Biographical Sketch
Douglas Laycock

Douglas Laycock is Associate Dean for Research and holds the Alice McKean Young Regents Chair in Law at The University of Texas. He has studied, taught, and written about religious liberty issues for fifteen years. He has published many articles in the leading law reviews on religious liberty, constitutional theory, judicial remedies, and other issues. He has served on boards and advisory committees on religious liberty at DePaul University, Baylor University, and the Presbyterian Church (U.S.A.). He has written briefs in important religious liberty cases on behalf of Protestant, Jewish, Mormon and other religious organizations, and on behalf of secular civil liberties organizations. He has published two books on the law of remedies, one of which won the 1991 Scribes Award. He is a graduate of Michigan State University and The University of Chicago Law School.

Summary of Statement of Douglas Laycock

I urge adoption of the Religious Freedom Restoration Act. RFRA is needed because of the Supreme Court's decision in *Employment Division v. Smith*, which held that religious exercise is fully subject to formally neutral and generally applicable laws.

In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience. Both mainstream churches and religious minorities suffer from regulatory interference, from bureaucratic indifference, and occasionally from simple religious bigotry.

RFRA can work only if it is as broad as the Free Exercise Clause, enacting the fundamental principle of religious liberty and leaving particular disputes to further litigation. The exceptions in the competing bill violate this principle, and they are not necessary to achieve their purposes. They should be rejected.

The express Congressional purpose to restore the compelling interest test of *Wisconsin v. Yoder* and *Sherbert v. Verner* should be retained in the statutory text.

Congress has power to enact this bill under section 5 of the Fourteenth Amendment. This Committee should find the following facts: formally neutral and generally applicable laws have been used as active instruments of religious persecution; enacting separate religious exemptions in every federal, state, and local statute is not a workable means of protecting religious liberty; and litigating government motive is not a workable means of protecting religious liberty.

Statement of Douglas Laycock
Professor of Law, The University of Texas
May 14, 1992

My name is Douglas Laycock, and I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin. I have studied, taught, and written about religious liberty for fifteen years. I am testifying in my individual capacity as a scholar; The University of Texas takes no position on these bills.

I appear to urge adoption of H.R. 2797, the Religious Freedom Restoration Act. This bill is urgently needed to protect the free exercise of religion from the Supreme Court's decision in *Employment Division v. Smith*.[1] That case held that federal courts can not protect religious exercise from formally neutral and generally applicable laws. In effect, the Court held that every American has a right to believe his religion, but no right to practice it. Religion cannot be singled out for discriminatory regulation, but religion is fully subject to the entire body of secular regulation.

In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that sometimes claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience.

The Religious Freedom Restoration Act would greatly ameliorate these consequences. The bill would enact a statutory replacement for the Free Exercise Clause. The bill can work only if it is as broad as the Free Exercise Clause, enacting the fundamental principle of religious liberty and leaving particular disputes to further litigation.

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[1] 494 U.S. 872 (1990).

In this statement I review historical and contemporary examples that illustrate the need for this bill, describe the dynamic of interest group politics that is the greatest threat to religious liberty under *Smith*, explain the compelling interest test that is central to the bill, explain why RFRA is far superior to the competing bill, and explain why the bill is within the power of Congress to enforce the Fourteenth Amendment.

I also urge the Committee to make specific findings of fact in support of the bill: that formally neutral, generally applicable laws have historically been instruments of religious persecution, that enacting separate religious exemptions in every statute is not a workable means of protecting religious liberty, and that litigation about governmental motives is not a workable means of protecting religious liberty.

I. Some Relevant History

The founding generation of Americans had a vision of a society in which religion would be entirely voluntary and entirely free. People of all faiths and of none would be welcome. Minority religions would be entitled not merely to grudging toleration, but to freely and openly exercise their religion. Even in their largely unregulated society, the Founders understood that the free exercise of religion sometimes required religious exemptions from formally neutral laws.[2] Guarantees of free exercise and disestablishment were written into our fundamental law in state and federal constitutions. The simultaneous American innovation of judicial review made those guarantees legally enforceable.

The religion clauses represent both a legal guarantee of religious liberty and a political commitment to religious liberty. The religion clauses made America a beacon of hope for religious minorities throughout the world. The extent of religious pluralism in this country, and of legal and political protections for religious minorities, is probably unsurpassed in

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[2] Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990).

human experience. Religious liberty is one of America's great contributions to civilization.

But a counter-tradition also runs through American history. We have not always lived up to our ideals. There has been religious intolerance in America; there have even been religious persecutions in America. The New England theocracy expelled dissenters, executed Quaker missionaries who returned, and most infamously, perpetrated the Salem witch trials. Colonial Virginia imprisoned Baptist ministers for preaching without a license. American slaveowners totally suppressed African religion among the slaves, in what one historian has called "the African spiritual holocaust."[3]

Hostility to Catholics produced anti-Catholic political movements, mob violence, and church burnings in the 19th century. Catholic children were beaten for refusing to read the Protestant Bible in public schools. In the 1920s, the Ku Klux Klan and other Nativist groups pushed through a law in Oregon requiring all children to attend public schools; the effect would have been to close the Catholic schools.

The Mormons fled from New York, to Ohio, to Missouri, to Illinois, to Utah. They were driven off their lands in Missouri by a combination of armed mobs and state militia. Their prophet was murdered by a mob while in the custody of the state of Illinois. The federal government prosecuted hundreds of Mormons for polygamy, it imposed test oaths that denied Mormons the right to vote, and finally it dissolved the Mormon Church and confiscated its property. The Supreme Court upheld all of these laws in a series of cases in the late nineteenth century.[4]

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[3] Jon Butler, *Awash in a Sea of Faith* 129-63 (1990).

