FURTHER DEVELOPMENTS

AN ECONOMIC ANALYSIS OF THE RELIGIOUS FREEDOM RESTORATION ACT

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I

INTRODUCTION

As an attempt by Congress to overturn a Supreme Court ruling by statute, the Religious Freedom Restoration Act ("RFRA"), although passed by a congressional landslide, was one of the most controversial pieces of legislation passed during the Clinton presidency.[1] Enacted by Congress in 1993, RFRA was intended to add a degree of protection to religious practices by requiring courts to evaluate facially neutral, non-religion specific statutes using the compelling interest test.[2] By enacting the statute, Congress attempted to overturn a prior Supreme Court decision[3] by mandating how all courts must decide free exercise cases. In 1997, however, the Supreme Court ruled that RFRA was an unconstitutional congressional usurpation of the judiciary's power to interpret the Constitution.[4] RFRA remains noteworthy, however, because of the means utilized by a dissatisfied Congress to overturn the Court. Instead of adhering to the amendment process outlined in the constitution, Congress, via a statute, effectively not only overturned a prior Supreme Court ruling, but also expanded constitutional rights beyond the Court's recent interpretation of the Constitution.

This note examines RFRA from a law and economics perspective to show that, as a method by which Congress attempted to impose its definition of a constitutional right upon the courts, the Act was inefficient.

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1. The current issue of Law and Contemporary Problems explores various aspects of the Constitution and constitutional interpretation during the Clinton Administration. This note adds to the exploration by examining, from a law and economics perspective, the attempt by Congress to expand the rights protected by the Constitution through the enactment of the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-1 (1993)).

2. *See* Elizabeth C. Williamson, City of Boerne v. Flores *and the Religious Freedom Restoration Act: The Delicate Balance Between Religious Freedom and Historic Preservation*, 13 J. LAND USE & ENVTL. L. 107, 113 (1997).

3. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that a facially neutral law of general applicability is constitutional as long as it only incidentally burdens one's religious beliefs).

4. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

II

RFRA'S SHORT HISTORY

RFRA represented an attempt by Congress to restore the compelling interest test articulated in *Sherbert v. Verner*,[5] and *Wisconsin v. Yoder*,[6] for all cases in which religious freedom was substantially burdened.[7] In *Sherbert*, the appellant was denied unemployment compensation after refusing to work on Saturday, the Sabbath Day for her faith. The Court found it unacceptable that the appellant had been forced to choose between violating a religious tenet and receiving unemployment benefits, and ruled that this conditioning of receipt of benefits unduly burdened her free exercise of religion.[8] The Court likened this burden to a fine imposed on the appellant for worshipping on Saturdays.[9]

In *Yoder*, the Court applied the *Sherbert* standard in granting Amish children an exception to a Wisconsin law requiring children to attend school until at least the age of sixteen. The Court concluded that the law, as applied in this case, was directly at odds with the purpose of the First Amendment and interfered with the "fundamental tenets" of the appellants' religion.[10] As in *Sherbert*, the Court held that a facially neutral statute may not unduly burden the free exercise of religion unless there is a compelling governmental interest.[11]

Nearly two decades after *Yoder*, a closely divided Court held that a facially neutral, generally applicable law is not unconstitutional even though it incidentally burdens one's religious beliefs.[12] In *Employment Division v. Smith*, two Native Americans had been terminated from their employment as private drug rehabilitation counselors for ingesting the illegal hallucinogen peyote, as part of a sacrament in their religion. Because the Employment Division concluded that they had been terminated for misconduct, the two were denied unemployment benefits.[13] Writing for the majority of the Court, Justice Scalia stated that to impose the compelling interest test in such cases would elevate religious doctrine above general law, thereby producing a "constitutional anomaly" in the form of a "private right to ignore generally applicable laws."[14]

Smith likely would have resulted in an identical outcome even under the compelling interest test. The government would have had little difficulty establishing that full enforcement of its narcotics laws represented a compelling in-

5. 374 U.S. 398 (1963).
6. 406 U.S. 205 (1972).
7. *See* Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 NEXUS J. OP. 73, 76 (1997).
8. *See Sherbert*, 374 U.S. at 404-05.
9. *See id.*
10. 406 U.S. at 218.
11. *See id.* at 220.
12. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990).
13. *See id*. at 874-75.
14. *Smith*, 494 U.S. at 886.

