# Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?

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## INTRODUCTION

The enactment of a state Religious Freedom Restoration Act ("RFRA") requires an enormous concerted effort by many people and groups. In California, I participated in that process and witnessed the huge amount of time spent by legislative staffs, legislators, numerous organizations, and countless individuals to agree on the appropriate language and garner the needed votes. In California, all of this came to naught when Governor Pete Wilson vetoed the bill.[1]

In light of the enormous time and energy required to enact a state RFRA, careful consideration should be given to whether such laws can withstand constitutional scrutiny once enacted. Obviously, constitutionality is important in assessing the desirability of any legislative effort. The question is whether state religious protection acts would meet the same fate as the federal law and be

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[1] *See* Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 Reg. Sess., 8 ASSEMBLY J. 9647, 9647 (Cal. 1998) (also available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_vt_19980928.html>).

invalidated.

The Court's decision in *City of Boerne v. Flores* offers no reason to be concerned about the constitutionality of state RFRAs.[2] Justice Kennedy's majority opinion focused exclusively on why the federal law exceeded the scope of Congress's authority under Section 5 of the Fourteenth Amendment. Nothing in the majority opinion indicated any limit on state government power to adopt such laws.

Although state RFRAs would not undergo the same analysis as the federal law, they could face other constitutional challenges. Two particularly important constitutional challenges involve the Establishment Clause and the separation of powers doctrine. Part I of this Article addresses the Establishment Clause as a basis for challenging the constitutionality of state RFRAs. Part II looks at separation of powers. I conclude that courts should find state RFRAs constitutional and that neither the Establishment Clause nor the separation of powers is a basis for invalidating these Acts.

## I. ESTABLISHMENT CLAUSE

In a concurring opinion in *City of Boerne v. Flores*, Justice Stevens declared: "In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution."[3] Last year, the Office of Legislative Services of the New Jersey legislature issued an opinion that a proposed state RFRA was unconstitutional.[4] A senior legislative counsel issued an opinion that the bill lacked a secular legislative purpose and that its principal effect was to advance religion, thus causing it to violate the Establishment Clause.[5] As a result, the state Senate's Judiciary Committee decided to hold the bill.[6]

Some prominent constitutional scholars have also argued that a RFRA violates the Establishment Clause. Professors Christopher L. Eisgruber and Lawrence G. Sager maintain that the Federal RFRA was unconstitutional in that it did "not simply favor religion; it

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[2] *See* City of Boerne v. Flores, 521 U.S. 507, 521 (1997) (stating that Religious Freedom Restoration Act is unconstitutional as exceeding scope of Congress's power under Section 5 of Fourteenth Amendment).

[3] *Id.* at 536 (Stevens, J., concurring).

[4] *See* Ellen Friedland, *New Grounds for RFRA Attack in NJ Senate*, N.J. JEWISH NEWS, Apr. 2, 1998, *available in* 1998 WL 11395779.

[5] *See id.*

[6] *See id.*

clothe[d] that favoritism in constitutional language and categories."[7] Likewise, Professor William P. Marshall stated that "[d]espite the statute's tie to free exercise concerns, the fact that [the Federal] RFRA extends across-the-board protection to religion might easily be viewed as an improper endorsement."[8] Their objections apply equally to a state RFRA.

Although this is an impressive line-up of critics, I believe they are incorrect and that RFRAs, federal or state, do not violate the Establishment Clause.[9] To explain, in section A, I detail the arguments advanced for why RFRAs are unconstitutional. Section B then responds to these concerns and defends the constitutionality of RFRAs.

### *A. The Arguments that RFRAs Violate the Establishment Clause*

In order to evaluate whether RFRAs violate the Establishment Clause, it is necessary to present the strongest version of that argument. A problem in analyzing RFRA under the Establishment Clause is that the Court has not been consistent in its approach or test for this constitutional provision. Justice Scalia colorfully lamented this and analogized the leading test for the Establishment Clause to

> [a] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . .
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> . . . It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely . . . .[10]

Despite this complaint, the Supreme Court continues to apply the three part test articulated in *Lemon v. Kurtzman*.[11] First, this test

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[7] Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 457-58 (1994).

