Missouri Law Review

Volume 69
Issue 3 *Summer 2004*

Article 10

Summer 2004

Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience

James A. Hanson

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

 Part of the Law Commons

Recommended Citation

James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. (2004)
Available at: https://scholarship.law.missouri.edu/mlr/vol69/iss3/10

This Summary is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Law Summary

Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience

I. INTRODUCTION

In 1997, the United States Supreme Court ruled that the Religious Freedom Restoration Act (RFRA), passed by Congress and signed by President Clinton in 1993, was unconstitutional as applied to the states. The rationale for this holding was based on the limits of congressional power under Section 5 of the Fourteenth Amendment. Refusing to accept that result, supporters rejoined the struggle by taking the matter to state legislatures. The fruit of their effort is a list of twelve states with either a statute or a constitutional amendment affording increased protection to the free exercise of religion.[1] This Law Summary will examine both the congressional and state efforts to buttress religious liberty guarantees. Of primary interest here is the most recent addition to this community: Missouri's RFRA. After outlining the history and language of Missouri's RFRA, this Summary will provide guidance for the interpretation and application of the statute in Missouri.

II. LEGAL BACKGROUND

A. Federal RFRA and the Division of Federal Power

The federal RFRA was the product of a disagreement between Congress and the United States Supreme Court. The Court held in *Sherbert v. Verner*[2] and *Wisconsin v. Yoder*[3] that facially neutral laws encroaching on a religious practice must pass the "compelling interest" analysis required when govern-

1. Several other state courts have interpreted their state constitution's free exercise protection to demand strict scrutiny when generally applicable laws collide with religious exercise. *See, e.g.*, Attorney Gen. v. Disilets, 636 N.E.2d 233 (Mass. 1994); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc); and State v. Miller, 549 N.W.2d 235 (Wis. 1996). *See generally* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275.

2. 374 U.S. 398 (1963).

3. 406 U.S. 205 (1972).

mental action conflicts with a fundamental right.[4] In *Employment Division v. Smith*,[5] when faced with a similar situation involving the religious use of a controlled substance, the Court reconsidered and applied a "rational basis" review.[6] Congress was displeased and responded by passing the federal RFRA. The act re-instated the "compelling interest" standard of *Sherbert* and *Yoder* in all cases involving religious activity burdened by facially neutral laws.[7] While detractors opined about the constitutionality of the statute from the beginning,[8] several decisions were rendered in lower federal courts under

---

4. In analyzing the constitutionality of a workers' compensation regulation, the Court wrote:

> Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any *incidental* burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ."

Sherbert, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (emphasis added). In applying Wisconsin truancy law to Amish children, the Court states:

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Yoder, 406 U.S. at 214.

5. 494 U.S. 872 (1990).

6. *Id.* at 879. Justice Scalia enunciated the Court's concern by quoting from Supreme Court case law:

> "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Id. (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

7. 42 U.S.C. § 2000bb(b)(1) (2000) ("to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

8. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994).

the federal RFRA between 1993 and 1997.[9] The Supreme Court re-entered the fray in 1997 and held RFRA unconstitutional in *City of Boerne v. Flores*,[10] but only as it applied to the states.[11] The Court reminded Congress that congressional enforcement power under Section 5 of the Fourteenth Amendment is limited to the Constitution as interpreted by the Judiciary.[12] Therefore, RFRA was an unconstitutional exercise of congressional power in that its restrictions clearly exceeded the scope of the liberty interests protected by Section 1 of the Fourteenth Amendment.[13]

---

9. *See infra* Part II.B.1.

10. 521 U.S. 507 (1997).

11. *See* Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001). This case involved a federal prison which denied a request for visitation by a Methodist minister and a Buddhist inmate. *Id.* at 953-54. As it pertains to RFRA, the decision states that the discussion in *Boerne* concerning separation of powers must be understood in its entire context and that the holding in *Boerne* reaches only to Congress's power to enforce RFRA on state and local governments. *Id.* at 958. Since *Boerne* discussed Congress' Fourteenth Amendment powers exclusively, it could not be used to substantiate a claim that Congress had exceeded its Article I powers as to the federal government. *Id.* at 959. Overruling lower court decisions, the Tenth Circuit joined the Eighth and Ninth Circuits in acknowledging RFRA's validity as it pertains to federal law. *Id.* at 958. *See also* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-32 (9th Cir. 1999); Young v. Crystal Evangelical Free Church, 141 F.3d 854, 858-59 (8th Cir. 1998).

12. Confusion is apparent concerning judicial review of RFRA. A few courts found RFRA to be unconstitutional for violating the separation of powers doctrine. *See, e.g., In re* Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995) (finding RFRA unconstitutional for forcing courts to determine questions which the Supreme Court found nonjusticiable). The role of judicial review in *Boerne*, however, is limited to defining what law applies to the states by means of the Fourteenth Amendment. The *Boerne* Court explained that Congress had no authority to enforce the First Amendment on state governments in contravention of the judiciary's interpretation. *Boerne*, 521 U.S. at 516-19. It also clarified that the First Amendment, as interpreted by the judiciary, was the full extent of what the Fourteenth Amendment imposed upon the states. *Id.* at 536. In other words, it was the unique blend of federal-state power and separation of powers that made RFRA unconstitutional as it applied to the states. However, since the corresponding federal-state power issue was not present in the case of federal law, RFRA was a permissible limitation on federal power in excess of the constitutional minimum. *See* Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001).

13. The *Boerne* Court reminds Congress that the Fourteenth Amendment does not allow federal regulation simply because Congress declared the regulation to be appropriate. When the Court incorporated the Free Exercise Clause of the First Amendment into the Fourteenth Amendment, it incorporated only the language of the clause and its corresponding case law. *See Boerne*, 521 U.S. at 519. Whereas Congress is permitted to voluntarily limit its own power, it may only limit state power under certain enunciated circumstances. *Id.* at 517-19. The most common Fourteenth Amendment basis for congressional imposition on the states is section 1 which includes the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. *Id.* at 516-17.

B. The Emergence of State RFRAs

In the aftermath of *Boerne*, RFRA supporters left Washington to begin lobbying in state capitals. Within two years of the *Boerne* decision, statutes had been proposed in several states.[14] Organizations traditionally considered adverse to one another joined forces to shepherd RFRA through state legislatures.[15] The results generally rewarded their efforts.

1. Federal RFRA in the Courts

In the five years between the passage of the federal RFRA and the United States Supreme Court's decision in *Boerne*, a number of cases were decided by the lower courts which interpreted and applied the law.[16] Amid the wide variety of factual scenarios[17] there was a common analytical process

14. States that considered and rejected RFRAs include California, Maryland and Virginia. States enacting RFRAs will be discussed later in this summary. *See infra* notes 53-66 and accompanying text.

15. "The original federal legislation was supported by one of the broadest coalitions ever assembled in Washington. Groups ranging from the Catholic Conference and Evangelical Lutheran Church of America to the Muslim Public Affairs Foundation and the Anti-Defamation League were in support." Missouri Senate Pension and General Laws Committee, Witness Appearance Forms and Legislation Backgrounder for Religious Freedom and Restoration Act, 2003 Missouri Legislative Session, at 7 (on file with the Missouri Law Review) [hereinafter Witness List].

16. The majority of cases during this period were brought in federal courts under federal question jurisdiction. A cursory perusal through the annotations to 42 U.S.C.A. § 2000bb-1 illustrates the impact this federal statute has had on state law questions. *See, e.g.*, Small v. Lehman, 98 F.3d 762 (3d Cir. 1996); Goehring v. Brophy, 94 F.3d 1294 (9th Cir. 1996); Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995); Goodall v. Stafford County Sch. Bd., 60 F.3d 168 (4th Cir. 1995); *In re* Three Children, 24 F. Supp. 2d 389 (D.N.J. 1998); Show v. Patterson, 955 F. Supp. 182 (S.D.N.Y. 1997); Jones-Bey v. Wright, 944 F. Supp. 723 (N.D. Ind. 1996); Abierta v. City of Chicago, 949 F. Supp. 637 (N.D. Ill. 1996), *rev'd sub nom.* Abierta v. Banks, 129 F.3d 899 (7th Cir. 1997); Klemka v. Nichols, 943 F. Supp. 470 (M.D. Pa. 1996). Cases involving property law, state or local prisons, or other areas of the law generally left to the state's jurisdiction are no longer governed by the federal RFRA, underscoring the significance of state RFRA legislation.

17. While issues of prison regulation and parole requirements were most common, other fact patterns included a state university insurance program which covered abortion, *Goehring*, 94 F.3d 1294; claims involving eminent domain, Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996); local ordinances regulating charitable solicitations, Gospel Missions of Am. v. Bennett, 951 F. Supp. 1429 (C.D. Cal. 1997); local parking laws, Storm v. Town of Woodstock, 944 F. Supp. 139 (N.D.N.Y. 1996); a rule prohibiting distribution of religious tracts by a first grade student, Harless v. Darr, 937 F. Supp. 1339 (S.D. Ind. 1996); and the selection of Christian music by a choir teacher with respect to a Jewish student in the class, Bauchman v. West High Sch., 900 F. Supp. 254 (D. Utah 1995), *aff'd* 132 F.3d 542 (10th Cir. 1997).

determined by the language of RFRA. This analysis required a prima facie showing by the plaintiff,[18] followed by a two-pronged test to be satisfied by the government defendant.[19]

After some initial confusion, courts agreed that religious liberty claims should be analyzed differently under the Free Exercise Clause and RFRA.[20] Supreme Court jurisprudence controls free exercise claims, while statutory interpretation applies to RFRA claims.[21] To invoke RFRA, the plaintiff must show that the governmental action placed a "substantial burden" on the plaintiff's exercise of a sincere religious belief.[22] If this threshold requirement is not met, then no claim or defense is available under RFRA.[23]

If a plaintiff meets the "substantial burden" requirement, the responsibility to produce evidence and to persuade the fact-finder shifts to the governmental defendant who must show a "compelling governmental interest"[24] which is

---

18. The plaintiff must identify the religious belief involved as well as the burden imposed upon it by governmental action. The "sincerity" requirement was established in *United States v. Ballard*, 322 U.S. 78, 86-87 (1944), and applies to RFRA claims as well.

19. The majority of RFRA cases deal with the government's required showing of a compelling interest accomplished by the least restrictive means. *See, e.g.*, Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996); Klemka v. Nichols, 943 F. Supp. 470 (M.D. Pa. 1996). While the prima facie showing required of plaintiff is not difficult to establish, the two-pronged test applied to the government under RFRA is the strictest standard available at law. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

20. *Show*, 955 F. Supp. at 189 (citing Jolly v. Coughlin, 76 F.3d 468, 475 (2d Cir. 1996)).

21. *Id.* ("In *Jolly*, the Court held that 'the *O'Lone* "reasonableness" test continues to have vitality for claims brought directly under the First Amendment—for the simple reason that a congressional enactment cannot modify the Supreme Court's constitutional interpretation—free exercise claims brought by prison inmates under RFRA are subject to the compelling interest test.' In any event, the language of RFRA explicitly provides a separate cause of action apart from a constitutional claim.") (citation omitted) (quoting *Jolly*, 76 F.3d at 475).

22. *See* Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999); *Goehring*, 94 F.3d 1294; Boomer v. Irvin, 963 F. Supp. 227 (W.D.N.Y. 1997). *See also* Rouser v. White, 944 F. Supp. 1447, 1455 (E.D. Cal. 1996) (substantial burden for RFRA claims is the same as substantial burden for First Amendment claims); Lewis v. Scott, 910 F. Supp. 282, 286 (E.D. Tex. 1995) (truth of inmate's religion not justiciable and therefore not valid basis for failing to find substantial burden), *rev'd* 127 F.3d 33 (5th Cir. 1997).

23. *See, e.g.*, Weir v. Nix, 114 F.3d 817 (8th Cir. 1997). In this case, the inmate was allowed access to the Bible and other religious books, but was limited to 25 books in his cell at any given time. *Id.* at 819-20. The court determined that these facts did not evidence a substantial burden to the inmate's exercise of religion and denied his RFRA claim. *Id.* at 820-22.

24. *See Goehring*, 94 F.3d at 1300 (mandatory registration fee served state university's compelling interest in student health and well-being); *In re* Three Children, 24 F. Supp. 2d 389, 391-92 (D. N.J. 1998); Rigdon v. Perry, 962 F. Supp. 150, 161-62

accomplished by the "least restrictive means."[25] This standard of review is identical to the standard afforded "fundamental rights" under the Fourteenth Amendment. Subsequent case law fulfilled RFRA's intent, restoring "strict scrutiny" analysis to religious claims afforded only "rational basis" review under *Smith*.

In Richmond, Virginia, a partnership of six churches challenged a city zoning ordinance limiting their feeding and housing ministries to thirty or less homeless persons for not more than seven days between October and April.[26] After determining that none of the three main abstention doctrines applied to this case,[27] the district court found the claim ripe for review[28] and evaluated the propriety of a temporary restraining order.[29] In discussing the likelihood of success on the merits, the court held that feeding the poor was a "central tenet" of the beliefs practiced by the churches involved,[30] establishing the basis for further litigation and justifying the issuance of a temporary restraining order.[31]

(D. D.C. 1997) (defining compelling interest in a military context); Klemka v. Nichols, 943 F. Supp. 470, 478-79 (M.D. Pa. 1996) (determining validity of compelling interest in time and manner of arrest by police). *But see* Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 492 (6th Cir. 1995) (constitutionally permissible time, place, and manner restrictions need not pass the compelling interest test).

25. *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997) (recording suspect's sacramental confession not least restrictive means); Harris v. Chapman, 97 F.3d 499, 503-04 (11th Cir. 1996) (hair length rule was least restrictive means of compelling penal interest); *Goehring*, 94 F.3d at 1301-03 (mandatory registration fee was least restrictive means of providing for interest in student health and well-being); Helland v. South Bend Cmty. Sch. Corp., 93 F.3d 327, 331-32 (7th Cir. 1996) (where substitute teacher had previously discussed impermissible religious topics, removal of the teacher from list of eligible substitutes was least restrictive means of constitutional compliance by the school district); Hamilton v. Schriro, 74 F.3d 1545, 1551-54 (8th Cir. 1996) (denying access of Native American inmate to a sweat lodge was least restrictive means of achieving prison safety and security); Jihad v. Wright, 929 F. Supp. 325, 330 (N.D. Ind. 1996) (placing inmate in medical isolation with inmates who tested positive for TB was not least restrictive means of preventing the spread of TB by inmates refusing to be tested).

26. Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1228 (E.D. Va. 1996).

27. *Id.* at 1229-33. The abstention doctrines rejected were the *Younger*, *Pullman*, and *Burford* doctrines. *Id.*

28. *Id.* at 1233-34.

29. *Id.* at 1234-40.

30. *Id.* at 1236. The "Central Tenant" test contemplated by several courts is as dangerous as it is unnecessary to RFRA analysis. Allowing a civil court to make findings concerning the necessity of a particular belief within a system of belief is precisely what the religion clauses of the First Amendment prohibit. The only inquiry into religious belief that the Supreme Court has entrusted to the judiciary is the sincerity requirement. United States v. Ballard, 322 U.S. 78, 86-87 (1944).

31. *Stuart Circle Parish*, 946 F. Supp at 1236-37, 1241.

Other ordinances and regulations were challenged on RFRA grounds as well. When a first-grader in Indiana sued his school for prohibiting him from distributing religious tracts during school, the federal district court found the denial to be a content-neutral time, place, and manner restriction which did not violate RFRA.[32] A nun employed at the Catholic University of America sued under Title VII for sex discrimination when the university denied her tenure, but the D.C. Circuit held that RFRA barred her Title VII claim.[33] In a suit brought by students against the University of California at Davis, the Ninth Circuit held that the university's mandatory student registration fee which funded, in part, a health insurance program that covered abortion satisfied RFRA's compelling interest test in a manner that was the least restrictive.[34] A civil rights action, claiming that an arrest taking place at a church at the close of a memorial service violated religious freedom, was defeated on summary judgment when a federal district court held that the arrest had not substantially burdened the plaintiff's exercise of religion.[35] Residents of Woodstock, New York, in the practice of holding full moon gatherings at the "Magic Meadow," brought a RFRA claim against the city.[36] The district court held that the parking ordinance prohibiting nighttime parking along the road near their meeting place did not substantially burden their exercise of religion.[37] In Kansas, a district court disregarded the sincerity of the beliefs of two parents when it allowed the condemnation of property including the grave site of plaintiffs' stillborn child on a finding that both Native American spirituality and Christian belief permitted the moving of grave sites when necessary.[38] And finally, a Jewish student's RFRA claim was denied because she was allowed the right of exit from choir practices and performances which offend her religious beliefs, but chose to participate anyway.[39]

---

32. Harless v. Darr, 937 F. Supp. 1339, 1341-42 (S.D. Ind. 1996).

33. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 457-60 (D.C. Cir. 1996). While state RFRAs may well serve this function regarding state human rights acts, this holding was unnecessary in the federal system. Federal courts have held since at least 1972 that they are precluded from hearing Title VII cases involving religious organizations and their clergy. *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). This "ecclesiastical exemption" serves as a basis for a motion to dismiss, making RFRA analysis completely unnecessary.

34. Goehring v. Brophy, 94 F.3d 1294, 1297 (9th Cir. 1996).

35. Klemka v. Nichols, 943 F. Supp. 470, 472 (M.D. Penn. 1996).

36. Storm v. Town of Woodstock, 944 F. Supp. 139, 141-42 (N.D.N.Y. 1996).

37. *Id.* at 146.

38. Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996).

39. Bauchman v. West High Sch., 900 F. Supp. 254, 270 (D. Utah 1995), *aff'd*, 132 F.3d 542 (10th Cir. 1997). This "right of exit" approach ignores the concern voiced in *Sherbert* of forcing individuals to make a cruel choice between participation or conviction. Sherbert v. Verner, 374 U.S. 398 (1963). Since the plaintiff did not raise the dismissal of her RFRA claim on appeal, the Tenth Circuit did not comment

Both proponents and opponents of RFRA were especially concerned about its impact on institutions of public education. One such case that attracted widespread attention involved children belonging to the Sikh religion.[40] The Ninth Circuit upheld the trial court's grant of a preliminary injunction preventing a school district from enforcing a weapons ban as it applied to students wearing ceremonial knives to school.[41]

RFRA decisions in bankruptcy courts are of special interest because they apply RFRA to a federal statute. The normal fact pattern presented in a bankruptcy case involves individuals under bankruptcy protection who contributed to a religious institution, usually a church, on the basis of their belief in tithing or sacrificial giving.[42] The complaint of the bankruptcy trustee generally involves allegations of fraudulent transfers on the part of the bankrupt party.[43] The various circuits of the U.S. Courts of Appeals split on whether RFRA protected these individuals.[44]

Inmates wasted no time in invoking RFRA protection in prison litigation. Grooming standards,[45] strip-searches,[46] cell assignments[47] and quaran-

---

on its application in this case. Bauchman v. West High Sch., 132 F.3d 542 (10th Cir. 1997).

40. Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995). The Sikh religious requirement that adherents carry ceremonial knives on their person came into conflict with school district policy when students wore their kirpans to school. *Id.* at 884.

41. *Id.* The Ninth Circuit held that the injunction imposed safety precautions and that the school's total ban was not the least restrictive means of accomplishing safety interests. *Id.* at 885-86.

42. *See In re* Hodge, 220 B.R. 386, 390-91 (D. Idaho 1996) (finding a substantial burden on the debtors' exercise of religion because governmental action forced a choice between debt relief and subjecting their church to a law suit).

43. *Id.* at 389.

44. *Compare id. and* Young v. Crystal Evangelical Free Church, 141 F.3d 854, 863 (8th Cir. 1998) (upholding RFRA as constitutional and holding that RFRA effected an amendment to the federal bankruptcy code), *with In re* Bloch, 207 B.R. 944, 950-51 (D. Colo. 1997) (constructive fraud provisions further compelling governmental interest and are the least restrictive means of accomplishing those interests), *and In re* Newman, 203 B.R. 468, 474-75 (D. Kan. 1996) (treating tithes as fraudulent transfers furthered compelling governmental interests).

45. *See* Diaz v. Collins, 114 F.3d 69, 73 (5th Cir. 1997) (prison grooming regulation requiring Native American to cut his hair did not violate RFRA); May v. Baldwin, 109 F.3d 557, 564 (9th Cir. 1997) (requiring inmate to unbraid dreadlocks during transfers to and from prison did not violate RFRA); Davie v. Wingard, 958 F. Supp. 1244, 1249-50 (S.D. Ohio 1997) (state interest in minimizing inmate-staff contact and avoid appearance of favoritism was sufficient defense of grooming standard against RFRA claim); Abordo v. Hawaii, 938 F. Supp. 656, 661 (D. Hawaii 1996) (state interest in inmate health and safety as well as preventing contraband smuggling was sufficient to defend grooming standard against RFRA claim). For a case involving grooming standards for prison staff, see Blanken v. Ohio Dep't of Rehab. & Corr., 944 F. Supp. 1359, 1361-63 (S.D. Ohio 1996) (grooming standard for male empl

tine procedures[48] all became subject to RFRA's standards. The courts responded by carefully applying each step in the analysis so as to minimize disruption to the penal system.[49] One method of limiting RFRA's scope in the prisons was to emphasize the "substantial burden" element so as to weed out frivolous claims.[50] Another means of protecting the penal system was to give the same deference to prison officials under RFRA's "compelling interest" review that they enjoyed under Free Exercise Clause analysis.[51] The

---

ees satisfied "least restrictive means" requirement despite the possibility of males using female grooming policy as it relates to long hair).

46. *See* Collins v. Scott, 961 F. Supp. 1009, 1016-17 (E.D. Tex. 1997) (strip-search by female officer did not violate RFRA since the search is the least restrictive means of accomplishing the state's interest and the gender of the guard is immaterial).

47. *See* Ochs v. Thalacker, 90 F.3d 293, 296-97 (8th Cir. 1996) (policy of random cell assignment supported by sufficient state interest to substantially burden religious belief of white supremacist).

48. *See* Jolly v. Coughlin, 76 F.3d 468, 479 (2d Cir. 1996) (continued confinement in medical keeplock was not least restrictive means of ensuring health of inmates when inmate in question refused to submit to tuberculosis screening test due to his Rastafarian beliefs); Jihad v. Wright, 929 F. Supp. 325, 330-31 (N.D. Ind. 1996) (confining inmate with others who had tested positive for tuberculosis after he refused to submit to screening test was not least restrictive means of ensuring health of prison population).

49. *See, e.g.*, Lawson v. Singletary, 85 F.3d 502, 509-11 (11th Cir. 1996) (assuming, arguendo, that RFRA replaced the *O'Lone* test for prison free exercise with the older *Martinez* test that was less stringent than strict scrutiny).

50. *See* Thomas D. Dillard, Note, *The RFRA: Two Years Later and Two Questions Threaten Its Legitimacy*, 22 J. CONTEMP. L. 435 (1996). Commenting on the application of federal RFRA by federal judges in prison cases, Dillard writes:

> The substantial burden test, so far, has given judges tremendous discretion on whether or not to apply the compelling state interest and least restrictive alternative requirements of the RFRA. This ambiguity on how to apply the test gives judges the ability to use the threshold issue as a masked decision on the merits. Therefore, most judges who are hesitant to second-guess prison administrators simply avoid the hard questions of the RFRA by using the markedly higher threshold standard of the substantial burden test.

Id. at 453-54.

51. *See id.* at 449-51. Dillard states, "[t]he RFRA has consistently been applied to prisoners and several courts, following Congress' admonition, have indicated that it overrules *Turner* and *O'Lone*. Nonetheless, as predicted by Senator Orin Hatch, courts still seem to accord prison administrators considerable deference following the *Turner/O'Lone* rationale." *Id.* at 451 (footnote omitted). In the footnote accompanying this statement, Dillard further discusses Senator Hatch's comments stating, "Senator Orin Hatch made assurances that courts will still give far-reaching deference to correction administrators and that costs of accommodation will be an important factor. He believed that 'almost all prison regulations will be held to fulfill the compelling interest test.'" *Id.* at 451 n.115 (quoting 139 CONG. REC. S14,366-67 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch)).

deference given to the government is limited, however, by the "least restrictive means" requirement.[52]

2. Statutory Language of State RFRAs

After *Boerne*, RFRA supporters redirected their efforts toward state capitals. The ten states enacting state RFRAs[53] and Alabama, which amended its state constitution,[54] all relied heavily on the language of the federal RFRA in shaping their provisions.[55]

The federal RFRA consists of five sections. The first provides congressional findings and the purpose of the statute.[56] Second, the statute provides

---

52. A good example of this limitation is *Jihad v. Wright*, 929 F. Supp. 325, (N.D. Ind. 1996), where the court found that placing an inmate who refused to submit to tuberculosis testing in quarantine with inmates who had tested positive was not the least restrictive means of preventing the spread of tuberculosis in the prison. *Id.* at 331. *But see* Dillard, *supra* note 50, at 454-55. Dillard comments on the application of this prong in the Eighth Circuit as follows:

> The Eighth Circuit, for instance, found a "'no greater than necessary' requirement to be functionally synonymous with the 'least restrictive means' prong of the RFRA test when applied in the prison context. . . ." Thus, the least restrictive means prong of RFRA, in the prison context, does not need to be closely fitted to the compelling interests of security, order, and discipline. It may be that there need only be a reasonable nexus in light of the drain on prison resources.

Id. at 454 (footnote omitted) (quoting Hamilton v. Schiro, 74 F.3d 1545, 1554 (8th Cir. 1996)).

53. Act of May 19, 1999, ch. 332, § 1, 1999 Ariz. Sess. Law 1769 (codified at ARIZ. REV. STAT. § 41-1493 (2003)); Act of June 29, 1993, No. 93-252, 1993 Conn. Acts 801 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-571b (2000)); Religious Freedom Restoration Act of 1998, ch. 98-412, 1998 Fla. Laws ch. 3296 (codified at FLA. STAT. ch. 761.01-.05 (Supp. 2003)); Act of Feb. 1, 2001, ch. 133, § 2, 2000 Idaho Sess. Laws 352 (codified at IDAHO CODE §§ 73-401 to -404 (Michie 2003)); Religious Freedom Restoration Act, No. 90-806, 1998 Ill, Laws 5014 (codified at 775 ILL. COMP. STAT. 35/1-99 (2002)); New Mexico Religious Freedom Restoration Act, ch. 17, 2000 N.M. Laws 1001 (codified at N.M. STAT. ANN. §§ 28-22-1 to -5 (Michie 2000); Oklahom Religious Freedom Act, ch. 272, § 1, 2000 Okla. Sess. Laws 1181 (codified at OKLA. STAT. tit. 51, §§ 251-58 (2003)); Religious Freedom Restoration Act, ch. 230, § 1, 1993 R.I. Pub. Laws 1017 (codified at R.I. GEN. LAWS § 42-80.1-1 to -4 (2002)); South Carolina Religious Freedom Act, No. 38, § 1, 1999 S.C. Acts 93 (codified at S.C. CODE ANN. §§ 1-32-10 to -60 (Supp. 2002)); Act of Aug. 30, 1999, ch. 399, 1999 Tex. Sess. Laws 2511 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon Supp. 2004-2005)).

54. ALA. CONST. amend. 622.

55. For the language of state constitutions which have been interpreted to demand strict scrutiny of generally applicable laws as applied to religious exercise, see *supra* note 1.

56. 42 U.S.C. § 2000bb (2000).

its general rule and standard of review.[57] The next section lists key definitions to be used in interpreting and applying the statute.[58] The final two sections explain the statute's applicability[59] and its compatibility with the Establishment Clause.[60]

Though the federal RFRA provided a basic template, each state structured and worded its statutes to suit its particular situation.[61] Alabama followed the format and substance of the federal RFRA, but required only a simple burden on religious exercise, rather than a substantial burden,[62] and enacted its RFRA as an amendment to its state constitution.[63] Connecticut joined Alabama in relaxing the prima facie standard to a simple "burden" on religious exercise.[64] Arizona, Florida, Idaho, Illinois, Oklahoma, South Carolina, and Texas copied the substantial burden and strict scrutiny requirements found in the federal RFRA.[65] Rhode Island and New Mexico apply their RFRA to laws that "restrict" religious exercise.[66]

3. Interpretation of State RFRAs

The cycle of legislation is never complete until the courts have interpreted and applied the legislative language to actual litigants. As state RFRAs continued to emerge, the judiciary began answering questions concerning the scope and nature of the protection afforded. A state-by-state survey of cases provides some context in which to evaluate Missouri's RFRA.

