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The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny

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I. Introduction

In *Cantwell v. Connecticut*,[1] the Supreme Court stated:

> The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect . . . freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.[2]

Cantwell enunciated two principles vital to free exercise jurisprudence. First, the Free Exercise Clause of the First Amendment applies equally to federal and state governments.[3] Second, the Constitution, through the First Amendment, limits the nature of the religious activity.[4] While the freedom to believe is capable of being protected absolutely, the freedom to act is only capable of being protected to the extent that society also remains protected.

In order to find the correct balance between religious action and the protection of society, the Free Exercise Clause requires that burdens on religious exercise be sufficiently justified.[5] A burden is "justified" when the

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1. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (finding a regulation that required a license to distribute religious material violated both the Free Exercise Clause and the Free Speech Clause of the First Amendment).

2. *Id.* at 303–04.

3. *Id.* at 303; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1182 (3d ed. 2006) ("The free exercise clause was first applied to the states through its incorporation into the due process clause of the Fourteenth Amendment in *Cantwell*.").

4. *See, e.g.*, *Cantwell*, 310 U.S. at 305 (explaining how solicitations that limit collection of funds, even for religious purposes, are constitutional).

5. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 506 (1985) ("No constitutional right is viewed as absolute—in each case a central issue is whether a sufficient justification exists for the challenged activity."); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (articulating that different constitutional claims can be subjected to varying levels of review); Timothy P. Loper, *Substantive Due Process and Discourse Ethics: Fundamental Rights Analysis*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 41, 49 (2006) (noting that "not all rights claims strengthen liberty overall by providing equality. Thus, the government must distinguish constitutionally protected, valid rights it cannot infringe

challenged law meets the level of constitutional scrutiny mandated by the Supreme Court.[6] If the law in question is a neutral law of general applicability, the Free Exercise Clause is violated unless the law passes rational basis review, a relatively permissive standard.[7] However, if the law in question is not neutral or of general applicability, the Free Exercise Clause is violated unless the law satisfies the compelling interest test, a rather restrictive standard.[8]

Congress, finding that courts should not distinguish between neutral laws of general applicability and laws that are not neutral or generally applicable, enacted the Religious Freedom Restoration Act of 1993 (RFRA).[9] Under the RFRA, all regulations—federal, state, and local—that substantially burdened a person's exercise of religion were subjected to the compelling interest test.[10] In *City of Boerne v. Flores*,[11] however, the Supreme Court held the RFRA unconstitutional as it applied to state and local governments.[12] While the Court did not address the RFRA's constitutionality as it applied to the federal government, subsequent developments indicate that the Court would uphold that application of the RFRA.[13]

Thus, after *Boerne*, the Free Exercise Clause seems not to apply equally to federal and state governments, at least not when neutral laws of general

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from constitutionally unprotected, invalid rights it can infringe").

6. *See* CHEMERINSKY, *supra* note 3, at 539 (describing how a court's application of scrutiny operates to protect individual liberties).

7. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990) (finding that application of the compelling interest test to neutral laws of general applicability would produce a "constitutional anomaly"); *see also* CHEMERINSKY, *supra* note 3, at 540 (explaining rational basis review).

8. *See* CHEMERINSKY, *supra* note 3, at 541–42 (explaining the compelling interest test).

9. *See* 42 U.S.C. § 2000bb(a)(5) (2000) ("[T]he compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.").

10. *See id.* § 2000bb-1(a), (b) (stating that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person" meets the requirements of the compelling interest test); Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2000bb-3(a), 1993 U.S.C.C.A.N. (107 Stat.) 1488, 1489, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (stating that the RFRA applies to "all Federal and State law").

11. *See Boerne*, 521 U.S. at 536 (addressing Congress's power to enact the RFRA).

12. *See id.* (finding that the RFRA's application to state and local governments was beyond Congress's legislative authority under § 5 of the Fourteenth Amendment).

13. *See* Gonzalez v. O Centro Espirita Uniao Do Vegetal, 546 U.S. 418, 439 (2006) (upholding a lower court's award of preliminary injunction upon finding the government had not shown a compelling governmental interest as required by the RFRA).

applicability are at issue.[14] State and local governments are only required to satisfy the constitutionally-mandated standard—rational basis review.[15] The federal government, however, is required to satisfy the RFRA-mandated standard of compelling interest.[16]

The existence of two standards makes certain applications of the RFRA unclear. This Note explores one circumstance in particular—when the federal government indirectly burdens a person's religious exercise. Part II begins with an examination of the background of this issue, including why rational basis review applies to state and local governments but the federal government is held to a second, more demanding standard. Part III presents the case *Village of Bensenville v. FAA*,[17] which introduces the problem of indirect burdens. In *Bensenville*, it is unclear whether the federal government or the local government is burdening religious exercise, therefore making it unclear whether rational basis review or the compelling interest test should apply.

Part IV begins this Note's attempt to clear the brush muddling the path towards resolution of this problem. Part IV.A looks to the plain meaning of the RFRA for an answer. This subpart recognizes that strict adherence to the RFRA's plain meaning would require courts to apply the federal standard to all indirect burdens, no matter how minimally the federal government is involved. This, however, would render the RFRA unconstitutional as violating *Boerne*. Then, Part IV.B analyzes whether never applying the RFRA to indirect burdens resolves the issue. After discussing the legislative history and intent behind recent amendments to the RFRA, however, subpart B concludes that such an interpretation is contrary to congressional intent, and therefore violates the avoidance doctrine. Finally, Part V looks to the state action doctrine as a middle path, examining whether the doctrine offers a method through which the RFRA can apply to indirect burdens without violating congressional intent or the Constitution. Part VI concludes by suggesting that state action is the best way forward.

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14. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (finding that the Free Exercise Clause applies equally to state and federal governments).

15. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990) (abandoning the compelling interest test as it applied to neutral laws of general applicability).

16. *See* 42 U.S.C. § 2000bb-1(a), (b) (2000) (stating that the federal government may not substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability," unless it meets the compelling interest test).

17. *See* Village of Bensenville v. FAA, 457 F.3d 52, 59–68 (D.C. Cir. 2006) (addressing whether the RFRA applied when the FAA was approving and funding a city support project that would substantially burden the claimant's religious exercise).

II. Background on the Levels of Scrutiny Applied in the Free Exercise Context

The Free Exercise Clause of the Constitution declares that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[18] As interpreted, the Clause requires absolute protection of religious thoughts and beliefs.[19] It does not, however, prohibit the state from validly regulating religious conduct.[20] Whether the state has "validly" regulated religious conduct often depends on what level of constitutional scrutiny applies to the rule in question.[21] Thus, the level of scrutiny can be thought of as the constitutional floor, the minimum amount of protection an individual must receive under the Constitution.[22]

Prior to 1990, the Supreme Court applied the compelling interest test, also known as strict scrutiny, to all cases where religious exercise was burdened.[23] Under the compelling interest test, a court will uphold a law if it is the least restrictive means of furthering a compelling or vital governmental interest.[24] In

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18. U.S. CONST. amend. I.

19. *See, e.g., Smith*, 494 U.S. at 877 (observing that the First Amendment excludes all governmental regulation of "the right to believe whatever religious doctrine one desires"); Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("[T]he Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs."); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (stating that the freedom to believe is absolute).

20. *See, e.g., Smith*, 494 U.S. at 877–78 (noting that the exercise of religion often involves physical acts that are not absolutely protected); *Sherbert*, 374 U.S. at 402–03 (stating that certain overt acts prompted by religious beliefs are not entirely protected from legislative restrictions); *Cantwell*, 310 U.S. at 303–04 (stating that the freedom to act is not absolute).

21. *See* CHEMERINSKY, *supra* note 3, at 539 ("In constitutional litigation concerning individuals rights . . . the outcome often very much depends on the level of scrutiny used."); Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "strict in theory and fatal in fact").

22. *See, e.g.*, Harvard Law Ass'n, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1334 (1989) ("[F]ederal law sets a minimum floor of rights below which the state courts cannot slip.").

23. *See* CHEMERINSKY, *supra* note 3, at 1247–48 (describing the level of scrutiny that applied to free exercise cases before *Smith*); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 73 (1993) ("Prior to *Smith* the prevailing view was that the Free Exercise Clause required the government to show a compelling state interest to justify an intrusion on religious freedom.").

24. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (noting that strict scrutiny requires "narrowly tailored measures that further compelling governmental interests"); Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (stating that strict scrutiny requires more than mere "relation to a State's legitimate interest"); Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("[In] highly sensitive constitutional area[s], only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.").

