THE RELIGIOUS FREEDOM RESTORATION ACT: FORMULATION, PASSAGE, AND MODERN EVALUATION

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Abstract

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in response to Employment Division, Department of Human Resources of Oregon v. Smith (1990). Smith essentially nullified the Free Exercise Clause by allowing the government to establish laws that burdened religious practices as long as they were not targeted at a specific religious group. In response to this crisis, Congress passed RFRA with a unanimous vote in the House and a 97-3 vote in the Senate. This study uses Dye's process model to examine what caused this rare phenomenon. It also uses Kingdon's "three streams" model to examine how RFRA was set on the policy agenda. This qualitative study analyzes RFRA mainly through primary sources.

Introduction

On April 17, 1990, the Supreme Court announced its decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). *Smith* (1990) allowed the government to establish laws that restricted religious practices provided the laws did not target a specific religious group. Almost immediately, advocates for religious liberty were concerned (Baptist Joint Committee, 2013). Oliver Thomas, a young lawyer serving as the General Counsel of the Baptist Joint Committee, called Marc Stern, a prominent Jewish Advocate for Religious Freedom.

> "Have you read the *Smith* opinion?" he asked. "Yes I have," replied Stern. "Are you as worried about it as I am?" Thomas responded. "Yes I am," Stern said bluntly. (Baptist Joint Committee, 2013, 1:50)

From there, the two men formed the team behind the idea of the Religious Freedom Restoration Act (Baptist Joint Committee, 2013). Congress ultimately passed the Religious Freedom Restoration Act in 1993 (Bomboy, 2014). According to the Act, its purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government" (42 U.S.C. § 2000bb). In other words, the Religious Freedom Restoration Act (RFRA) nullified the *Smith* decision and re-established strict scrutiny as the standard of review for cases in which the Free Exercise Clause has been abridged.

RFRA's formulation, passage, and modern application is a crucial topic that must be understood by anyone seeking to effectively defend religious freedom in the United States. As such, this study will analyze RFRA, examining why it was passed and how it applies to the government today. More specifically, this study will use Thomas Dye's (2013) process model to examine the Religious Freedom Restoration Act. In accordance with the process model, this study will examine the following stages: problem identification, agenda setting, policy formulation, policy legitimation, policy implementation, and policy evaluation as applied to RFRA. The analysis on the agenda setting and policy formulation phases will be conducted using Kingdon's (2011) "three streams" model. Finally, the modern application of RFRA will be analyzed in the policy implementation and policy evaluation sections. These sections will focus primarily on how RFRA was implemented in federal courts, how RFRA's application changed after *City of Boerne v. Florez* (1997), how state versions of RFRA were implemented, and the opinions of today's interest groups regarding RFRA.

Literature Review

Numerous organizations have written short articles on the passage and effect of the Religious Freedom Restoration Act. Bomboy (2014) documented that RFRA's story began in 1963 with the case *Sherbert v. Verner* (1963). According to Bomboy (2014), *Sherbert* stated that "if a person claimed a sincere religious belief, and a government action placed a substantial burden on that belief, the government needed to prove a compelling state interest, and that it pursued that action in the least burdensome way" (para. 6). The *Sherbert* test was later affirmed by *Wisconsin v. Yoder* in 1972 (Carter, 2018).

In 1989, the Supreme Court heard the case of *Employment Division v. Smith,* in which drug counselors were fired for ingesting drugs as part of a religious ceremony. The Supreme Court upheld the firing. In his majority opinion, Justice Scalia wrote that "using a religious exemption in conflict of a valid law 'would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind'" (Bombay, 2014, para. 4). Justice Scalia's opinion severely limited religious liberty protections under the First Amendment ("History of RFRA," n.d.).

In response to this crisis, a broad coalition of 66 interests groups began to push for the passage of RFRA ("History of RFRA," n.d.). Carter (2018) recorded, "The legislation was introduced by Rep. Chuck Schumer (D-NY) on March 11, 1993 and passed by a unanimous U.S. House and a near unanimous U.S. Senate with three dissenting votes. The bill was signed into law by President Bill Clinton" (para. 2). RFRA expressly stated that its purpose was to restore the constitutional protections for religious liberty found in *Sherbert v. Verner* and *Wisconsin v. Yoder* (Carter, 2018). More precisely, RFRA reinstated the compelling interest test for cases involving the Free Exercise Clause ("RFRA Info Central," n.d.). The Becket Fund for Religious Liberty put it this way: under the compelling interest test, RFRA requires courts to go through three steps before they uphold a law that burdens the free exercise of religion. A court first asks, "Does the individual have a sincere religious belief that is being substantially burdened?" ("RFRA Info Central," n.d., para. 1). If the answer is "Yes," then the court moves to the second part of RFRA and asks, "Does the government have a compelling reason (e.g. health or safety) to suppress this right?" If the answer is still affirmative, the court then asks, "Is there a reasonable alternative to serve the public interest?" ("RFRA Info Central," n.d., para. 2-3). If all three of these questions are answered in the affirmative, then the government action restricting religion is prohibited ("RFRA Info Central," n.d.).

