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DRAFT - condensed parts of book chapters

## **Religion and Justice: Why Popular Legal Approaches Fail**

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Law is the art of governing the human world. The poetry of law is the motive for solving problems, the sacred stir toward justice, our priceless discontent at the remoteness of perfect law.

Many have asked, “What is justice?” No answer, in words, has the ring of true coin. [W]e might ask instead, “*What is injustice?*” The natural law tradition ... has at least tried to keep the poetry of law alive.

CHARLES L. BLACK, JR., THE HUMANE IMAGINATION<sup>2</sup>

### **I. A Statement of the Problem**

For better or worse, religion has always been a powerful force in human history. For many people in today’s world, religion provides an intrinsic and indispensable part of identity, and the most profound meaning possible for human life. In American history, religion has been the source of moral courage and passion for social change, from the anti-slavery campaigns of the eighteenth and nineteenth centuries to the Civil Rights movement of the 1960s. As historian Henry May has observed, true religious skepticism in the United States has been largely confined to small groups of intellectuals; emotionally fervent and often theologically conservative religion

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<sup>2</sup>CHARLES L. BLACK, JR., THE HUMANE IMAGINATION 48, 52 (1986) (emphasis in original).

has always been very prevalent and very powerful.<sup>3</sup> Even if identification with conventional religious institutions has declined in recent decades, the percentage of Americans who consider themselves to be “religious” or “spiritual” has remained remarkably constant.<sup>4</sup>

At the same time, there is no doubt that religion has “sanctified many cruelties.”<sup>5</sup> The common beliefs that religion is the source of ultimate and incontrovertible truth, and that religious imperatives must be superior to secular authority, have led to the persecution of nonbelievers and a threatened anarchical attitude toward secular law. It has often been observed that although many colonists arrived on North American shores to pursue religious freedom, rarely did they extend that concept to others. The result was religious oppression and persecution in virtually all of the American colonies.<sup>6</sup> Dissenters were banished from their homes, prohibited from occupying public office, and imprisoned for repeated denials of what was regarded as the true faith.<sup>7</sup> Struggles against colonial (and later state) establishments were not easy; many dissenters suffered when their beliefs were made known, and some paid the ultimate penalty.<sup>8</sup> After the adoption of the federal constitution and its amendments, the acceptability of overt oppression on the basis of

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<sup>3</sup>HENRY F. MAY, *IDEAS, FAITHS AND FEELINGS: ESSAYS ON AMERICAN INTELLECTUAL AND RELIGIOUS HISTORY 1952-1982*, 136 (1983).

<sup>4</sup>*See, e.g.*, Pew Research Center, *Religious Landscape Study* (2019) (in a survey of 30,071 adults in the U.S., only 11% stated that religion was ‘not at all important’ in their lives). [web address]

<sup>5</sup>WILLIAM L. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 218, 347 (1986).

<sup>6</sup>*See* SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 68-71 (1902); THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* *passim* (1986); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 42-45 (1985); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 71-90 (1967); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WILLIAM & MARY L. REV. 837, 879-91, 919-92 (1995).

<sup>7</sup>*See* Underkuffler-Freund, note 6 *supra*, at 880-91.

<sup>8</sup>*See id.*

religious identity gradually faded. However, this does not mean that religion has ceased to play a strident and often uncompromising role in the enforcement of its norms in American life.

The response of American government to religion's complexities has been divided, reflecting the nature of religion itself. On the one hand, religion is celebrated as a legal and cultural matter as something that is – beyond question – of ultimate human value and entitled to paramount protection from government. On the other hand, knowledge of religion's absolutist roots and assertions of superiority over secular authority have compelled government to struggle to find ways to restrain religious actions and their challenges to the governmental order.

This struggle is not new. In the American Founding Era, declarations by enlightened statesmen about the sanctity of free religious exercise in the manner that conscience dictates<sup>9</sup> were tempered with concerns that freedom for religiously based actions could not be absolute.<sup>10</sup> For instance, there was often general endorsement of the immunity of religion from civil jurisdiction as long as it “does not trespass on private rights or the public peace.”<sup>11</sup> “Laws of morality,”<sup>12</sup> the

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<sup>9</sup>For instance, in his famous *Memorial and Remonstrance Against Religious Assessments*, James Madison wrote that “the equal right of every citizen to the free exercise of his Religion” is held “by the same tenure” as other rights. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PUBLISHED 183, 190 (Gaillard Hunt ed., 1906). “If ... all men are to be considered as entering into Society on equal conditions,” then “[a]bove all are they to be considered as retaining an ‘equal title to the free exercise of Religion according to the dictates of conscience.’” *Id.* at 186 (emphasis in original). A memorial drafted by a committee of the First Continental Congress stated that “the kingdom of Christ is not of this world, and religion is a concern between God and the soul with which no human authority can intermeddle ...”. Samuel Davis, et. al., *Memorial*, quoted in ALVAH HOVEY, A MEMOIR OF THE LIFE AND TIMES OF THE REV. ISAAC BACKUS 204-05 (1858). For additional discussion of the expression of this sentiment in this era, see Underkuffler-Freund, *supra* note 6, at 891-907, 919-23.

<sup>10</sup>See Underkuffler-Freund, *supra* note 6, at 923-29.

<sup>11</sup>Letter from James Madison to Edward Livingston (July 10, 1822), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 273, 274 (1867).

<sup>12</sup>See MD. CONST. OF 1776, A Declaration of Rights, Etc., XXXIII, in 3 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING

rights of others,<sup>13</sup> and the requirement of general social well being<sup>14</sup> were often cited as the ultimate restraints on religious conduct. How these sweeping limits and religious privilege would intermesh in practice received only perfunctory discussion. Often it was simply urged that there must be trust, in a free society, that reason would prevail.<sup>15</sup>

During subsequent years in American history, tension between belief in the privileged status of religion and belief in the need for its restraint periodically waxed and waned. Two factors have been of particular importance over time: religion's involvement in divisive social issues, and the public prominence of what were perceived to be unusual, "dangerous," or otherwise "non-mainstream" religious groups. In the late twentieth and early twenty-first centuries, broad popular assumptions about religion's privilege have collided with public unease over religiously based anti-abortion and anti-gay-rights activities; religious ceremonial demands for illegal drug use; the perceived aberrant lifestyles and anti-government attitudes of splinter Christian groups such as the Branch Dividians and Sage Brush Rebellion activists; and popular fears of links between international terrorist groups and Muslims living in the United States.

In the academy and in the courts, tensions of these kinds have led to attempts to rethink the approach that should be taken to "religious exceptionalism": that is, the idea that religious beliefs and their expression occupy a particularly privileged and protected status in American law. In the discussion that follows, I will set forth the most prominent reconciliation schemes that have influenced American law over the past five decades. I shall argue that these attempts have largely failed to achieve lasting coherence because of their failure to account for the deeper, conflicting impulses involved. They have also failed to account for our halting but foundational sense of a need for justice.

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THE UNITED STATES OF AMERICA 1686, 1689 (1909).

<sup>13</sup>See Letter from James Madison to Edward Livingston, *supra* note 11; MASS. CONST. OF 1780, pt. 1, art. II, in 3 THORPE, *supra* note 12, at 1888, 1889.

<sup>14</sup>See CURRY, *supra* note 6, at 162 (quoting John Jay).

<sup>15</sup>See, e.g., Letter from James Madison to the Rev. Adams (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 9, at 484, 487.

## II. Religious Exceptionalism: Judicial and Legislative Reconciliation Schemes

### a. The Traditional Supreme Court Approach

The United States Supreme Court's attempts to reconcile religious privilege and secular law are hardly the only influential understandings in the field; they are far from it. However, their basic contours have both captured and influenced popular understandings, and therefore are a useful place to begin.

In Supreme Court jurisprudence, the idea of religious exceptionalism finds its presumed textual root in the First Amendment to the United States Constitution. This declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... ." <sup>16</sup> The second or "free exercise" clause is that which is argued to privilege religious beliefs and practices over the demands of secular law.

When one attempts to articulate the doctrinal boundaries of religious privilege, a threshold question immediately arises. What is "religion" in this context? The Court's definition of religion has undergone a process of evolution over the years. In the early cases, the Court defined religion in traditional theistic terms – it was "one's views of his relations to his Creator" <sup>17</sup> or a "belief in a relation to God involving duties superior to those arising from any human relation." <sup>18</sup> Not until *Torcaso v. Watkins*, <sup>19</sup> decided in 1961, did the Court extend recognition to nontheistic religions as well. <sup>20</sup> Later, in the context of statutory interpretation, the Court refined its definition of nontheistic religious belief to be one that is "sincere and meaningful" and "occupies in the life

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<sup>16</sup>U.S. CONST. amend. I.

<sup>17</sup>*See* Davis v. Beason, 133 U.S. 333, 342 (1890).

<sup>18</sup>*United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

<sup>19</sup>367 U.S. 488 (1961).

<sup>20</sup>*Id.* at 495 n.11 ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.").

of its possessor a place parallel to that filled by ... God.”<sup>21</sup> In an attempt to further limit religious claims, the Court has consistently insisted that religious belief is more than philosophic conviction.<sup>22</sup> However, to date, the court has not explained just how religious beliefs differ from philosophical ones.

Attempts to define religion are complicated by the Court’s bedrock assertion that the nature of asserted religious belief and the question of an individual’s adherence to that belief must be left to the individual believer’s determination, without interference or second-guessing by courts.<sup>23</sup> In a famous passage, the Court declared that the boundaries of religious belief are subjective, understood and defined by the individual adherent alone. “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others” in order to merit legal protection.<sup>24</sup> “Religious experiences which are as real as life to some may be incomprehensible to

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<sup>21</sup>United States v. Seeger, 380 U.S. 163, 176 (1965).

<sup>22</sup>See Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

<sup>23</sup>Indeed, it has been suggested that judicial formulation of a definition of religion might itself violate Establishment Clause guarantees. See United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment) (for the legislature or the courts to be in “the business of evaluating the relative merits of differing religious claims,” with “governmental approval of some and disapproval of others[,] will be perceived as favoring one religion over another[, a] ... risk the Establishment Clause was designed to preclude”); Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting) (“Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the ‘religion’ which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid.”).

<sup>24</sup>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (quoting Thomas v. Review Bd., 450 U.S. 707, 714 (1981)). See also Emp’t Div., Dep’t. of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.”).

Oddly, the Court has sometimes violated this professed reluctance to “evaluate” religious sects when it comes to endorsing particular sects’ lifestyles or attributes. Most famously, the Court effusively praised the Amish religion and culture in the course of granting the Amish an exemption from compulsory education laws. “Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish ... have convincingly demonstrated the sincerity of their religious

others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”<sup>25</sup>

Obviously, the question of the boundaries of cognizable “religious faith” is particularly crucial when the question of religious exemption from secular norms is considered. However, despite some lower court attempts to set boundaries,<sup>26</sup> the Supreme Court – to date – has refused to do so. In a recent case,<sup>27</sup> the Court was presented with professed followers of the religion of Summum, who held highly unorthodox beliefs.<sup>28</sup> The Court assumed (without discussion) that this was a legally cognizable religious organization, and that the beliefs asserted by its followers were bona fide.<sup>29</sup> Another recent case involved claims of religious privilege asserted by state prisoners who claimed to be believers in the Church of Jesus Christ Christian, a white supremacist organization; followers of Asatru, a polytheistic religion with claimed Northern European origins; Satanism; and witchcraft.<sup>30</sup> To avoid the religious-assessment problem, the state defendants

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beliefs ... [and] the vital role that belief ... play[s] in [their] ... continued survival ... .” *Yoder*, 406 U.S. at 235. Justice Douglas, in dissent, observed that “the emphasis of the Court on the ‘law and order’ record of this Amish group of people is quite irrelevant.” *Id.* at 246 (Douglas, J., dissenting in part).