[4] *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

. . . From the late 1930s to the early 1950s, towns all over America tried to stop the Jehovah's Witnesses from proselytizing. These towns enacted a remarkable variety of ordinances, most of which were struck down. The Court's decision in *Minersville School District v. Gobitis*,[5] upholding the requirement that Jehovah's Witnesses salute the flag, triggered a nationwide outburst of private violence against the Witnesses. Jehovah's Witness children were beaten on American school grounds.[6]

This thumbnail sketch of religious tolerance and intolerance in American history is relevant to the Religious Freedom Restoration Act for two reasons. Most obviously, history shows that even in America, government cannot always be trusted to protect religious liberty. Judicial enforcement of free exercise is not foolproof either, but it is an important additional safeguard.

This history of religious intolerance is also relevant in a more specific way. The law that would have closed all the Catholic schools in Oregon was a formally neutral, generally applicable law. The polygamy law that underlay much of the Mormon persecution was a formally neutral, generally applicable law. The flag salute law invoked against Jehovah's Witnesses was a formally neutral, generally applicable law. These formally neutral, generally applicable laws were central to three of the worst religious persecutions in our history.

The Court upheld the polygamy law in *Reynolds v. United States*.[7] It upheld the flag salute law in *Gobitis*, although it later struck down a similar law under the Free Speech Clause.[8] *Reynolds* and *Gobitis* are the two precedents principally relied on in *Smith*; the Court was simply oblivious

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[5] 310 U.S. 586 (1940).

[6] Peter Irons, *The Courage of Their Convictions* 22-35 (1988).

[7] 98 U.S. 145 (1878).

[8] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

to the shameful historical episodes of which these cases were a part. The law closing Catholic schools was struck down in *Pierce v. Society of Sisters*,[9] a decision cast in serious doubt by *Smith*. If *Pierce* survives, it rests on an unenumerated right of parents to educate their children, and that is a precarious base indeed.

In only one of these three episodes was the formally neutral law originally enacted for the *purpose* of persecuting a religious minority. The law closing private schools in Oregon was enacted to get the Catholics. But the polygamy law was not enacted to get the Mormons, and the flag salute laws were not enacted to get the Jehovah's Witnesses. They were originally enacted for legitimate reasons, but when they were enforced against religious minorities, they fanned the flames of persecution.

This Committee can find as a fact that formally neutral, generally applicable laws have repeatedly been the instruments of religious persecution, even in America. Formally neutral laws can lead to persecution for a simple reason: Once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point to that demand. Conscientious resistance by religious minorities sometimes inspires respectful tolerance and exemptions, but sometimes instead it inspires religious hatred and determined, systematic efforts to suppress the religious minority.

II. Some Contemporary Examples

I mention the history of religious persecutions because that possibility cannot be assumed away. But deliberate persecution is not the usual problem in this country. Churches and religious believers can lose the right to practice their faith for a whole range of reasons: because their practice offends some interest group that successfully insists on a regulatory law with no exceptions; because the secular bureaucracy is indifferent to their needs; because the legislature was unaware

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[9] 268 U.S. 510 (1945).

of their existence and failed to provide an exemption. Some interest groups and individual citizens are aggressively hostile to particular religious teachings, or to religion in general. Others are not hostile, but are simply uncomprehending when confronted with religious needs for exemption. But whether regulation results from hostility, or indifference, or ignorance, the consequence to believers is the same.

All of these problems are aggravated by the reaction to *Smith* in the lower courts, in government bureaus, and among secular interest groups. Many judges, bureaucrats, and activists have taken *Smith* as a signal that the Free Exercise Clause is largely repealed, and that the needs of religious minorities are no longer entitled to any consideration. Let me briefly review a few contemporary examples:

Culturally conservative churches, including Catholics, conservative Protestants, Orthodox Jews, and Mormons, are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior. The most aggressive elements of the pro-choice, gay rights, and feminist movements are not content to prevail in the larger society; they also want to impose their agenda on dissenting churches. Sometimes they succeed. For example, St. Agnes Hospital in Baltimore had a residency program in obstetrics and gynecology. That program lost its accreditation, because it refused to perform abortions or teach doctors how to do them.[10] There has been recurring litigation between churches and gay rights organizations, with mixed results. But the opinion in *Smith* is reasonably clear: any well-drafted gay rights ordinance is a facially neutral law of general applicability, and the Free Exercise Clause does not exempt churches or synagogues. These recurring conflicts over sexual morality are the most obvious example of interest group attacks on religious liberty.

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[10] *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

. . . . . The problem of bureaucratic inflexibility is illustrated by one of the saddest cases since *Smith*, a case involving an unauthorized autopsy. The Committee heard about this case yesterday from one of the victims. Several minority religions in America have strong teachings against the mutilation of a human body, and they view autopsies as a form of mutilation. Faith groups with such teachings include many Jews, Navajo Indians, and the Hmong, an immigrant population from Laos. The Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free.

In *You Vang Yang v. Sturner*,[11] a distressed district judge held that *Smith* left him powerless to do anything about an unnecessary autopsy performed on a young Hmong man. The judge movingly describes the deep grief of the victim's family, the obvious emotional pain of the many Hmongs who came to witness the trial, and his own deep regret at being forced to uphold a profound violation of their religious liberty. He describes an autopsy done largely out of medical curiosity, with no suspicion of foul play, with no authorization in Rhode Island law, and without the slightest regard for the family's religious beliefs. But under *Smith*, the state does not need a good reason, or even any reason at all. There simply is no substantive constitutional right to religious liberty any more.