However, in 1997, the Supreme Court ruled that RFRA could not be applied to the states. In *City of Boerne v. Florez,* Justice Kennedy wrote that Congress had exceeded its authority by attempting to apply RFRA to state jurisdictions (Bomboy, 2014). In response, some states passed state-level versions of the Religious Freedom

Restoration Act (Carter, 2018). Based on data from Carter (2018), 62% of states are covered by a "*Sherbert*-like" protection for religious liberty.

The most high profile case involving RFRA was *Burwell v. Hobby Lobby* (2014) (Carter, 2018). In that case, Hobby Lobby objected to a portion of the Affordable Care Act that required for-profit companies to "provide [its employees] insurance coverage for morning-after pills and similar emergency birth control methods and devices" (Bomboy, 2014, para. 13). Their objection was based on the fact that the leadership of Hobby Lobby held a religious belief that abortion was wrong. The Supreme Court combined the *Hobby Lobby* case with the *Conestoga Wood Specialties Corp. v. Health and Human Services Department* case (3rd Cir. 2013). Conestoga was a Mennonite, for-profit business that also objected to the Affordable Care Act's birth control mandate (Bomboy, 2014). RFRA applied to the portion of the decision in the *Hobby Lobby* case that dealt with Conestoga (Bomboy, 2014). Carter (2018) summarized the Court's RFRA related findings:

> The Court found that the HHS mandate violated RFRA because it imposed a substantial burden...The government also failed to satisfy RFRA's least restrictive-means standard, since the government could assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections or extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. (p. 6)

The *Hobby Lobby* decision was a crucial victory for religious liberty in which RFRA played a large role.

Data and Methods

Many short articles have been written regarding RFRA's passage and modern application. However, no expert has analyzed RFRA through the lens of Dye's (2013) process model. Furthermore, no formal research has been conducted to explain how RFRA gained such sudden prominence on the policy agenda. This study will perform such analysis by applying Kingdon's (2011) "three streams" model.

This study is primarily qualitative in nature and will mainly use primary sources. For the purposes of this study, primary sources will include news articles written during the time period that RFRA was passed, law review articles by RFRA's authors, congressional hearings and reports, video interviews, speeches by important figures,

court cases, records from interest groups, and the Religious Freedom Restoration Act itself.

Problem Identification

As documented in the literature review and the introduction, the Religious Freedom Restoration Act was primarily a response to the Supreme Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith* (1989). In an interview, Oliver Thomas, former General Counsel of the Baptist Joint Committee and the former Chair of the Coalition for the Free Exercise of Religion, recounted that the press initially missed the importance of what happened in the *Smith* case but that "[t]he religious community figured [the problems with *Smith*] out pretty quickly" (Baptist Joint Committee, 2013, 1:34). Thomas contacted Marc Stern, and the two agreed that something needed to be done to address the *Smith* decision. The two men established a nationwide meeting with leaders of interest groups that represented multiple different faiths (Baptist Joint Committee, 2013).

Smith was reinforced in the 1993 case *Church of the Lukumi Babalu Aye v. City of Hialeah,* which was the first Free Exercise case that the Court heard after *Smith* ("The Religious Freedom Restoration Act: 20 years," n.d.). The Supreme Court invalidated a Florida city statute that prohibited animal sacrifices performed as part of religious rituals. The law was struck down because it was clear that the city had passed a statute specifically designed to limit the religious practices of the Church of the Lukumi Babalu Aye. The regulations were neither neutral nor generally applicable and thus warranted strict scrutiny under *Smith*. While *Church of the Lukumi* resulted in a victory for religious liberty in the short term, religious liberty was ultimately harmed because the case reinforced *Smith.*

Primary source documents reveal that it was initially difficult to obtain large public support for RFRA's cause. A *New York Times* article published shortly after RFRA was passed detailed, "Although supporters of the Religious Freedom Restoration Act saw [the *Smith*] ruling as having wide implications, especially for small religious groups without political muscle, they said they at first found it hard to rouse public concern about a case involving hallucinogenic drugs" (Steinfels, 1993, para. 16). However, this problem did not exist for very long. Shortly after the Act was passed in 1993, supporters of RFRA explained that cases abridging religious liberty abounded (Steinfels, 1993). Advocates for RFRA consistently pointed to these cases to showcase the problem. Steinfels (1993) wrote, "Supporters of the law say that 50 to 60 cases of government infringements on religious practices have been justified in the courts on the basis of the [*Smith*] 1990 ruling" (para. 8). Interest groups across the nation realized the danger of *Smith* and joined the Coalition for the Free Exercise

of Religion. Even the American Civil Liberties Union (ACLU) supported the passage of RFRA (Melling, 2015).

