious Freedom in America

Religious freedom is more rhetoric than reality in much of the world. The 1948 Universal Declaration of Human Rights includes religious freedom as one of the "equal and inalienable rights of all members of the human family."[8] The Universal Declaration and the 1966 International Covenant on Civil and Political Rights[9] incorporate the same robust definition of religious freedom. It is the "freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Endorsing nations commit to "promote respect for these rights and freedoms and...to secure their universal and effective recognition and observance."[10]

All but one of the 47 nations endorsing the Universal Declaration also signed or ratified the International Covenant. The religious freedom reality in most of those nations, however, does not match the rhetoric. The Pew Research Center, for example, annually assesses religious freedom around the world through indices of both government restrictions and social hostilities toward religion.[11] Based on survey scores, each nation receives a designation of "very high," "high," "moderate," or "low" level of restrictions. In its most recent report, only 38 percent of the nations approving both of these international agreements had a low level of government restriction, and only one-third had a low level of social hostility toward religion.

The U.S. Commission on International Religious Freedom also publishes an annual report evaluating religious freedom around the world. "Countries of particular concern" and those on the State Department's Special Watch List have the most egregious violations of religious freedom.[12] Two-thirds of the nations on these lists endorsed both the Universal Declaration and the International Covenant.

The U.S. is different. Here, both the rhetoric and reality of religious freedom preceded—and literally informed—the nation's birth. The Senate Judiciary Committee report on the RFRA, for example, noted that 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."[13] Five years later, when unanimously enacting the International Religious Freedom Act, Congress declared: "The right to freedom of religion undergirds the very origin and existence of the United States."[14]

Act Concerning Religion. McConnell writes that by the time the First Amendment was drafted, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world."[15] This did not, however, mean that the conviction about the right to observe one's faith was understood or implemented in the same way across the colonies. The Act Concerning Religion, enacted by the Maryland colony in 1649, stated that no person would be "troubled...in respect of his or her religion nor in the free exercise thereof." This protection, however, extended only to those "professing to believe in Jesus Christ."[16]

Flushing Remonstrance. Similarly, the "liberty of conscience" affirmed in the charter of the New Netherland colony (what is now New York) did not extend to Catholics or Quakers. When the government prohibited anyone from providing shelter to the latter, a group of residents in the town of Flushing wrote the colony's director-general that they could not comply with that edict but must treat others "as God shall persuade our consciences." This statement became known as the Flushing Remonstrance.[17]

Colonial Charters and State Constitutions. These colonial examples show that, though not enjoyed universally at the time, religious liberty was understood to encompass not only personal belief but also *decisions and actions* based on such belief. The Free Exercise Clause in the U.S. Constitution "evolved from the longstanding protections for religious liberty in early colonial charters and state constitutions."[18] These governing documents "protected religious liberty as a fundamental, inviolable right."[19] 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.[20]

Pre-Constitutional Developments. Three developments in Virginia during the years prior to the Constitution's drafting are particularly important. The 1776 Virginia Declaration of Rights,[21] 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." This document influenced not only the committee drafting of the Declaration of Independence, but also James Madison when he helped draft the First Amendment.

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." The individual's conclusion on that question, he wrote, "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[22]

Six months later, the Virginia legislature enacted the Statute for Religious Freedom. Originally authored by Thomas Jefferson in 1777,[23] it held that religious freedom is one of the "natural rights of mankind."[24] 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."[25]

This *Legal Memorandum* can touch on only a few points in the broad narrative[26] of religious freedom in America. In addition to prioritizing religious liberty both domestically and internationally, U.S. presidents have consistently and publicly affirmed the meaning and importance of religious freedom.

Presidential Statements. In his annual address to Congress on January 6, 1941, for example, President Franklin Roosevelt encouraged taking steps toward a world built on "four essential human freedoms."[27] One of these is "freedom of every person to worship God in his own way—everywhere in the world." In 1992, Congress passed a resolution designating January 16, anniversary of the Virginia Statute for Religious Freedom's enactment, as Religious Freedom Day and requesting that Presidents issue a proclamation "calling on the people of the United States to join together to celebrate their religious freedom."[28] Every President since then has done so.[29]

- **President George H. W. Bush** recognized that religious freedom "has been integral to the preservation and development of the United States" and that "the free exercise of religion goes hand in hand with the preservation of our other rights."

- **President Bill Clinton**, who signed the Religious Freedom Restoration Act into law, said that the "fundamental right of all people" to "follow our own personal beliefs" and "practice our faith freely and openly" is "essential to our well-being."

- **President George W. Bush** called religious freedom "a cornerstone of our Republic, a core principle of our Constitution, and a fundamental human right." The right "to have religious beliefs and to freely practice such beliefs," he said, "are among the most fundamental freedoms we possess."

- **President Barack Obama** said that religious freedom is "the natural right of all humanity—not a privilege for any government to give or take away" and that "our freedom to practice our faith and follow our conscience is central to our ability to live in harmony." It is a "critical foundation of our Nation's liberty" and "a key to a stable, prosperous, and peaceful future."

- **President Donald Trump** also recognized that religious freedom "is not a gift from the government, but a sacred right from Almighty God" and includes individuals' "right not just to believe as they see fit, but to freely exercise their religion." Government action such as "forcing people to comply with laws that violate their core religious beliefs without sufficient justification....can destroy the fundamental freedom underlying our democracy."

President Trump's observation is particularly important. The fact that religious freedom is part of America's cultural and political DNA has shaped the nature of modern conflicts between government action and religious practice. Rather than the overt, punitive restrictions and hostilities common around the world, these conflicts in America are more likely to involve government action that appears facially neutral toward religion. Its implementation and enforcement, however, can still restrict, impair, and even prevent the exercise of religion.

Professor McConnell frames the primary constitutional question regarding the free exercise of religion this way: "[D]oes the freedom of religious exercise guaranteed by the constitutions of the states and United States require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations?"[30] As noted above, Madison argued that religious exercise is "precedent...to the claims of Civil Society." McConnell has published the most extensive analysis favoring the view that religious exemptions from such laws are consistent with the First Amendment.[31] Other scholars disagree.[32] Professor Vincent Muñoz, for example, writes that, rather than endorsing actual religious exemptions from generally applicable laws, the Founders sought to protect the "natural right of religious liberty" by "limiting the federal government's power in general."[33]

If, on the latter view, the Founders believed that limiting government in general would protect religious freedom in particular, those limits have long since weakened—as government power has expanded far beyond anything the Founders could have imagined. The free exercise of religion, however, remains a natural and inalienable right, and the ways that government can interfere with—even cripple—that right have multiplied.

Pre-1990 Free Exercise Jurisprudence

The steady expansion and intrusiveness of statutes and regulations virtually guaranteed that the Supreme Court would have to address how to resolve conflicts between government action and the exercise of religion.

Reynolds. In *Reynolds v. United States*,[34] George Reynolds was convicted of violating the Morrill Anti-Bigamy Act by marrying a second wife in the Utah Territory, and the Utah Territorial Supreme Court affirmed the conviction. The U.S. Supreme Court unanimously affirmed, holding that while the First Amendment deprived Congress "of all legislative power over mere opinion," it left Congress "free to reach actions which were in violation of social duties or subversive of good order."[35]

If this holding were as absolute as it might appear, government could restrict or prohibit any exercise of religion that involved action rather than belief or opinion. The Founders, however, understood the "exercise" of religion to encompass *both*. Since *Reynolds* involved a criminal prohibition on a specific religious practice, a fuller development of the Court's approach would come in cases that involved government action that appeared to be religiously neutral.

Cantwell. In 1940, in *Cantwell v. Connecticut*,[36] a Jehovah's Witness and his two sons alleged that their conviction for failing to obtain government approval to solicit funds violated their First Amendment right to exercise religion. The Supreme Court agreed. This unanimous landmark decision is important for several reasons.

1. The Court held that the Free Exercise Clause applies to *state,* as well as federal, government action.

2. The Court held that while the "freedom to act" is not absolute,[37] "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[38] *Cantwell* thus established its basic standard for free exercise cases. A court must examine the government end as well as its means to ensure that the former is permissible and the latter is not undue.

3. The Court distinguished between laws that "wholly deny the right to preach or to disseminate religious views" from "general and non-discriminatory legislation."[39] The latter category, however, was limited to laws that regulate the "times, the places, and the manner of soliciting" and that "safeguard the peace, good order and comfort of the community."[40]

The Court concluded that restricting the exercise of religion requires "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."[41]

Murdock. Three years later, the Court considered the case of *Murdock v. Commonwealth of Pennsylvania*,[42] which involved a local ordinance requiring a license to canvass or solicit "orders for...merchandise of any kind" or to deliver merchandise ordered during such canvassing or soliciting. Several Jehovah's Witnesses were convicted and fined for violating the ordinance by soliciting people to purchase religious literature. Reversing the convictions, the Supreme Court made two important distinctions.