An example of old-fashioned religious prejudice is *Munn v. Algee*,[12] a suit for the wrongful death of Mrs. Elaine Munn. Mrs. Munn was killed in an automobile accident in which the other driver admitted fault. In accord with her Jehovah's Witness faith, Mrs. Munn refused a blood transfusion; the doctors disagreed sharply over whether a transfusion would have done any good. The other driver's insurance company successfully argued that she was responsible for her own death, because she refused the blood transfusion. Citing *Smith*, the

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[11] 750 F. Supp. 558 (D.R.I. 1990).

[12] 924 F.2d 568 (5th Cir. 1991).

court of appeals held that she had no right to refuse a blood transfusion.

Even worse, the insurance company was permitted to attack a wide range of other Jehovah's Witness teachings as unpatriotic, narrow-minded, or strange. The insurance company forced her husband to testify about the Jehovah's Witness belief that Christ returned to earth in 1914, their belief that the world will end at Armageddon and that only Jehovah's Witnesses will be spared destruction, their belief that there is no hell, and their conscientious refusal to serve in the military or salute the flag. This case was tried to a mostly white Mississippi jury at the height of the political controversy over flagburning. The Munn family is black, and the insurance company had successfully excluded all but one of the black jurors. The jury awarded no damages for Mrs. Munn's death, and only token damages for Mr. Munn's injuries and for Mrs. Munn's pain and suffering prior to death.

Astonishingly, the court of appeals upheld the jury's verdict. One judge thought the attack on Jehovah's Witness teachings was relevant and entirely proper. A second judge thought these attacks were so obviously irrelevant that they could not have affected the jury's deliberations. For these wholly inconsistent reasons, the Munns were left with only token compensation. This trial was surely unconstitutional even after *Smith*, but the Supreme Court denied certiorari. The case illustrates the symbolic consequences of *Smith*: there is a widespread impression that religious minorities simply have no constitutional rights any more.

These cases also illustrate another important point. The Munns were black; the Yangs were Hmong. Racial and ethnic minorities are often also religious minorities. The civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice.

Not even mainstream churches can count on sympathetic regulation. Cornerstone Bible Church in Hastings, Minnesota was zoned out of town, left with no place to worship. The

district court upheld the exclusionary zoning, applying *Smith* and equating the zoning rights of churches with the zoning rights of pornographic movie theatres.[13] The court of appeals said that Cornerstone is entitled to a new trial, but that opinion did not solve either Cornerstone's problem or the zoning problems of other churches. The *Cornerstone* case says that cities need only have a rational basis for excluding churches from town; even with clear evidence of discrimination against churches, the court refused to restore the compelling interest test.[14]

Cornerstone's problem with hostile zoning is not unique. Restrictive zoning laws are often enforced with indifference to religious needs and sometimes with outright hostility to the presence of churches. Zoning laws have been invoked to prevent new activities in existing churches and synagogues, to limit the architecture of churches and synagogues, to exclude minority faiths such as Islam and Buddhism, and to prevent churches and synagogues from being built at all in new suburban communities.[15] Most major American religions teach some duty to feed the hungry, clothe the naked, and shelter the homeless, but when a church or synagogue tries to act on such teachings, it is likely to get a complaint from the neighbors and a citation from the zoning board.

Note that in the zoning cases, the problem is not that the church has a doctrinal tenet or moral teaching that directly conflicts with the policy of the law. Rather, the problem is simply that the law restricts the church's ability to carry out its mission. Religious exercise is not free when churches cannot locate in new communities, or when existing churches cannot

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[13] *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654, 663 (D. Minn. 1990).

[14] *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991).

[15] For accounts of these cases, see R. Gustav Niebuhr, *Here Is the Church; As for the People, They're Picketing It*, Wall St. J. Nov. 20, 1991, p. A1, col. 4.

define their own mission. The exercise of religion must be understood to include the churches' management of their own internal affairs and the churches' definition and pursuit of their religious missions.

III. The Dynamic of Interest Group Politics

The Supreme Court says that legislatures may exempt religious exercise from formally neutral laws. If those exemptions must be obtained piecemeal, one statute at a time, they are not a workable means of protecting religious liberty. In every such request for a legislative exemption, churches are likely to find an aroused interest group on the other side, and they will be trying to amend that interest group's statute. These battles can be endless; the fight over student gay rights groups at Georgetown University has so far resulted in ten published judicial orders and two Acts of Congress.[16]

Churches have to win these fights over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissioners, by the city council, and by the administrative agencies at each of those levels. They have to avoid being regulated this year and next year and every year after that. If they lose in any forum in any year, they have lost; their religious practice is subject to regulatory interference. That is not a workable means of protecting religious liberty.

It is important to understand that every religion is at risk. Every church offends some interest group, and many churches offend lots of interest groups. No church is big enough or tough enough to fight them all off, over and over, at every level of government.

The situation is even more hopeless for individual believers with special needs not shared by their whole denomination. Consider the case of Frances Quaring, a

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[16] The judicial and legislative history is summarized in *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990).

Pentecostal Christian who studied the Bible on her own and understood the Commandment against graven images with unusual strictness.[17] Mrs. Quaring would not allow a photograph in her house. She would not allow a television in her house. She removed the labels from her groceries or obliterated the pictures with black markers. For Mrs. Quaring, it was plainly forbidden to carry a photograph on her driver's license. When the legislature required photographs, she could not get a driver's license.