1990, in *Employment Division v. Smith*, the Court lowered the level of scrutiny used for neutral laws of general applicability.[25] The Court found it was inappropriate to apply the compelling interest test to challenges against "broad proscriptions that were not enacted with religion in mind and that [did] not mention or appear to concern religion, but that nevertheless happen[ed] to place substantial burdens on an individual's religious exercise."[26] Justice Scalia, writing for the majority, reasoned:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious belief, except where the State's interest is "compelling" . . . contradicts both constitutional tradition and common sense.[27]

After *Smith*, neutral laws of general applicability that burdened religious practice had to only meet rational basis review.[28] Under rational basis review, a law will be upheld if it is rationally related to a legitimate government purpose.[29]

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25. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990) (abandoning the compelling interest test and applying rational basis review to neutral laws of general applicability that burden a person's religious exercise). In *Smith*, two drug rehabilitation counselors ingested peyote for sacramental use at a Native American religious ceremony. *Id.* at 874. Because peyote was illegal under state law, the counselors were fired for violating a condition of their employment which prohibited illegal drug use. *Id.* at 875. Further, the counselors were denied state unemployment benefits because of an exception that disallowed applicants who were discharged for work-related "misconduct." *Id.* at 874. The Supreme Court declined to apply the compelling interest test to the state law and upheld the denial of benefits. *Id.* at 883–86. The Court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879.

26. Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 926 (1998); *see also* Church of Lukumi Babalu Aye, Inc. v. City of Haileah, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649–50 (10th Cir. 2006) ("A law is neutral so long as its object is something other than the infringement or restriction of religious practices.").

27. *Smith*, 494 U.S. at 885.

28. *See* S. REP. NO. 103-111, at 7–8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 (stating that *Smith*'s effect was "to hold laws of general applicability that operate to burden religious practice to the lowest level of scrutiny employed by the courts: the rational relationship test").

29. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (stating that rational basis review requires a showing that the burden is "rationally related to a legitimate state interest"); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959) (stating that rational basis review is

Smith was met with enormous criticism. Congress seemed to agree that *Smith* dramatically weakened the constitutional protection for freedom of religion.[30] In direct response to *Smith*, Congress passed the RFRA in 1993 with nearly unanimous support in both the House and the Senate.[31]

The RFRA operates under two assumptions. First, "laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[32] Second, "governments should not substantially burden religious exercise without compelling justification."[33] Based on these assumptions, the RFRA dictates that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability"[34] unless application of the burden "is the least restrictive means of furthering [a] compelling governmental interest."[35]

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satisfied "if any state of facts reasonably can be conceived that would sustain [the burden]"); Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

30. *See* 42 U.S.C. § 2000bb(a)(4) (2000) (finding that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion"); S. REP. NO. 103-111, at 8 (stating that *Smith* "created a climate in which the free exercise of religion was jeopardized"). *Compare* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848 (1992) (asserting that *Smith* involves "the near total loss of any substantive right to practice religion"), *and* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 232 (1991) ("*Smith* reaches a low point in modern constitutional protection under the Free Exercise Clause."), *with* CHEMERINSKY, *supra* note 3, at 1259–60 ("[I]t can be argued that *Smith* simply changed the doctrine of the free exercise to reflect the actual pattern of decisions."), *and* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Prospective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (arguing that the First Amendment does not create a right of religious exemptions), *and* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308 (1991) (defending "*Smith*'s rejection of the constitutionally compelled free exercise exemption").

31. 42 U.S.C. §§ 2000bb–2000bb-4 (2000); *see also* 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993) (reporting the Senate vote as 97-3); 139 CONG. REC. H2363 (daily ed. May 11, 1993) (reporting the House vote as unanimous).

32. 42 U.S.C. § 2000bb(a)(2) (2000).

33. *Id.* § 2000bb(a)(3).

34. *Id.* § 2000bb-1(a).

35. *Id.* § 2000bb-1(b)(2). Courts have interpreted the RFRA to require a two-step analysis. *See, e.g.*, United States v. Winddancer, 435 F. Supp. 2d 687, 692 (M.D. Tenn. 2006). In *Winddancer*, the court stated:

> Under the RFRA, as in the compelling interest test, the [claimant] bears the initial burden to demonstrate a sincere religious belief that has been substantially burdened by the state. Once the [claimant] has made that showing, the burden shifts to the state to demonstrate that the challenged regulation furthers a compelling state interest by the least restrictive means.

Id.

As originally defined in the Act, "government" is "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State,"[36] and "exercise of religion" is "the exercise of religion under the First Amendment to the Constitution."[37] While Congress did not define "substantial burden" in the RFRA, the Act's legislative history indicates that the term is to be interpreted through pre-*Smith* case law.[38]

The RFRA was greeted with much support, yet even some supporters of the Act questioned its constitutional validity.[39] At bottom, it was not obvious "that Congress had the power to impose upon the states a view of the Free Exercise Clause that the Supreme Court ha[d] explicitly rejected."[40]

In *City of Boerne v. Flores*, the Supreme Court considered Congress's power to enact the RFRA.[41] The *Boerne* Court held that Congress's power under Section 5 extended "only to enforcing the provisions of the Fourteenth Amendment."[42] Further, the Court ruled that this enforcement power was remedial, meaning Congress could only enforce the Clause by responding to or preventing constitutional violations.[43] Applying this interpretation to the

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36. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2000bb-2(1), 1993 U.S.C.C.A.N. (107 Stat.) 1488, 1489, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

37. *Id.* § 2000 bb-2(4).

38. *See* H.R. REP. NO. 103-88, at 6–7 (1993) ("It is the Committee's expectation that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened."); S. REP. NO. 103-88, at 9 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 ("Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act.").

39. *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 40 (1995) (arguing that "[the] RFRA exceeds the power of Congress and should be declared unconstitutional in its application to state and local governmental practices"); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 284–322 (1994) (questioning whether the RFRA violates the Establishment Clause of the First Amendment or exceeds Congress's enforcement power under Section 5 of the Fourteenth Amendment); Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1, 66 (1993) (concluding that an analysis of the issues involving constitutionality of the RFRA yields "pessimistic results").

40. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 275 (1993).

41. City of Boerne v. Flores, 521 U.S. 507, 529–36 (1997) (considering whether the RFRA was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment).

42. *Id.* at 519.

43. *Id.* (reasoning that measures that "remedy or prevent unconstitutional actions" were

RFRA, the Court found that the Act was "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior."[44] Rather, the Court found that the RFRA was an attempt to proscribe prospective state conduct that the Fourteenth Amendment itself did not prohibit.[45] Therefore, the Court held that Congress exceeded its Section 5 enforcement power in applying the Act to the states and struck down the RFRA as it applied to state and local governments.[46]

It is important to note the Court's concern with federalism; rather than striking the Act on more narrow grounds,[47] the *Boerne* Court adopted a broad version of judicial supremacy.[48] For example, the Court stated that "Congress does not enforce a constitutional right by changing what the right is."[49] As Professor Mark Tushnet points out, "[t]he very use of the word 'changing' signals the Court's commitment to its theory of judicial supremacy, for Congress can change a right only if its prior specification by the Supreme Court has controlling force."[50] Although laws enacted by Congress generally receive a presumption of validity, without such "prior specification," the Court ruled that Congress will receive no such deference.[51] As Justice Kennedy, writing for the majority, stated, "[w]here the provisions of [a] federal statute . . . are beyond congressional authority, it is the Court's precedent, not [the statute], which must control."[52]

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valid exercises of Congress's Section 5 power). Alternatively, a substantive interpretation of Congress's Section 5 power would allow Congress's enforcement power to include the power "to specify the substantive rights protected by the guarantees against abridgments of privileges and immunities, depreciation without due process, or denials of equal protection." Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 945 (1998).

44. *Boerne*, 521 U.S. at 532.

45. *See id.* at 534 ("Laws valid under *Smith* would fall under [the] RFRA without regard to whether they had the object of stifling or punishing free exercise.").

46. *See id.* at 536 (stating that the "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance").

47. *See* Tushnet, *supra* note 43, at 946–48 (arguing that the Court could have struck the RFRA "on the relatively narrow ground that Congress directed the courts to apply a standard that, according to this reading of *Smith*, courts of the sort created by Article III simply cannot apply").

48. *See id.* at 948 (explaining how the *Boerne* Court created a test, the congruence and proportionality test, and then used it to invalidate the RFRA).

49. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

50. Tushnet, *supra* note 43, at 945.

51. *See Boerne*, 521 U.S. at 535–36 (stating that the federal statute will control unless it conflicts with the Court's precedent).

52. *Id.* at 536.

Boerne's reasoning did not speak to the constitutionality of the RFRA as it applied to the federal government, and quick action was taken to ensure the decision would not foreclose the Act's application to the federal government.[53] The Department of Justice argued that because *Boerne* only discussed Congress's power under Section 5 of the Fourteenth Amendment, the federal portion remained in effect.[54] As applied to the federal government, the RFRA was enacted "pursuant to its substantive Article I powers coupled with its broad authority under the Necessary and Proper Clause."[55] Based on this argument, several lower court decisions post-*Boerne* upheld the RFRA's constitutionality as applied to the federal government.[56] In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA),[57] which removed all references to state and local governments,[58] explicitly making clear that the unconstitutional portions of the RFRA were severable from the constitutional portions still applicable to the federal government.[59] In essence, the RLUIPA amended the RFRA in order to reflect the Court's holding in *Boerne*.

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53. *See* Aurora R. Bearse, Note, *RFRA: Is It Necessary? Is It Proper?*, 50 RUTGERS L. REV. 1045, 1056 (1998) (describing the efforts made to preserve the RFRA's applicability to the federal government).

54. *See* United States' Motion to Amend Opinion, United States v. Grant, 117 F.3d 788 (5th Cir. 1997) (No. 96-10981) (arguing that a footnote contained within the *Grant* opinion, stating that *Boerne* invalidated the RFRA entirely, should be amended to reflect the Supreme Court's actual holding in the decision).

55. *Id.* The Fifth Circuit accepted the Government's argument and agreed to alter the footnote. *See* Bearse, *supra* note 53, at 1056–57 (describing the court's "subsequent, albeit grudging, acceptance").

56. *See* Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (finding the RFRA constitutional as applied to federal law); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (same); Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001) (same); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 833–34 (9th Cir. 1999) (same); *In re* Bruce Young, 141 F.3d 854 (8th Cir. 1998) (same).

57. *See* 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

58. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 2000 U.S.C.C.A.N. (114 Stat.) 806 (removing all references to the state and local governments). The RLUIPA also amends the RFRA's definition of exercise of religion to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* Courts have interpreted this amendment broadly. *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 663 (10th Cir. 2006) ("[W]hatever the substantial burden test required prior to the passage of the RLUIPA, the statute substantially modified and relaxed the definition of religious exercise."); Kikumura v. Hurley, 242 F.3d 950, 960–61 (10th Cir. 2006) ("[A] religious exercise need not be mandatory for it to be protected under RFRA.").

59. *See Kikumura*, 242 F.3d at 959–60 (discussing the RFRA's applicability to the federal government). The court stated:

> The invalid portion of RFRA does not alter the structure of RFRA, it simply prevents the application of the statute to a certain class of defendants. Thus, RFRA as applied to the federal government is severable from the portion of RFRA

Six years later, the Supreme Court applied the RFRA to the Controlled Substances Act[60] in *Gonzalez v. O Centro Espirita Uniao Do Vegetal*.[61] Although the Court did not reach the question of constitutionality, the Court upheld a lower court's use of the RFRA.[62] This suggests the RFRA, in at least some form (such as its post-RLUIPA amended form), is applicable and constitutional as applied to the federal government.

III. Village of Bensenville v. FAA*: How Should the RFRA Apply to Indirect Burdens?*

Upon reflection of the current state of Free Exercise Clause jurisprudence, Professor Erwin Chemerinsky posed the question: "Assuming the [RFRA] is constitutional and that the [Act] remains in force as to the federal government, what is the current law?"[63] Professor Chemerinsky answers:

> For state and local governments, *Smith* is controlling, and the free exercise clause cannot be used to challenge neutral laws of general applicability. As to the federal government, although *Smith* defines [the constitutional floor of] the free exercise clause, the [RFRA] requires that federal actions burdening religion meet the compelling interest test.[64]

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declared unconstitutional in *Flores*, and independently remains applicable to federal officials.

Id.

60. 21 U.S.C. § 801 (2000 and Supp. I).

61. *See* Gonzalez v. O Centro Espirita Uniao Do Vegetal, 546 U.S. 418, 439 (2006) (finding the federal government had not carried its burden under the RFRA where it failed to show a compelling governmental interest in refusing to except a religious sect from prosecution for the sect's religious use of an illegal drug). In *O Centro*, a religious sect received communion by drinking sacramental tea brewed from plants containing a hallucinogen regulated under the Controlled Substances Act. *Id.* at 423. Relying on the RFRA, the sect sued to block enforcement of the Act and moved for a preliminary injunction. *Id.* After the government "conceded that the challenged application of the . . . Act would substantially burden a sincere exercise of religion by the [sect]," the government argued that this burden did not violate the RFRA. *Id.* at 426. The government then put forth three compelling governmental interests: "protecting the health and safety of [sect] members, preventing the diversion of [the hallucinogen] from the church to recreational users, and complying with the 1971 United Nations Convention on Psychotropic Substances." *Id.* The Court then applied the compelling interest test dictated by the RFRA, and found that the government "failed to demonstrate . . . a compelling interest in barring the [sect's] sacramental use of [the hallucinogen]." *Id.* at 439.

62. *See id.* at 439 (upholding the lower court's finding that the federal government did not satisfy RFRA's compelling interest prong).

63. CHEMERINSKY, *supra* note 3, at 1265.

64. *Id.*

This answer does not seem to fully address the question. Surely there are instances when a burden is attributable to both the federal and state (or local) governments.[65] When this situation arises, what constitutional standard applies?

The first case to address this issue was *Village of Bensenville v. FAA*.[66] In *Bensenville*, the City of Chicago submitted a plan to the Federal Aviation Administration (FAA) to modernize O'Hare International Airport.[67] Although O'Hare was once the busiest airport in the world, massive delays have plagued the hub in recent years,[68] thereby causing inefficiencies throughout the nation's air transportation system and forcing the FAA to impose artificial flight restrictions.[69] In order to reduce delays and have the flight restrictions lifted, the city planned to reconfigure three of the airport's seven existing runways and add an eighth runway.[70] To effectuate the plan, the city needed to acquire 440

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65. *See* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 80–81 (1998) (arguing that federalism "no longer divides power in any meaningful way," and therefore "becomes a serious structural threat to liberty"). Professor Laycock further stated:

> A religious practice, however important to the believer, may be forbidden by each of the following: an act of Congress, a regulation of a federal agency, an act of a state legislature, a regulation of a state agency, an act of a county board or a county agency, an act of a city council or a city agency, an act of a special purpose district, a state court exercising common law powers, or a federal court sitting in diversity and predicting common law developments. We have created thousands of regulatory bodies with overlapping authority, any one of which can suppress liberty.

Id. at 81.

66. *See* Village of Bensenville v. FAA, 457 F.3d 52, 59–68 (D.C. Cir. 2006) (addressing whether the RFRA applied when the FAA was approving and funding a city airport project that would substantially burden the claimant's religious exercise).

67. *See id.* at 58 (stating that the city submitted the plan for FAA review).

68. *See id.* at 57 (commenting on the airport's shortcomings in recent years); *see also* Brief for the Respondent at 4, Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. Apr. 13, 2006) (No. 05-1383) ("By 2003, 39 percent of all O'Hare arrivals were delayed, with an average of 492 delays per day and an average 57 minutes delay per aircraft.").

69. *See Bensenville*, 457 F.3d at 58 (stating that the delays were "interfering with O'Hare's role as a major connecting hub"); *see also* Brief for the Intervenor at 4, *Bensenville*, 457 F.3d 52 (No. 05-1383) (stating that O'Hare has been subject to "extraordinary FAA orders limiting the number of flights" since 2004).