terest.[15] Indeed, *Smith* distinguished *Sherbert* and *Yoder* because they did not involve conduct prohibited by law.[16]

Unhappy with the decision in *Smith*, Congress "moved quite literally to substitute as 'law' the view of the dissent in the case,"[17] passing RFRA, which read, in part, as follows:

> (a) In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[18]

Because it was directed at courts hearing free exercise cases, RFRA created a "statutory right where the Court declined to create a constitutional right."[19] As such, RFRA was not a constitutional guarantee of rights, but merely a legislative guarantee.[20] The Act, therefore, was not binding on Congress: It retained the authority either to appeal or override RFRA.[21]

Congressional victory was short-lived, however. In the first RFRA claim brought before the Supreme Court, the Act was invalidated for going so far beyond the congressional prerogative of protecting constitutional rights that it *created* constitutional rights.[22] RFRA was a curiosity in that it had no power to deter future legislatures from statutorily overruling or nullifying it, and yet it claimed the authority to bind the Supreme Court. If Congress can mandate precisely how the courts will review the constitutionality of statutes, then the Constitution becomes indistinguishable from ordinary law.[23] Although the legislature can nullify the Court's misinterpretation of a statute by amending the statute, the transaction costs associated with this process are significantly higher than those associated with judicial interpretation, and, in order to maximize ef-

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15. *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 276 (1994).

16. *See Smith*, 494 U.S. at 876 (failing to note that *Smith*, like *Sherbert*, was an unemployment benefits case).

17. William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 DUKE L. J. 291, 306 (1996).

18. 42 U.S.C. § 2000bb-1 (Supp. V 1993).

19. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 246.

20. *See* Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1308 (1998).

21. *See id*.

22. *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

23. *See id.*

ficiency, courts should "have much more leeway in interpreting the Constitution."[24]

III

RFRA FROM A LAW AND ECONOMICS PERSPECTIVE

In order to have a firm understanding of RFRA, one must be familiar with some aspects of the free exercise claims it was intended to facilitate. Free exercise claims are more likely to be successful if they merely reduce the sacrifice necessary on the part of the believer than if they make the believer better off than the nonbeliever.[25] That is, courts are suspicious of ulterior motives in bringing such claims. If a successful claim would leave the individual better off than others with different religious convictions (for example, allowing one to use peyote when others not affiliated with the faith may not), there is a greater chance of claimants bringing suit for ulterior motives. For instance, in *Sherbert*, Mrs. Sherbert made a value choice between honoring her religious convictions, by not working on Saturdays, and retaining her job.[26] She was not necessarily better off relative to others because she may very well have wanted to have worked Saturdays in order to earn additional income. By protecting her employment, the Court allowed Mrs. Sherbert to limit her religious sacrifice to Saturday earnings, rather than risk total unemployment. Though seemingly analogous on the facts, *Smith* is quite different. In *Smith*, if the appellants had been confronted with the necessity of choosing between peyote use in a ceremonial manner or maintaining employment, it is not at all certain that they would have chosen the latter. Had the *Smith* appellants prevailed, they would have been better off than non-believers, for whom peyote use would still be illegal.

Free exercise claims also have a higher likelihood of success if the claimants seek a benefit of meager value to nonbelievers, such as the right to wear a yarmulke while playing high school basketball.[27] In these cases, there is little risk of ulterior motive on the part of the claimants,[28] a risk that is particularly prevalent in cases like *Smith*, which sparked RFRA's enactment. To allow the use of narcotics in religious ceremonies gives rise to the possibility that groups will engage in illicit drug use under the pretense of religious necessity. In *United States v. Bauer*, for example, Rastafarians, under RFRA, challenged convictions for possession and conspiracy to manufacture and distribute marijuana, arguing that such use and manufacture was central to their religion.[29] The Ninth Circuit affirmed the conspiracy convictions, saying that "the religious freedom of the de-

24. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 291 (1982).

25. *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 52 (1989).

26. *See id.* at 51-52.

27. *See id.* at 52.

28. *See id.*

29. 84 F.3d 1549, 1556 (9th Cir. 1996).

fendants was not invaded" because "[n]othing before [the court] suggests that Rastafarianism would require this conduct."[30] Many such claims from groups or individuals affiliated with nontraditional religious sects could have been anticipated had RFRA been allowed to stand.