It is impossible for a legislature to know about a believer like Mrs. Quaring and enact an exemption for her. The Mrs. Quarings of the world cannot hire lobbyists to monitor the legislature and protect their religious liberty from any bill that might interfere with their little known belief. The only way to provide for such unforeseeable religious claims is with a general provision guaranteeing free exercise of religion. The Free Exercise Clause was such a provision, but *Smith* says that it is not. The Religious Freedom Restoration Act would restore such a provision to the United States Code.

RFRA would solve the problem of perpetual religious conflict with interest groups and also the problem of religious minorities too small to be heard in the legislature. It would do so by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions. RFRA has a chance to work because it is as universal as the Free Exercise Clause. It treats every religious faith and every government interest equally, with no special favors for any group and no exceptions for any group. That is the only hope to rise above the paralysis of interest group politics and restore protection for religious liberty.

Religious liberty is popular in principle, but in specific applications it quickly gets entangled in other issues. No

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

government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated. Few interest groups admit that they are against religious liberty, but almost every interest group thinks its own agenda is so important that no religious exception can be tolerated. The religious community itself is divided on many issues raised by secular interest groups, and denominations sometimes find it hard to speak out when a bill pits their commitment to religious liberty against their commitment to some other cause. RFRA's across-the-board feature attempts to cut through all this special pleading.

In most of these conflicts between religious liberty and secular interest groups, an exemption for religious liberty does little or no damage to any legitimate secular goals. The interest group that succeeds in enacting a bill gets its way in 95 or 98 or 99.9% of the cases, and the religious exemption creates a small enclave of conscience for religious dissenters. But to get those exemptions statute by statute requires legislative battles that can be enormously divisive and expensive.

Congress is the greatest expert on the legislative process; Congress knows these problems far better than I do. This Committee can find as a fact that specific exemptions enacted one statute at a time are not a workable means of protecting the free exercise of religion.

IV. The Compelling Interest Standard

RFRA would permit religious liberty to be burdened only when that is the least restrictive means to serve a compelling interest. The compelling interest test takes meaning from the Court's earlier cases, and especially from the Congressional purpose in § 2(b)(1) "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." That statement of purpose is important to the bill. It should not be left to legislative history, because the Court is increasingly resistant to even reading legislative history.

Even before *Smith*, the Court had been criticized for excessive deference to governmental agencies. But most deferential decisions were not decided under the compelling interest test at all, either because the Court found no burden on religious exercise,[18] or because the Court created exceptions to the compelling interest test.[19] These cases cast no light on the meaning of the compelling interest test.

It is not every or even most legitimate government interests that are compelling. "Compelling" does not merely mean a "reasonable means of promoting a legitimate public interest."[20] Compelling does not merely mean "important."[21] Rather, "compelling interests" include only those few interests "of the highest order,"[22] or in a similar formulation, "[o]nly the gravest abuses, endangering paramount interests,"[23] The Supreme Court explains "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served,"[24] if "no alternative forms of regulation would combat such abuses,"[25] if the challenged law is "the least restrictive means of achieving" the compelling interest,[26] and if the government pursues its alleged interest uniformly across the full range of

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[18] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986).

[19] *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons).

[20] *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

[21] *Thomas v. Review Board*, 450 U.S. 707, 719 (1981).

[22] *Smith*, 494 U.S. at 888; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

[23] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

[24] *Yoder*, 406 U.S. at 215.

[25] *Sherbert*, 374 U.S. at 407.

[26] *Thomas v. Review Board*, 450 U.S. at 718.

similar conduct.[27] Even *Smith* cautions against watering down the test: "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test."[28]

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, invalidating Wisconsin's compulsory education laws as applied to Amish children.[29] The education of children is important, and the first two years of high school are basic to that interest. But the state's interest in the first two years of high school was not sufficiently compelling to justify a serious burden on free exercise.

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate. But it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualified them from employment.[30]

Moreover, it is not enough for government to point to unconfirmed risks or fears. Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life."[31] The Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they were "doomed to become burdens on society." Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute

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[27] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

[28] 494 U.S. at 888.

[29] 406 U.S. at 219-29.

[30] *Sherbert*, 374 U.S. 398, 406-09 (1963).

[31] 406 U.S. at 224.

unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But the Supreme Court rejected them all for lack of evidence that they were really happening.[32]

The lesson of the Court's cases is that government must show something more compelling than saving money, more compelling than educating Amish children. That is the compelling interest test of *Sherbert* and *Yoder*.

The Supreme Court has found a compelling interest in only three free exercise cases. In each of these cases, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to national survival or to express constitutional norms: national defense,[33] collection of revenue,[34] and racial equality in education.[35]

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text.[36] The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. RFRA makes the exception explicit rather than

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[32] *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

[33] *Gillette v. United States*, 401 U.S. 437 (1971).

[34] *United States v. Lee*, 455 U.S. 252 (1982).

[35] *Bob Jones University v. United States*, 461 U.S. 574 (1983).

[36] Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights* (Book Review), 99 Yale L.J. 1711, 1744-45 (1990).

implicit, but the standard for satisfying the exception should not change.

V. The Competing Bill

H.R. 4040 is an alternative to RFRA. The important difference between the two bills appears in §3(c)(2) of H.R. 4040, which states that the bill would create no cause of action to challenge laws restricting abortion, the use or disposition of public funds or property, or the tax status of any other person. These amendments inject into the bill highly divisive and mostly irrelevant controversies over abortion, public funding of religious institutions, and tax exemptions for religious institutions. These amendments should be rejected. If I had deliberately set out to draft amendments that would prevent the enactment of any bill, I could not have done better than these three amendments.