1. A tax need not be "laid specifically on the exercise of" First Amendment freedoms but can be unconstitutional as a result of its effect.[43]

2. While sincere or zealous religious belief does not automatically transform "any conduct [into] a religious rite,"[44] government action does not automatically become constitutional because it is not "discriminatory."[45] A license tax, the Court said, "certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality of treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion *are in a preferred position*."[46]

Thomas. In 1945, in *Thomas v. Collins*,[47] a union official was arrested after speaking at an organizing meeting in violation of a temporary restraining order. He argued that the order violated his First Amendment right to freedom of speech. Citing *Cantwell*, the Court applied certain principles to all of "the indispensable democratic freedoms secured by the First Amendment."[48]

The permissibility of government action is determined by "the character of the right, not of the limitation" government seeks to place on that right. "[A]ny attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by a clear and present danger."[49] A mere "rational connection between the remedy and the evil to be curbed...will not suffice." Only the "gravest abuses, endangering paramount interests, give occasion for permissible limitation."[50] The Court can approve "an intrusion upon this domain, only if grave and impending public danger requires this."[51]

Braunfeld. In 1961, in *Braunfeld v. Brown*,[52] Orthodox Jewish merchants challenged the constitutionality of a state law prohibiting the sale of certain products on Sunday. They argued that since they observed the Sabbath on Saturday, this retail restriction would effectively "prohibit the free exercise of their religion" by putting them at a "serious economic disadvantage if they continue to adhere to their Sabbath."[53] The Court voted 6–3 to reject this free exercise claim.

Writing for himself and three colleagues, Supreme Court Chief Justice Earl Warren explained that "legislative power...may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion."[54] The impact on these plaintiffs was twofold.

1. The law "does not make unlawful any religious practices."

2. The generally applicable restriction itself has an indirect effect by "making the practice of their religious beliefs more expensive."[55]

Citing *Cantwell*, the Court held that "if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[56]

Sherbert. Two years later, in *Sherbert v. Verner*,[57] a member of the Seventh-Day Adventist faith was fired from her job and denied unemployment benefits after refusing to work on her Saturday Sabbath. The state Employment Security Commission concluded that following the dictates of her faith did not constitute "good cause," and both the state trial court and the South Carolina Supreme Court affirmed.

The U.S. Supreme Court reversed, holding that *Sherbert*'s "ineligibility for benefits derives solely from the practice of her religion.... Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship."[58] A "substantial infringement" upon the exercise of religion, the Court said, must be justified by a "compelling state interest."[59] As it had in *Collins*, the Court said that "no showing merely of a rational relationship to some colorable state interest would suffice." Instead, quoting from *Collins*, the Court reaffirmed that "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[60]

Yoder. In 1972, in *Wisconsin v. Yoder*,[61] adherents to the Old Order Amish and Conservative Amish Mennonite faiths declined to send their children to school past the eighth grade, violating Wisconsin's law requiring school attendance until age 16.

Following *Collins*, the Supreme Court placed more emphasis on the "character of the right" than on the purpose behind the government's action. Even a purpose "at the very apex of the function of a State," the Court said, "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the First Amendment."[62] The Court noted that the First Amendment "firmly fixed the right to free exercise of religious beliefs" long before other public policies—such as compulsory education—were established. The Court reaffirmed that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[63] Citing

Sherbert, the Court considered to be "settled" that "however strong" a state interest may be, "it is by no means absolute to the exclusion or subordination of all other interests." A "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[64]

Thomas. In 1981, in *Thomas v. Review Board*,[65] a Jehovah's Witness was fired from his foundry job and denied unemployment benefits after he refused to participate in the production of armaments or war materials. An administrative review board concluded that religious convictions did not constitute "good cause" and affirmed the denial of benefits. A closely divided Indiana Supreme Court came to the same conclusion, asserting that Thomas had made a "personal philosophical choice rather than a religious choice" that was insufficient to justify leaving employment.[66]

Applying *Sherbert*, the U.S. Supreme Court reversed. The fact that a law does not literally compel a violation of conscience "is only the beginning, not the end, of our inquiry."[67] Significantly, the Court reaffirmed the principle that a facially neutral regulation can violate the Free Exercise Clause "if it unduly burdens the free exercise of religion."[68] The fact that compulsion is indirect does not mean that "the infringement upon free exercise is nonetheless substantial."[69] The state "may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[70]

Hobbie. In 1987, in *Hobbie v. Unemployment Appeals Commission*,[71] a jewelry store employee informed her supervisor that she could no longer work on Saturdays following her conversion to the Seventh-Day Adventist faith. Despite an arrangement with the supervisor to accommodate her religious observance, the general manager fired her. The relevant state agency denied her claim for unemployment benefits, characterizing her refusal to work on her Sabbath as "misconduct connected with [her] work,"[72] and the state appeals court affirmed the agency's decision.

Citing *Sherbert* and *Thomas*, the Supreme Court reversed. The Court explicitly reaffirmed the principle that indirect compulsion may nonetheless substantially infringe upon religious exercise, and "must be subjected to strict scrutiny."[73] It rejected the agency's argument that, by converting after being hired, Hobbie herself created the conflict between her job and religious beliefs. "In effect," the Court said, the agency "asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so.... The salient inquiry under the Free Exercise Clause is the burden involved."[74]

Frazee. Finally, in 1989, in *Frazee v. Illinois Dept. of Employment Security*,[75] an individual refused a temporary retail position because it would require that he work on Sunday. Kelly Services fired him and, in refusing to award unemployment benefits, a state agency said that to constitute "good cause" to accept work, religious convictions must be based on "tenets or dogma...of some church, sect, or denomination" rather than "an individual's personal belief."[76] The state appeals court affirmed the benefits denial, refusing to apply *Sherbert*, *Thomas*, or *Hobbie* because Frazee was not a member of an established religious sect or church.

The Supreme Court unanimously reversed, noting that none of its precedents relied on church membership or a specific tenet of a recognized religious group. Those facts may exist in such cases, but their absence does not create a "purely personal preference rather than a religious belief."[77]

Combining the Precedents. These precedents provided the elements of the Supreme Court's approach to free exercise cases.

1. The standard of review must be based on the "preferred" character of the right to exercise religion and the burden on that right—rather than the government's purpose or objective in imposing that burden.

2. Religion-neutral statutes or regulations may place unconstitutional burdens on the exercise of religion. The fact that it may appear facially nondiscriminatory, as the Court said in *Murdock*, is "immaterial."

3. While not providing an absolute shield for particular religious practices or government actions, the strict-scrutiny standard does mean that government may not burden the exercise of religion any more than absolutely necessary.

As Justice Sandra Day O'Connor put it:

> The compelling interest test effectuates the First Amendment's command that religious liberty is an individual liberty, that it occupies a preferred position, and that the Court will not permit encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order."[78]

Employment Division v. Smith

In *Employment Division v. Smith* (1990), two members of the Native American Church were fired from their jobs and denied unemployment compensation benefits after using peyote, prohibited under Oregon state law, during a religious ceremony. Applying the *Sherbert* strict-scrutiny standard, the Oregon Supreme Court concluded that the state had violated the plaintiffs' First Amendment right to exercise religion.[79]

Unexpectedly, however, the U.S. Supreme Court reversed and profoundly changed its interpretation of the Free Exercise Clause. That provision, Justice Antonin Scalia wrote for the majority, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" even if that law "incidentally" burdens the exercise of religion.[80] The strict-scrutiny standard, the Court said, would thereafter apply only when government action is "specifically directed at" religious practice[81] or in cases that involve "the Free Exercise Clause in conjunction with other constitutional provisions, such as freedom of speech and of the press."[82]

Smith: Procedural Problems

Smith is problematic for both procedural and substantive reasons. The most glaring procedural problem is that the Court revisited its interpretation of the Free Exercise Clause even though neither party had raised, briefed, or argued the issue.[83] The House Judiciary Committee report on the RFRA noted: "The parties did not ask the Court to render a decision on the level of scrutiny applicable when a law of general applicability allegedly infringes upon an individual's rights under the Free Exercise Clause, nor did the Court request briefing or argument on this well settled issue."[84]

For nearly two centuries, the doctrine of constitutional avoidance has counseled against addressing constitutional questions except when "indispensably necessary to the case."[85] In a famous statement of this doctrine, Justice Louis Brandeis wrote 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."[86] The majority in *Smith* never acknowledged—let alone addressed—its departure from this principle.

Unnecessarily addressing a constitutional issue that had been neither briefed nor argued sets *Smith* in stark contrast to another well-known First Amendment case. In *Citizens United v. Federal Election Commission*,[87] a nonprofit organization sought to enjoin a federal ban on independent

expenditures for "electioneering communications" within a specific period prior to primary or general elections. The group wanted to distribute a film about one of the candidates in the 2008 presidential primaries.

Initially, Citizens United argued that its film did not meet the statutory definition of "electioneering communications." The Supreme Court first examined whether the case could be decided without addressing a constitutional issue.[88] Even after concluding that it must address the validity of certain First Amendment precedents, however, the Court asked the parties to brief and argue the constitutional issues.[89] Only then, *after exploring alternatives and after seeking proper briefing and argument*, did the Court address whether to overrule any precedents interpreting the First Amendment. The Court in *Smith* took neither of these steps.