Perhaps the best-known examples of religious practices conflicting with state law are the cases upholding antipolygamy laws in the face of free exercise claims.[31] In *Potter v. Murray*, the United States District Court for the District of Utah ruled that the Free Exercise Clause does not protect the practice of polygamy.[32] The Tenth Circuit affirmed, utilizing the compelling state interest test in holding that though the freedom to believe is absolute, freedom to act is not absolute, and a state has a compelling interest in enforcing its criminal code.[33]

It is unlikely courts will ever have much difficulty in holding that the enforcement of criminal laws is a compelling state interest,[34] which makes RFRA all the more of a curiosity. *Smith* held that a generally applicable neutral law that only incidentally prohibits the performance of a religiously required act does not violate the Free Exercise Clause.[35] This rule is necessary to balance the competing goals of the Free Exercise Clause and the Establishment Clause because any exception that would exempt religious groups from the criminal code would amount to the establishment of religion by the federal government.[36]

Herein lies RFRA's fatal flaw: If free exercise claims exempt individuals in certain circumstances from generally applicable laws, then religion becomes, in effect, subsidized.[37] If no such exemptions exist, then individuals, relative to others not of the same religious persuasion, will neither gain nor lose rights because of their religious practices. For example, in *Smith*, the appellants' religious affiliation would not enlarge or diminish their right to smoke peyote.

A. RFRA Was a Statute, Not an Amendment

Legislation can be viewed much like any other good supplied on the market. According to the "interest group" theory, for example, legislative protection is provided to those groups that derive from it the greatest value, regardless of overall social wealth.[38] Under this theory, small, well-organized interest groups can appropriate to themselves disproportionate benefits from the political proc-

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30. *Id.*

31. *See* Harmer-Dionne, *supra* note 20, at 1298.

32. 585 F. Supp. 1126 (D. Utah 1984).

33. *See Potter v. Murray*, 760 F.2d at 1070 (10th Cir. 1985); *Smith*, 494 U.S. at 879.

34. *See* Idleman, *supra* note 15, at 276.

35. *See* Employment Div. V. Smith, 494 U.S. 872, 878 (1990).

36. *See Flores,* 521 U.S. at 537 (Stevens, J., concurring) (stating that a "governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment").

37. The prevailing view is that the government is prohibited from either advancing (a lower threshold than attempting to actually "establish" religion*)* or retarding religion. In economic terms, religion is advanced through subsidization and retarded through taxation. *See* McConnell & Posner, *supra* note 25, at 2.

38. *See* Posner, *supra* note 24, at 265-66.

ess.[39] This leads to socially inefficient laws, because members of more diffuse groups with less specific goals are often correspondingly less adamant in opposing a tight-knit organization's push for legislation.[40]

Thus, rationally behaving interest groups will have incentives to maximize their gains from potential legislation while minimizing their costs. Interest groups have four primary means by which to engage in rent-seeking[41] with the government. First, an interest group can petition the executive branch by "lobbying for changes in administrative regulations and enforcement practices."[42] Second, an interest group may attempt to persuade courts "to interpret statutes or constitutional provisions in a manner consistent with [the group's] goals," [43] either by investing in litigation or by attempting to influence the process of judicial selection.[44] Third, and at more cost to an interest group, rent-seeking may take the form of lobbying the legislature for the enactment of a statutory provision.[45] Finally, and at most cost, an interest group may campaign for a constitutional amendment.[46]

RFRA was the result of the third approach—lobbying the legislature for the enactment of a statute. Yet RFRA violated a major check in the separation of powers inherent in the Constitution by statutorily mandating the standard by which courts could evaluate free exercise claims. RFRA effectively inserted an additional provision into the Constitution—namely, that such claims would stand unless the state demonstrates a compelling interest in abridging that right and furthers that interest in the least restrictive manner possible. In *City of Boerne v. Flores*, the Supreme Court denied the constitutionality of this provision.

The compelling interest test is a judicial invention, designed to facilitate the difficult process of interpreting the Constitution where the Framers' intent is less than clear. Though courts are not more inherently capable of accurately interpreting the Constitution than legislatures, this responsibility has been bestowed upon them for very pragmatic reasons. Perhaps the principal reason is the relative independence of the judiciary. That is, because federal judges are appointed for life and thus not subject to reelection, their advancement is assumed to be less correlated to their decisions.[47] In short, federal judges have no

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39. *See* John O. McGinnis, *The Original Constitution and its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 202 (1997).

