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Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act

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"[N]o liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause . . . ."[1]

INTRODUCTION

The Religious Freedom Restoration Act of 1993[2] (the "RFRA," or the "Act") attempts to renew our national commitment to the free exercise of religion. Beginning with the adoption of the compelling state interest test in 1963,[3] the Supreme Court defended religious freedom by strictly scrutinizing any government policy that burdened a religious practice. The Court curtailed the protection afforded by the Free Exercise Clause, however, in the 1990 landmark case of *Employment Division, Department of Human Resources of Oregon v. Smith*.[4] Under the Court's new standard of review, the First Amendment no longer protects religious practices that conflict with a " 'valid and neutral law of general applicability.' "[5]

The *Smith* decision sparked a remarkable public outcry.[6] An ecumenical coalition of religious and secular organizations voiced

1. Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Stewart, J., concurring in result). The First Amendment to the Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

2. 42 U.S.C. § 2000bb (1994). The Supreme Court recently granted certiorari to address the constitutionality of the RFRA. *See* Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *cert. granted,* 117 S. Ct. 293 (1996). As this Note went to press, the Court's decision in *Flores* was still pending.

3. *See Sherbert,* 374 U.S. at 406-07. Under the compelling state interest test, the government must justify a law that burdens a religious practice by demonstrating that it furthers a compelling state interest that cannot be achieved by a less restrictive means. *See* 374 U.S. at 406-407.

4. 494 U.S. 872 (1990).

5. 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). In the Court's view, excusing a religious individual from generally applicable laws allows him to " 'become a law unto himself,' " *Smith,* 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)), which "contradicts both constitutional tradition and common sense," *Smith,* 494 U.S. at 885. Our society would be "courting anarchy," the Court observed, if the legal system continued to accommodate such religious exemptions. *See* 494 U.S. at 888. In short, the Court held that accommodating religious objections to generally applicable laws is a "luxury" that "we cannot afford." 494 U.S. at 888.

6. *See, e.g., Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 102d

immediate opposition to the Court's new approach.[7] With overwhelming bipartisan support,[8] Congress responded by reinstating the compelling state interest test through the RFRA.[9]

Despite this effort to restore religious freedom, the Act has not fully achieved its remedial goals due to narrow judicial interpretations of the substantial burden requirement.[10] The statute requires a claimant to establish that the government "substantially bur-

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Cong. 64 (1992) [hereinafter *Hearings on H.R. 2797*] (statement of Nadine Strossen, President, American Civil Liberties Union) ("I do not recall such sustained and vigorous and vitriolic criticism of a Supreme Court's decision in a constitutional law area by lower courts .... Likewise, in terms of constitutional law professors, religious organizations, public interest organizations, this decision has deserved and received an unprecedented degree of criticism for departing so dramatically from traditional constitutional principles."). For a compilation of more than 50 articles criticizing *Smith*, see *The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 60-62 (1992) [hereinafter *Hearings on S. 2969*] (provided by Oliver S. Thomas, on behalf of the Baptist Joint Committee and the American Jewish Committee).

7. *See Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 17 (1990) [hereinafter *Hearings on H.R. 5377*] (statement of Rep. Solarz) (noting that the broad coalition in support of the RFRA was " 'ecumenical' in both the political and religious sense of that term"); *see also* 139 CONG. REC. S14,469 (daily ed. Oct. 27, 1993) (statement of Sen. Bradley) ("It is a testament to the importance of RFRA that virtually every religious group, spanning the entire spectrum, has voiced its support for this bill. It is a rare thing when such a diverse coalition joins in wholehearted agreement."); 139 CONG. REC. S14,351 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (noting examples of groups that supported the bill, including the National Association of Evangelicals, the Baptist Joint Committee on Public Affairs, the American Civil Liberties Union, Concerned Women for America, People for the American Way, the American Jewish Committee, and the U.S. Catholic Conference).

8. *See Hearings on H.R. 5377, supra* note 7, at 13 (statement of Rep. Solarz) ("It is perhaps not too hyperbolic to suggest that in the history of the Republic, there has rarely been a bill which more closely approximates motherhood and apple pie than the legislation now before you. In fact, I know, at least so far, of no one who opposes the legislation.").

9. The avowed purpose of the statute is "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." 42 U.S.C. § 2000bb(b)(1) (1994) (parallel citations omitted). Congress recognized the value of religious freedom in the first line of the statute, finding that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." 42 U.S.C. § 2000bb(a)(1) (1994). Congress found that "governments should not substantially burden religious exercise without compelling justification," and repudiated *Smith* for "virtually eliminat[ing] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(3)-(4) (1994).

10. Perhaps courts fear the institutional consequences of accommodating the exercise of religion. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."); *see also* Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1259 (1989) ("The sheer number of different and unusual religions in the United States has traditionally prompted judicial fears that an expansive reading of the free exercise clause might paralyze government.").

den[ed]" her exercise of religion.[11] Once a claimant satisfies this requirement, the burden shifts to the government to demonstrate that the policy furthers a "compelling state interest" that cannot be achieved by a less restrictive means.[12]

The emerging RFRA case law has yielded three different interpretations of the substantial burden requirement. One approach, the "centrality test," requires a claimant to establish that the practice in question is "central" to her religious beliefs.[13] A related standard, the "compulsion test," limits the RFRA to practices that are religiously compelled.[14] Under this test, a claimant must

11. *See* 42 U.S.C. § 2000bb-1(a) (1994) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.").

12. *See* 42 U.S.C. § 2000bb-1(b) (1994) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

13. The Sixth and Tenth Circuits apply the centrality test. *See* Abdur-Rahman v. Michigan Dept. of Corrections, 65 F.3d 489, 491-92 (6th Cir. 1995) (finding no substantial burden because the practice was not "essential" or "fundamental" to the claimant's religion); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) ("To exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs; must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion." (citations omitted)); Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996) (observing that the *Werner* approach equally applies to nonprisoners); *see also* Hall v. Griego, 896 F. Supp. 1043, 1047 (D. Colo. 1995); United States v. Jim, 888 F. Supp. 1058, 1061 (D. Or. 1995).

The Eighth Circuit also appears to have adopted the centrality test. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407 (8th Cir. 1996). The court expressly repudiated the compulsion test, protecting tithing even though it was not required by the claimants' religion. *See Christians*, 82 F.3d at 1418. The Court favorably quoted the Tenth Circuit test, however, which requires a demonstration of centrality, and assumed for purposes of analysis that courts can constitutionally determine "what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance." 82 F.3d at 1418.

14. The Fourth and Eleventh Circuits apply the compulsion test. *See* Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172-73 (4th Cir. 1995) (finding no substantial burden because the claimants "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take"); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); *see also* Davidson v. Davis, No. 92 Civ. 4040(SWK), 1995 WL 60732, at *5 (S.D.N.Y. Feb. 14, 1995); Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239, 251 (Bankr. D. Kan. 1995).

Although the centrality test and the compulsion test are theoretically distinct, courts frequently blur them together to form a hybrid standard. The Third, Fifth, and Ninth Circuits fall into this category. *See, e.g.*, Small v. Lehman, 98 F.3d 762, 767-68 (3d Cir. 1996) (referring both to centrality and compulsion); Hicks v. Garner, 69 F.3d 22, 26 n.22 (5th Cir. 1995) (same); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) ("In order to show a free exercise violation using the 'substantial burden' test, 'the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.' " (alterations in original) (quoting Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987)); *see also* Crosley-El v. Berge, 896 F. Supp. 885, 887 (E.D. Wis. 1995); Rhinehart v. Gomez, No. 93-CV-3747, 1995 WL 364339, at *4 (N.D. Cal. June 8, 1995); Weir v. Nix, 890 F. Supp. 769,

demonstrate that the government infringes upon a practice that is mandated by her faith, or that the government requires the claimant to engage in conduct that is prohibited by her religion. A third approach, the "religious motivation test," interprets the provision more broadly: a claimant satisfies this standard by demonstrating that the government infringes upon a practice that is motivated by sincere religious belief.[15]

This Note argues that the religious motivation test best secures the religious liberty guaranteed by the Constitution and the RFRA. Part I examines the text and legislative history of the Act and establishes that Congress intended to protect religiously motivated practices. Part II argues that the free exercise case law prior to *Smith,* to which the RFRA explicitly appeals, did not require litigants to prove centrality or compulsion. Part III demonstrates that the religious motivation test protects the full spectrum of religious practices and religious groups, unlike the centrality test and the compulsion test. Part IV illustrates that the motivation test, unlike competing approaches, does not require courts to make judgments that exceed the bounds of their capacity and their authority. This Note concludes that a claimant who demonstrates a government infringement of a religiously motivated practice satisfies the substantial burden requirement of the RFRA.

I. Statutory Interpretation Through Text and Legislative History

This Part examines the text and legislative history of the RFRA, and concludes that Congress intended to protect practices that are

783 (S.D. Iowa 1995); Tinsley v. San Francisco, No. C 95-0667 EFL, 1995 WL 302445, at *1 (N.D. Cal. May 11, 1995).

15. *See, e.g.,* Sasnett v. Sullivan, 908 F. Supp. 1429, 1443-44 (W.D. Wis. 1995) *petition for cert. filed,* 65 U.S.L.W. 3370 (U.S. Oct. 29, 1996) (No. 96-710); Muslim v. Frame, 897 F. Supp. 215, 217-18 (E.D. Pa. 1995); Muslim v. Frame, 891 F. Supp. 226, 231 (E.D. Pa. 1995) ("Thus, a plaintiff's burden under RFRA is satisfied by a showing that the government has placed a substantial burden on a practice motivated by a sincere religious belief.").

The Second Circuit's explanation of the substantial burden requirement makes no mention of centrality or compulsion, and would appear to encompass religiously motivated practices. *See* Jolly v. Coughlin, 76 F.3d 468, 476-77 (2d Cir. 1996) ("Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. . . . [A] substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.' " (second alteration in original) (quoting Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981))).

The Seventh Circuit interprets the RFRA to cover religiously motivated practices, but adopts a test that also reflects vestiges of centrality. *See* Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("[A] substantial burden on the free exercise of religion, within the meaning of the Act, is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs."); *see also* Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996) (protecting the "religiously motivated" decision to wear a crucifix while in prison, even though wearing such jewelry was not "required" by the claimant's religion).

motivated by sincere religious beliefs. Section I.A argues that the broad language of the Act manifests an intention to cover all forms of religious exercise. Section I.B explores the congressional discussions of the bill, and demonstrates that Congress expected that the statute would protect religious practices irrespective of compulsion or centrality.

A. *The Plain Meaning of the Provisions*

The text of the RFRA provides a natural point of departure for an interpretation of the substantial burden requirement.[16] The statute provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[17] The drafters incorporated only one ex-

16. *See* Bowsher v. Merck & Co., 460 U.S. 824, 830 (1983) ("As with any issue of statutory construction, we ' "must begin with the language of the statute itself." ' " (footnote omitted) (quoting Bread Political Action Comm. v. FEC, 455 U.S. 577, 580 (1982) (quoting Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 187 (1980)))).

17. 42 U.S.C. § 2000bb-1(a) (1994). On its face, the text appears to separate a "substantial burden" from a claimant's "exercise of religion." Hence, one would expect that courts would engage in two distinct inquiries: first, whether the government policy constituted a substantial burden; and second, whether the claimant's activity constituted an exercise of religion. In other words, a claimant might fail to present a prima facie case, either because the government action did not sufficiently impair the claimant's religious activity, or because the claimant's practice did not amount to an exercise of religion under the Act.

Courts that impose a third requirement—demonstrating centrality or compulsion—do so under the substantial burden prong of the Act. Under the centrality and compulsion tests, courts find that a claimant has not suffered a "substantial burden" unless the government action is sufficiently invasive, *and* unless the religious practice in question is central or compelled, respectively. *See, e.g.*, Lewis v. Scott, 910 F. Supp. 282, 287 (E.D. Tex. 1995) ("In weighing whether a particular regulation constitutes a substantial burden, other circuits have looked both to the degree of burden placed on an individual and the centrality of the particular practice burdened . . . .").

Such courts create unnecessary confusion by linking "substantial burden" with notions of centrality and compulsion. Rather than concluding that claimants do not suffer a substantial burden if the practice is noncentral or noncompulsory, it would seem more natural, and more consistent with the statutory text, for such courts to conclude that noncentral and noncompulsory practices do not amount to an "exercise of religion" under the Act. Put another way, if the statute only protects central or compelled practices, as certain courts maintain, then it would appear sensible to conclude that noncentral and noncompelled practices do not constitute an "exercise of religion" covered by the RFRA, as opposed to concluding that the government policy does not impose a substantial burden.

A simple example illustrates the point. Suppose that a local government passed a generally applicable ordinance that forbade the creation of new homeless shelters in a downtown area. Claimant A, for sake of argument, views caring for the homeless as a central part of her religion; Claimant B considers the same activity to be motivated by his religion, but does not believe that such conduct is central to his faith. Under the centrality test, the government policy might constitute a substantial burden with respect to Claimant A, but not as to Claimant B, because the latter individual does not claim a burden upon a central religious practice. A court might reach this result in spite of the fact that the same government policy — the prohibition of new shelters — equally applies to each of the two believers. Rather than holding that the government policy is burdensome with respect to Claimant A, but not as to Claimant B, it would appear more direct for such courts to conclude that the burden upon each claimant is equal, but that the noncentral religious practice of Claimant B is not an "exercise of religion" under the RFRA.

ception to this blanket rule: the state may substantially burden an exercise of religion only if the policy or program furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.[18] Thus, if a claimant establishes a substantial burden upon her religious practice, the government must satisfy the compelling state interest test, or else the statute entitles the claimant to "appropriate relief."[19]

The words of the statute inform the present debate in two important respects. First, the RFRA extends to the full range of religious conduct that received protection under the Free Exercise Clause in the pre-*Smith* era. Congress ensured that the RFRA would apply to the same spectrum of religious conduct by defining "exercise of religion"[20] by reference to the Free Exercise Clause: "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution."[21] This definition reveals that the RFRA protects religiously motivated practices to the extent that such conduct received protection under the Constitution in the years leading up to *Smith*. In short, RFRA claimants do not need to demonstrate centrality or compulsion if the Court did not impose such requirements in the pre-*Smith* case law.[22]

Second, the absence of restrictive language in the text of the RFRA suggests that Congress intended to provide broad protection for religion.[23] On its face, the text manifests no intention on the

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In short, whether the government imposes a substantial burden should not turn on whether the believer views the practice to be central or compelled; it should only turn on the level of hardship that the government imposes on the claimant's religious practice.