<sup>25</sup>*United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (citations omitted).

<sup>26</sup>For instance, a lower federal court opined that constitutional protection does not extend to “so-called religions that tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.” *Therault v. Carlson*, 495 F.2d 390, 395 (5<sup>th</sup> Cir.), cert. denied, 419 U.S. 1003 (1974). The closest that the Supreme Court has come is an off-hand comment that a particular claimant’s religious claims “‘cannot be deemed bizarre or incredible.’” *Church of the Lukumi*, 508 U.S. at 531-32 (quoting *Frazee v. Illinois Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 n.2 (1989)). If a belief need not be “comprehensible to others,” one wonders what “bizarre or incredible” might be.

<sup>27</sup>*Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

<sup>28</sup>These included inspiration from other-worldly beings, the critical role of a fermented sacramental nectar, the mummification of remains, and the preparation of a sexual ointment called Mehr. See [www.summum.us/about/welcome.shtml](http://www.summum.us/about/welcome.shtml) (accessed \_\_\_\_\_).

<sup>29</sup>See *Summum*, 555 U.S. at 460.

<sup>30</sup>*Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

stipulated that the claimants were members of bona fide religions and that they were sincere in their beliefs – conclusions that the Supreme Court simply adopted without comment.<sup>31</sup> As the Court most recently declared, “it is not for us to say that ... religious beliefs are mistaken or insubstantial.”<sup>32</sup>

Skipping over this problem, and assuming that a cognizable “religious” status is established, the Court for many years articulated a particular doctrinal approach for determining when religious claims to exemption from secular law should be granted. Under this test – established as a matter of federal constitutional law – religious belief receives absolute protection,<sup>33</sup> while freedom to act (in accordance with that belief) does not.<sup>34</sup> Freedom to act is protected only if it is required by a central religious belief; is substantially burdened by the government action; and is not outweighed by a compelling state interest.<sup>35</sup>

The distinction between belief and action seems straightforward. Belief is what occurs in

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<sup>31</sup>*See id.* at 713.

<sup>32</sup>*Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2779 (2014). The farthest that the Court has gone in this inquiry is whether the religious claim “reflects an honest conviction.” *See id.* at 2779. *Cf. Davila v. Gladden*, 777 F.3d 1198, 1204 (11<sup>th</sup> Cir. 2015) (“[W]e look only to see whether ‘the claimant is ... seeking to perpetuate a fraud on the court – whether he actually holds the beliefs he claims to hold.’”) (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10<sup>th</sup> Cir. 2014)).

<sup>33</sup>*See, e.g., Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such ... . Government may neither compel affirmation of a religious belief, ... nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities ... .”).

<sup>34</sup>*See, e.g., Sherbert*, 374 U.S. at 403; *Braunfeld v. Brown*, 366 U.S. 599, 603-05 (1961). Occasionally, the United States Supreme Court – in a particularly ardent endorsement of religious freedom – has made statements that seem to endorse absolute protection for religiously based action as well. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963) (The Constitution’s Free Exercise Clause “withdraws from legislative power, state and federal, the exertion of *any restraint* on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting *any invasions* thereof by civil authority.”) (emphasis added). Of course, a moment’s reflection requires the conclusion that this cannot be the case.

<sup>35</sup>*See, e.g., Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *Thomas*, 450 U.S. at 717-19; *Yoder*, 406 U.S. at 220-21.



one's mind; action is what is done. There have been times, however, when this dichotomy has been tested. For instance, the distinction between belief and action assumes an analytical and actual separation that might characterize some mainstream religious faiths, but is clearly rejected by others.<sup>36</sup> Since – under the Court's principles – the nature of religious belief must be left to the adherent, the existence of an enforceable boundary between religious belief and action has been contested by some religious groups. There is also the difficult question of when "action" can be characterized as a "declaration of belief." Faced with such issues, the Court has found virtually all religious claims to involve "action"<sup>37</sup> – even when the issue was the status of an individual as a leader of a religious group.<sup>38</sup>

With "belief" playing little practical role, it was "action" that became the battleground for religious privilege claims. Because – as noted above – religious claimants were effectively free to define the content of their religious beliefs, and the extent of their conflicts with secular norms,<sup>39</sup>

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<sup>36</sup>See, e.g., *State v. Sports & Health Club Inc.*, 370 N.W.2d 844, 859-62 (Minn. 1985) (Peterson, J., dissenting) (discussing evangelical Christian views of religious beliefs and secular life), dismissed for lack of juris., 478 U.S. 1015 (1986); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 364 n.81 (1980) (observing that Jehovah's Witnesses and Jews, among others, see a broad role for religious beliefs in areas of life often considered to be secular).

<sup>37</sup>See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 109-10 (1943) (holding that distribution of religious literature was "action," even though "[t]his form of religious activity occupies the same high estate ... as ... preaching from the pulpits"); *Cantwell v. Connecticut*, 310 U.S. 296, 303-07 (1940) (holding that delivery of the religious message by Jehovah's Witnesses in house-to-house canvassing was religious "action" subject to compelling state interests). The problem of course, is that religious belief is arguably worth little if it cannot be expressed.

<sup>38</sup>See *McDaniel v. Paty*, 435 U.S. 618, 626-27 (1978) (plurality opinion) (holding that an individual's status as a "minister" or "priest" should be treated as "action," not freedom to believe). In the history of the Court's adjudication of constitutionally based free-exercise claims, only once has the Court characterized a case as involving belief only; that was one in which the holding of public office required the taking of a religious oath. See *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>39</sup>See text at notes 23-25, *supra*. *United States v. Lee*, decided four decades ago, includes a typical statement. "Although the Government does not challenge the sincerity of [the appellee's religious] belief, the Government does contend that payment of social security taxes will not threaten the integrity of the [appellee's] ... religious beliefs or observance. It is not

the first two prongs of the Court's free-exercise doctrinal test were almost never of importance. Only very rarely did the Court question whether a claimed religious exercise was "required by a central religious belief," or was "substantially burdened" by the complained-of law.<sup>40</sup> Attention was focused on the final part of the inquiry: whether there was a compelling governmental interest which trumped the religious claim.

This question was, of course, the true intellectual crux of the matter. Religious claims, however important to the adherent and however much impaired by government, must yield – at some point – to secular state concerns. Religious exceptionalism, however much we might value it in principle, cannot be interpreted to allow religious adherents to engage in rape, pillage, mayhem, and murder. Under any interpretation, religious exceptionalism must yield – at some point – to the essential values protected by government.

The question is what that point is. Divining any overarching answer to this question from the Court's decisions is difficult. Despite occasional, sweeping statements about the extent of religious privilege,<sup>41</sup> past decisions held particular government interests to be compelling, or not, with little in the way of articulated reasons. For instance, compelling state interests were found in the forced participation of citizens in the federal social security system,<sup>42</sup> in compulsory military

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within 'the judicial function and judicial competence,' however, to determine whether appellee or Government has the proper interpretation of the [appellee's] ... faith ... ." *Lee*, 455 U.S. at 257 (quoting *Thomas*, 450 U.S. at 716).

<sup>40</sup>*See, e.g.,* *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 304-05 (1985) (denying a free-exercise claim on the ground that government action did not actually burden the claimant's religious beliefs). *Cf. Hernandez*, 490 U.S. at 699 (Although "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds, ... [w]e do, however, have doubts [as to] whether the alleged burden [in this case] ... is a substantial one.").

<sup>41</sup>*See, e.g., Sherbert*, 374 U.S. at 403 (characterizing losing religious claims narrowly, as "conduct or actions ... [that] have invariably posed some substantial threat to public safety, peace or order"), and *id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation")).

<sup>42</sup>*See Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting Native Americans' claims for exemption from the assignment of Social Security numbers); *Lee*, 455 U.S. at 252 (rejecting Amish claim for exemption from participation in the Social Security system).

service,<sup>43</sup> and in the prohibition of polygamy.<sup>44</sup> Less-than-compelling state interests were found in work requirements for participation in state unemployment-compensation plans,<sup>45</sup> and in licensing and taxing systems that govern in-person solicitation activities.<sup>46</sup> In a ruling which was (perhaps) the high water mark for religious privilege, Amish religious beliefs which required the discontinuance of a child's education after the eighth grade of elementary school were given precedence over the state's competing interest in universal childhood education.<sup>47</sup>

The underlying problem, of course, is that government interests that oppose religious claims are as diverse as the reasons for the existence of government itself. At one extreme are interests that are fundamental to an organized society – interests which, if abandoned, would endanger the state's existence. At the other extreme are interests that arguably promote ideas of general social (but ultimately nonessential) well being. In a regime of religious exceptionalism, it is easy to state that claimed religious privilege must presumably yield to the former, while it should – if it is to have any meaning – trump the latter. The problem is where, along that spectrum, particular claims lie.

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b. Doctrinal Repudiation by the Supreme Court

In two cases decided in 1988 and 1990, the United States Supreme Court abruptly shifted

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<sup>43</sup>See *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting claim for exemption by a selective service (compulsory military service) inductee who opposed war on religious grounds).

<sup>44</sup>See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (denying Mormons' asserted right to practice polygamy); *Reynolds v. United States*, 98 U.S. 145 (1878) (same).

<sup>45</sup>See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (invalidating state unemployment rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his or her religion); *Thomas*, 450 U.S. at 707, 707 (same).

<sup>46</sup>See *Murdock*, 319 U.S. at 105 (striking down licensing and taxing systems that restricted religious speech and solicitation); *Cantwell*, 310 U.S. at 296 (same).

<sup>47</sup>See *Yoder*, 406 U.S. at 219-36.

course. In *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>48</sup> Native Americans challenged the construction of a road and the conducting of logging activities in an area of a national forest that they used for religious worship. The Court acknowledged at the outset that it was undisputed that the claimants' beliefs were sincere and that the Government's proposed actions will severely impact the practice of their religion – assertions that were (under the Court's prior decisions) determined by the religious claimants themselves.<sup>49</sup>

Under the Court's traditional tests, the next step was to determine whether a compelling government interest trumped the claimants' free exercise claims. The problem – for the government and apparently also for the Court – was that no such compelling interest in the activities at issue existed.<sup>50</sup> Faced with this situation, the Court simply held the compelling-interest test was inapplicable to all claims of this type. In a new doctrinal pronouncement, the Court asserted that only when an individual *is coerced by government to act* in violation of his or her religious beliefs must a compelling government interest be shown. If the government's actions simply create conditions that make religious exercise impossible, that – in the absence of a discriminatory intent by government – creates no cognizable constitutional claim.<sup>51</sup>

The reason for the Court's decision was apparent from its opinion. After years of attempting to reconcile religious privilege and secular law, the effort was now abandoned. If individuals could declare road building and logging to be subordinate to religious exercise, they could declare other government activities to be as well.<sup>52</sup> The potential costs of the compelling-interest regime – which had always been lurking – were now finally acknowledged. As the Court stated, to “require government to bring forward a compelling justification for its otherwise lawful actions” whenever a claimant asserted a clash between government and religion, was to allow

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<sup>48</sup>485 U.S. 439 (1989).

<sup>49</sup>*Id.* at 447.

<sup>50</sup>*Id.* at 445.

<sup>51</sup>*Id.* at 449, 451-52.