Smith: Substantive Problems

Turning to *Smith*'s substantive problems, the Court announced a new understanding of the Free Exercise Clause without attempting to interpret that provision. "But the Supreme Court has never determined whether this holding [in *Smith*] reflects the original meaning of the Free Exercise Clause."[90] Instead, the Court abandoned the strict-scrutiny standard because of its speculation about the result of applying that standard in future cases. Doing so "would be courting anarchy"[91] and "open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."[92]

Not only did the Court reinterpret the Free Exercise Clause by speculating about its consequences (rather than actually interpreting it), but this prediction of dire consequences was itself highly questionable. The strict-scrutiny standard had been in place for 27 years prior to *Smith*, and those consequences had not occurred. In fact, decisions during that period "preserved the form of strict scrutiny while belying the notion that the test is outcome-determinative."[93]

The Court, for example, declined to apply the strict-scrutiny standard in "specialized" contexts such as the military[94] or prisons[95] or in cases involving "government's management of its own affairs"[96] where courts had traditionally been deferential. The Court's own analysis in *Smith* asserted that the *Sherbert* standard had resulted in very few Free Exercise Clause exemptions, noting that it had "never invalidated any governmental action on the basis of the *Sherbert* [strict-scrutiny] test except the denial of unemployment compensation."[97] The Court's own description of the precedential record, therefore, appeared at odds with its prediction of future jurisprudential anarchy.

***Sherbert* and Free Exercise.** In addition, the Court did not explain why its observation that the *Sherbert* standard had not resulted in exemptions outside one limited context should result in abandoning that standard for almost all free exercise cases. As O'Connor put it in her opinion (concurring in the judgment only), the fact that the Court "rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win–loss record of the plaintiffs who happen to come before us."[98] The Court found significant the fact that, unlike other free exercise cases, *Smith* involved "an across-the-board criminal prohibition on a particular form of conduct."[99] It did not, however, limit its holding to that context, but made the *Sherbert* test no longer applicable to all cases involving "a generally applicable and otherwise valid provision"[100] of any kind.

Another substantive problem with *Smith* is that the Court did not acknowledge, let alone address, that it was not only abandoning application of the strict-scrutiny standard, but also undermining the principles that led the Court to adopt that standard in the first place. *Murdock*, for example, held that the right to freely exercise religion is in a "preferred position." *Collins* held that the "character of the right" is more important than "the limitation" government seeks to place on that right. *Yoder* held that even interests "at the apex of the functions of the State" cannot absolutely subordinate fundamental interests such as the free exercise of religion. And several precedents affirmed that non-discriminatory or generally applicable government action can restrict or burden religious exercise as fully as direct, intentional restrictions. *Smith* left these precedents intact—but significantly diluted their core principles.

Focusing on "the character of the right," as commanded by *Collins*, is especially important for those expressing religious views or engaging in practices that are outside the mainstream or that the majority finds objectionable. The Court in *Smith*, however, shifted its focus from the character of the right to "the character of...the limitation" the government would seek to impose. Unless restricting the exercise of religion is actually "the object of...a generally applicable" law, the *Sherbert* standard would no longer apply at all.

As a result, accommodating religious practice would be left "to the political process [even though that] will place at a relative disadvantage those religious practices that are not widely engaged in." O'Connor responded that

> the First Amendment does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naïve 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.[101]

Limiting the First Amendment's protection of religious exercise, wrote Scalia, is an "unavoidable consequence of democratic government" and is "preferred to a system in which each conscience is a law unto itself."[102] As noted above, the Court's own analysis belied its worst-case scenario; did not explain why its alternative must be preferred; and did not attempt to show that the First Amendment, properly interpreted, compelled reconfiguring a half-century of free exercise jurisprudence. Nonetheless, the Court "substantially constricted the use of the strict-scrutiny test for free exercise cases and relegated most religious claims for exemptions from statutes of general applicability to the political process."[103] After *Smith*, "Supreme Court precedent still requires the application of the compelling interest test in free exercise cases involving government action that intentionally (rather than incidentally) burdens religious exercise."[104]

Religious Freedom Restoration Act

While application of strict scrutiny did not result in widespread religious exemptions, abandoning that standard had an immediate and dramatic effect. Less than two years after *Smith*, a Congressional Research Service report documented federal and state court decisions rejecting religious exercise claims of all kinds.[105] "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."[106] Simply put, applying "the principle of non-exemption stated in *Smith* has resulted in the denial of most free exercise claims."[107]

Three months after *Smith*, Representative Stephen Solarz (D–NY) introduced House Resolution 5277, the Religious Freedom Restoration Act. It provided that "a governmental authority" may not "intentionally discriminate against religion, or among religions." That authority may "restrict any person's free exercise of religion" only by "a rule of general applicability" that "is essential to further a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." On October 26, 1990, then-Senator Joseph Biden (D–DE) introduced similar language as S. 3254 with seven co-sponsors.

When Solarz reintroduced the RFRA in the 102nd Congress with more than 100 additional co-sponsors, it included a section of congressional findings and purposes. The findings included the assertion, echoing the Supreme Court in *Sherbert*, that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." And its purposes included "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is burdened." In addition, the bill's language had been refined to more closely track *Sherbert* and *Yoder*. On July 2, 1992, Senator Edward Kennedy (D–MA) introduced a companion bill, S. 2969, with the same language and 26 co-sponsors.

102nd Congress. The Senate Judiciary Committee hearing on the RFRA, in September 1992, revealed the breadth of its support. Witnesses supporting the bill included Michael P. Farris, President of the Home School Legal Defense Association, and Nadine Strossen, President of the American Civil Liberties Union. Senator Kennedy, who chaired the hearing, observed that the RFRA "is supported by an extraordinary coalition of organizations with widely differing views on many other issues," including "the American Civil Liberties Union [and] the Coalitions for America."[108] Senator Orrin Hatch (R–UT), an RFRA co-sponsor, agreed: "When the American Civil Liberties Union and the Coalitions for America see eye to eye on a major piece of legislation, I think it is certainly safe to say that someone has seen the light."[109]

103rd Congress. In the 103rd Congress, then-Representative Charles Schumer (D–NY) re-introduced this language with 170 co-sponsors. The House Judiciary Committee report explained that, by substituting "the lowest level of scrutiny" for the previous strict-scrutiny standard, *Smith* "has created a climate in which the free exercise of religion is continually in jeopardy."[110] Changing that climate required not only restoring the strict-scrutiny standard, but "in all cases where free exercise of religion is substantially burdened."[111] The bill's findings, therefore, stated that the exercise of religion is an "unalienable right,"[112] and the fact that laws appearing to be neutral toward religion "may burden religious exercise as surely as laws intended to interfere with religious exercise."[113] All federal laws adopted after the RFRA's effective date of November 16, 1993, must meet this standard "unless such law explicitly excludes such application."[114] The House passed Schumer's bill by voice vote, the Senate voted 97–3 to approve it, and President Bill Clinton signed the RFRA into law on November 16, 1993.

Two indispensable principles define the RFRA.

1. The standard it sets for government reflects the "character of the right" to exercise religion. As Justice O'Connor wrote in her *Smith* concurrence, it "reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."[115] It stands for the principle that government should not burden the fundamental right to exercise religion more than absolutely necessary. When he signed the RFRA into law, Clinton said: "What [the RFRA] basically says is that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion."[116]

2. By applying this standard to all government action, the RFRA does not "presume to be outcome-determinative."[117] The strict scrutiny standard reflects the substance and significance of religious freedom in America. It should be more difficult for government to burden a natural and inalienable right than a right or liberty of less significance, especially one granted by statute or regulation. Two scholars intimately involved in the RFRA's development and passage explained: "Congress did not intend to codify the results of any particular free exercise cases.... [The] RFRA does not dictate specific results; it simply codified the standard of review to be applied in all cases."[118]

The House Judiciary Committee report on the RFRA put it this way: "Furthermore, by enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion.... This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions."[119] In a separate statement included in the report, several committee members emphasized that the RFRA "will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight."[120]

In addition to making this principle clear in the RFRA's text, Congress demonstrated it by rejecting proposals to limit the RFRA's application. A coalition of state legislators and prison administrators, for example, argued that prisons should be exempt.[121] Congress, however, rejected carving out areas of public policy in which the strict-scrutiny standard would not apply. Instead, as the Senate Judiciary Committee report noted, the long-standing tradition of judicial deference to the judgment and experience of prison administrators "will not place undue burdens" on them.[122] The Senate rejected a prison exemption amendment offered by Senator Harry Reid (D–NV) before passing the unamended RFRA.

Current Status of the Religious Freedom Restoration Act

Section 5 of the Fourteenth Amendment, which limits the power of state government, gives Congress the power to enforce its provisions "by appropriate legislation."[123] The House and Senate Judiciary Committee reports on the RFRA defended the RFRA's application to state and local governments because "the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority."[124] Scholarly opinion remains divided,[125] and the issue of whether state and local governments could also be subjected to the RFRA's requirements eventually came before the Supreme Court.