Agenda Setting and Policy Formulation

According to J.W. Kingdon (2011), there are "three streams" that fuel agenda setting and alternative specification (policy formulation): the problem stream, the policy stream, and the political stream. This study utilizes Kingdon's three streams model to analyze RFRA's agenda setting and policy formulation stages. This is because Kingdon's model accurately explains the agenda setting process and provides a convenient framework by which political scientists can succinctly but holistically analyze the emergence of a policy on the decision agenda.

The Problem Stream: RFRA

Under *Smith* (1990), the government could pass a neutral and generally applicable law restricting the free exercise of religion as long as the law passed the rational basis test, which simply required proof of a legitimate reason for establishing the regulation. This gave the government license to abridge religion in almost any manner, as long as the law was not targeted at a specific religion. Oliver Thomas explained the detrimental effects of the *Smith* decision through the following hypothetical:

> So let's just say that you had an orthodox Jewish kid at a public school who needed to wear his yamaka to school because God requires it. If the school had a policy that said, "Nobody can wear caps to school," he couldn't even complain about it even though… we know a yamaka is different from a baseball cap. So the landscape changed for everybody overnight. (Baptist Joint Committee, 2013, 1:10)

While this illustration was a hypothetical, Congress had seen many similarly concerning cases.

Regarding the problem stream, Congress saw a need to embrace the Religious Freedom Restoration Act for two main reasons. First, it was clear that past cases involving the First Amendment would have seen different results if *Smith* was in place (Laycock & Thomas, 1994). Second, many Americans were losing cases where their Free Exercise rights were improperly abridged (Laycock & Thomas, 1994). Each of these problems should be covered in further detail.

Related to the first problem, Congress was concerned that *Smith* was inadequate because "throughout much of our history, facially neutral laws…severely

undermined religious observance" (S. Rept. No. 111, 1993). Congress recognized that past Free Exercise cases upholding religious liberty would have gone differently had *Smith* been in place (Laycock & Thomas, 1994). This caused great concern. Laycock and Thomas (1994) commented:

> America's history of sporadic religious intolerance shows the need for vigorous enforcement of the Free Exercise Clause. But this history also makes a more specific point. Facially neutral laws of general application—the kind that raise no constitutional issue after *Smith*—were central to some of this country's worst religious persecutions. Both the polygamy law that underlay much of the Mormon persecution, and the flag salute law invoked against Jehovah's Witnesses,' were facially neutral, generally applicable laws. A facially neutral law in Oregon would have required all children to attend public school; the underlying motive was to suppress Catholic schools. (p. 213)

Congress and RFRA advocates saw this history as proof that more generally applicable laws would burden the Free Exercise clause in the future. Since *Smith* could not provide sufficient protection against these laws, Congress knew that a more robust restraint was needed.

Additionally, Congress was concerned by multiple cases that suggested that *Smith* was allowing unconstitutional restrictions of religious liberty. The negative effects of *Smith* were seen almost immediately. Within a week after the *Smith* decision was announced, the Supreme Court cited *Smith* to vacate a Minnesota judgment that exempted an Amish man from a law requiring him to put a bright orange triangle on his horse-drawn carriage (*Minnesota v. Hershberger,* 1990). The Amish man rejected the law on religious grounds. He believed that the bright orange triangle was a "worldly" symbol that conflicted with his religious belief. The Minnesota Supreme Court noted, "Appellants have demonstrated a willingness to be incarcerated to avoid using a symbol whose color and meaning are antithetical to their faith, establishing that their religious belief in opposition to the SMV symbol is sincere" (*State v. Hershberger,* 1990, at 396). On remand, the Minnesota Supreme Court protected Hershberger under the Free Exercise Clause of the state constitution and "rejected *Smith's* persuasive authority" (Laycock & Thomas, 1994, p. 214). Laycock and Thomas (1994) further noted, "*Hershberger* was only the beginning for the new federal law of religious liberty; dozens of reported cases have been decided against religious claimants since *Smith*" (p. 214). As mentioned earlier, advocates for RFRA cited 50-60 other cases where religious liberty had been abridged due to *Smith* (Steinfels, 1993).

The Policy Stream: RFRA

The *Smith* decision and the Religious Freedom Restoration Act were common topics of discussion in the policy community. By the time RFRA was passed, *Smith* had been the topic of over 50 different articles in academic journals (Laycock & Thomas, 1994). Laycock (1993) wrote a piece defending Congress's constitutional authority to pass RFRA. The idea of the Religious Freedom Restoration Act came from a meeting with experts who represented various special interest groups (Baptist Joint Committee, 2013). The meeting took place shortly after the *Smith* decision was announced. The original group that came up with the idea included Marc Stern, Douglas Laycock, and Dean Kelly, among other experts (Baptist Joint Committee, 2013). After the idea of RFRA was formulated, word about the Act spread rapidly. Brent Walker and Oliver Thomas became the faces of RFRA and led a coalition of many faiths to pass the Act (Baptist Joint Committee, 2013).