40. *See id.*

41. Rent-seeking is "the purposeful pursuit, through the political process, of above-normal profits." Michael E. DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 HARV. J.L.& PUB. POL'Y 205, 214 (1991).

42. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 116 (1993).

43. *Id.*

44. *See id.*

45. *See id.* at 117.

46. *See id.*

47. *See* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 8 (1987).

need for a base of support supplied by interest groups and lobbyists. Therefore, legal protections of the welfare of those in the minority[48] are more likely to be enforced by judges than by legislators.[49] The judicial decisionmaking authority protects those whose rights are infringed by statutes pushed through by rent-seeking interest groups.

RFRA was an attempt by organized religious groups to usurp judicial decisionmaking authority and to reap the benefits normally associated with a constitutional amendment while only expending the resources required of a statute.[50] In an economic sense, lobbying for a constitutional amendment is likely to be more costly than lobbying for a statute.[51] For example, interest groups advocating an amendment immediately bear the costs of seeing an amendment through to ratification, but the benefits of the amendment may accrue only in the long run. Thus, future benefits of the amendment must be discounted to reflect the time value of money.[52] Of particular importance is the risk of additional costs to repeal the amendment in the event its judicial interpretation is unexpected.[53]

As a general rule, "[i]f the benefits of amendment are greater than the costs of obtaining one, a group will opt for constitutional change," but "if the added cost of constitutional protection exceeds the added benefit for an interest group, that group will pursue statutory protections."[54] An economically rational interest group, however, will not pursue an amendment—even if its benefits exceed its costs—if those same benefits can be realized at lower costs.[55]

RFRA would have reduced the future costs of securing certain rights through litigation. For instance, if it is known that the right to use peyote in a religious ceremony will be judged under the more favorable (from the perspective of the religious organization) compelling governmental interest test,[56] an interest group might elect to incur the costs of litigation with little risk of failure. While this may seem to be efficient prospectively, it is uncertain what implications RFRA would hold for prior Court rulings that had not been decided un-

48. "Minority" frequently does not refer to a numerical minority, but rather to the amount of political influence exerted by opposing groups. Therefore, a minority interest might be one held by a majority of the population, if that majority is too diffuse to resist the passage of legislation advocated by a strong and influential interest group. *See id*. at 10.

49. *See id*. at 8.

50. *See* H.R. REP. NO. 88, 103d Cong., 1st Sess. (1993) (stating that RFRA's purpose is creating "a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened").

51. *See* Boudreaux & Pritchard, *supra* note 42, at 117 (theorizing that "amendments cost more because they require more lobbying and other expenditures than statutes").

52. *See id.*

53. *See id.*

54. *Id.* at 118.

55. *See id*.

56. This is highly doubtful. The government would probably have had little difficulty establishing that full enforcement of its narcotics-related laws is a compelling interest. *See* Idleman, *supra* note 15, at 275-76.

der the compelling interest test, giving rise to the possibility that many issues would have to be relitigated.

The religious freedom cases used a variety of review standards. Under the test established in *Lemon v. Kurtzman*—the one used in the "establishment of religion" cases—a statute must have a secular purpose, have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.[57] This has been criticized as an inherently unworkable doctrine.[58] Justice Scalia, lamenting its invocation in *Lamb's Chapel v. Center Moriches Union Free School District*,[59] stated that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after repeatedly being killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys."[60] Scalia also noted that six of the current nine justices have, when they have seen fit, "personally driven pencils through the creature's heart."[61]

These Establishment Clause cases remain uncertain because the Court itself is unsure of how much of a religious purpose must be found before a statute will be invalidated.[62] Justices Scalia and Rehnquist both "reject the purpose prong of the Lemon Test in its entirety," while other Justices argue that "a statute may be constitutional if it is motivated in part by religious purposes," but they do not agree as to where the line should be drawn.[63] All this is to say that the law regarding religious liberty is an excessively tangled web.

It is unclear what effect RFRA would have had on this web of case law. It seems apparent, however, that the doctrine of *stare decisis* would have conflicted with its application, as such a substantial expansion of rights under the Free Exercise Clause would have necessarily intruded upon the domain of the Establishment Clause. Would cases decided under the *Lemon* test no longer have any precedential effect? Currently, with the Court rather sporadically applying the *Lemon* test, there may be times when a new claimant will be uncertain as to which standard will be applied to his case. Still, many settled issues could have been expected to have been re-litigated under RFRA, and it is doubtful that the costs saved in those new uncertain cases (that could be ensured a compelling interest standard) would outweigh the costs incurred in relitigating old issues decided under different standards.