---

57. *Id.* § 2000bb-1.

58. *Id.* § 2000bb-2.

59. *Id.* § 2000bb-3.

60. *Id.* § 2000bb-4.

61. For a helpful chart explaining the substance of state RFRAs as of 2001, see *Congress Enacts Religious Land Use Law; Three More States Adopt RFRAs*, SG040 A.L.I.-A.B.A. 757, 764 (2001).

62. ALA. CONST. amend. 622, § V(a) ("Government shall not *burden* a person's freedom of religion even if the *burden* results from a rule of general applicability. . . .") (emphasis added).

63. It is interesting that Alabama included a severability clause in the amendment. While this measure is unnecessary within the state since it is a constitutional amendment, it could serve as protection against potential federal constitutional challenges in the United States Supreme Court.

64. CONN. GEN. STAT. § 52-571b(a) (2000) ("The state or any political subdivision of the state shall not *burden* a person's exercise of religion under section 3 of article first of the constitution of the state even if the *burden* results from a rule of general applicability. . . .") (emphasis added).

65. ARIZ. REV. STAT. § 41-1493.01(B) (2003); FLA. STAT. ch. 761.03(1) (Supp. 2003); IDAHO CODE § 73-402(2) (Michie 2003); 775 ILL. COMP. STAT. 35/15 (2001); OKLA. STAT. tit. 51, § 253(A) (2003); S.C. CODE ANN. § 1-32-40 (Law. Co-op. Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a) (Vernon Supp. 2004-2005).

66. N.M. STAT. ANN. § 28-22-3 (Michie 2000); R.I. GEN. LAWS § 42-80.1-3 (2002).

Illinois. The litigation created by Illinois's RFRA was predominately concerned with local zoning ordinances. In *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*,[67] the Appellate Court of Illinois decided that a city zoning ordinance intended to encourage economic development was based on a more compelling interest than public worship in the same sector.[68] Since most of the city was still available for the maintenance and operation of a house of worship, the court opined, this interest was accomplished by the least restrictive means.[69] On further appeal, the Illinois Supreme Court fortuitously found the permit denial "arbitrary and capricious,"[70] partly reversing the appellate court but without reaching the RFRA claim.[71]

Another Illinois state claim concerning zoning was preoccupied with procedural issues,[72] and five of six federal suits involving Illinois's RFRA involved challenges to local zoning decisions.[73] Two Illinois cases dealt with

---

67. 707 N.E.2d 53 (Ill. App. Ct. 1999), *aff'd in part & rev'd in part*, 749 N.E.2d 916 (2001).

68. *Id.* at 59 ("Even a substantial burden on the free exercise of religion is justified by the broad public interest in maintaining a sound tax system. The city has a cognizable compelling interest to enforce its zoning laws.") (citations omitted).

69. *Id.* ("The ordinance only affects 40% of the city. Because the Church has free access to a majority of the city, we conclude that the least restrictive means are used to further the city's interest.").

70. City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 749 N.E.2d 916 (Ill. 2001). The court reasoned:

> [T]he decision to deny the permit application cannot be sustained solely on the ground that the proposed use is at odds with the comprehensive plan. Because there is no other reason offered for denying the application, that denial is, by definition, arbitrary and capricious and one which "bear[s] no substantial relation to the public health, safety, morals, comfort and general welfare."

Id. at 931 (quoting La Salle Nat'l Bank of Chicago v. County of Cook, 145 N.E.2d 65 (Ill. 1957)).

71. *Id.* at 932 ("In light of our disposition of this appeal, we need not address Living Word's contentions that the City violated the Illinois RFRA and the church's constitutional rights when the city council denied the church's application for a special use permit.").

72. *See* Oak Grove Jubilee Ctr., Inc. v. City of Genoa, 770 N.E.2d 1243 (Ill. App. Ct. 2002), *vacated by* 808 N.E.2d 576 (Ill. App. Ct. 2004). During the intervening time between these appellate cases, the Illinois Supreme Court decided *People ex rel. Klaeren v. Vill. of Lisle*, 781 N.E.2d 223 (Ill. 2002), and denied defendant's petition for appeal directing the appellate court to reconsider in light of this new precedent. Oak Grove Jubilee Ctr., Inc. v. City of Genoa, 796 N.E.2d 1059, 1059 (Ill. 2003).

73. Petra Presbyterian Church v. Vill. of Northbrook, No. 03 1936, 2003 WL 22048089 (N.D. Ill. Aug. 29, 2003); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003); Al-Salam Mosque Found. v. City of Palos Heights, No. 00 C 4596, 2002 WL 535046 (N.D. Ill. Apr. 5, 2002);

RFRA in the prisons[74] and one concerned the state's refusal to issue driver's licenses without the disclosure of a social security number.[75]

Florida. In Florida, the court missed the point of RFRA entirely when it held that a challenge to a local zoning decision did not violate the statute because it regulated religious conduct and not religious belief.[76] However, when a city ordinance prohibiting the feeding of the homeless on a city beach was challenged, a Florida appellate court affirmed the lower court's finding that RFRA *was* applicable, whereas the First Amendment *was not.*[77] Ruling in the period following September 11, 2001, a Florida trial court found a compelling governmental interest in taking full face photographs for driver's

---

C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001); Al-Salam Mosque Found. v. City of Palos Heights, No. 00 C 4596, 2001 WL 204772 (N.D. Ill. Mar. 1, 2001).

74. Goodman v. Carter, No. 2000 C 948, 2001 WL 755137 (N.D. Ill. July 2, 2001); Diggs v. Snyder, 775 N.E.2d 40 (Ill. App. Ct. 2002).

75. Mefford v. White, 770 N.E.2d 1251 (Ill. App. Ct. 2002).

76. First Baptist Church of Perrine v. Miami-Dade County, 768 So. 2d 1114, 1117 (Fla. Dist. Ct. App. 2000). The court reasoned:

> We do not agree that the County has the burden of showing it has a compelling interest requiring denial of the Church's zoning request. The United States Supreme Court, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, explained that "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." In *Grosz v. City of Miami Beach,* the court enunciated a three-part test to determine whether there has been a violation of the constitutional First Amendment Free Exercise Clause (which Florida's Act is obviously designed to protect): (1) the ordinance must regulate religious conduct, not belief; (2) the law must have a secular purpose and secular effect; and (3) once these threshold tests are met, the court must balance the competing governmental and religious interests.

Id. (citation omitted). In reasoning this way, the court applied First Amendment Free Exercise analysis in place of RFRA. This is obviously erroneous for two reasons: first, if Free Exercise protection is already available then the statute is surplusage; second, RFRA has been found to require separate analysis from Free Exercise claims in every other jurisdiction and is specifically intended to apply to cases in which the Free Exercise Clause *does not* provide the compelling interest standard. For cases demonstrating the separate analyses, see Mefford v. White, 770 N.E.2d 1251 (Ill. App. Ct. 2002); Goodman v. Carter, No. 2000 C 948, 2001 WL 755137 (N.D. Ill. July 2, 2001); First Baptist Church of Perrine v. Miami-Dade County, 768 So. 2d 1114 (Fl. Dist. Ct. App. 2000); Roles v. Townsend, 64 P.3d 338 (Id. Ct. App. 2003); Steele v. Guilfoyle, 76 P.3d 99 (Okla. Civ. App. 2003); Scott v. State, 80 S.W.3d 184 (Tex. Ct. App. 2002).

77. Abbott v. City of Fort Lauderdale, 783 So. 2d 1213, 1214 (Fla. Dist. Ct. App. 2001). After ordering the city to find an alternative site on public property for the feeding program, the trial judge refused to consider the appropriateness of the selected site. *Id.* at 1215. The appellate court disagreed and remanded with instructions that the lower court evaluate the propriety of the site provided by the city. *Id.*

licenses in spite of plaintiff's Islamic practice concerning head coverings.[78] With respect to prisons, a Florida appellate court affirmed a trial court determination that the state should be given a reasonable amount of time to process the name change of a prisoner before allowing him to travel using that name, even if the name change was religiously motivated.[79] In a federal suit exercising supplemental jurisdiction, a Florida district court found that a city's prohibition on vertical grave decorations did not burden the plaintiff's exercise of religion as required by RFRA's threshold test.[80]

Texas. The Texas RFRA was invoked in an action filed by a Christian school that had been shut down by the city of Abilene for building code violations.[81] While the court found the Act inapplicable based on an historical note concerning the effective date of the statute,[82] the facts of the case would likely have allowed enforcement of the code for public safety reasons.[83] In a Texas case involving the exclusion of private schools from an interscholastic athletic association, the court failed to find a burden on the exercise of religion.[84] Another Texas case failed to find a burden on the exercise of religion

78. Freeman v. Florida, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003). Plaintiff had obtained a Florida driver's license on February 21, 2001 with her picture revealing only her eyes. *Id.* at *1. She received notice on November 28, 2001 that her license would be revoked on December 18, 2001 unless she submitted to a photograph without her veil. *Id.* The state offered to give maximum privacy to plaintiff when taking the photo, and argued that the license would not need to be seen by anyone except law enforcement officials. *Id.* at *3.

79. Yasir v. Singletary, 766 So. 2d 1197, 1198-99 (Fla. Dist. Ct. App. 2000).

80. Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1279 (S.D. Fla. 1999).

81. Christian Acad. of Abilene v. City of Abilene, 62 S.W.3d 217, 218-20 (Tex. App. 2001).

82. *Id.* at 219. The historical note referenced by the decision states: "This Act applies only to a cause of action that accrues on or after the effective date of this Act." TEX. CIV. PRAC. & REM. CODE ANN. § 110.002 note (Vernon Supp. 2004-2005) (Historical and Statutory Notes). Missouri's RFRA, like the federal RFRA and unlike Texas' RFRA, applies retroactively to violations pre-dating the effective date of the statute. *Compare id. with* MO. REV. STAT § 1.307.1 (Supp. 2003).

83. According to the opinion, "[t]he City of Abilene asserted and the trial court found that the building used by the Academy for school purposes violated city ordinances by failing to meet certain life-safety measures and that the building created a substantial danger of injury or adverse health impact." *Id.* at 218. It is unlikely that the health and safety of school age children are less than compelling interests, or that building codes are too restrictive a means of accomplishing this purpose.

84. Jesuit Coll. Preparatory Sch. v. Judy, 231 F. Supp. 2d 520, 523, 536 (N.D. Texas 2002), *vacated as moot by* No. 02-10174, 2003 WL 23323003 (5th Cir. Feb. 26, 2003). The athletic association voluntarily modified its rules to allow private school participation, which prompted the Fifth Circuit to dismiss the appeal as moot.

resulting from a court order requiring a mentally ill individual to take psychoactive medications.[85]

Connecticut. A Connecticut court found that a prison policy refusing to change the label on an inmate's file to reflect a new legal name, rather than listing the new name as an alias, served a compelling governmental interest accomplished by the least restrictive means.[86] In a zoning case, another trial court decided inexplicably that Connecticut's RFRA only applied to general rules that were pretextual.[87] In a related case, a Connecticut appellate court affirmed a lower court's dismissal of an appeal where a local historic preservation authority had denied a church a certificate of appropriateness to install vinyl siding.[88] Though federal courts have been presented with several reli-

---

85. *In re* R.M., 90 S.W.3d 909, 913 (Tex. App. 2002) ("R.M.'s testimony failed to show that the trial court's order substantially burdened her free exercise of religion. We need not, therefore, determine whether the State had sufficiently shown a compelling interest.").

86. Outlaw v. Warden, No. CV000802033, 2001 WL 418561, at *1 (Conn. Super. Ct. Mar. 30, 2001). While this case involves a petty dispute over which name gets printed where, the responsibility to accommodate rests on the government, not the inmate, under RFRA.

87. Farmington Ave. Baptist Church v. Farmington Planning & Zoning Comm'n, No. CV010811563S, 2003 WL 21771916, at *5 (Conn. Super. Ct. July, 9, 2003). The court explained its rationale in a footnote:

> The church has also argued that state and federal statutes require the commission to avoid restrictions on religion and, if free exercise of religion is at stake, to take the least restrictive means of accomplishing a compelling government interest. I agree with the commission on this issue. Secular concerns such as safety do not impinge on the exercise of religion, assuming, of course, that the recitation of such concerns is not a mere pretext. Our case law already establishes a heightened scrutiny as to the more general and less quantitative considerations. The statutes seeking to preserve the value of freedom of religion can peacefully coexist with zoning regulations regarding safety, traffic, and the like, so long as those concerns are not used to mask discriminatory intent.

Id. at *5 n.4 (citations omitted). This analysis fails to appreciate the historical and express intent of RFRA as it relates to laws of general applicability. In the wake of the *Smith* decision, the Supreme Court found the use of facially neutral laws as a pretext for religious discrimination to be a violation of the Free Exercise Clause. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). RFRA was enacted to address religious exercise *not* protected under the post-*Smith* Free Exercise Clause.

88. First Church of Christ, Scientist v. Historic Dist. Comm'n, 737 A.2d 989, 989 (Conn. App. Ct. 1999). The appellate court simply affirmed by reference to the analysis of the lower court. *Id.* at 990. The trial court, while not referring to RFRA or applying typical RFRA analysis, ultimately found that putting siding on a church building did not qualify as an exercise of religion and, thus, no burden on the free exercise of religion existed. First Church of Christ, Scientist v. Historic Dist. Comm'n, 738 A.2d 224, 231 (Conn. Super. Ct. 1998) ("The commission's decision,

gious exercise claims in Connecticut, they have refused to apply Connecticut's RFRA.[89]

Oklahoma. An interesting case in Oklahoma held that a prison's failure to assign a Muslim inmate to a cell with another Muslim neither violated the Free Exercise Clause nor placed a substantial burden on the inmate's free exercise of religion as required by RFRA.[90] What is intriguing about the case, however, is the footnote applying the *Lemon* Test to a RFRA claim.[91] This application of an Establishment Clause test to a Free Exercise issue is inexcusable error as well as the source of much confusion in applying the Free Exercise Clause, and now RFRA as well.[92]

Idaho. Idaho's RFRA has likewise been invoked by a prison inmate.[93] An Idaho appellate court held that the prison system's no-tobacco policy

---

however, has not interfered with the right of the plaintiff or its members to express their religious views, or associate or assemble for that purpose."). This result is puzzling since government control of a religious group's facilities cannot help but burden its ability to function. While *City of Boerne* had similar facts, it is important to remember that it was decided solely under Section 5 of the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

89. *See* Leebaert v. Harrington, 193 F. Supp. 2d 491 (D. Conn. 2002); Quental v. Connecticut Comm'n on the Deaf & Hearing Impaired, 122 F. Supp. 2d 133 (D. Conn. 2000).