70. *See Bensenville*, 457 F.3d at 58 (describing the city's plan); *see also* 49 U.S.C. § 47101(a)(9) (2000) ("[A]rtifical restraints on airport capacity are not in the public interest."); Brief for the Respondent, *supra* note 68, at 4 (explaining how the triangular configuration of O'Hare's runways created dependencies that severely constrained the Airport's ability to move large volumes of traffic); Brief for the Intervenor, *supra* note 69, at 4 (stating that the flight restrictions harm local economy and are contrary to the congressionally determined "public interest").

acres of land, a portion of which included a cemetery in the Village of Bensenville.[71]

The village objected to the relocation of the cemetery and the excavation of the bodies resting there.[72] The petitioners claimed that "the relocation of the cemeter[y] would substantially burden their exercise of religion because of their belief in the physical resurrection of the bodies of Christian believers."[73] Because the federal government was operating under federal law, the Airport and Airway Improvement Act,[74] the petitioners argued that the RFRA applied.[75] Under the RFRA, petitioners argued, the FAA could not approve of the city's design nor fund any portion of the project without first demonstrating that there was a compelling interest and that the proposed plan was the least restrictive way to further that interest.[76]

The City of Chicago, as intervenor, argued that the RFRA did not apply because the petitioner's burden could not be attributable to the FAA.[77] Rather, the city and the city alone caused the burden.[78] The city conceded that under the RFRA's amended definition of government, the Act clearly bound the FAA, an agency of the United States.[79] Equally clear after *Boerne* however, the City of Chicago was not bound by the Act.[80] Therefore, the city argued,

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71. *See Bensenville*, 457 F.3d at 58 (stating that the plan would require the city to acquire 440 acres of adjacent property).

72. *See id.* at 59 (stating that "members of St. Johannes Church and descendants of those buried at the cemeteries" objected to the relocation).

73. *Id.*

74. *See* 49 U.S.C. §§ 47101–47142 (2000) (encouraging airport development through public funding).

75. *See* Brief for the Petitioner at 23, *Bensenville*, 457 F.3d 52 (No. 05-1383) (arguing that under the RFRA's plain terms and subsequent case law, the RFRA would apply to this case); *see also* 42 U.S.C. § 2000bb-3(a) (2000) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.").

76. *See* Brief for the Petitioner, *supra* note 75, at 4–7 (No. 05-1383) (arguing that the FAA failed to show that the plan was narrowly tailored because it failed to analyze alternative plans).

77. *See* Village of Bensenville v. FAA, 457 F.3d 52, 61 (D.C. Cir. 2006) ("The City . . . contends that the relocation of the cemetery does not implicate RFRA because the City, not the FAA, is responsible for the imposition of the claimed burden on religious exercise.").

78. *See* Brief for the Intervenor, *supra* note 69, at 14 (stating that the city, as airport operator, was responsible for all burdens). The city responded: "The 'burdens' about which petitioners complain will be imposed by Chicago, not the FAA. The plan itself—including the basic design, location, and policy preferences it reflects—is Chicago's alone. More important, the cemetery will be acquired and the graves relocated by Chicago alone." *Id.*

79. *See Bensenville*, 457 F.3d at 60 (stating that the FAA is "undeniably" an agency of the United States for purposes of the RFRA).

80. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (striking down the RFRA as it

because it was not bound by the RFRA and because the FAA did not cause the burden, the RFRA did not apply to the case.[81]

Bensenville is important for at least three reasons. First, the case presents the issue—whether the RFRA applies when the federal government causes an "indirect burden" on a person's free exercise of religion. For this Note's purposes, an indirect burden is defined as a substantial burden that, although not inflicted directly by the federal government, can be attributed, at least to some extent, to the federal government's involvement in a state or local government's project. The FAA's role in *Bensenville* creates an indirect burden because, to simplify, the FAA is approving and providing funding for a plan that, if implemented by the city, will (allegedly) burden the petitioner's exercise of religion.

Second, this fact pattern can be easily changed to illustrate how the problem addressed in this Note could arise in different contexts. For example, if the FAA was working with the city to develop, fund, and implement the plan, the problem addressed in this Note would apply. Likewise, if a private party owned and operated the airport rather than the city, the problem addressed in this Note would apply. This alternative is particularly disturbing because the Constitution does not bind private parties in the first instance.[82]

Finally, *Bensenville* is important because the majority and the dissent agree that, at some point, the federal government's involvement in the city's plan would trigger the RFRA.[83] Neither is willing to say that the RFRA always applies to indirect burdens or that the RFRA never applies to indirect burdens (although these arguments can be made, and this Note will illustrate why they are wrong). What the majority and dissent disagree over is how the court can evaluate whether an indirect burden triggers the RFRA.[84]

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applies to state and local and governments).

81. *See* Brief for the Intervenor, *supra* note 69, at 15 (describing the FAA's regulatory role as "fatal" to the RFRA claim).

82. *See* CHEMERINSKY, *supra* note 3, at 507 ("The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government.").

83. *See Bensenville*, 457 F.3d at 60 (stating that because the FAA falls within the RFRA's definition of "government," the FAA is bound by the RFRA); *id.* at 74 (Griffin, J., concurring in part and dissenting in part) ("RFRA's substantial reach encompasses . . . the FAA.").

84. *Compare id.* at 60 (stating that the RFRA is implicated when the FAA's action can be considered the "source" of the burden), *with id.* at 74 (Griffin, J., concurring in part and dissenting in part) (stating that the RFRA is implicated where "the party being challenged is the federal government and the action at issue is the implementation of federal law").

IV. When Does the RFRA Apply? Employing Tools of Statutory Interpretation

Typically, when a court interprets a statute, it begins with "the understanding that Congress says in a statute what it means and means in a statute what it says there."[85] If, however, a plain meaning interpretation would lead to an unconstitutional result, a court will often employ the avoidance canon.[86] One of the first articulations of the avoidance canon occurred in *Crowell v. Benson*,[87] a case involving a constitutional challenge to a federal workers' compensation statute.[88] Interpreting the statute in order to avoid constitutional infirmity, Chief Justice Hughes, writing for the majority, stated:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[89]

There are two versions of the avoidance canon: a broad version and a narrow version.[90] The broad version allows a court to "focus[] on doubts rather

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85. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)); *see, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) ("The starting point for our interpretation of a statute is always its language."); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."). Further, if "the statutory language is unambiguous and the statutory scheme is coherent and consistent," a court's inquiry must "cease." *Id.*

86. *See* Philip P. Frickey, *Getting From Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation*, 93 CA. L. REV. 397, 399 (2005) ("[T]he familiar canon of statutory interpretation [states] that a serious constitutional challenge to a statute should be avoided if the statute can plausibly be construed in a manner that makes the constitutional question disappear."). This canon is corollary to the "most fundamental canon" that courts "should not decide a constitutional issue if there is some plausible way to avoid it." *Id.*

87. Crowell v. Benson, 285 U.S. 22 (1931).

88. *See id.* at 63 (construing a statute to find Congress intended to have unconstitutional provisions severed and terms interpreted to avoid otherwise unconstitutional implications). For a full discussion on the avoidance canon in the context of separation of powers controversies, see generally Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995).

89. *Crowell*, 285 U.S. at 62.

90. *See* Murchison, *supra* note 88, at 91 (describing the narrow and broad versions of the avoidance canon). "The narrow version states that 'if one permissible reading (of a statute) will be constitutional and another will not be, the former must be chosen.'" *Id.* (citing HENRY J. FRIENDLY, BENCHMARKS 210 (1967)).

than certainty about the constitutionality of the statute."[91] Through the broad version, "where an otherwise acceptable construction of a statute . . . would cause serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[92]

Employing basic rules of statutory interpretation, subpart A begins with an investigation into the RFRA's plain meaning. Upon finding a plain meaning application would likely lead to unconstitutional results, subpart B begins with an analysis of Congress's intent. Upon finding that Congress intended courts to recognize exceptions to the RFRA, section B.2 analyzes whether a refusal to apply the RFRA to indirect burdens would fare a better result. Unfortunately, while the result is clearly constitutional, this Note finds it is also clearly contrary to congressional intent.

A. Plain Meaning—Always Applying the RFRA to Indirect Burdens—Violates the Constitution

1. Plain Meaning of the RFRA

A court applying the RFRA according to its plain language could reasonably conclude that the RFRA requires application whenever the federal government is in the vicinity.[93] As discussed in Part II, the RLUIPA amended the RFRA to reflect the RFRA's compliance with the Supreme Court's holding in *Boerne*.[94] In order to sever the unconstitutional aspects of the Act, Congress amended four sections of the RFRA.[95] First, Congress amended the RFRA's applicability,[96] deleting the phrase "and State" in order to limit its application

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91. *Id.*

92. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) (citing DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

93. *See* 42 U.S.C. § 2000bb(b)(1) (2000) (guaranteeing the RFRA's application in "all cases where free exercise of religion is substantially burdened"); *see also* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (construing the RFRA to cover all governmental action, apply to every governmental agency, and apply to all federal and state law).

94. *See supra* notes 57–59 and accompanying text (stating that the RLUIPA amendments removed all references to state government and enhanced the definition of "exercise of religion").

95. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7(a), (b), 2000 U.S.C.C.A.N. (114 Stat.) 806 (deleting all references to state and local government and amending the definition of "exercise of religion").

96. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2000bb-3(a), 1993 U.S.C.C.A.N. (107 Stat.) 1488, 1489, *invalidated by* City of Boerne v. Flores, 521 U.S.

"to all Federal law, and the implementation of that law, whether statutory or otherwise."[97]

Next, the RFRA's definition of government was amended to read "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity."[98] Additionally, Congress amended "covered entity" to mean "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States."[99] Effectively, these two amendments modify the term "government" in the RFRA to mean "federal government." Accordingly, under the amended language, the RFRA dictates that the "[federal] government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the federal government demonstrates that application of the burden to the person "is the least restrictive means of furthering that compelling governmental interest."[100]

The final amendment is by far the most momentous. Originally, Congress defined the term "exercise of religion" as "the exercise of religion under the First Amendment of the Constitution."[101] This definition proved to be problematic because the First Amendment never defines exercise of religion.[102] Further, the Court has avoided formulating a definition because it is "not within the judicial ken to question the centrality of particular beliefs or practices to a faith."[103]

In *Smith*, Justice Scalia stated that any effort to determine centrality would conflict with the fundamental religion clause principle that courts cannot assess the merits of religious beliefs; after all, how could a court "contradict a believer's assertion that a particular act is 'central' to his personal faith?"[104]

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507 (1997) (making the RFRA applicable to "all Federal and State law").

97. 42 U.S.C. § 2000bb-3(a) (2000).

98. *Id.* § 2000bb-2(1).

99. *Id.* § 2000bb-2(2).

100. *Id.* §§ 2000bb-1(a), (b)(2).

101. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2000bb-2(4), 1993 U.S.C.C.A.N. (107 Stat.) 1488, 1489, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

102. *See* U.S. CONST. amend. I (prohibiting Congress from abridging certain liberties, without defining what those liberties entail). The entire Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

103. Employment Div. v. Smith, 494 U.S. 872, 887 (1990) (citing Hernandez v. CIR, 490 U.S. 680, 699 (1989)); *see also* CHEMERINSKY, *supra* note 3, at 1187–92 (explaining why exercise of religion is difficult to define, and how the Supreme Court has approached the issue).

104. *Smith*, 494 U.S. at 887.

Answering that question "never," the Court reasoned that the compelling interest standard would have to be applied to every religious practice, not merely to those central to an individual's belief system.[105] As discussed in Part II, the majority in *Boerne* could have struck the RFRA based on Justice Scalia's reasoning.[106] Thus, as an attempt to maintain the RFRA's constitutionality as it applied to the federal government, or perhaps as a way to address Justice Scalia's complaint, Congress amended its definition of exercise of religion to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[107]

Although the amended RFRA limits the Act's application to the federal government, the amended language does not illuminate whether or how the RFRA applies to indirect burdens. After taking all four amendments into account, the RFRA's compelling interest test seems to apply whenever (1) the federal government is (2) acting under federal law (3) to substantially burden (4) a person's exercise of religion "whether or not that exercise of religion is compelled by, or central to, a system of religious belief."[108] In applying this plain meaning interpretation to *Bensenville*, it would appear the four requirements are met. The federal government, through the FAA, is acting under federal law, the Airport and Airway Improvement Act.[109] Further, petitioners argue that their exercise of religion (an incredibly easy standard to meet) will be substantially burdened by this federal action.[110]

It could be argued that the actual burden placed on petitioners by the FAA is not "substantial." However, the plain language of the Act does not speak to this particular objection. The Act only states that a substantial burden must be present; the RFRA does not comment on the allocation of burden between federal and nonfederal entities or suggest at what point the federal party should be alleviated from responsibility.[111] Further, the Act's broad language argues

105. *See Smith*, 494 U.S. at 888 ("If the 'compelling interest' test is to be applied at all, it must be applied across the board, to all actions thought to be religiously commanded.").

106. *See supra* notes 47–52 and accompanying text (arguing that the Court could have dispelled of the RFRA on more narrow grounds, but instead chose to adopt a broad version of judicial supremacy).

107. 42 U.S.C. § 2000bb-2(4) (2000).

108. *Id.*

109. *See supra* notes 74–76 and accompanying text (describing petitioners' argument for why the RFRA applied to the case).

110. *See supra* notes 72–74 and accompanying text (describing petitioners' argument for why the government's activity burdened their free exercise of religion).

111. *See* 42 U.S.C. § 2000bb(b)(2) (2000) (specifying that the RFRA provides "a claim or defense to persons whose religious exercise is substantially burdened by the government"); *Id.* § 2000bb-3 (specifying that the RFRA applies to all Federal law).

for the entertainment of such attenuation; the Act states that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise."[112]

2. *Always Applying the RFRA to Indirect Burdens Violates the Constitution*

As discussed in Part II, the *Boerne* Court struck down the RFRA as it applied to state and local governments.[113] The Court found that Congress could not pass a law under § 5 unless there was "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[114] The Court's application of the congruence and proportionality test engaged two distinct lines of inquiry.[115] The first inquiry requires a court to determine whether the measure actually prevents or remedies identifiable constitutional violations.[116] In *Boerne*, the Court found that the RFRA did not remedy or prevent constitutional violations.[117] Rather, the Act "intrud[ed] into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[118]

The second inquiry focuses on the balance between the magnitude of the remedy and the magnitude of the wrong to be addressed.[119] As the Court explained in *Boerne*, "[t]he appropriateness of remedial measures must be considered in light of the evil presented."[120] Thus, particularly disturbing to the

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112. *Id.* § 2000bb-3.

113. *See supra* notes 41–52 and accompanying text (describing the Supreme Court's reasoning in *Boerne*, including the formation and application of the congruence and proportionality test).

114. *See* City of Boerne v. Flores, 521 U.S. 507, 533 (1997); *see also* Jason P. Rubin, Note, *A Constitutional Education: Use of the Enforcement Clause to Limit the Unfortunate Effect of the Qualified Immunity Doctrine*, 6 U. PA. J. CONST. L. 163, 173 (2003) (explaining how the congruence and proportionality test limits Congress).

115. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1153–58 (2001) (describing how courts apply *Boerne*'s congruence and proportionality test).

116. *See Boerne*, 521 U.S. at 529–30 (determining that RFRA's legislative record identifies no unconstitutional conduct); *see also* Caminker, *supra* note 115, at 1153–54 (describing the first part of *Boerne*'s two-part congruence and proportionality test).

117. *See Boerne*, 521 U.S. at 532 ("RFRA cannot be considered remedial, preventative legislation.").

118. *Id.* at 534.

119. *See id.* at 530–32 (stating that the legislation must be "adapted to the mischief" the Fourteenth Amendment seeks to protect against); Caminker, *supra* note 115, at 1153–54 (describing the second part of *Boerne*'s two-part congruence and proportionality test).

120. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

Boerne Court was the fact that neutral laws of general applicability, valid under *Smith* (and thus, valid under the Constitution), would fail "without regard to whether they had the object of stifling or punishing free exercise."[121] The Court stated:

> The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.[122]

Based on the congruence and proportionality test presented in *Boerne*, and the Court's reasons for striking down portions of the RFRA, it is clear that applying the RFRA to certain indirect burdens would be unconstitutional. To illustrate, consider the *Bensenville* fact pattern with one slight change. In *Bensenville*, the City of Chicago, owner and operator of O'Hare Airport, was required to obtain approval from, and follow certain rules enforced by, the FAA, an agency of the United States, in order to receive federal funding for its airport modernization plan.[123] Suppose the city needed these funds to complete the project; without federal assistance, the project would fail. If the RFRA applied to the FAA, as indicated by the plain language of the Act, the FAA would have to show that the city's plan was the least restrictive means of furthering a compelling governmental interest. Assuming the FAA could not meet this burden, the FAA would not be able to approve the city's plan or supply federal funding. The city, dependent on the funds, would then be forced to forfeit the project entirely or comply with the RFRA in order to receive funding.

This situation is not uncommon. The Supreme Court's construction of the Constitution does not limit a government's ability to create mutually beneficial, interstate relationships.[124] Further, it is constitutionally permissible for

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121. *Id.* at 534.

122. *Id.* at 534–35.

123. *See* Village of Bensenville v. FAA, 457 F.3d 52, 57–58 (D.C. Cir. 2006) (describing the requirements an airport owner and operator must take in order to comply with the FAA in order to receive funding).