18. *See* 42 U.S.C. § 2000bb-1(b)(1)-(2) (1994).

19. *See* 42 U.S.C. § 2000bb-1(c) (1994). Declaratory and injunctive relief represent the most common remedies under the RFRA.

20. Whether the conduct in question is religious, as opposed to nonreligious, is an issue that must be resolved under any of these three interpretations of the RFRA. For a discussion of what constitutes a "religion" for purposes of the Free Exercise Clause and the RFRA, see James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23 (1995); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal,* 23 HOFSTRA L. REV. 309 (1994); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Douglas Laycock, *Religious Liberty as Liberty,* 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

21. 42 U.S.C. § 2000bb-2(4) (1994).

22. For a discussion of the pre-*Smith* case law, see *infra* Part II.

23. *See* Mack v. O'Leary, 80 F.3d 1175, 1178 (7th Cir. 1996) (finding that the religious motivation test "is more faithful both to the statutory language and to the approach that the courts took before *Smith*"); Muslim v. Frame, 897 F. Supp. 215, 218 (E.D. Pa. 1995) ("[T]he text of RFRA . . . protects 'the free exercise of religion.' . . . [T]his phrase refers to particular practices which are religious in nature. Such practices are not limited to those deemed to be compulsory by religious doctrine."); Muslim v. Frame, 891 F. Supp. 226, 230 (E.D. Pa. 1995) ("This language in no way suggests that the right to free exercise is limited to exercises judicially deemed central to the plaintiff's religion."); *see also* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act,* 39 VILL. L. REV. 1, 54 (1994) ("Simple textualism strongly argues against limiting RFRA's protection only to religious conduct implicating doctrinal 'commands or prohibitions.' ").

part of Congress to cabin the statute to narrow subcategories of religious conduct. The Act extends to a person's "exercise of religion," a category of conduct that would appear to encompass all religious activities.[24] If Congress intended to protect only central or compelled practices, the drafters easily could have inserted language to reflect this crucial limitation. Yet Congress bypassed the opportunity to limit the scope of the Act, choosing rather to employ inclusive language that reveals no inherent restrictions. The absence of restrictive language in the statutory text supports the conclusion that Congress did not intend to confine the RFRA to central or compelled practices.[25]

B. *Legislative History*

The legislative history of the RFRA reveals that Congress expected the statute to apply to all religiously motivated practices. Section I.B.1 demonstrates that Congress specifically rejected the compulsion test as an overly restrictive interpretation of the statute. Section I.B.2 argues that the examples of impermissible burdens discussed during the hearings illustrate that the RFRA does not require a demonstration of centrality.

1. *The Compulsion Test*

The legislative history indicates that a claimant may satisfy her burden without demonstrating that the practice is compelled by her religion.[26] While considering the bill, Congress discussed the com-

24. *See* 42 U.S.C. § 2000bb-1(a) (1994); *see also* Laycock, *supra* note 20, at 337 ("[T]he text [of the Constitution] affirmatively supports the interpretation of guaranteeing as much liberty as possible to holders of all views about religion."); Michael J. Perry, *Religion, Politics, and the Constitution,* 7 J. CONTEMP. LEGAL ISSUES 407, 412 (1996) ("The 'exercise' of religion comprises many different but related kinds of religious practice, including: public affirmation of religious beliefs; affiliation, based on shared religious beliefs, with a church or other religious group; worship and study animated by religious beliefs; the proselytizing dissemination of religious beliefs or other religious information; and moral choices, or even a whole way of life, guided by religious beliefs.").

25. Moreover, the Court's traditional approach toward remedial statutes weighs in favor of the motivation test. A "standard of liberal construction" applies to statutes that confer new rights or benefits, in order to effectuate the beneficent goals of Congress. *See, e.g.,* Atchison, Topeka, & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 (1987) (quoting Urie v. Thompson, 337 U.S. 163, 180 (1949)) (construing the Federal Employers' Liability Act); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397-98 (1982) (construing Title VII). This principle of statutory construction supports an interpretation of the Act that reaches religiously motivated practices. The RFRA is a classic example of a remedial statute: its specific purpose is to increase protection for the exercise of religion by restoring the compelling state interest test. *See* 42 U.S.C. § 2000bb(b)(1) (1994). Congress recognized that religious freedom was in jeopardy, and that legislative action was necessary in order to restore the balance. A court can advance the goals of the RFRA and follow this accepted approach to remedial statutes by construing the Act to extend to practices that are motivated by religion.

26. *See* Berg, *supra* note 23, at 55 ("Eliminating protection for all claims not rooted in a religious 'command or prohibition' would undermine some of the central concerns of the Act."); Douglas Laycock, *RFRA, Congress, and the Ratchet,* 56 MONT. L. REV. 145, 150-51

pulsion test because of the Act's perceived effect upon abortion rights. The House conducted subcommittee hearings on the bill in May of 1992, on the eve of the Court's decision in *Planned Parenthood v. Casey,*[27] which reaffirmed the constitutional right to an abortion. Reflecting uncertainty over the future of *Roe v. Wade,*[28] prolife members of Congress voiced concern that the RFRA could provide a statutory basis for the right to an abortion if the Court overturned *Roe.*[29]

Prolife members of Congress initially expressed reservations about the bill because they believed that it would cover religiously motivated practices.[30] Representative Hyde and others observed that the bill would not be limited to compulsory conduct, but would extend to practices motivated by religion.[31] James Bopp, Jr., General Counsel to the National Right to Life Committee, shared the reservations of the prolife members, and voiced concern over the broad scope of the bill:

> [T]he primary scholarly champions of the bill insist that the RFRA must be interpreted as applicable to religious motivation, not just religious compulsion. . . . Given that the RFRA no where defines the phrase "burden a person's exercise of religion" and that it[ ]s scholarly proponents call for a "motivated by religion" interpretation, it is doubtless that a court called upon to make the decision of whether the RFRA reaches religious motivation would find that it does.[32]

The possible ramifications of an expansive statute were not lost on the prolife community: a law that protected religiously motivated conduct might also protect religiously motivated abortions. Prolife participants thus advocated, without success, an amendment to the

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(1995) ("[B]oth the opponents and proponents of the original bill agreed that the standard is simply that religion be the principal motivation for the conduct. . . . The legislative history is clear that the conduct does not have to be compelled by religion."); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 TEXAS L. REV. 209, 232 (1994) ("In both the House and Senate hearings, supporters and opponents agreed that the bill would protect conduct that was religiously 'motivated.' ").

27. 505 U.S. 833 (1992).

28. 410 U.S. 113 (1973). *Roe* established that the Due Process Clause of the Fourteenth Amendment protects a woman's right to an abortion.

29. *See, e.g., Hearings on H.R. 2797, supra* note 6, at 7-8 (statement of Rep. Hyde). Interest in this issue did not fade even after *Casey:* participants in the Senate hearings also discussed how the RFRA might affect future restrictions on abortion. *See, e.g., Hearings on S. 2969, supra* note 6, at 203-04 (statement of James Bopp, Jr., general counsel, National Right to Life Committee, Inc.).

30. *See* Robert F. Drinan, S.J. & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History,* 10 J.L. & RELIGION 531, 536-37 (1993-94) ("[T]he primary focus of the critics' concerns regarding the RFRA was abortion-related. Of particular concern was whether the bill protected only acts 'compelled' by a religious belief or those 'motivated' by religious belief.").

31. *See Hearings on H.R. 2797, supra* note 6, at 135-36.

32. *Hearings on S. 2969, supra* note 6, at 220-21 (statement of James Bopp, Jr.); *Hearings on H.R. 2797, supra* note 6, at 284-85 (statement of James Bopp, Jr.).

bill that would have restricted the RFRA to compelled religious practices.[33]

Addressing these concerns about the scope of the bill, Representative Solarz, the chief sponsor,[34] confirmed that the RFRA would protect religiously motivated practices. During the hearings, Hyde directly asked whether the statute would cover practices that are religiously motivated, or only those that are religiously compelled.[35] Solarz responded, "I would be reluctant to limit it to actions compelled by religion, as distinguished from actions which are motivated by a sincere belief."[36]

Hoping to keep the legislative history "as clear as possible,"[37] Solarz submitted an explanatory letter to the subcommittee following his testimony.[38] Solarz revealed that the drafters of the bill intended to avoid two extremes. On the one hand, they did not want

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33. *See Hearings on H.R. 2797, supra* note 6, at 285 (statement of James Bopp, Jr.) ("Supporters of the RFRA could, of course, easily resolve this problem by inserting 'compelled by' language in the RFRA."); *see also* Laycock, *supra* note 26, at 151 ("Congress rejected the view that only religious compulsion is protected. In committee hearings, lobbyists offered amendments to change to a compulsion standard, but those amendments went nowhere."). Opponents of an abortion amendment did not deny that the Act would protect religiously motivated practices, but questioned the likelihood that the RFRA would restore the right to an abortion if *Roe* were overturned. *See Hearings on H.R. 2797, supra* note 6, at 119 (statement of Rep. Solarz) ("[I]f, in fact, the Supreme Court does rescind or repeal *Roe v. Wade,* it is virtually inconceivable that the very same Court would then turn around and, on free exercise grounds, reinstate the right to have an abortion . . . .").

34. Hyde noted that the views of Solarz, the chief sponsor, would be critical when determining the intent of Congress. *See Hearings on H.R. 2797, supra* note 6, at 136 (statement of Rep. Hyde).

35. *See id.*

36. *Id.* (statement of Rep. Solarz). Solarz conceded that the bill protected religiously motivated practices, but took issue with Hyde's description of the motivation test. Hyde feared that the motivation standard would cover any conduct that was consistent with one's faith. *See id.* at 136 (statement of Rep. Hyde) ("All of this stuff about being compelled is really beside the point. It is, someone who says my religion nudges me toward — I think it is compatible with my religion to have an abortion. That is motivated. And that is protected by your bill."). Solarz laid these fears to rest in his testimony and in his letter to the subcommittee: the RFRA would not apply to conduct which is merely "consistent" with one's religious beliefs. *See id.* at 128-30, 136 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards, and statement of Rep. Solarz). The meaning of the motivation test received the attention of other witnesses during the hearings. *See id.* at 372 (statement of Douglas Laycock, professor, University of Texas School of Law) ("Now, what would the woman have to show about her individual religious beliefs? She has to say that her desire for abortion is compelled by or at least motivated by her religion. Now, what does motivated mean? It means because of her religion. . . . Religion has to be the reason for her abortion."); *Hearings on S. 2969, supra* note 6, at 42 (statement of Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs) ("RFRA protects conduct only when religion is the primary cause or reason for the conduct. It is not enough that religion contributes to a decision that is made largely for secular reasons."); *see also* Laycock, *supra* note 26, at 151 ("What comes through in the legislative history is that compulsion is not required and motivation is sufficient, but religion has to be the dominant or the principal motivation.").

37. *See Hearings on H.R. 2797, supra* note 6, at 128 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards).

38. *See id.* at 128-30 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards).

to limit the RFRA to practices that are compelled by religious belief.[39] Confining the legislation to mandatory conduct would "run the risk of excluding practices which are generally believed to be exercises of religion worthy of protection."[40] Solarz offered noncompulsory prayer as an example of an "unmistakable exercise of religion" that the drafters intended to protect, but which would remain unprotected under the compulsion test.[41] At the same time, the drafters did not want to include conduct that is only "consistent with" one's faith.[42] Searching for language to capture the middle ground between "compelled" and "consistent," Solarz selected the word "motivated" in an initial draft of the bill.[43] Although the generic phrase "exercise of religion" eventually became the statutory standard,[44] one conclusion seems clear: the sponsors of the bill ex-

39. *See id.*; *id.* at 129 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards) (" '[I]t would be a mistake to tighten the language of the Act by confining it to conduct "compelled by" religious belief.' " (quoting letter dated Feb. 21, 1991, from Michael W. McConnell, professor, University of Chicago Law School, Edward McGlynn Gaffney, dean, Valparaiso Law School, and Douglas Laycock, professor, University of Texas School of Law, to Reps. Solarz and Henry)).

40. *Id.* at 129; *see also Hearings on S. 2969, supra* note 6, at 46 (statement of Oliver S. Thomas) ("[A] law that protects only religiously compelled acts would exclude many acts that are obviously religious. Most believers seek to do more than the bare minimum that God requires. Is prayer compelled? Only on occasion. . . . Is serving as a minister compelled? Not always. These acts would not be protected by the compulsion test. Clearly, they should be protected, and are, by RFRA.").

41. *See Hearings on H.R. 2797, supra* note 6, at 129 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards).