90. Steele v. Guilfoyle, 76 P.3d 99, 102 (Okla. Civ. App. 2003).

91. *Id.* at 102 n.1. The footnote relies on the decisions in *Kilaab al Ghashiyah v. Department of Corrections*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003) and *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *rev'd* 355 F.3d 310 (4th Cir. 2003), which held that the Religious Land Use and Institutionalized Persons Act (RLUIPA) was unconstitutional by applying the *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Steele*, 76 P.3d at 102 n.1. The effect of this type of analysis is to make enforcement of the Free Exercise Clause a violation of the Establishment Clause which is illogical and unworkable. *See* Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 892 (2001) ("Arguing a clash-of-the-Clauses is to advance the wholly improbable: that the Framers drafted an Amendment with two fundamental guarantees side-by-side, each trying to cancel out the other."). For an in-depth discussion of the concept of a clash between the Free Exercise Clause and the Establishment Clause, see *id.* at 890-94.

92. "It is logically impossible for one Religion Clause to clash with the other if the purpose of each Clause was to independently 'carve out' an exception to existing governmental power. . . . [I]t is quite impossible for these Clauses to conflict when both are negating governmental power." Esbeck, *supra* note 91, at 893 (footnote omitted). RFRA, like the Religion Clauses, is a rule which "negatives" governmental power. This makes a conflict between the Establishment Clause and RFRA impossible.

93. Roles v. Townsend, 64 P.3d 338 (Idaho Ct. App. 2003).

served a compelling governmental interest. The court further held that the policy utilized the least restrictive means.[94]

III. RECENT DEVELOPMENTS

A. The Legislative History of Missouri's RFRA

The motivating forces behind the scene in Jefferson City were similar to those previously at work on Capitol Hill. The organizations involved included conservative religious institutions and liberal civil liberties groups.[95] Both camps saw RFRA as an additional defense against government actions perceived to be increasingly hostile to religion.[96] This alliance of liberal and conservative forces, while rare by contemporary standards, resembled similar

94. *Id.* at 339. The state stipulated to the inmate's claim that tobacco smoking was essential to the practice of his Native American beliefs. This is a routine means of avoiding the question of what constitutes a "sincerely held" religious belief. To highlight the difficulty faced by courts when evaluating the legitimacy of religious beliefs, this plaintiff claimed that "[h]e desire[d] to smoke tobacco for the purification of body and spirit and to keep away evil and sickness." *Id.* While the public at large understands the health *hazards* of tobacco smoking, the courts are to look to the sincerity of the individual's belief rather than passing judgment on its wisdom or validity. The United States Supreme Court has determined that the appropriate test is *sincerity*. *See* United States v. Ballard, 322 U.S. 78 (1944).

95. A page entitled "Missouri RFRA Coalition Partners" included in the Witness List, listed the following organizations as proponents of Missouri's RFRA: American Anglican Church, Diocese of the Nativity; American Jewish Committee; American Jewish Congress, West Central Region; American United for Separation of Church and State, St. Louis Chapter; Anti-Defamation League; Christian Science Committee on Publication for Missouri; Greek Orthodox Diocese of Chicago (includes the St. Louis area); Hadassah, St. Louis Chapter; Home School Legal Association; Interfaith Alliance of Greater St. Louis; Jewish Community Relations Council; Jewish Community Relations Bureau/American Jewish Committee of Greater Kansas City; Missouri Baptist Convention; Missouri Family Network; Missouri Conference, United Church of Christ; NA'AMAT USA; Prison Fellowship; Religious Freedom Alliance; Seventh Day Adventist Church; Union of American Hebrew Congregation Midwest Council; Interfaith Partnership Cabinet Faith Communities; Christian Methodist Episcopal Church; The National Conference for Community and Justice; St. Louis Society of Friends; St. Louis Metro Baptist Association; St. Louis Rabbinical Association; St. Louis Association Council of the United Church of Christ; Vedanta Society of St. Louis. Missouri RFRA Coalition Partners, *in* Witness List, *supra* note 15, at 8.

96. Though allied in their political goal, these groups were motivated by different ultimate purposes. The conservatives were interested in protections benefiting conservative Christian churches, such as zoning exceptions. The liberals were concerned with protecting under-represented religious communities.

alliances formed for the purpose of disestablishing religion in various states during the period of the early republic.[97]

The idea of a RFRA in Missouri was not new in 2003.[98] Senate Bill 551, proposed in 2000, first suggested increased protection for religious exercise in Missouri.[99] The following year, RFRA was introduced as Senate Bill 337.[100] In 2002, Senate Bills 958 and 657, as well as House Bill 1801, were proposed to the Missouri General Assembly.[101] On December 1, 2002, Senate Bill 12 was pre-filed and re-introduced the language of its antecedents requiring the same strict standard as the federal RFRA.[102] After some modification, the House Committee Substitute to Senate Bill 12 was finally passed,[103] and Governor Holden signed it into law on July 9, 2003.[104] Missouri's RFRA took legal effect on August 28, 2003.[105]

---

97. *See* SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 27-35 (1963). For example, Mead writes:

> Hence came that apparently strange coalition of rationalists with pietistic-revivalistic sectarians during the last quarter of the eighteenth century. Together, they provided much of the propelling energy behind the final thrust for the religious freedom that was written into the constitution of the new nation. This coalition seems less strange if we keep in mind that at the time, religious freedom was for both more a practical and legal problem than a theoretical one. They agreed on the practical goal.

Id. at 35.

98. The bills mentioned in this paragraph were obtained from the Missouri Senate official web site at http://www.senate.state.mo.us. In the interest of creating a permanent and complete record of the history of RFRA in Missouri, these bills have also been printed and are on file with the Missouri Law Review. This record, along with various other papers concerning the history of RFRA, will collectively be cited, hereinafter, as The Kinder File.

99. S. 551, 90th Gen. Assem., 2d Reg. Sess. (Mo. 2000).

100. S. 337, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001).

101. S. 958 & 657, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 18-19).

102. The original form of Senate Bill 12 required the "least restrictive means" and provided an exception only for "federal, state, or local civil rights law." S. 12, 92d Gen. Assem., 1st Reg. Sess. (Mo. 2003) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 38-39).

103. Rep. Richard Byrd wrote a short article discussing some of the questions considered by the House of Representatives before agreeing on the final language of their substitute for the Senate bill. *See* Richard G. Byrd, *Missouri's Religious Freedom Restoration Act: The Impact on Municipal Regulations*, MO. MUN. REV., Aug. 2003, at 9.

104. *See* 2003 Regular Session Legislative Action taken by Governor Bob Holden, *available at* http://www.gov.state.mo.us/legis03/laf071103.htm (last visited Aug. 11, 2003).

105. *See* Senate Bill 12 (2003) Bill Summary, *available at* http://www.senate.state.mo.us/03INFO/bills/SB012.htm (last visited Aug. 11, 2003).

Three sessions of debate generated two points particularly worthy of consideration. First, the language included in the civil rights exception to Missouri's RFRA was the result of fiscal analysis and not floor debate. A technical memo concerning the fiscal analysis of the 2002 bills states simply that including the exception would "avert the potential loss of federal funds."[106] A similar memo involving Senate Bill 12 explains the putative dilemma in more detail.[107] Since federal law requires state human rights statutes to provide at least as much protection as their federal counterparts,[108] federal funding for some state programs could be jeopardized by interpreting RFRA to allow less protection than federal law.[109] This potential conflict was theoretical,[110] but was deemed troublesome enough by lawmakers to cause a civil rights exception to the legislation in both sessions.[111]

---

106. Fiscal Estimate Worksheet Technical Memorandum from Analyst Daniel L. Hays on Fiscal Note FN 3812-03N, Bill No. SCS SB 958 & 657 (Jan. 28, 2002) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 25). The memo fails to provide a citation to the referenced federal law.

107. Fiscal Estimate Worksheet Technical Memorandum from Analyst Tammy Cavender on Fiscal Note 0406-01N, Bill No. SB 12 (Dec. 17, 2002) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 43). As with the first memo, this memo fails to cite the relevant authority upon which its concern is based.

108. In the absence of a citation by the analysts, it is difficult to know the provision to which they are referring. One possibility is 42 U.S.C. § 2000d-1 (2000), which prohibits officials granting federal funds from giving grants to programs or activities that are not consistent with the purposes of the federal law providing the funds.

109. Fiscal Estimate Worksheet Technical Memorandum from Analyst Tammy Cavender, *supra* note 107. Ms. Cavander's description of the technical error states:

> As long as the language in section 1.307.2 is included specfically [sic] as "except that nothing in these sections shall be construed to establish or eliminate a defense to a civial [sic] action or criminal prosecution based on federal, state or local civil right law" then the adoption of this bill will not have any effect on the Missouri Commission on Human Rights. This section is critical. Without it, the Missouri Human Rights Act would be open to interpriations [sic] that provide less protection than federal law. Federal Law requires state civial [sic] rights acts to provide equal or greater protection than federal law in order to be valid. This could lead to sections of the act being declared invalid and to the loss of federal funds. The MHRA, [sic] must provide substantially equivalent protection as federal law to be eligable [sic] for federal funds.

Id.

110. To say that increased protection of religious liberty could violate civil rights laws seems illogical. In the case of Title VII employment regulation, religious institutions are exempted from the ban on religious discrimination, but required to comply with other categories. *See* 42 U.S.C. § 2000e-2(e) (2000).

111. What troubled the legislature in this analysis, of course, was the potential loss of federal funds.

The more contentious debate concerned the application of RFRA to the corrections system. The history of litigation arising in the prison context under federal and state RFRAs excited fear in corrections circles concerning the impact of a Missouri RFRA on their facilities and administration.[112] The fiscal analysis reflected the fear of increased litigation by estimating the annual cost of the statute to be over $100,000 in the years following its implementation.[113] Amendments to the bill were proposed that would retain the rational-basis review standard from *Smith* in cases involving penal institutions.[114] Advocates and some legislators failed to see the feared harm and

---

112. Mickey Wilson, Fiscal Note for Perfected SB 12 (Apr. 16, 2003) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 50-54). Included in his assumptions, Mr. Wilson provides the following:

> Officials from the Department of Corrections (DOC) stated that the proposal would essentially create a law guaranteeing a person's free exercise of religion. Officials assume DOC would not be able to have any restrictions on incarcerated offenders unless there were a compelling governmental interest in the least restrictive means. DOC states the least restrictive means of providing free exercise of inmates' religious beliefs could require additional personnel to provide inmates the religious services of their choosing and varied religious paraphernalia. Additional meeting space may be required, which could therefore require capital improvements. The least restrictive means to provide for special dietary requirements could require operation of separate food service/dining operations which could also require capital improvements. These requirements could very well apply to each facility operated by the DOC and the burden would be on the Department to provide these things.
>
> DOC states that additional inmates could challenge DOC regulations in state court and issues which have been decided in federal court could be relitigated in state court. An individual would be competent and sufficient by themselves to determine and establish a religious practice under the religious exercise clause. There would no longer be a necessity for a practice or belief to be endorsed by a larger religious community before the DOC would be required to allow/facilitate the expression of [an] individuals' [sic] religious practices.
>
> DOC assumes the various components of this bill, and their potential for excessive fiscal impact, would result in unknown costs to the DOC which could very well exceed $100,000 per year. DOC notes that these same concerns would likely hold true for jails throughout the state.
>
> Oversight agrees that the same issues could apply to jails operated by political subdivisions.
>
> Oversight assumes any additional costs related to the Department of Corrections and political subdivisions would not occur until FY 2005.

Id. at 51-52.

113. *Id.* at 50-53.

114. Unnumbered Senate Amendment to Senate Bill 12, offered by Sen. Kennedy of the 3rd District (on file with The Missouri Law Review, in The Kinder File, *supra* note 98, at 42). The amendment provides:

resisted the amendments, believing instead that the legitimate interests of the corrections system are "compelling" under the statute and that no negative impact was expected. [115] One advocate pointed out that state prison systems were already required to meet the compelling interest test with respect to the exercise of religion under the Religious Land Use and Institutionalized Per-

---

> 1.309. A governmental authority may not restrict an inmate's or prisoner's free exercise of religion unless it demonstrates that the application of the restriction to an inmate held in a state correctional facility or prisoner held in a county or municipal jail is reasonably related to legitimate penological interests and otherwise meets all criteria set forth by the United States Supreme Court.

Id.

115. A memo dated February 12, 2002 from Jeff Davis, Senator Kinder's General Counsel, to staff attorney Cindy Kadlec requesting a new draft of the 2002 version of RFRA expresses the legislative doubts which lingered throughout the 2003 session, stating:

> I do not want any of the corrections language included. Please analyze the DOC fiscal comments and please tell me what you think. My impression, without much research, is that they are making a mountain out of a mole hill. I fail to see how the "compelling state interest test" will allow inmates to violate state or federal statutes regarding drug laws, fire codes, the health and welfare of other inmates, etc. or that they would be permitted to have conjugal . . . visits or animal sacrifice.