[8] William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 242 (1995).

[9] The Establishment Clause analysis for federal and state RFRAs is identical.

[10] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring in judgment) (citations omitted).

[11] 403 U.S. 602 (1971). Although there have been many cases in which the Court decided Establishment Clause cases without applying this test, it has been frequently used.

requires that the statute have a secular legislative purpose. Second, the principal or primary effect of the statute must neither advance nor inhibit religion. Finally, the statute must not promote "'an excessive government entanglement with religion.'"[12] A law is unconstitutional if it fails any prong of the *Lemon* test.

The argument that RFRAs violate the Establishment Clause is straightforward. The claim is that the purpose of a RFRA is to advance religion.[13] The unquestionable objective of a RFRA is to further the ability of people to practice their religion. By its very terms, it is meant to increase the likelihood that courts will invalidate laws that burden religious practices, and thus advance religion.

The effect of a RFRA on the Court's decision in *Employment Division v. Smith* is illustrative of this argument.[14] *Smith*, of course, involved a challenge by Native Americans to an Oregon law prohibiting use of peyote, a hallucinogenic substance. Specifically, individuals challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits. Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law.

The RFRA bill of 1993 was adopted to negate the *Smith* test and require strict scrutiny for Free Exercise Clause claims.[15] Indeed, the findings section of the Act notes that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[16] The Act de-

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While several Justices have criticized the test and called for it to be overruled, this has not occurred. Justice Scalia has expressly called for the overruling of the *Lemon* test. *See Lamb's Chapel*, 508 U.S. at 399-400 (Scalia, J., concurring in judgment); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting). For recent cases where the majority approvingly cited to and used the *Lemon* test, see *Agostini v. Felton*, 521 U.S. 203, 209 (1997), which overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), in its prohibition of the government providing remedial education services to parochial school students on the site of a parochial school, and *Lamb's Chapel*, 508 U.S. at 395, which applied the *Lemon* test and concluded that allowing religious groups to use school facilities during evenings and weekends did not violate the Establishment Clause.

[12] *Lemon*, 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[13] As one commentator remarked: "[I]ts principal purpose is to advance religion, or at least to advance the free exercise thereof, relative to other conscientious conduct that is not deemed religious." Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 285-86 (1994).

[14] *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

[15] *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).

[16] *Id.* § 2000bb(a)(4).

clares that its purposes are

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[17]

The key provision of the Act states:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . [g]overnment 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]

In the context of *Smith*, the purpose of a RFRA is to allow groups like the Native Americans to practice their religion, whereas otherwise under the Supreme Court's decision they could not. Moreover, it is argued that the second prong of the *Lemon* test is violated in that the effect of a RFRA is to advance religion. Under *Smith*, the Native Americans would not be able to engage in the religious ritual of using peyote. But, a RFRA would require that the government meet strict scrutiny in applying its drug law prohibiting peyote to the Native Americans, and thus in all likelihood the Native Americans would prevail. The unquestionable effect is to further religion.

The argument that RFRAs violate the Establishment Clause also can be made without reference to the *Lemon* test. Simply put, RFRAs favor religious beliefs and practices over secular beliefs and practices and this violates the Establishment Clause. This was Justice Stevens primary point in his concurring opinion in *City of Boerne v. Flores*:

> If the historic landmark on the hill in *Boerne* happened to be a museum or an art gallery owned by an atheist, it would not be eli-

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[17] *Id.* § 2000bb(b) (citations omitted).
[18] *Id.* § 2000bb-1(a), (b).