<sup>52</sup>*See id.* at 452.

intolerable intrusion of religious beliefs into public affairs.<sup>53</sup>

In the second case – *Employment Division v. Smith*<sup>54</sup> – religious claimants were dismissed from their employment because they ingested peyote for sacramental purposes during a ceremony of the Native American Church.<sup>55</sup> Denied unemployment compensation, they sued on the ground that the state could not condition the availability of benefits on an individual’s willingness to forgo conduct that was religiously required.<sup>56</sup>

The Court rejected this claim. If prohibiting or burdening the exercise of religion is not the object of the law, but merely an “incidental effect of a generally applicable and otherwise valid provision, the ... [Constitution] has not been offended.”<sup>57</sup> The Court first noted that, under its prior decisions, “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.”<sup>58</sup> In addition, “[i]f the ‘compelling interest’ test is to be applied at all ... it must be applied across the board, to all actions thought to be religiously commanded.”<sup>59</sup> When these ideas are combined, a difficult problem arises. If claimants can define religion and its requirements, there will be no limitation from that direction. And “if ‘compelling interest’ really means what it says ..., many laws will not meet the test. Any society adopting such a system would be courting anarchy. ...[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious

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<sup>53</sup>*Id.* at 450-51.

<sup>54</sup>494 U.S. 872 (1990).

<sup>55</sup>*Id.* at 874.

<sup>56</sup>*Id.* at 874-76.

<sup>57</sup>*Id.* at 878; *see also Church of the Lukumi*, 508 U.S. at 531 (“[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”).

<sup>58</sup>*Smith*, 494 U.S. at 887 (quoting *Hernandez*, 490 U.S. at 699) (emphasis omitted).

<sup>59</sup>*Smith*, 494 U.S. at 888.

objector, every regulation of conduct” that fails these tests.<sup>60</sup>

From a historical perspective, these holdings were extraordinary. They overturned – in a single stroke – more than fifty years of Supreme Court jurisprudence. For decades, the Court had celebrated the primacy of religion in American life and insisted – rhetorically, at least – on its rigorous protection. However, when finally faced with the prospect of unlimited religious claims – and the intrusion that such claims might make into secular government – the Court simply abandoned the idea of religious exemption from secular law. After these decisions, in only the rarest of cases would a claim of religious exemption from secular law be entertained.

Justice Antonin Scalia – the author of the *Smith* opinion – was previously, and remained thereafter, one of the most staunch defenders of religion in American life.<sup>61</sup> However, realism and consequences apparently had forced his hand. The idea that religious believers are exempt – as a federal constitutional matter – from otherwise neutral and generally applicable secular laws, was gone.

#### c. The Legislative Response

Popular reaction to the post-*Lyng* and post-*Smith* state of affairs was swift. By a vote of 97-3 in the United States Senate, and a voice vote in the United States House of Representatives, Congress passed the federal Religious Freedom Restoration Act (RFRA) in 1993.<sup>62</sup> Although

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<sup>60</sup>*Id.* (emphasis in original).

<sup>61</sup>Subsequent Supreme Court decisions which Justice Scalia voted to uphold religious claims of other kinds include *Van Orden v. Perry*, 545 U.S.677 (2005) (upholding the constitutionality of a Ten Commandments monument on public grounds); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding the use of taxpayer money, through voucher programs, to fund religious schools); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that religious viewpoints must be given equal access to open, public fora); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (plurality opinion) (same); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same). For one of Scalia’s strongest statements on religious/government relations, see *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting) (asserting that the federal Constitution neither mandates neutrality between religion and nonreligion, nor prohibits the favoring of religion over nonreligion, in public life).

<sup>62</sup>Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§2000bb et seq. (2006)).

Congress could not alter the Supreme Court’s interpretation of the First Amendment, it could – it believed – add more protection by statute.

The federal RFRA declared that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,”<sup>63</sup> and that “governments should not substantially burden religious exercise without compelling justification.”<sup>64</sup> The purpose of the statute, Congress stated, was “to restore the compelling interest test as set forth in [previous Supreme Court jurisprudence] and to guarantee its application in all cases where free exercise of religion is substantially burdened.”<sup>65</sup> More precisely, the statute stated that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability [unless it] demonstrates that application of the burden ... is in furtherance of a compelling government interest,” and is the least restrictive means of furthering that interest.<sup>66</sup> The statute was explicitly stated that provided both a claim to relief from, and a defense to, government action.<sup>67</sup>

The federal RFRA was passed in response to public outcry that, under *Lyng* and *Smith*, the vaunted tradition of religious liberty that had been in place since the Nation’s founding was suddenly in peril.<sup>68</sup> Alarm was also sounded by academic commentators.<sup>69</sup> Lost in the cacophony was the fact that neither the Supreme Court’s prior compelling interest test, nor its codification in the federal RFRA, addressed the underlying problem that the *Lyng* and *Smith* decisions identified.

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<sup>63</sup>*Id.* at §2000bb(a)(2).

<sup>64</sup>*Id.* at §2000bb(a)(3).

<sup>65</sup>*Id.* at §2000bb(b).

<sup>66</sup>*Id.* at §2000bb-1(a), (b). There has been a subsequent and lively discussion among United States Supreme Court justices as to whether the “least restrictive means” requirement was an innovation, or previously a part of Supreme Court jurisprudence. See *Hobby Lobby*, 134 S. Ct. at 2761, 2767 & n.3, n.18; and *id.* at 2791, 2793-94 & n.9, n.11 (Ginsburg, J., dissenting).

<sup>67</sup>42 U.S.C. §2000bb-1(a).

<sup>68</sup>[citations]

<sup>69</sup>[citations]

How could an organized society – dedicated to the rule of law – tolerate a system of religious exceptionalism for individually defined (and judicially unreviewable) religious belief? In the heat of the moment, that critical question was simply shoved aside in the rush by politicians to demonstrate commitment to the ideal of free exercise of religious liberty.<sup>70</sup>

The federal RFRA was a sweeping statement which purported to reinstate the compelling-interest test in all cases of government impairment of religious exercise -- federal, state, and local.<sup>71</sup> Four years later, the Supreme Court struck back. In *City of Boerne v. Flores*,<sup>72</sup> the Court held that the law's application to state and local governments was beyond Congress's constitutional power.<sup>73</sup>

In response, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>74</sup> This statute confirmed that the federal RFRA remained applicable to the government of the United States, its territories and possessions, the District of Columbia, and Puerto Rico.<sup>75</sup> It also reasserted that federal RFRA tests applied to two more limited categories of state and local government actions: the enforcement of land-use regulations, and the policies of custodial institutions toward institutionalized persons.<sup>76</sup> Federal jurisdiction in these areas was

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<sup>70</sup>During the aftermath of the *Lyng* and *Smith* decisions, I served in the position of Special Counsel in the United States Senate. When – for instance – a group of academics raised this issue, and advocated Congressional caution in this complex area, the overwhelming response of members of Congress was indifference. Belief in the need for an emphatic statement by Congress overwhelmed all other considerations.

<sup>71</sup>Pub. L. No. 103-141, §§5(1), 6(a), 107 Stat. 1489.

<sup>72</sup>521 U.S. 507 (1997).

<sup>73</sup>*See id.* at 532-34. RFRA remained applicable to actions by the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006).

<sup>74</sup>Pub. L. No., 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§2000bb et. seq.).

<sup>75</sup>*See* 42 U.S.C. §§2000 bb-2(1) to (2).

<sup>76</sup>*See* 42 U.S.C. §§2000cc(b), -2(g), -5(4). RLUIPA expressly defines “religious exercise” to include “[t]he use, building, or conversion of real property for the purpose of religious exercise.” 42 U.S.C. §2000cc-5(7)(B). A “land use regulation” is defined as “a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or



claimed through federal funding of state and local governments, or because their actions affected interstate interstate commerce.<sup>77</sup>

RLUIPA also broadened the scope of protected “religious exercise” by stating that it would include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>78</sup> This change was accompanied by a Congressional statement that the new statute should be broadly construed in favor of religious exemptions from secular law.<sup>79</sup>

The states also became active in the reassertion of religious exceptionalism within their borders. To date, twenty-two states have enacted RFRA or RLUIPA in some form as a matter of state law. One state, Alabama, enacted a state constitutional amendment that proclaims that the prior Supreme Court compelling-interest test applies to “[a]ny government statute, regulation, ordinance, administrative provision, ruling guideline, requirement, or any statement of law whatever.”<sup>80</sup> Nineteen other state statutory efforts have similarly broad applicability, either as a matter of explicit statement or implicit interpretation.<sup>81</sup> One is limited (like the federal RLUIPA)

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development of land ... .” 42 U.S.C. §2000cc-5(5). Institutionalized persons are defined as those persons “residing in or confined to an institution.” 42 U.S.C. §2000cc-1(a).

<sup>77</sup>See 42 U.S.C. §2000cc(b), -2(g), -5(4).

<sup>78</sup>42 U.S.C. §2000cc-5(7)(A).

<sup>79</sup>Religious exercise should “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. §2000cc-3(g).

<sup>80</sup>ALA. CONST. Art. I, §3.01.

<sup>81</sup>See Arizona, A.R.S. §41-1493-01; Arkansas, A.C.A. §16-123-404; Connecticut, C.G.S.A. §52-571b; Florida, F.S.A. §761.03; Idaho, I.C. §73-402; Illinois, 775 I.L.C.S. §35/15; Indiana, In. St. §§34-13-9-1 et. seq.; Kansas, K.S.A. §60-5303; Kentucky, K.R.S. §446.350; Louisiana, L.S.A.-R.S. §13:5233; Mississippi, Miss. Code Ann. §11-61-1; Missouri, V.A.M.S. §1.302; New Mexico, N.M.S.A. 1978, §28-22-3; Oklahoma, 51 Okl. St. Ann. §253; Pennsylvania, 71 P.S. §2404; Rhode Island, Gen. Laws 1956, §42-80.1-3; South Carolina, Code 1976 §1-32-40; Tennessee, T.C.A. §4-1-407; Texas, V.T.C.A., Civil Practice & Remedies Code §110.003; Utah, U.C.A. 1953 §63L-5-201; Virginia, Va. Code §57-2.02.

to land-use regulations.<sup>82</sup> One statute simply restates, in its entirety, an act that was passed on January 16, 1786 by the state’s general assembly. This declares broad principles of freedom of belief and the guarantee of equal civil rights.<sup>83</sup>

The substantive guarantees afforded by these laws generally track the federal RFRA or pre-*Lyng* and pre-*Smith* “compelling-interest” test requirements. Five of these laws exceed prior federal requirements by stating that *any* burden – not only a substantial burden – on religious exercise will invoke the laws’ protections.<sup>84</sup>

Some scholars and religious-rights advocates have argued that federal and state RFRA and RLUIPA statutes have been of little consequence, either because courts have rarely enforced them<sup>85</sup> or – in a diametrically opposing argument – that they have simply and uncontroversially restored what was a prior, workable status quo.<sup>86</sup> Both statements might credibly describe the first years of RFRA and RLUIPA litigation. However, recent events have torn them asunder.

d. The Post-RFRA and Post-RLUIPA World

The fate of federal and state RFRA and RLUIPA claims, and the controversies that they have generated, have depended heavily on the context involved. Some assertions of RFRA or

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<sup>82</sup>U.C.A. 1953 §63-L-5-201 (Utah).

<sup>83</sup>V.A. Code Ann. §57-1 (Virginia).

<sup>84</sup>See ALA. CONST. Art. I, §3.01 (Alabama); C.G.S.A. §52-571(b) (Connecticut); V.A.M.S. §1.302 (Missouri); N.M.S.A. 1978, §28-22-3 (New Mexico); Gen. Laws 1956, 42-80.1-3 (Rhode Island).