The Religious Freedom Restoration Act itself was formulated by a broad coalition of special interest groups known as the Coalition for the Free Exercise of Religion. President Clinton recognized this on the day that he signed RFRA into law, saying, "Let me especially thank the Coalition for the Free Exercise of Religion for the central role they played in drafting this legislation and working so hard for its passage" (White House/Office of the Press Secretary, 1993, para. 1). The Act was written carefully in order to ensure that all religions would be protected equally. It established broad standards and had no sections containing endorsement or prohibition of specific religious practices. Laycock and Thomas (1994) wrote:

> Congress was not being irresponsible in refusing to legislate about particular religious practices or particular governmental interests. The logical conclusion of doing that would have been a committee report evaluating every known religious practice in light of every imaginable governmental interest, and a bill listing which religious practices are permitted and to what extent, and which may be forbidden. Instead of a charter of religious liberty, the bill would have become a religious licensing act. (p. 219)

Furthermore, legislating general principles enabled the Act to be politically viable. Because RFRA established broad principles, a large coalition of interest groups and congressmen supported the bill (Laycock & Thomas, 1994).

The Political Stream: RFRA

Advocates for RFRA did a masterful job of gathering support for the bill that transcended common party lines and conflicts between interest groups. Sixty-six interest groups came together to support RFRA by forming the Coalition for the

Free Exercise of Religion ("The Religious Freedom Restoration Act: 20 years," n.d.). Interest groups across the political spectrum joined. Politicians also worked together with remarkable unity. Steinfels (1994) captured this well:

> In the Senate, where the bill was approved 97 to 3 on Oct. 27, it was sponsored by Senators Edward M. Kennedy, Democrat of Massachusetts, and Orrin G. Hatch, Republican of Utah. In the House, which passed the bill last May by a voice vote without objection, it was sponsored by Representative Charles E. Schumer, Democrat of Brooklyn, and Representative Christopher C. Cox, Republican of California. President Clinton voiced wonder today at this alliance of forces that are often at odds across religious or ideological lines. "The power of God is such that even in the legislative process miracles can happen," he said. (para. 12)

Steinfels (1993) also recorded details about the "unusual coalition of liberal, conservative and religious groups that had pressed for the new law" (para. 11). Organizations that had historically been bitter enemies united to pass RFRA. Steinfels (1993) explained that "[t]he coalition included the National Association of Evangelicals, the Southern Baptist Convention, the National Council of Churches, the American Jewish Congress, the National Conference of Catholic Bishops, the Mormon Church, the Traditional Values Coalition and the American Civil Liberties Union" (para. 11). Oliver Thomas also detailed noteworthy political unity by recounting that President Clinton (D) and Congressman Newt Gingrich (R) played important roles in forcing RFRA onto Congress's agenda (Baptist Joint Committee, 2013).

Advocates from across the political spectrum ardently fought for RFRA. The statement of the American Jewish Congress to the House Judiciary Committee said:

> All religious minorities must be alarmed when the courts are stripped of the power to require government to accommodate those religious practices, to use Justice Scalia's phrase, "not widely engaged in." The Religious Liberty Restoration Act returns that power to the courts and, with it, ensures that government does not arbitrarily interfere with religious freedom. (Religious Freedom Restoration Act, 1990, at 67)

Vice President Al Gore also commented:

> Those whose religion forbids autopsies have been subjected to mandatory autopsies…Those who want churches close to where they live have seen churches zoned out of residential areas. Those who want the freedom to design their churches have seen local governments dictate the configuration of their building. (Steinfels, 1993, para. 7)

The overwhelming support for RFRA was not just a Washington phenomenon. As President Clinton noted, the majority of United States citizens supported RFRA ("The Religious Freedom Restoration Act: 20 years," n.d.).

Policy Legitimation

RFRA was introduced in the 101st and 102nd Congresses but never made it out of committee ("The Religious Freedom Restoration Act: 20 years," n.d.). The Act encountered opposition for three primary reasons. First, pro-life groups were concerned that RFRA could be used to make a religiously motivated claim about abortion rights ("The Religious Freedom Restoration Act: 20 years," n.d.). Secondly, some believed that the Act could be construed to challenge the tax-exempt status of religious organizations. This would prevent religious organizations from participating in government programs ("The Religious Freedom Restoration Act: 20 years," n.d.). Finally, some were worried that RFRA would improperly restrict the ability of prisons to effectively control prisoners (Laycock & Thomas, 1994). The first two concerns were remedied, while the final concern was ultimately dismissed. Changes ensuring that RFRA could not be construed to support abortion rights or challenge the tax-exempt status of religious organizations ultimately "paved the way for RFRA's passage" ("The Religious Freedom Restoration Act: 20 years," n.d., para. 2). Each of these three concerns, as well as the processes used to remedy them, will be addressed in further detail.

