ATHEISM AND THE RELIGIOUS LIBERTY PROTECTION ACT: A PLACE FOR EVERYONE OR EVERYONE IN THEIR PLACE

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Upset with the perceived failure of the Supreme Court to properly protect religious organizations from governmental intrusion, Congress passed the Religious Freedom Restoration Act (RFRA)[1]. RFRA was ultimately struck down as an unconstitutional expansion of Congress's power under section 5 of the 14th Amendment.[2] Undeterred, Congress has attempted to resurrect RFRA in the form of the Religious Liberty Protection Act (RLPA).[3] Atheists, who believe that the world is only capable of being understood through rational scientific observation,[4] have complained vehemently that RFRA and RLPA violate the Establishment Clause of the 1st Amendment.[5] Atheists

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[1] Religious Freedom Restoration Act, 42 U.S.C. §2000bb (2001).

[2] City of Boerne v. Flores, 521 U.S. 507 (1997). The narrowest reading of *Boerne* is that RFRA was struck down as it applied to the states. Others take the view that while the Court seemingly ruled only on this narrow point, there is language in *Boerne* to indicate RFRA is ultimately unconstitutional in its totality.

[3] H.R. 1691, 106th Cong. (1999), *available at* http://www.thomas.loc.gov.; S. 2081,106th Cong. (2000), *available at* http://www.thomas.loc.gov. The House version of RLPA was passed during the 106th Congress, while the Senate version was placed on the Senate calendar but never brought to a vote. RLPA has not been reintroduced in the Senate during the current Congress.

[4] Madalyn Murray O'Hair, *Atheism*, THE AMERICAN RATIONALIST, (Sept./Oct. 1962), *available at* http://www.atheists.org/Atheism/atheism.html.

have adopted Justice Stevens' claim that "the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain."[6]

However, RLPA, while it incorporates the same test as RFRA, can be read to provide its protections to atheists as well as traditional religious organizations. Taking an expansive view of what constitutes a religious belief under RLPA and looking to emerging protections provided to atheists in the international arena can provide atheists with the same protections available to religious groups under RLPA.

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[5] *The Rise of the Theo-Libertarian State* (Aug. 11, 1998), *at* http://www.atheism.about.com/aboutaus/atheism/library/weekly/aa081198.htm (on file with the Rutgers Journal of Law and Religion).

[6] *Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring). The United States Supreme Court struck down the Religious Freedom Restoration Act as applied to the states on the grounds that Congress exceeded its authority under section 5 of the Fourteenth Amendment. Justice Stevens addressed the issue as a violation of the Establishment Clause of the First Amendment. His complete concurrence read:

> In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a law respecting an establishment of religion that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

Id. at 536-37 (internal quotations and citations omitted.)

This note will provide a general overview of atheism to acquaint the reader with the basic tenets of this belief system. In order to understand RLPA fully, it is necessary to examine the background that gave birth to this legislation. As such, the Supreme Court's Establishment and Free Exercise Clause case law will be examined, and RFRA, which grew out of this case law progression and ultimately provided the basis for RLPA, will be deconstructed. Turning from this historical view of free exercise case law and legislation, both the House[7] and Senate[8] versions of RLPA will be dissected and reviewed. Both versions, while very similar, do have a few differences. Then this note will attempt to reconcile atheism and RLPA in such a way as to provide the same protections for the Catholic Church and similar organizations and atheists in the United States.

OVERVIEW OF ATHEISM

Atheism is regarded as a philosophy or belief system[9] that looks to science, logic, and social experience as the guiding principles of how the world works.[10]

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[7] H.R. 1691, 106th Cong. (1999), *available at* http://www.thomas.loc.gov.

[8] S. 2081, 106th Cong. (2000), *available at* http://www.thomas.loc.gov.

[9] Some atheists eschew the use of the term belief when discussing atheism to distinguish it from traditional religious belief systems. *Compare* O'Hair, *supra* note 4, *with* B. A. Robinson, *Atheism: Belief in No God and No Belief in God, at* http://www.religioustolerance.org/atheist.htm (last modified Feb. 22, 2001) (on file with the Rutgers Journal of Law and Religion).

[10] *See* O'Hair, *supra* note 4; Robinson, *supra* note 9; *An Introduction to Atheism*, available at http://www.infidels.org/news/atheism/intro.html (last modified June 30, 1997) (on file with the Rutgers Journal of Law and Religion). Ms. O'Hair is actually the

Atheism is derived from the Greek tradition.[11] The central philosophy of atheism as it has developed over time is materialism or naturalism.[12] Atheists believe the world is

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founder of the American Atheists and was a petitioner in*Murray v. Curlett*, 374 U.S. 203 (1963). In *Murray*, the Supreme Court struck down a statute that required the reading of the Bible or the recitation of the Lord's Prayer at the beginning of the school day. *Id.* at 226. *Murray* is one of the key school prayer cases. In describing atheism to the Supreme Court in papers, Ms. O'Hair (Murray) wrote:

> An Atheist loves himself and his fellow men instead of a god. An Atheist knows that heaven is something for which we should work now - here on earth - for all men together to enjoy. An Atheist thinks that he can get no help through prayer but that he must find in himself the inner conviction and strength to meet life, to grapple with it, to subdue, and enjoy it. An Atheist thinks that only in a knowledge of himself and a knowledge of his fellow man can he find the understanding that will help to a life of fulfillment. Therefore, he seeks to know himself and his fellow man rather than to know a god. An Atheist knows that a hospital should be built instead of a church. An Atheist knows that a deed must be done instead of a prayer said. An Atheist strives for involvement in life and not escape from death. He wants disease conquered, poverty vanquished, war eliminated. He wants man to understand and love man. He wants an ethical way of life. He knows that we are our brother's keeper and keepers of our lives; that we are responsible persons, that the job is here and the time is now.

Robinson, *supra* note 9.

[11] Robinson, *supra* note 9. The term atheist was originally used to describe those that did not believe in the Greek pantheon. *Id.* The term was also applied to Christians in ancient Rome. *Id.* Agnostics, those that are not sure whether there is a God or not, were called atheists until the 19th century when the term agnosticism came into popular use. *Id.* Ms. O'Hair saw the atheist tradition as growing out of scientists and philosophers, such as Democritus, Anaxagoras and Epicurus, and their struggle against the religious forces that fought to silence their work. O'Hair, *supra* note 4. Ms. O'Hair also railed against the Inquisition and the imprisonment of Voltaire and Diderot. *Id.*

only capable of being understood through the sciences by "uncovering and publicizing the laws of nature and human behavior, and in applying these laws in the interest of human welfare."[13] Supernatural phenomena have no place in atheism; only nature and the natural, which are observable phenomena, have a place in atheist philosophy.[14] Atheism's central focus is the human being and his or her interactions with the world.[15] Experiment, in the form of human experience, determines the nature of reality.[16] Atheists are supposed to be involved in the community and working to promote progressive ideas and social changes.[17]

The level of antagonism between atheism and other organized religions varies.[18] Weak atheism is the lack of belief in a supreme supernatural being because of a choice or

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[12] O'Hair, *supra* note 4. "Atheistic materialism is the logical outcome of scientific knowledge gained over the centuries." *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Introduction to Atheism*, *supra* note 10. *See also* Robinson, *supra* note 9. Robinson cites statistics showing that Christians overwhelmingly (74% of traditional Christians and 92% of "born-again" Christians) feel that atheists should not be entitled to First Amendment free speech protections and are a negative influence in society. Robinson, *supra* note 9. Robinson also presents a number of anti-atheist quotes attributed to Pat Buchanan, George Bush, Jerry Falwell and the Boy Scouts. *Id.* Any antagonism between atheism and other religions is a vicious circle. There is some antagonism even in Ms. O'Hair's work. *See* O'Hair, *supra* note 4. Ms. O'Hair seems to be particularly upset with what she viewed as repression of scientific knowledge and thought down through the centuries. *Id.* This almost palpable anger seems to exist in tension with the

an inability to reconcile the religious teachings with the everyday observation of the world.[19] Strong atheism takes the position that gods do not or cannot exist.[20] Strong atheism is more antagonistic to organized religion and religious activities in general than weak atheism.[21] Atheists say religion is based on idealism instead of observable natural phenomena.[22] Atheists also view religion as a "reactionary philosophy" intended to retain the *status quo* as opposed to supporting real social change.[23]

THE ESTABLISHMENT AND FREE EXERCISE CLAUSES

The arguments surrounding both RFRA and RLPA are based in large part on the Establishment and Free Exercise Clauses of the First Amendment.[24] These clauses are collectively known as the Religion Clauses.[25] The Religion Clauses contain ambiguities and are a sensitive area of constitutional jurisprudence. Interestingly, The Free Exercise

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notion of knowing oneself in order to know the world, the demand that atheists make positive changes to the world, and the love of fellow human beings that Ms. O'Hair related to the Supreme Court. *See*Robinson, *supra* note 9.