The principle of RFRA is that it enacts a statutory version of the Free Exercise Clause. Like the Free Exercise Clause itself, RFRA is universal in its scope. It singles out no claims for special advantage or disadvantage. It favors no religious view over any other, and it favors no state interest over any other. It simply enacts a universal standard: burdens on religious exercise must be justified by compelling interests.

Limiting the bill to enactment of the standard is a principled solution to the practical problem of disagreement over particular claims. If we try to resolve every possible religious claim and governmental interest in RFRA, we will be caught up in the same morass of endless political conflict that we will face if RFRA is not enacted. A bill limited to a statement of universal principle is neutral on all possible claims, including claims about abortion, tax exemption, and public funding. It leaves all such claims just where they would be under the Free Exercise Clause if *Smith* had not so greatly reduced protection for religious practice. It leaves each side to make the arguments they would have made if *Smith* had never happened.

H.R. 4040 takes a very different approach. H.R. 4040 says that *Smith* was a good decision insofar as it cut off the last

shred of argument for certain claims that the sponsors of H.R. 4040 do not like. H.R. 4040 says that most religious claims are restored to where they would have been under the Free Exercise Clause, but that three sets of claims are left subject to *Smith*. Whatever the merits of these amendments, they cannot be defended on the ground that they are neutral toward the three excluded sets of claims.

These three amendments are enormously divisive, but the divisions are almost entirely symbolic. Each of the three amendments relates to an issue that has always been litigated and decided under some other clause of the Constitution. The right to abortion has been principally litigated under the Due Process Clause; most challenges to church tax exemption and to public funding for churches have been brought under the Establishment Clause. In each case, free exercise theories have been around for a long time, but the Supreme Court has rejected them.

As the Court has become more and more conservative, challenges to abortion laws, church tax exemptions, and public funding for religious agencies have gotten an increasingly hostile reception under any clause. The litigants who bring these challenges are increasingly desperate, they are experimenting with alternative legal theories, and they are unwilling to give up on any theory, however long its odds of success. But the reality is that changing the legal theory in their pleadings is not going to make the Court any more receptive to their claims. With or without *Smith*, putting a free exercise label on a warmed over abortion claim or Establishment Clause claim is quite unlikely to make any difference.

The tax exemption issues are largely resolved by cases already decided; the public funding issues will continue to be litigated under the Establishment Clause with or without RFRA; and abortion is being fought out in pending litigation and in legislative debate over the pending Freedom of Choice Act. If

the Court overrules *Roe v. Wade*,[37] it will be because of a fundamental jurisprudential judgment that the abortion issue is not appropriately resolved by judges -- that "the answers to most of the cruel questions posed are political and not juridical."[38]

A. Abortion

With respect to abortion, parts of the pro-choice movement have persistently asserted that restrictions on abortion violate the religion clauses of the First Amendment. Of course these arguments are of limited significance so long as there is a general right to abortion under *Roe v. Wade*. But the sponsors of H.R. 4040 fear that the Court might overrule *Roe*, and then re-create abortion rights as a matter of free exercise under the Religious Freedom Restoration Act. For several reasons, I believe that these fears are groundless.

First, religion clause objections to restrictions on abortion are not new. They were presented to the Supreme Court in *Harris v. McRae*.[39] The Court rejected the claim that abortion laws that coincide with religious teachings violate the Establishment Clause. It also held that no plaintiff in that case had standing to assert a free exercise claim, because no plaintiff alleged that her religious beliefs compelled or motivated her desire for an abortion. The Court also held that a free exercise claim to abortion would depend on the religious beliefs of individual women, and that such a claim could not be asserted by an organization.

In the twelve years since *Harris*, there has been no judicial movement toward a free exercise right to publicly funded abortions. If free exercise were a viable route for evading decisions upholding restrictions on abortion, someone should have come forward with plaintiffs who could satisfy the

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[37] 410 U.S. 113 (1973).

[38] *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

[39] 448 U.S. 297, 318-21 (1980).

standing requirements laid down in *Harris*. Even though *Harris* does not formally resolve the free exercise issue, it has effectively resolved the larger issue: the Court does not recognize any constitutional right to public funding for abortions. A decision overruling *Roe* would just as effectively resolve the larger issue of any right to abortion.

The standing rule in *Harris* is also a major victory for pro-life forces and a serious obstacle to pro-choice forces. The rule that organizations lack standing to bring free exercise claims would logically apply to RFRA claims, and it would preclude broad-based RFRA challenges to abortion laws. Any RFRA challenge would have to proceed one woman at a time, with judicial examination of her individual beliefs.

Second, a decision overruling *Roe* would almost certainly preclude a right to abortion under the Free Exercise Clause or the Religious Freedom Restoration Act. *Roe* will be overruled on the ground that government may assert a compelling interest in protecting unborn life; five justices have already said that the state's interest in unborn life is compelling from the beginning of pregnancy.[40] If the state's interest in protecting unborn life is compelling under the Due Process Clause, I believe that interest will be equally compelling under the Religious Freedom Restoration Act. Thus, even if the Court were to hold that abortion can sometimes be religious exercise, the states' compelling interest would override that right.