Concern 1: Abortion

Laycock and Thomas (1994) recorded that the most common criticism of RFRA concerned whether or not the Act could be construed to support abortion rights. In the early 1990's, pro-life advocacy groups believed that the overturning of *Roe v. Wade* (1973) was imminent. There was concern that RFRA could be used to specifically challenge subsequent restriction of abortion (Laycock & Thomas, 1994). Critics specifically cited *McRae v. Califano* (1980) in which a district court upheld a Free Exercise challenge to the Hyde Amendment, a ban on federal funding

of abortion (Laycock & Thomas, 1994). Even though the decision was overturned on appeal, both the Catholic Conference and the National Right to Life maintained that the case demonstrated that there was sufficient risk that RFRA could be construed to uphold abortion rights (Laycock & Thomas, 1994). In their view, a woman could consult with her minister, rabbi, or imam and claim that her religious convictions led her to seek an abortion (Laycock & Thomas, 1994).

Abortion concerns related to RFRA produced opposition to the bill in Congress. Lead Republican sponsors in the House, Representatives Paul Henry and Henry Hyde, withdrew their support for the Act (Laycock & Thomas, 1994). Simultaneously, the Religious Freedom Act (RFA) was introduced by Representative Chris Smith. The Religious Freedom Act was similar to RFRA in most respects with one exception. The RFA contained a provision stating, "Nothing in this Act shall be construed to authorize a cause of action by any person to challenge…any limitation or restriction on abortion, on access to abortion services or on abortion funding" (H.R. 4040, 1991). However, the Religious Freedom Act was deemed unnecessary after the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). After *Casey,* it became clear that *Roe* was not going to be overturned anytime soon (Laycock & Thomas, 1994). This paved the way for the brokering of a compromise that would allow pro-life groups to support RFRA. To remedy the problem, RFRA supporters agreed to make perfectly clear within the legislative record that the Act could not be construed to support abortion. The House Report on RFRA in the 103rd Congress stated:

> There has been much debate about this bill's relevance to the issue of abortion. Some have suggested that if Roe v. Wade were reversed, the bill might be used to overturn restrictions on abortion.…To be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*. (H. Rep. 103-88, 1993, at 8)

Because the legislative record was clear concerning congressional intent on this matter, pro-life groups no longer had reason for concern.

Concern 2: Tax-Exempt Status and Government Funding for Religious Organizations

The United States Catholic Conference was also concerned that RFRA could be used to challenge government funding and tax exemption for religious organizations ("The Religious Freedom Restoration Act," 1992). Laycock and Thomas (1994)

attributed concern that arose regarding tax exemption status to fear of a repeat of the case *United States Catholic Conference v. Abortion Rights Mobilization, Inc.* (1988). In *Abortion Rights Mobilization, Inc.,* pro-choice groups attempted to overturn the tax-exempt status of all groups linked with the Roman Catholic Church. The United States Catholic Conference was also concerned that RFRA could affect the ability of religious organizations to participate in government funding of social services. Mark Chopko, the General Counsel on behalf of the United States Catholic Conference, stated:

> Another area where S. 2969 [RFRA] could cause great harm is in the operation of government programs.…The threat of litigation in this area is real, and the basis for predicting success or failure is untested.…In any event, challenges brought under S. 2969 [RFRA] could seriously disrupt a myriad of federal and state programs where legislatures, including the Congress, have wisely concluded that the participation of religious providers contributes to the successful operation of government programs and thus to the public good. ("The Religious Freedom Restoration Act," 1992, pp. 110-111)

As Laycock and Thomas recounted (1994), the Coalition for the Free Exercise of Religion sought to remedy these problems by adding Section 3(c) to RFRA, which commented on standing. Section 3(c) states, "Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution" (42 U.S.C. § 2000bb-1(c)). However, the United States Catholic Conference was still concerned that RFRA could be construed to allow challenges to government funding of religious institutions (Laycock & Thomas, 1994).

In order to settle the matter once and for all, RFRA was amended in the 102nd Congress (Laycock & Thomas, 1994). The Amendment stated:

> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. (42 U.S.C. § 2000bb-4)

Once this amendment was added to RFRA, along with the pro-life language added to the House and Senate records, the U.S. Catholic Conference agreed to endorse the Act.