Flores. In *City of Boerne v. Flores*,[126] local zoning officials denied a Catholic church's application for a permit to renovate and expand its sanctuary. The church sued, claiming that the denial violated the RFRA, and the city argued that Congress lacked authority to apply the RFRA to state or local governments. The district court agreed with the city, the U.S. Court of Appeals reversed, and the U.S. Supreme Court reversed again. In his majority opinion, Justice Anthony Kennedy wrote that the RFRA exceeded merely enforcing the Fourteenth Amendment and instead "decree[d its] substance."[127] Legislation that "alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."[128]

Section 5, Kennedy wrote, is "remedial" rather than "substantive"[129] and, therefore, since Congress was not attempting to remedy documented, ongoing abuses by state and local governments of religious liberty rights of others, it did not have the power to enforce the RFRA's restrictions against them. Instead, Kennedy wrote, the RFRA "appears...to attempt a substantive change in constitutional protections."[130] He further elaborated:

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.... While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.[131]

Scalia took the opportunity in his *Boerne* concurrence to do what he had not done in his *Smith* majority opinion, addressing whether "historical materials support a result contrary to the one reached in" *Smith*.[132] He

cited McConnell's scholarship and his conclusion that requiring religious exemptions from generally applicable laws is only a "possible interpretation of the free exercise clause."[133] Scalia, however, did not acknowledge his own assertion in *Smith* that the opposite conclusion was also only a "permissible reading of the text."[134]

In dissent, O'Connor wrote, "I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument."[135] In other words, she advocated the same process the Court would later use in *Citizens United* to address constitutional issues that were deemed necessary, but that had not been briefed or argued.

Producing seven different opinions, *Boerne* did not settle every dispute or address every issue left by *Smith*. It did, however, mean that "states and localities are no longer bound by RFRA"[136] and prompted both state and federal legislative efforts to reverse this restricted application. The National Conference of State Legislatures reports that 21 states have added constitutional or statutory provisions similar to the RFRA,[137] while protections in at least 10 other states have come from judicial interpretations of existing laws.[138]

Other Legislative Efforts to Protect Religious Freedom

At the federal level, RFRA supporters attempted to apply strict scrutiny to state government action impinging on free exercise by relying on other legislation based on a different constitutional foundation.

The RLPA. The Religious Liberty Protection Act (RLPA), for example, sought to ground its protection for religious exercise in Congress' authority to regulate interstate commerce and federal spending. House and Senate committees held hearings in 1998, but neither reported the legislation to its respective chamber.

Representative Charles Canady (R–FL) re-introduced the bill in the 106th Congress, and the House voted 306–118 to pass it on July 15, 1999. The bill, however, stalled in the Senate when the Coalition for the Free Exercise of Religion, which had been united in backing the RFRA, "fractured" over questions about the RLPA's impact on civil rights laws prohibiting discrimination.[139]

The RLUIPA. In July 2000, Senators Hatch and Kennedy introduced the Religious Land Use and Institutionalized Persons Act (RLUIPA), "a narrowed version"[140] of the RLPA. It would apply strict scrutiny to state and local

government actions in zoning or landmarking policies and practices, as well as those affecting persons institutionalized in state or local government facilities. Two weeks after the RLUIPA's introduction, the Senate and House each passed it without opposition or even a roll call vote. Like the RFRA before it, the RLUIPA demonstrates that "religious exercise is a crucial element of true religious liberty" and can be "hindered, intentionally or not, by state and local government decisions."[141] The U.S. Department of Justice's Civil Rights Division, which enforces the RLUIPA, issued reports on its implementation on the 10th and 20th anniversary of its enactment,[142] surveying its use to defend the rights especially of adherents to minority religions.

In *Cutter v. Wilkinson*,[143] current and former prison inmates in Ohio sued, alleging that prison officials violated the RLUIPA by failing to accommodate their "non-mainstream" religious practices. In response, prison officials challenged the RLUIPA's constitutionality by claiming that it is an "establishment of religion" that violates the First Amendment. The Supreme Court unanimously rejected that argument, holding that the RLUIPA "qualifies as a permissible legislative accommodation of religion…because it alleviates exceptional government-created burdens on private religious exercise."[144]

Post-*Boerne* RFRA. The Supreme Court's first post-*Boerne* opportunity to construe and apply the RFRA came in *Gonzales v. O Centro Espirita*.[145] In 1999, federal agents seized a Brazilian shipment of a sacramental tea (used in religious ceremonies) that contains a hallucinogenic compound regulated under the federal Controlled Substances Act. The government conceded that this substantially burdened the exercise of religion by a religious sect that uses this tea, but argued that its regulation was consistent with the RFRA because it is the least restrictive means of achieving a compelling purpose. The Court emphasized that evaluating religious exemptions from generally applicable laws requires a case-by-case approach examining "the specific application of the law to the particular claimant,"[146] and that generally enforcing a federal statute is not, by itself, a compelling government interest.[147]

Just as the First Amendment's protection for the free exercise of religion was undermined by the Supreme Court's decision in *Smith*, the RFRA's protection for this fundamental right is now being threatened in several ways. These include cultural shifts, legislation, and litigation.

Threats to the RFRA: Cultural Shifts

As demonstrated above, religious liberty has been seen for centuries as a natural and inalienable right that occupies, as the Supreme Court put it in *Murdock*, "a preferred position."[148] While James Madison argued that the

exercise of religion took precedence over the demands of civil society, today it is often viewed not as a primary right but, at best, an ordinary interest of no more value than any other. Worse, religious freedom is increasingly considered a negative influence or factor in our society that should be limited or even eliminated.

Current cultural trends undermine the traditional understanding and protection of religious freedom in both general and specific ways. The focus on personal notions of identity, the growing popularity of theories (such as the malleability of sex), or politically inspired diversity, for example, challenge the view, stated in the Declaration of Independence, that the purpose of government is to secure inalienable rights.

Nones. In addition, the factors that have long made the United States one of the world's more religious countries[149] are rapidly changing. Barely three-quarters of Americans now identify with a religion, and only about half of Americans claim membership in a church, synagogue, or mosque.[150] The public's view of religion has declined precipitously since the RFRA's enactment in 1993. In 2019, a Gallup poll found that a 70 percent drop in church membership over just two decades was primarily attributable to the rising percentage of Americans who say they have no religion (commonly referred to as "nones").[151]

Public Confidence. Public confidence in religious institutions has also deteriorated. Organized religion, for example, was the most respected institution in Gallup polls as recently as 1985. By 2019, however, that perception had sunk to a new low.[152] The consistency with which presidential administrations of both parties traditionally approach religious freedom has also changed markedly.

Presidential Administrations. As discussed below, for example, the Obama Administration's health care policies sparked significant litigation over their negative impact on religious freedom. Subsequently, the Trump Administration in October 2017 identified religious freedom as a priority when then-Attorney General Jeff Sessions issued a memorandum outlining 20 "principles of religious liberty" that should "guide all administrative agencies and executive departments."[153] This memorandum, and its detailed implementation guidelines, asserted that "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity." With the Biden Administration and a Democrat-led Congress, the pendulum appears to be swinging back again. With highly religious Americans more likely to be politically conservative than liberal, however, these conflicting cultural and political currents will likely further disrupt the traditional consensus behind religious freedom.

COVID-19. The continuing COVID-19 pandemic has further illuminated national sentiment toward organized religion and religious practice, and perhaps even hastened its decline. In 2020 polls, for example, less than one-tenth of Americans thought in-person religious services should be permitted without restrictions, while nearly half believed that services should not be permitted at all. Americans who identified with a particular religion had virtually the same opinion, 45 percent agreeing that in-person services should be prohibited altogether.[154]

These emerging trends provide a negative frame of reference for how Americans view religious liberty generally—and its protection by law specifically. They signal a decided shift from identifying religious freedom as a positive good and a preferred right to, at best, viewing it as an optional competing interest or, at worst, a negative influence or political obstacle that must be limited or eliminated.[155] This shift manifests itself in both legislation and litigation that, individually and in combination, threaten to undermine the principles behind the RFRA, and even the future viability of the law itself.

Legislation and Litigation

The ACA/Obamacare. Approximately 92 percent of Americans have health insurance, a majority of them through their employers.[156] In 2010, by completely partisan majorities, Congress passed the Patient Protection and Affordable Care Act (ACA, popularly called Obamacare),[157] the most comprehensive regulatory overhaul of health insurance coverage since the creation of the Medicaid and Medicare programs in 1965. The ACA requires that employer-provided insurance coverage include "preventive care services" at no cost to employees or face massive financial penalties. The Department of Health and Human Services ("HHS") defined this category of "preventive care" services to include 20 methods of birth control, 16 contraceptives, and four abortifacients approved by the Food and Drug Administration. The statute's narrow religious exemption applied only to houses of worship, church associations, and religious orders engaging in exclusively religious activity.

The First Amendment, however, protects not the right of certain parties to exercise religion, but "the free exercise" of religion itself. It is an inalienable individual right that, as Attorney General Sessions stated in 2017, "is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice."[158] The birth-control mandate affected all religious employers the same way;

exempting only a small portion of them and exposing the rest to a potentially crushing financial burden for practicing their faith. In addition to this burden imposed directly by the ACA, however, the Obama Justice Department's aggressive litigation defending it sought to limit the RFRA's protection as much as possible.

Burwell v. Hobby Lobby Stores. The threat of severe financial penalty led to more than 100 lawsuits[159] challenging the birth-control mandate filed in federal courts around the country. *Burwell v. Hobby Lobby Stores, Inc.* (2014)[160] combined three cases brought by Christian owners of for-profit companies. They each claimed that, by including abortifacient methods, the birth-control mandate required them to violate their religious belief that life begins at conception, thereby violating the RFRA.