<sup>85</sup>See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858-66 (2006); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35 (2015). Some scholars believe that after the Supreme Court’s most recent and important RFRA decision, that tally might well change. See, e.g., Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 165 (2015) (“*Hobby Lobby* left little doubt that [the federal] RFRA now imposes a genuinely ‘strict’ standard of review entailing serious and searching scrutiny of religiously burdensome government actions.”). Cf. *Hobby Lobby*, 134 S.Ct. at 2761 (RFRA’s “least restrictive means” requirement is a “stringent” and “exceptionally demanding” test.).

<sup>86</sup>[sources - Liberty Fund, etc.]

RLUIPA protections have generated little public interest. In other cases, RFRA and RLUIPA claims have generated widespread outrage and fear about the inroads that these claims can make in secular norms and law.<sup>87</sup>

During the 1990s and the first decade of the twentieth century, federal and state RFRA and RLUIPA claims in some contexts were handled in a largely consistent and doctrinally coherent manner. For instance, attitudes of federal and state judges toward religious claims of prisoners have been both careful and grudging. At the outset, adjudication of these claims has been bracketed by repeated admonitions that judges must be “mindful of the urgency of discipline, order, safety, and security in penal institutions.”<sup>88</sup> As a result, cases must be adjudicated “with ‘due deference to the experiences and expertise of prison and jail administrators in establishing necessary regulations and procedures.’”<sup>89</sup> Restrictions against inquiry into a religious adherent’s sincerity have also been relaxed, as a practical matter, in this context. As stated by the United States Supreme Court, prison officials (and judges) can “appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic.”<sup>90</sup>

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<sup>87</sup>*See, e.g.,* Swanner v. Anchorage Equal Rights Com’n, 874 P.2d 274, 280 n.9 (Alaska 1994); Smith v. Fair Emp’t and Hous. Comm’n, 913 P.2d 909 (Cal. 1996); Jasniowski v. Rushing, 678 N.W.2d 743 (Ill. App. 1997); Thomas v. Anchorage Equal Rights Com’n, 102 P.3d 937 (Alaska 2004).

<sup>88</sup>*See Cutter*, 544 U.S. at 723.

<sup>89</sup>*Id.* at 723 (quoting S. Rep. No. 103-111, at 10, U.S. Code Cong. & Admin. News 1993, at 1892, 1899, 1900).

<sup>90</sup>*Id.* at 725 n.13. This skepticism can take many forms. *See, e.g.,* Smith v. Allen, 502 F.3d 1255, 1278 (11<sup>th</sup> Cir. 2007) (“Put simply, we are not convinced – and there is no evidence, other than [the complainant’s] ... own assertion and his scant sources, to establish – that the [prison] Committee’s decision denying [him] ... a small quartz crystal place[d] more than an inconvenience on [his] religious exercise.”); Rowe v. Lemon, 976 N.E.2d 129, 136 (Ind. App. 2012) (“[A] particular belief or practice need not be ‘orthodox’ within a person’s chosen faith in order to be ‘sincere,’ although orthodoxy of a belief or practice (or lack thereof) may be relevant to an inquiry into a prisoner’s sincerity [of belief].”); Winters v. State, 549 N.W.2d 819, 821 (Iowa 1996) (inmate failed to establish the tenets of his religious beliefs with any “credible evidence.” “The district court’s findings did not reject [the claimant’s] ... profession of sincerity in certain religious beliefs. It [properly] rejected his claim as to what those beliefs are.”).

The largely negative dispositions of prisoners' federal and state RFRA and RLUIPA claims reflect these attitudes. Reasons given for denial have included that the challenged prison regulations did not "substantially burden" the claimant's religious beliefs or practices;<sup>91</sup> that the institutions's regulations furthered compelling state interests and were the least restrictive means available;<sup>92</sup> that the claimant failed to assert himself as a religious believer in earlier stages of the litigation;<sup>93</sup> and that the government's actions rendered the claim moot.<sup>94</sup>

Prison inmates have occasionally won these cases. In one recent case, the United States Supreme Court held that prison regulations violated the federal RLUIPA, insofar as they prevented a Muslim inmate from growing a 1/2-inch beard.<sup>95</sup> Critical to this holding were findings that the state failed "to scrutinize the asserted harm" to prison safety and security that the

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<sup>91</sup>*See, e.g.*, *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8<sup>th</sup> Cir. 2008) (requirement that inmate purchase religiously mandated materials did not substantially burden the exercise of his religious beliefs); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5<sup>th</sup> Cir. 2004) (requiring the presence of a qualified outside volunteer at prison religious meetings did not impose a substantial burden on inmate's religious exercise); *Smith*, 502 F.3d at 1277-81 (denial of quartz crystal, designated area for worship, and firepit did not impose a substantial burden on the exercise of inmate's religious beliefs).

<sup>92</sup>*See, e.g.*, *Knight v. Thompson*, 797 F.3d 934, 944-46 (11<sup>th</sup> Cir. 2015) (challenge to prison short-hair policy); *Roles v. Townsend*, 64 P.3d 338, 339-40 (Idaho 2003) (challenge to prohibition against inmate tobacco use); *Fawaad v. Jones*, 81 F.3d 1084, 1087 (11<sup>th</sup> Cir. 1996) (challenge to prison inmate identification system); *Yahweh v. United States Parole Com'n*, 158 F.Supp.2d 1332, 1346-51 (S.D. Fla. 2001) (challenge to parole conditions); *Lawson v. Singletary*, 85 F.3d 502 (11<sup>th</sup> Cir. 1996) (challenge to prison rules that restrict access to religious texts).

<sup>93</sup>*See, e.g.*, *Dean v. Giles*, 2009 WL 4894799 at 9 (U.S. D. Ct., M.D. Ala. 2009) (claimant "failed to identify himself ... has an adherent of the Native American religion" to prison officials). *See also* *Diggs v. Snyder*, 775 N.E.2d 40, 45 (Ill. App. 2002) (inmate failed to assert below that possession of the disputed pamphlet "was required by the basic tenets of his religion"); *Marshall v. Federal Bureau of Prisons*, 580 Fed. Appx. 896, 897 (11<sup>th</sup> Cir. 2014) (prisoner "failed to produce evidence that Buddhism required his dietary demands").

<sup>94</sup>*See, e.g.*, *Evans v. Godinez*, 21 N.E.3d 1280, 1287 (Ill. App. 2014) (inmate's release rendered request for injunctive claim moot).

<sup>95</sup>*See* *Holt v. Hobbs*, 135 S.Ct. 853, 862-67 (2015).

requested accommodation would allegedly have caused.<sup>96</sup> Indeed, the Court found, the official argument that prison safety and security would be seriously compromised in this case was an “almost preposterous” one.<sup>97</sup> Other courts have held that “conclusory statements” of general penological interests were inadequate to meet compelling-interest and least-restrictive-means tests.<sup>98</sup>

The courts’ adjudications of federal and state RFRA and RLUIPA claims by prisoners have generated little public interest. Perhaps this has been because – in the rare instances when such claims have been granted – those negatively affected (prison officials and possibly other inmates) were generally neither outraged nor in a position to complain. If – on the other hand – such claims were denied, few cared. Prisoners are not popular or sympathetic litigants, and members of the public – if aware of these claims at all – were more likely to believe that they were by their nature “fraudulent,” or represented attempts at excessive “coddling” of inmates, than that some fundamental injustice had been done.

Claims by prisoners are not the only ones that have generated little public controversy. Others are also of apparently marginal public interest because their settings are unique, their effects are limited, and/or courts are reluctant to grant them. Despite the broad protections afforded by federal and state RFRA and RLUIPA claims, claims for exemptions from criminal

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<sup>96</sup>*See id.* at 863.

<sup>97</sup>*Id.* (quoting opinion of the Magistrate Judge). In another case, the court observed that “respondent does not argue [that] the rejection of petitioner’s request ... furthers a compelling governmental interest and is the least restrictive means of doing so. ... We are not surprised. On this record we fail to see any legitimate governmental interest, let alone a compelling interest, in allowing traditional Jews to receive kosher meals but denying the same ... to Messianic Jews ... .” In re Garcia, 136 Cal. Rptr. 3d 298, 307 (Cal. App. 2012).

<sup>98</sup>*See, e.g.,* Davila v. Gladden, 777 F.3d 1198, 1203-08 (11<sup>th</sup> Cir. 2015) (claim challenging denial of right to possess personal religious jewelry); Spratt v. R.I. Dept. of Corr., 482 F.3d 33 (1<sup>st</sup> Cir. 2007) (claim challenging prohibition of inmate’s preaching to others); Washington v. Klem, 497 F.3d 272 (3rd Cir. 2007) (claim challenging denial of access to religious books); Warsoldier v. Woodford, 418 F.3d 989 (9<sup>th</sup> Cir. 2005) (claim challenging hair length regulations).

laws,<sup>99</sup> fair housing laws,<sup>100</sup> employment laws,<sup>101</sup> drivers license requirements,<sup>102</sup> autopsy laws,<sup>103</sup> endangered species laws,<sup>104</sup> and tax laws<sup>105</sup> have received little public attention.

However, claims in other contexts have been bitter, highly controversial, and have led to severe doctrinal splintering in the courts. Of cases of this type, land-use disputes are prominent. From the time of the earliest federal and state RFRA and RLUIPA adjudications, claimed

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<sup>99</sup>*See, e.g.,* State v. Bent, 328 P.3d 677 (Ct. App. N.M. 2013) (criminal sexual contact); State v. Cordingley, 302 P.3d 730 (Ct. App. Idaho 2013) (drug laws); State v. White, 271 P.3d 1217 (Ct. App. Idaho 2011) (drug laws); *O Centro Espirita*, 546 U.S. at 418 (drug laws); Lineker v. State, 2006 W.L. 2847849 (Ct. App. Alaska) (drug laws); Nesbeth v. United States, 870 A.2d 1193 (D.C. App. 2005) (drug laws); State v. Pedersen, 679 N.W.2d 368 (Ct. App. Minn. 2004); Guam v. Guerrero, 290 F.3d 1210 (9<sup>th</sup> Cir. 2002) (drug laws); Cheffer v. Reno, 55 F.3d 1517 (11<sup>th</sup> Cir. 1995) (blocking access to an abortion clinic). One court described a prevalent judicial attitude: “As the district court ... recognized, [protection laws] could easily be the first refuge of scoundrels if defendants could justify illegal conduct simply by crying ‘religion.’” *White*, 271 P.3d at 1225 (internal quotation marks omitted).

One outstanding exception is *O Centro Espirita*, in which the United States Supreme Court granted a very small Amazonian religious group exemption from federal drug laws for the importation of hoasca, a hallucinogenic tea. *See O Centro Espirita*, 546 U.S. at 419. Apparently, the “exotic” nature of this group and the fact that U.S. law has long tolerated religious exemptions of this type for Native tribes, *see id.* at 425, 433-34, tempered any negative public response to this case.

<sup>100</sup>*See, e.g.,* Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274, 280 n.9 (Alaska 1994); *Smith*, 913 P.2d at 909; Jasniowski v. Rushing, 678 N.W.2d 743 (Ill. App. 1997); Thomas v. Anchorage Equal Rights Comm’n, 102 P.3d 937 (Alaska 2004).

<sup>101</sup>*See, e.g.,* Gunning v. Runyon, 3 F.Supp. 2d 1432 (S.D. Fla. 1998); Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195 (Mich. App. 1995).