Concern 3: Prisons

Some state and federal government leaders were concerned that RFRA would negatively affect the ability of prisons to effectively control their prisoners (Laycock & Thomas, 1994). In May of 1993, multiple state attorneys general wrote a letter to each member of the Senate Judiciary Committee stating their concern about RFRA's application to prisons (Laycock & Thomas, 1994). The letters proposed that RFRA be amended to exempt prisons from the Act. Under the view of the state attorneys general, a provision could be added to the bill that would allow prisons to restrict the free exercise rights of prisoners only if the restrictions are "reasonably related to a legitimate penological interest" (Laycock & Thomas, 1994, p. 239).

Many of the bill's sponsors responded in opposition to the proposal of the attorneys general (Laycock & Thomas, 1994). They maintained that Congress had no business picking and choosing who would have the right to free exercise. In their view, freedom of religion should be based on a unitary standard for all Americans (Laycock & Thomas, 1994). Additionally, there was concern that exemption for prisons would lead to the exemption of other programs. This would have jeopardized the bill's passage (Laycock & Thomas, 1994). In this way, an amendment exempting prisons would have been politically untenable.

Janet Reno, the Attorney General of the United States, strongly supported RFRA's sponsors in this debate. Since she oversaw the nation's largest prison system, numerous senators came to her for expert advice (Laycock & Thomas, 1994). Reno wrote letters to Sen. Joe Biden, Chairman of the Senate Judiciary Committee, and Rep. Jack Brooks, Chairman of the House Judiciary Committee. She stated:

> Concerns have been expressed that the standard of review of H.R. 1308 will unduly burden the operation of prisons and that the bill should be amended to adopt a standard more favorable to prison administrators when confronted with the religious claims of prisoners. These concerns have been presented by knowledgeable and sincere individuals for whom I have great respect, but I respectfully disagree with their position and urge the Committee to approve the bill without amendment. (Reno, 1993)

As the attorney general, Reno was an expert in the needs of U.S. prisons and prison management. Given her knowledge, some congressmen were persuaded by Reno to dismiss prison concerns.

The debate over prison exemptions was ultimately resolved through legislative history. Laycock and Thomas (1994) explained:

> This legislative history indicates that the Senate Judiciary Committee expected context to play an important role when applying RFRA to specific cases. Although the Committee recognized that threats to safety and security pose a unique risk in prisons, and that the government has a compelling interest in responding to bona fide dangers," it nevertheless insisted that prison authorities prove the existence of actual dangers when religious liberty is at stake. (p. 242)

Legislative sponsors of RFRA also emphasized that prisons would have a compelling interest to restrict free exercise in circumstances where people could be endangered (Laycock & Thomas, 1994). In this way, prisons would still have a reasonable ability to restrict the free exercise right of prisoners in circumstances where safety was jeopardized. After the three aforementioned concerns were addressed, RFRA passed unanimously in the House and 97-3 in the Senate (Steinfels, 1993).

Policy Implementation

After RFRA was passed, Laycock and Thomas (1994) published an article in the *Texas Law Review* to discuss the history of RFRA and its legislative intent. Given that Laycock and Thomas were two of the masterminds behind the bill, the article was ostensibly intended to further instruct courts about how the Act should be interpreted. From the outset, Laycock and Thomas realized that RFRA would have to be implemented by the Courts in order to be truly successful. They wrote:

> RFRA is not a mere technical change from *Smith*. Rather, it restores a fundamentally different vision of human liberty. Religious believers…are exercising a fundamental human right, and the American commitment is to let them exercise it unless there is an extraordinary reason to interfere-not a rational reason, or even a substantial reason, but a compelling reason.…RFRA can achieve its purpose only if the courts enforce this vision. (Laycock & Thomas, 1994, pp. 244-245)

In order to make the intent of RFRA abundantly clear to the courts, Laycock and Thomas (1994) took care to define certain terms in the bill. They noted, "The

future of the Act depends principally on judicial interpretation of three terms: 'compelling interest,' 'substantially burden,' and 'exercise of religion'" (Laycock & Thomas, 1994, p. 221). Laycock and Thomas (1994) defined each of these three terms in depth.

While courts clearly understood the intent of RFRA, the Supreme Court ruled that portions of RFRA were unconstitutional in *City of Boerne v. Florez* (1997). In *Boerne,* the Archbishop of San Antonio sought to sue the City of Boerne for violating his free exercise rights. Boerne had a zoning ordinance that prohibited the archbishop from expanding his church building. The Archbishop sued on the basis that the City of Boerne had not satisfied the compelling interest test, which was established under RFRA. In his majority opinion, Justice Kennedy wrote that it was an unconstitutional use of Congress's power to apply RFRA to the states. As it currently stands, RFRA is enforceable against federal statutes but not against state and local statutes.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2005), the Supreme Court strictly applied the compelling interest test to a federal statute. This was done in accordance with RFRA. *Gonzales* was the first case after *Boerne v. Florez* in which RFRA was applied by the Supreme Court ("The Religious Freedom Restoration Act: 20 years," n.d.). As the Baptist Joint Committee wrote, "The Court [in *Gonzales*] reject[ed] the government's argument that it ha[d] a compelling interest in applying the Controlled Substances Act without allowing exceptions for a small religious sect that ingests a prohibited substance as part of its religious ceremonies" ("The Religious Freedom Restoration Act: 20 years," n.d., para. 5). In this way, *Gonzales* affirmed that RFRA was applicable to federal statutes.