Memorandum from Jeff Davis to Cindy Kadlec (Feb. 12, 2002) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 28). Karen Aroesty, of the Anti-Defamation League, in an e-mail to Jeff Davis dated February 13, 2002 addresses DOC concerns frontally:

> If I'm not mistaken, DOC is already paying per diems for chaplains from different religious denominations to visit the prisons. They would likely not need new personnel in that regard for religious services. Their belief that the law will "guarantee" a person's free exercise of religion doesn't take into consideration all the things they are already doing, thus making null the argument that they will be having to do so much more. RFRA would not require that they have separate food operations; no capitol [sic] improvement are likely necessary. I would be interested in knowing how many prisoners in Missouri, for instance, are suing for the right to keep Kosher, and what impact that has had. As regards the individual being competent by themselves to determine and establish a religious practice, that concern also holds no water. People still need to establish under current caselaw that they have reasonable and legitimate beliefs. Prison officials have a big factor riding in their favor that will likely trump any ridiculous or particularly burdensome religious request—that is—the issue of security and maintaining accountability to the community at large. That is going to be a very, very compelling interest for any judge, and will rest very much in the prison system's interest.

E-mail from Karen Aroesty, Regional Director, Anti-Defamation League, to Jeff Davis (Feb. 13, 2002) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 31).

sons Act (RLUIPA).[116] Thus, Missouri's RFRA would not impose upon Missouri's jails and prisons a burden they were not already required to bear. RFRA supporters alleged that heavy-handed corrections policies that were suppressing legitimate prison ministry and religious activity by inmates were a greater concern than unfounded fears of the cost of compliance.[117] The resulting House Committee Substitute language sufficiently satisfied these competing interests and won passage in both houses of the legislature.[118]

B. The Text of Missouri's RFRA

The intentional and specific wording of Missouri's RFRA was the result of the legislature's critical analysis of the standard RFRA language.[119] Missouri's RFRA is codified in two sections of Chapter 1 of the Revised Statutes of Missouri.[120] The first of these sections provides the standard of review and two definitions.[121] The standard of review prohibits governmental interference with the "free exercise of religion" unless the government satisfies a

---

116. Karen Aroesty wrote to Jeff Davis:

> The DOC must by now be aware of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), a measure designed to ensure that government not interfere with an individual's freedom to practice his/her religion unless the highest governmental interest is at stake. . . . [I]t provides protection for religious observances of prisoners and other institutionalized persons without compromising appropriate institutional concerns about security. . . .
>
> . . . The nature of their accommodation, which they must do now under RLUIPA anyway, will not require anyone to build anything or to expend substantial amounts of money.

E-mail from Karen Aroesty, Regional Director, Anti-Defamation League, to Jeff Davis (Feb. 13, 2002) (on file with the Missouri Law Review, in The Kinder File, *supra* note 98, at 29).

117. Again, an e-mail from Karen Aroesty to Jeff Davis, gives a specific example when it states, "[a]mong the examples of unfair restrictions on prisoners . . . at congressional hearings were cases in which prison officials not only refused to purchase Passover matzo for the 8 days of the Passover holiday, they refused to accept donated matzo from a Jewish organization."
Id.

118. Missouri Revised Statute Section 1.307.4 (Supp. 2003) provides:

> "Relevant circumstances" may include legitimate penological interests needed to protect the safety and security of incarcerated persons and correctional facilities, but shall not include reasonable requests by incarcerated individuals for the opportunity to pray, reasonable access to clergy, use of religious materials that are not violent or profane, and reasonable dietary requests.

Id.

119. *See* Byrd, *supra* note 103, at 9.

120. MO. REV. STAT. §§ 1.302, 1.307.

121. *Id.* at § 1.302.

two-pronged exception.[122] The first prong requires the state law in question to be a "rule of general applicability" which does "not [intentionally] discriminate against religion, or among religions."[123] The second prong forces the government to demonstrate (a) "a compelling governmental interest" which (b) "is not unduly restrictive considering the relevant circumstances."[124] This final phrase is a departure from other RFRAs. It is calculated to grant more flexibility to the government than the familiar "least restrictive means" requirement.[125]

In order to bring clarity to the act, the statute defines two terms: "exercise of religion" and "demonstrates." "Exercise of religion" is "an act or refusal to act that is substantially motivated by religious belief."[126] This religious belief need not be "compulsory or central" to the individual's religious worldview.[127] "Demonstrates" is used in RFRA to mean "meet[ing] the burden of going forward with the evidence and [meeting the burden] of persuasion."[128]

---

122. *Id.* at § 1.302.1.

123. *Id.* at § 1.302.1(1). This requirement is a reminder that laws which facially discriminate against a religious practice or belief should be challenged on state and federal constitutional grounds.

124. *Id.* at § 1.302.1(2). The "not unduly restrictive considering the relevant circumstances" standard was not based on previous case law or statute, but was meant to establish a case-by-case evaluation of each claim examining the totality of the circumstances before determining whether the governmental action was appropriate. Telephone Interview with Rep. Richard G. Byrd, Chairman of the House Judiciary Committee, Missouri General Assembly (Sept. 29, 2003).

125. Byrd, *supra* note 103.

126. MO. REV. STAT. § 1.302.2.

127. *Id.* This part of the definition prevents the courts from making determinations concerning what doctrines or practices are central to a particular religious system. Since diversity of religious belief and practice is common even within one religious community, fact-finding efforts by the courts concerning the centrality of a belief or practice would inevitably result in Establishment Clause violations. *See* Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 451 (1988); United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981). The correct analysis asks whether the practice in question was *motivated* by religious belief, instead of asking whether or not the practice is *mandatory* according to that belief. *See Lyng*, 485 U.S. at 451, *Lee*, 455 U.S. at 257, *Thomas*, 450 U.S. at 715-16. This is why Congress amended the federal RFRA, when it enacted RLUIPA, eliminating the "central tenet" requirement. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

128. MO. REV. STAT. § 1.302.3. In other words, once the plaintiff has met the burden of pleading and the threshold showing of a "burden" on the free exercise of religion, the government must bear the burdens of production and persuasion in meeting the standard set out in RFRA.

The second section of the statute defines which laws are subject to the act.[129] It then carves out exceptions to the general rule. The first exception prevents Missouri's RFRA from applying to any civil rights claim.[130] The next subsection prevents RFRA from "allowing any person to cause physical injury to another person," authorizing the possession of an otherwise unlawful weapon, or allowing a failure to pay child support or provide medical treatment to a child under life-threatening conditions.[131] The final subsection clarifies the application of RFRA within the prison system.[132]

IV. DISCUSSION

While federal case law and decisions from sister states are informative in interpreting a new statute, the absence of congressional power announced in *Boerne* also encourages the states to use their own bodies of law to shape their case law. Since the primary purpose of all RFRAs is to apply free exercise analysis to laws of general applicability, Missouri courts may find guidance in the cases interpreting and applying the free exercise clause of the Missouri Constitution. After examining Missouri's free exercise provision and its application by the courts, applying this jurisprudence to a series of hypothetical RFRA suits will aid in understanding Missouri's RFRA.

A. Free Exercise and No-Establishment in the Missouri Constitution

Like many other state constitutions, Missouri's Bill of Rights is Article I of the constitution's body.[133] Section 5 provides for the religious liberty of

129. *Id.* at § 1.307.1 ("Sections 1.302 and this section apply to all state and local laws, resolutions and ordinances and the implementation of such laws, resolutions, and ordinances, whether statutory or otherwise, and whether adopted before or after August 28, 2003.").

130. *Id.* at § 1.307.2 ("Nothing in sections 1.302 and this section shall be construed to authorize any government to burden any religious belief, except that nothing in these sections shall be construed to establish or eliminate a defense to a civil action or criminal prosecution based on a federal, state, or local civil rights law.").

131. *Id.* at § 1.307.3 ("Nothing in sections 1.302 and this section shall be construed as allowing any person to cause physical injury to another person, to possess a weapon otherwise prohibited by law, to fail to provide monetary support for a child or to fail to provide health care for a child suffering from a life threatening condition.").

132. *Id.* at § 1.307.4 ("'Relevant circumstances' may include legitimate penological interests needed to protect the safety and security of incarcerated persons and correctional facilities, but shall not include reasonable requests by incarcerated individuals for the opportunity to pray, reasonable access to clergy, use of religious materials that are not violent or profane, and reasonable dietary requests.").

133. The Missouri Constitution is organized into thirteen articles outlining the structure and function of government within the state. Of interest to this Law Summary are Article I (Bill of Rights), Article V (Judiciary), and Article IX (Education). Including a Bill of Rights or Declaration of Rights within the body of the state consti-

Missouri citizens much the way the federal Free Exercise Clause does in the First Amendment.[134] Sections 6 and 7, read together, prevent the government from forcing any particular religious system or practice on its citizens or offering direct financial support to any religious entity.[135] The language preventing the state from funding religion is repeated again in Article IX's provisions on education.[136]

Unlike the no-establishment sections, but similar to RFRA, Article I, section 5 provides the government with some exceptions to the general rule of

---

tution is a practice used by many states. *See, e.g.*, CAL. CONST. art. I; COLO. CONST. art. II; CONN. CONST. art. I; HAW. CONST. art. I; LA. CONST. art. I; MASS. CONST. pt. I; N.Y. CONST. art. I; OHIO CONST. art. I; TEX. CONST. art. I; VA. CONST. art. I; WASH. CONST. art. I.

134. MO. CONST. art. I, § 5. This section is titled, "Religious freedom–liberty of conscience and belief–limitations" and is taken from Article II, Section 5 of Missouri's 1875 Constitution. It reads:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Id.

135. MO. CONST. art. I, §§ 6, 7. Section 6, entitled "Practice and support of religion not compulsory–contracts therefor enforceable," states:

> That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to performance of the same.

Id. Section 7, entitled "Public aid for religious purposes–preferences and discriminations on religious grounds," says:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Id.

136. Nestled in Article IX's rules for education, the Missouri constitution extends its no-establishment policy even further. *See* MO. CONST. art. IX, § 8. Closely resembling the failed federal "Blaine Amendment" of that same year, Section 8 prohibits the use of any government funds for any religious purpose whatsoever. *Id.* The provision is very similar to Sections 6 and 7 of Article I, and has been interpreted by the Missouri Supreme Court to extend further than the federal Establishment Clause. Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997) (en banc) (citing Paster v. Tussey, 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc)).

religious liberty.[137] Regulation of religious practices which amount to "acts of licentiousness" or "practices inconsistent with the good order, peace or safety of the state, or with the rights of others" is allowed.[138] These exceptions, which originated in the 1875 Missouri constitution,[139] acknowledge that religion must not be used as an excuse for behavior that is a clear and present harm to public order.[140]

In applying constitutional protections to religious property use, three cases are of particular interest. In *Congregation Temple Israel v. City of Creve Coeur*,[141] after acknowledging the applicability of the federal religion clauses to the states,[142] the Missouri Supreme Court reasoned that the protection of religious exercise by both the state and federal constitutions precluded any legislative intent to empower a municipality to regulate a church's use of land.[143] The court did, however, acknowledge the delegated authority of a municipality to regulate land use by churches in matters involving public health and safety.[144] Expanding on this precedent, the court of appeals held

137. The exceptions found in Missouri's constitution are typical of state constitutions dating back as far as the beginning of the republic. *See, e.g.*, CONN. CONST. art. I (the Declaration of Rights constitutes Article I of the constitution); MD. CONST. Declaration of Rights (the Declaration of Rights stands alone within the Constitution); MASS. CONST. pt. I (the constitution is divided into "Parts," the first of which is the Declaration of Rights). These provisions were meant to define the limitations on religious behavior previous to the incorporation of the Free Exercise clause into the Fourteenth Amendment of the federal constitution in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Though overshadowed by the federal constitution now, these exceptions still provide state courts with analogous analyses in applying Missouri's RFRA.

138. MO. CONST. art. I, § 5.

139. *Id.* The annotations to this section cite the source of this language as MO. CONST. art. 2, § 5 (1875).

140. The exceptions listed in this section are essentially concrete expressions of the abstract "compelling interest" standard. Rather than arguing the government's compelling interest in health to justify regulation of ritualistic animal slaughter, this section specifically excepts threats to public safety, which would include health risks.

141. 320 S.W.2d 451 (Mo. 1959) (en banc).

142. *Id.* at 454 ("The provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made applicable to the states by the Fourteenth Amendment."). The court cites *Cantwell* and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in support of this assertion. *Congregation Temple*, 320 S.W.2d at 454.

143. *Congregation Temple*, 320 S.W.2d at 454 ("[W]e do not believe our legislature in using the language it did, in Section 89.020, had any intention of granting authority to municipalities to restrict location and use of buildings and land for churches.").

144. *Id.* at 456 ("[M]unicipalities under the police power have the power of regulation of the facilities of public schools, and we hold the same thing is true of churches, such as safety of boilers, smokestacks and similar facilities, sanitation, manner and type of construction for fire protection and certainly likewise off-street

in *Village Lutheran Church v. City of Ladue*,[145] that the enabling statute "does not give municipalities zoning power over churches."[146] Three years later, when the damages portion of the suit returned on appeal,[147] the court reiterated the circumstances under which municipalities could permissibly regulate religious land use by means of zoning[148] and cited federal case law in support.[149] However, in *Association for Educational Development v. Hayward*[150] the Missouri Supreme Court upheld a municipal zoning decision preventing a priest and six laymen from erecting and residing in a dwelling built on property zoned for single-family occupancy because a monastery or parish-house, which was allowed by the zoning ordinance, would be inhabited exclusively by clergy.[151]

Three other state cases also deserve mention. Mrs. Baird, a Christian Science practitioner, treated disease as a spiritual ailment rather than a physical one.[152] In *City of Kansas City v. Baird*,[153] her conviction for failure to report a case of diphtheria, as required by ordinance, was held by the Missouri Supreme Court to be unrelated to her free exercise of religion.[154] In

---

parking facilities, sewage disposal and other matters related to the public health, safety and welfare.") (citations omitted).

145. 935 S.W.2d 720 (Mo. Ct. App. 1996) ("Village Lutheran I").

146. *Id.* at 722.

147. Vill. Lutheran Church v. City of Ladue, 997 S.W.2d 506 (Mo. Ct. App. 1999) ("Village Lutheran II").

148. *Id.* at 508 ("*Village Lutheran I*, however, does not stand for the proposition that municipalities may never regulate the use of property by churches or that churches need never seek approval from municipalities to engage in certain conduct. Rather, *Village Lutheran I* recognizes that municipalities may use their regulatory powers over churches solely for the purposes of promoting health, safety, morals, or the general welfare of the community.") (citation omitted).