<sup>102</sup>*See, e.g.,* Freeman v. Dep’t of Highway Safety & Motor Vehicles, 924 So.2d 48 (Ct. App. Fla. 2006); Valov v. Dep’t of Motor Vehicles, 34 Cal. Rptr. 3d 174 (Cal. App. 2005).

<sup>103</sup>*Johnson v. Levy*, 2010 WL 119288 (Ct. App. Tenn. 2010); *Sanchez v. Saghian*, 2009 WL 3248266 (Ct. App. Tex. 2009).

<sup>104</sup>*Gibson v. Babbitt*, 72 F.Supp.2d 1356 (S.D. Fla. 1999); *Horen v. Commonwealth*, 479 S.E.2d 553 (Va. App. 1997).

<sup>105</sup>*See, e.g.,* Christ Church Pentecostal v. Tenn. State Bd. of Equalization, 428 S.W.3d 800 (Ct. App. Tenn. 2013).

exemptions from land-use laws have defied consistent or accepted resolutions in the courts. Religiously motivated actions that have harmed the property interests of neighbors, or community aesthetic, economic, or cultural-property interests, have often been the subject of bitter, protracted, and (for someone) ultimately disillusioning litigation in the courts. Indeed, it was a land-use case involving the application of historic preservation laws that led to the invalidation of the federal RFRA legislation as applied to state and local governments.<sup>106</sup>

These cases involve several doctrinal pieces. As a threshold matter, the federal RLUIPA requires that in the land-use context, the statute applies when “the government makes ... *individualized assessments* of the proposed uses for the property involved.”<sup>107</sup> In addition, claims under all of these laws require proof of the usual elements: that there be religious exercise that is substantially burdened (or, under some statutes, simply burdened) by government, and – if so – that government must demonstrate a compelling interest, implemented in the least restrictive way, for the law to be upheld.

Each of these requirements has led to doctrinal splintering from the moment that the courts considered them in this context. Whether particular zoning actions involved “individualized assessments” has been the subject of dramatically opposed court judgments. One highly publicized case involved the construction of a 7618-square-foot Buddhist meditation temple and meeting hall, with a parking lot for 148 vehicles on a ten-acre lot located in a farming and residential zone.<sup>108</sup> After contentious public hearings, the application was denied by the town on the grounds that it would create additional traffic congestion, and that the project – in its entirety – was not in harmony with the general character of the neighborhood.<sup>109</sup> On appeal, the Connecticut Supreme Court rejected a federal RLUIPA challenge to the town’s action. RLUIPA requires that an “individualized assessment” be made by zoning authorities, and that does not include – in the

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<sup>106</sup>*See Boerne*, 521 U.S. at 507.

<sup>107</sup>42 U.S.C §2000cc(a)(1) (emphasis added).

<sup>108</sup>*Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n*, 941 A.2d 868, 873-74 (Conn. 2000).

<sup>109</sup>*Id.* at 875.

Connecticut Court’s view – the application of zoning laws that are neutral and “applicable without discrimination to all property owners in a jurisdiction.”<sup>110</sup> This view has been echoed in other cases.<sup>111</sup> However, other courts have held flatly to the contrary. In their view, “individualized assessments” occur whenever government is empowered “to take into account the particular details of an applicant’s proposed use of land”<sup>112</sup> – a formulation that includes just about any land-use decision.<sup>113</sup>

“Substantial burden” requirements have similarly been the subject of doctrinally and philosophically incompatible formulations in this context. Some courts have understood this requirement very narrowly; to meet this test, the zoning denial must bear “direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable.”<sup>114</sup> “Ordinary difficulties” associated with compliance with land-use regulations, including the scarcity of land in permissible zones and the “costs, procedural requirements, and inherent political aspects” of the approval process, are not sufficient.<sup>115</sup> Under this approach, there was no

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<sup>110</sup>*See id.* at 892.

<sup>111</sup>*See, e.g.,* Westchester Day Sch. v. Mamaroneck, 504 F.3d 338, 350 (2<sup>nd</sup> Cir. 2007); Grace United Methodist Church v. Cheyenne, 451 F.3d 643, 651 (10<sup>th</sup> Cir. 2006); Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752, 764-65 (7<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1096 (2004).

<sup>112</sup>*See, e.g.,* Guru Nanak Sikh Society of Yuba City v. Sutter Co., 456 F.3d 978, 986 (9<sup>th</sup> Cir. 2006).

<sup>113</sup>*See, e.g.,* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140, 1148 (Ore. App. 2004), aff’d, 111 P.3d 1123 (Or. 2005) (conditional use permit request); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271, 279 (Mich. App. 2003) (variance request); Great Lakes Soc’y. v. Georgetown Chester Twp., 2007 W.L. 6623821 (Mich. Cir. Ct.) (rezoning request). *See also* Freedom Baptist Church of Delaware v. Twp. of Middleton, 204 F.Supp.2d 857, 868-69 (E.D. Pa. 2002) (zoning ordinances “by their nature” impose individualized assessment regimes).

<sup>114</sup>*Civil Liberties for Urban Believers*, 342 F.3d at 761. *Accord*, San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034-35 (9<sup>th</sup> Cir. 2004); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70 (3<sup>rd</sup> Cir. 2004).

<sup>115</sup>*Civil Liberties for Urban Believers*, 342 F.3d at 762.



substantial burden when the religious claimant -- although denied permission to enlarge or build in one place -- could do so within city limits in another;<sup>116</sup> when the regulation did not restrict current religious practice, but merely prevented a change in practice;<sup>117</sup> when a restriction required a religious institution to relocate, and forced its members to walk a few more blocks;<sup>118</sup> and when land-use restrictions merely made religious exercise more expensive.<sup>119</sup> In one of the more severe cases of this type, it was held that the taking of church property through eminent domain did not impose a substantial burden.<sup>120</sup>

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<sup>116</sup>*See, e.g.,* Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 750 (Mich. 2007) (no substantial burden when other land in the jurisdiction permitted the claimant's religious use); *Grace United Methodist Church*, 451 F.3d at 662 (no substantial burden when zoning merely required complainant to comply with requirements applicable to other applicants, and the record did not demonstrate that it was precluded from using alternative sites in the city); *San Jose Christian Coll.*, 360 F.3d at 1035 (no substantial burden when city zoning laws "may have rendered [the] [c]ollege unable to provide education and/or worship at the Property, [but] there was no evidence ... that [the] [c]ollege was precluded from using other sites within the city"); *Civil Liberties for Urban Believers*, 342 F.3d at 761 (no substantial burden when zoning scheme did not "render impracticable the use of real property in [the jurisdiction] for religious exercise"); *Episcopal Student Found. v. Ann Arbor*, 341 F.Supp.2d 691, 704 (E.D. Mich. 2004) (no substantial burden when "there [was] no indication that [the claimant was] precluded from fulfilling its religious mission ... in other locations throughout the city."); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F.Supp. 1554, 1560 (M.D. Fla. 1995) (no substantial burden when, "[a]lthough denial of the application ... prevents [the applicants] from running a homeless shelter and food program from the [chosen] site, ... [they] fail[ed] to show that the City code prevents them from engaging in such conduct" within the City limits altogether).

<sup>117</sup>*See, e.g., Corp. of Presiding Bishop*, 86 P.3d at 1153; *Vineyard Christian Fellowship v. City of Evanston*, 250 F.Supp.2d 961, 991-92 (N.D. Ill. 2003).

<sup>118</sup>*See* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11<sup>th</sup> Cir. 2004). "[R]easonable, 'run-of-the-mill' zoning considerations do not constitute substantial burdens." *Id.* at 1227-28 n.11.

<sup>119</sup>*See* *Vineyard Christian Fellowship*, 250 F.Supp.2d at 991; *Corp. of Presiding Bishop*, 86 P.3d at 1153.

<sup>120</sup>*Christian Romany Church v. Broward County*, 980 So.2d 1164, 1167-68 (Fla. App. 2008). In the course of that opinion, the court rejected "[t]he church's insistence that a specific church building for holding worship services is fundamental to [its] religious exercise" -- a dismissal of individual religious interpretation that might be permissible under the state RFRA

The fear, in the view of these courts, is “[u]nless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind.”<sup>121</sup> As pithily stated in one case, in which a religious organization sued to build an apartment building in a single-family residential zone: “If plaintiff wants to use the property for housing, then it can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.”<sup>122</sup>

In other cases – in which the facts are virtually indistinguishable – the presence of “substantial burdens” were readily found. Substantial burdens on religious exercise were found when land-use regulations limited the number of people who could gather for religious meetings at a private residence;<sup>123</sup> when a church was required to move in order to accommodate new activities;<sup>124</sup> and when a church could not build on the particular lot (or in the particular area of the city) chosen.<sup>125</sup> Speaking to the last issue, one court simply stated that “[p]reventing a church from building on a [chosen] worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If [the applicant cannot] ... build a

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under which the case was tried, but would be highly problematic under federal precedents. *See id.* at 1168.

<sup>121</sup>*Petra Presbyterian Church v. Northbrook*, 489 F.3d 846, 851 (7<sup>th</sup> Cir. 2007), cert. denied, 552 U.S. 1131 (2008).

<sup>122</sup>*Greater Bible Way Temple of Jackson*, 733 N.W.2d at 750.

<sup>123</sup>*Murphy v. Zoning Comm’n*, 289 F.Supp.2d 87, 113-14 (D. Conn. 2003), vacated on procedural grounds, 402 F.3d 342 (2<sup>nd</sup> Cir. 2005).

<sup>124</sup>*See Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 704 (Mich. App. 1995) (zoning board’s decision that homeless shelter was not an “accessory use” to church, and which therefore required religious organization “to move its entire operation or relocate its shelter,” was a substantial burden on religion).

<sup>125</sup>*See, e.g., Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1090 (C.D. Cal. 2003); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F.Supp.2d 1203, 1226 (C.D. Cal. 2002); *Vineyard Christian Fellowship*, 250 F.Supp.2d at 961.

church, it [cannot] ... exist,” and “numerous religious services” cannot be performed.<sup>126</sup> Similar reasoning was advanced a case in which a religious school was denied permission to build additional buildings on the existing school site. In the reviewing court’s view, denial of the permit was a “substantial burden” for three reasons: it burdened the “quality” of the school’s religious education; it “limited” the students’ religious experience, by restricting the size and condition of school buildings; and it prevented the school from accommodating a “growing number of students” who wished to pursue a religious education.<sup>127</sup>

Whether routine zoning regulations serve compelling state interests in the least restrictive way possible has also dissolved, for the most part, into doctrinal chaos. There are some cases in which the usual goals of zoning, such as protecting neighborhood character, prevention of traffic congestion, and aesthetic concerns, have been held to meet those tests.<sup>128</sup> In others, such goals were deemed to be patently inadequate to meet religious challenges.<sup>129</sup>

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<sup>126</sup>*Cottonwood Christian Ctr.*, 218 F.Supp.2d at 1226.

<sup>127</sup>*Westchester Day Sch. v. Vill. of Mamaroneck*, F.Supp.2d 230, 241-42 (S.D.N.Y. 2003), rev’d on other grounds 386 F.3d 183, 188 (2<sup>nd</sup> Cir. 2004) (no substantial burden because the village “did not purport to pronounce the death knell of the school’s proposed renovations ..., but rather to deny only the application submitted”).

<sup>128</sup>*See, e.g., New Life Worship Ctr. v. Town of Smithfield Zoning Bd. of Review*, 2010 W.L. 2729280 (R.I. Super.), at 12-13 (denial of a special use permit to protect students in a private, religious school from the regular entry into the building by members of the general public was a compelling government interest enforced by the least restrictive means); *Greater Bible Way Temple of Jackson*, 733 N.W.2d at 751-54 (zoning to protect a residential area from commercial development is a compelling state interest, enforced by least restrictive means); *Daytona Rescue Mission, Inc.*, 885 F.Supp. at 1560 (city’s regulation of where homeless shelters and food banks could locate was backed by “a compelling interest,” and furthers that interest in the least restrictive way).