It makes no difference if the Court says that the Constitution simply does not protect the right to choose abortion, thus distinguishing abortion from other constitutionally

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[40] *Webster*, 492 U.S. at 519 ("the State's interest, if compelling after viability, is equally compelling before viability") (plurality opinion of Justices Rehnquist, White, and Kennedy); *id.* at 532 (this part of the plurality opinion "would effectively overrule *Roe*," and I "would do it more explicitly") (Scalia, J., concurring); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'") (O'Connor, J., concurring).

protected choices about family, reproduction, or bodily integrity. The basis for such a distinction could not be that abortion has nothing to do with reproduction or bodily integrity. Rather, the only plausible reason for distinction is that the state's interest in unborn life changes everything.

It has been suggested that the Court might read the Religious Freedom Restoration Act as codifying *Roe*'s rule that the interest in unborn life is not compelling, on the ground that was the law at the time Congress acted. This outcome is implausible as well. The bill takes no position on whether any particular government interest is compelling. This silence is appropriate; Congress should not attempt to resolve particular controversies in a bill about religious exercise generally.

If Congress is going to codify anything about abortion, it will be in the Freedom of Choice Act. The Court knows full well that Congress is divided over abortion just as the American people are divided. It would be absurd to read a statute that never mentions abortion as somehow codifying the law of abortion. That RFRA has both pro-life and pro-choice sponsors would make it even more absurd. A bill supported by a broad range of pro-life groups cannot sensibly be read as creating a right to abortion.

If I were a pro-life Representative, I would turn out the largest possible pro-life vote for RFRA, and the largest possible pro-life vote against the Freedom of Choice Act, and in that way I would unambiguously make the record that the two bills are very different -- that one takes a position on abortion and the other does not. And in working to turn out the pro-life vote on RFRA, I would emphasize one simple point: *St. Agnes Hospital* is a real case.[41] Pro-life doctors and nurses and even whole hospitals are being forced out of OB-GYN. That is real, and RFRA would protect those people. Successful abortion claims under RFRA are imaginary. They are a theoretical possibility

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[41] *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

that depends on an extraordinarily unlikely combination of circumstances.

Pro-life Representatives must also understand that not all resistance to these amendments comes from the pro-choice side. Agudath Israel, the Orthodox Jewish group that has been an active part of the pro-life movement, insists that Jewish teaching mandates abortion in certainly narrowly defined and exceptional cases. Any state prohibitions of abortion likely to be enacted will have exceptions for the cases that matter to Agudath Israel; they do not expect to rely on RFRA. But neither can they accept Christian coalition partners dismissing their sincere religious teachings as officially unworthy of respect. Their loyal support for the pro-life movement, over the objection of most other Jewish organizations, entitles them to consideration in return from pro-life Representatives. Their counsel has done a careful analysis identifying other ways in which the three amendments might be counterproductive even to their intended purposes, and I commend that analysis to the Committee.

Even though I believe that there is little merit to claims of a free exercise right to abortion, there are pro-choice groups supporting the bill. They cannot be forced to accept language precluding their argument, any more than they can force pro-life groups to accept language precluding pro-life arguments. The way for the bill to be abortion-neutral is not to mention abortion at all. The legislative history should simply say: 1) that the pro-life side can make its arguments that no abortions are religiously motivated, and that in a post-*Roe* world, protecting unborn life is obviously a compelling interest; 2) that the pro-choice side can make its arguments that at least some abortions are religiously motivated, and that protection of potential life is not a compelling interest; and 3) that Congress has merely enacted the standard for decision and has not codified either set of answers. I have no doubt who will win those arguments in a post-*Roe* world. But neither side should be able to say that Congress codified its position. The bill as drafted is abortion neutral, and I urge you to keep it that way.

B. Tax Exemption

With respect to tax exemption, the law is relatively settled. Religious organizations cannot be given tax exemptions

exclusively for religion, but they can be included in broader tax-exempt categories, such as the religious, charitable, scientific, and educational organizations mentioned in the Internal Revenue Code.[42]

With respect to any particular organization's eligibility for a tax exemption, I think it a safe generalization from the cases that no plaintiff has standing to litigate the tax liability of another taxpayer.[43] Cases challenging tax exemptions of churches, schools, and hospitals have had multiple plaintiffs with resourceful lawyers; if none of them could find a plaintiff with standing, I do not think it can be done. The Second Circuit's opinion in *U.S. Catholic Conference* holds out the possibility of an exception some day,[44] but that theoretical possibility would not be a free exercise exception and it is not relevant to RFRA. The *U.S. Catholic Conference* litigation imposed an enormous burden on the Catholic Church; Dean Gaffney and I filed an amicus brief supporting the Church; and I fully support the Church's desire never to repeat that experience. But the fact is that the Church won, and there is no need to refight that war. The opinions that so burdened the Church in that litigation relied on the Establishment Clause and the Equal Protection Clause; no court at any stage of that litigation relied on the Free Exercise Clause. RFRA would not be a basis for litigation over tax exemptions.

C. Public Funding

Challenges to public funding of religious institutions have always been litigated under the Establishment Clause. The Establishment Clause directly addresses that issue, and the Court has created a special standing rule for Establishment Clause claims to facilitate that litigation.[45] An occasional litigant has

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[42] *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

[43] *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989).

[44] 885 F.2d at 1031.

[45] *Flast v. Cohen*, 392 U.S. 83 (1968).

asserted in the alternative that such expenditures also violate the Free Exercise Clause, and the Supreme Court has twice summarily rejected those claims.[46] The Court considered an analogous claim at greater length in *United States v. Lee*, and held unanimously that the Free Exercise Clause gives taxpayers no right "to challenge the tax system because tax payments were spent in a manner that violates their religious belief," and that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[47] This conclusion was based on the compelling interest test, the same defense that is written into RFRA.