The U.S. Courts of Appeals handling these cases came to different conclusions. The Third Circuit held that RFRA did not apply because a for-profit company is not a "person" whose religious exercise the RFRA protected. The Tenth Circuit, however, held that a company is a "person" under the RFRA, that the birth-control mandate substantially burdened these companies' exercise of religion, and that the government had not met the strict-scrutiny standard.

The Supreme Court agreed with the Tenth Circuit, affirming that "Congress enacted RFRA in 1993 to provide very broad protection for religious liberty."[161] Since the RFRA itself did not define "person," the Court relied on the Dictionary Act,[162] which defines the term as including not only individuals, but also "corporations, companies...firms...and joint stock companies."[163] Justice Samuel Alito wrote for the majority that Congress expressed no intention to depart from recognized legal definitions of "person" that do not make artificial distinctions between nonprofit organizations and for-profit companies. Both can exercise religion and, therefore, can avail themselves of the RFRA's protection.

The financial penalty for just one of the companies in *Burwell* could have reached $475 million per year. "If these consequences do not amount to a substantial burden," the Court said, "it is hard to see what would."[164] The Court then assumed, without deciding, that providing cost-free coverage for the four challenged abortifacient methods of birth control is a "compelling" government interest. The birth-control mandate nonetheless violated the RFRA because it was not the least restrictive means of furthering that interest.

Zubik v. Burwell. *Zubik v. Burwell* (2016)[165] combined challenges by nonprofit religious employers, including religious colleges and the Little Sisters of the Poor, a group of Catholic nuns who are dedicated to serving the

impoverished elderly. This litigation involved a new administrative process that continued the ACA's no-cost birth-control mandate but, according to HHS, better accommodated religious employers.

In this new process, however, birth control coverage still resulted from the employers' action of submitting a form to their insurers stating their religious objections to providing contraceptive coverage that would result in the insurers providing such coverage directly. The *Zubik* plaintiffs argued that this still made them complicit in abortion and, therefore, violated the RFRA. The Court did not initially address the merits of the case but gave the parties time to develop a suitable accommodation on their own.

Little Sisters of the Poor v. Pennsylvania. In late 2017, following an executive order by President Trump,[166] HHS issued new rules that broadened the birth-control mandate's exemption for churches and created a "moral exemption" for other religious employers. This time, Pennsylvania and New Jersey sued, claiming that neither the ACA nor RFRA gave HHS the authority to issue these rules. When the lower courts blocked their implementation, the Little Sisters of the Poor, one of the plaintiffs in *Zubik*, intervened to once again bring the issue to the Supreme Court.

In a 7–2 decision, the Court upheld the new HHS rules. Justice Clarence Thomas wrote the majority opinion, joined by four other justices, explaining that all federal law, including agency regulations, must comply with the RFRA unless Congress explicitly says otherwise. Congress had not done so when it enacted the ACA.[167]

By enacting and implementing the Affordable Care Act, neither Congress nor executive branch agencies considered the ACA's impact on religious freedom. Even worse, when that impact became clear, the Obama Administration actively sought to minimize or eliminate the RFRA as an obstacle to its policy objective. This reverses the Supreme Court's directive in *Collins* that "the character of the right, not of the limitation" on that right must determine the permissibility of government action that burdens First Amendment rights.

Less than three decades after the RFRA's enactment, it took an executive order, new agency rules, and years of costly litigation to defend what Congress had clearly stated.

Obergefell v. Hodges. American history, the Constitution, and actions by all three branches of government make clear that the right to exercise religion is a natural and inalienable right that government may not burden more than absolutely necessary. While the Declaration of Independence states that securing such inalienable rights is the very purpose of government, the Supreme Court and Congress have taken steps in the opposite direction.

In *Obergefell v. Hodges* (2015),[168] plaintiffs in four states challenged the constitutionality of state constitutional provisions or statutes (both federal and state) that limited marriage to opposite-sex couples. In a 5–4 decision, the Supreme Court acknowledged that its precedents involving the right to marry "presumed a relationship involving opposite-sex partners."[169] Nonetheless, other precedents involving "principles of broader reach" show that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[170] The Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as a fundamental liberty for both opposite-sex and same-sex couples.[171]

Like the government's defense of the ACA, Justice Kennedy's majority opinion sought to minimize religious freedom as an obstacle to reaching his conclusion. Those who "deem same-sex marriage to be wrong" based on "religious or philosophical premises,"[172] he wrote, may still "advocate" or "teach the principles that are so fulfilling and so central to their lives and faiths," as well as "engage those who disagree with their view in an open and searching debate."[173] Shifting the focus to the freedom of speech, however, reduced the separate right of free exercise to little more than personal beliefs or principles about the morality of same-sex marriage.

The dissenting justices addressed the decision's impact on the right to exercise religion. Chief Justice John Roberts, for example, presciently described how "people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage," using the example of "a religious adoption agency [that] declines to place children with same-sex married couples."[174] These issues, Roberts wrote, "will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."[175]

Justice Clarence Thomas, who joined in Alito's dissent[176] and authored one of his own, specifically mentioned the RFRA and noted that the Court's decision will have "'unavoidable and wide-ranging implications for religious liberty.'" Since marriage "is not simply a governmental institution [but] a religious institution as well...[i]t appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."[177]

Bostock v. Clayton County. In *Bostock v. Clayton County* (2020),[178] which combined three individual cases, the Supreme Court had to decide whether the prohibition on "sex" discrimination in Title VII of the Civil Rights Act of 1964[179] covers discrimination on the basis of sexual orientation and gender identity. In a 6–3 decision written by Justice Neil Gorsuch, the Court said that it does.

The Court's "clear" task, Gorsuch wrote, was to determine the "ordinary public meaning of [Title VII's] terms at the time of its enactment."[180] The Court proceeded "on the assumption that 'sex'...refer[s] only to the biological distinctions between male and female."[181] However, within the context of "sex" discrimination under Title VII, Gorsuch clarified: "We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[182] Like Justice Kennedy had done in *Obergefell*, Gorsuch had treated the conclusion on the central interpretive question as "just a starting point."[183] The Court's analysis instead yielded the rule that if "the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee...a statutory violation has occurred."[184]

In addition to the Court's problematic statutory analysis,[185] *Bostock* actually created a potential conflict over religious freedom and signaled another. Gorusch acknowledged the concern that "complying with Title VII's requirement in cases like [these] may require some employers to violate their religious convictions."[186] He noted, however, that Title VII has an "express statutory exception for religious organizations."[187] But, as the Court itself acknowledged, the fact that "sex" in Title VII meant "the biological distinctions between male and female," religious employers had no reason to think that this statutory exception would apply to such personnel decisions. The Court itself created that conflict.

In addition, the Court noted that Congress had "gone a step further" than the Title VII religious exception "in the Religious Freedom Restoration Act of 1993." Gorsuch described the RFRA as "a kind of super statute, displacing the normal operation of other federal laws" that "might supersede Title VII's commands in appropriate cases."[188] Nonetheless, how those legal principles "protecting religious liberty interact with Title VII," he stated, "are questions for future cases." While not indicating how the Court might decide those future cases, this obviously signaled to Congress that completely eliminating discrimination on the basis of sexual orientation or gender identity might require amending or even repealing the RFRA.

Do No Harm Act. To date, Congress has never exempted any law from the RFRA's rule that, in order to substantially burden the exercise of religion, it must be the least restrictive means of furthering a compelling government interest. This is consistent with the understanding and conviction that the RFRA was to apply to all conflicts between federal government action and

the exercise of religion. That conviction, however, has begun to fracture. And Gorsuch's suggestion in *Bostock* that Congress might have to restrict the RFRA to achieve certain policy goals became concrete legislative text in the Do No Harm Act (DNHA).

The advocates of the DNHA tendered rationale that included arguments the Supreme Court had incorrectly expanded the RFRA beyond its original intent, thereby permitting controversial use of the law as a basis for statutory discrimination. This, they argued, was a function of the historically weaponized use of religion; the RFRA, they argued, had become a sword with which to justify harm, rather than a shield to protect the faithful.[189]

Originally introduced in 2019 by Representative Joseph Kennedy (D–MA) and then-Senator Kamala Harris (D–CA), the Do No Harm Act would prohibit application of the RFRA to four federal statutes,[190] one executive order, and various executive branch agency rules or their implementation. The strategy behind the DNHA[191] reverses what Congress sought when enacting the RFRA—namely, to single out certain government interests as *always* more important than any religious freedom claim.

While that would be sufficient to advance certain policy goals, the DNHA goes further and characterizes religious freedom claims not only as less important but as *negative and harmful*. Any exemptions to the specified laws and rules, the DNHA asserts, would constitute "impos[ing] the religious views, habits, or practices of one party upon another"; "impos[ing] meaningful harm, including dignitary harm, on a third party"; or "permit[ting] discrimination against others."[192]

While the RFRA protects the right to exercise religion, legislation such as the DNHA instead seeks to regulate it, allowing certain assertions of this right but not others. As the Center for American Progress puts it, the goal is to ensure America is a country that prioritizes not religious liberty itself but "religious liberty policies...reflect[ing] the moral values of equality, inclusion, and freedom for all to live without fear of discrimination."[193]

Further evidence of this change in the basic understanding of religious freedom underlying the RFRA is that groups that once formed the Coalition for the Free Exercise of Religion and strongly backed the RFRA, such as the American Civil Liberties Union, now advocate passage of bills such as the DNHA.[194] The ACLU's assertion that "prohibiting discrimination" is a "compelling government interest," however, no more requires eliminating the RFRA's application than *Smith*'s speculation about hypothetical cases required restricting strict scrutiny's application.