124. *See* New York v. O'Neill, 359 U.S. 1, 6 (1959) (rejecting an interpretation of the Constitution that would "reduce [it] to a rigid, detailed and niggardly code"). The Court further stated:

> The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety

Congress to urge cooperation with its federal schemes by attaching conditions to the receipt of federal funding.[125] This practice does not exceed Congress's Commerce Clause power because the receiving party theoretically can refuse the money if it does not like the condition.[126] As often noted, however, "the federal government's fiscal power is so great that a state's choice about taking the money is often no choice at all."[127]

Allowing the RFRA to apply to all indirect burdens would allow Congress to apply the RFRA to the states, thereby circumventing the congruence and proportionality requirement of § 5 of the Fourteenth Amendment. De facto application of the RFRA would allow intrusion into "the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[128] Because this intrusion would not serve to remedy or prevent any identifiable constitutional violations, the intrusion would be deemed disproportionate to any "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[129] Further, because the *Boerne* Court already ruled that Congress did not have the power to apply the RFRA to the states, this application would not be tolerated.[130] As Justice Kennedy stated, "it is the Court's precedent, not RFRA, which must control."[131]

> of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution.

Id.

125. *See* South Dakota v. Dole, 483 U.S. 203, 206–08 (1987) (upholding the constitutionality of a federal statute that withheld a percentage of federal highway funds from states that refused to raise their minimum drinking age to twenty-one years). In *Dole*, the Court announced a four-prong test to assess the constitutionality of spending conditions. *Id.* at 207–08. First, the spending must be in pursuit of the general welfare. *Id.* at 207. Second, Congress must condition the funds unambiguously to ensure recipients know the conditions of their acceptance. *Id.* Third, the spending must be reasonably related to a "federal interest in a particular program." *Id.* Finally, no other constitutional provision may provide a bar to the conditional grant of federal funds. *Id.* at 208.

126. *See id.* at 207 (requiring Congress to unambiguously announce the condition so that a state may knowingly exercise its choice to accept or reject the conditional funds).

127. Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 127 (2001).

128. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

129. *Id.*

130. *Id.* at 536 (concluding that while Congress is entitled to great deference, that deference will not be extended if Congress's legislation requires the Court to ignore its previous precedents); *see also Dole*, 483 U.S. at 208 (allowing Congress to condition its spending as long as the conditions do not violate any constitutional provisions).

131. *Boerne*, 521 U.S. at 536.

B. The Opposite of Plain Meaning—Never Applying the RFRA to Indirect Burdens—Is Contrary to Congressional Intent

1. Searching for Congressional Intent

Many scholars interpret the RFRA to expand rights beyond those that existed pre-*Smith*.[132] This interpretation can be traced back to a single section of the Act. Section 2000bb(b)(1) states: "the purpose[] of this chapter [is] to restore the compelling interest test as set forth in *Sherbert* and *Yoder*."[133]

Sherbert and *Yoder* "represent the zenith of free exercise jurisprudence, where religious plaintiffs who sought to have their individual claims balanced against government interests actually prevailed."[134] In reality, most plaintiffs who challenged laws of general applicability during *Sherbert*'s reign found little success.[135] Typically, the Court found ways to conclude that the free exercise claim was nonmeritorious.[136] After the last major free exercise victory

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132. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996) (stating that the RFRA endorses a specific version of pre-*Smith* law); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 224 (1994) (stating that the *Sherbert-Yoder* language signifies that the RFRA incorporates a highly protective standard).

133. *See* 42 U.S.C. § 2000bb(b)(1) (2000). For a brief discussion of *Wisconsin v. Yoder* and *Sherbert v. Verner*, see *infra* note 135.

134. H.R. REP. NO. 103-88, at 15 (1993); *see also* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 316 (1986) (describing the *Sherbert-Yoder* doctrine as "an approach" under which the Court "takes the language of the free exercise clause seriously and gives the clause great power").

135. *See* Prabha Sipi Bhandari, *The Failure of Equal Regard to Explain the* Sherbert *Quartet*, 72 N.Y.U. L. REV. 97, 98 n.5–6 (1997) (describing those cases that actually prevailed under the *Sherbert* regime). In fact, in the twenty-seven years that *Sherbert* governed free exercise cases, only five claimants prevailed at the Supreme Court. *See* Frazee v. Ill. Dep't of Employment Sec'y, 489 U.S. 829, 834 (1989) (holding the state's denial of unemployment benefits to a claimant whose religious scruples caused her to lose her job was unconstitutional); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) (same); Thomas v. Review Bd., 450 U.S. 707, 709 (1981) (same); Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (holding that Wisconsin's interest in requiring children to remain in school was not sufficiently compelling to exonerate the state from interfering with the religiously motivated desire of the Amish to shield their children from American schools); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina could not constitutionally deny unemployment compensation benefits to a Seventh-Day Adventist whose observance of Saturday as the Sabbath prevented her from accepting otherwise available employment).

136. *See* Ira C. Lupu, *Reconstructing the Establishment Clause*, 140 U. PA. L. REV. 555, 560 (1991) (stating that the Court would typically dismiss claims by finding "exceptions to the presumptively applicable free exercise standard or unjustifiably weak applications of it"); *see, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) (holding that a generally applicable sales tax could be levied on a religious organization without violating the Free Exercise Clause); Hernandez v. CIR, 490 U.S. 680, 683–84 (1989) (holding that payments

in 1972, "the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims . . . which were governed by clear precedent."[137]

Because *Sherbert* and *Yoder* represent such a protective standard, the RFRA's reference to those cases makes it very tempting to overstate Congress's intent.[138] However, the RFRA's text allows for an additional interpretation; this interpretation argues that Congress's intent was to erase *Smith* and nothing more. Section 2000bb(a)(5) of the RFRA states "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[139] While the *Sherbert-Yoder* language can be found in earlier versions of the Act, the "prior Federal court rulings" language was new to the enacted version.[140] Because post-*Yoder* federal court rulings "very much tended to dilute the rigors of *Yoder*," it can be argued that this change reflects an intentional weakening of the Act's standard on the part of Congress.[141] This reading is further supported by the Act's legislative history.

The *Sherbert-Yoder* language was a "major issue of contention" in Congress.[142] In fact, prior to the Act's introduction in Congress, the House

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made to the Church of Scientology's branch churches for auditing and training services were not deductible charitable contributions); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988) (holding that the Free Exercise Clause did not prohibit the government from harvesting timber and constructing roads in an area traditionally used for religious purposes by Native American tribes); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (holding that prison security policies were not violative of the Free Exercise Clause); Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (upholding the government's denial of tax benefits to a university, which, for religious reasons, prohibited interracial dating and marriage on campus); United States v. Lee, 455 U.S. 252, 261 (1982) (upholding the imposition of social security tax on an Amish employer).

137. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

138. *See* Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335, 357–58 (1994) ("All that can be said with confidence is that Congress has used the [*Sherbert-Yoder*] language . . . to enact a judicial outlook, an attitude, a mood."); Pepper, *supra* note 134, at 316 (stating that both *Sherbert* and *Yoder* "have dicta (in *Yoder* quite extensive dicta) which substantially undercut the articulated doctrine").

139. 42 U.S.C. § 2000(a)(5) (2000).

140. H.R. 2797, 102d Cong. (1991); *see also* Lupu, *supra* note 39, at 52–66 (analyzing an earlier version of the RFRA). The earlier version of the RFRA is printed as part of an appendix to that article. *Id.* at 87–89.

141. Lupu, *supra* note 40, at 274.

142. H.R. REP. NO. 103-88, at 14 (1993).

made several changes in order to resolve the ambiguity caused by the reference.[143] As the House Report states, the changes:

> [M]ake clear that the purpose of the statute is to "turn the clock back" to the day before *Smith* was decided. In interpreting the statute, courts are not to look exclusively to the compelling state interest test as applied in *Sherbert* and *Yoder*, but to all prior "Federal court cases."[144]

Although not all changes remained intact, it is clear the House's purpose in passing the RFRA was "not [to] reinstate the free exercise standard to the high water mark as found in *Sherbert* . . . and . . . *Yoder*, but merely [to] return the law to the state as it existed prior to *Smith*."[145]

Additionally, legislative history from the Senate similarly states that the RFRA's purpose was only to overturn the Supreme Court's decision in *Smith*, not to unsettle other areas of law.[146] The Act was not meant to "expand, contract, or alter the ability of the claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*."[147]

2. *Never Applying the RFRA to Indirect Burdens Is Contrary to Congressional Intent*

The Senate Judiciary Committee stated: "[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."[148] A footnote accompanying this language indicates that the Committee was referring to two Supreme Court cases: *Bowen v. Roy*[149] and *Lying v. Northwest Indian Cemetery*

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143. *Id.* at 14–16 (describing the changes that were made before the bill's introduction). These changes included the deletion of the *Sherbert-Yoder* language. *Id.*

144. *Id.* at 15 (citations omitted).