[19]*Introduction to Atheism*, *supra* note 10.

[20] *Id.*

[21] *Id.* Weak atheists, if given objective proof and a clear definition of "god," might be convinced of "god's" existence. *Id*.

[22] O'Hair, *supra* note 4.

[23] *Id.*

[24] U.S. CONST. amend. I.

[25] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

Clause jurisprudence gave birth to RFRA and RLPA, but opponents of the statutes fight to bring about their demise, in part, by means of Establishment Clause jurisprudence.

Violations of the Establishment Clause are decided under the standard set out in *Lemon v. Kurtzman*.[26] Many of the opponents of RFRA and RLPA claim that the statutes constitute a violation of the Establishment Clause. *Lemon* dealt with Pennsylvania and Rhode Island state statutes providing aid for church-related educational institutions.[27]

Lemon established a three-part test. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive

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[26] *Id*. at 612-13. However, the *Lemon* test has its opponents. Justice Scalia has colorfully described the *Lemon* test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993)(Scalia, J. concurring in the judgment). According to Justice Scalia, "[t]he secret of the *Lemon* test's survival…is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will." *Id*. at 399. The Supreme Court has declined to apply the *Lemon* test in some Establishment Clause cases. *See, e.g.* Lee v. Weisman, 505 U.S. 577 (1992). The *Lemon* test, in Justice Scalia's eyes, is only used when doing to achieves the Court's goals, otherwise the test is ignored or downplayed. *Lamb's Chapel*, 508 U.S. at 399. Despite this controversy, the *Lemon* test is still applied by the courts in Establishment Clause cases. *See, e.g.* ACLU v. Schundler, 104 F.3d 1435, 1440 (3d Cir. 1997)(applying *Lemon* test to creche display); ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1483-84 (3d Cir. 1996)(en banc)(applying *Lemon* test to policy allowing senior class vote on whether to have prayer at graduation).

[27] *Id.* at 606. The Pennsylvania statute provided for the "reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects." *Id*. at 606-07. The Rhode Island statute directly paid the teachers 15% of their annual salary. *Id.* at 607.

government entanglement with religion.'"[28] The statutes in *Lemon* violated the establishment clause because they fostered an excessive entanglement.[29]

The Court recognizes that absolute and total separation is impossible.[30] Excessive entanglement is determined by looking at: 1) the character and purposes of the institutions benefited, 2) the nature of the state aid, and 3) the resulting relationship between the government and the religious authority.[31] In *Lemon*, the statutes required annual appropriations that might grow over time, thereby requiring more of the public finances.[32] Political fragmentation along religious lines was possible under this scheme.[33] The statutes also required the state to look at the school's financial records to determine which expenses were secular (therefore recoverable from the state) and which

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[28] *Id.* at 612-13 (citations omitted).

[29] *Id.* at 614. The court held that there was a legitimate secular purpose in maintaining minimum educational standards. *Id.* at 613. The court declined to examine the second part of the test, because while both statutes intended to apply only to the teaching of secular subjects, the effects of the legislation might have actually advanced religion. *Id*. It is for this reason that the court hung its hat on the third part of the test. *Id.* at 613-14.

[30] Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court states "that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614. Building inspections, fire and zoning regulations are all examples of permissible government and religion interaction according to the Court. *Id.* The Court states that these interactions between the state and religious organizations are inevitable and necessary. *Id.*

[31] *Id.* at 615.

[32] *Id.* at 623.

[33] *Id.*

were religious (not recoverable).[34] The continuous oversight was particularly troubling and was the straw that broke the camel's back.[35]

In order to understand RFRA and RLPA, it is also necessary to look at the development of the Free Exercise Clause in Supreme Court precedent. It now appears that the Court has made its way back to where it started. RFRA and RLPA were born of this progression.

R*eynolds v. United States*[36] dealt with Mormon polygamy. Reynolds was tried and convicted of polygamy under a federal anti-polygamy law after he married his second wife while his first was still alive.[37] Reynolds sought a religion-based exemption from polygamy laws by claiming that polygamy was an accepted part of the Mormon religion and it was his duty as a Mormon to marry a second wife under Mormon religious tenets.[38] The Court drew a distinction between belief and action.[39] Under this distinction, the Free Exercise Clause only protects beliefs.[40] The Court made a "parade

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[34] *Id.* at 621. The direct subsidies of the Pennsylvania statute were particularly troubling in this matter. *Id.* Only teachers of secular matters were covered by the Rhode Island statute. *Id.* at 619, 621. It would require continuous state examination to determine whether the teacher taught only secular matters. *Id.* at 619.

[35] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[36] Reynolds v. United States, 98 U.S. 145 (1878).

[37] *Id.* at 145.

[38] *Id.* at 161. For failing to practice polygamy, when circumstances permitted, a man would suffer eternal damnation. *Id.*

[39] *Id.* at 166.

[40] *Id.* "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.*

of horribles" argument to support the belief/action distinction.[41] The Court was afraid that by allowing the Mormons an exemption for polygamy, religious doctrine would be a higher law than the law of the land, thereby making every citizen a law unto himself or herself.[42]

The Court in later Free Exercise cases seemingly abandoned the belief/action distinction.[43] In *Sherbert v. Verner*,[44] the Court adopted a quasi-balancing test.[45] In *Sherbert*, the petitioner was a member of the Seventh-Day Adventist Church who was

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[41] Reynolds v. United States, 98 U.S. 145, 166 (1878). A "parade of horribles" argument is a variation on a slippery slope argument. A court attempts to support its position by claiming that if this action is permitted, then all of these other actions (typically with more dire consequences for those involved) will be allowed. Elaborating on its parade of horribles, the Court in *Reynolds* wrote:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id.

[42] *Id*. at 167.

[43] Despite this, however, *Reynolds* has not been overruled. In fact, Justice Scalia specifically relied upon *Reynolds* in *Employment Division v. Smith*. *See infra* note 85 and accompanying text. R*eynolds* was also cited in passing in *Sherbert v. Verner*. *See infra* note 53 and accompanying text.

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

[45] *Id*. at 403.

denied a claim for unemployment benefits by the South Carolina Employment Security Commission.[46] The petitioner was fired from her job because she refused to work on Saturdays.[47] Saturday is the Sabbath day of the Seventh-Day Adventist faith.[48] The petitioner was not able to find other suitable work and so sought unemployment benefits.[49] The Employment Security Commission denied the petitioner benefits because it determined that her inability to work on Saturday due to her religious beliefs was not good cause for turning down otherwise suitable work.[50]

The Supreme Court held that the application of the statute in this manner was a violation of the Free Exercise Clause of the First Amendment.[51] The Court reiterated in its opinion that there are certain kinds of actions that may be legislated against regardless of whether the actions were undertaken as part of a religious duty.[52] Actions that can be regulated include those that pose "some substantial threat to public safety, peace or

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[46] *Id*. at 399-401.

[47] *Id*. at 399.

[48] *Id*.. The ban on working on Saturday is based on an interpretation of the Bible and is a "basic tenet" of Seventh-Day Adventists. *Id*. at 399, n.1.

[49] Sherbert v. Verner, 374 U.S. 398, 399-400 (1963).

[50] *Id*. at 401. The Supreme Court of South Carolina held that the statute on which the Commission's decision was based didnot violate the First Amendment of the Constitution. *Id*. The court held that the statute did not prevent the petitioner from observing or exercising her religious beliefs. *Id*.

[51] *Id*. at 410.

[52] *Id*. at 403.

order."[53] Because the denial of the petitioner's benefits did not reach this level, the Court held that the denial would only be constitutional if: 1) the denial resulted in no infringement by the state on her right to exercise her religion freely; or 2) "any incidental burden on the free exercise of appellant's religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[54] This test does not look to the religious interest, just the state's interest in regulating the area.[55] The Court found that interpreting the statute in this way was a burden on the petitioner's free exercise of her religion, but found that there was no compelling state interest.[56] Because of the importance of the First Amendment, a state needs to show more than "a rational relationship to some colorable state interest."[57] The Commission could only show a potential danger of the possibility of persons attempting to use purported religious beliefs to avoid work and collect unemployment benefits.[58] The Supreme Court did not find this danger persuasive.[59]

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[53] *Id*. at 403. The court here cites to *Reynolds* and its anti-polygamy statute as a statute regulating a threat to public peace or order.

[54] Sherbert v. Verner, 374 U.S. 398, 403 (1963) (internal quotes omitted).

[55] *See id*.

[56] *Id*. at 403-07.

[57] *Id*. at 406. The Court stated that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id*. (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[58] *Id*. at 407.

[59] Sherbert v. Verner, 374 U.S. 398, 406-08 (1963).