Equality Act. The Equality Act[195] passed by the House of Representatives on February 18, 2021,[196] is the most expansive version of legislation

that has been introduced in different forms since the early 1990s. It would prohibit discrimination based on sexual orientation or gender identity in broad areas of American life and, to that end, would make substantive changes to long-standing federal laws, including:

- The Civil Rights Act of 1964,[197]
- The Government Employee Rights Act of 1991,[198]
- The Congressional Accountability Act of 1995,[199]
- The Civil Service Reform Act of 1978,[200]
- The Fair Housing Act,[201]
- The Civil Rights Act of 1968,[202]
- The Equal Credit Opportunity Act,[203] and
- The Jury Selection & Services Act.[204]

Even more important for this analysis, it provides that the RFRA "shall not provide a claim concerning, 'a defense to a claim under,'" or "provide a basis for challenging the application or enforcement of" any of these changes to federal law.[205] The Equality Act does more than dictate the result that the government interests it represents must prevail over any competing religious exercise claims. By prohibiting the RFRA's application altogether, the Equality Act prevents anyone from even arguing that its implementation in these broad contexts conflicts with their religious practice. It treats the exercise of religion not simply as a less important interest, but as *an interest that is not worthy of any judicial protection—or even consideration—whatsoever.*

Professor Douglas Laycock of the University of Virginia School of Law, one of the authors of the RFRA who has argued religious freedom cases, including cases involving the RFRA, before the Supreme Court, 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."[206]

Conclusion

At the time of America's founding, religious freedom in general and the free exercise of religion in particular were considered natural and inalienable rights that government existed to secure. That understanding has informed legislation, international agreements, presidential proclamations, and court decisions for centuries.

By 1990, the Supreme Court had for decades interpreted the First Amendment to require that government may burden religious exercise no more than absolutely necessary, a standard that applied not only to government actions that burden religion directly but also to facially neutral laws that do so by simple force of application. In *Smith*, the Supreme Court unnecessarily departed from this historical path, depriving the exercise of religion of its most legal protection. Congress reasserted that protection, with widespread support for the principle that a single protective standard should apply to all claims that government action burdens religious exercise.

That principle, embodied in the Religious Freedom Restoration Act, is now under sustained assault. The cultural context that remained consistent throughout much of American history and informed the RFRA's enactment, is rapidly changing. Personal religiosity, as well as appreciation for the overall importance of religious freedom, is declining. In addition, legislative and litigation strategies are underway to remove the RFRA's protection against broad categories of government action—and even to characterize religious freedom in different areas as negative, oppressive, or worse.

In its 2019 annual assessment of religious freedom around the world,[207] the Pew Research Center noted that between 2007 and 2017, limits on religious activity within the United States increased from 1.9 to 6.7, statistics that comport with cultural shifts and legal challenges limiting religious liberty generally and the RFRA specifically.[208] While America's religious foundation sets her apart from her international counterparts, continued efforts to curtail the RFRA's application may hasten her similarity to that of a country "of particular concern."[209]

The threats to the RFRA are significant. Countering them requires an understanding of the preeminence of religious liberty as a foundational American principle and the protective effects that the RFRA ensures against the government's burdening of religious liberty. The RFRA's viability requires continued vigilance, particularly in the face of legislation that would repeal or limit its application.

A strict-scrutiny standard that emphasizes the "character of the right" being protected is especially important to minority religions. A review of 10 years of jurisprudence from 2007 to 2017 indicates that small religious minorities such as Muslims, Native Americans, or Hindus bring a disproportionately large share of religious freedom claims. Christians, though criticized by opponents for supposedly using the RFRA to shield discriminatory intent, actually bring a disproportionately small share.[210] Christians are, however, viewed by a full 50 percent of Americans as suffering some degree of discrimination.[211]

If the religious liberty protections of our Constitution are to fulfill their role, as Justice Alito wrote,[212] such that we live in a society "in which people of all beliefs can live together harmoniously," the RFRA's status as one of the modern era's most valuable defenses of the right of conscience must be continually defended. Doing so will ensure a bulwark against further injury to the cherished notion of religious freedom that Americans hold dear.

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Endnotes

1. *See generally* Thomas Berg, Free Exercise of Religion, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/amendments/1/essays/139/free-exercise-of-religion (last accessed April 25, 2021). The Supreme Court has held that both the Establishment Clause and the Free Exercise Clause apply to state, as well as federal, government. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947).
2. 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 William & Mary L.R. 819, 823 (1997). *See also* Congressional Research Service*, Free Exercise Clause: Overview, Constitution Annotated*, https://constitution.congress.gov/browse/essay/amdt1_1_4_1/ (last accessed April 25, 2021) ("Freedom of conscience is the basis of the Free Exercise of Religion.").
3. McConnell, *supra* note 2, at 823.
4. *Id*.
5. Religious Freedom Restoration Act of 1993, Report 103–111, 103rd Congress, 1st Session, July 27, 1993, at 4–5, (current version at 42 U.S.C. § 2000bb et seq.)
6. 494 U.S. 872 (1990).
7. *Id*. at 878.
8. Universal Declaration of Human Rights, United Nations G.A. Res. 217A (December 10, 1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights (last accessed April 25, 2021).
9. International Covenant on Civil and Political Rights, United Nations G.A. Res. (last accessed April 25, 2021).
10. In addition to the Universal Declaration and International Covenant, Article I of the 1981 U.S. Declaration on the Elimination of all Forms of Intolerance or Discrimination Based on Religion or Belief incorporates the same broad definition of religious freedom. United Nations G.A. Res. 36/55, 36 United Nations GAOR Supp. (No. 51), U.N. Doc. A/36/684 (1981), http://hrlibrary.umn.edu/instree/d4deidrb.htm (last accessed April 25, 2021).
11. Pew Research Center, *In 2018, Government Restrictions on Religion Reach Highest Level Globally in More Than a Decade*, November 10, 2020, https://www.pewforum.org/2020/11/10/in-2018-government-restrictions-on-religion-reach-highest-level-globally-in-more-than-a-decade/ (last accessed April 25, 2021).
12. *See* U.S. Commission on International Religious Freedom, Annual Report 2020, https://www.uscirf.gov/sites/default/files/USCIRF%202020%20Annual%20Report_Final_42920.pdf (last accessed April 25, 2021).
13. Religious Freedom Restoration Act, at 4.
14. 22 U.S.C. § 6401.
15. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L.R. 1409, 1421 (1990).
16. *See* Wei Zhu, *The Forgotten Story of the Flushing Remonstrance*, The Immanent Frame, January 15, 2014, https://tif.ssrc.org/2014/01/15/the-forgotten-story-of-the-flushing-remonstrance/ (last accessed April 25, 2021).
17. The Flushing Remonstrance, 1657, https://www.thirteen.org/dutchny/interactives/document-the-flushing-remonstrance/ (last accessed April 25, 2021).
18. Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harvard J. L. & Pub. Pol. 971, 973 (2019).
19. *Id*. at 974.
20. *Id*. at 976.
21. National Archives, America's Founding Documents, The Virginia Declaration of Rights, https://www.archives.gov/founding-docs/virginia-declaration-of-rights (last accessed April 25, 2021).
22. National Archives, Founders Online, Memorial and Remonstrance Against Religious Assessments, https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr (last accessed April 25, 2021).
23. 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, The Thomas Jefferson Encyclopedia, https://www.monticello.org/site/research-and-collections/jeffersons-gravestone (last accessed April 25, 2021).
24. See Virginia Statute for Religious Freedom, The Thomas Jefferson Encyclopedia, https://www.monticello.org/site/research-and-collections/virginia-statute-religious-freedom#:~:text=We%20the%20General%20Assembly%20of,suffer%2C%20on%20account%20of%20his (last accessed April 25, 2021).
25. Press Release, U.S. Agency for International Development, January 16, 2021, https://www.usaid.gov/news-information/press-releases/jan-16-2021-religious-freedom-day (last accessed April 25, 2021).
26. In the fall of 2015, Senator Orrin Hatch (R–UT) delivered a significant series of speeches exploring this narrative. *See* Congressional Record, September

22, 2015, at S6873; Congressional Record, October 1, 2015, at S7080; Congressional Record, October 7, 2015, at S7211; Congressional Record, November 4, 2015, at S7752; Congressional Record, November 10, 2015, at S7899; Congressional Record, November 19, 2015, at S8131; Congressional Record, December 1, 2015, at S8206; Congressional Record, December 10, 2015, at S8586.