<sup>129</sup>In one case, for instance, a church prevailed in its claim to rezone its property, when it would otherwise have had to find alternative land or be subjected to “unreasonable delay by having to restart the permit process.” The court observed that in its view, the city had been “playing a delaying game” and its concerns were “legal chimeras.” *Saints Constantine & Helen Greek Orthodox Church, Inc. v. New Berlin*, 396 F.3d 895, 900 (7<sup>th</sup> Cir. 2005). In another case, a religious organization prevailed in its claim to expand its daycare facility in violation of zoning laws. Reasons for zoning restrictions were overcome by the burdens of “duplicate administration” and possible insufficient enrollment that the church might experience at a

On occasion, rejection of the adequacy of routine zoning goals by courts can be explained by the particularly sympathetic nature of the religious claimant or by the particularly sweeping and preclusive nature of the zoning law involved. In one case, for instance, a pastor who operated a halfway-house ministry for recently released prisoners prevailed against a small-town zoning law that attempted to exclude his use from the jurisdiction.<sup>130</sup> The court rejected arguments that a simple asserted interest in precluding “correctional facilities” within 1,000 feet of residential areas, churches, or schools was either a sufficiently compelling interest or the least restrictive means of furthering any such interest.<sup>131</sup> Rather, “courts must look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular ... claimants.”<sup>132</sup> Influential facts in that case appeared to include that the pastor admitted only nonviolent offenders to his program; that prior to the city’s action, neither he nor the city manager was aware of any complaints of disturbance; and that the city made no effort to enforce the ordinance for more than a year after it was adopted.<sup>133</sup> As the Court observed, “[a]n interest that need not be enforced against the very thing it is adopted to prevent can hardly be considered compelling.”<sup>134</sup>

Such noncontroversy around the challenged religious use is rare, however. In most cases, it is citizen opposition to the use that brings it to the attention of the authorities. As a result, bitterness in land-use cases has often erupted on both sides.

In one of the most famous (or infamous) decisions, a federal court in Texas held that the religious slaughter of animals including goats, chickens, and turtles in an urban backyard must be

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second, independent location. *See Shepherd Montessori Center Milan*, 675 N.W.2d at 281.

<sup>130</sup>*See* Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009).

<sup>131</sup>*See id.* at 291-93, 305-08.

<sup>132</sup>*See id.* at 306 (quoting *O Centro Espírita*, 546 U.S. at 431). “[T]he assertion that zoning ordinances are per se superior to ... the free exercise of religion[] must be fairly regarded as indefensible.” *Id.* at 305-06.

<sup>133</sup>*See id.* at 307.

<sup>134</sup>*Id.*

permitted under the state's RFRA.<sup>135</sup> It was not the reviewing court's role, it stated, to determine the place of a particular belief in a claimant's religious views or to evaluate the religion's worth or plausibility.<sup>136</sup> Nor, in the court's view, were the city's interests in public health, humane animal treatment, and the neighborhood's environment "compelling."<sup>137</sup> Therefore, the religious claimant's "free exercise of religion" trumped government interests in slaughter regulation.

Public response to this decision was swift. The attorney for the religious claimant proclaimed to the press that "[i]t's a great day for religious freedom." The local press wrote, "[l]ocal citizens are learning the hard way, of the two-edged nature of religious rights."<sup>138</sup>

Subsequently, this decision haunted religious-rights advocates. When a resolution to enact a constitutional amendment protecting religious freedom was discussed in the state's legislature, "concerns [were voiced] about abortion rights, the Westboro Baptist Church, and goat slaughter."<sup>139</sup> "[T]he chair of the [state] senate's Committee on Veteran's Affairs and Military Installations voiced concern about the possibility ... [that] a constitutional amendment ... would strengthen the rights of the Westboro Baptist Church," a group that had taken to protesting at military funerals. "But perhaps the most unexpected objection of the day ... came from ... the executive director of the Texas Alliance for Life, who said his group opposed the resolution out of concern that "abortion would become a religious right and taxpayers could be forced to pay for abortions."<sup>140</sup> Supporters of the proposal were undeterred. "There is a war raging in our country right now that threatens to eradicate religious freedoms. [H]ostility against religious liberty has

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<sup>135</sup>See *Merced v. Kasson*, 577 F.3d 578 (5<sup>th</sup> Cir. 2009).

<sup>136</sup>See *id.* at 590.

<sup>137</sup>See *id.* at 592-94.

<sup>138</sup>[citation]

<sup>139</sup>Laura Wright, *Campbell Faces Unexpected Opposition on Religious Liberties Bill*, TEXAS MONTHLY, April 16, 2013.

<sup>140</sup>See *id.*

reached an all-time high.”<sup>141</sup> They argued that the Texas RFRA, already in place, “doesn’t provide enough protection.”<sup>142</sup>

There are two other areas in which there has been intense social fracturing, represented and accelerated – in part – by federal and state RFRA claims. The first involves a seismic step in social policy by Congress; the second involves the same, by state actors and – finally – by federal courts.

The first area concerns the enactment of the Affordable Care Act (“ACA”) by Congress in 2010. Enacted over the vehement opposition of conservatives, the ACA was an attempt to reduce the number of people without health insurance in the United States. For the first time, individuals were required (with the help of generous federal subsidies) to procure health insurance either through their employers or through the private market. Larger employers also face mandates that require the offering of insurance to employees. All plans, whether offered by private insurers or through employers, must meet certain minimum requirements for coverage under the Act.

The Women’s Health Amendment to the ACA added a mandate that health plans provide women with coverage for preventive care and screenings.<sup>143</sup> Subsequent regulations specify that this must include all Food and Drug Administration approved contraceptive methods. Religious employers are expressly exempt from this mandate. Nonprofit organizations with religious objections to providing contraceptive coverage are entitled to opt out of the mandate if certain procedures are followed. These procedures require that a form be filled out, stating the employer’s objection; and that the form be given to the employer’s insurance company (if it has one), to its third party administrator (if self-insured), or to a government agency directly. In the event of an employer’s exemption or opt-out, the group-health-issuer must provide the coverage for contraceptive services for plan participants at no cost to the employer.

These requirements were immediately and broadly challenged by religious individuals and organizations who objected to contraceptives on religious grounds. Several have reached the

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<sup>141</sup>*Id.* (quoting Jeff Mateer, general counsel for the Liberty Institute).

<sup>142</sup>*See id.*

<sup>143</sup>*See* 42 U.S.C. §300gg-13(a)(4).

United States Supreme Court. In the first, *Burwell v. Hobby Lobby Stores, Inc.*,<sup>144</sup> the Court dealt with the following question: “whether the Religious Freedom Restoration Act of 1993 ... permits the United States Department of Health and Human Services ... to demand that three closely held [for-profit] corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners.”<sup>145</sup> The owners objected to involvement in the provision of the contraceptives on the ground that doing so would enable or facilitate another’s wrongful act.<sup>146</sup>

The Court – in a very controversial holding – first determined that closely-held for-profit corporations were entitled to invoke the protections of RFRA, because corporations were included within the definition of “persons” who “exercised religion” under that Act.<sup>147</sup> Next, the Court found that the contraceptive mandate “substantially burden[s]” the exercise of religion in this context.<sup>148</sup>

Finally, the Court was required to decide “whether ... the mandate both ‘(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.’”<sup>149</sup> The Court began by assuming that the interest in guaranteeing cost-free access to the four challenged contraceptive methods was compelling.<sup>150</sup> However, the Court held, the chosen means were not the least restrictive. “The least-restrictive means standard is exceptionally demanding ... . [And the government] has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of

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<sup>144</sup>134 S.Ct. 2751 (2014).

<sup>145</sup>*Id.* at 2759.

<sup>146</sup>*See id.* at 2778.

<sup>147</sup>*See id.* at 2767-75.

<sup>148</sup>*See id.* at 2775-79.

<sup>149</sup>*See id.* at 2779, quoting 42 U.S.C § 2000bb-1(b).

<sup>150</sup>*See id.* at 2780.

religion by the objecting parties in these cases.”<sup>151</sup> Government could, for instance, assume the cost of providing the contraceptives at issue through a new, government-funded program. Or it could afford to these objectors the accommodation currently offered to nonprofit organizations which have religious objections to the contraception mandate.<sup>152</sup> Under either approach, the Court stressed, contraceptives would be provided to the objecting employer’s employees.<sup>153</sup>

The Court acknowledged the fears expressed by the government, and numerous commentators: that “a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions.”<sup>154</sup> The Court dismissed these fears on the ground that the government had made “no effort to substantiate this prediction.”<sup>155</sup> However, it proceeded to hedge its bets. “Our decision,” it wrote, “should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests ..., and may involve different arguments about the least restrictive means of providing them.”<sup>156</sup>

The second seismic step in social policy that generated great controversy deals with the legal status of gay men and lesbian women. General prohibitions against discrimination on the basis of race, color, gender, religion, and national origin have been entrenched for decades in national and state laws. Prohibiting discrimination on the basis of sexual orientation or gender identity has been a recent and tortuous affair.

By the year 2014, almost half of the states and the District of Columbia had laws

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<sup>151</sup>*See id.*

<sup>152</sup>*See id.* at 2781-83.

<sup>153</sup>*See id.*

<sup>154</sup>*See id.* at 2783.

<sup>155</sup>*See id.*

<sup>156</sup>*Id.* at 2783.



prohibiting sexual-orientation discrimination in public and private-sector employment.<sup>157</sup> Statutes and ordinances also prohibited sexual-orientation discrimination in public accommodations, housing, and credit.<sup>158</sup> This process, however, was not an even one. In many instances, state and local protections for gay and lesbian people were enacted, only to be the subject of legislative reversals and attempts at repeal through popular referenda.<sup>159</sup> On the national level, repeated attempts to amend national civil rights laws to add sexual orientation and gender identity to the list of prohibited bases for discrimination have failed, even to the date of this writing.

There is one area in which a remarkable – and promisingly permanent – legal shift occurred in the elimination of discrimination against gay men and lesbian women. In 2003, Massachusetts became the first state in the United States to legalize same-sex marriage by judicial decree.<sup>160</sup> Within ten years, same-sex marriage was legally available in states that contained more than 70% of the U.S. population. This change happened in various ways: through the actions of state courts, state legislatures, lower federal courts, and popular referenda.

These developments triggered tremendous opposition by some, who often cited religious objections. Steps taken to afford same-sex marriage rights were matched by efforts of opponents to block them. Over a period of years, opponents succeeded in the enactment of restrictions against same-sex marriage by federal statute, and sometimes by state legislative or popular enactment.

Litigation of the issue eventually engulfed the federal courts. It was finally resolved by the United States Supreme Court in its ruling in *Obergefell v. Hodges*<sup>161</sup> on June 26, 2015. In that ruling, the Court declared that all states are required to grant marriage licenses to gay and lesbian couples and to recognize such marriages that take place in other states.

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<sup>157</sup>[sources]

<sup>158</sup>[sources]

<sup>159</sup>[describe]

<sup>160</sup>See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>161</sup>135 S.Ct. 2584 (2015).