Wisconsin v. Yoder[60] altered the test in *Sherbert* and made it more of a real balancing test.[61] *Yoder* dealt with an Amish family seeking an exemption to Wisconsin's compulsory education statute.[62] State law required the respondents to have their children attend public or private school until they were sixteen years old.[63] The respondents removed their children from school after 8th grade when the children were either fourteen or fifteen years old.[64] The children received no further schooling sufficient to satisfy the statute, nor where they subject to any exception under the statute.[65] The local school district requested that criminal charges be filed.[66] The respondents were tried, convicted, and fined five dollars each.[67]

The Old Order Amish claimed that a child's attendance of a public or private high school was contrary to the central tenets of their religion.[68] If the respondents sent their

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[60] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[61] *Id*. at 214.

[62] *Id*. at 208-09.

[63] *Id*. at 207. The statute in question was Wis. Stat. § 118.15 (1969). Id. at 207, n. 2.

[64] *Id*. at 207.

[65] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[66] *Id*. at 208.

[67] *Id*. The respondents argued that the statute violated their rights to exercise their religion freely under the First Amendment. *Id*. at 208-09. The conviction was upheld on appeal to the Wisconsin Circuit Court. *Id*. at 213. However, the Wisconsin Supreme Court overturned the conviction under the Free Exercise Clause of the First Amendment. *Id*.

[68] *Id*. at 209.

children to high school, they believed that they were endangering their own salvation as well as their children's.[69]

The Court looked to the rationale behind the respondents' refusal to comply with the compulsory attendance statute.[70] The respondents produced experts who testified about the effect that compulsory high school attendance would have on Amish children.[71] High school would expose Amish adolescents to worldly ideas that run counter to Amish tenets, including isolation from the world at large.[72] High school would pose "a serious barrier to the integration of the Amish child into the Amish religious community."[73] High schools are not equipped to teach the manual farming techniques that are essential

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[69] *Id*. "Old Order Amish communities. . . are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." *Id*. at 210.

[70] *See* Wisconsin v. Yoder, 406 U.S. 205, 209-14 (1972).

[71] *See id*.

[72] *Id*. at 211.

> The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Id.

[73] *Id*. at 211-12.

to the Old Amish way of life and based in religion.[74] According to Dr. John Hostetler, an expert on Amish society, forcing Amish children to attend high school could bring about the end of the Old Order Amish way of life.[75]

Subsequently, the Court looked to Wisconsin's interest in compulsory education.[76] The Court stated that while the state interest in compulsory education is high, it is by no means free from a balancing test.[77] Thus, the Court held that the interests of the state must outweigh the religious interests.[78] Unlike *Sherbert*, this is a true blancing test. Under this test, the Court held that the Amish were entitled to an exemption from the compulsory attendance statute under the Free Exercise Clause of the First Amendment.[79]

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[74] *Id*. at 211.

[75] Wisconsin v. Yoder, 406 U.S. 205, 212 (1972).

[76] *Id*. at 213.

[77] *Id*. at 213-14.

[78] *Id*. at 214.

[79] *Id*. at 236. The Court found that:

> [T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

Id. at 235. The Court held that while the state's interest in compulsory attendance was high, the Amish society's interest in preserving their society was higher. *Id*. at 235-36.

In *Employment Division v. Smith*,[80] the Supreme Court held that neutral laws of general applicability applied to religious groups are valid under the Free Exercise Clause despite the lack of a compelling governmental interest.[81] In *Smith*, the respondents were fired from their jobs because they used peyote as a part of a religious ceremony of the Native American Church.[82] The Employment Division of the Department of Human Resources of Oregon subsequently denied the respondents unemployment benefits because their termination was for "work-related 'misconduct.'"[83]

Justice Scalia, writing for the majority hearkened back to *Reynolds*.[84] The Court stated that "the right of free exercise 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

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This is particularly so given that the state's interest in education is carried on by the Amish with their agricultural training. *Id*. at 236.

[80] Employment Division v. Smith, 494 U.S. 872 (1990).

[81] *Id*. at 879-86.

[82] *Id*. at 874.

[83] *Id*. The Oregon Court of Appeals reversed this denial as a violation of the Free Exercise Clause of the First Amendment. *Id*. at 875. The Oregon Supreme Court affirmed that decision. *Id*.

[84] *Id*. at 879. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law." *Id*. at 878-79. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Id*. at 879 (quoting Minersville School District Bdoard of Education v. Gobitis, 310 U.S. 586, 594-95 (1940)).

proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[85] Justice Scalia wrote that since there was no attempt by the Oregon legislature to regulate religious beliefs or the communication of those beliefs, *Reynolds* was applicable to the case.[86] The compelling governmental interest test was not used because it would require an examination of the importance of the religious act in the overall scheme of the religion.[87] Another stated reason for eschewing the compelling interest test was that such a test would have to be applied to any action that could be religiously commanded and therefore "courting anarchy."[88] The balancing tests laid out in *Sherbert* and *Yoder* were set aside in *Smith*. This set the stage for the rise of RFRA.

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[85] Employment Division v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263, n. 3 (1982)).

[86] *Id*. at 882. Justice Scalia indicated that *Reynolds* also applied here because there was no indication that the Oregon drug law attempted to regulate a parent's inculcation of religious beliefs in his or her child. *Id*.

[87] *Id*. at 886-87. Justice Scalia likened this to a test requiring a court to examine the 'importance' of an idea before applying a compelling interest test in a free speech case. *Id*. at 887.

[88] *Id*. at 888. This hearkens back to the parade of horribles argument in *Reynolds*. *Supra* note 41. Justice Scalia saw this test as allowing the creation of religious exemptions to compulsory military service, taxes, manslaughter, child welfare laws, drug laws, traffic laws, compulsory vaccination laws, minimum wage laws, animal cruelty laws, equal opportunity laws, child labor laws, and environmental laws. *Smith*, 494 U.S. at 888-89.

THE RISE AND FALL OF RFRA

Congress pushed RFRA through based, in part, on a concern that *Smith* would prompt municipal authorities, groups that can be antagonistic to religious organizations,[89] to deny claims by religious bodies.[90]

RFRA sailed through Congress with no real opposition. RFRA's stated intention was to restore the balancing test established in *Sherbert* and *Yoder*.[91]

RFRA set up a three part test requiring plaintiffs to show that: 1) the law was a substantial burden on their religious freedom; 2) the government had no compelling reason for the law; and 3) if the government had a compelling reason, then the state did not use the least restrictive means of vindicating that reason.[92]

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[89] *See* Robert F. Drinan, *Reflections of the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 101 (1997).

[90] *Id*. at 105.

[91] Religious Freedom Restoration Act 42 U.S.C. § 2000bb(b). The appropriate sections follow:

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 15, 92 S. Ct. 1526 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by the government.

Id.

[92] *See* Drinan, *supra* note 89, at 105.

The case that spelled the end for RFRA, *City of Boerne v. Flores*,[93] grew out of a dispute between a parish church wanting to enlarge and a city planning commission seeking to preserve historic landmarks and districts.[94] The church was deemed a historic landmark and could not be altered.[95]

The lawyers for the archdiocese made a tactical decision and sued in federal court under RFRA.[96] The district court judge held that RFRA was unconstitutional because it violated the separation of powers given Congress' clear intent to overturn *Smith*.[97] On appeal to the Fifth Circuit Court of Appeals, the district court decision was reversed.[98] The Court of Appeals held that RFRA was a constitutional exercise of Congress' remedial powers under section five of the Fourteenth Amendment.[99]

During the argument before the United States Supreme Court, a number of Justices thought that Congress had invaded the Court's turf and these Justices were not

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[93] City of Boerne v. Flores, 521 U.S. 507 (1997).

[94] *Id.* at 512; Drinan, *supra* note 89, at 101.

[95] *Boerne*, 521 U.S. at 512; Drinan, *supra* note 89, at 101. There is no known reason why the church was denied a permit to expand. Some argue that it was because of antireligious bias. Drinan, *supra* note 89, at 102. Others argue that it was because members of the congregation wanted to build a new church in another part of the city. *Id.* Still others argue that the city did not want to set a precedent that others could use to expand buildings for purely commercial reasons. *Id.*

[96] Drinan, *supra* note 89, at 102.

[97] *Boerne*, 521 U.S. at 512.

[98] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[99] *Id.*

happy about that invasion.[100] This anger is apparent early in the *Boerne* majority opinion.[101] The majority opinion stated that "Congress enacted RFRA in direct response to the Court's decision in [*Smith*]."[102] The Court also stated that Congress was not enforcing the Fourteenth Amendment by changing the meaning of the Free Exercise Clause.[103] The Court claimed that Congress was acting outside of its sphere in violation of the separation of powers.[104] The Court ultimately held that Congress could not make RFRA applicable to the states based on its power under section 5 of the Fourteenth Amendment.[105] Section 5 of the Fourteenth Amendment did not cover RFRA because Congress was seeking to apply a new standard rather than enforcing the standard set forth in *Smith*.[106]

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[100] Drinan, *supra* note 89, at 105. This was played up by Marcie Hamilton, the lawyer for the City of Boerne, who used this theme to begin her argument. *Id.*. at 105-06.