The argument for a public funding amendment is therefore even more bizarre than the argument for an abortion amendment. The Court has repeatedly limited public funding to religious bodies under the Establishment Clause; it has squarely rejected Free Exercise complaints about the expenditure of tax funds to support religion or any other program to which a taxpayer has religious objections. The fear is that the Court will change its mind -- on both issues -- in opposite directions. Maybe the Court will overrule its Establishment Clause cases and permit more public funding for religious bodies, and also overrule its Free Exercise cases and say that RFRA forbids the public funding that the Court just permitted under the Establishment Clause. It is hard to imagine a less plausible pair of doctrinal developments.

D. The Establishment Clause Proviso

There is one other difference between the two bills. H.R. 4040 has no equivalent to RFRA's § 7, which provides that nothing in the bill "shall be construed to affect, interpret, or in any way address" the Establishment Clause. The reason for this proviso is the same as the reason for not saying anything about particular free exercise claims. The supporters of the bill agree on the principle of free exercise, but disagree on particular applications, and disagree even about the basic principle of the Establishment Clause. Those disputed issues are carefully

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[46] *Tilton v. Richardson*, 403 U.S. 672, 689 (1971); *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968).

[47] 455 U.S. 252, 260 (1982).

excluded from a bill designed simply to enact the one fundamental principle on which nearly everyone agrees.

All sides to Establishment Clause disputes can continue to argue their position. Those so inclined can continue to argue that the Establishment Clause is merely a redundant appendage to the Free Exercise Clause. This bill does not reject that argument any more than it rejects the argument of strict separationists. This bill is quite explicit; it says nothing about the Establishment Clause.

The fear that this proviso will codify current interpretations of the Establishment Clause borders on the irrational. That is plainly not what § 7 says; a bill cannot codify something that it neither affects, interprets, or addresses. The key verbs were drafted by Mark Chopko, who is now opposing the bill. When it became publicly known that Mark had drafted this language, he wrote me that the real problem was with the object of the verbs: with the phrase "that portion of the First Amendment prohibiting laws respecting the establishment of religion."

I cannot imagine that it makes any difference how the bill refers to a clause that it is not affecting or addressing. But if it would help pass the bill, I think the Committee should be willing to accept any plausible means of referring to the Establishment Clause. I have suggested that the reference be put in quotation marks, amending § 7 to read:

> Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment that reads: "Congress shall make no law respecting the establishment of religion."

VI. Congressional Power

Congress has power to enact this bill under section 5 of the Fourteenth Amendment. Repeated majorities of the Supreme Court have upheld analogous exercises of Congressional power to enforce the reconstruction amendments. I have reviewed the cases interpreting section 5 in some detail in the record of last

year's hearings, and I refer the Committee to that analysis.[48] I summarize the most important points again here.

Section 5 gives with respect to the Fourteenth Amendment "the same broad powers expressed in the Necessary and Proper Clause" with respect to Article I.[49] Power to enforce the Fourteenth Amendment includes power to enforce the Free Exercise Clause and other provisions of the bill of rights that are applied to the states through the Fourteenth Amendment. Congress has enacted other legislation to enforce the provisions of the bill of rights, most obviously in 42 U.S.C. §§ 1983 and 1988, and these provisions have been used to enforce the First, Fourth, Fifth, and Eighth Amendments, as incorporated through the Fourteenth, in thousands of cases. The Supreme Court has routinely decided these cases, usually without noting the source of Congressional power. It did note the source of Congressional power in *Hutto v. Finney*,[50] an Eighth Amendment case in which the Court relied on Congress's section 5 power to override state sovereign immunity.

The express Congressional power to "enforce" the amendment is independent of the judicial power to adjudicate cases and controversies arising under it. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."[51] Thus, Congress may sometimes provide statutory protection for constitutional values that the Supreme Court is unwilling or unable to protect on its own authority. The Court agreed unanimously on that point in *Metro Broadcasting, Inc. v. FCC*.[52]

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[48] *Religious Freedom Restoration Act of 1990*, Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary 72 (Serial No. 150; Sept. 27, 1990).

[49] *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

[50] 437 U.S. 678, 693-99 (1978).

[51] *Katzenbach*, 384 U.S. at 659.

[52] 110 S. Ct. 2997 (1990).

The most familiar illustration of this power is the various Voting Rights Acts, in which Congress has forbidden discriminatory practices that the Supreme Court had been prepared to tolerate. Similarly, much of the law of private racial discrimination depends on Congress's analogous powers under section 2 of the Thirteenth Amendment.

RFRA is well within the three limits on section 5 power. First, Congress may not "restrict, abrogate, or dilute" the protections of the bill of rights in the guise of enforcing them.[53] Second, section 5 does not necessarily override other express allocations of power in the Constitution.[54] Third, Congress may not assert its section 5 powers as a sham to achieve ends unrelated to the Fourteenth Amendment. That is, Congress may not act under section 5 where neither Congress nor the Court believes that a constitutional right is at stake. "Congress may act only where a violation lurks."[55]

The Religious Freedom Restoration Act does not run afoul of these limitations. First, there is no plausible claim that the Act would violate the Court's interpretation of the Free Exercise Clause or any other right incorporated into the Fourteenth Amendment. *Smith* reaffirms that legislative exemptions to protect religious exercise are "expected . . . permitted, and even . . . desirable."[56] The Court unanimously rejected an Establishment Clause challenge to legislative exemptions in *Corporation of the Presiding Bishop v. Amos*.[57]

Second, the Act would not interfere with any other express allocation of power in the Constitution. The federal Constitution does not recognize or preserve any specific state

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[53] *Katzenbach*, 384 U.S. at 651 n.10.