> gible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.[19]

Professors Eisgruber and Sager make a similar point:

> RFRA's compelling state interest test privileges religious believers by giving them an ill-defined and potentially sweeping right to claim exemption from generally applicable laws, while comparably serious secular commitments — such as those flowing from parental obligation, philosophical conviction, or lifelong cultural practice — receive no such legal solicitude.[20]

This argument finds some support in Supreme Court precedents. In *Texas Monthly, Inc. v. Bullock*, the Court declared unconstitutional a tax exemption that was available only for religious organizations.[21] A Texas law provided an exemption from the state sales and use tax for periodicals published or distributed by a religious faith promulgating the teaching of the faith, and for books that consisted wholly of writings sacred to a religious faith. The plurality opinion by Justice Brennan, and joined by Justices Marshall and Stevens, emphasized that *Walz*, which had upheld tax exemptions for religious property, was distinguishable because there "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well."[22] Justice Brennan explained:

> Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations . . ., the fact that religious groups benefit incidentally does not deprive the subsidy

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[19] Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985)).

[20] Eisgruber & Sager, *supra* note 7, at 453-54.

[21] *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (plurality opinion).

[22] *Id.* at 11.

> of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause . . ., it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.[23]

*Estate of Thornton v. Caldor, Inc.* can also be used to support the claim that a law which favors religious practices and beliefs over secular ones violates the Establishment Clause.[24] In *Caldor*, a Connecticut statute provided that no person may be required by an employer to work on his or her Sabbath. The Supreme Court declared the law unconstitutional, emphasizing that the law created an absolute and unqualified right for individuals not to work for religious reasons. Thus, the Court concluded, the statute is invalid because it impermissibly advances a particular religious practice.[25]

### *B. Why RFRAs Don't Violate the Establishment Clause*

State RFRAs are modelled after the federal one invalidated in *City of Flores*.[26] Certainly, the Establishment Clause argument is not frivolous and is a serious threat to state RFRAs. Yet, I believe that careful analysis of the Establishment Clause claim should lead courts to the conclusion that RFRAs are constitutional.

There are many reasons why RFRAs should not be regarded as violating the Establishment Clause of the First Amendment. First, strict scrutiny for the Free Exercise Clause did not violate the Establishment Clause before *Smith*; it, therefore, should not be regarded as offending that provision after *Smith*. Prior to *Smith*, the Court applied strict scrutiny in evaluating Free Exercise Clause claims.[27] In *Sherbert v. Verner*, in 1963, the Court expressly held that

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[23] *Id.* at 14-15 (citing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment)). The Court also rejected the argument that the denial of a tax exemption to religion would violate the Free Exercise Clause. *See id.* at 24.

[24] *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-11 (1985).

[25] *See id.* at 710.

[26] 521 U.S. 507 (1997).

[27] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (discussing strict scrutiny requirements needed to withstand Free Exercise Clause challenge); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (stating that incidental burden on free exercise of religion must be justified by compelling state interest).

strict scrutiny should be used in evaluating laws burdening the free exercise of religion. After close analysis, the Court declared unconstitutional the denial of unemployment benefits to a woman who was discharged from her job rather than work on her Saturday Sabbath.[28] Although the Court has not always consistently applied strict scrutiny, and rarely invalidated laws for violating free exercise,[29] strict scrutiny is without question the test articulated for the Free Exercise Clause.

No one ever suggested that the use of strict scrutiny for the Free Exercise Clause offended the Establishment Clause. The Free Exercise Clause is a fundamental right and, thus, should trigger the same protection as other fundamental rights. The strict scrutiny announced in *Sherbert* also had the purpose and effect of advancing religion, just as much as under a RFRA.

It must be recognized that an inherent tension exists between the Free Exercise Clause and the Establishment Clause. Any government action to protect free exercise could be said to have the purpose of advancing religion and, if successful, the effect of doing so. For example, if the government creates an exemption to a law solely for religious purposes, it arguably violates the Establishment Clause. If the government fails to create such an exemption for religion, it arguably infringes free exercise.[30] The Court has recognized that this tension is inherent in the First Amendment and has noted the difficulty of finding "a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[31] Because strict scrutiny for the Free Exercise

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[28] *See Sherbert*, 374 U.S. at 406-10 (1963).

[29] *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986) (rejecting claim for religious exemption to requirement that individuals provide Social Security numbers in order to receive welfare benefits). In *Bowen*, individuals argued that the requirement for Social Security numbers violated their religion. *See id.* at 695-96. The Court denied this claim and declared:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . .
>
> The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

*Id.* at 699-700.