42. *See id.* at 129-30 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards) ("To say that the 'exercise of religion' might include acts not necessarily compelled by a sincerely held religious belief is not to say that any act merely consistent with, or not proscribed [by] one's religion would be an exercise of religion."). Solarz provided the following example: the RFRA would not protect the right to brandish a machine gun if the claimant merely asserted that the bearing of arms was compatible with his religious beliefs. *Id.* at 130 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards).

43. *See id.* at 128-29 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards).

44. Solarz revealed that he included "motivated" in an earlier draft of the bill, but removed the word because it began to generate "more heat than light." *Id.* at 128 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards). Viewed in isolation, the removal of "motivated" from the text of the statute might suggest that the drafters intended to exclude religiously motivated practices from the protection of the RFRA. When considered in the context of the remainder of the letter, however, this alteration represents an attempt to avoid confusing the judiciary, rather than a limitation on the scope of the statute.

Solarz remarked that " '[i]t is difficult to capture the idea of the dictates of conscience in statutory language.' " *Id.* at 129 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards) quoting letter from Professor McConnell et al. to Reps. Solarz and Henry. Given that the pre-*Smith* case law was not " 'limited to any particular verbal formula in describing what constitutes a religious exercise for First Amendment purposes,' " the drafters decided that it would be appropriate to employ a generic standard in the text of the statute. *Id.* (quoting the Congressional Research Service); *see also id.* at 131 (statement of the Congressional Research Service). Solarz concluded that "the term 'free exercise of religion,' used by the drafters of the First Amendment, most accurately described what I hoped to protect through passage of RFRA." *Id.* at 128 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards). Utilizing the broad language of the First Amendment would give courts "enough flexibility to protect the exercises of different religions on an equal, case-by-case basis," *id.* at

plicitly rejected the compulsion test because it would provide insufficient protection for the exercise of religion.[45]

2. *The Centrality Test*

Unfortunately, Congress did not reveal its view of the centrality test in such transparent terms. The subcommittee debates did not address directly whether the bill would protect only the central practices of one's faith. Representative Solarz provided the closest thing to a statement on this issue, expressing the expectation that courts would not dissect religious doctrine when deciding cases under the RFRA: "Even the independent judiciary has been careful to inquire only into the nature and sincerity of an individual's religious belief on a case-by-case basis, avoiding broader inquiries into a particular denomination's doctrine, or the nature of religion generally."[46] Apart from this general observation, the record does not include an express instruction on the issue of centrality.

Courts are not left without direction, however, when construing the RFRA. For instance, one might infer from congressional discussions of the compulsion test that the Act does not require a demonstration of centrality. Statements indicating that the RFRA would protect religiously motivated conduct naturally support the conclusion that Congress intended to protect all practices within this classification. In other words, it would be curious for Congress to state that the proposed statute would protect religiously motivated practices if Congress simultaneously intended to limit the statute to religiously motivated practices that are also "central." In the absence of a statement to the contrary,[47] it appears that Con-

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129, and would provide a "useful framework for application of the Act" by employing a term "sufficiently familiar to the courts," *id.* at 130. In short, the drafters did not believe that Congress could "do any better than the Framers of the Bill of Rights when they chose to protect the 'free exercise of religion' and leave its definition to the independent judiciary on a case-by-case basis." *Id.*

Thus understood, the drafters removed "motivated" in order to avoid confusion: courts might misconstrue a departure from the language of the First Amendment as a signal that the statute extends to a different range of religious conduct. By incorporating the familiar language of the Constitution, the drafters communicated that the statute covers the religious activities that received protection under the First Amendment in the years preceding *Smith.* Although the text of the RFRA does not specifically use the word "motivated," religiously motivated practices receive protection under the RFRA to the same extent that such practices enjoyed protection in the pre-*Smith* case law.

This conclusion seems all the more reasonable when one considers that the letter repudiates the compulsion test, which would deny protection to religiously motivated practices, in no uncertain terms. *See* sources cited *supra* notes 39-41 and accompanying text.

45. *See Hearings on H.R. 2797, supra* note 6, at 128-30 (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards).

46. *Id.* at 130 (statement of Rep. Solarz).

47. The record reveals no intention to limit the scope of the Act to practices that are central to the adherent's faith.

gress intended to protect all practices that are motivated by religion, irrespective of centrality or compulsion.

In addition, one can glean guidance from the examples provided during the congressional discussions of the bill. Advocates demonstrated the need for the RFRA by appealing to concrete examples — instances when the government had infringed upon the right to the free exercise of religion.[48] Members offered examples with the express expectation that the RFRA would provide a remedy in such situations.[49] By providing these examples, supporters of the bill revealed their assumptions that the Act would extend to the religious practices under discussion: the RFRA could "make a difference" in a given case only if the state imposed a cognizable burden upon a practice covered by the Act. An examination of these examples thus yields a sense of the types of practices Congress intended to protect under the RFRA.

The examples indicate that Congress did not intend to limit the Act to central religious practices. Supporters of the bill highlighted the need for corrective legislation by citing dozens of actual and potential violations of religious liberty.[50] Nadine Strossen of the American Civil Liberties Union provided a typical litany of practices that remained vulnerable without the RFRA:

> In the aftermath of the *Smith* decision . . . [a]t risk were such familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional, religious preferences in church hiring, establishing places of worship in areas zoned for other use, permitting religiously sponsored hospitals to decline to provide abortion or contraception services, sex segregation during worship services, exemptions from mandatory retirement[ ] laws, a church's refusal to ordain women or homosexuals, exemptions from landmark and zoning regulations, and the inapplicability of highly intrusive educational rules to parochial schools.[51]

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48. *Cf. Hearings on S. 2969, supra* note 6, at 44 (statement of Oliver S. Thomas) ("Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction.").

49. *See Hearings on H.R. 2797, supra* note 6, at 18 (statement of Rep. Solarz); *id.* at 70 (statement of the Anti-Defamation League); *id.* at 361-71 (statement of Prof. Laycock); *see also* Laycock & Thomas, *supra* note 26, at 229.

50. Professor Laycock offered pages of cases decided after *Smith* in order to illustrate the need for remedial legislation. *See Hearings on H.R. 2797, supra* note 6, at 361-71; *see also Hearings on S. 2969, supra* note 6, at 50-58 (containing a summary of post-*Smith* cases compiled by J. Brent Walker).

51. *Hearings on S. 2969, supra* note 6, at 192 (statement of Nadine Strossen); *see also Hearings on H.R. 5377, supra* note 7, at 23 (statement of Rep. Lamar Smith) ("Without the restoration of the 'compelling interest' standard, all religious activity is at risk. Government employees could be forced to work on religious holidays like Yom Kippur; Catholic children could be prevented from taking wine for communion because they are under the legal drinking age; individuals could be denied the right to pray for healing; Moslems, whose religion mandates ritual slaughter, could be unable to obtain religiously sanctioned food; people, in

Supporters of the bill offered many other prominent examples: forcing the Amish to display bright orange reflectors on their buggies,[52] interfering with worship by landmarking the interior of a church,[53] and shutting down a religious homeless shelter for failure to install an elevator to the second floor.[54]

When considering these examples, one is struck both by the wide range of conduct and by the sheer number of practices that Congress intended to protect. On their face, the examples appear to represent ordinary instances of religiously motivated conduct. The record provides no indication that these practices would be considered central, nor that they must be considered central in order to receive protection.[55] Given the broad spectrum of religious practices discussed in the hearings, and the absence of any indication that these practices were or needed to be considered central, it seems reasonable to conclude that Congress did not foresee a centrality requirement for the RFRA. Through these examples, Congress expressed a quiet but distinct expectation that the RFRA would offer broad protection for religious practices regardless of their centrality to the individual believer.

II. The Free Exercise Case Law

Cases construing the Free Exercise Clause also provide valuable instruction to courts that interpret the RFRA. In the decades preceding *Smith,* the Court applied the compelling state interest test when claimants established a burden upon the practice of their religion. *Smith* introduced a new era of free exercise jurisprudence, abandoning the strict scrutiny test in cases challenging generally applicable laws that are facially neutral toward religion. The RFRA represents a bold attempt to return to the status quo ante. The Act aims to "restore" religious freedom by reintroducing the compelling state interest test when individuals challenge governmental action that burdens religious conduct. Congress explicitly recognized the jurisprudential roots of the statute, and expected that courts would look to prior case law for guidance when construing the Act.[56] As a

fact, could be prevented from reading religious literature in public places. This list could go on and on. Clearly, every American's personal freedom is at stake.").

52. *See Hearings on H.R. 2797, supra* note 6, at 18 (statement of Robert P. Dugan, Jr., director, office of Public Affairs, National Association of Evangelicals).

53. *See id.* at 122 (statement of Rep. Solarz).

54. *See id.* at 149 (statement of Dean Gaffney).

55. *See* Laycock, *supra* note 26, at 152 ("What emerges from these examples is that religious exercise is substantially burdened if religious institutions or *religiously motivated conduct* is burdened, penalized, or discouraged." (emphasis added)).

56. Congress expressly invoked the prior case law in the text of the statute. *See* 42 U.S.C. § 2000bb(b) (1994); 42 U.S.C. § 2000bb-2(4) (1994) ("[T]he term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution."). The committee reports likewise revealed a clear intention to subject the statute to the approach developed in

consequence, the pre-*Smith* case law plays a major role when interpreting the requirements of the RFRA.

The pre-*Smith* case law reveals that the Court has never restricted the Free Exercise Clause to central or compelled practices. Since the introduction of the strict scrutiny test, the Court has addressed an array of religious practices brought by believers of diverse faiths. Although the Court has found a cognizable burden in a number of cases, the Court has not resorted to any single formulation of words to describe a religious practice burdened by the government.[57] Instead, the opinions repeatedly draw attention to the religious nature of the conduct, and characterize the underlying religious activities in broad and inclusive terms. The cases thus focus upon government interference with the exercise of religious scruples, without dissecting claimants' religious beliefs to determine if the practice is central or compelled.

To be sure, some cases observe that the religious practice in question was central to the beliefs of the claimant, while other cases mention the mandatory nature of the religious conduct. Yet, the fact remains that the Court has never *required* that the claimant establish either centrality or compulsion in order to receive protection under the First Amendment.[58] On the contrary, the opinions indicate that a claimant may satisfy her burden by demonstrating

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the cases preceding *Smith*. *See* S. REP. NO. 103-111, at 8 (1993) ("The committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened . . . ."); H.R. REP. NO. 103-88, at 6-7 (1993) ("It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened . . . ."). The reports also indicated, however, that the RFRA must not be construed as a Congressional sanction of any prior case in particular. *See* S. REP. NO. 103-111, at 9 (1993); H.R. REP. NO. 103-88, at 7 (1993).

57. *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEXAS L. REV. 247, 271 (1994).

58. As for "compulsion," Representative Solarz asked the Congressional Research Service to determine "whether the exercise of religion has been deemed by the Court to be limited to actions that are compelled by religious beliefs or has been more inclusive." *Hearings on H.R. 2797*, *supra* note 6, at 131 (statement of the Congressional Research Service). The Service responded: "The cases indicate that the Court, although frequently finding the religious practice in question to have been compelled or commanded by religious belief, has not been limited to any particular verbal formula in describing what constitutes a religious exercise for First Amendment purposes." *Id.* Further, Professor Tribe has argued that the Court has never required a demonstration of centrality. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1247 (2d ed. 1988) ("The magnitude of the religious burdens is often stated in terms of the centrality of the tenet to the believer's faith; however, 'centrality' only partially describes the courts' inquiry. True, centrality does help explain some holdings, and the Supreme Court in *Sherbert* and especially in *Yoder* emphasized the centrality of the burdened beliefs. However, the Court has never specifically required free exercise claimants to demonstrate that the state requirement burden a central tenet of their beliefs." (citations omitted)); *see also* Muslim v. Frame, 897 F. Supp. 215, 219 (E.D. Pa. 1995) ("Supreme Court case law before *Smith*, to which RFRA specifically directs courts to look for guidance . . . did not present a single formulation as to the types of practices covered by the Free Exercise Clause.").

that the government violated the claimant's exercise of religion, without regard to centrality or compulsion.

Section I.A reviews the two cases specifically cited in the RFRA; section I.B examines the string of unemployment compensation cases, in which the Court repeatedly found cognizable burdens; section I.C discusses the last few cases leading up to *Smith,* which include an express repudiation of the centrality test.

A. *The Foundational Cases*

The two cases cited in the text of the RFRA, *Sherbert v. Verner*[59] and *Wisconsin v. Yoder,*[60] introduce this discussion of the Free Exercise case law. These precedents support the conclusion that the First Amendment protects religiously motivated conduct regardless of whether the practice is central or compelled.

In *Sherbert,* the Court confronted a denial of government benefits based on a person's religious beliefs. As a member of the Seventh-Day Adventist Church, Adell Sherbert devoutly observed Saturday as the Sabbath Day of her faith.[61] When her employer changed to a six-day work week, Ms. Sherbert adhered to her religious principles, and subsequently lost her job. The state administrative agency denied her request for unemployment compensation benefits, finding that she had refused employment opportunities "without good cause."[62]

In the view of the Court, it was "clear" that the denial of benefits constituted a burden on the free exercise of the claimant's religion.[63] The Court began its explanation with a general statement about the Free Exercise Clause: a law imposes a cognizable burden " '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions.' "[64] Turning to the particular experience of Adell Sherbert, the Court cast the burden in terms of a Hobson's choice: "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[65] The Court concluded that this between-a-rock-and-a-hard-place scenario constituted a "substantial infringement" of her

59. 374 U.S. 398 (1963).

60. 406 U.S. 205 (1972).