145. *Id.* at 14.

146. S. REP. NO. 103-111, at 12–13 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1902–03 (investigating the RFRA's impact on other areas of law, specifically how the RFRA would affect abortion and military rights).

147. *Id.*

148. *Id.* at 9.

149. *See* Bowen v. Roy, 476 U.S. 693, 699–700 (1986) (holding that the manner in which the federal government conducts its internal affairs does not create a cognizable burden under the Free Exercise Clause). In *Bowen*, parents of a Native American child were denied welfare benefits because they refused to obtain a social security number for the child, thereby violating a requirement of the welfare program. *Id.* at 695–96. The district court granted injunctive relief

Protective Ass'n.[150] This statement, viewed in context with surrounding language from the report, seems to stand for the proposition that exceptions available pre-*Smith* would remain available after enactment of the RFRA.[151] However, scholars argue that *Bowen* and *Lying* stood for much more than an isolated exception; the cases signaled the Court was ready to greatly "narrow the set of conflicts that [would] produce injury cognizable under the free exercise clause."[152]

Thus, the *Lying-Bowen* language, combined with Congress's intent to simply erase *Smith*,[153] may lead a court faced with an indirect burden on free exercise to dismiss the claim as an exception to the RFRA. This approach was advocated in *Bensenville*.[154] The city argued that the petitioners did not show "the kind of burden on religious exercise necessary to trigger strict scrutiny under the statute."[155] Instead, the city described indirect burdens as those imposed when "federal agencies [were] reviewing state and local projects"—

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upon finding that assigning a number to the child would significantly burden her religious beliefs and finding that "the public interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number for [the child]." *Id.* at 698. Reversing the district court, the Supreme Court reasoned that the Free Exercise Clause prohibited certain forms of governmental compulsion, but it did not give individuals a right to dictate the internal policies of the government. *Id.* at 700.

150. *See* Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (holding that the manner in which the federal government uses its land does not create a cognizable burden under the Free Exercise Clause). In *Lying*, an Indian organization attempted to block the federal government's construction of mining or logging roads over public lands owned by the government, but sacred to a Native American religion. *Id.* at 442. The organization claimed that "successful use of the [land] is dependent upon and facilitated by . . . privacy, silence, and an undisturbed natural setting." *Id.* While the Court accepted for purposes of argument that the road would "virtually destroy the Indians' ability to practice their religion," the Court ruled that the Free Exercise Clause did not require balancing the indirect adverse effects on religion against the government's interests. *Id.* at 450–51. The majority concluded, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land." *Id.* at 453.

151. *See* S. REP. NO. 103-111, at 9 n.19 ("[T]he manner in which the Government manages its internal affairs and uses its own property does not constitute a cognizable 'burden' on anyone's exercise of religion.").

152. Ira. C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 944 (1989).

153. *See supra* notes 132–47 and accompanying text (arguing that Congress's intent was to reverse the *Smith* decision, not to disrupt pre-*Smith* case law or enhance rights beyond those that claimants had before *Smith*).

154. *See* Brief for Intervenor, *supra* note 69, at 18 (arguing that the burden inflicted by the FAA was not cognizable under the Act).

155. *Id.* at 13.

which impose incidental burdens on religion—"for conformity with particular federal policies."[156]

While the judicial ease of this approach is tempting, it is clearly contrary to congressional intent. Based on Congress's actions just prior to the RFRA's date of enactment and Congress's amendment to the RFRA subsequent to *Boerne*, Congress likely intended the RFRA to apply to the greatest extent possible under Congress's constitutional authority. First, while the current RFRA only applies to the federal government, as originally enacted, the RFRA applied to all state action—federal, state, and local government.[157] Further, legislative history indicates that "the definition of governmental activity covered by the bill is meant to be all inclusive."[158]

Second, as discussed in Part II, Congress amended the RFRA as an effort to maintain the RFRA's constitutionality in light of *Boerne*.[159] However, these amendments did no more than remove all references to state and local government and enhance the definition of exercise of religion.[160] Even more telling, these amendments came through an Act that reinstated, to the extent possible under Congress's Commerce Clause and Spending Clause powers, the RFRA upon the states.[161] Thus, it is clear that a bright line rule that would disallow the RFRA's application to all indirect burdens would be so over-inclusive as to frustrate Congress's clear intent.

V. Bensenville*'s Solution: Using the State Action Doctrine As a Middle Path*

Congressional intent could also lead a court to require additional threshold inquiries before applying the RFRA to indirect burdens. The RFRA already includes certain limiting principles. As discussed in Part IV, the amended

156. *Id.* at 18.

157. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2000bb-3(a), 1993 U.S.C.C.A.N. (107 Stat.) 1488, 1489, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (mandating the RFRA applicable to all "Federal and State law").

158. *See* H.R. REP. NO. 103-88, at 7 (1993).

159. *See supra* notes 57–59 and accompanying text (describing the RLUIPA amendments).

160. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 2000 U.S.C.C.A.N. (114 Stat.) 806 (enlarging the definition of the exercise of religion and deleting all references to state and local government).

161. *See* 42 U.S.C. §§ 2000cc–2000cc-5 (2000) (amending the RFRA, and requiring federal and state governmental entities to meet strict scrutiny when it significantly burdens religion in two areas: land use decisions and institutionalized persons).

RFRA applies only when (1) the federal government (2) is acting under federal law (3) to substantially burden (4) a person's free exercise of religion.[162]

Lending credence to the proposition that the amended RFRA applies only to burdens that reach a certain level is Congress's addition of the term "substantial."[163] In earlier versions of the Act, Congress referred to burdens generally.[164] This change seems to suggest "a class of governmental impacts on religion that are viewed as burdensome, but unsubstantially so."[165] The Act's legislative history further supports this reading; the House Judiciary report states that the RFRA would not require the compelling interest apply to "every government action that may have some incidental effect on religious institutions."[166]

Based on Congress's intent to limit the RFRA's application, a court could read in an additional limiting principle for the purpose of ensuring the RFRA is applied only to those indirect burdens for which the federal government is truly responsible. In *Bensenville*, the court determined that this could be accomplished through the state action doctrine.[167] The court acknowledged it would be an "unusual" inquiry, "because the regulated party is a separate sovereign rather than a private entity."[168] However, the analysis would proceed "as if the federal government were regulating the decision of a private entity, with the City standing in the place of a private party."[169]

A. The State Action Approach

State action is the concept that the Constitution's protections of individual liberties apply only to the government.[170] While private conduct generally does

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162. *See supra* note 108 and accompanying text (finding that, as amended, the RFRA requires four threshold inquiries).

163. 42 U.S.C. § 2000bb-1(a) (2000).

164. H.R. 2797, 102d Cong. § 3(a) (1992).

165. Lupu, *supra* note 40, at 274.

166. *See* S. REP. NO. 103-88, at 9 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

167. Village of Bensenville v. FAA, 457 F.3d 52, 62 (D.C. Cir. 2006) (noting that the proper inquiry would be to determine whether the federal government could be characterized as responsible for the petitioners' burden).

168. *Id.* at 63.

169. *Id.*

170. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("The Constitution's protections of individual liberty and equal protection apply in general only to action by the government."); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private

not have to comply with the Constitution, it may be deemed state action when the private action performs a public function, a task that has been traditionally and exclusively performed by the government.[171] Although its validity is continually recognized, courts narrowly interpret and rarely apply the public functions exception.[172] Additionally, a court will construe private conduct to be state action if "there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."[173] Unlike the public functions exception, the entanglement exception has been described as "highly flexible," and has been applied in a variety of circumstances.[174]

Typically, a court faced with a state action question will first identify "the specific conduct of which the plaintiff complains," then ask whether such conduct is "fairly attributable to the state."[175] This requires "a particularized inquiry into the circumstances of each case."[176] Further, "the dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility."[177]

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conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

171. *See Edmonson*, 500 U.S. at 624 (finding that the participation in jury selection through the use of preemptory challenges is a traditional government function); Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974) (reasoning that conduct traditionally reserved exclusively to the state may qualify as a government function for purposes of deeming a private entity to be a state actor).