RFRA was most recently applied to protect freedom of religion in *Burwell v. Hobby Lobby* (2014). In his majority opinion, Justice Alito wrote that RFRA could be applied to corporations since corporations are composed of individuals with sincerely held religious beliefs. Furthermore, Justice Alito wrote that accommodations provided to religious corporations could also be applied to closely-held, for-profit organizations. Because of this interpretation of RFRA, Hobby Lobby successfully received an exemption from the Affordable Care Act's contraceptive mandate.

Finally, in the wake of *Boerne,* multiple state legislatures have passed laws similar to RFRA. Carter (2018) wrote:

> In response to [*Boerne v. Florez*]…some individual states passed state-level Religious Freedom Restoration Acts that apply to state governments and local municipalities. Currently, there are 21 states that have passed a Religious Freedom Restoration Act that is based on or is similar to the federal act…Ten other states have religious

> liberty protections that state courts have interpreted to provide a similar (strict scrutiny) level of protection. (para. 5)

State versions of RFRA have caused controversy in certain states. The City of Indianapolis lost $60 billion in convention business due to a state RFRA controversy (Bender, 2016). State RFRAs supposedly caused tension because some proponents of the bills said that the new laws could be used to protect religious individuals with objections to same-sex weddings. After the law was passed in Indiana, there was a strong wave of business cancellations. Bender (2016) wrote:

> After the law passed on March 26, 2015, reaction was swift, strong and negative, with cancellations of planned events and business expansions, travel bans and denunciations from across the spectrum: companies including Salesforce, Apple, Eli Lilly and Angie's List; sports leagues including the NCAA, NBA and WNBA; states and municipalities coast to coast; rock concerts; comedy shows and church groups. (p. 4)

A week later, Indiana's state RFRA was amended so that it did not give protection for religious individuals with objections to same-sex weddings.

Policy Evaluation

Twenty-five years later, RFRA has received mixed reviews. While RFRA originally had a broad coalition of supporters from across the political spectrum, it is now supported primarily by conservatives. In 2015, Louise Melling, the deputy legal director of the ACLU, wrote in an op-ed published in *The Washington Post:*

> The ACLU [originally] supported the RFRA's passage…because it didn't believe the Constitution, as newly interpreted by the Supreme Court, would protect people…whose religious expression does not harm anyone else. But we can no longer support the law in its current form. For more than 15 years, we have been concerned about how the RFRA could be used to discriminate against others…it is now often used as a sword to discriminate against women, gay and transgender people and others. Efforts of this nature will likely only increase should the Supreme Court rule — as is expected — that same-sex couples have the freedom to marry. (para. 5)

Given also what occurred with Indiana's state RFRA, it appears that there is less support for the general idea of giving strict scrutiny to cases where someone's right to free exercise has been violated. Many liberals rescinded their support for RFRA when people with Judeo-Christian religious beliefs started objecting to supporting same-sex weddings.

Organizations like the Becket Fund for Religious Liberty strongly support RFRA and have attempted to dispel liberal fears about the bill ("Religious Freedom Restoration Act Information Central," n.d.). The organization wrote that RFRA is not a trump card for religious people to use in court ("Religious Freedom Restoration Act Information Central," n.d.). Becket emphasized that no side is guaranteed a win and that the Act established a reasonable test that religious organizations must satisfy in order to qualify for constitutional protection. Becket also said that it is a myth that RFRA was created to discriminate based on sexual orientation and that RFRA spells disaster for LGBT rights ("Religious Freedom Restoration Act Information Central," n.d.). Becket strongly supports RFRA even though it does not identify itself with the conservative response to homosexual marriage.

On the 20th anniversary of RFRA's passage, the Baptist Joint Committee published a report discussing RFRA's history:

> Two decades later, opinions about RFRA vary. Some prior RFRA advocates now express concerns about its application in particular contexts, such as its interaction with civil rights and health care laws; others argue RFRA has not lived up to its promise of providing meaningful protection for religious liberty for all. Others conclude that RFRA, while not perfectly applied in every case, has on balance provided much needed protection against governmental interference with the exercise of religion. ("The Religious Freedom Restoration Act: 20 years," n.d., para. 2)

Conservative organizations such as Alliance Defending Freedom (ADF) fall into the last category of evaluators of RFRA. They clearly support RFRA's mandate that courts give free exercise cases strict scrutiny ("Will you take," n.d.). Additionally, Michael Farris (2015), the CEO of ADF, expressed that he only wished that the federal RFRA remain applicable to states.