[101] Drinan, *supra* note 89, at 109.

[102] *Boerne*, 521 U.S. at 512.

[103] *Id.*. at 519.

[104] *Id.* at 535. The Court restates that only the Court can interpret the Constitution, and regardless of Congressional action, that interpretation of the Constitution will be controlling. *Id.*. at 536.

[105] *Id.* at 511.

[106] Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 715 (1998). Another possible reason for the Court to strike down RFRA is that the Court was looking for a means of limiting section five of the Fourteenth Amendment. Drinan, *supra* note 89, at 116.

RLPA: RFRA'S OFFSPRING

However, Congress was not to be deterred in entering the field of religious protection statutes following*Boerne*. While the House and Senate Version of RLPA are substantially the same, there are a few key differences.

Both the House[107] and Senate[108] versions of RLPA are justified as an exercise of congressional power under the Commerce Clause, avoiding *Boerne*'s restriction on section 5 of the Fourteenth Amendment.[109] RLPA would apply if the burden itself affected interstate commerce or the removal of the burden would have such an effect.[110] RLPA would also apply when the program or activity that infringes on the religious freedom of an individual receives government funding.[111]

This sets up one of the key differences between the Senate version of RLPA and the House version. The Senate version contains a further limitation on the applicability of RLPA.[112] In section 2(c), the Senate states that RLPA will not apply: 1) if the only

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[107] Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999), *available at* http://www.thomas.loc.gov. This bill was sponsored by Representative Charles T. Canady (R-FL) and was passed by the House on July 15, 1999.

[108] Religious Liberty Protection Act of 2000, S. 2081, 106th Cong. (2000), *available at* http://www.thomas.loc.gov.. The Senate version of RLPA was sponsored by Senator Orrin Hatch (R-UT) and was on the Senate calendar but was not passed during the 106th Congress. RLPA has yet to be introduced in the Senate during the current Congress.

[109] H.R. 1691 § 2(a)(2); S. 2081 § 2(a)(2). Congress' commerce power is found in Art. I of the United States Constitution. U.S. CON. art. I § 7.

[110] H.R. 1691 § 2(a)(2); S. 2081 § 2(a)(2).

[111] H.R. 1691 § 2(a)(1); S. 2081 § 2(a)(1).

[112] S. 2081, 106th Cong. § 2(c) (2000).

basis for application is the Commerce Clause; and 2) the government can show that the effect of the restriction or the removal of the restriction on all similar religious practices will not lead to a substantial effect on commerce or substantially related activities.[113] This might be an attempt by the Senate to shore up RLPA by rooting it more deeply in the Commerce Clause.[114]

Both versions also state that federal funds cannot be withheld for violations of RLPA, but the United States may institute or intervene in any action under RLPA.[115]

The procedure for making out a claim under RLPA is the same under both the Senate and House versions.[116] First, the claimant must set out a *prima facie* case of a Free Exercise Clause violation.[117] The government then bears the burden of persuasion on any of the elements of the claim.[118] However, the claimant bears the burden of

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[113] *Id.*

[114] This is probably a good idea given the Supreme Court's recent decisions limiting the application of the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zones Act unconstitutional as an exercise of the Commerce Clause power because the possession of guns in a school zone, which was supposed to have a substantial effect on commerce, looked so unlike something economic that it could not be supported by the Commerce Clause).

[115] H.R. 1691, 106th Cong. § 2(c) (1999); S. 2081, 106th Cong. § 2(d) (2000).

[116] H.R. 1691 § 3; S. 2081 § 3.

[117] H.R. 1691 § 3(a); S. 2081 § 3(a).

[118] H.R. 1691 § 3(a); S. 2081 § 3(a).

persuasion on whether the government action "burdens or substantially burdens" free exercise.[119]

There are specific guidelines for handling land use regulations in both versions of RLPA.[120] Both versions state that if a government entity can make an individualized examination of the proposed uses of the property, then RLPA comes into play.[121] However, the House version only mentions that it applies to persons,[122] while the Senate version applies to religious assemblies, institutions, and a person in his or her home.[123] The government may impose a substantial burden on free exercise in these instances if it can make a showing of two requirements.[124] Both versions require that the burden is "in furtherance of a compelling governmental interest."[125] The House version requires that

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[119] H.R. 1691 § 3(a); S. 2081 § 3(a).

[120] H.R. 1691, 106th Cong. § 3(b) (1999); S. 2081, 106th Cong. § 3(b) (2000).

[121] H.R. 1691 § 3(b)(1)(A); S. 2081 § 3(b)(1)(A).

[122] H.R. 1691 § 3(b)(1)(A).

[123] S. 2081 § 3(b)(1)(A).

[124] H.R. 1691 § 3(b)(1)(A); S. 2081 § 3(b)(1)(A).

[125] H.R. 1691, 106th Cong. § 3(b)(1)(A) (1999); S. 2081, 106th Cong. § 3(b)(1)(A)(i) (2000).

the least restrictive means be used,[126] while the Senate version requires the burden be "narrowly tailored to further [the government's stated] compelling interest."[127] Both versions require that religious assemblies or institutions be treated "on equal terms" with non-religious institutions.[128] There is also a nondiscrimination requirement.[129] Both versions also require that if a government has zoning authority, the government will not unreasonably exclude or limit religious institutions from that area.[130]

Full faith and credit are given to any case tried in a non-federal forum involving a violation of the Free Exercise Clause or a violation of the land use regulations in RLPA,[131] unless the issue was not given a "full and fair adjudication" in the other forum.[132]

A non-preemption clause is present in both versions and allows for the continued viability of a state law, which provides equal or greater protection of free exercise.[133]

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[126] H.R. 1691 § 3(b)(1)(A).

[127] S. 2081 § 3(b)(1)(A)(ii). There may be little practical difference between these two requirements, but it is something that will have to be addressed when Congress is trying to reconcile these two versions of RLPA.

[128] H.R. 1691 § 3(b)(1)(B); S. 2081 § 3(b)(1)(B).

[129] H.R. 1691 § 3(b)(1)(C); S. 2081 § 3(b)(1)(C). Government entities may not discriminate on the basis of religion or denomination. *Id.*

[130] H.R. 1691, 106th Cong. § 3(b)(1)(D) (1999); S. 2081, 106th Cong. § 3(b)(1)(D) (2000).

[131] This covers violations of § 3(b) of both versions.

[132] H.R. 1691 § 3(b)(2); S. 2081 § 3(b)(2).

[133] H.R. 1691 § 3(b)(3); S. 2081 § 3(b)(3).

Article III of the Constitution governs standing to sue under RLPA.[134] The United States may also sue to obtain declaratory or injunctive relief under both versions.[135] However, under the Senate version, RLPA cannot abrogate state sovereign immunity;[136] the House version has no similar clause.[137]

Section 5 of both versions contains the rules of construction.[138] The most important aspect of these rules for including atheists under its protective banner is the requirement of a broad construction.[139] The section states that "[t]his Act should be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution."[140] Both versions state the RLPA shall not be construed as authorizing any governmental burden on or a regulation of a religious

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[134] H.R. 1691 § 4(a); S. 2081 § 4(a).

[135] H.R. 1691, 106th Cong. § 4(d) (1999); S. 2081, 106th Cong. § 4(d) (2000).

[136] S. 2081 § 4(e).

[137] H.R. 1691 § 4(e).

[138] H.R. 1691 § 5; S. 2081 § 5. A number of rules of construction are included. There are clauses covering severability of any part of the act declared unconstitutional. H.R. 1691 § 5(h); S. 2081 § 5(h). Any right of a religious organization to receive governmental funding or assistance is neither created nor precluded by RLPA. H.R. 1691 § 5(c); S. 2081 § 5(c). RLPA does not authorize a government to regulate the activities or policies of anyone other than a government as a condition in order to receive funding. H.R. 1691 § 5(d); S. 2081 § 5(d).

[139] H.R. 1691 § 5(g); S. 2081 § 5(g).

[140] H.R. 1691, 106th Cong. § 5(g) (1999); S. 2081, 106th Cong. § 5(g) (2000).

belief or the exercise thereof.[141] A government may avoid the force of RLPA by alleviating the burden on free exercise.[142]

RLPA also states that it should not be interpreted in such a way as to violate the Establishment Clause.[143] Actions taken by the government that are permissible under the Establishment Clause cannot constitute a violation of RLPA.[144] Nothing in RLPA is intended to "affect, interpret, or in any way address" the Establishment Clause.[145] RLPA also amends RFRA to eliminate references to the states and incorporate RLPA definitions of religious exercise.[146]

Religious exercise is defined as:

> any exercise of religion, whether or not compelled by, or central to, a system of religious belief, and includes (A) the use, building, or conversion of real property by a person or entity intending that property to be used for religious exercise; and (B) any conduct protected as exercise of religion under the first amendment to the Constitution.[147]

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[141] H.R. 1691 § 5(a) & (b); S. 2081 § 5(a) & (b).