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57. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

58. *See* Stephen G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468-69.

59. 508 U.S. 384 (1993).

60. *Id*. at 398.

61. *Id*.

62. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L. J. 89, 125 (1990).

63. *Id*.

B. RFRA's Textual Ambiguities

RFRA required that the government not "substantially burden a person's exercise of religion" unless the government could demonstrate that the burden was "in furtherance of a compelling governmental interest and [was] the least restrictive means of furthering that compelling governmental interest."[64] Yet Congress provided little guidance about how to interpret the terms "compelling interest" and "substantially burden."[65] Although RFRA stated that the compelling interest test is that set forth in prior federal court rulings and that it provides "a workable test for striking sensible balances between religious liberty and competing prior governmental interests,"[66] this assumes that courts have clear, well-defined standards for recognizing a compelling interest. As this often may not be the case, there is no reason to assume RFRA would have resulted in fewer cases being litigated. Indeed, it is likely that only the focal point of the litigation would have changed.

Under RFRA, courts asked whether a compelling state interest was present, and, if so, whether the restriction on religious practice was the least burdensome possible. Courts were by no means uniform in their application of RFRA. For instance, a Wisconsin court ruled that the state could not prohibit prisoners from wearing religiously significant jewelry,[67] but an Iowa court held that a prisoner could be denied the opportunity to witness a baptismal ceremony because these actions did not touch upon religious practices that were "mandated" by the faith or "central" to a religious tenet.[68] In a case analogous to *Employment Division v. Smith*,[69] the United States Court of Appeals for the Ninth Circuit held that because Rastafarians could not show that the distribution of marijuana was required by their faith, they could not challenge their conspiracy convictions under RFRA.[70] The Court found error, however, in the lower court's failure to require the government to show that that the application of the marijuana laws to the defendants on the possession charges was the least restrictive means of furthering a compelling governmental interest.[71]

As mentioned above, RFRA noted that the compelling interest test utilized in past federal court rulings was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[72] Prior court rulings, however, never adequately explain what constitutes a compelling

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64. 42 U.S.C. § 2000bb-1 (Supp. V 1993).

65. *See* Idleman, *supra* note 15, at 274.

66. 42 U.S.C. § 2000bb (Supp. V 1993).

67. *See* Sasnett v. Sullivan, 908 F.Supp. 1429, 1432 (W.D. Wisc. 1995), *vacated by* 521 U.S. 1114 (1997).

68. *See* Weir v. Nix, 890 F. Supp. 746, 768 (S.D. Iowa 1995).

69. 494 U.S. 872 (1990).

70. *See* United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996) (affirming convictions for conspiracy to distribute, possession with intent to distribute, and money laundering, but remanding to allow religious defense for possession counts).

71. *See id.*

72. 42 U.S.C. § 2000bb(a)(5) (Supp. V 1993).

state interest. Indeed, the standard is intended to be sufficiently flexible to allow courts to interpret it more or less restrictively as they see fit.[73] Courts have had a tendency to find a compelling interest when issues arise in the military, criminal, or prison context,[74] but RFRA did not purport to limit itself to any specific contexts.[75]

RFRA also failed to define the term "burden" or its modifier "substantially."[76] Courts interpreting RFRA were required to look to existing case law to construe the terms or, that failing, simply to fashion a definition that seemed suitable.[77] "At best, this doctrinal uncertainty and analytical manipulability [would] cause RFRA to be interpreted in unpredictable and inconsistent ways" and, at worst, would "endow RFRA-resistant judges with a powerful means by which to interpret the Act narrowly."[78]

This wide latitude of judicial discretion under the Act not only could result in little meaningful protection for religious minorities, but would also increase the total cost to society due to a rise in the number of cases litigated contesting the interpretation of such terms as "compelling interest" and "substantial burden." To illustrate this point, by the date of the *Flores* decision—only five years after RFRA's enactment—state and federal courts had heard a total of 168 RFRA challenges.[79] In challenges to state prison policies, claimants were granted relief nine times and denied relief eighty-five times. In all cases, relief was granted twenty-five times and denied 143 times, for a relief percentage of approximately fifteen percent.[80] Thus, the possibility of additional protection appeared to inspire claims, the vast majority of which were unsuccessful. Many of these claims likely would not have been brought had the law as articulated in *Smith* (which held that a facially neutral, generally applicable law that incidentally burdens one's religious beliefs is constitutional) remained in effect.