149. *Id.* (citing in support of regulation Messiah Baptist Church v. County of Jefferson, 359 F.2d 820, 828 (10th Cir. 1988); First Assembly of God v. City of Alexandria, 739 F.2d 942, 944 (4th Cir. 1984); Grosz v. City of Miami Beach, 721 F.2d 729, 738 (11th Cir. 1983); and against regulation W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 547 (D.C. Cir. 1994)).

150. 533 S.W.2d 579 (Mo. 1976) (en banc).

151. *Id.* at 585 ("Considering the definitions of the terms used in the zoning ordinance, supra, it clearly appears that the concept common to all is that the principal residents of places called rectories, parish houses, convents, and monasteries, are people who have the religious ministry as their regular and primary vocation as distinguished from avocation."). This case is a good example of why Missouri needed RFRA to augment its constitutional protections.

152. City of Kansas City v. Baird, 63 S.W. 495 (Mo. 1901).

153. 63 S.W. 495 (Mo. 1901).

154. *Id.* at 495. Mrs. Baird's view of healing, in the mind of the court, had no bearing on the ordinance which required the reporting of all known cases of diphtheria. *Id.* The mandatory reporting obligation in no way interfered with her exercise of religion as it related to treatment of disease.

Walton v. Walton,[155] the court of appeals held that a contempt order against a husband who failed to pay court-ordered maintenance was a constitutionally permissible imposition on religious exercise.[156] In *State v. Pride*,[157] the court of appeals failed to find an abuse of discretion where a trial judge refused to accommodate the defendant's religious practices when scheduling a trial.[158]

City of Louisiana v. Bottoms[159] sheds some light on the exceptions provided in Article I, Section 5 of the Missouri Constitution. In that case a young black minister was convicted of a breach of peace violation when the "Hallelujahs" and "Amens" generated by his religious service between seven and nine-thirty in the evening were heard by neighbors two blocks away.[160] The court of appeals was willing to convict a clergyman for using "foul and obscene language in the pulpit,"[161] or for creating excessive noise in violation of an ordinance,[162] but stopped short of allowing a conviction on the facts in

---

155. 789 S.W.2d 64 (Mo. Ct. App. 1990).

156. *Id.* at 66-67. Citing *Penner v. King*, 695 S.W.2d 887 (Mo. 1985) as foundation, the court held:

> Even if, in the case at bar, enforcing the court's order for the payment of maintenance and attorney's fees could be considered an inroad on religious liberty, the state has ample justification. It is of the utmost importance for the state to maintain a system that strives for the orderly and civilized dissolution of a family unit. When that unit is dissolved, the state is rightfully concerned that all parties be treated fairly and be given an opportunity, to the fullest extent possible, to continue their lives in an independent fashion without the assistance of public funds to maintain a decent standard of living.

Id. at 67.

157. 1 S.W.3d 494 (Mo. Ct. App. 1999).

158. *Id.* at 505-08. This case is important because the resolution of the free exercise claim was argued using a federal RFRA precedent, but was decided under *Smith* and its rational basis standard of review for neutral state actions. *Id.* at 505-06 ("The Free Exercise Clause precludes all governmental regulations on beliefs, but the government may, under certain circumstances, impinge on a [sic] individual's actions in accordance with those beliefs in exercising the power to proscribe conduct.") (citing Employment Div. v. Smith, 494 U.S. 872, 890 (1990)); *Id.* at 507 ("The balancing test used in *Gilliam* was consistent with that required by [federal RFRA.] That Act was, however, invalidated by the United States Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997)."). This case would now fall under Missouri's RFRA, which would reverse the result.

159. 300 S.W. 316 (Mo. Ct. App. 1927).

160. *Id.* at 317.

161. *Id.* at 318 ("In fact, there are cases in the books, though from other jurisdictions, which establish conclusively that the transgressor may not shield himself behind the vestments of the clergy when brought to task for the use of foul and obscene language in the pulpit.") (citing Delk v. Commonwealth, 178 S.W. 1129 (Ky. Ct. App. 1915); Holcombe v. State, 62 S.E. 647 (Ga. Ct. App. 1908)).

162. *Id.* ("Likewise the beating of a drum upon the streets, no permit having been secured from the proper officer, has been held to be a breach of the peace, even

question.[163] A subsequent opinion by the Missouri Attorney General[164] cites *Bottoms* in response to a local prosecutor's request for guidance in similar but less innocent circumstances.[165] The advisory opinion also refers to a federal court decision citing *Bottoms* with approval[166] and advises the local prosecutor to exercise his discretion.[167]

B. Missouri's RFRA in Light of Free Exercise and No-Establishment Cases

The primary goal of every RFRA is to safeguard the exercise of religious practice. Protecting behavior motivated by religious conviction, even in the face of general laws to the contrary, does not normally stir up controversy. The real difficulty in RFRA analysis is in drawing the line which divides the legitimate exercise of governmental power from the protected exercise of religious liberty.

---

though done in the performance of a religious service, when the statute expressly provided that it should be unlawful for any person to beat a drum, except by command of a military official having authority therefor.") (citing State v. White, 5 A. 828 (N.H. 1886)).

163. *Id.* ("The case at bar, however, presents a far different situation. Here defendant stands charged, not with the use of obscene or indecent language, and not with having performed any act expressly prohibited by the ordinance, unless the latter be so construed as to comprehend and regulate the volume of sound that may be employed in a lawfully conducted church service. . . . That the city fathers, in the enactment of such ordinance, intended that it should be given such effect, we cannot believe.").

164. 69 Op. Mo. Att'y Gen. 1 (Sept. 21, 1950).

165. *Id.* at 1-5. The question presented was: "Does a religious meeting which continues until 11:00, 12:00 or 1:00 o'clock at night and conducte [sic] in such a manner that loud and unusual noises emanate from their gathering constitute a peace disturbance to adjoining neighbors, and if so, who are the proper persons to make defendants thereto?" *Id.* at 1.

166. *Id.* at 5 (discussing Minersville Sch. Dist. V. Gobitis, 108 F.2d 683 (3rd Cir. 1939), *rev'd by* 310 U.S. 586 (1940), *overruled by* W.Va. State Bd. of Educ. V. Barnett, 319 U.S. 624 (1943).

167. *Id.* at 7. The opinion concludes with this advice to the prosecutor:

> Whether the facts stated in your letter constitute a breach of the peace, as contemplated by Section 4636 R.S. Mo. 1939, would depend upon all the circumstances attending said religious meeting, including whether or not the neighborhood, or any family or any persons have been disturbed in their peace. It is a matter within the discretion of the Prosecuting Attorney as to the form of action, if any, that may be filed and as to who shall be made defendants therein.

Id.

Considering the requirement that the state action in question be of general applicability,[168] it is improbable that there would be a conflict between the application of RFRA and Missouri's no-establishment provisions. A law of general applicability will not, by definition, either force an individual to support a religion with which they do not agree or extend state funds for a religious purpose to any particular religious entity or enterprise.[169] Any attempt to plead RFRA in a situation involving an action impermissible under Missouri's no-establishment provisions would be defeated on state constitutional grounds.[170] RFRA is concerned with, and limited to, religious free exercise cases.[171]

---

168. RFRA is designed to deal with laws that affect religion incidentally. For instance, the legal drinking age for Missouri has nothing to do with religion on its face, but in application places the aura of illegality over communion services in Christian denominations that use alcoholic wine as a part of the rite. Laws that specifically target religious practices are dealt with under Free Exercise Clause analysis, not RFRA. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Employment Div. v. Smith, 494 U.S. 872 (1990).

169. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445 (2002). In answer to the allegation that RFRA protection provides an impermissible benefit to religious organizations, Professor Esbeck explains:

> Structure, to be sure, often has the laudable but indirect consequence of enlarging the field of operation for the exercise of individual liberties. It does this by compelling the various branches of the government (legislative, executive, and judicial) to stay confined within their proper limits. However, the immediate object of structure is the management of power: a dividing, dispersing, and balancing of the various prerogatives of the nation's [or state's] sovereignty. Not every exercise of power that exceeds a structural restraint will result in an injury to an individual. Lack of injury or harm, however, does not discount the fact that a constitutional restraint was exceeded.

Id. at 455. Applying this Establishment Clause analysis to RFRA reinforces the mutually exclusive nature of this statute and the no-establishment provisions in Missouri's constitution. RFRA is a statutory prohibition on certain state actions, just the opposite of the type of government activity enjoined by the no-establishment sections.

170. This would be accomplished in one of three ways: 1) the supremacy of a state constitutional provision over a legislative act; 2) the supremacy of the federal Establishment Clause as applied to Missouri law by the Fourteenth Amendment; and 3) the invalidity of a claim under Missouri's RFRA requiring the state to actively favor oppose religion.

171. RFRA, then, "compel[s] the various branches of the government (legislative, executive, and judicial) to stay confined within their proper limits," thus "enlarging the field of operation for the exercise of [religion]." Esbeck, *supra* note 169, at 455.

C. Missouri's RFRA Exceptions in Light of the Free Exercise Exceptions

The civil rights exception in Missouri's RFRA mirrors one application of Missouri's constitutional free exercise exception for "acts of licentiousness."[172] Any claim that racist behavior is protected by either Missouri's constitution or RFRA will ultimately fail as being an impermissible application of religious belief.[173] It must be emphasized, however, that religious *belief*—as distinct from practice—is fully protected regardless of the unsavory nature of the belief.[174]

Likewise, the remaining constitutional exceptions in Article I, section 5 provide guidance for courts in determining what interests are compelling enough to satisfy RFRA. The "good order" exception, in Missouri's constitutional cases, allows the government to control disturbances of the peace without violating RFRA.[175] The "health and safety" exception allows vital regulation of the medical profession in particular and governs situations protecting the public in general from disease or injury.[176] Finally, the exception protecting the rights of others from religious behavior provides a rather broad category within which the courts may find an array of compelling interests ranging from RFRA's child support exception to conflicts involving spousal support or other monetary judgments against a party wanting to take religious vows of poverty.[177]

---

172. Another area in which this exception will be significant deals with religiously motivated sexual behavior. Communal living involving group sexuality as well as Wiccan or Neo-Pagan rites involving outdoor nudity and sexually related activity may well be found within the pale of government regulation as "acts of licentiousness."

173. Even without the civil rights exception in RFRA, the courts would certainly find government suppression of racial discrimination to be a compelling interest.

174. The government is never permitted to regulate the thoughts and beliefs of a citizen. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) ("The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'") (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969)). The expression of these thoughts and beliefs is only slightly more open to government oversight. *Id.* ("The government may suppress speech for advocating the use of force or a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'") (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). RFRA operates in the third tier, where religious belief translates into action.

175. For these situations, *Bottoms* and the subsequent Attorney General Opinion provide the courts with some insight. *See supra* notes 159-67 and accompanying text.

176. The *Baird* case is the key precedent for this exception. *See supra* notes 153-54 and accompanying text.

177. The *Walton* case involved an alimony judgment against an ex-husband which effectively prohibited his exercise of religion. *See supra* notes 152-53 and accompanying text.

D. Missouri's RFRA in Context

With the history of the federal RFRA and that of eleven states with their own versions of the Act serving as a guide, Missouri has ample case law with which to supplement its own jurisprudence respecting religion. The following discussion poses some plausible religious disputes or claims and their possible solutions under Missouri's RFRA.

1. Standard RFRA Scenarios

Suppose an Orthodox Jew loses his job in a layoff and seeks unemployment benefits. While receiving these benefits, he has little success in finding suitable work except for a company that has offered him a position which matches his training and experience but requires him to work the late night shift every Friday.[178] If the state terminates unemployment benefits for failure to accept the position,[179] this individual will have a claim against the state under RFRA.[180] This is RFRA applied to the situation in *Sherbert v. Verner*.[181]

Interest in increasing the age range of compulsory school attendance is apparent in recent legislative activity.[182] This change would serve the twin goals of increasing the percentage of high school graduates and keeping teen-

178. This arrangement would cause an impossible conflict for this individual since the Sabbath begins at sundown on Friday evening and continues until sundown Saturday. This poses for such an individual a choice between taking the job and violating his faith, or turning down the job as a matter of conscience and losing his benefits.

179. The assumption made for the sake of the hypothetical is that the rules governing unemployment benefits would require acceptance of an offered position within the training and experience level of the unemployed individual. If the unemployment compensation rules make provision for religious sentiment, then RFRA is not invoked. However, the presence of RFRA assures protection of religious exercise when the rule of general applicability fails to so provide.

180. The plaintiff would have to plead a RFRA claim with sufficient evidence to demonstrate a burden on the exercise of the plaintiff's religion. Articulating the impossible choice between observing the Sabbath and taking the job would be a pleading sufficient to shift the burden of demonstrating a compelling interest to the government.

181. *See* 374 U.S. 398 (1963) (holding that termination of Seventh Day Adventist's worker compensation benefits for failure to take a job which required Saturday work was a violation of the Free Exercise Clause).

182. Senate Bills 968 and 969 (2004), which took effect on August 28, 2004, replaced Missouri Revised Statute Sections 167.031 and 167.051. S. 968 & 969, 92nd Leg., 1st Reg. Sess. (2003). The changes made to Section 167.031.6 allow metropolitan school districts to raise the compulsory attendance age to seventeen should they so choose. MO. REV. STAT. § 167.031.6 (Supp. 2004). The above mentioned hypothetical assumes a similar law which applies to the entire state.

agers off the streets during the workday.[183] If the compulsory school age were raised to 18 in an area which included Amish families, the situation changes significantly. RFRA would provide these Amish families an exception to such laws because the statutory educational requirements are unduly restrictive as to 17 year old boys who are generally learning agrarian skills with their fathers rather than studying math, English, and history for 1000 hours a year.[184] This is RFRA applied to the situation in *Wisconsin v. Yoder*.[185]

Suppose a citation is issued to a Pentecostal church for a violation of a city noise ordinance during a week-long revival. The city would be required to show that noise control is a compelling interest and that the ordinance is not unduly restrictive. While a case like this would be dependent to some degree on the facts, the *Bottoms* case and the subsequent Attorney General opinion would prove helpful.[186] While this fact pattern will generally favor the church, it is conceivable that some noise disturbances arising from public worship could cross the line previously drawn by Missouri's constitution and make enforcement of the ordinance proper under RFRA.[187]

2. Defining "Compelling Governmental Interest"

Zoning ordinances and building codes provide good examples of what does or does not constitute a "compelling governmental interest." Zoning ordinances are a powerful tool for local governments in managing their interest in real estate and economic development. However, when the economic interests of city planners collide with a religious institution's plans to build a house of worship, the government must demonstrate a "compelling inter-

183. An alternative to compulsory school attendance is home school which requires the parent to log 1000 hours of course work, 600 hours of which must be in core subject areas. MO. REV. STAT. § 167.031.2(2)(b) (2000). Compulsory school attendance age according to MO. REV. STAT. § 167.031.1 is between seven and sixteen years.