[142] H.R. 1691 § 5(e); S. 2081 § 5(e). This alleviation may be accomplished through altering the regulation or policy that creates the burden, providing an exemption from the regulation, or any other means. *Id*.

[143] H.R. 1691 § 6; S. 2081 § 6.

[144] . H.R. 1691 § 6; S. 2081 § 6.

[145] H.R. 1691, 106th Cong. § 6 (1999); S. 2081, 106th Cong. § 6 (2000).

[146] H.R. 1691 § 7, S. 2081 § 7.

[147] H.R. 1691 § 8(1). The Senate version has the same wording but the breakdown into subsections within the definition is different. S. 2081 § 8(6). Other terms defined include: demonstrates, free exercise clause, land use regulation, program or activity, and government. H.R. 1691 § 8(5), (2), (3), (4), & (6); S. 2081 § 8(1), (2), (4), (5), & (3).

Religious belief itself is not defined.[148]

ROCKING THE BOAT: ARGUMENTS AGAINST RLPA

RLPA's constitutionality is questionable. In striking down RLPA, there are a few avenues that could be pursued, including arguing that RLPA 1) violates the Establishment Clause,[149] 2) can not be justified under the Commerce Clause,[150] 3) conflicts with the limits on Congress' spending power,[151] 4) violates the separation of powers,[152] and 5) is in actuality a constitutional amendment in the guise of a statute

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[148] *See* H.R. 1691 § 8; S. 2081 § 8.

[149] U.S. CONST. amend. I.

[150] *See* United States v. Lopez, 514 U.S. 549(1995) (holding that the Gun Free School Zones Act of 1990 cannot be supported by the Commerce Clause). When the thing that is accused of having a substantial effect on interstate commerce looks so unlike something economic it cannot be supported by the Commerce Clause. *Id*. RLPA is possibly so unlike anything economic that it cannot be supported by the Commerce Clause.

[151] Christopher L. Eisgruber and Lawrence G. Sager, *Testimony Submitted to the House Judiciary Committee, Sub-Committee on the Constitution, available at* http://www.atheism.about.com/religion/atheism/library/legal/legislation/bl_rlpa_eisgruber.htm (June 16, 1999). Mr. Eisgruber and Mr. Sager are both law professors at New York University School of Law. *Id.* Professors Eisgruber and Sager raised their concerns about the 1998 draft version of RLPA. *Id.* These concerns are still valid in regards to H.R. 1691, 106th Cong. (1999) and S. 2081, 106th Cong (2000).

[152] H.R. 1691; S. 2081.

violating the requirements of Article V of the Constitution.[153] These arguments vary in weight, but all question RLPA's constitutionality .

A. Establishment Clause

Opponents of RLPA claim that it "privileges religion over all other interests in the society."[154] This argument tracks Justice Stevens' comments in his concurring opinion in *Boerne* that such a preference violated the Establishment Clause.[155] This favoring of religion and the religious over the secular and the subsequent violation of the Establishment Clause arises from (1) using the compelling state interest test, (2) defining

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[153] Marci A. Hamilton, *Testimony to the House Committee on the Judiciary, Sub-Committee on the Constitution, available at* http://www.atheism.about.com/religion/atheism/library/legal/legislation/bl_rlpa_hamilton.htm(June 16, 1998). Ms. Hamilton is a law professor at Benjamin N. Cardozo School of Law at Yeshiva University. *Id.* Professor Hamilton raised her concerns about the 1998 draft of RLPA. *Id.* These concerns are still valid in regards to H.R. 1691 and S. 2081.

[154] Hamilton, *supra* note 153. Professor Hamilton provides a list of groups whose interests would be adversely affected by RLPA. *Id*. These groups include: 1) children, where the religion endorses child abuse or refuses to allow access to medical treatments; 2) women, where women's positions are subordinated to men's positions by religious fiat; 3) pediatricians, who support mandatory immunizations; 4) persons protected by anti-discrimination laws (including the disabled and minorities), where those laws might be trumped by religious practices; 5) prison officials, where prison regulations might be trumped by religious practices; 6) historical and artistic preservation boards, where their decisions and regulations on preservation would not be applicable to buildings owned by religious groups; 7)neighborhoods, which would not be able to subject religious groups to the neighborhood rules; 8) school boards, which would have to make numerous accommodations to religious consideration; 9) local governments, which will have to accommodate religious beliefs or be subject to litigation; 10) taxpayers, who will ultimately have to foot the bill for litigation. *Id.*

[155] City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J. concurring)(citing Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985)). "This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Id.*.

"religious exercise" broadly, and (3) encouraging religious belief by holding out the possibility of and exemption.

The crux of this claim of privileging religion is the use of the compelling state interest test.[156] The compelling state interest test is the most stringent test in all of constitutional law.[157] The compelling state interest test would cause some laws that are neutral to religion on their face, such as historical preservation ordinances, to be inapplicable to religious organizations because the ordinance would have an incidental burden on religious practices.[158] Religious beliefs, no matter how deeply held, would justify allowing a religious organization or individual to disregard a regulation that would still apply to a secular group or individual, regardless of whether the regulation infringed upon a deeply held moral, political, artistic, professional, or other societal belief not founded in religion.[159]

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[156] Eisgruber & Sager, *supra* note 151.

[157] *Id*. Professors Eisgruber and Sager contend that the compelling state interest test should be applicable only when "it is appropriate to entertain a broad presumption of unconstitutionality—where, in other words, almost all of the cases that trigger the test will be abhorrent to the best standards of government behavior." *Id*. In their eyes, this standard only should be applied to censorship of speech or racial and religious discrimination. *Id*.

[158] *Id.*

[159] *Id.* Professors Eisgruber and Sager feel that RFRA and RLPA were based on a misreading of the Supreme Court precedent prior to *Smith*. *Id.* Eisgruber and Sager argue that Congress read too deeply into the broad language that the Court used pre-*Smith*. *Id.* After reviewing pre-*Smith* cases, Eisgruber and Sager *only* found two groups that succeeded in gaining an exemption using the compelling state interest test. *Id.* The first group was the Amish who were allowed and exemption from a compulsory education statute. *Id.* The second group was those "who were presumptively entitled to claim unemployment benefits; who had deep religious reasons for refusing an available

This compelling state interest test, as announced in RLPA, is more stringent than the test used in prior Supreme Court decisions.[160] Under the compelling interest test in RLPA, the government must show a compelling state interest and that the least restrictive means were used to achieve that interest.[161] The fact that this test is so difficult for the government to satisfy means that more laws would be inapplicable to religious organizations.

Both the House and Senate versions of RLPA provide a broad definition of "religious exercise" creating further problems.[162] Religious exercise is protected under RLPA whether or not it is compelled by or central to the religion.[163] This language was

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job; and who faced a serious danger that those reasons might be treated with hostility by state bureaucrats." *Id.* Accordingly, all *Smith* did was announce the abandonment of the compelling state interest test, although for all practical purposes, the test had been abandoned long before. *Id.*

[160] *Id.*

[161] *Id.* (citing City of Boerne v. Flores, 521 U.S. 507, 534 (1997)); H.R. 1691, 106th Cong. § 2(b) (1999); S. 2081, 106th Cong. §2(b) (2000).

[162] H.R. 1691, 106th Cong. § 8(1) (1999); S. 2081, 106th Cong. § 8(6) (2000). In the Senate version, religious exercise

> (A) means any exercise of religion, whether or not compelled by, or central to, a system of religious belief; and (B) includes— (i) the use, building, or conversion of real property by a person or entity intending that property to be used for religious exercise; and (ii) any conduct protected as exercise of religion under the first amendment to the Constitution.

S. 2081 § 8(6). The words are the same in the House version although the subsection breakdown within the definition is different. H.R. 1691 § 8(1).

[163] H.R. 1691 § 8(1); S. 2081 § 8(6).

not present in RLPA's predecessor, RFRA, or in the Supreme Court's free exercise jurisprudence.[164] By requiring that the religious practice infringed upon by the government need not be central to the religion, the breadth of religious practice exempted from government intrusion is widened.[165] In fact, courts that decided cases under RFRA rarely looked to whether the religious practice was compulsory; instead they looked to the degree of importance of the practice to the religion.[166] This new definition of religious exercise forestalls claiming that a law is valid due to the fact that the governmental burden is not substantial because it only affected optional or secondary practices of the religion that had readily available substitutes.[167] Thus, the new definition eliminates a pro-RFRA argument that RFRA tended to limit the impact of this preferential treatment of religious organizations.