[30] *See* Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 123-24 (arguing that tension between Establishment and Free Exercise Clauses is inherent and difficult to reconcile).

[31] Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970). For efforts to reconcile these

Clause did not violate the Establishment Clause before *Smith*, it should not be regarded as offending the Establishment Clause under a RFRA.

Perhaps a distinction can be drawn between a legislative act and a judicial act; RFRA is obviously the former and *Sherbert* the latter.[32] Yet, it is not clear why this distinction should matter. Perhaps it is that strict scrutiny is permissible if regarded as constitutionally necessary, but impermissible under the Establishment Clause if without a constitutional mandate.

This raises difficult questions concerning the ability of a legislature to independently interpret the Constitution.[33] The legislature, as much as the court, has a constitutional duty to interpret the Constitution. Also, it is a distinction that seems highly formalistic and arbitrary. If strict scrutiny for the Free Exercise Clause did not violate the Establishment Clause for the almost three decades between *Sherbert* and *Smith*, it should not violate the Establishment Clause after these decisions.

Second, favoring, at times, religious beliefs and practices over secular beliefs and practices is inherent to the Free Exercise Clause. As described above, a central argument advanced to invalidate RFRAs under the Establishment Clause is that they favor the religious over the secular.[34] Yet, to a large degree, this is inherent to the existence of a Free Exercise Clause in the Constitution. If all aspects of freedom of conscience and behavior were protected by the Free Speech Clause of the First Amendment, the Free Exercise Clause would be a meaningless and redundant provision. The enumeration of free exercise as a right must be understood as providing it, in some circumstances, a preferred status.

To illustrate, consider again the facts of *Sherbert v. Verner*.[35] A woman who quit her job rather than work on her Saturday Sabbath was deemed to have a constitutional right to unemployment bene-

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tensions, see Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980), and William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

[32] *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994); *Sherbert*, 374 U.S. at 398.

[33] *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987) (stating that "[t]he Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution — the executive and legislative no less than the judicial — has a duty to interpret the Constitution in the performance of its official functions.").

[34] *See supra* text accompanying notes 7-8.

[35] 374 U.S. 398 (1963).

fits. The Court held that for the state to deny these benefits was to impermissibly burden free exercise of religion.

Imagine, however, a person deeply involved in a purely secular pursuit, perhaps an antinuclear movement. A particularly important rally is scheduled for a workday and the person's employer refuses to allow the individual to have the day off work. The person quits rather than miss this important event. The person applies for unemployment benefits, but like Sherbert, is told that because there was a voluntary resignation, no unemployment benefits will be accorded. Would the Supreme Court hold that the denial of unemployment benefits violates the Free Speech Clause of the First Amendment under these circumstances? Almost certainly not, indicating that religious reasons for quitting work are given a favored status over secular beliefs.

As another example, consider the only Supreme Court decision interpreting and applying *Smith*: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[36] The Santeria religion uses animal sacrifice as one of its principal forms of worship. Animals are killed and then cooked and eaten in accord with Santeria rituals. After the Santerias announced plans to establish a house of worship, a school, a cultural center, and a museum in Hialeah, Florida, the city adopted an ordinance prohibiting ritual sacrifice of animals. The law defined "sacrifice" as killing animals "not for the primary purpose of food consumption."[37] The law applied only to an individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."[38] All of the Justices agreed the law was unconstitutional, with Justice Kennedy writing the opinion for the Court. The Court decided that the Hialeah law was not neutral because its clear objective was to prohibit a religious practice.

Imagine, however, that a city enacts a law to stop certain hunting practices or to regulate stockyard slaughtering practices. Even if hunters claimed a deep philosophical commitment, there is no chance that the law would be struck down on First Amendment grounds, even if it was clearly motivated by a desire to regulate the hunters' behavior. In other words, a law burdening the religious slaughter of animals is treated differently from the secular slaugh-

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[36] 508 U.S. 520 (1993).
[37] *Id.* at 527.
[38] *Id.*

ter of animals.