184. The reason for not continuing education beyond the eighth grade in many Amish communities is based on their religious beliefs concerning leading lives of simplicity. For young Amish men, the more important skills to be learned during the teen years include woodworking, construction, and agriculture. Requiring compliance with the home school statute in lieu of public school attendance for these families would be unduly restrictive under the relevant circumstances.

185. 406 U.S. 205 (1972) (holding that compulsory school attendance laws involving Amish students between age 14 and 16 were a violation of the Free Exercise Clause).

186. *See supra* notes 159-67 and accompanying text.

187. For instance, noise levels that disturb neighbors after ten o'clock at night would more likely favor the city's case than a complaint called in at eight o'clock. Also, loud singing and religious exclamations are most certainly protected, whereas screaming or shrieking which disturbs the neighborhood is more suspect. *See supra* notes 161-63 and accompanying text.

est."[188] Missouri courts have already decided that the interests involved in zoning ordinances do not rise to the level of a "compelling governmental interest."[189]

On the other hand, building codes are generally enacted to ensure public health and safety.[190] The design, structural, and material requirements found in these codes often make certain building projects impossibly expensive. For example, an Islamic congregation wishes to build a mosque with adjacent prayer minaret. The local building code requires a particular design, particular structural reinforcements, and particular quality materials before the minaret will be approved by the inspector. In this case, the safety interests accomplished by the building code are compelling enough to uphold the general rule,[191] even if the cost of compliance effectively prohibits the erection of the mosque and minaret.[192] The same analysis applies to fire prevention equipment and emergency lighting requirements imposed on facilities constructed by religious institutions for religious purposes.[193]

---

188. Building a facility for the purpose of conducting worship would obviously be an exercise of religion. A closer case would be the building of a homeless shelter or safe-house by a religious organization for the purpose of conducting a social ministry.

189. Vill. Lutheran Church v. City of Ladue, 935 S.W.2d 720, 722 (Mo. Ct. App. 1996) ("Village Lutheran I") (citing Congregation Temple Israel v. City of Creve Coeur, 230 S.W.2d 451 (Mo. 1959) in holding that power delegated to municipalities for zoning did not extend to religious land use).

190. *See, e.g.*, MO. REV. STAT. § 89.020.1 (2000). Use of police power in the areas of health, safety, morals or the general welfare rises to the level of a compelling interest, thereby permitting government regulation of religious land use. *See Vill. Lutheran Church*, 935 S.W.2d at 722. ("The Supreme Court stated that municipalities have regulatory power over churches under their police power, but that power is purely limited to safety regulation."); *see also* Vill. Lutheran Church v. City of Ladue, 997 S.W.2d 506, 508 (Mo. Ct. App. 1999) ("Village Lutheran II") ("[M]unicipalities may use their regulatory powers over churches solely for the purposes of promoting health, safety, morals, or the general welfare of the community.").

191. This assumes that the building code is not open to attack for being pretextual or artificially strict so as to single out religion for regulation. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

192. *See* Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995) (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

193. The municipality's interest in the orderly evacuation of a building in case of emergency makes a requirement of emergency lighting legitimate. The interest in preventing a fire disaster makes sprinkler systems and other fire prevention and detection device requirements a prudent regulation. These requirements will undoubtedly add to construction costs and may prevent some religious bodies from building or adding to structures used for worship. A more difficult case involves regulations requiring handicap accessibility for houses of worship.

3. Defining "Not Unduly Restrictive Considering the Relevant Circumstances"

Even when a "compelling governmental interest" is present, the means of accomplishing that purpose must also meet the RFRA standard. For instance, the government has a "compelling interest" in regulating alcohol consumption by persons under the age of twenty-one.[194] When applied to alcoholic wine used in the Catholic sacrament of the Eucharist, however, this general prohibition falls short of being "not unduly restrictive under the relevant circumstances."[195] A closer case might involve the use of marijuana by members of the Rastifarian religion.[196] Significant factors in evaluating "the relevant circumstances" in this case include the frequency of ritual marijuana use, the age of the participants, and the quantity of drug consumed.

Another possible scenario involves a state university policy with respect to transfer credits and degrees.[197] Assuming state universities have a "compelling interest" in maintaining the quality and integrity of the education they provide, a policy which accomplishes that purpose by recognizing only educational institutions accredited by a particular accrediting agency to the exclusion of all others would have to survive RFRA's means-to-ends analysis.[198] If an alternative means of evaluation could vouch for the academic

194. The goals of this regulation generally include reduction in alcohol-related injuries and fatalities due to use of alcohol by immature persons, reduction in alcoholism rates in the population as a whole, and health concerns related to the introduction of alcohol into still-developing bodies.

195. MO. REV. STAT. § 1.302.1(2) (Supp. 2004). Prohibiting a minor from participating in the holiest portion of the mass simply because a sip of alcoholic wine is involved surely qualifies as "unduly restrictive."

196. *See* United States v. Jefferson, 175 F. Supp. 2d 1123 (N.D. Ind. 2001), *aff'd* 317 F.3d 768. While the courts had no problem avoiding RFRA in this case, claims by Rastafarians who use marijuana only once a month under very controlled circumstances could provide a closer case.

197. One such policy was discussed by the University of Missouri's Faculty Council on June 13, 2002, and passed unanimously by that body on July 25, 2002. University of Missouri, Faculty Council, Meeting Minutes (June 13, 2002 and July 25, 2002), *available at* http://web.missouri.edu/~mufcwww/minutes/index.html. Under this new policy, the University only accepts credits and/or degrees from "regionally accredited" institutions. *Id.* No mention is made in the minutes of the June 13th meeting as to how international students would be treated under this policy.

198. In the University of Missouri scenario, the University would have to show that rejection of all accrediting agencies not under the umbrella of "regional accreditation" would be "not unduly restrictive under the relevant circumstances." "The relevant circumstances" would include the academic record of students from disfavored institutions compared to those from "regionally accredited" ones.

excellence of a religious college,[199] then the state university's exclusionary policy would be unduly restrictive and violate RFRA.[200]

4. Defining "Exercise of Religion"

Another issue that must be resolved by the courts is the scope of "exercise of religion" as defined by the statute. Suppose that a county has adopted an ordinance concerning poultry processing that requires certain facilities and procedures, and which is meant to decrease the health hazards posed by substandard poultry farms and processing sites. Would adherents of Santaria be exempted from these rules where they kept chickens near their place of worship for use in animal sacrifices? In this case, the sacrifice of animals would qualify as an exercise of religion under RFRA and the county would bear the burden of meeting the RFRA standard.[201]

The state of Georgia recently settled a law suit over its faith-based initiative program.[202] As part of the settlement, Georgia now requires religious institutions to forego their Title VII exemptions regarding employment to

---

199. Many Bible colleges have decided not to pursue "regional accreditation" for several reasons, many of which are religious. For one college's experience, see Lynn Gardner, OZARK CHRISTIAN COLLEGE: A VISION OF TEACHING THE WORD OF CHRIST IN THE SPIRIT OF CHRIST 253-60 (1992). As a result, the Association of Biblical Higher Education ("ABHE"), formerly the American Association of Bible Colleges, was formed to provide credentials for these educational institutions. *See generally* John Mostert, THE AABC STORY: FORTY YEARS WITH THE AMERICAN ASSOCIATION OF BIBLE COLLEGES (1986). *See also* http://abhe.gospelcom.net/abherecognition.htm (July 26, 2004). The ABHE is recognized as a "national accrediting agency" by the U.S. Dept. of Education, the same recognition enjoyed by the American Bar Association's accrediting agency, which regulates law schools across the country. *See* http://www.ed.gov/admins/finaid/accred/accreditation_pg6.html (last visited July 26, 2004). This is one example of an alternative method of evaluating the academic standards of a religious college or university.

200. The difficulties for AABC schools under RFRA involve standing and meeting the threshold requirement. Should a student from an AABC accredited school establish standing to sue and demonstrate a burden on his exercise of religion, then the University of Missouri bears the burden of producing evidence and persuading the fact finder that this policy is "not unduly restrictive under the relevant circumstances."

201. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). The *Lukumi* case involved a Free Exercise Clause violation by a municipality which had created health ordinances intended to prevent animal sacrifice. *Id.* In the hypothetical above, the ordinance was designed to serve *general* health purposes without reference to religion, thus making it subject to RFRA analysis as a law of general applicability.

202. For a column outlining the issues involved, see Felix Hoover, *Case Opens Hiring-Bias Debate Again*, COLUMBUS DISPATCH, Nov. 15, 2002, at 1E.

qualify for funding.[203] This arrangement forces religious institutions to choose between funding for legitimate social programs and adherence to religious belief, a choice that burdens their exercise of religion.[204] Should Missouri adopt such a policy, the government would be forced to demonstrate a compelling governmental interest for the policy which is not unduly restrictive. Discontent among individuals or groups not eligible for employment under religious hiring guidelines does not rise to the level of a compelling governmental interest, and therefore the policy would violate RFRA.

5. The Burden of Producing Evidence and the Burden of Persuasion

Missouri's RFRA requires the plaintiff to show only an "exercise of religion" which is burdened by a law of general applicability.[205] Once this showing has been made, the state must "demonstrate[]" a "compelling governmental interest" and that the law is "not unduly restrictive considering the relevant circumstances."[206] The burden shifting nature of the statute is significant in that a tie goes to the plaintiff.[207]

Suppose a Muslim inmate alleges that group strip-searches violate a tenet of his religion which requires that he not expose his genitals to strangers.[208] Suppose further that the inmate has indicated his willingness to submit to strip-searches conducted by male prison personnel, and by female personnel in emergency circumstances.[209] The state is required to produce more than a bald assertion that a compelling interest in safety and efficient prison administration exists.[210] Rather, evidence must be presented to convince the fact finder that the strip-search policy actually accomplishes the asserted interest in a manner that is "not unduly restrictive" to the inmate's exercise of

---

203. For an editorial explaining the settlement and its ramifications, see Stephen Lazarus, *Regress, Not Progress, in Georgia*, CAP. COMMENT., Nov. 17, 2003, *available at* http://www.cpjustice.org/stories/storyReader$1125.

204. This lose-lose choice is similar to the dilemma condemned by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963).

205. MO. REV. STAT. § 1.302.1 (Supp. 2003).

206. *Id.* § 1.302.1.

207. Missouri's RFRA spares the plaintiff from producing evidence or explaining policy when the government is better situated to bear such a burden. The plaintiff is only required to explain how his or her religious practices are being burdened and what law is burdening those practices.

208. *See* Collins v. Scott, 961 F. Supp. 1009, 1014 (E.D. Tex. 1997).

209. *Id.*

210. In *Collins*, the court did not apply RFRA because the inmate failed to show that his objection was motivated by a central tenet of his religion. *Id.* This standard is not required under Missouri's RFRA. In Missouri, a practice based on a sincerely held religious belief is enough to require the state to withstand RFRA scrutiny.

religion.[211] The government's failure to produce or persuade would result in a judgment for the inmate.

6. The Civil Rights Legislation Exception

The language of the civil rights exception includes any classification protected under civil rights laws, not simply race.[212] The question to be litigated, then, is how to determine which laws are "civil rights" laws and which are simply laws of general applicability.[213]

Assume a state school adopts a policy of nondiscrimination including homosexual individuals as a protected class. The policy prevents any entity not willing to sign and comply with the policy from using school facilities or participating in school functions. Could a religious institution raise a RFRA claim because of its exclusion from recruiting opportunities for failure to sign or comply with the policy?[214] One of the questions in this fact pattern that must be resolved by the courts is whether a non-discrimination policy at an educational institution qualifies as a "state or local civil rights law." While the state school is exposed to RFRA claims under the general provision,[215] the non-discrimination policy does not qualify as a state or local civil rights law, as required by the civil rights exception. Only state and local governments are capable of creating state and local civil rights law. Therefore, policies at a state-sponsored institution do not rise to the level of local law regardless of their intended civil rights purposes.

7. The Weapons Exception

Missouri's RFRA has spared the courts from wrestling with the possibility of school children wearing ceremonial knives to school. The exception

---

211. Under these facts, the prison must demonstrate that having female guards conduct strip-searches is not unduly restrictive in the prison context.

212. MO. REV. STAT. § 1.307.2 (Supp. 2003).

213. The nature of the body creating the law in question becomes important. There are several entities that qualify as governmental authorities under RFRA that do not qualify as "state or local" bodies capable of enacting a "civil rights law." One distinction involves the line between governments and their agencies. A different distinction involves distinguishing judicial and legislative "civil rights law."

214. This is a very different scenario from the one raised by military recruiters. Under this fact pattern, a completely private entity has set hiring standards on the basis of the religious belief embraced by the organization. The policy, as applied to this firm, is forcing the firm to choose between violating its religious practice or being excluded from a limited public forum.

215. In order to become applicable, Missouri's RFRA simply requires that a "governmental authority" restrict the exercise of religion. *See* MO. REV. STAT. § 1.302.1 (Supp. 2003). A state school falls within the definition of "governmental authority."

allowing the state to regulate the use and transport of weapons notwithstanding their religious significance was inspired by the Ninth Circuit decision requiring an exception to be made for children of the Sikh religion who wanted to wear ceremonial knives.[216] In a school-shootings environment, especially after September 11, 2001, the General Assembly created this safety and security exception to RFRA.[217]

A problem posed by this exception may surface in the prison context. The Greek Orthodox Church uses a ceremonial knife when conducting its sacrament of the Eucharist.[218] The knife is possessed and utilized only by the priest performing the ceremony, but it is essential to performing the rite.[219] If the exception concerning weapons is rigidly followed, it is possible that the prohibition of knives in prisons could effectively deny Greek Orthodox inmates the most important sacrament of their faith.[220]

8. The Child Support Exception

The child support exception[221] was created to ensure the maintenance of children after a divorce and limit the number of children supported by state aid due to divorce.[222] While these are worthy goals, the impact on the reli-

---

216. Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995).