61. *See Sherbert,* 374 U.S. at 399.

62. *See* 374 U.S. at 401.

63. *See* 374 U.S. at 403.

64. 374 U.S. at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

65. 374 U.S. at 404; *cf. Braunfeld,* 366 U.S. at 611 (Brennan, J., dissenting) ("[T]he issue in this case . . . is whether a State may put an individual to a choice between his business and his religion.").

First Amendment rights,[66] comparable to a fine on those who worship on Saturday.[67]

The several opinions in this case reflect an inclusive approach toward religion, describing Ms. Sherbert's conduct in the broadest of terms.[68] In the words of the majority, the First Amendment covers "acts prompted by religious beliefs or principles."[69] The plaintiff readily satisfied this standard by demonstrating that her refusal to work on Saturday sprang from her "conscientious scruples,"[70] and from her "religious convictions respecting the day of rest."[71] The Court referred broadly to the "precepts of her religion,"[72] without suggesting that only certain types of religious practices would be eligible for protection. The opinions filed by other Justices echoed the majority, describing the exercise of her religion in general terms. The concurring opinions observed that Ms. Sherbert's refusal to work on Saturdays was "based on the tenets of her religious faith,"[73] and that her "religious scruples" prompted her decision.[74] "The harm," Justice Douglas observed, "is the interference

66. *See Sherbert,* 374 U.S. at 406.

67. *See* 374 U.S. at 404.

68. Despite a number of references to the broad protection afforded by the Constitution, some courts have interpreted *Sherbert* narrowly on the basis of two passages in the majority opinion. At the outset of the opinion, the Court acknowledged that the prohibition against Saturday labor "is a basic tenet of the Seventh-day Adventist creed." 374 U.S. at 399 n.1. In a later passage, the Court observed that the state had penalized the free exercise of the claimant's constitutional liberties by conditioning the receipt of benefits upon her willingness to violate a "cardinal principle of her religious faith." 374 U.S. at 406. Some courts have inferred from these passages that the Free Exercise Clause only protects central religious practices. *See, e.g.,* Swanson v. Guthrie Indep. Sch. Dist. No. I-1, 942 F. Supp. 511, 516 (W.D. Okla. 1996); Lewis v. Scott, 910 F. Supp. 282, 287 (E.D. Tex. 1995).

It is noteworthy, however, that no reference to centrality appears when the Court addressed the crucial inquiry: "[W]hether the disqualification for benefits imposes any burden on the free exercise of appellant's religion." *Sherbert,* 374 U.S. at 403. In the primary passage discussing cognizable burdens, the Court made no reference to the centrality of the claimant's religious practice, and provided no indication that the practice could not enjoy constitutional protection unless it was central to her religion. *See* 374 U.S. at 403-04. If the Court intended to restrict the Free Exercise Clause to central religious practices, one would expect that the Court would communicate this restriction in its discussion of cognizable burdens. The absence of any reference to centrality in this passage casts doubt upon the conclusion that the Court in *Sherbert* restricted the Free Exercise Clause to central religious practices.

Viewed in this context, the two aforementioned references to the claimant's religion are best understood in descriptive terms: The Court observed that the state burdened a fundamental religious practice, but did not intend to establish centrality as a constitutional requirement.

69. *Sherbert,* 374 U.S. at 403. The implication from this passage is that the First Amendment protects conduct "prompted" by religious belief, unless the state can establish a compelling interest in regulation.

70. *See* 374 U.S. at 399.

71. 374 U.S. at 410.

72. *See* 374 U.S. at 404.

73. 374 U.S. at 414 (Stewart, J., concurring in the result).

74. *See* 374 U.S. at 412 (Douglas, J., concurring).

with the individual's scruples or conscience . . . ."[75] The dissenters also recognized that the Court's holding affected "those whose behavior is religiously motivated," including Adell Sherbert.[76] These open-ended references to the plaintiff's religious conduct suggest that the Constitution affords broad protection to practices that are motivated by sincere religious beliefs.

The other seminal case, *Wisconsin v. Yoder*,[77] provides further guidance about the scope of the Free Exercise Clause. *Yoder* addressed a compulsory school-attendance statute that required all Wisconsin children to go to school until the age of sixteen.[78] As members of the Old Order Amish community, the Yoder family objected to formal education beyond the eighth grade on religious grounds.[79]

The Yoders convincingly demonstrated that the state had infringed upon the exercise of their religious beliefs. The family belonged to a conservative Amish community that emphasized separation from secular society.[80] The Yoders established that compliance with the school attendance statute would impose a serious barrier to the integration of the children into the Amish community.[81] Forcing the children to undergo formalized education beyond the eighth grade would also jeopardize the family's standing in the community, threaten the survival of the Old Order Amish society, and endanger the eternal salvation of the family.[82]

Again employing inclusive language, the Court found that the family's way of life was "rooted in religious belief."[83] The Yoders' separatist lifestyle was not a matter of personal preference, the Court observed, but rather stemmed from "deep religious conviction."[84] In the Court's view, the record abundantly supported the claim that additional years of education would be "contrary to the Amish religion."[85]

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75. 374 U.S. at 412 (Douglas, J., concurring).

76. 374 U.S. at 422 (Harlan, J., dissenting).

77. 406 U.S. 205 (1972).

78. *See* 406 U.S. at 207-09.

79. The school district administrator filed suit when the Yoders refused to send their children, ages fourteen and fifteen, to public school. Rejecting the constitutional challenge, the county court convicted the parents of violating the statute and imposed a nominal fine. *See* 406 U.S. at 207-08.

80. *See* 406 U.S. at 209-10.

81. *See* 406 U.S. at 211-12.

82. *See* 406 U.S. at 209, 212.

83. *See* 406 U.S. at 215.

84. *See* 406 U.S. at 216. A "deep" religious conviction is not necessarily synonymous with a central religious practice. For example, a believer might have a deep religious conviction that abortion is wrong, but might picket outside of abortion clinics without viewing such activity as a "central" religious practice.

85. 406 U.S. at 209.

Admittedly, the Court repeatedly observed that nonconformance with secular society was central to the Yoders' religious beliefs. The Court noted that the concept of separation from the world was "central to their faith,"[86] and that the objection to compulsory education was "firmly grounded in these central religious concepts."[87] The "fundamental tenets of their religious beliefs" would be violated if the state forced Amish parents to surrender their teenaged children to formalized education.[88]

Despite these repeated references to the centrality of the conduct, several factors suggest that *Yoder* did not establish centrality as an essential element of a Free Exercise claim. First, although the Court noted that Wisconsin infringed upon a central religious practice, the Court offered no indication that practices *needed* to be central in order to receive protection under the Free Exercise Clause. Standing alone, references to the centrality of the Yoders' beliefs fail to establish centrality as a constitutional requirement. Other passages in the opinion illustrate the point. For example, the majority mentioned no less than five times that the compulsory education statute threatened the very existence of the Old Order Amish community.[89] Yet, few people would infer from these passages that the Constitution protects individual believers only if the state action endangers the future of their religious group. The Court made an equal number of references to the fact that the Amish practice of separation had persisted for several centuries,[90] but it would not be sensible to conclude that the Free Exercise Clause applies only to religions with such an established heritage. In similar fashion, by observing that the state burdened a central religious practice, the Court did not thereby restrict the First Amendment to the exercise of central religious beliefs. The fact that the state burdened a central religious practice in *Yoder* does not mean that the Free Exercise Clause is not implicated when the government burdens other forms of religiously motivated conduct.

Limitations upon constitutional liberties should not be lightly assumed. Absent a specific restriction in the text of the provision, or an express directive from the Supreme Court, a constitutional guarantee ought to apply to the full extent that its words imply. The First Amendment protects the "exercise of religion," a category of conduct that appears broad on its face. Before one concludes that the Constitution only protects a subcategory of religious practices — those that are central — it is appropriate to require

86. *See* 406 U.S. at 210.

87. 406 U.S. at 210.

88. *See* 406 U.S. at 218.

89. *See* 406 U.S. at 209, 212, 218, 219, 235.

90. *See* 406 U.S. at 209-10, 215, 216-17, 219, 235.

some definitive statement to that effect from the Court. The handful of references to the centrality of the Yoders' conduct does not rise to the level of clarity one would expect if the Court intended to impose such a significant constriction of a First Amendment guarantee.

Second, other passages cast doubt upon the notion that *Yoder* imposed a centrality requirement. At the outset of the opinion, the Court implied that the Free Exercise Clause enjoyed a broad application, observing that the Constitution protected "religiously based" and "religiously grounded" conduct.[91] Moreover, at the end of the opinion, the Court summarized the facts that contributed to its finding that the Yoders had suffered a cognizable burden.[92] A reference to centrality is noticeably absent from the Court's recitation of the important elements of the Yoders' case,[93] adding support to the conclusion that *Yoder* did not restrict the First Amendment to the exercise of central religious beliefs.[94]

Third, references to the centrality of the Yoders' religious practices are consistent with the application of the motivation test. Practices that are fundamental to a person's religious beliefs constitute a subset of religiously motivated conduct. By establishing that the state had violated a central religious practice, the Yoders thereby demonstrated that the government burdened a religiously motivated practice. Given that the Court nowhere required a demonstration of centrality, it seems reasonable to conclude that the Yoders proved more than was necessary when they established that their religiously motivated conduct was also central to their religion.[95]

One can also conclude from the facts of *Yoder* that a claimant may satisfy her burden without demonstrating religious compulsion. By their own account, the parents were not, strictly speaking, *compelled* by their religion to remove their children from formal education.[96] On the contrary, their objection sprang from a general belief

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91. *See* 406 U.S. at 220. The Court summarily rejected the state's assertion that the First Amendment protects religious beliefs, but not religious conduct. *See* 406 U.S. at 219-20.

92. *See* 406 U.S. at 235-36.

93. *See* 406 U.S. at 235-36.

94. This conclusion seems especially appropriate, considering that no subsequent case mentioned centrality to the extent of *Yoder*. *See* Berg, *supra* note 23, at 52 ("Thus, although *Yoder* spent a good deal of time discussing how 'central' the concept of separation from the world was to the Amish identity, the Court later backed off from making such judgments. In unemployment cases after *Sherbert*, it simply deferred to the believer's claim about importance." (citations omitted)).

95. This conclusion seems reasonable given the Court's statement that the plaintiffs presented an unusually compelling claim. *See Yoder*, 406 U.S. at 235-36 (observing that the plaintiffs made a "convincing showing, one that probably few other religious groups or sects could make").

96. *See* Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 466 (1988) (Brennan, J., dissenting) ("[T]he parents in *Yoder* did not argue that their religion expressly

in remaining separate from secular society.[97] Because their faith did not mandate opposition to the secondary schooling, the success of the parents in *Yoder* exemplifies that claimants may establish a cognizable burden without demonstrating religious compulsion.

B. *The Unemployment Compensation Cases*

In the years between *Yoder* and *Smith,* the only plaintiffs who successfully argued free exercise claims before the Court were those who contested the denial of unemployment compensation benefits.[98] These precedents reveal that the Free Exercise Clause is not limited to central or compelled practices.

In *Thomas v. Review Board of the Indiana Employment Security Division,*[99] the Court outlined an approach that casts serious doubt upon the permissibility of the centrality and compulsion tests. The plaintiff, Eddie Thomas, worked in a foundry that produced steel for industrial use, but was transferred to a department that manufactured parts for military tanks.[100] Believing that assisting in the production of weapons would violate his religious scruples as a Jehovah's Witness, he decided to terminate his employment rather than surrender his principles.[101] Mr. Thomas ultimately filed suit after the state review board denied his application for unemployment benefits.[102]

The Court began with the general observation that the Free Exercise Clause protects beliefs and practices that are "rooted in religion."[103] The Court decided this aspect of the case with relative ease, finding "clear" support in the record that the plaintiff had quit his job "for religious reasons."[104]

Having resolved this preliminary issue, the Court reviewed the specific lines of inquiry entertained by the state court. The

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proscribed public education beyond the eighth grade; rather, they objected to the law because 'the *values* . . . of the modern secondary school are in sharp conflict with the fundamental *mode of life* mandated by the Amish religion.' " (emphasis and alteration in original) (quoting *Yoder,* 406 U.S. at 217)); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act,* 56 MONT. L. REV. 171, 203 (1995) ("Indeed, *Yoder* itself could not withstand a view so pinched. Although the Old Order Amish parents did assert that salvation required a life apart from worldly influence, they were not strictly obliged by their faith doctrines to withdraw their children from school at the teenage years.").

97. *See Yoder,* 406 U.S. at 210.

98. *See* Lupu, *supra* note 96, at 177.

99. 450 U.S. 707 (1981).

100. *See* 450 U.S. at 710.

101. *See* 450 U.S. at 710.

102. *See* 450 U.S. at 712.

103. *See* 450 U.S. at 713-14.

104. *See* 450 U.S. at 716; *see also* Bowen v. Roy, 476 U.S. 693, 708 (1986) (Burger, C.J.) (observing that *Thomas* involved a "religiously motivated resignation").

Supreme Court of Indiana had concluded that the plaintiff's objection to the new work assignment stemmed from personal considerations, rather than religious convictions.[105] In support of its finding, the state court closely scrutinized the religious beliefs of Mr. Thomas, and even considered the religious views of another believer.[106] The Court soundly rejected these inquiries as constitutionally infirm, and in the process revealed three constitutional principles that undermine both the centrality test and the compulsion test.