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[164] Eisgruber & Sager, *supra* note 151.

[165] *Id.*

[166] *Id.*

[167] *Id.* At times, these arguments hinged on the availability of comparable substitutes.

> For example, under RFRA, several churches running soup-kitchens in residential neighborhoods sought zoning exemptions which, they conceded, were unavailable to comparably situated secular charities. In these cases, it was possible to argue that no "substantial burden" upon religious practice existed: the churches were free to run soup-kitchens in other locations, and they were free to engage in other charitable practices which, as a matter of their own religious doctrine, were equally worthy.

Id.(citing Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995)).

It could also be argued that RLPA encourages religious belief and excessively entangles the government and religion.[168] RLPA encourages religious belief in that it holds out the promise of an exemption for generally applicable laws for those who believe.[169]

B. Commerce Clause

Other arguments against RLPA are based on RLPA's grounding in the Commerce Clause. RLPA is made applicable to the states by the use of the Commerce Clause power.[170] RLPA's grounding in the Commerce Clause is potentially fatal because (1) recent Supreme Court decisions have limited the scope of the Commerce Clause; (2) religious conduct is difficult to characterize as commercial; (3) commercial characterization denigrates religion; and (4) commercial characterization favors wealthy religiouns.

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[168] Dave Kong, *American Atheists Written Testimony on the California Religious Freedom Protection Act* (June 9, 1998), *at* http://www.atheists.org/flash.line/rfra18.htm (on file with the Rutgers Journal of Law and Religion). Dave Kong is the State Director of the American Atheists in California. *Id.* This testimony was in opposition to the state version of the RFRA proposed in California. *Id*. While specifically addressing the state version of the RFRA, these general observations apply equally to H.R. 1691 and S. 2081.

[169] *Id.* Mr. Kong argues that some citizens might see a statute like RLPA as a means of enjoying legalized marijuana by joining the Rastafarians. *Id.* While RLPA may prompt people to "adopt" religious beliefs, courts may still determine whether those beliefs are sincerely held. *See* United States v. Ballard, 322 U.S. 78 (1944).

[170] H.R. 1691, 106th Cong. § 2(a)(2) (1999); S. 2081, 106th Cong. § 2(a)(2) (2000).

The Commerce Clause has been used in the past as a means of prohibiting discriminatory conduct by the states.[171] However, in *United States v. Lopez*, the Supreme Court held the Gun-Free School Zones Act unconstitutional as an exercise of the commerce power because the activity that was to be regulated looked so unlike an economic activity that the regulation could not be supported by the Commerce Clause.[172] The protection of religious activities from government regulation looks sufficiently unlike an economic activity that RLPA cannot be supported by the Commerce Clause. In fact, the Senate seems so concerned by *Lopez* that the Senate version of RLPA does not apply to situations where the Commerce Clause is the only basis for the application of RLPA.[173]

This concern is valid, however, because it would be difficult to construct an argument that a local regulation that denies a church the ability to expand could have an affect on interstate commerce.[174] In fact, some commentators have described religious

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[171] Eisgruber & Sager, *supra* note 151 (citing Katzenbach v. McClung, 379 U.S. 294 (1964)). Katzenbach dealt with Title II of the Civil Rights Act of 1964. *Katzenbach*, 379 U.S. at 295. In *Katzenbach*, a restaurant in Birmingham, Alabama (Ollie's Barbecue) refused to serve African-Americans. *Id*. at 296. Title II was applicable because the restaurant was engaged in interstate commerce and by refusing to serve African-Americans, the overall demand for food and food products in interstate commerce was diminished. *Id*. at 304.

[172] United States v. Lopez, 514 U.S. 549 (1995).

[173] *See supra* note 114 and accompanying text.

[174] It seems unlikely that the parishioners would cross state lines to flee an overcrowded church taking their hard earned donations with them.

activities as "intrinsically non-commercial."[175] Nonetheless, perhaps by denying a religious organization the ability to open a soup kitchen, there could be a colorable argument to the effect that the subsequent denial of the interstate sale and transportation of food products to the proposed kitchen has an effect on interstate commerce.

Still, there are other considerations against using the Commerce Clause to justify RLPA. There is an argument that religion is denigrated when it must be reduced to "big business" in order to be protected.[176] To force religious organizations to frame their conduct in light of their finances cheapens religion and further entangles sacred beliefs with secular concerns.[177]

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[175] *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the House Subcommittee on the Constitution, 105th Cong.* (1998) (Testimony of Michael P. Farris, Esq., Founder and President of the Home School Legal Defense Association), *available at* http://www.atheism.about.com/religion/atheism/library/legal/legislation/bl_rlpa_farris.htm (on file with The Rutgers Journal of Law and Religion). Mr. Farris is the Founder and President of the Home School Legal Defense Association, which addresses concerns by parents seeking to provide in-home education for their children, particularly religiously based education. *Id.* Mr. Farris was also co-chair of the initial drafting committee for RFRA. *Id.* In fact, Mr. Farris claims that his organization also speaks for other groups including: "Concerned Women for America, the American Family Association, Eagle Forum, the Traditional Values Coalition, the American Association of Christian Schools, Paul Weyrich and the Free Congress Foundation, and former Attorney General Edwin Meese." *Id.* Although Mr. Farris testified about a 1998 draft of RLPA, his concerns still apply to H.R. 1691, 106th Cong. (1999) and S. 2081, 106th Cong. (2000).

[176] *Id.*

[177] Mr. Farris alludes to Mark 12:17, which states, "[t]hen Jesus answered and said to them 'Render to Caesar the things that are Caesar's and to God the things that are God's.'" *Mark* 12:17 (King James). He also relates an interesting hypothetical:

> There is a law of general applicability in every State banning the use of alcohol by minors. Under *Smith* and*Boerne*, applying this law to Holy Communion would

Another argument is that RLPA not only unjustly discriminates against non-religious organizations by providing religious organizations with protections not available to non-religious organizations, but also discriminates amongst religions by using the Commerce Clause.[178] Only religious groups that are capable of acting in interstate commerce or receiving federal funds would be protected by RLPA.[179] By favoring larger and wealthier religious organizations over smaller groups, RLPA actually

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> not violate the Free Exercise Clause. Suppose a sheriff decides actually to enforce this law during a worship service, and the church defends on the basis of RLPA. "Don't worry about the religious stuff," the church's lawyer would say. "Under RLPA, the most important thing is to prove that the bread and wine were purchased through channels of interstate commerce. Otherwise, we lose."

Farris, *supra* note 175.

[178] Farris, *supra* note 175.

[179] *Id*. Mr. Farris sees the situation as it particularly affects his organization in this way:

> Religious groups and organizations that are large, powerful and involved in economic activities such as publishing houses and products distribution will have little problem establishing that their ministries have an effect on interstate commerce. Not so the "little guy." Individual religious believers, families—including the almost 60,000 home schooling families who make up [the Home School Legal Defense Association's] constituency—and small churches and ministries will be left defenseless. A home school run out of religious conviction will be unable to claim the protections of RLPA because the family will be unable to establish that their faith has any material effect on interstate commerce.

Id.

runs counter to the purposes of the First Amendment.[180] The wealthier religions can look to the political process to redress any grievances, but the smaller groups, which traditionally have to look to the courts for redress, would be prevented from doing so by RLPA.[181]

C. Spending Power

It is also argued that RLPA violates the limitations on Congress' spending powers.[182] Congress does have the ability to impose conditions on the receipt of federal funds, so long as the conditions imposed are related to the federal interest in a national project.[183]

Since RLPA applies across the board to all federal spending, it cannot be related to a specific federal interest in a national project.[184] While Congress claims a general interest in preserving the free exercise of religion under the First Amendment, that general interest is applied to all federal programs, not just highway funding, etc., and is

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[180] *Id*.

[181] *Id.*

[182] Eisgruber & Sager, *supra* note 151.

[183] *Id*. (citing South Dakota v. Dole, 483 U.S. 203 (1987)). *Dole* dealt with a federal statute, which imposed a condition on the receipt of federal highway funds. *Dole,* 483 U.S. at 205. In order to receive the funds, states had to raise the minimum drinking age to 21. *Id.* South Dakota argued that the drinking age was peculiarly a local decision and that Congress's action was barred by the Twenty-first Amendment. *Id.* The Supreme Court held that the statute was constitutional by reasoning that the condition was related to the national purpose of providing safe interstate travel and states had the option to keep their original drinking age by declining the federal funding. *Id*. at 210-11.