[54] *Oregon v. Mitchell*, 400 U.S. 112, 124-31, 154-213, 293-96 (1971) (three opinions joined by Justices Black, Harlan, Stewart, Burger, and Blackmun).

[55] *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (1983) (dissenting opinion of Burger, Powell, Rehnquist, and O'Connor).

[56] 494 U.S. at 890.

[57] 483 U.S. 327 (1987).

power to regulate religion. The state regulatory powers that would be affected by the proposed Act are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

Third, the Act does not assert Fourteenth Amendment power where there is no plausible Fourteenth Amendment claim. For some members of Congress, this is a critical distinction between RFRA and the proposed Freedom of Choice Act. If you believe that the Constitution properly interpreted protects a woman's right to choose abortion, then both RFRA and the Freedom of Choice Act are within Congressional power under section 5. But if you believe that the Constitution properly interpreted simply says nothing about abortion, or that the Constitution protects the unborn child's right to life, then you believe that there is no Fourteenth Amendment violation lurking for Congress to address in the Freedom of Choice Act. Thus, pro-life Congressmen can with complete intellectual consistency support the Religious Freedom Restoration Act and oppose the Freedom of Choice Act on constitutional grounds.

There *is* a constitutional violation to be remedied by the Religious Freedom Restoration Act. RFRA would enforce the constitutional rule against laws prohibiting the free exercise of religion. Congress can act on the premise that the exercise of religion includes religiously motivated conduct. Even the Supreme Court recognizes that much. The Court interprets the Constitution of its own force to protect religiously motivated acts from regulation that discriminates against religion and from regulation motivated by hostility to religion in general or to a particular religion. "[T]he exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts."[58]

From the perspective of a believer whose religious exercise has been prohibited, it makes little difference whether the prohibition is found in a discriminatory law or in a neutral law of general applicability. Either way, he must abandon his faith or risk imprisonment and persecution. Either way, it is

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[58] *Smith*, 494 U.S. at 877.

undeniably true that his religious exercise has been prohibited. RFRA would protect the right to free exercise against inadvertent, insensitive, and incidental prohibitions as well as against discriminatory and hostile prohibitions.

Thus RFRA parallels important provisions of the Voting Rights Acts under section 5. The Supreme Court construed the constitutional protection for minority voting rights to require proof of overt discrimination or racial motive on the part of government officials. Congress dispensed with the requirements of overt discrimination or motive, and required state and local governments to justify laws that burden minority voting rights. Similarly here, the Court requires proof of overt discrimination or anti-religious motive to make out a free exercise violation; RFRA would dispense with those requirements and require government to justify any burden on religious practice. RFRA is within the scope of Congressional power under section 5 for the same reasons that the Voting Rights Acts are within the scope of Congressional power.

This Committee can find as a fact that judicial review of legislative motive is an insufficient protection against religious persecution by means of formally neutral laws. Legislative motive is often unknowable. Legislatures may be wholly indifferent to the needs of a minority faith, and yet not reveal overt legislative hostility. When a religious minority opposes a bill, or seeks an exemption on the ground that a bill requires immoral conduct, it is hard to distinguish religious hostility from political conflict. Even when there is clear religious hostility, courts are reluctant to impute bad motives to legislators. Religious minorities are no safer than racial minorities if their rights depend on persuading a federal judge to condemn the government's motives.

In the Voting Rights Acts, Congress found that facially neutral laws could be used to deprive minorities of the right to vote or to dilute their vote, and that legislative motives were easily hidden so that proof of discriminatory motive was not a workable means of protecting minority voting rights. Similarly here, Congress can find that facially neutral laws are readily used to suppress religious practice, that at times such laws have been instruments of active religious persecution, that proof of

anti-religious motive is not a workable means of protecting religious liberty, and that legislating individual exemptions in every statute at every level of government is not a workable means of protecting religious liberty.

The Supreme Court's reason for not requiring government to justify all burdens on religious practice is institutional. The opinion in *Smith* is quite clear that the Court does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which *judges* weigh the social importance of all laws against the centrality of all religious beliefs."[59] To say that an exemption for religious exercise "is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned *by the courts*."[60]

These institutional concerns do not apply to the Religious Freedom Restoration Act. Congress, rather than the Court, will make the decision that religious exercise should sometimes be exempted from generally applicable laws. And Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of that decision.

Of course the courts would apply the compelling interest test under the Act, and these decisions would require courts to balance the importance of government policies against the burden on religious exercise. But striking this balance in the enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.

Thus, the Act would protect the religious exercise that the Court felt unable to protect on its own authority, and the Act would solve the institutional problem that inhibited the Court from acting independently. The difficulties the Court identified in *Smith* are a perfect illustration of why there is need for

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[59] 494 U.S. at 890 (emphasis added); *see also id.* at 889 n.5.

[60] *Id.* at 890 (emphasis added).

independent power to enforce the bill of rights in both the judiciary and the Congress.

By creating judicially enforceable statutory rights, Congress can call on the powers of the judiciary that the Court feared to invoke on its own. Because the rights created would be statutory, Congress can retain a voice that it could not have retained if the Court had acted on its own. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress can reduce the danger that it will not respond to the needs of small faiths. If Court and Congress cooperate in this way, then the oppression of small faiths need not be, as the Court feared, "an inevitable consequence of democratic government."[61] One function of section 5 of the Fourteenth Amendment is to provide for just such interbranch cooperation.

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[61] *Id.* at 890.