First, the protection of the Free Exercise Clause must not depend upon "a judicial perception of the particular belief or practice in question."[107] The state court observed that the claimant opposed working in a weapons factory, but would not object to providing raw products that ultimately might be used for military purposes.[108] Perceiving an internal inconsistency, the state court concluded that Thomas opposed the new assignment for philosophical rather than religious reasons.[109] Upon review, the Court repudiated this approach, explaining that the First Amendment protects religious practices even if they do not appear "acceptable, logical, consistent, or comprehensible to others."[110] Even the plaintiff's admission that he was "struggling" with his beliefs did not dissuade the Court from affording considerable deference to the believer's expression of his religious convictions.[111] "We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."[112]

Second, whether a practice qualifies for constitutional protection is not contingent upon doctrinal conformity with other believers. The Indiana Supreme Court gave special weight to the testimony of another Jehovah's Witness, who stated that working in an armaments factory would not violate his religious beliefs.[113] The fact that a fellow believer did not share the plaintiff's views convinced the state court that he had presented a meritless claim. Rejecting this line of inquiry, the Court offered a broader vision of the right to religious freedom. At its core, the Free Exercise Clause protects individuals who dissent from the majority's interpretation of religious doctrine. The disagreement with another believer did

105. *See Thomas*, 450 U.S. at 712-13.
106. *See* 450 U.S. at 712-16.
107. 450 U.S. at 714.
108. *See* 450 U.S. at 715.
109. *See* 450 U.S. at 714-15.
110. 450 U.S. at 714.
111. *See* 450 U.S. at 715.
112. 450 U.S. at 715.
113. *See* 450 U.S. at 715.

not impair the plaintiff's claim, the Court found, because "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[114]

Third, courts must decide free exercise claims without immersing themselves in the middle of theological disputes. The Court acknowledged that "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed."[115] Refusing to assume the role of an ecclesiastical referee, the Court candidly recognized that "the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."[116] In the words of the Court, "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."[117]

These three principles strongly suggest that applying either the centrality test or the compulsion test would contravene the requirements of the Constitution. As will be developed in Part IV, both tests entail intrusive inquiries into the claimant's religious beliefs. Courts cannot remain faithful to the three commands of *Thomas* — showing deference to the individual believer, protecting doctrinal diversity, and avoiding theological disputes — if they condition the guarantee of religious freedom upon a demonstration that the practice was central to or compelled by the claimant's religious beliefs.[118]

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114. 450 U.S. at 715-16.

115. 450 U.S. at 715.

116. 450 U.S. at 715.

117. 450 U.S. at 716.

118. An oft-quoted passage does not support a conclusion to the contrary. Discussing the burden on Mr. Thomas, the Court stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

450 U.S. at 717-18. Despite this reference to mandatory and prohibited conduct, this statement should not be understood to support the compulsion test, for two reasons. First, there is little reason to believe that the Court intended to exhaust the range of cognizable burdens in this passage. By stating that a burden may exist if the government infringes upon compulsory conduct, the Court did not thereby imply that a religious practice *must* be compulsory in order to receive protection. Indeed, it would appear arbitrary to suggest that government conduct constitutes a burden when the believer considers the practice to be compulsory, but that identical state action would not amount to a burden if the believer views the religious practice to be noncompulsory. Second, the middle of this passage reveals the true focus of the Court: a cognizable burden exists when the government places "substantial pressure on an adherent *to modify his behavior and to violate his beliefs*." 450 U.S. at 718 (emphasis added). The underlying concern, it appears, is to limit governmental encroachment upon religious conduct. As such, the adverse treatment of the claimant, rather than her theological views, determines whether the state has imposed a substantial burden upon the exercise of religion.

Building upon *Thomas,* the Court extended the protection of the Free Exercise Clause to recent converts in *Hobbie v. Unemployment Appeals Commission of Florida.*[119] After joining the Seventh-day Adventist Church, Paula Hobbie informed her employer that she would no longer be able to work on the Sabbath, a decision that ultimately resulted in her dismissal. The state subsequently refused her request for unemployment benefits, finding that she had been discharged for "misconduct connected with [her] work."[120] Echoing *Sherbert* and *Thomas,* the Court found that the subsequent denial of unemployment benefits imposed a cognizable burden, because it forced her "to choose between fidelity to religious belief and continued employment."[121] The fact that the plaintiff had recently converted to the faith did not dissuade the Court from protecting her "religiously motivated choice."[122]

Addressing yet another denial of unemployment benefits in *Frazee v. Illinois Department of Employment Security,*[123] the Court reinforced the notion that the First Amendment protects individual believers, irrespective of whether they share the beliefs of any particular religious group. As an avowed Christian, William Frazee professed an opposition to working on Sunday. The state denied his request for unemployment benefits, however, because he was not a member of any particular church or denomination. Upon review, the Court repeated that the individual right to the free exercise of religion does not depend upon allegiance to the doctrine of a broader religious community. As the Court explained, an independent believer may invoke the protection of the First Amendment without reference to the views of other believers: "[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held *religious belief.* Under our cases, he was entitled to in-

119. 480 U.S. 136 (1987).

120. 480 U.S. at 139 (alteration in original).

121. 480 U.S. at 144. Once again, the Court referred to the exercise of religion in general terms, without suggesting that the First Amendment only protects central or compelled practices. *See also* 480 U.S. at 137 (referring broadly to the claimant's "sincerely held religious convictions").

122. *See* 480 U.S. at 142 n.7; 480 U.S. at 148 (Stevens, J., concurring). The Court's opinion in *Hobbie* also suggests that a demonstration of centrality is not required under the Constitution. At the outset of the opinion, the Court noted that Ms. Hobbie's "conversion was bona fide and that her religious belief is sincerely held." 480 U.S. at 138 n.2. Unlike *Sherbert* and *Yoder,* however, the *Hobbie* opinion makes no reference to the centrality of the claimant's religious practice — the opinion provides no indication that this particular claimant viewed the observance of the Sabbath as a central practice of her religion. The absence of any reference to centrality in *Hobbie* suggests that the Free Exercise Clause is not restricted to central religious practices.

123. 489 U.S. 829 (1989).

voke First Amendment protection."[124] In short, the Free Exercise Clause protects individual believers without requiring conformance to the doctrine of a larger religious community. As will be elaborated in Part IV, the centrality and compulsion tests undermine the holding in *Frazee,* often requiring claimants to establish centrality or compulsion by reference to the views of other members of the faith.

C. *Repudiating the Centrality Test*

Beginning with *Lyng v. Northwest Indian Cemetery Protective Association,*[125] the Court issued a series of opinions that explicitly repudiated the centrality test as a constitutionally infirm inquiry.[126] *Lyng* addressed a Forest Service proposal to construct a road in a national forest over land that was sacred to local Native American tribes.[127] The centrality test entered the fray at the suggestion of dissenting Justice Brennan. Seeking to balance the competing interests, Justice Brennan proposed that the plaintiffs be required to

124. 489 U.S. at 834 (emphasis added). This passage reveals that an individual suffers a cognizable burden when the state infringes upon the exercise of a "sincerely held religious belief." This general statement supports the conclusion that the First Amendment protects religious practices, irrespective of whether the claimant believes that they are central or compelled.

125. 485 U.S. 439 (1988).

126. In other contexts, the Court has significantly restricted the scope of cognizable burdens. In institutional settings, such as prisons and the military, believers will encounter greater difficulty establishing a substantial burden upon their free exercise rights. *See* O'Lone v. Shabazz, 482 U.S. 342 (1987); Goldman v. Weinberger, 475 U.S. 503 (1986). A claimant may also lack a prima facie claim if she cannot establish a violation of a *specific* religious belief, or if she challenges the internal workings of the government. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Bowen v. Roy, 476 U.S. 693 (1986). The Court imposed these limitations, however, without reference to whether the practices were central to or compelled by the claimants' religious beliefs.

During the legislative hearings for the RFRA, one advocate suggested that the Free Exercise Clause only protects religiously mandated practices, on the basis of the Court's holding in *Harris v. McRae,* 448 U.S. 297 (1980). *See S. 2969, supra* note 6, at 239 (statement of James Bopp, Jr.). *Harris* addressed a free exercise challenge to the Hyde Amendment, which limited the use of Medicaid funds to reimburse the cost of abortions. The Court held that the plaintiffs lacked standing to raise the free exercise challenge, because "none [of the indigent pregnant women] alleged, much less proved, that she sought an abortion under compulsion of religious belief." 448 U.S. at 320. Despite this passing reference to "compulsion," the Court found that the plaintiffs lacked standing, not because their religious beliefs did not *mandate* abortions, but because the women did not allege an infringement of *their* religious beliefs *at all.* The plaintiffs, in fact, brought the free exercise challenge because "a woman's decision to seek a medically necessary abortion *may* be a product of her religious beliefs under certain Protestant and Jewish tenets." 448 U.S. at 319 (emphasis added). Thus understood, *Harris* does not require a demonstration of compulsion, but merely stands for the rather unexceptional proposition that litigants lack standing to raise a free exercise challenge on their own behalf if they do not allege that the government burdened the exercise of their personal religious beliefs.

127. *See Lyng,* 485 U.S. at 442.

demonstrate that the land-use decision adversely affected sites that were "central" to the practice of their religion.[128]

The majority responded by rejecting the centrality test in no uncertain terms. As the Court explained, unless courts automatically accept a claimant's assertion of centrality, this standard places courts in the position of deciding whether the claimant is correct in professing that a practice is central to her religion.[129] If a court holds that the practice is not in fact central, in spite of the claimant's statement to the contrary, the court would implicitly decide that the claimant misunderstands the principles of her own religious faith.[130] The majority concluded that "such an approach cannot be squared with the Constitution or with our precedents," and would "cast the Judiciary in a role that we were never intended to play."[131]

The Court returned to the issue of centrality in *Hernandez v. Commissioner*.[132] Addressing a free exercise challenge to the disallowance of a tax deduction, the Court began with a broad statement that appeared to open the door to inquiries into centrality.[133] The Court immediately explained, however, that courts must not undertake judicial expeditions into religious territory. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[134]

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128. *See* 485 U.S. at 473-75 (Brennan, J., dissenting).

129. *See* 485 U.S. at 457.

130. *See* 485 U.S. at 457-58.

131. 485 U.S. at 458. This rationale for rejecting the centrality test would seem to apply to the compulsion test with equal force. There is little reason to believe that courts are capable of discerning whether a practice is compelled, given their inability to determine whether a practice is central. Both tests place courts in the untenable position of second-guessing the avowed religious beliefs of a devout litigant.

132. 490 U.S. 680 (1989).

133. *See* 490 U.S. at 699 ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice . . . .").

134. 490 U.S. at 699. Given that this passage specifically rejected inquiries into centrality, it is curious that the preceding sentence in the opinion cast the free exercise inquiry in terms of a burden upon a "central religious belief or practice." Perhaps the Court meant that practices *must* be central in order to be protected, but courts cannot second guess an assertion that the centrality requirement has been satisfied. In other words, one might interpret this passage to create a subjective centrality requirement — the claimant must believe that the practice is central in order to receive protection, but the court cannot dispute the avowed centrality of the practice.

This interpretation of *Hernandez* seems unlikely — in practical terms, it would amount to a requirement that the plaintiff plead centrality, and nothing more. It also seems doubtful that the Court would establish such a requirement with a passing reference in an introductory sentence, without offering any rationale, and without acknowledging the clear repudiation of centrality inquiries in *Lyng*. Moreover, given that the text of the First Amendment broadly protects the "exercise of religion," there is little reason to restrict this constitutional guarantee to the central practices of one's faith. Practices that are not central to one's religion are no less deserving of constitutional protection. This conclusion seems all the more sound when one considers other rights protected by the First Amendment. It would be unthinkable

Although a construction of the RFRA must turn upon the pre-*Smith* case law, it is noteworthy that the Court once again expressed disapproval of the centrality test in the *Smith*[135] decision. Building a case against the compelling state interest test, the Court addressed the contention that the test should apply only when the state burdens a central religious practice.[136] The majority explained that the judiciary is institutionally incapable of deciding the role of a particular practice within a claimant's religion:

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.[137]

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to suggest, for example, that the Free Speech Clause protects only the "central" statements of a speaker, or that the Free Press Clause extends only to the "central" practices of the media.

A more plausible explanation is that the Court referred to a burden upon a central practice in descriptive, rather than prescriptive, terms. The Court probably intended to make the observation that believers are more likely to challenge government conduct if it encroaches upon practices that are central to their religion, even though the practices need not be central to merit protection under the Constitution.

135. Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

136. *See* 494 U.S. at 886.

137. 494 U.S. at 887-88 (citations omitted) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)); *see also* 494 U.S. at 906 (O'Connor, J., concurring in judgment) ("I agree with the Court [that] '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.' " (citation omitted) (quoting *Hernandez*, 490 U.S. at 699)); 494 U.S. at 919 (Blackmun, J., dissenting) ("I agree with Justice O'Connor that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion."); Muslim v. Frame, 897 F. Supp. 215, 220 (1995) (observing that the Court in *Smith* "unanimously rejected a centrality inquiry on the basis of judicial competence").

The text of *Smith* sharply criticized the centrality test, but footnote four contained the bulk of the Court's larger point. The majority attempted to use the established failure of the centrality test as another reason for dispensing with the compelling state interest standard when claimants challenge generally applicable laws. After the text reaffirmed the pre-*Smith* repudiation of the centrality test, footnote four introduced an entirely new proposition: courts cannot apply the compelling state interest test *without* inquiring into the centrality of the religious practice. In the Court's words, dispensing with considerations of centrality would be "utterly unworkable," because "both the importance of the law at issue and the centrality of the practice at issue must reasonably be considered" if claimants are able to challenge generally applicable laws on free exercise grounds. 494 U.S. at 888 n.4 (emphasis omitted). A "'[c]onstitutionally significant burden,'" Justice Scalia believed, "would seem to be 'centrality' under another name." 494 U.S. at 887-88 n.4. Without the burden of establishing centrality, Justice Scalia feared that claimants would demand protection for Lilliputian concerns, thus giving "the practice of throwing rice at church weddings" the same status as "the practice of getting married in church." 494 U.S. at 888 n.4. To summarize the Court's argument, because the compelling state interest standard requires a judicial determination of the centrality of a religious practice, and because courts are institutionally incapable of evaluating centrality, the compelling state interest test must be an inappropriate standard for free exercise claims.