Conclusion

The Religious Freedom Restoration Act is a remarkable law for several reasons. First, RFRA brought together special interest groups from across the political spectrum. Groups such as the ACLU and groups that support traditional values rarely

come together to advocate for a singular cause. Furthermore, cooperation among various interest groups translated into cooperation amongst leaders in Washington, D.C. Republicans and Democrats united together to ensure that religious liberty was protected. RFRA ultimately passed unanimously in the House and 97-3 in the Senate. Given the unique cooperation seen in RFRA, political scientists should do further research into the reasons for the Act's success. RFRA is also important because it majorly affects current policy regarding religious liberty in the United States. Without RFRA, religious corporations like Hobby Lobby would be forced to provide contraceptive services to their employees. Anyone who hopes to defend religious liberty in the future needs to understand RFRA and what it does. Finally, further research ought to be conducted about what can be done in light of *Boerne v. Florez*. Congress should attempt to pass more laws, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA), to systematically restore rights that were lost due to *Smith* and *Boerne*. Additionally, more states should pass state versions of RFRA in order to safeguard religious liberty for all Americans.

Reference List

42 U.S.C. §§ 21B-2000bb (1993).

Baptist Joint Committee (Producer). (2013). *Oliver "Buzz" Thomas on the Religious Freedom Restoration Act* [Vimeo]. Retrieved from https://vimeo.com/99046873

Bender, A. (2016, January 31). Indiana's Religious Freedom Act cost Indianapolis $60 million in lost revenue. *Forbes.* Retrieved from https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#3903fdb02e2a

Bomboy, S. (2014, June 30). What is RFRA and why do we care? [Blog post]. Retrieved from https://constitutioncenter.org/blog/what-is-rfra-and-why-do-we-care

Burwell v. Hobby Lobby, 573 U.S. __ (2014).

Carter, J. (2018, January 18). 5 facts about the Religious Freedom Restoration Act. *ERLC.* Retrieved from https://erlc.com/resource-library/articles/5-facts-about-the-religious-freedom-restoration-act

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

City of Boerne v. Florez, 521 U.S. 507 (1997).

Conestoga Wood Specialties Corp. v. Health and Human Services Department, 723 F.3d 377 (3rd Cir. 2013).

Dye, T. (2013). *Understanding public policy* (15th ed.). Upper Saddle River, NJ: Pearson Education, Inc.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

H. Rep. No. 88 (1993).

History of RFRA. (n.d.). *Becket.* Retrieved from https://www.becketlaw.org/research-central/rfra-info-central/history/#numberone

Kingdon, J. W. (2011). *Agendas, alternatives, and public policies* (2nd ed.). Glenview, IL: Pearson Education, Inc.

Laycock, D., & Thomas, O. (1994). Interpreting the Religious Freedom Restoration Act. *Texas Law Review, 73*(2), 209-245.

McRae v. Califano, 491 F.Supp. 630 (1980).

Melling, L. (2015, June 25). ACLU: Why we can no longer support the federal 'religious freedom' law. *The Washington Post.* Retrieved from https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.7f3e36fc80b2

Minnesota v. Hershberger, 495 U.S. 901 (1990).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 US 833 (1992).

Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102d Cong. 2 (1992).

Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong. 2., at Appendix 1 (1990) (statement of the American Jewish Congress).

The Religious Freedom Restoration Act: 20 years of protecting our first freedom. (n.d.). Retrieved from https://bjconline.org/rfra-symposium/

T*he Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Committee on the Judiciary,* 102nd Cong. 2, (1992) (Testimony of Mark Chapko).

Reno, J. (1993, May 5). [Letter to Joseph Biden, Jr.]. Copy in possession of the Texas Law Review.

RFRA info central. (n.d.). *Becket.* Retrieved from https://www.becketlaw.org/research-central/rfra-info-central/

Roe v. Wade, 410 U.S. 113 (1973).

S. Rep. No. 111 (1993).

Sherbert v. Verner, 374 U.S. 398 (1963).

State v. Hershberger, 462 N.W.2d 393 (1990).

Steinfels, P. (1993, November 17). Clinton signs law protecting religious practices. *The New York Times.* Retrieved from https://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 US 72 (1988).

White House/Office of the Press Secretary. (1993, November 16). Remarks by the President at signing ceremony for the Religious Freedom Restoration Act [Press Release]. Retrieved from https://clintonwhitehouse6.archives.gov/1993/11/1993-11-16-religious-freedom-restoration-act-remarks.html

Will you take a stand for religious freedom? (n.d.) *Alliance Defending Freedom.* Retrieved from https://www.adflegal.org/campaigns/stand-for-rfra