217. The language of Missouri Revised Statute Section 1.307.3 (Supp. 2003) effectively exempts weapons laws from the strict scrutiny standard. This carve out of RFRA's protection in favor of state police power is indicative of current sensitivity to matters of public safety and security.

218. In the Greek Orthodox tradition, the Eucharist is the holiest rite of the church and is central to its entire worship service. Rev. Thomas Fitzerald, *The Sacraments*, *available at* http://www.goarch.org/print/en/ourfaith/article7105.asp (last visited July 27, 2004).

219. The bread in the rite becomes the "Lamb of God" which is sacrificed by means of the "Lance," a double-edged knife used only by the priest. *Sacred Utensils*, *in* THE BLACKWELL DICTIONARY OF EASTERN CHRISTIANITY 437-38 (Ken Parry et al. eds., 1999); Fotios K. Litsas, Ph.D., *A Dictionary of Orthodox Terminology*, *available at* http://www.goarch.org/print/en/ourfaith/article8049.asp (last visited July 27, 2004).

220. This outcome is unfortunate in that the interests of all concerned could plausibly be met. Prison officials could ensure their safety interests by providing an environment in which the priest is able to administer the elements to the prisoners without the prisoners having access to the sacred utensils.

221. MO. REV. STAT. § 1.307.3.

222. *See* Walton v. Walton, 789 S.W.2d 64 (Mo. Ct. App. 1990). The Missouri Court of Appeals for the Western District stated the state's interest by writing:

> Even if, in the case at bar, enforcing the court's order for the payment of maintenance and attorney's fees could be considered an inroad on religious liberty, the state has ample justification. It is of the utmost importance for the state to maintain a system that strives for the orderly and civilized dissolution of a family unit. When that unit is dissolved, the state is rightfully concerned that all parties be treated fairly and be given

gious liberty of noncustodial parents is significant. Suppose a divorced man decides to re-evaluate his life goals and chooses to enter holy orders, with its attending vow of poverty. The child support exception would prevent him from taking this step, no matter how sincere his desire, by requiring that he pay child support at the amount agreed upon by the court.[223] If he chooses to take the vow, he would be in contempt of court for non-payment of the support payments and could face incarceration.[224]

9. The Medical Care for Minors Exception

The right of a parent to make decisions on behalf of her child is generally honored by the law. This is true, to a large degree, in the area of medical treatment.[225] However, lawmakers were uncomfortable with extending this prerogative too far on religious grounds.[226] For instance, if a child has a serious but not life-threatening medical need, the parents are free to decide what medical treatment, if any, is appropriate, including faith healing and prayer.[227] However, the medical care for minors exception allows the state to force a blood transfusion, for example, to save the life of a child whose parents are Jehovah's Witnesses and who have a religious objection to blood transfu-

---

> an opportunity, to the fullest extent possible, to continue their lives in an independent fashion without the assistance of public funds to maintain a decent standard of living.

Id. at 67.

223. While the court may not force a non-custodial parent to earn a particular income, it does impute income to the parent based on that parent's earning capacity. Vendegna v. Vendegna, 125 S.W.3d 911, 915 (Mo. Ct. App. 2004). In this scenario, the father would likely have an imputed income based on his training and experience, and his child support payments would be calculated from this figure.

224. In a curious twist of fate, the religious father in this hypothetical runs a greater risk of incarceration than the proverbial "dead-beat dad." The religious father, because he refuses to earn an income for religious reasons, may be more susceptible to incarceration as a method of punishment than the father who is unemployed or underemployed.

225. In Missouri, parents are empowered to give consent to medical treatment on behalf of their children by Missouri Revised Statute Section 431.061 (2000). The statute proscribing child endangerment in Missouri carefully states that "nonmedical remedial treatment" does not qualify as criminal behavior by a parent or guardian. MO. REV. STAT. § 568.050.2 (2000). For a Missouri case involving a court ordered blood transfusion for a seventeen year old Jehovah's Witness, see *In re* W.M., Jr., 823 S.W.2d 128 (Mo. Ct. App. 1992).

226. *See* Byrd, *supra* note 103, at 9 ("[A]n adult can refuse medical treatment for religious reasons, and . . . a parent can choose faith based healing for their children, *but only if the child's medical condition is not life threatening.*") (emphasis added).

227. *Id.* Representative Byrd adds, "This provision was an effort to codify the current status of case law on this issue." *Id.*

sions.[228] A more difficult question arises when a child, perhaps as old as age 15, personally expresses a desire to refuse blood under similar circumstances.[229]

10. RFRA in Missouri Prisons

The prison provision in Missouri's RFRA clarifies the act's application in the prison context. The prison provision points out that the safety and security of both the inmate and the facility are matters that should be considered when evaluating "the relevant circumstances."[230] Therefore, policies restricting the possession of candles,[231] Native American medicine bags,[232] or other religious items may be warranted in prisons. Rather than being an exception to the rule, this subsection serves more as a guide to applying the rule as it relates to the prison system.[233]

Legitimate RFRA claims in the prison context, however, are both possible and probable. Access to clergy, accommodation of prayer times, and dietary peculiarities are all potential issues for Muslim inmates.[234] Also left

228. *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd* 390 U.S. 598 (1968) (memorandum opinion).

229. The difficult question in this fact pattern is the age at which a child is capable of personal religious belief. If the courts too freely accuse parents of "brainwashing" their children, they run the risk of deciding matters "respecting an establishment of religion" in violation of the Establishment Clause. If the courts take the profession of religious belief at face value, they are faced with (1) the risk of allowing the parents to exercise undue influence over their adolescent children, and (2) the difficult task of drawing a line regarding how old is old enough for the formation of sincere and informed religious opinions. Adults, of course, have the right to refuse medical treatment for any reason.

230. MO. REV. STAT. § 1.307.4 (Supp. 2003).

231. *See* Brower v. Nuckles, No. 98-1276, 1999 WL 435173, at *1-2 (6th Cir. June 18, 1999) (Catholic inmate's challenge of policy against open flame candles was defeated by *City of Boerne* decision holding RFRA unconstitutional and prison officials' change of policy which mooted his claim for equitable relief); Doty v. Lewis, 995 F. Supp. 1081 (D. Ariz. 1998) (Satanist inmate lost his challenge to prison policy denying him candles, a tapestry, and two books after *City of Boerne* decision found RFRA unconstitutional).

232. *See* Craddick v. Duckworth, 113 F.3d 83, 85 (7th Cir. 1997) (holding that prison officials failed to meet burden of persuasion with respect to least restrictive means of maintaining prison security).

233. The plain language of this section indicates a legislative intent to protect prison ministry and inmate exercise of religion without undermining the safety and security of all involved. This balance has been effectively struck by the courts in the various jurisdictions which have already implemented RFRA, and is provided in the statute to placate Department of Corrections concerns about RFRA. *See supra* notes 45-52, 79, 86, 90, 93-94 and accompanying text.

234. Misunderstanding of various religious traditions is often at the core of religious liberty disputes, especially in prisons. While it would be naïve to say that relig-

open for litigation are the limits on availability and acceptability of religious reading materials.[235] One court, ruling under the federal RFRA, has already held that a limit of 25 religious books is permissible.[236]

11. Court Rules of Procedure as Laws of General Applicability

An interesting question raised by the Missouri Constitution involves the validity of court rules which burden the exercise of religion. Article V, Section 5 of the Missouri Constitution authorizes the courts to "establish rules relating to practice, procedure and pleading for all courts and administrative tribunals."[237] However, the courts do not have the constitutional authority to enact rules that "change substantive rights."[238] The courts have previously ruled that the substantive rights of citizens are regulated solely by the legislature, and court rules of procedure that conflict with those rights are invalid.[239]

---

ion is never used as a pretext for other ends, prison officials are just as capable of alleging pretext as inmates where legitimate religious practices are involved. The more unfamiliar or esoteric the religious practice in question, the more likely it is to be resisted by officials.

235. The reading materials which are most often the source of litigation involve either racial supremacy themes or anti-government sentiments. *See* Weir v. Nix, 114 F.3d 817 (8th Cir. 1997); Haff v. Cooke, 923 F. Supp. 1104, 1108-10 (E.D. Wis. 1996); Reimann v. Murphy, 897 F. Supp 398, 400 (E.D. Wis. 1995); Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994), *rev'd by sub nom* Lawson v. Singletary, 85 F.3d 502 (11th Cir. 1996).

236. *Weir*, 114 F.3d at 820-22. This case involved a "strict fundamentalist" inmate who challenged a prison's policies regarding the 25 book limit imposed on inmates, a limit of 3 hours per week for worship, and the denial of fellow inmate participation in a baptismal service. *Id.* at 819-20.

237. MO. CONST. art. V., § 5.

238. *Id.*

239. *See* Glasby v. State, 739 S.W.2d 769 (Mo. 1985). In discussing the court's rule making power in this case, the Missouri Supreme Court found:

> The constitution's express limitation that rules should "not change substantive rights" prohibits the use of such power to create jurisdiction. A court's power and authority to take cognizance of and to adjudicate a case, i.e., jurisdiction, is not self-generated: it is bestowed upon the court by the constitution and by legislative enactment. The rules of practice and procedure are but a means to establish order and stability in the exercise of the jurisdiction which is vested in the courts by the people and by their representatives. In the absence of such jurisdiction, the rules have no application.

Id. at 771. *See also* State v. Martin, 602 S.W.2d 772 (Mo. Ct. App. 1980). Concerning this same rule making authority, the court of appeals concluded:

> Whether, as a matter of law, a defendant can be convicted of a given crime is a matter of substance not procedure. MAI-CR and MAI-CR2d are products of the Supreme Court's rule making authority. They cannot make criminal that which is not.

This seems to indicate that a court rule burdening the exercise of religion is subject to RFRA.[240]

Consider a Presbyterian church in which the minister has been accused of child abuse by one of its parishioners. The elders at the Presbytery exercise church discipline policies and procedures in an effort to determine the validity of the claim and respond appropriately to the complaint.[241] After these proceedings take place, the parents of the alleged victim file an intentional tort claim against the minister and a negligent supervision of clergy claim against the local church, as well as the Presbytery and the denomination.[242] During discovery, the plaintiff's attorney requests a copy of all documents generated during the church discipline investigation and adjudication.[243] In compelling this discovery, the trial judge would burden the congregation's exercise of religion by attaching the risk of discovery requests to the exercise of church discipline.[244] The same information desired by the

---

Id. at 779 n.11.

240. Statutory protection of religious exercise in excess of First Amendment protection under the federal constitution creates a substantive right. A rule of discovery promulgated by the Missouri Supreme Court is a rule of general applicability by a governmental entity. Applying *Glasby* and *Martin*, then, the courts are barred by RFRA from applying a discovery rule that burdens the exercise of religion absent a showing of a compelling governmental interest accomplished by means "not unduly restrictive considering the relevant circumstances."

241. One of the difficulties to be resolved by the courts involves the statutory definition of "exercise of religion" as applied to, *inter alia*, church discipline. One possible solution is to require either a religious text or institutional by-laws which define the process and scope of church discipline before allowing a mere allegation of religious exercise to qualify under the definition. However, the statutory definition does not require a religious practice to be central or essential to the particular religious system, MO. REV. STAT. § 1.302.2 (Supp. 2003), making this solution somewhat problematic.

242. The Missouri Supreme Court dealt with the issues of negligent supervision of clergy and intentional failure to supervise clergy in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997). The court concluded that religious institutions are not exempt from these claims, but only "[i]f neutral principles of law can be applied without determining questions of religious doctrine, polity, and practice." *Id.* at 246. If a court should decide that it can appropriately adjudicate a claim for negligent supervision of clergy, then RFRA and its effect on the rules of discovery would provide another layer of protection for the religious institution.

243. MO. R. CIV. P. 58.01. For Missouri's rule on failure to produce documents, see MO. R. CIV. P. 61.01(d).

244. While rarer now than in previous generations, church discipline is mandated by religious text in many religious systems and serves the purpose of maintaining doctrinal purity and settling of internal conflict. Allowing transcripts of these proceedings to become discoverable in civil litigation would have a chilling effect on the exercise of disciplinary procedures, frustrating the purposes they serve. This is not to say that persons involved in the proceedings could not be deposed or otherwise discovered by either party in a civil suit.

plaintiffs is available by other means so disclosure is "unduly restrictive under the relevant circumstances."[245] The denominational officials would surely be able to avoid discovery of all the documents in question under Missouri's RFRA.[246]

V. CONCLUSION

Missouri, while the twelfth state to enact RFRA, is the first state to modify the means-to-ends standard imposed upon the government. Another difference between Missouri's RFRA and those of other states is the handful of exceptions provided within the statute. In addition to a decade of case law in other jurisdictions applying both federal and state RFRAs, Missouri also has state constitutional precedent which will aid the courts as they implement RFRA's general rule and its exceptions. The end result is increased protection for religious liberties with extra flexibility granted to the government in a few highly sensitive areas.

JAMES A. HANSON

245. Because the plaintiff in a civil suit would have knowledge concerning the procedures of the defendant church, identifying witnesses to be deposed would not be an unreasonable burden on the plaintiff. On the other hand, forcing disclosure of documents related to church discipline provides the plaintiff with a discovery shortcut which imposes a significant burden on the religious institution's use of church discipline for religious purposes.

246. Applying *Glasby*, RFRA denies jurisdiction to the courts with respect to the disclosure of the transcript under the rules of discovery. The rules may not create jurisdiction where none has been granted by the Missouri Constitution or the legislature. Glasby v. State, 739 S.W.2d 769, 771 (Mo. 1985). Likewise, the church, relying on *Martin*, could not be held in contempt for failure to disclose because the rule cannot make unlawful an act which is protected by statute. State v. Martin, 602 S.W.2d 772, 779 n.11 (Mo. Ct. App. 1980).