When addressing the Court's argument, it is essential to recall that the RFRA rejects the *Smith* approach in favor of the *Sherbert* line of cases. Congress envisioned that courts would

As the Court explained, it is inappropriate for courts to evaluate the "centrality" of a practice when deciding a free exercise claim, just as it is improper for courts to decide the "importance" of ideas in free speech cases.[138]

In her concurring opinion in *Smith*, Justice O'Connor made clear what has been at least implicit in the preceding series of free exercise cases. No less than one dozen times, Justice O'Connor made reference to the fact that the Constitution protects practices that are "motivated" by religion.[139] These passages quietly attest to a principle that now seems clear: the First Amendment protects practices that are motivated by religious beliefs, irrespective of whether the believer views them to be central or compelled.

III. The Inclusive Scope of the Religious Motivation Test

This Part focuses on the scope of each of the three tests, and argues that the motivation test offers the appropriate breadth of protection for religious-based conduct. Section I.A demonstrates that the centrality test and the compulsion test exclude religious practices that warrant protection under the RFRA. Section I.B contends that these two standards also categorically exclude certain religious groups, whose practices cannot be understood in terms of centrality or compulsion.

A. *The Exclusion of Certain Religious Practices*

As their names reveal, the three competing interpretations of the RFRA do not protect an identical range of religious conduct. The religious motivation test encompasses all practices that are principally motivated by sincere religious beliefs. In contrast, the centrality test confines the statute to the fundamental aspects of one's faith, and the compulsion test limits the Act to practices that are either mandated or prohibited by one's religious beliefs. By

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construe the Act according to pre-*Smith* case law, and thus *Smith* can contribute to a construction of the Act only to the extent that it conforms with the preceding free exercise jurisprudence. When the text of *Smith* repeated the earlier renunciation of the centrality test, the Court plainly echoed its prior holdings, therefore, this passage can inform a construction of the Act. When footnote four claimed that centrality inquiries are inherent in the application of the compelling state interest test, however, the Court embraced a novel proposition that found no support in the preceding case law. As a result, this material departure from the Court's free exercise heritage ought not be considered by those who construe the RFRA.

At another level, there is little reason to accept the premise that application of the compelling state interest test entails a consideration of centrality. Whether the government imposes a cognizable burden can and should be determined by the degree of governmental interference with religious conduct and not by the theological views of the individual claimant.

138. *See Smith*, 494 U.S. at 886-87.

139. *See* 494 U.S. at 891, 893, 893, 893-94, 894, 895, 897, 898, 900, 904, 906, 907.

failing to include the entire spectrum of religious conduct, the centrality and compulsion tests leave vulnerable a significant number of religious practices, and thereby frustrate the broad remedial goals of the RFRA.

The compulsion test offers insufficient protection for the exercise of religion because it misperceives the nature of religious experience. At its core, the compulsion test assumes that the exercise of religion amounts to nothing more than obedience to a set of commands and prohibitions. Put another way, the compulsion test rests upon a duty-based conception of religion, viewing religious practices in terms of the "do's" and "don'ts" of one's faith. Although it is beyond doubt that some religious practices can be understood in such terms, it is equally certain that not all religious conduct includes the element of compulsion.[140] Indeed, believers engage in many religious practices that are not strictly compelled by their religion.[141] For example, believers might pray the rosary, contribute financially to a place of worship, or care for the poor without feeling strictly compelled to do so.[142] Under the compulsion test, the state could encroach upon any of these religious practices with impunity, because those who engage in such noncompulsory conduct would be unable to establish that the government burdened a compulsory religious practice.[143] The compulsion test significantly con-

140. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1390 (1981) ("One of the most common errors in free exercise analysis is to try to fit all free exercise claims into the conscientious objector category and reject the ones that do not fit. Under this approach, every free exercise claim requires an elaborate judicial inquiry into the conscience or doctrines of the claimant. If he is not compelled by religion to engage in the disputed conduct, he is not entitled to free exercise protection. . . . This approach reflects a rigid, simplistic, and erroneous view of religion.").

141. *See* Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("Many religious practices that clearly are not mandatory . . . are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty."); *Hearings on H.R. 2797, supra* note 6, at 322 (statement of Dean Gaffney) ("We do lots of things in our religious exercise that are not compelled."); *id.* at 370 (statement of Prof. Laycock) ("[A]n amendment limiting the bill to conduct that is religiously compelled would impose serious costs on religious liberty.") (providing four case examples); *see also* Berg, *supra* note 23, at 53; Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty,* 60 GEO. WASH. L. REV. 841, 847 (1992).

142. *See* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence,* 60 GEO. WASH. L. REV. 782, 803-04 (1992) ("Although a specific religious tenet may not mandate and define the nature of a pastoral counseling center, a drug and alcohol rehabilitation program, or a community's participation in moral dialogue, it surely is the case that these forms of religious conduct are rooted firmly in belief and are motivated by broad obligations to love and serve the neighbor." (emphasis omitted) (footnote omitted)); Laycock, *supra* note 140, at 1390 ("Many activities that obviously are exercises of religion are not required by conscience or doctrine. Singing in the church choir and saying the Roman Catholic rosary are two common examples."). Other examples of religious practices that may not be strictly compelled include: building a place of worship, operating a homeless shelter, attending religious services, and studying at religious educational institutions.

143. Of course, claimants could present a free exercise challenge to a law if it lacked a rational basis, or if it specifically targeted religious activity. *See* Church of the Lukumi

stricts the scope of the statute, leaving many believers without recourse if the government interferes with the exercise of their religious beliefs. This unfortunate consequence of the compulsion test is difficult to reconcile with the broad remedial purposes of the RFRA.[144]

When actually employed in a free exercise case, the underinclusive scope of the compulsion test leads to unacceptable distinctions between comparable religious practices. A case decided prior to the enactment of the RFRA illustrates the point. In *Brandon v. Board of Education,*[145] a Christian student organization filed suit after school officials denied their request to conduct prayer meetings on school premises.[146] The Second Circuit found no cognizable burden on their exercise of religion, resting its decision upon a dubious distinction between voluntary and compulsory prayer. The court observed that members of the aptly named "Students for Voluntary Prayer" were not required by their religious beliefs to pray together before school. Because the prayer session was not strictly *compelled* by their religion, the court concluded that the denial of access did not violate the students' right to the free exercise of religion.[147]

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); *Smith*, 494 U.S. 872. The point here is simply that the compulsion test forecloses the opportunity to present a RFRA challenge, and thus to enjoy the benefit of the compelling state interest test, when the state infringes upon noncompulsory practices through neutral laws of general applicability.

144. Those who urged passage of the RFRA anticipated that the statute would confer broad protection for religious freedom. *See, e.g.*, S. REP. NO. 103-111, at 8 (1993) ("[T]he committee finds that legislation is needed to restore the compelling interest test. As Justice O'Connor stated in *Smith,* '[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the *fullest extent possible* in a pluralistic society.' " (emphasis added) (quoting *Smith,* 494 U.S. at 903 (O'Connor, J., concurring in judgment))); H.R. REP. NO. 103-88, at 6-7 (1993) (same); *see also* 139 CONG. REC. H8,714 (daily ed. Nov. 3, 1993) (statement of Rep. Edwards) ("[T]oday, we have taken another step to ensure that the promise of the first amendment and the protections afforded by the Constitution are available to all religious believers."); 139 CONG. REC. S14,467 (daily ed. Oct. 27, 1993) (statement of Sen. Kennedy) ("The Religious Freedom Restoration Act will assure all Americans the right to follow the teaching of their faiths, free from Government interference."); 139 CONG. REC. S14,469 (daily ed. Oct. 27, 1993) (statement of Sen. Bradley) ("[T]his bill breathes new life into the protections we give for the free exercise of religion and ensures that . . . freedom of religion will again be restored as a constitutional norm, not an anomaly. This bill ensures that religious liberty will once again be given its proper place among our most valued liberties."); 139 CONG. REC. H2,357 (daily ed. May 11, 1993) (statement of Rep. Fish) ("Since Smith was decided in 1990, individuals seeking to practice their religion, unhampered by Government action, have largely been without recourse. The Religious Freedom Restoration Act will provide them with a means to challenge Government regulations which unnecessarily burden the free exercise of religion. The legislation will guarantee that all Americans, regardless of their particular creed or oath, are able to enjoy the right to worship and practice their faith, [free] from unnecessary Government intrusion.").

145. 635 F.2d 971 (2d Cir. 1980).

146. *See* 635 F.2d at 973.

147. *See* 635 F.2d at 977.

With remarkable candor, the court revealed that the decision likely would have been different if the students had been followers of Islam. Unlike the plaintiffs' Christian beliefs, the court observed, the Muslim faith *requires* its followers to prostrate themselves "five times daily in the direction of Mecca."[148] Without explaining why the presence of compulsion was constitutionally significant, the court expressed the view that the Constitution would require access to school facilities if the claim were brought by Muslim students.[149] The court in *Brandon* thus illustrates the perils created by the compulsion test. Needless to say, an approach that affords different treatment to Christian and Muslim prayer offers insufficient protection for the exercise of religion.[150]

Like the compulsion test, the centrality test excludes religious activities that deserve protection under the RFRA. Almost by definition, only a limited number of religious practices can be fundamental to a person's religion. Indeed, for many believers, only a moment's reflection is needed to call to mind a number of sincere religious practices that are not necessarily "central" to their religion. For example, for some individuals, singing in a church choir, volunteering at a homeless shelter, or supporting a religious charity are important religious practices, though they might not view such participation as central to their religion. The centrality test removes such practices from the sphere of protection afforded by the RFRA, leaving them vulnerable to governmental interference.

Practices that are not central to a believer's religion are no less deserving of protection under the RFRA.[151] Noncentral practices contribute to the richness of religious experience, complementing the fundamental aspects of one's faith in meaningful ways. Such practices often serve as an expression of the believer's faith, and allow individuals to carry out their beliefs in everyday life. The exclusion of noncentral religious practices deprives believers of the right to participate fully in their religious heritage, and thus falls

148. 635 F.2d at 977.

149. *See* 635 F.2d at 977.

150. The Supreme Court of Washington reached an equally remarkable result in *Witters v. State Commn. for the Blind,* 771 P.2d 1119 (Wash. 1989) (en banc). The Commission for the Blind denied a student financial assistance for vocational training because he sought to pursue Biblical studies in preparation for a career as a pastor or missionary. *See* 771 P.2d at 1120. The student alleged that the denial of funding due to the religious nature of his studies violated his rights under the Free Exercise Clause. The Supreme Court of Washington applied the "compulsion test" and achieved a counter-intuitive result: because the student's religion did not *mandate* that he become a minister, the denial of funding did not implicate his right to freely exercise his religion. *See* 771 P.2d at 1123.

151. Just as the Free Speech Clause is not confined to the central parts of a person's speech, so also the Free Exercise Clause, and the RFRA, should not be limited to the central parts of a person's religion.

short of the RFRA's goal to secure religious freedom for individual believers.[152]

In contrast to these two interpretations, the religious motivation test fully protects the "exercise of religion." Even a casual observer of religion is undoubtedly aware that believers engage in all sorts of religious practices, including those practices that are neither fundamental nor mandatory. The motivation test reflects an appreciation for this diversity by extending the RFRA to the entire spectrum of religious experience. Under this approach, any practice that is principally motivated by religion can enjoy the protection of the RFRA. Unlike the centrality test and the compulsion test, which limit the Act to subsets of religious conduct, the motivation test embraces the diversity of religious practices by protecting the full range of religious conduct.[153]

B. *The Exclusion of Certain Religious Groups*

The motivation test also extends the RFRA to all religious groups. This approach allows believers of any religion to invoke the RFRA when the government infringes upon their religiously motivated practices. In contrast, the centrality test and the compulsion test only protect certain forms of religion, leaving vulnerable those believers who follow minority faiths. The inability of these two tests to cover all religious groups militates strongly in favor of a more inclusive approach: the religious motivation test.

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152. *See* sources cited *supra* note 144. Moreover, the text of the RFRA reflects an appreciation for the holistic religious experience, broadly protecting the "exercise of religion."

153. Critics of the motivation test might argue that this approach offers *too much* protection for religious practices. Some religious plaintiffs might claim, so the argument goes, that most everything they do is "motivated" by religion in a very real sense. If the RFRA covers religiously motivated practices, religious individuals might be able to challenge almost every governmental action, thus forcing the state to justify its policies under the compelling state interest test.