The existence of a Free Exercise Clause in the Constitution means that in some circumstances religious practices will be protected from government interference and burdening in a manner that secular ones are not. Such protection, even if labelled favoritism, should be regarded as inherent to the enumeration of free exercise of religion as a constitutional right.

Third, and perhaps most important, accommodating religion should not be regarded as the establishment of religion. A RFRA should be regarded as respecting and accommodating religion, and this should be deemed constitutional. Strong support for this claim is found in the Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.[39] In *Amos*, the Court unanimously rejected the Establishment Clause challenge to the Title VII exemption for religious organizations. Justice White, writing for the Court, stated: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[40]

*Amos* makes it clear that such accommodation of religion does not violate the Establishment Clause. The purpose of such legislation is not to advance religion, but to accommodate it. Indeed, in *Amos* the Court concluded that the exemption met the first prong of the *Lemon* test because it was a permissible purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[41] The line between accommodation and advancement will never be clear, but a difference exists between government action that fosters religion and government action that permits people to practice their religions. The former is an impermissible advancement; the latter accommodation.

Further, permitting people to practice their religion free from government involvement is a permissible and desirable effect; it, too, should not be regarded as an effect of advancing religion. In *Amos*, the Court found that the exemption was not inconsistent with the second part of the *Lemon* test. Justice White said that "[a]

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[39] 483 U.S. 327, 334 (1987) (stating that government accommodation of religion without violating Constitution is well-established principle).

[40] *Id.* at 334 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987)).

[41] *Id.* at 335.

law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[42] Furthermore, the Court said that where government acts to lift a regulation that burdens religion, there is no reason to require that the exemption also benefit secular entities.[43]

The effect of state RFRAs is to lift burdens on religion by requiring that they meet strict scrutiny. *Amos* is clear that this effect should not be regarded as the establishment of religion. *Amos* thus strongly supports a distinction between accommodating religion and advancing religion, though "accommodation" has never been defined with any precision.

The two primary cases used to support the claim that RFRA violates the Establishment Clause can be distinguished. *Texas Monthly v. Bullock* involved an exemption from a state sales tax for religious publications that was not available for secular publications. Apart from the Establishment Clause, this law was a content-based regulation of speech, and thus violated that part of the First Amendment unless strict scrutiny was met.[44] The availability of the sales tax exemption depended entirely on the content of the speech.[45] Moreover, the effect of the tax exemption for religious publications effectively created a government subsidy for religious organizations. This raised serious Establishment Clause problems under the many cases limiting government aid to religion.[46]

Somewhat harder to distinguish is the Supreme Court decision in *Estate of Thornton v. Caldor, Inc.*[47] The Connecticut law that required employers to provide employees a day off work for their Sabbaths can be regarded as accommodating religion in the same

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[42] *Id.* at 337.

[43] *See id.* at 338.

[44] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (arguing that "[c]ontent-based regulations are presumptively invalid"); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1994) (stating general rule that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulation need only meet intermediate scrutiny).

[45] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393-95 (1993) (arguing that discrimination against speech because of religious content triggers strict scrutiny under First Amendment).

[46] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) (finding maintenance and repair provisions of New York statute unconstitutional because provisions act to subsidize and advance sectarian schools); Sloan v. Lemon, 413 U.S. 825, 832-33 (1973) (finding Pennsylvania's "Parent Reimbursement Act for Nonpublic Education" unconstitutional because it advances religious institutions).

[47] 472 U.S. 703 (1985).

manner as a RFRA. The purpose of the law, arguably, is to facilitate individuals practicing their religion. The same can be seen as the effect of the law.