Although the issue was legally resolved, opposition was not. Upon *Obergefell*'s announcement, opponents announced their defiance. The tone of an article published by the National Review was a common one. The Supreme Court's decision, the article declared, was "unconstitutional." "[W]e need not, and must not, give in to *Obergefell*."<sup>162</sup> Objectors to same-sex marriage announced personal plans for noncompliance. In Tennessee, a clerk and two employees resigned rather than issue marriage licenses to same-sex couples, and a Texas clerk said that she would not obey the "lawless" ruling.<sup>163</sup> In Alabama and elsewhere, state lawmakers pursued laws that would end state involvement in the issuance of marriage licenses.<sup>164</sup>

For many opponents, focus quickly became centered on religious objections to the Supreme Court's directive. In Texas, the governor signed a "Pastor Protection Act" "which ensure[d] that pastors 'have the freedom to exercise their First Amendment rights' and decline to participate in marriages that violate their sincerely held religious beliefs."<sup>165</sup> Other state lawmakers issued directives and opinions stating that county clerks and other municipal employees could "follow their consciences" and seek accommodations under religious freedom laws.<sup>166</sup> Opponents pushed state RFRA's in some states to shore up religious protections, and more limited measures barring "adverse action" by state governments against anyone who followed his or her religious beliefs in rejecting same-sex marriage.<sup>167</sup>

The idea that municipal employees can refuse to issue marriage licenses to same-sex

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<sup>162</sup>Bradley C.S. Watson, *Reclaiming the Rule of Law after Obergefell*, NATIONAL REVIEW, July 9, 2015.

<sup>163</sup>See Chery Wetzstein, *States Rebel Against Supreme Court Gay Marriage Ruling*, WASHINGTON TIMES, July 6, 2015.

<sup>164</sup>See *id.*

<sup>165</sup>*Id.*

<sup>166</sup>See *id.*; [others]

<sup>167</sup>See Alan Blinder & Campbell Robertson, *Proposed Bills Would Protect Opponents of Gay Marriage*, N.Y. TIMES, Mar. 4, 2016 at A10.

couples by citing religious objections has little chance of ultimate success.<sup>168</sup> However, whether existing state RFRA or new laws can be used to exempt commercial vendors, hotel operators, restaurant operators, and scores of others from obligations to serve gay or lesbian individuals or their marriages is an open legal question.<sup>169</sup>

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As the result of all of these areas of conflict, attempts to enact or strengthen state RFRA have become increasingly controversial. After the rapid and generally unquestioning enactment of such laws in the years following the Supreme Court's decisions in *Lyng*, *Smith*, and *Boerne*, the road has become much rougher for passage of these laws. Placed on a state-wide ballot, RFRA laws in Wisconsin and North Dakota (in 2012 and 2013) were defeated. The Maine Legislature considered a state RFRA in 2015, but after intense opposition at public hearings it was withdrawn. Indiana passed a RFRA in 2015, but it was quickly amended to exclude discrimination against sexual orientation or gender identity after a national outcry ensued. Arkansas also passed a RFRA in 2015, but only after it was narrowed to specify that it would "be interpreted consistent[ly] with the (federal) RFRA of 1993."

Part of recent resistance can be traced to a suspicion that state laws of this type are part of

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<sup>168</sup>[Kentucky litigation]

<sup>169</sup>For instance, a recent Missouri bill – a proposed amendment to the state Constitution – stated that clergy members and religious groups would not have to facilitate gay weddings and celebrations, a basically uncontested proposition. But it also gave businesses like caterers and florists the right to refuse services. Even more concerning to advocates of gay rights, it contained a passage that it was not limited to weddings; it would have shielded religious objectors from being penalized for any act "in accordance with a sincere religious belief" about same-sex marriage. Those who opposed the bill feared that it could be used to deny married gay men and lesbian women housing, employment, schooling, and other services. See Austin Huguelet & Richard Perez-Pena, *Same-Sex Marriage Bill Advances in Missouri*, N.Y. TIMES, March 10, 2016 at A18. The bill passed the state Senate; it was defeated in the House. A proponent of the bill vowed that he "would continue to personally fight for the protection of religious freedom in our state." Mike Lear, *Missouri Elected Leaders React to Defeat of Proposed Same-Sex Objector Amendment*, missourinet.com, April 27, 2016 (quoting statement by Representative Elijah Haahr).

an effort to insulate discriminatory conduct against gay, lesbian, and transgender persons – in housing, employment, commercial services, and other areas – on religious grounds. However, as described above, other resistance has been more longstanding. Opposition in many settings has come from the realization – often after litigation – that these laws, and their federal counterparts, are not as benign toward the larger community as they appeared.

### III. “Rights” and “Super-Rights”: The Difficulty with Existing Judicial and Legislative Schemes

The challenge of religious exceptionalism will never be easily resolved. By its nature, the “rule of law” requires absolute adherence; for many, religious imperatives require the same. There is no magic formula or magic accommodation that will instantly and always resolve the conflict between these contending principles.

There is, however, a deep reason why current practice and legal tests fail and will continue to fail in the resolution of these conflicts. Recognition of this deep problem might not lead to instant answers satisfactory to all; quests for justice, and for the implementation of other transcendent or natural principles, rarely do. What we do know is that failure is guaranteed without them.

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#### a. Revisiting *Wisconsin Yoder*: Finding What is Wrong

*Wisconsin v. Yoder*<sup>170</sup> is, by any reckoning, the high water mark for religious exceptionalism in United States Supreme Court jurisprudence. It is, in addition, one of the cases most cited by those who would return religious protection in law to what, historically, it is believed that it was before.

In *Yoder*, the religious claimants presented a sympathetic case. Members of the Old Order Amish community, a religious group admired for its self-sufficiency and dedication to religious principle, objected to the forced attendance of their children in school beyond completion of the

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<sup>170</sup>406 U.S. 205 (1972).

eighth grade.<sup>171</sup> They contended that their children's attendance in high school, whether public or private, was contrary to the Amish religion and way of life. Old Order Amish communities strive for a simple, non-materialistic, Christian, and agrarian form of life. They believe that salvation requires life in a church community that pervades all of life's routines and choices, and that is separate and apart from the larger world.<sup>172</sup> Compulsory high school attendance, they believed, undermined all of what they valued and what their religious beliefs required.

The Supreme Court began its discussion by extolling the virtues of the Amish and their religious way of life. Despite its oddity in modern majoritarian terms, the Amish are "law-abiding ..., self-sufficient members" of the larger communities in which they live.<sup>173</sup> They "have not altered [their way of life] in fundamentals for centuries." Their striving toward "a church-oriented community, separated from the outside world and 'worldly' influences, [and] their attachment to nature and the soil, is an inherently simple and uncomplicated," yet noble, way to live.<sup>174</sup>

The Court then proceeded to discuss the conflict before it. There is no doubt, the Court stated, that a state's interest in the education of its citizens "ranks at the very apex" of a state's functions.<sup>175</sup> Yet even this interest must be balanced against "the values of parental direction of the religious upbringing and education of their children in their early and formative years."<sup>176</sup> To succeed in this case, the state's interest must be "of sufficient magnitude to override [that] ... interest claim[ed]" by the petitioners in the case.<sup>177</sup>

Religious freedom, the Court went on, is of paramount importance in American culture and law. "Long before there was general acknowledgment of the need for universal formal

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<sup>171</sup>*See id.* at 207.

<sup>172</sup>*See id.* at 209.

<sup>173</sup>*See id.* at 213.

<sup>174</sup>*Id.* at 217.

<sup>175</sup>*Id.* at 213.

<sup>176</sup>*Id.* at 213-14.

<sup>177</sup>*Id.* at 214.

education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious belief.”<sup>178</sup> Throughout the years since this nation’s founding, the values underlying this provision have “been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.”<sup>179</sup>

The Court then weighed the claimants’ asserted right against the state’s competing interest. It rejected the idea that the state’s interest in universal compulsory formal secondary education “is so great that it is paramount ... .”<sup>180</sup> “It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote ... health, safety, and the general welfare.”<sup>181</sup> “But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected” by the First Amendment.<sup>182</sup> In this case, the Court held, the state’s interest in compelling two additional years of schooling was insufficient to overcome the claimants’ religious rights.<sup>183</sup>

How to choose between the competing interest in a case such as this is, of course, a difficult question. There is, however, a characteristic of the Court’s analysis that is both fundamental and disturbing. It is that the conflict, as portrayed by the Court’s doctrinal test, was simply one of *individual rights* vs. *public interests*. Because of this framing, there was little or no recognition of *the rights of other individuals* that were at stake.

To understand what this problem represents, we must begin with some discussion of the theoretical nature of rights in American law. A declaration of right clothes an interest with awesome rhetorical, political, and legal power. “I have a right” is a challenge to the world; my

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<sup>178</sup>*Id.*

<sup>179</sup>*Id.*

<sup>180</sup>*Id.* at 219.

<sup>181</sup>*Id.* at 220.

<sup>182</sup>*Id.*

<sup>183</sup>*See id.* at 221-34.

interest, which I assert, is – presumptively, at least – superior to all non-rights interests with which it might conflict. The assertions of an individual right carries with it a powerful message of individual autonomy and the protection of the asserted individual interest from the claims or control of others.

The division of demands into those that are rights-based and those that are not is deeply entrenched in political rhetoric, moral philosophy, and law. The common view of rights as normative demands, with particular strength which “trump” (at least as a *prima facie* matter) non-rights interests that conflict with them can be found in the discussion of any contemporary social issue. It certainly is the foundational premise of those who claim religious rights, and of the state and federal laws that guarantee their protection.

*Prima facie* power does not, of course, mean absolute power; in our legal system, many individual demands that are recognized as rights ultimately yield to the conflicting interests of the collective. However, the point remains that an individual interest, once deemed a “right,” is assumed to be vastly superior – as a threshold matter – to competing public interests.

The heavy hand that this model lends in the resolution of conflicting individual and collective demands can be seen throughout American jurisprudence. It is certainly true of the right to freely exercise one’s religion. Indeed, the presumptive power of the individual religious right over competing public-interest demands is the core or *sine qua non* of the compelling interest test in all of its forms. It is assumed – as a threshold matter, and perhaps (as a practical matter) throughout – that the religious right should win, and the opposing public interest should lose. A religious free-exercise right, found to be impaired by government, can be defeated “only [by] those [state] interests of the highest order.”<sup>184</sup> Such is the assumption by religious claimants (as members of the public), by courts, and by those who enact RFRA and RLUIPA statutes.

The idea of designating religious free-exercise claims as “rights,” with this power, is a societal normative choice. There are arguments, of course, that this should not be done.<sup>185</sup> However, it is my firm belief that wholesale attempts to deny religious exercise as an individual

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<sup>184</sup>*Yoder*, 405 U.S. at 415.

<sup>185</sup>[citations]

right, commensurate with other individual rights, should and will fail. It is not simply the textual privilege that the First Amendment confers that prescribes that outcome; it is the overwhelmingly popular belief that religion *is different* from secular belief, and of unique power and value in human lives. In other words, the reaction to *Lyng* and *Smith* was entirely predictable, as a matter of our culture, and correct for that reason: although the idea of special protection for religious belief and its expression exacts a cost, it cannot – in our society – simply be ignored.

According religious exercise the “power of rights” status does not mean, however, that it is, as an entity, *worth more* than other rights. It does not mean that the law should be structured in a way that appears to guarantee its supremacy in all cases. In particular, it cannot be presented, as a matter of law, in a way that obscures the presence and vitality of other, conflicting rights. Freedom of religion is a right, with all that means; but it is not a “super-right,” which is subtly presumed – through the structure presented – to trump all others.