This objection fails to withstand close analysis. First, the legislative history reveals that the motivation test only extends to practices that are *principally* motivated by religious beliefs. *See Hearings on H.R. 2797, supra* note 6, at 136 (statement of Rep. Solarz). Even if a litigant claimed that every action was motivated by religion at some level, the claimant would have to demonstrate that religion provided the principal motivation behind the activity in question. As an empirical matter, there are probably few religious individuals who would claim that their every action is principally motivated by religion. This intuition is reinforced by the RFRA and free exercise case law: litigants have yet to claim that their right to religious freedom extends to everything they do. Second, even if a litigant did make this bold claim, a court would not be forced to accept the individual's assertion without further inquiry. On the contrary, the court must determine whether a litigant is sincere in her religious objection to a governmental policy. Very few individuals could sincerely claim that religion provides the principal motivation for every action in everyday life. Third, even if courts encountered a few such claims, brought by sincere individuals, the litigation would hardly be able to debilitate the state: the government would have the opportunity to justify its practice under the compelling state interest test. Fourth, the Court has previously shown displeasure with such slippery-slope objections. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963) (rejecting the speculative claim that the compelling state interest test will encourage the "filing of fraudulent claims by unscrupulous claimants feigning religious objections").

The compulsion test does not extend to all religious groups because it misconceives the nature of religious faith. As stated above, the compulsion test views the practice of religion as obedience to a set of sacred commands and prohibitions. This narrow conception of religion results in the exclusion of recognized religious groups from the refuge of the RFRA. Although some religions instruct their followers to obey the commands and prohibitions of the faith, other religious groups, especially those outside the Judeo-Christian tradition, lack the concept of religious compulsion. Theravada Buddhism, for example, is a nonduty-based religion, which emphasizes inward spiritual maturity rather than obedience to religious mandates.[154] Unfortunately, if the state substantially burdened the exercise of this religion, the compulsion test would insulate the state's action from review under the RFRA, because followers of this faith would not be able to demonstrate a burden upon a religiously *compelled* practice. The compulsion test thus would foreclose the opportunity to challenge state action under the RFRA when the state infringes upon religions that do not compel the conduct of their followers.

The centrality test rests upon a similarly flawed view of religion, and thus creates a comparable exclusion of certain religious groups. By requiring a demonstration of centrality, this test assumes that all religions have practices that are more central than others. Not all religions, however, necessarily maintain practices that can be termed "central."[155] For example, faiths that either embrace all religions, such as certain New Age religions,[156] and groups that support no unifying creed, such as the Quakers,[157] may not be able to demonstrate that any particular practice is central to their religious beliefs. Individuals who adhere to such religions cannot share in

154. *See* NANCY WILSON ROSS, BUDDHISM: A WAY OF LIFE AND THOUGHT 80 (1980) ("[W]hereas in our Western religious tradition sins and virtues are matters of 'Thou shalt' and 'Thou shalt not,' the Theravada Buddhist has no similar commandments. There are instead, counsels of perfection which begin 'It is better to . . .' or 'It is better not to . . .' follow such and such a course of action. This type of instruction leaves the choice of behavior to the individual, who remains free to verify through his own experience the wisdom of these suggestions." (quoted in Berg, *supra* note 23, at 53 n.228)).

155. *See* TRIBE, *supra* note 58, § 14-12, at 1249 n.48 ("[T]he very concepts of 'centrality' and 'religious burden' may be tied to particular religious traditions. Various forms of Christianity, for example, have clear divisions between secular and religious spheres, while other Christian sects, and other religions, perceive themselves as consisting of an integrated way of life.").

156. The Truth of Life Movement and other New Age religious groups fit into this category. *See* THE ENCYCLOPEDIA OF AMERICAN RELIGIONS: RELIGIOUS CREEDS 690-92 (J. Gordon Melton ed., 1st ed. 1988).

157. The Quakers, the Unitarians, and the Bahais are generally viewed as noncreedal, and thus may lack practices that may be termed "central." *See* THE ENCYCLOPEDIA OF AMERICAN RELIGIONS: RELIGIOUS CREEDS, *supra* note 156, at 448-49, 649-50, 788.

the religious freedom offered by the RFRA so long as courts continue to require a demonstration of centrality.

This categorical exclusion of religious groups is problematic on a number of levels. First, excluding particular religions from the protection of the RFRA betrays the spirit of the ecumenical coalition that rallied support for the Act. The RFRA came into existence largely through the efforts of the religious community, which united in support of the bill notwithstanding their theological differences.[158] Courts cannot remain faithful to the ecumenical origins of the RFRA so long as they adopt interpretations of the statute that deny certain religious groups an equal share of religious freedom.

Second, the exclusion of minority religious groups violates a central purpose of the RFRA — to prevent the government from imposing majoritarian conceptions of religion. As Justice Scalia conceded in *Smith,* leaving accommodation to the political process places unpopular religious groups at a "relative disadvantage."[159] In order to protect minority religious groups, which would remain vulnerable if the political process represented their only recourse, Congress returned supervisory powers to the judiciary, empowering them to strictly scrutinize governmental action that burdens the exercise of religion.[160] Courts that adopt the centrality test or the compulsion test, however, unwittingly reintroduce majoritarian religious perspectives, as evidenced by the exclusion of minority religious groups. The adoption of these two tests thus undermines a central goal of the RFRA — to secure religious freedom for minority groups who cannot protect themselves through the political process.[161]

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158. *See* sources cited *supra* note 7.

159. *See* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990); *see also* Sasnett v. Sullivan, 91 F.3d 1018, 1021 (7th Cir. 1996) ("Religions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests — possibly even oblivious to their existence."); *Hearings on H.R. 2797, supra* note 6, at 104 (statement of Nadine Strossen) ("[I]t is precisely the most unpopular religions practiced by the most marginalized and vulnerable people in our society where we cannot expect the legislative process to be attentive to their beliefs. . . . It is the minority religions, the unpopular religions, the new religions that are going to be discriminated against.").

160. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

161. *See Hearings on H.R. 2797, supra* note 6, at 127 (statement of Rep. Solarz) ("If religious freedom has any meaning at all, it is that everyone's exercise of religion must be protected equally — free from the threat that popular passions will interfere with the enforcement of so fundamental a liberty."); S. REP. NO. 103-111, at 8 (1993) ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application

Third, and most importantly, interpreting the Act so as to exclude certain religious groups violates the First Amendment. Throughout its history, the Court has repeatedly declared that the state may not show favoritism toward any particular religion.[162] Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[163] Both the compulsion test and the centrality test violate this prohibition by adopting models of religion that favor certain religious groups while entirely excluding others.[164] Denying relief to individuals, simply because they follow religions without central or compelled practices, contravenes the First Amendment's command to give equal treatment to different religions.

The religious motivation test, in contrast, avoids these serious pitfalls. Under this approach, followers of any religion may invoke the RFRA when the government imposes a substantial burden upon religiously motivated conduct. Presumably, no religious adherent can claim to be excluded by a standard that protects religiously motivated practices. Unlike competing interpretations, which exclude certain religious groups from the outset, the motivation test allows followers of any religion to utilize the Act when the government infringes upon the exercise of religion.[165] By extending

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to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right . . . . To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test."); *see also Hearings on H.R. 5377, supra* note 7, at 20 (statement of Rep. Solarz); *Hearings on H.R. 2797, supra* note 6, at 129 (statement of Rep. Solarz); *Hearings on H.R. 5377, supra* note 7, at 70 (statement of the Anti-Defamation League).

162. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97, 104-06 (1968) ("The First Amendment mandates governmental neutrality between religion and religion . . . . [T]he State may not adopt programs or practices . . . which 'aid or oppose' any religion. This prohibition is absolute." (citation omitted) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963))); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."); Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (noting that the state cannot "prefer one religion over another"); United States v. Ballard, 322 U.S. 78, 87 (1944) ("The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.").

163. Larson v. Valente, 456 U.S. 228, 244 (1982); *see also* 456 U.S. at 245 ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.").

164. *See* Lupu, *supra* note 10, at 958 ("When narrow, ethnocentric models of religion are employed by decisionmakers, free exercise adjudication may readily become a vehicle for judicial violations of the establishment clause.").

165. Indeed, if there were a religion without religiously motivated practices, there would never be an occasion to bring a claim under the RFRA for a governmental infringement of a religious practice. If religions without practices did, in fact, exist, the government would only be able to infringe upon their religious *beliefs,* and such regulation is prohibited per se under the First Amendment. *See* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 877 (1990).

the RFRA to followers of all religions, the motivation test reflects an appreciation for the origins of the statute, protects minority groups that would remain vulnerable in the political process, and remains faithful to the requirements of the Constitution.

IV. Heeding Judicial Limitations

The religious motivation test recognizes the limitations placed upon courts that interpret and apply the RFRA. Under this approach, courts must decide whether sincere religious beliefs provide the principal motivation behind a claimant's course of conduct. Requiring courts to determine a claimant's motivations does not place insuperable burdens on the judiciary, and does not encourage courts to engage in an inappropriate line of inquiry.

In contrast, both the centrality test and the compulsion test invite courts to make judgments that are beyond the bounds of their capacity and their authority. In two important respects, both tests encourage determinations that exceed the limits placed upon the judiciary. Section I.A argues that courts lack the ability to discern whether a practice is in fact central to or compelled by a claimant's religious beliefs. Section I.B contends that courts cannot apply either test without violating the prohibition against resolving theological disputes.

A. *The Limits of Judicial Capacity*

A primary difficulty with the centrality and compulsion tests is that neither standard can be meaningfully administered by the courts. Each test assumes that courts are capable of discerning whether a practice is either central to or compelled by a claimant's religious beliefs. Courts, however, lack the capacity to make such judgments, because there is no definitive authority against which to measure a claimant's assertions regarding centrality or compulsion.[166]

Imagine that a devout individual presented a RFRA claim before a court that adopted the centrality test. Unless the court accepts the practitioner's own evaluation of the centrality of the practice,[167] the court would have to consider extrinsic evidence to determine if the practice is, in fact, central to the claimant's religious beliefs. Similarly, if the court adopted the compulsion test, the court would need to consider evidence apart from the believer's own views to decide whether her faith compelled the practice in

166. *See* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination,* 67 B.U. L. Rev. 391, 405 (1987) (noting that courts lack "competence to choose between conflicting assertions of the content of religious doctrine").

167. *See* Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 457 (1988).

question. In short, unless courts are willing to defer to a believer's judgment regarding centrality or compulsion, they must appeal to some external source of authority to determine if a given religious practice is in fact central or compelled.

A fundamental problem arises, however, when courts search for a body of authority by which to gauge whether a claimant's religious practice is central or compelled. Neither religious texts, nor religious experts, nor even those in positions of spiritual leadership, can disprove the religious beliefs of an individual believer.

Courts sometimes make the mistake of accepting the testimony of other members of the claimant's faith, believing that such individuals can offer insights about the religious practice in question.[168] The religious views of other individuals, however, cannot disprove that the *claimant* believes the practice to be central or compelled.[169] The practice of religion, after all, is an intensely personal enterprise.[170] Individuals invariably form religious views that differ from those held by members of the same faith.[171] Because individuals develop personally tailored religious beliefs, the religious views of other believers cannot be used to contest the beliefs of a particular claimant.

Even an appeal to the "mainstream" view of members of the claimant's religion misses the essential point. The right to the free exercise of religion includes the right to develop viewpoints that

168. *See, e.g.*, Abdur-Rahman v. Michigan Dept. of Corrections, 65 F.3d 489, 492 (6th Cir. 1995) (finding that Friday services were not "fundamental" to the claimant's religion on the basis of a chaplain's testimony about the Islamic religion); Rhinehart v. Gomez, No. 93-CV-3747, 1995 WL 364339, at *5 (N.D. Cal. June 8, 1995) (rejecting a prisoner's objection to tuberculosis testing, on the basis of testimony from a Muslim authority).

169. *See* TRIBE, *supra* note 58, § 14-12, at 1249 ("When a claimant avers that a prohibition or requirement conflicts with his or her own faith, the appropriate inquiry may begin but cannot end by looking to the dogma of a religious tract or organization; the ultimate inquiry must look to the claimant's sincerity in stating that the conflict is indeed burdensome *for that individual.*").

170. *See generally* Note, *supra* note 10, at 1266-69.

171. *See* Ward v. Walsh, 1 F.3d 873, 878 (9th Cir. 1993) ("In religious matters, we take judicial notice of the fact that often the keenest disputes and the most lively intolerance exists among persons of the same general religious belief, who, however, are in disagreement as to what that faith requires in particular matters."); *see also* Laycock, *supra* note 140, at 1391 ("A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith, morals, and spirituality. . . . [T]he officially promulgated church doctrine, on which courts too often rely, is not a reliable indication of what the faithful believe. At best the officially promulgated doctrine of a large denomination represents the dominant or most commonly held view; it cannot safely be imputed to every believer or every affiliated congregation." (citation omitted)); Lupu, *supra* note 10, at 959 ("[T]he individualization of religion in the Court's free exercise decisions renders the concept of centrality even less useful; what is central to one observant may be peripheral to others, including some or all of the 'experts.' " (citation omitted)); Thomas E. Geyer, Comment, *Free Exercise Jurisprudence: A Comment on the Heightened Threshold and the Proposal of the "Burden Plus" Standard*, 50 OHIO ST. L.J. 1035, 1043 (1989) ("[A] burden to one believer may be trivial to another believer of the same faith.").

vary from those of other believers.[172] This right to form one's own religious beliefs would be circumscribed if courts could consider the subjective religious views of other individuals when addressing the avowed beliefs of a particular litigant.[173]

The Court's candid discussion of judicial limitations in *Thomas*[174] supports this conclusion. The lower court gave great weight to the testimony of another Jehovah's Witness, who expressed a view about working in an armaments factory that differed from that of the plaintiff.[175] The Supreme Court soundly rejected the notion that courts are allowed to consider the religious views of other believers. "Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."[176]

Besides an appeal to other members of the faith, alternative sources of evidence prove to be equally unhelpful. Scrutinizing the practice itself would be a fruitless exercise, because it is unclear what a "central" or "compelled" practice looks like, especially when one considers the religious diversity in our society.[177] Religious texts also provide an improper basis for contesting the views

172. *See* Note, *supra* note 10, at 1268-69 ("A proper respect for the value of individual identity underlying the free exercise clause should empower an individual with the right to originate religious claims as an expression of moral independence. This power encompasses the right to form, express, and revise religious conceptions. Objective determinations of religious burdens deviate from this vision because they undervalue the claims of atypical individuals — those who feel the weight of government intrusions differently and who adhere to certain religious practices more stringently than others. Because religious beliefs are so individualistic, free exercise jurisprudence must consider each person's particular conception of religious obligations and how they may be fulfilled. Individuals, even among those belonging to the same faith, may attribute varying degrees of sacredness to religious tenets." (citations omitted)).