*Caldor*, however, can be distinguished in several ways.[48] The Connecticut law did not favor all religions because only some religions observe Sabbaths. Justice O'Connor, in her concurring opinion in *Caldor*, emphasized this aspect of the law. She wrote:

> Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees . . . [t]he message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.[49]

In contrast, a RFRA applies to all religions and all religious practices; there is no favoring of some religions over others as in *Caldor*.[50]

Moreover, the Connecticut law was directed at private conduct, whereas a RFRA is directed at the government. A RFRA requires that the government burden religion only if it can meet strict scrutiny. The Connecticut law in *Caldor* governed the behavior of all private employers. An important difference exists between the government ensuring that it not burden free exercise of religion and the government requiring that private entities behave in a particular fashion with regard to religion. Thus, RFRAs should be regarded as permissible accommodation of religion. Even though a precise line between fostering religion and accommodating religion never can be drawn, RFRA, in light of the cases, should be regarded as the latter.

Finally, with regard to the Establishment Clause argument, it is important to recognize that the Establishment Clause is not irrelevant under a state RFRA. The government should be regarded as having a compelling interest in not violating the Establishment Clause. In particular instances, protecting free exercise of religion

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[48] I am grateful to Vik Amar, Doug Laycock, and Robert O'Neil for helpful suggestions in this regard.

[49] *Caldor*, 472 U.S. at 711 (O'Connor, J., concurring).

[50] *See id.* at 708-10.

might be seen as offending the Establishment Clause. For example, imagine that parents argue that the government's failure to subsidize parochial schools violates a state's RFRA. They contend that the government's refusal burdens their free exercise of religion by making it impossible for them to afford parochial school education. A court properly would conclude that the government has a compelling interest in not providing such a subsidy: the Establishment Clause of the First Amendment. In other words, although RFRAs do not facially violate the Establishment Clause, that does not make the Establishment Clause irrelevant. The Establishment Clause would be in a compelling interest, sufficient to meet strict scrutiny, and thus to justify some government actions that allegedly infringe free exercise of religion.

Indeed, the failure to recognize the Establishment Clause as a compelling interest was the key flaw in the Court's analysis in *Rosenberger v. Rector and Visitors of University of Virginia.*[51] In *Rosenberger,* the Court declared unconstitutional a state university's refusal to give student activity funds to a Christian group that published an expressly religious magazine. The Court concluded that denying funds to the religious student group was impermissible content-based discrimination against religious speech. The Court concluded that although the government has wide discretion when it chooses to allocate scarce financial resources, "[i]t does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[52] Kennedy said that

> [v]ital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.[53]

Although Justice Kennedy was correct that the University of Virginia's decision constituted content-based discrimination, he in-

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[51] 515 U.S. 819 (1995).
[52] *Id.* at 834.
[53] *Id.* at 835.

correctly failed to recognize that a compelling interest justifying the University's action avoided the Establishment Clause violation. As Justice Souter argued in dissent, this was the first time that the Court ever had allowed, let alone required, direct government financial subsidies to a religious group. Souter stated that "[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money."[54] He concluded that "[t]he principle against direct funding with public money is patently violated by the contested use of today's student activity fee."[55]

Justice Kennedy did not ignore the Establishment Clause argument. He concluded that providing funds to the religious group did not violate the Establishment Clause because "[t]he governmental program here is neutral toward religion."[56] However, as the dissent argued, a direct government subsidy to religious entity is not neutral; rather, it is a quintessential Establishment Clause violation.

The point is that the government has a compelling interest in avoiding a violation of the Establishment Clause. In particular instances, the government can defend its actions, in the face of a RFRA challenge, on the grounds that its action is necessary to avoid a violation of the Establishment Clause. Overall, however, RFRAs should be regarded as permissible accommodation of religion and, thus, constitutional.

## II. DO STATE RFRAS VIOLATE SEPARATION OF POWERS?

Separation of powers analysis of state RFRAs is more difficult than Establishment Clause analysis. Unlike the Establishment Clause objections, which are based on the United States Constitution, separation of powers arguments are founded entirely on state constitutions. The United States Constitution creates separation of powers for the federal government, but leaves the structure of state constitutions to the states. State constitutions vary enormously in

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[54] *Id.* at 868 (Souter, J., dissenting). Justice Souter relied on James Madison's *Memorial and Remonstrance Against Religious Assessments*, which objected to a state tax to aid the church. *See id.* at 868-72 (Souter, J., dissenting). Justice Thomas, in a concurring opinion, offered a different view of Madison's *Remonstrance*: as prohibiting preferential treatment of some religions over others with government funds. *See id.* at 853-58 (Thomas, J., concurring).