27. Transcript of President Franklin Roosevelt's Annual Message (Four Freedoms) to Congress (1941), https://www.ourdocuments.gov/doc.php?flash=false&doc=70&page=transcript (last accessed April 25, 2021).
28. P. L. 102–464, 106 Stat. 2277 (October 23, 1992).
29. Presidential proclamations are published in the Federal Register and may be found at https://www.federalregister.gov/presidential-documents (last accessed April 25, 2021).
30. McConnell, *supra* note 15, at 1411.
31. *Id*. at 12.
32. *See, e.g.*, Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). Scholars also disagree on finer points, such as the Free Exercise Clause's lack of a proviso. Professor Muñoz compares its absence to the first Congress' rejection of such a proviso for the Second Amendment, while Branton Nestor compares it to inclusion of such provisos in colonial charters and early state constitutions. *See* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J. L. & Pub. Pol. 1083 (2008); Branton Nestor, *supra* note 18.
33. Vincent Phillip Muñoz, *How the Founders Protected the Natural Right of Religious Liberty*, National Review Online, December 7, 2018, https://www.nationalreview.com/2018/12/founders-protected-religious-freedom-first-amendment-natural-rights/ (last accessed April 25, 2021).
34. 98 U.S. 145 (1878).
35. *Id*. at 164. *See also* Davis v. Beason, 133 U.S. 333, 342 (1890) ("It was never intended or supposed that the [First Amendment] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."); The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, (1890) ("[T]he State has the perfect right to prohibit…open offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they be advocated and practiced.").
36. 310 U.S. 296 (1940).
37. *Id*. at 303.
38. *Id*. at 304.
39. *Id*.
40. *Id*.
41. *Id*. at 311.
42. 319 U.S. 105 (1943).
43. *Id*. at 108.
44. *Id*. at 109.
45. *Id*. at 113.
46. *Id*. at 115 (emphasis added).
47. 323 U.S. 516 (1945).
48. *Id*. at 530.
49. *Id*.
50. *Id*.
51. *Id*. at 531.
52. 366 U.S. 599 (1961).
53. *Id*. at 602.
54. *Id*. at 603–04.
55. *Id*. at 605.
56. *Id*. at 607.
57. 374 U.S. 398 (1963).
58. *Id*. at 404.
59. *Id*. at 406.
60. *Id*., quoting *Collins*, 323 U.S. at 530.

61. 406 U.S. 205 (1972).
62. *Id*. at 214.
63. *Id*. at 215
64. *Id*. at 220.
65. 450 U.S. 707 (1981).
66. *Id*. at 713.
67. *Id*. at 717, quoting *Sherbert*, 374 U.S. at 403–04.
68. *Id*., quoting *Yoder*, 406 U.S. at 220.
69. *Id.* at 718.
70. *Id*.
71. 480 U.S. 136 (1987).
72. *Id*. at 139.
73. *Id*. at 141.
74. *Id*. at 144.
75. 489 U.S. 829 (1989).
76. *Id*. at 830.
77. *Id*. at 833.
78. *Smith*, 494 U.S. at 895 (O'Connor, J., concurring in the judgment), quoting *Yoder*, 406 U.S. at 215.
79. Smith v. Employment Division, 301 Or. 209, 721 P.2d 445 (1986). On remand, the court came to the same conclusion after considering additional issues. *See* Smith v. Employment Division, 307 Or. 68, 713 P.2d 146 (1988).
80. Smith, 494 U.S. at 872.
81. *Id*. at 878. *See also* Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (Laws that are not "neutral and of general applicability" must still be justified "by a compelling governmental interest and must be narrowly tailored to advance that interest.").
82. *Smith*, 494 U.S. at 881.
83. *See* David M. Ackerman, Cong. Rsch. Serv., 92-366, The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis 9 (1992).
84. Religious Freedom Restoration Act of 1993, Report 103–88, 103rd Congress, 1st Session, May 11, 1993, at 3.
85. *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) (Court should refrain from addressing constitutional issues unless "obliged to do so…when the question is raised by a party."); Andrew Nolan, Cong. Rsch. Serv., R43706, The Doctrine of Constitutional Avoidance 2 (2014) (The "constitutional avoidance doctrine…discourage[s] a federal court from issuing broad rulings on matters of constitutional law.").
86. Ashwander v. Tennessee Valley Auth., 2997 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 Nolan, *supra* note 80, at 9.
87. 558 U.S. 310 (2010).
88. *Id.* at 322
89. *Id*.
90. Nestor, *supra* note 18, at 971. *See also* Vincent Phillip Muñoz, *supra* note 32, at 1084 ("In *Smith*, Justice Scalia defended his interpretation without referring to the Founders.").
91. *Smith*, 494 U.S. at 888.
92. *Id*. *See also* Religious Freedom Restoration Act, *supra* note 84, at 4.
93. Ackerman, *supra* note 83, at 7.
94. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986).
95. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
96. Ackerman, *supra* note 83, at 7.
97. *Smith*, 494 U.S. at 883.
98. *Id*. at 896–97.
99. *Id*. at 884.

100. *Id*. at 878.
101. *Id*. at 895 (O'Connor, J., concurring in the judgment).
102. *Id*. at 890.
103. Ackerman, *supra* note 83, at 12.
104. Whitney K. Novak, Cong. Rsch. Serv., The Religious Freedom Restoration Act: A Primer (2020).
105. Ackerman, *supra* note 83, at 13–17.
106. *Id*. at 17–18.
107. *Id*. at 20. *See also* Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & Religion 531, 532 (1993).
108. The Religious Freedom Restoration Act, S.Hrg. 102–1076, 102nd Congress, 2nd Session, September 18, 1992, at 2.
109. *Id*. at 8.
110. Report 103–88, *supra* note 84, at 5.
111. 42 U.S.C. § 2000bb(b)(1).
112. *Id*. at § 2000bb(a)(1).
113. *Id*. at § 2000bb(a)(2).
114. *Id*. at § 2000bb-3(b).
115. *Smith*, 494 U.S. at 903 (O'Connor, J., concurring in the judgment).
116. Quoted in Baptist Joint Committee for Religious Liberty, *The Religious Freedom Restoration Act: 20 Years of Protecting our First Freedom*, https://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf (last accessed April 25, 2021).
117. Ackerman, *supra* note 83, at 22. *See also* The Religious Freedom Restoration Act, *supra* note 108, at 2 (Sen. Ted Kennedy (D–MA)), *id*. at 8 (Sen. Howard Metzenbaum (D–OH)).
118. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Texas L. R. 209, 218 (1994).
119. Report 103–88, *supra* note 84, at 7; Report 103–111, *supra* note 5, at 9. *See also* David M. Ackerman, Cong. Rsch. Serv., 97-795, The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status 3 (1999) (The RFRA did not address "any specific free exercise concern. Rather, the intent was to restore the strict scrutiny test as the general standard governing the interaction of government and free exercise.").
120. Report 103–88, *supra* note 84, at 17 (statement of Representatives Henry Hyde (R–IL), Betty McCollum (D–MN), Charles Canady (R–FL), Bob Goodlatte (R–VA), Jim Sensenbrenner (R–WI), Howard Coble (R–NC), and Bob Inglis (R–SC)).
121. *See* Report 103–111, *supra* note 5, at 25–38.
122. *Id*. at 11.
123. *See* Roger Clegg, Enforcement Clause, in Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/amendments/14/essays/175/enforcement-clause (last accessed April 26, 2021).
124. Report 103–88, *supra* note 84, at 9; Report 103–111, *supra* note 5, at 13–14. *See also* Drinan & Huffman, *supra* note 107, at 533 ("Members of Congress and legal scholars have generally agreed that Congress had the power to enact [the RFRA], though there was some disagreement on this issue.").
125. *See* Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vanderbilt L.R. 1539 (1995) (The RFRA exceeded Congress' authority under Section 5 of the Fourteenth Amendment.); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Ca. L. R. 589 (1996) (RFRA consistent with Congress' Section 5 authority).
126. 521 U.S. 507 (1997).
127. *Id*. at 519.
128. *Id*.
129. *Id*. at 520.
130. *Id*. at 532.
131. *Id*. at 519–20.
132. *Id*. at 537 (Scalia, J., concurring in part).
133. *Id*. at 538, quoting McConnell, *supra* note 15, at 1415.
134. *Smith*, 494 U.S. at 878.
135. *Id*. at 545 (O'Connor, J., dissenting).
136. Ackerman, *supra* note 119, at 5.