Consider, again, the *Yoder* case. In that case, the Court carefully considered the religious rights of the Amish objectors, and the public interest asserted by the state in the compulsory education of its children. However, setting up the conflict in this way did not mean an even playing field between these contending forces. Rights are – as a presumptive matter – defeating of opposing public interests. The religious rights, once established, were structured – by the Court’s tests – as particularly powerful and presumptively victorious, absent an extraordinarily compelling interest on the other side. This structure might be skewed, slightly, in a particular case, but its basic import is a familiar and routine one. Assumed presumptive power is the way that rights – as a theoretical matter, *qua* rights – work.

However, in the *Yoder* case there was a serious deficiency in this structure. What about the *rights of other parties*, that were implicated in this conflict? In particular, what about the rights – if any – *of the children* whose fates were bound by the outcome of the case?

The Court’s treatment of this subject is awkward. Added as a last section to the Court’s analysis, the Court recognized the issue of the children’s rights to education only as something that was a part of, and legally derivative of, the state’s public-interest claim.<sup>186</sup> Thus, those

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<sup>186</sup>See *Yoder*, 406 U.S. at 229.



educational rights began (as described above) with one large strike against them. In addition, the Court claimed a factual failure of evidence: in its view, there was no demonstration (by the state) of “any harm to the physical or mental health of [any] ... child.”<sup>187</sup>

Finally and in any event, the Court held, the any rights that the children might have had were collateral to the case. “The children are not parties to the litigation,” the Court observed.<sup>188</sup> “It is the parents who are subject to prosecution here ..., and it is their right to free exercise ... that must determine [the state’s] ... power to impose [its will].”<sup>189</sup> (The Court added, as an aside, that it was unlikely that the children had any rights or interests that were legally cognizable. Such an idea “would ... call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court’s past decisions. It is clear that such intrusion by a State into family relations in the area of religious training would give rise to grave questions” of impairing the religious freedom of parents.<sup>190</sup>)

Therein lies the rub, however – and the lingering sense of injustice in the case. As a technical legal matter, the Court might well have been correct in its setting aside the issue of any child’s right to a high school education. But the failure to consider the possibility of such claims – indeed, the Court’s summary dismissal, in an aside, of their possible legal existence – leaves us with a deep feeling of discomfort.<sup>191</sup> How do we *know* that the Amish children involved had no desire for further education? How can it be *assumed* – as the Court so readily assumed – that the claims of these “third parties” should be automatically devalued, and set aside, as simply a part – at best – of the presumptively less powerful, and therefore ultimately inadequate, state “public interests”?

This problem is not limited to *Yoder*; it is part of the inherent structure of the compelling-

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<sup>187</sup>*See id.* at 230.

<sup>188</sup>*Id.* at 231.

<sup>189</sup>*Id.* at 230-31.

<sup>190</sup>*Id.* at 231-32.

<sup>191</sup>[citations]

interest test. In none of these cases are the *competing rights of other individuals* identified or considered. Rather, they are (apparently?) lumped together with, and/or seen as something derivative from, the (admittedly less legally compelling) public interests in the case.

For instance, consider religious land-use cases, which are some of the most bitter and controversial. In these, the identical deficiency lurks. Land-use regulations are not simply the codification of abstract notions of “nice communities”; they are chosen, almost always, to protect the legitimate property rights and interests of others. The use of land is not something that is always confined within the boundaries of an owner’s parcel; it can have unavoidable, and sometimes extremely deleterious impacts on the land and property rights of others. And that is true, even when what you are doing is claimed to be a religious right.

The compelling-interest test, however, precludes that basic insight. By structuring the question as a (religious) right vs. (weaker) public interests, the test itself admits of no role for the competing property rights of others. It is true, of course, that rights of neighbors can be considered as part of the “government interest” in the case; as stated above, protection of the owners of other land is often the core concern of zoning laws and regulations. However, the structure of the compelling-interest test tends to make both the standing and power of such competing rights invisible. First, they can be captured, and considered, only if they were explicitly stated to be the reason for challenged government action. And even if they were, they are demoted to the status of only weaker “public interests” in the case.

This reality can be illustrated by the “urban slaughter” case, previously discussed, which generated particular public outrage. In that case, the reviewing court held that the city’s interests in public health, humane animal treatment, and the neighborhood’s general environment were insufficient to overcome a religious adherent’s asserted right to engage in animal slaughter in his urban backyard.<sup>192</sup> What was ignored, astonishingly, was that this activity was not simply something that impinged upon (presumptively inferior) public interests; it had real and seriously detrimental impacts on the psychological comfort and property values of those who were forced to

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<sup>192</sup>See *Merced*, 577 F.3d at 578.

live adjacent to these activities.<sup>193</sup> It is fair to assume that not many prospective buyers of urban land would choose to buy a lot next door to slaughtering activities. Yet, in the entirety of the Court’s opinion in the case, no mention of the rights of neighbors or other owners was made.

As a final example, consider the claims of gay men and lesbian women who are asked to sacrifice their civil rights for the claimed religious exemptions of others. Despite the zealousness of some lawmakers and judges for the supremacy of religious rights in these cases, and choruses demanding “religious freedom,” in this context the presumed superiority of religious rights has always seemed uniquely weak. The reason, we see now, is quite obvious. When the civil rights of others is at stake, the presumptive structure of (powerful) “rights” vs. (weaker) “public interests” does not fit. These are conflicts in which the fact that “rights” oppose “rights” is undeniable. Municipal clerks and caterers might be outraged that their religious rights are trampled; but gay and lesbian citizens are justifiably outraged that *their* rights are trampled, as well.

Of course, losses to individuals in the ways presented by these cases are not uniform across the spectrum of religious claims. There are cases in which this problem is acute, and cases in which it is not. For instance, the problem of reciprocal rights interference and felt loss by others is not acute when the religious adherent seeks exemption from laws that serve purely bureaucratic interests, or in which there are no identifiable “others” involved. But those are not all cases. In the post-RFRA and post-RLUIPA world, in both federal and state courts, there have been many (including zoning laws, civil rights laws, health insurance laws, employment laws, and others) in which the rights of others are involved.

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The point is not to denigrate the importance of religious claims; it is to acknowledge that in many cases, there are *bilateral, conflicting rights* of others. What is striking is that there is so little awareness of this in religious exceptionalism debates, either as a matter of embedded theory or of legal doctrine. There have been some isolated instances when the Supreme Court or lower courts acknowledged that granting particular religious exemptions claimed might impose costs on

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<sup>193</sup>Complaints in the case were initiated by neighbors to city officials. *See id.* at 583.

others; but those are rare, and those “interests” generally swept aside.<sup>194</sup> Costs for others – *identified* others – is a little-discussed concern by courts, and something that fits uncomfortably in our model of religious rights. Overwhelmingly, the emphasis is on the religious adherent, and what she will lose. There is no acknowledgment of what other individuals will lose, if the exemption is granted.

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#### IV. Coda

“Natural law” has different meanings for different people. For some, it means principles of law that are grounded in a stylized understanding of human characteristics or human needs. For others, it means the implementation of particular principles grounded in moral philosophy or religious law. For yet others, it means simple recourse to human conscience, or other identified ways of human knowing.

In this work, I do not adopt any one of these views. Rather, I mean, by “natural law,” what all of these conceptions have in common. It is this: commitment to natural law means that there must be commitment to the belief that transcendent norms or ideals exist in some real sense and must shape in some real way the content of law. We might struggle over what those transcendent norms mean; we might struggle over how they should be implemented by law; *but we see their expression as a part of law*. Law cannot be detached from our commitment to principles of greater and transcendent meaning. There can be no “exceptions” to the quest for justice in American law.

Recently I attended a hearing in the Maine Legislature, on a proposed RFRA in that state. The hearing was crowded with speakers and spectators. The Liberty Institute had organized about thirty earnest adults and even more children, who wore large badges that said “Save Our Religious Liberty” as they waited for their turn to speak. The hearing opened with speaker after speaker

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<sup>194</sup>See, e.g., *Hobby Lobby*, 134 S.Ct. at 2780-85 (court was careful, in its analysis, to stress the statutory rights of employees of objecting employers to complete health-care coverage, including contraceptive coverage); *Cutter*, 544 U.S. at 726 (court acknowledged that inmate requests for religious accommodations might impose unjustified burdens on others).

saying that religious liberty – which meant religious exemption from secular law – was a God-given part of our cherished constitutional heritage. There was a lot of impassioned testimony about the Founding Fathers, and the tradition of religious liberty in the United States. What struck me was that for these people, and many of the members of the legislative panel, the idea that religion was superior to the concerns of others was unquestioned.

Religious freedom, or “freedom of conscience” as it was then described, was of obvious importance to those who were involved in the establishment of the American republic; but there was no assertion – let alone consensus – that religious rights, in practice, supercede the foundational values and needs of a democratic society, expressed through law. The historical record does not only fail to support the claims of those who believe in religious “super rights”; it soundly supports the opposite. As I have written about this history in another context:

With their emphasis upon the equality of all sects and believers, in public as well private spheres, there is little doubt that reformers believed that citizens of all religious and nonreligious persuasions should freely participate in public life; and that it should be presumed that they – like the Protestant Christians before them – would bring their beliefs, values, and identifies to the task.<sup>195</sup> Indeed, the universal condemnation among reformers of test oaths for public office was the most uncontrovertible evidence of equality in the public sphere. For instance, in his initial draft of what would become the First Amendment, Madison offered the following language to the House of Representatives: “The civil rights of none shall be abridged on account of religious belief or worship, ... nor shall the full and equal rights of conscience be in any manner, or on any pretext, be infringed.”<sup>196</sup> The religious freedom that reformers envisioned was, indeed, *freedom*; it was the granting to dissenting individuals the same prerogatives and freedom of action granted to others.

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<sup>195</sup> See James Madison, *Address of the General Assembly to the People of the Commonwealth of Virginia*, in 6 THE WRITINGS OF JAMES MADISON, *supra* note 9, at 332, 337 (discussing the vital connection between the formation of religious belief and its expression).

<sup>196</sup> 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834).

The idea that religious liberty should be permitted to undermine the necessary social order was, however, completely unthinkable to the reformers of the Founding Era. The goal of religious liberty and freedom of conscience was not to reject or undermine the republic's necessary civil laws or moral foundations; it was to *reinforce* them. Religious freedom was not seen as a wholly individualistic enterprise, antagonistic to the ideas of public virtue and the moral cohesion necessary for society and republican government to survive. Religious freedom and freedom of conscience would well set individuals against unjust, oppressive, and unequal laws; but it could not empower individuals to engage in actions that rent the underlying social fabric. Actions that contravened transcendent values and threatened the social fabric were no more acceptable when done by religious individuals as by anyone else. Religious freedom and its protection were not free standing entities; they were deeply merged with what the reformers saw as the necessary place of community restraints and communitarian ideals. The idea was *equality within the restraints of the necessary bonds of society and government*. It was not to confer upon religious objectors the power to defy the republic's necessary laws and the rights of others.<sup>197</sup> In all cases, it was critical that public order and the legal rights of others be preserved.<sup>198</sup>

The idea that religion enjoys special status – “exceptional” treatment – has been a fixture in American culture and American law for many years. It is taken for granted by many, as a cultural matter, and is used in large swaths of American law. It is time for justice to others is recognized in this debate, as well.

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<sup>197</sup>See, e.g., James Madison, *Amendments to the Declaration of Rights*, I THE PAPERS OF JAMES MADISON 174, 175 (William T. Hutchinson and William M.E. Rachal eds., 1962).

<sup>198</sup>See Laura S. Underkuffler, *The Historical Record: True First Principles* (discussing extensive historical evidence, available from the author).