The more specific a rule is, the less costly it is to apply. With a clear, measurable objective standard against which a statute may be compared, relatively little cost is associated with interpretation. Certainty sacrifices flexibility, however, which is particularly desirable in a rule with the widespread applicability of RFRA. If the rule had been narrowly tailored to overturn *Smith* with regard to peyote use, for example, the dangers associated with textual ambiguities

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73. *See* Idleman, *supra* note 15, at 275.

74. *See, e.g.,* United States v. Schumucker, 815 F.2d 413, 417 (6th Cir. 1987) (rejecting free exercise claim regarding mandatory selective service registration on the ground that government has a "compelling interest" in quickly conscripting citizens into service should doing so prove necessary); Faheem-El v. Lane, 657 F.Supp. 638, 645-46 (C.D. Ill. 1986) (holding that institutional security provided a compelling interest for restricting prisoners from wearing religious emblems and holding separate religious services).

75. *See* Idleman, *supra* note 15, at 276-77.

76. *Id.* at 266.

77. *See id.*

78. *Id.* at 271.

79. *See* Ira C. Lupu, *Why the Congress was Wrong and the Court was Right—Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 802 (1998).

80. *See id.* at 803.

leading to inconsistent court rulings would not be present. RFRA, however, was a very broad act and purported to reach any free exercise claim.

Despite its intended purpose of strictly limiting judicial interpretation in free exercise cases, RFRA gave surprisingly little guidance to judges attempting to apply it in good faith.

C. The Uncertainty of the Rights Secured by RFRA

The most pointed criticism of RFRA, articulated by the Supreme Court in *Flores*, is that it lacked the necessary proportionality between the means (the statutory remedy) and the ends (the right being protected).[81] RFRA's stated purpose was to restore the pre-*Smith* free exercise regime by prohibiting the government from either intentionally or inadvertently substantially burdening the free exercise of religion unless the government could show that it had employed the least restrictive means of furthering a compelling state interest.[82] Simply put, the *Smith* case implemented a purpose test for religious discrimination (allowing incidental burdens upon religion), and RFRA was an effort to replace the purpose test with an effects test that would give consideration to the purpose of the contested governmental regulation.[83]

Congress has no authority to define or redefine constitutional rights, but it can prescribe remedies for existing rights.[84] If, in interpreting the Constitution, the judiciary also defines the rights that are to be protected, then these rights, under a "rights essentialist theory," [85] are value judgments of the courts and not bona fide constitutional rights.[86] According to this theory, these constitutional rights represent a form of judge-made constitutional common law.[87]

If constitutional rights are derived from common law, then from a traditional law and economics perspective, the goal would be simply to optimize the number of constitutional breaches. But would that optimal number be zero, making violations so frequent that remedies would come to be regarded primarily as compensatory fines and not as punitive sanctions?[88] The optimal number of true constitutional violations would, of course, be zero and remedies would, of course, be punitive. However, if courts are allowed to add fundamental rights to be protected under the umbrella of the Constitution, the number of violations will correspondingly increase. An inevitable over-enforcement of these judicially crafted rights would lead to the subjection of too many persons to the stigma of penal actions for violating constitutional rights, until such penal actions and stigma were so diluted that the original document-created rights

81. *See Flores*, 521 U.S. at 530.

82. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 864 (1999).

83. *See id.*

84. *See id.* at 864-65.

85. *See id.* at 861.

86. *See id.* at 865.

87. *See* Posner, *supra* note 47, at 37.

88. *See* Levinson, *supra* note 82, at 859-60.

would no longer be adequately protected. This is perhaps the most obvious danger inherent in enforcing questionable rights, and a compelling reason for resolving such doubtful constitutional claims (claims not arising from the text of the document) against the claimant.[89]

Given that the source of rights and the source of remedies originate in two different branches of government—and that remedies are concrete statutory declarations—over-inclusive remedies will often effectively create additional constitutional rights. Thus, when rights are created by two separate branches, and these rights differ, then from either perspective, the contested rights will appear to be either under- or over-enforced.