[184] Eisgruber & Sager, *supra* note 151.

not directed at supporting a federal interest related to a particular federal program.[185] RLPA's compelling interest test is so broad that applying it would inevitably result in the vitiation of the goals of those federal programs.[186] RLPA seems to operate under the assumption that once states receive federal funding, those state programs are subject to federal regulation regardless of the purpose of the regulation and its connection to the distribution of funding.[187]

At the same time, RLPA is fundamentally different than other conditional receipts of federal funding because RLPA does not require the states to do something, such as enact a statutory change, or lose the federal funds.[188] RLPA instead places additional conditions on funds that did not have those conditions attached at the time the states received the funds.[189] RLPA thereby subjects the states to private causes of action as opposed to providing funding.[190] A state could then find itself in a compromising situation. On the one hand, there is no way for a state to function without federal funding. On the other, there is no way for a state to receive federal funding under RLPA

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[185] *Id*.

[186] *Id*.

[187] *Id*.

[188] *Id*.

[189] *Id.*

[190] *Id.*

without subjecting itself to RLPA and opening its laws and regulations up to attacks by religious organizations.[191]

D. Separation of Powers

RLPA and its predecessor, RFRA, were drafted to reverse the Supreme Court's interpretation of the First Amendment in *Smith*.[192] The Supreme Court addressed the separation of powers in *Boerne* when dealing with RFRA.[193] The Court was not pleased with what it viewed as Congress' intrusion into its territory. RLPA is a similar invasion of the Supreme Court's territory by establishing the content of First Amendment free exercise protection.[194]

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[191] Some see this as a clear attack on States' Rights. *See* Hamilton, *supra* note 153. Hamilton claims that RLPA will completely eliminate local government by "federalizing local land use law." *Id.* Professors Eisgruber and Sager also claim that RLPA is "a sweeping and unwarranted federalization of local decision-making." Eisgruber & Sager, *supra* note 151. Eisgruber and Sager attack RPLA stating that "[t]his remarkable preemption of local authority cannot be defended as a reasonable mechanism to remedy or prevent discrimination against religious interests." *Id*. RLPA is unreasonable because it applies to all religious organizations and to all decisions by zoning boards involving those organizations. *Id.* All religious organizations get a free pass to federal court over zoning decisions. *Id.* As such, RLPA improperly intrudes on states' rights by using the spending power in an overly broad fashion. *Id*.

[192] *Id.*

[193] *Boerne*, 521 U.S. at 519, 535

[194] Hamilton, *supra* note 153. *See* H.R. 1691, 106th Cong. § 2(a) (1999); S. 2081, 106th Cong. § 2(a) (2000) . Both versions read as follows:

> (a) General Rule. Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise--
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> (1) in a program or activity, operated by a government, that receives Federal financial assistance; or

RLPA also establishes presumptions that are to be used in First Amendment cases.[195] RLPA increases the government's burden of persuasion in cases arising under

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> (2) in any case in which the substantial burden on the person's religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes;
>
> even if the burden results from a rule of general applicability.

H.R. 1691 § 2(a) ; S. 2081 § 2(a) .

[195] H.R. 1691 §3(a); S. 2081 §3(a). Both versions contain essentially the same language. The Senate version states:

> Procedure. If a claimant produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of a provision of this Act enforcing that clause, the government shall bear the burden of persuasion on any element of the claim, except that the claimant shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim burdens or substantially burdens the claimant's exercise of religion.

S. 2081 §3(a). The House version reads:

> Procedure. If a claimant produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of a provision of this Act enforcing that clause, the government shall bear the burden of persuasion on any element of the claim; however, the claimant shall bear the burden of persuasion on whether the challenged government practice, law, or regulation burdens or substantially burdens the claimant's exercise of religion.

H.R. 1691 §3(a).

the Free Exercise Clause and RLPA.[196] By altering the presumptions in a free exercise context, Congress is violating the separation of powers and instructing the Supreme Court on how to interpret the Constitution.[197] Thus, RLPA raises grave constitutional concerns.

There are two primary ways the Court may find RLPA unconstitutional as a violation of the separation of powers. The first is to analogize RLPA to RFRA in*Boerne*.[198] As noted above, the Supreme Court was not receptive to RFRA's attempt to re-introduce the pre-*Smith* standard for Free Exercise Clause violations. RLPA is intended to accomplish the same purpose as RFRA. Therefore, it is unlikely that the Court would be any more receptive in this case. Second, the RLPA decision could be read in a manner that would be in violation of Supreme Court precedent.[199] While Congress is entitled to determine what is constitutional on their own, the courts should have the same independence, especially since the Supreme Court has the final say on the

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[196] Eisgruber & Sager, *supra* note 151; H.R. 1691 §3(a); S.2081 §3(a).

[197] Eisgruber & Sager, *supra* note 151.

[198] *Id.*

[199] *Id.* (citing United States v. Klein, 80 U.S. (3 Wall.) 128 (1871)). Klein states that Congress cannot force their own interpretation of a statute or the Constitution on the courts. *Klein*, 80 U.S. at 147-48. The courts must be able to develop their own interpretation. *Id.* However, as Professors Eisengruber and Sager point out, every statute establishes some sort of rule of decision by its very language. Eisengruber & Sager, *supra* note 151. RLPA's language, however, is so far beyond the norm that *Klein* must apply. *Id.*

Constitution. RLPA attempts to bind the courts to Congress' interpretation of the Constitution.

E. Amendment Ratification

Since RLPA attempts to alter the test for violations of the Free Exercise Clause, some scholars claim that RLPA is an attempt to amend the Constitution without abiding by the procedures required by Article V.[200] Since RLPA was passed by a simple majority vote, these scholars claim that Congress is amending the Constitution without meeting the requisite two thirds vote in favor in the Congress and the approval of three fourths of the states.[201] Thus, Congress should not be permitted to get in the back door what it could not get in the front. If Congress really wants to change the way the Free Exercise Clause is examined, it should amend the First Amendment.

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[200] Hamilton, *supra* note 153. Article V of the Constitution reads in pertinent part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress….

U.S. CONST. art. V.

[201] Hamilton, *supra* note 153.

INCLUSIVENESS: RECONCILING ATHEISM AND RLPA

Setting these arguments against RLPA's constitutionality aside, the question becomes whether it would be possible to interpret RLPA in such a way that it includes atheists within its protections. The Supreme Court has never defined what a religious belief is, only what a religious belief does not require.[202] The Supreme Court has stated that "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God" is entitled to exemption for those that believe in God.[203] RLPA does not define religion or religious belief[204] and it has a broad construction

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[202] *See* Torcaso v. Watkins, 367 U.S. 488 (1961). In *Torcaso,* the Supreme Court declared that the Maryland constitutional requirement of declaring a belief in God to be appointed to the Office of Notary Public, invaded the appointee's freedom of belief and religion. *Id.* at 489. Neither a State not the federal government can constitutionally pass laws that aid religions against non-believers nor can they aid religions based on the belief of an existence of God as against those founded on different beliefs. *Id.* at 490. *See also* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (do not need an organized or traditional religion to constitute a religious belief). The Supreme Court held that the denial of appellant's unemployment compensation benefits violated the Free Exercise Clause of the First Amendment, even though appellant had not professed that his membership in a particular religious group did not allow him to be employed on Sundays. *Torcaso*, 367 U.S. at 495. The Court found that appellants refusal was based on a sincerely held religious belief and therefore reversed the lower court's decision. *Id.* Additionally, while courts have struggled to define a religious belief, courts may not declare a belief to be false. *See* United States v. Ballard, 322 U.S. 78 (1944). Courts may determine, however, whether the person is sincerely asserting the belief. *See Id.*

[203] United States v. Seeger, 380 U.S. 163, 165-78 (1965) (interpreting § 6(j) of the Universal Military Training and Service Act, which exempts from combative training and service in the armed forces people who because of their religion are opposed to participation in any form of war). The Court in this case was dealing with amorphous theistic beliefs rather than atheism.

[204] *See supra* note 147-148 and accompanying text.

requirement.[205] As such, RLPA's protections can be extended to atheists by (1) using an expansive definition of religion or religious belief based in part on utility or (2) incorporating international law principles.

Some scholars have argued for an expansive definition of religious belief. This would enable organizations that are traditionally considered non-religious, but which do "good,"[206] to be entitled to the same exemptions as traditional religious organizations.[207] Though the precise terminology or mechanics may differ, those seeking to include traditionally non-religious organizations in RLPA-style exemptions focus on the similarities between the actions sought to be protected.[208] For instance, these scholars would provide the same exemptions to an atheist soup kitchen as a Christian soup

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[205] *See supra* note 139 and accompanying text.

[206] "Good" in this instance means the performance of socially useful functions like social services, food kitchens, etc.

[207] Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 571-572 (Spring 1998).