137. State Religious Freedom Acts, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last accessed April 26, 2021).
138. See Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, Wash. Post., March 1, 2014, https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/ (last accessed April 26, 2021).
139. David M. Ackerman, Cong. Rsch. Serv., RS20638, The Religious Land Use and Institutionalized Persons Act of 2000 6 (2000).
140. *Id*. at 1.
141. U.S. Department of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act*, September 22, 2010, at 3, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_report_092210.pdf (last accessed April 26, 2021).
142. These reports, and other materials related to RLUIPA's passage and enforcement, may be found on the U.S. Department of Justice's website, https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act (last accessed April 26, 2021).
143. 544 U.S. 709 (2005).
144. *Id*. at 720.
145. 546 U.S. 428 (2006).
146. Novak, *supra* note 104.
147. *See* Angie A. Welborn, Cong. Rscg. Serv., RS22392, Religious Freedom Restoration Act: An Overview of *Gonzales v. O Centro Espirita Beneficente Uniao do* Vegetal (2006).
148. *Murdock*, 319 U.S. at 115.
149. See Steve Crabtree, *Religiosity Highest in World's Poorest Nations, United States is Among the Rich Countries that Buck the Trend*, Gallup (Aug. 31, 2010), https://news.gallup.com/poll/142727/Religiosity-Highest-World-Poorest-Nations.aspx (last accessed April 26, 2021).
150. Jeffrey Jones, *U.S. Church Membership Down Sharply in Past Two Decades*, Gallup (Apr. 18, 2019), https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx (last accessed April 26, 2021).
151. In other polling, the percentage of respondents who gave their religious preference as "none" rose from 6 percent in 1993 to 20 percent in 2020, while the share who say that religion is important in their own lives dropped by 15 points.
152. Frank Newport, *Why Are Americans Losing Confidence in Organized Religion?* Gallup (Jul. 16, 2019), https://news.gallup.com/opinion/polling-matters/260738/why-americans-losing-confidence-organized-religion.aspx (last accessed April 26, 2021).
153. Office of the Attorney General, Memorandum for All Executive Departments and Agencies, Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668, October 6, 2017, https://www.justice.gov/opa/press-release/file/1001891/download (last accessed April 26, 2021).
154. Elana Schor & Emily Swanson, *Poll: Most in U.S. Back Curbing In-Person Worship Amid Virus*, AP News (May 8, 2020), https://apnews.com/article/f27186ad0edcf2a415cd03e0cdd52714 (last accessed April 26, 2021).
155. California, for example, has led the charge in both eliminating the vestiges of public displays of religion within education and supplanting neutral course curriculum with hyper-sexualized, identity-driven programs aimed at grooming children to become more sexually active—over the objections of religious students and their families. See e.g., Anna North, *The Future of Sex Ed Has Arrived. Is America Ready?* Vox (Dec. 3, 2019), https://www.vox.com/identities/2019/12/3/20877238/sex-education-california-lgbtq-gender-schools-health (last accessed April 26, 2021).
156. 2019 U.S. Census data, "Percentage of People by Type of Health Insurance Coverage: 2019," https://www.census.gov/content/dam/Census/library/visualizations/2020/demo/p60-271/figure1.pdf (last accessed April 26, 2021).
157. Patient Protection and Affordable Care Act of 2010, P. L. No. 111–148, 124 Stat. 119 (2010).
158. Federal Law Protections for Religious Liberty, *supra* note 153.
159. Jane Perkins, *The Affordable Care Act in Court—Litigation Continues Unabated*, N.C. Medical Journal, Vol. 81, No. 6 at 386 (2000).
160. 573 U.S. 682 (2014).
161. *Id*. at 693.
162. 1 U.S.C. § 1.
163. *Burwell*, 573 at 707–08.
164. *Id*. at 691.
165. Zubik v. Burwell (per curiam), 136 S.Ct. 1557 (2016).
166. Exec. Order No. 13,798, 51 Fed. Reg. 33,948 (May 9, 2017).
167. *Id.* at 2382–2383.
168. 576 U.S. 644 (2015).
169. *Id*. at 665.

170. *Id*.
171. In reaching this conclusion, the Court overruled Baker v. Nelson, 409 U.S. 810 (1972), and abrogated Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006), and Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).
172. *Obergefell*, 576 U.S. at 704.
173. *Id*. at 679–680.
174. *Id.* at 711 (Roberts, C.J., dissenting). Currently before the Supreme Court as of the writing of this memorandum, is Fulton v. City of Philadelphia, PA, ____ U.S. _____ (argued Nov. 3, 2020), docket no. 19–123, in which a religious foster care and adoption agency, Catholic Social Services ("CSS") was prevented from participating in the city's foster care program due to its refusal to refer foster children to gay couples in accordance with their religious convictions. CSS claimed that the city violated its rights under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, and likewise claimed a violation of Pennsylvania's Religious Freedom Protection Act. The lower court had relied on *Employment Division v. Smith*, the problematic precedent that prompted the RFRA's enactment in 1993 in the first place, to uphold Philadelphia's efforts to foreclose CSS from participation in the program. Petitioners in *Fulton* have asked the Supreme Court to revisit *Smith*.
175. *Obergefell*, 576 U.S. at 711–712.
176. *Id.* at 733–734 (internal citations omitted).
177. *Id.* at 734 (Thomas, J. dissenting)
178. 140 S.Ct. 1731 (2020).
179. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).
180. *Bostock*, 140 S.Ct. at 1738.
181. *Id*. at 1738.
182. *Id.* at 1746–1747.
183. *Id*. at 1739.
184. *Id*. at 1741.
185. Joined by Justice Thomas, Justice Alito opened his dissent this way: "There is only one word for what the Court has done today: legislation….The question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*. It indisputably did not." *Id*. at 1755–56 (Alito, J., dissenting). Conservative legal scholars have roundly criticized the majority's strained conclusion in *Bostock*. *See e.g.*, Robert Lowry Clinton, *Textual Literalism and Legal Positivism: On Bostock and the Western Legal Tradition*, The Public Discourse (July 5, 2020) https://www.thepublicdiscourse.com/2020/07/66630/ (last accessed April 26, 2021) ("When the Court employs Bostock-style textual literalism, unmoored from the constraints imposed by a more rigorous originalism tied to the will of the lawgiver, it abdicates the judicial function and intrudes into the legislative domain"); *see also* Ed Whelan, *A 'Pirate Ship' Sailing under a 'Textualist Flag'*, National Review Online (June 15, 2020), https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag/ (last accessed April 26, 2021) ("[Bostock] sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated––the theory that courts should 'update' old statutes so that they better reflect the current values of society.").
186. *Bostock* at 1753.
187. *Id*. at 1754.
188. *Id*.
189. *See* Ranen Miao, *Religion as a Shield, Not a Sword: Why We Need to Pass the Do No Harm Act*, Columbia Pol. Rev. (April 14, 2021), http://www.cpreview.org/blog/2021/4/religion-as-a-shield-not-a-sword-why-we-need-to-pass-the-do-no-harm-act (last accessed April 26, 2021).
190. The Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Violence Against Women Act.
191. Emily London and Maggie Siddiqi, *Religious Liberty Should Do No Harm*, Center for American Progress (Apr. 11, 2019), https://www.americanprogress.org/issues/religion/reports/2019/04/11/468041/religious-liberty-no-harm/ (last accessed April 26, 2021).
192. Do No Harm Act, H.R. 1378, 117th Cong. § 2 (2021).
193. London and Siddiqi, *supra* note 191.
194. In advocating for passage of the DNHA, the ACLU has claimed that the "RFRA has been increasingly invoked to provide a blank check to discriminate or to impose religious beliefs onto others," and has likewise asserted that the "RFRA has been abused." Ian Thompson, *In an Era of Religious Refusals, the Do No Harm Act Is an Essential Safeguard*, American Civil Liberties Union (February 28, 2019), https://www.aclu.org/blog/religious-liberty/using-religion-discriminate/era-religious-refusals-do-no-harm-act-essential (last accessed April 26, 2021).
195. Equality Act, H.R. 5, 117th Cong. (2021).
196. On February 25, 2021, the House passed the Equality Act by a vote of 224–206. It had voted previously to pass similar legislation on May 17, 2019, but the Senate, then controlled by Republicans in the 116th Congress, did not consider the legislation. As of the date of this *Legal Memorandum*, the Equality Act's companion bill in the Senate, S. 393, awaits a floor vote.

197. Civil Rights Act of 1964, P.L. 88–353, 78 Stat. 241 (1964).
198. The Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16a – 16c (1991).
199. Congressional Accountability Act of 1995, P.L. 104–1, 3 Stat. 109 (1995).
200. Civil Service Reform Act of 1978, P.L. 95–454, 92 Stat. 1111 (1978).
201. Fair Housing Act of 1968, P.L. 90–284, 82 Stat. 81 (1968).
202. Civil Rights Act of 1968, P.L. 90–284, 82 Stat. 73 (1968).
203. Equal Credit Opportunity Act, 15 U.S.C. § 1691–1691f (2011).
204. Jury Selection and Services Act, 28 U.S. Code § 1861–1878 (1992).
205. Equality Act, *supra* note 195 at § 1107.
206. John McCormack, *A Liberal Law Professor Explains Why the Equality Act Would 'Crush' Religious Dissenters*, National Review Online (May 17, 2019), https://www.nationalreview.com/2019/05/law-professor-explains-why-the-equality-act-would-crush-religious-dissenters/ (last accessed April 26, 2021).
207. *See* note 11, *supra*.
208. Pew Research Center, *A Closer Look at How Religious Restrictions Have Risen Around the World*, July 15, 2019, https://www.pewforum.org/wp-content/uploads/sites/7/2019/07/6-PF_19.07.15_Restrictions2019appendixE.pdf (last accessed April 26, 2021).
209. See note 12, *supra*.
210. Luke Goodrich & Rachel N. Morrison, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L.R. 353 (2018).
211. Pew Research Center, *Sharp Rise in the Share of Americans Saying Jews Face Discrimination*, April 15, 2019, https://perma.cc/J8WU-HVJE (last accessed April 26, 2021).
212. American Legion v. American Humanist Association, 139 S.Ct. 2067, 2075 (2019).