[55] *Id.* at 873 (Souter, J., dissenting).

[56] *Id.* at 840.

terms of what they require in terms of separation of powers and in the analysis to be used.

The basic argument, though, in terms of separation of powers is that RFRAs are unconstitutional because they impermissibly direct the judiciary as to how to decide particular cases. This separation of powers argument can be supported by precedents at both the federal and state levels.

In *United States v. Klein*, more than a century ago, the Supreme Court held that Congress cannot constitutionally direct particular substantive results.[57] *Klein* arose during the Reconstruction Period. In 1863, Congress adopted a statute providing that individuals whose property was seized during the Civil War could recover the property, or be compensated, upon proof that they had not offered aid or comfort to the enemy during the war. The Supreme Court subsequently held that a presidential pardon fulfilled the statutory requirement of demonstrating that an individual was not a supporter of the rebellion.[58]

In response to this decision, and frequent pardons issued by the president, Congress quickly adopted a statute providing that a pardon was inadmissible as evidence in a claim for return of seized property. Moreover, the statute provided that a pardon, without an express disclaimer of guilt, was proof that the person aided the rebellion and would deny the federal courts jurisdiction over the claims. The statute declared that upon "proof of such pardon . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."[59]

The Supreme Court held that the statute was unconstitutional. The Court stated:

> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
>
> What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pend-

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[57] *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

[58] *See* United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1870).

[59] Act of July 12, 1870, ch. 251, 16 Stat. 235.

> ing before it?
>
> We think not . . . .
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.[60]

*Klein* remains powerful authority that a legislature acts unconstitutionally if it commands that the judiciary decide a case in a particular manner.

A recent state court decision applying the same analysis was *Caulk v. Superior Court*.[61] California law requires that counties provide eligible individuals needed food, clothing, shelter, and medical care. After a California Court of Appeal interpreted this law as relieving the duty of counties to provide medical care in certain circumstances, the legislature enacted a statute making it clear that counties had the duty to provide such care. In *Caulk*, the California Court of Appeal declared that this statute was unconstitutionally "instruct[ing] the judicial branch in the proper interpretation of a statute."[62]

Under cases like *Klein* and *Caulk*, RFRAs are unconstitutional because they are directing the judiciary as to the test to use in Free Exercise Clause cases. This objection, however, is fundamentally wrong because it ignores the legislature's ability to create rights greater than those found in the Constitution.

At this point, it is necessary to distinguish between statutes dictating results in particular cases and statutes changing the substantive law in the future. The former should be regarded as a separation of powers, but not the latter. Legislatures retain ultimate control over the common law and statutes. If a legislature dislikes a judicially created common law rule, it can always replace or modify the common law with a statute. Similarly, if the legislature disagrees with a judicial interpretation of the statute, the legislature can modify the law to reflect its intent. These legislative actions are entirely within the proper legislative realm. RFRAs do not direct the results in any cases; they simply create a statutory right of individuals to be free from significant burdens of religion unless the government can meet strict scrutiny.

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[60] *Klein*, 80 U.S. at 146-47.

[61] 71 Cal. Rptr. 2d 904, 909 (Ct. App.), *petition for rev. granted*, 74 Cal. Rptr. 2d 824 (Ct. App. 1998) (stating that legislature telling courts how statute may be interpreted violates separation of powers).

[62] *Caulk*, 71 Cal. Rptr. 2d at 906.

Legislatures clearly have the power to expand the scope of rights, even though doing so changes the substantive test to be applied by the courts. The Constitution's protection of rights long has been understood as the floor, the minimum liberties possessed by all individuals. The Ninth Amendment provides clear textual support for this view in its declaration: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[63] The Ninth Amendment is a clear and open invitation for government to provide more rights than the Federal Constitution accords.