The under-enforcement theory posits that federal courts do not always enforce constitutional rights to their fullest.[90] When Congress takes note of this, it may fashion a "remedy" designed to protect not only the court-recognized right, but also rights it perceives to be inherent in the Constitution. Thus, Congress remedies judicial under-enforcement with legislative over-enforcement.

RFRA is such an example of Congress over-enforcing a right, or, alternatively, fashioning a right where none existed.[91] Given this problem, to whom should deference be given? In this case, is the efficient solution a post-*Smith* under-enforcement by the Court or a post-RFRA over-enforcement by Congress? This inquiry begs the question of whether the right to religious freedom was under-enforced at all following *Smith*. Quite simply, "the power to interpret the Constitution in a case or controversy remains in the judiciary."[92] If Congress were authorized to infringe upon this power of the judiciary, the Constitution would no longer be "superior paramount law, unchangeable by ordinary means."[93] Once the Court establishes how it interprets the right to be protected, any attempt by Congress to alter this interpretation leads to a new right in place of the original, and, by extension, the original right is left unprotected.[94]

To allow Congress and the judiciary to share this interpretive power would only lead to increased uncertainty as to what rights are protected by the Constitution. If Congress creates a statutory right courts are unwilling to enforce, claimants who would have benefited from the additional protection are in a worse position after incurring the costs of mounting an unsuccessful claim than they would have been had they known at the outset that no claim existed. This is precisely what occurred with RFRA before the *Flores* decision.[95]

RFRA did not expand free exercise rights; rather, it made those rights less certain. While a clear constitutional right must be enforced, uncertain rights

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89. *See* Posner, *supra* note 24, at 284.

90. *See* Lawrence Gene Sager, *Fair Measure: the Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

91. *See Flores*, 521 U.S. at 508 (stating that "Congress does not enforce a constitutional right by changing what that right is").

92. *See id.* at 524.

93. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

94. *See Flores*, 521 U.S. at 508.

95. *See* Lupu, *supra* note 79, at 802-03.

"should be denied; [and] doubts should be resolved against the claimant," so that protection of the more firmly entrenched rights will not be diluted.[96] When the concept of fundamental rights is stretched to include rights without firm constitutional roots, the compelling interest standard serves only to "prevent serious consideration of any possible justifications for the challenged statute."[97] If a compelling state interest is shown when infringing on a fundamental right produces the greatest good for the greatest number,[98] then this supposedly high bar of protection is reduced to nothing more than a simple cost-benefit analysis. Such may occur when courts are given the leeway to interpret the ambiguous terms "compelling interest" and "substantially burden." Protecting these judicially created rights gives rise to the inherent danger that no constitutionally created rights can rise above this cost-benefit analysis.

It follows that any over-protection of free exercise rights resulting from RFRA is a fiction, because these rights are nonexistent unless enforced by the courts.

IV

CONCLUSION

Could RFRA have been worded so as to achieve its purpose in an efficient manner? As a single act designed to alter the way all such cases must be decided, probably not. Though religious organizations of all sorts banded together to lobby for the enactment of RFRA, they might have fared better by lobbying for their own specific causes of action. Though the united approach minimized transaction costs to the individual organizations, the results would likely have been disappointing to many such groups.

In the *Smith* case concerning the use of peyote in religious ceremonies, for instance, the Court could easily have found that the state had a compelling interest in enforcing its narcotics laws. A narrowly tailored statute, on the other hand, that legitimized peyote's use during the ceremonies of a recognized religion that deems such use essential to its practice would likely have achieved the desired result. Here, Congress would not be altering or adding to the Constitution, but merely abridging other statutes. These narrowly tailored rules, while perhaps initially more expensive, would also be less likely to spurn excessive litigation questioning the reach of the statute as a whole or the interpretation of certain key words or phrases central to its application. Any resulting litigation would be confined to the more narrow reach of the statute, reducing the number of litigants affected by the statute's reach.

Finally, in the tradition of Coasean bargaining,[99] if interest groups have a firm understanding of what their rights are under the Constitution, they may

96. Posner, *supra* note 24, at 284.
97. *Id.* at 287.
98. *See id.*
99. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

more effectively lobby for statutes from which they might benefit. With peyote, for example, if Congress and the Court have different opinions as to what rights exist, then it is unclear by what means one would attempt to alter the existing rule. It was this tension that contributed to RFRA's failure.