173. *See Id.* at 1266.

174. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

175. *See* 450 U.S. at 715.

176. 450 U.S. at 715. This conclusion also seems to follow from the holding in *Frazee*. If a person need not be a member of a religious organization to enjoy the benefit of the Free Exercise Clause, then it stands to reason that the believer also need not conform to the views of other believers to share in the right to religious freedom. *See* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); *see also* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); Bowen v. Roy, 476 U.S. 693, 696 (1986) (addressing the petitioner's unique views regarding social security cards without considering the religious beliefs of other members of the Abeneki tribe).

177. Indeed, efforts to establish objective guidelines for what constitutes a "central" or "compelled" practice may violate constitutional boundaries. *See* Lupu, *supra* note 10, at 959 ("The idea [of centrality] cannot be employed without judicial standards concerning the meaning and significance of religious behavior, teachings, and phenomena. Any attempt to declare such standards, however, runs the usual and grave risk of bias toward Western, monotheistic religions . . . .").

of a claimant, given that scripture is susceptible to different interpretations.[178] The claimant's history of engaging in the practice is also of questionable value, given the possibility of sincere religious conversions.[179] Indeed, it appears that there is no source of authority by which to determine whether a particular practice is central or compelled, apart from the expressed views of the individual claimant. Without an external locus of authority, courts lack the capacity to decide whether the practice is, in fact, central or compelled.[180]

In contrast, courts are eminently capable of applying the religious motivation test. This standard requires courts to decide whether a practice is motivated by sincere religious beliefs.[181] Courts are routinely called upon to make determinations of motivation in other areas of law.[182] Issues often arise about a party's motivations, and the legal system presumes that courts are able to resolve such issues.[183] By focusing on an inquiry that is frequently

178. The sheer number of Christian denominations, for example, attests to the fact that followers of a common faith interpret scripture differently. A court cannot reject a RFRA claim based upon a passage of scripture, because the individual may accept a different understanding of the text, or may even reject the authority of a given passage of scripture entirely. In any event, courts lack the authority to interpret religious texts, and cannot require a claimant to accept an "orthodox" interpretation of scripture. For a discussion of Establishment Clause concerns, see *infra* section IV.B.

179. *See* Hobbie v. Unemployment Appeals Commn. of Fla., 480 U.S. 136, 144 (1987) ("In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so.").

180. At a more basic level, even if a court *could* determine whether the practice was central or compelled, religious practices that are not central or compelled are no less deserving of protection. Such practices form a valuable part of a believer's religious experience, and ought to receive protection irrespective of the theological views of the claimant. Interestingly enough, courts that adopt the centrality and compulsion tests fail to offer a rationale for leaving such practices vulnerable to state interference.

181. Granted, deciding whether a particular claimant is "sincere," and resolving whether a particular practice is "religious," are problematic inquiries. Such difficulties, however, are not unique to the motivation test. Under any of the three competing interpretations of the RFRA, courts must decide that the claimant is sincere, and that the conduct in question is, in fact, religious in nature. For a discussion of what constitutes a religion under the First Amendment and the RFRA, see sources cited *supra* note 20. For a discussion of the sincerity requirement, see TRIBE, *supra* note 58, § 14-12, at 1248-51.

182. *See, e.g.*, Civil Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C. § 13981 (1994) (protecting the civil rights of victims of gender-motivated violence); Smith v. Wade, 461 U.S. 30, 56 (1983) (allowing punitive damages under 42 U.S.C. § 1983 if an improper intent motivated the defendant's actions); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977) (scrutinizing the motivations of policymakers under the Equal Protection Clause); Deutsch v. United States, 67 F.3d 1080, 1086 (3rd Cir. 1995) (observing that the federal in forma pauperis statute requires courts to "engage in a subjective inquiry into the litigant's motivations at the time of the filing of the lawsuit to determine whether the action is an attempt to vex, injure or harass the defendant").

183. *See* Rouser v. White, 944 F. Supp. 1447, 1455 (E.D. Cal. 1996) ("[P]roving a requisite motive or mental state is hardly an unknown burden on plaintiffs. . . . The law frequently requires proof of a state of mind, and the fact that such proof is always circumstantial has not constituted an insurmountable barrier to conviction for specific intent crimes, or liability for malicious conduct. The issue [of religious motivation] is similar and should prove no more

raised in other legal disputes, the motivation standard allows courts to stay within the bounds of their judicial capacities.[184]

B. *The Limits of Judicial Authority*

In addition, the centrality test and the compulsion test violate the Constitution by requiring courts to resolve theological disputes.[185] Courts cannot decide whether a practice is central to or compelled by a litigant's religion without making a theological interpretation of the believer's faith. Courts exceed constitutional boundaries when they willingly engage in such doctrinal decisionmaking.

The centrality and compulsion tests require courts to make judgments about theological issues, as illustrated by the case of *Rhinehart v. Gomez*.[186] The plaintiff, a Muslim prisoner, objected to a required tuberculosis ("TB") test on religious grounds. After the prison officials forcibly administered the test, the plaintiff filed suit under the RFRA.

Applying a hybrid test that considered both centrality and compulsion, the court found no substantial burden on the plaintiff's religion.[187] The court justified its conclusion by appealing to the views of other followers of Islam. The court accepted the testimony of a local Muslim chaplain, who expressed the opinion that TB testing is consistent with the Islamic faith. The court also drew attention to the plaintiff's inability to cite Muslim authorities who shared his religious beliefs.[188] After noting that other courts had approved the TB testing of Muslim inmates,[189] the court concluded that the prisoner had failed to establish that TB testing "substantially bur-

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difficult than in those other instances." (construing the substantial burden requirement of the RFRA)).

184. For a brief discussion of how to establish religious motive, see *Rouser*, 944 F. Supp. at 1455 n.14.

185. *See* Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) ("[T]he decisive argument in favor of the generous definition of 'substantial burden,' it seems to us, is the undesirability of making judges arbiters of religious law, as required by the alternative approach[es]." (citations omitted)).

186. No. 93-CV-3747, 1995 WL 364339 (N.D. Cal. June 8, 1995).

187. *See Rhinehart*, 1995 WL 364339. Even if the Court had found a cognizable burden on the claimant's religion, the state might have been able to justify the TB testing under the compelling state interest test.

188. *See Rhinehart*, 1995 WL 364339, at *5.

189. *See Rhinehart*, 1995 WL 364339, at *5. The fact that other Muslim inmates had objected to TB tests casts into doubt the court's conclusion that the Muslim faith provides no basis for such objections. Again, the subjective religious views of other members of the plaintiff's faith ought not to have been considered at all. Yet, it is curious that a court would consider external evidence and then overlook the pattern of objections to TB testing brought by Muslim prisoners in other cases.

den[ed] his ability to exercise an *essential* element of his religion."[190]

Viewing a "substantial burden" in terms of central beliefs and religious compulsion, the court in *Rhinehart* entered the "thicket of theology."[191] Embroiled in the middle of a doctrinal dispute, the court threw the power of the state behind one party's interpretation of the Islamic faith. In essence, the court endorsed the chaplain's view as the "orthodox" Islamic perspective, while repudiating the theological convictions of the plaintiff as an aberrant interpretation of a common faith. Such theological involvement by a state official—an inevitable consequence of both the centrality test and the compulsion test—is inconsistent with a long line of cases that forbids courts from deciding questions of religious doctrine.[192]

Beginning with the seminal case of *Watson v. Jones,*[193] the Court has steadfastly refused to make judgments regarding theological issues. "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine . . . is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[194]

Subsequent cases reinforced the rule that judges may not take sides in a theological controversy.[195] In short, "[c]ourts are not ar-

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190. *Rhinehart,* 1995 WL 364339, at *5 (emphasis added).

191. The phrase is from Lupu, *supra* note 10, at 959.

192. *See id.* at 959 ("[A]ny imaginable process for resolving disputes over centrality creates the spectre of religious experts giving conflicting testimony about the significance of a religious practice, with the state's decisionmaker authoritatively choosing among them. A hoary and well-respected line of cases . . . strongly suggests that judicial resolution of theological controversy is both beyond judicial competence and out of constitutional bounds."); *see also* TRIBE, *supra* note 58, § 14-12, at 1244 ("[A]n intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty."); Berg, *supra* note 23, at 51-56 ("Unfortunately, it is often difficult for courts to calibrate effects on religious practice, because an important part of that calculus — how important is the practice to the believer or church? — is essentially a theological question beyond the competence or authority of judges. . . . [T]he 'command or prohibition' limit itself suffers from the same defect as did the Court's previous inquiries into the 'centrality' or 'importance' of a practice. It improperly requires courts to make 'theological' judgments about whether the particular conduct is religiously mandated or just religiously motivated." (citations omitted)); Lupu, *supra* note 166, at 406-07 ("[T]he constitutional evil to be avoided in all cases is judicial resolution of questions of religious doctrine and practice. . . .").

193. 80 U.S. (13 Wall.) 679 (1871).

194. 80 U.S. (13 Wall.) at 728. *Watson* involved a dispute over church property. The Court flatly rejected the invitation to decide which party followed the principles of the Presbyterian Church. *See* 80 U.S. (13 Wall.) at 728-29.

195. *See, e.g.,* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring))); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the

biters of scriptural interpretation."[196] Adopting one party's view of "centrality" or "compulsion" would violate both the Establishment and Free Exercise Clauses of the First Amendment: it would amount to a state sanction of one set of religious beliefs, and also would deprive the losing party of the right to exercise religion without governmental interference.[197] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[198]

Simply put, judges should not be permitted to dissect religious doctrine and determine the theological significance of a claimant's exercise of religion. The compulsion test and the centrality test require courts to transgress this limitation — courts must offer a definitive interpretation of religious doctrine whenever there is a dispute about whether a given practice is central or compelled. Such unsavory inquiries violate the rights of the individual believers and undermine the traditional prohibition against a judicial resolution of theological disputes.

In contrast, the religious motivation test allows courts to avoid such unpalatable inquiries. This standard requires courts to decide whether a practice is principally motivated by religious belief. Once a claimant demonstrates religious motivation, the court has no opportunity for further inquiries into the role of the practice

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centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); Jones v. Wolf, 443 U.S. 595, 602 (1979) ("Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."); Serbian E. Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 713 (1976) ("[R]eligious controversies are not the proper subject of civil court inquiry . . . ."); Maryland and Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367, 370 (1970) (Brennan, J., concurring) (stating that courts must resolve religious disputes "without the resolution of doctrinal questions and without extensive inquiry into religious polity"); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Meml. Presbyterian Church, 393 U.S. 440, 450 (1969) (holding that the First Amendment forbids courts from deciding "matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion"); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A., 344 U.S. 94, 116 (1952) (affirming the power of religious bodies "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1981) (noting that the judiciary is "ill-equipped to examine the breadth and content of an avowed religion").

196. *Thomas*, 450 U.S. at 716.

197. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.12, at 1242 (4th ed. 1991) ("[T]he government cannot declare which party is correct in matters of religion, for that would violate the principles of both religion clauses. A judicial declaration of such matters would simultaneously establish one religious view as correct for the organization while inhibiting the free exercise of the opposing belief.").

198. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

within the claimant's faith. The religious motivation test thus maintains fidelity to the Constitution by avoiding the "treacherous business"[199] of deciding the place of a religious practice in the lives of devout individuals.

CONCLUSION

Smith concluded that religious individuals must look to the political branches, and not to the Constitution, for protection from generally applicable laws that encroach upon religion. The political branches, in turn, soundly repudiated *Smith* and reinstated the compelling state interest test through the RFRA.

With broad remedial designs, Congress intended for the Religious Freedom Restoration Act to provide a bulwark of protection for religious liberty. Many courts, however, have failed to remain faithful to the laudable goals of the statute. Narrow interpretations of the substantial burden requirement undermine the ultimate purpose of the Act: to secure the inalienable right to the free exercise of religion.

The religious motivation test conforms with the sweeping language of the RFRA, with the intent of Congress as revealed in the legislative history, and with the directives of the Court in the pre-*Smith* case law. The motivation standard protects the exercise of religion without excluding any religious practice or religious group. This standard shows respect for the limitations placed upon the judiciary, and does not put courts in the position of resolving theological disputes. In short, the religious motivation test provides the best avenue for enhancing protection for the exercise of religion.

As Representative Solarz observed during consideration of the bill: "It would be tragic if the effort to overturn *Smith* resulted in Congressional inquisitions into, and determinations of, the content of religious law, or a narrow statutory definition of what is a 'religion' or a religious 'exercise.' "[200] It would be equally tragic if courts continued their inquisitions into religious law by limiting the RFRA to central and compelled practices.

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199. *See* TRIBE, *supra* note 58, § 14-12, at 1251 (noting that courts are "engaged in a treacherous business indeed when they try to assess the place that religion occupies in a person's life").

200. *Hearings on H.R. 2797*, *supra* note 6, at 130 (letter from Rep. Solarz to Rep. Don Edwards (June 22, 1992)).