State governments certainly can do this both by judicial decisions and by statute. For instance, in *Pruneyard Shopping Center v. Robins*,[64] the United States Supreme Court held that the California Supreme Court could recognize a state constitutional right to use shopping centers for speech purposes, even though the United States Supreme Court had ruled that no such right exists under the Federal Constitution.[65]

RFRAs properly should be seen as statutes creating additional substantive rights, not as laws directing courts to decide any specific cases in any particular manner. This distinction, however, is often overlooked or misunderstood by courts. From this perspective, the California Court of Appeal's decision in *Caulk* is clearly wrong: the California legislature revised its own statute in response to a judicial decision; the legislature was not directing any specific judicial decision.

Another example of this flaw is the Supreme Court's recent decision in *Plaut v. Spendthrift Farm, Inc.*[66] In 1991, the Court ruled that actions brought under the securities laws, specifically § 10(b) and Rule 10(b)(5) of the 1934 Act, had to be brought within one year of discovering the facts giving rise to the violation, and within three years of the violation.[67] Congress then amended the law to allow cases filed before this decision to go forward if they could have been brought under the prior law.

In *Plaut*, the Supreme Court declared the new statute unconstitutional as violating separation of powers. Although the Court ac-

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[63] U.S. CONST. amend IX.

[64] 447 U.S. 74 (1980).

[65] *See* Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (holding pickers do not have First Amendment right to enter shopping center to advertise strike).

[66] 514 U.S. 211 (1995).

[67] *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

knowledged that *Hayburn's Case* was distinguishable, the Court found *Hayburn's* underlying principle of finality applicable.[68] Justice Scalia, writing for the Court in *Plaut*, said that the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them."[69] He said that because the "'[j]udicial [p]ower' is one to render dispositive judgments," the federal law "effects a clear violation of the separation-of-powers."[70] The statute was unconstitutional because it overturned a Supreme Court decision and gave relief to a party that the Court had said was entitled to none.

The difficulty with Justice Scalia's analysis is that Congress always has the ability to overturn Supreme Court statutory interpretation by amending the law. The Court's concern was that Congress was reinstating cases that had been dismissed by the judiciary. But, it is not clear why Congress cannot give individuals a cause of action, even if the courts previously ruled that none existed. For example, if the Court ruled that a group of plaintiffs could not obtain relief under a particular civil rights law, Congress surely could amend the law to overturn the decision and also could provide retroactive effect for the new statute. Critics of *Plaut* argue that this is exactly what Congress did with regard to the securities law after the Supreme Court's earlier ruling.[71]

Thus, RFRAs properly should be seen as a civil rights law, expanding the scope of rights, not as an impermissible command to the courts. Prior to the Civil Rights Act of 1964, employees had no right to be free from employment-based discrimination on account of race, gender, or religion. A federal court would have had to dismiss such a case for failure to state a claim upon which relief can be granted. But, the 1964 Civil Rights Act expressly created a cause of action, and thus completely changed how courts would deal with such claims. Of course, no one suggested that such a law violated separation of powers because legislatures unquestionably have the power to create additional rights. Likewise, a RFRA should be regarded as establishing additional rights: the right to be protected from laws burdening religion unless they meet strict scrutiny.

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[68] *See* Hayburn's Case, 2 U.S. (1 Dall.) 409 (1792).

[69] *Plaut*, 514 U.S. at 218-19.

[70] *Id.* at 219, 225.

[71] *See id.* at 252 (discussing situations in which Congress tried to set aside final judgment by retroactive legislation).

## CONCLUSION

As states adopt Religious Freedom Restoration Acts, constitutional challenges are inevitable. The most likely grounds for objection are based on the Establishment Clause and separation of powers. Careful analysis of these claims indicates, however, that neither should be accepted by the courts. RFRAs are an essential means for safeguarding the fundamental right of free exercise of religion. Without a RFRA, individuals have no protection from government actions significantly burdening the free exercise of religion. RFRAs are appropriate, indeed essential, acts of legislatures expanding the scope of individual rights.