172. *See* John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 584 (2005) (stating that the public functions exception was interpreted "narrowly" by the Court). In fact, since *Jackson*, the Court has "only once found state action under [the public functions] theory, and it was not the sole basis for the Court's opinion." *Id.* at 584 n.68.

173. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

174. Fee, *supra* note 172, at 585; *see also Brentwood*, 531 U.S. at 296 (finding that state entanglement in the management or control of a private entity rendered the private entity a state actor); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) (finding joint participation between a private party and the state in the seizure of property rendered the private party a state actor); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (finding state action when "the state provides significant encouragement, either overt or covert"); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–25 (1961) (finding that the interdependent relationship between the state, as lessor, and the restaurant, as lessee, made the restaurant a state actor).

175. *E.g.*, *Brentwood*, 531 U.S. at 296; Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50–51 (1999); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

176. *Jackson*, 419 U.S. at 360.

177. *Id.*

B. Is State Action an Acceptable Middle Path?

The state action doctrine may offer a way to apply the RFRA to indirect burdens without frustrating congressional intent or the Supreme Court's holding in *Boerne*. The doctrine has already been applied to the delegation of government power in the context of privatization.[178] The problem addressed in those cases is similar to the one addressed in this Note:

> The dichotomy between public and private spheres affects many areas of constitutional law. It also raises several puzzles. One problem is how to define the boundary between public and private spheres in a world of overlapping interests and roles. In this golden age of 'privatization,' where private entities often perform public functions with government-sanctioned authority, it is not easy to identify where the government domain ends and the private domain begins for purposes of constitutional law.[179]

Further, while the state action doctrine is by no means free from criticism, many of these criticisms do not apply (or do not apply with as much strength) to indirect burdens.[180] This Note will address three such criticisms.

First, the state action doctrine receives continual criticism for its use as a threshold test.[181] Critics view state action as an "all-or-nothing question. Either

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178. *See, e.g.*, Logiodice v. Trustees of Me. Cent. Inst., 296 F.3d 22, 31 (1st Cir. 2002) (finding that a private school serving as the high school for the school district was not a state actor because the school district was "generally not involved in running the school"); Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982) (finding state action where detailed contracts between the private school and the school district existed, juvenile courts placed students involuntarily at the private school, and the private school received significant state funding); Blumel v. Mylander, 919 F. Supp. 423, 427 (M.D. Fla. 1996) (finding state action where a privately operated prison held a defendant for thirty days without judicially determining probable cause as required by the Constitution).

179. Fee, *supra* note 172, at 572 (internal citations omitted).

180. *See* Charles Black, *Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967) (calling the state action doctrine a "conceptual disaster area"); Chemerinsky, *supra* note 5, at 550–57 (arguing to "do[] away with the state action requirement"); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 261 (1976) (arguing that the Court should interpret the Constitution to proscribe some private behavior, as determined through the use of a balancing test). Despite criticism and calls for modification and abandonment, the doctrine continues to be viewed by courts as a reasonable way to determine when a party, not usually constitutionally responsible, should be so held.

181. *See, e.g.*, Fee, *supra* note 172, at 573 ("[State action] serves a boundary-like function for determining whether constitutional rules apply but is seldom thought to affect the substance of individual constitutional rights."). *But see* Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 41 (2006) ("[D]espite the familiar cadences of the case law, it's a mistake to think that the state action inquiry and the appraisal of claimed violations of legal rights are two independent queries, with the first serving as a threshold inquiry to the second.").

there is state action, in which case the ultimate act is attributed to the government or there is no state action, and the case is dismissed."[182] Because of this, critics argue, "the doctrine operates to illegitimately shield [certain violations] from constitutional review."[183] While this may be true as the doctrine is traditionally applied, it does not raise as great a concern with respect to indirect burdens. In the context of indirect burdens, a claim would only be dismissed under the RFRA; it would not be completely shielded from constitutional review. Upon finding that the RFRA does not apply, a court would apply the standard dictated by the Constitution—rational basis review.[184] Thus, a threshold question in this context seems justified. The approach allows a court to reach the merits of the constitutional claim only after determining what level of scrutiny should apply—the RFRA's standard or *Smith*'s standard.

Additionally, the doctrine receives criticism for working "backwards."[185] Critics argue that application of the doctrine creates an inverse relationship, where a private party has the most discretion when the court is the least likely to find state action.[186] This, the critics argue, is problematic because it means a court is least likely to find state action when the private party has the most power to cause harm to individual liberties.[187] Again, this criticism does not apply with the same strength to indirect burdens. In searching for a middle road—a way to apply the RFRA's heightened level of scrutiny to only those burdens truly belonging to the federal government—the inverse relationship works well. It allows the court to identify instances where the federal government has the most discretion over a project, and apply the RFRA to only those cases.

Finally, many of these critics point to the federal government's ability to offer incentives in exchange for private cooperation as a way to demonstrate the

182. Fee, *supra* note 172, at 578.

183. Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1446 (2003); *see also* Chemerinsky, *supra* note 5, at 536–43 (arguing that state action does not adequately protect individual rights); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 5–17 (1962) (arguing that traditional state action analysis wrongly focuses on formal inquiries, without considering the individual's constitutional interests at stake).

184. *See supra* notes 26–29 and accompanying text (describing how *Smith* lowered the level of scrutiny that applies to neutral laws of general applicability that operate to burden religion).

185. Metzger, *supra* note 183, at 1425.

186. *Id.* at 1424–27 (2003) ("The extent of government power exercised by private actors is likely to vary inversely rather than directly with government involvement.").

187. *See id.* at 1424–27 (arguing the state action doctrine is not used to safeguard against private actors welding government power).

possibility of extensive governmental involvement without proximity.[188] Part IV addressed this problem as an argument against a finding that indirect burdens always trigger the RFRA.[189] As stated, applying the RFRA whenever the federal government is involved would raise serious doubts about the constitutionality of the RFRA.[190] Thus, the fact that the state action doctrine requires "pervasive entanglement" before it will hold the private entity responsible would fit the constraints argued for in this Note.[191] It would require a court to find "pervasive entanglement" between the federal government and the non-federal entity before the court would hold the federal entity (and by proxy the nonfederal entity) responsible for the burden.

VI. Conclusion

A current expression of free exercise jurisprudence is that:

> For state and local governments, *Smith* is controlling, and the free exercise clause cannot be used to challenge neutral laws of general applicability. As to the federal government, although *Smith* defines [the constitutional floor of] the free exercise clause, the [RFRA] requires that federal actions burdening religion meet the compelling interest test.[192]

This simplification, however, ignores the practical implications of governmental action in an interconnected system.[193] The sounder approach, and the one adopted by this Note, is to employ the state action doctrine in order to first determine the source of the burden.

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188. *See id.* at 1425–26 ("[G]overnment does need not be closely involved in the specific decisions of a private entity in order to wield substantial influence over its actions."); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1178–85 (2000) (describing the ways in which performance incentives influence a private actor's course of action); STEPHEN RATHGEB SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING 72–73, 103–11, 144–46 (1993) (arguing that the government informally influences non-profits through its power to award contracts and grants).

189. *See supra* notes 123–27 and accompanying text (arguing that the existence of conditional funds at times requires nonfederal entities to comply with the mandates of the RFRA).

190. *See supra* notes 128–31 and accompanying text (describing how some applications would fail the congruence and proportionality test the Court put forth in *Boerne*).

191. Metzger, *supra* note 183, at 1426.

192. CHEMERINSKY, *supra* note 3, at 1265.

193. *See supra* note 122 and accompanying text (stating that the Constitution does not foreclose a government's ability to create interstate relationships).

The state action approach encompasses the current law. Where the source of the burden is clear, *Smith* applies to state and local governments and the RFRA applies to the federal government. However, where the source is unclear, as is often the case, the state action approach allows a court to determine the applicable standard at the threshold of the inquiry.

Further, applying the doctrine at the threshold of a free exercise inquiry allows the RFRA to avoid interfering with the broad version of judicial supremacy the Court adopted in *Boerne*.[194] Therefore, the state action approach allows courts the freedom of judicial discretion, and yet maintains congressional deference. Because Congress intended for the RFRA to apply to the greatest extent possible under the Constitution, the state action approach is the ideal solution to the complicated determination of indirect burdens on religious exercise.[195]

194. *See supra* Part IV.A.2 (describing the interaction between the *Boerne* decision and a finding that the RFRA applied to all indirect burdens).

195. *See supra* Part IV.B (finding that Congress intended for the RFRA to apply to the greatest extent possible under the Constitution).