[208] *Id.* Professor Ira C. Lupu would keep any exemptions narrow, but would apply them to similar secular interests. *Id.* at 571. Professor Douglas Laycock would keep the formal distinctions intact, but would advocate an expansive definition of religion to include agnosticism and atheism. *Id.* Dean Rodney K. Smith would apply traditionally religion-based exemptions based on a notion of "conscience" which would similarly extend the protection of exemptions beyond traditional religious practices. *Id.* While Professor Michael McConnell, who is perhaps the most prominent current defender of "Benevolent Neutrality," would allow exemptions for early release from school for supplemental religious teaching so long as students could also be released for supplemental non-religious teaching. *Id.* at 571-572. This last take on exemptions does away with distinctions between sacred and secular purposes and allows exemptions based solely on the social utility of the exempted actions. *Id.*

kitchen. This expansiveness is predicated on a notion of equality.[209] "In short, a society committed to individual equality cannot explain why believers should be deprived of benefits or relieved of burdens which are equally distributed and fully justified on secular grounds."[210] In order to keep exemptions and provide some sort of rational basis for them, these scholars broaden the definition of religious belief in some way to eliminate any inherent inequality.[211]

Taking these arguments into consideration, it is possible to read RLPA in such a way so as to provide atheists with all of the benefits that RLPA would provide traditional religious organizations. It can hardly be argued that the atheist philosophy is any less central to an atheist's worldview than a belief in Jesus Christ is to a Christian's. Atheist organizations are as devoted to public works as are other traditional religious organizations.[213] To deny an atheist organization performing the same works as a traditional religious organization the same protections as that religious organization is inequitable and provides a disincentive for atheists to perform those beneficial works.

Some atheists are opposed to expanding the definition of religion or religious belief so as to include atheism under RLPA's protective umbrella.[214] They argue that

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[209] *Id.* at 571.

[210] *Id.*

[211] *See id.* at 571-572.

[212] *Id. at 572.*

[213] *See supra* note 10.

[214] Kong, *supra* note 168.

"[a]theism is by no means a religion, and to suggest that would be disingenuous and unethical."[215] This refusal to be included with traditional religions could very well be a part of strong atheism's antagonism to organized religion.[216]

Other atheists argue against using a broad definition of religion in RLPA because they argue that a broad definition would open the floodgates and allow everyone to claim an exemption.[217] While setting forth a "parade of horribles" argument, these atheists claim that broadening the definition of religion would allow individuals to circumvent any variety of laws at will.[218] It could mean that everyone would have the opportunity to engage in any practice that is otherwise prohibited by simply stating that it is important to his or her "religion." The only benefits these atheists can see in this arrangement are the opportunity for lawyers to litigate.[219]

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[215] Dave Kong, *American Atheists Written Testimony on the California Religious Freedom Protection Act* (June 9, 1998), *at* http://www.atheists.org/flash.line/rfra18.htm (on file with the Rutgers Journal of Law and Religion)

[216] *See supra* notes 18-23 and accompanying text.

[217] *The Rise of the Theo-Libertarian State*, *supra* note 5.

[218] *Id.* These atheists claim that drug policy would be easily circumvented by broadening the definition of religion, and other laws with a "religious basis" such as prohibitions on same-sex marriages, polygamy, and sodomy laws also could be circumvented at will. *Id.* "No matter what laws [lawmakers described by the author as 'narrow-minded religious zealots'] pass against whatever behaviors, there will exist the possibility of circumventing those laws at will." *Id.*

[219] *Id.* "At the very least, lawyers and people working for the court system will find full employment for a long time to come – but eventually, I can see the situation arising where anything which is religiously motivated but which does not harm other people is permitted." *Id.*

In addition, these atheists claim that broadening the definition of religion to include atheism defeats the perceived intent of RLPA's drafters to protect traditional religions. The underlying point of the argument is that if exemptions are given to everyone, there is no value to an exemption.[220]

International law provides another means of interpreting RLPA in a way that includes atheism. "International law is a part of [United States] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[221] In order to determine the current status of international law on a subject, courts should look to scholarly works.[222] International law should be upheld provided that the legislature

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[220] There is an inherent tension in defining religion.

> Fairness compels the broadest possible definition of religion so that every religious claim, and claimant, has a place in [the] court of public opinion, if not a court of law. But prudence compels a narrower definition of religion so that not everything becomes religious, and therefore nothing gets special religious protection.

Abdullahi A. An-Na'im, ed., *Round Table Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief*, 12 EMORY INT'L L. REV. 973, 999 (Spring 1998). If religion is too broadly defined, it's meaning would lose all semblance of spirituality and be secularized. *Id.* at 988.

[221] The Paquete Habana, 175 U.S. 677, 700 (1900).

[222] *Id.* "[R]esort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.*

had not enacted legislation contrary to that international law; this is a canon of statutory interpretation.[223]

Providing international protections for religious freedom has been a long, slow process. In 1981, the United Nations General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[224] (Declaration) by consensus.[225] Although not binding of its own accord, the Declaration articulates the current international principles on protecting religious freedom.[226] The process of formally drafting the Declaration had begun 19 years earlier.[227]

However, the Declaration as adopted does not contain a formal definition of "religion" or "belief."[228] Drafts of and preparatory documents for the Declaration did propose that the phrase "religion or belief" should incorporate mono- and polytheistic

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[223] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 81 (1804). "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Id.*

[224] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GOAR, Supp. No. 51, U.N. Doc. A/36/51 (1981).

[225] Donna J. Sullivan, *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 487 (July 1988).

[226] *See id.* at 488.

[227] *Id* at 487.

[228] *Id.* at 491.

religions, atheism and agnosticism.[229] The European Court of Human Rights has extended similar protections to atheists under the European Convention for the Protection of Human Rights and Fundamental Freedoms.[230] Looking to these sources, there would appear to be some strong indications that international law would require RLPA's protections be extended to cover atheists.

Unfortunately, this apparent inclusiveness on the international scene is not as clear as it first appears. There is some dispute over the particular meaning of terms and the general application of the principles embodied in the Declaration.[231] The Declaration is not binding of its own accord on any nation, and many scholars believe that there is not enough of a consensus on matters relating to religion to forge ahead with a binding convention.[233]

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[229] *Id.* at 491 n. 16-17. The Special Rapporteur for the Declaration defined a religion "as 'an explanation of the meaning of life and how to live accordingly'" *Id.* at 491 n. 16. Michael Roan of the Tandem Project, a nongovernmental organization dedicated to promoting the Declaration, also claims that the Declaration covers atheism. An-Na'im, ed., 12 EMORY INT'L L. REV. at 980.

[230] Buscarini v. San Marino, 38 I.L.M. 738 (Eur. Ct. of Human Rts. 1999) (requiring atheists to take a religious oath prior to taking a public office violated Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

[231] An-Na'im, ed., 12 EMORY INT'L L. REV. at 1004.

[232] *Id.*

[233] *Id.* Declarations are non-binding agreements intended to create a basis for discussion of the issues in the declaration. *Id.* When a sufficient degree of consensus is reached, the new principals that grow out of the declaration and discussion are memorialized in a treaty or convention that is binding. *Id.* If a convention is drafted before a real level of consensus is reached, the convention will end up hollow and meaningless. *Id.* Scholars argue that to expect a binding agreement to be in place 20 years later is a little

Regardless of whether international law dictates that RLPA's protections be afforded to atheists, some scholars argue against applying international law due to Congress' strong opposition to international standards.[234] To apply international standards in interpreting RLPA would be "politically lethal" and "counter-productive."[235] Congress, already uneasy with international law, would turn even further away from the international community.[236] Even the Supreme Court has not readily accepted arguments based on international human rights.[237]

Looking to broader definitions based on general equality and emerging international principles, RLPA can and should be read to provide atheists the same protections as traditional religious groups. To treat atheists any differently because of their own beliefs, beliefs which are as central to an atheist's being as any religious dogma is to a believer's, ignores the social benefits that these beliefs provide. There is no principled means of distinguishing between atheism and traditional religions for the

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unreasonable given the deliberateness of the process that created the non-binding Declaration, which took twenty-eight years. *Id.* at 1005.

[234] *Id.* at 983.

[235] *Id.*

[236] *Id.* at 984.

[237] Martha F. Davis, *Lecture: International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 419 (2000). The Supreme Court has usually ignored amicus briefs raising issues under international human rights law. *Id.* Professor Davis notes that some members of the Court (particularly Justices Scalia and Thomas) are "openly hostile" to international law. *Id.* at 420. Professor Davis believes that within the next five years the Court will start to look closer at and be more open to international law. *Id.* This will probably start with the Court looking to international law more for persuasive authority rather than decisional authority. *Id.*

purposes of RLPA. An atheist soup kitchen feeds the disenfranchised just as well as a Christian soup kitchen.

CONCLUSION

One question left to be answered is even if RLPA could be read to include atheists, would the atheists agree to go along? It seems very unlikely that atheists would allow themselves to enjoy RLPA's exemptions if they were included. The strong criticisms that certain segments of atheism have of traditional organized religion would probably prevent atheists from allowing themselves to be subject to RLPA's protections.

RLPA's constitutionality is suspect. The benefits of exemptions in general may also be suspect, but atheists should be allowed the protections of RLPA's exemptions while they last.