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The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRA's Don't Work

Mary Jean Dolan*

I. INTRODUCTION

The Illinois Religious Freedom Restoration Act¹ ("Illinois RFRA") is one of the first of a growing number of similar state statutes that seek to replace a substantially identical federal law that was held unconstitutional.² The Illinois General Assembly passed the act by an overwhelming margin on December 2, 1998, and made it effective as of July 1, 1998.³ The purpose of all of these RFRA's is to codify a standard of review for religious freedom claims. The RFRA test provides that the government may not substantially burden any conduct motivated by a person's religious beliefs, even where doing so is the unintentional result of a general law, unless the government can prove that the application of the law is the least restrictive means of furthering a compelling governmental interest.⁴

The concept of a religious freedom restoration act began as the congressional response to the much-criticized Supreme Court decision in *Employment Division, Department of Human Resources v. Smith*.⁵ *Smith* rejected the free exercise claims of two Native Americans who

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1. 775 ILL. COMP. STAT. 35/1-99 (West Supp. 1999). The author refers to this statute by its official name, the Illinois Religious Freedom Restoration Act ("Illinois RFRA").

2. See 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. On November 17, 1998, with a vote of 110-3-1, the House overrode Governor Edgar's amendatory veto, which had exempted prisons from the requirements of the Act. See 12 Legis. Synopsis & Dig. 2516 (Ill. 1999). The Senate followed with a vote of 55-0-2 on December 2, 1998. See *id.*

4. See 775 ILL. COMP. STAT. 35/15.

5. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

broke Oregon's criminal law by using peyote in a sacred ritual and, subsequently, were denied unemployment compensation. Rather than recognizing a compelling interest in enforcing drug laws that outweighed free exercise rights, the *Smith* Court pronounced its holding as a categorical rule: The Free Exercise Clause is not violated where the burden on religious conduct is merely an incidental effect of a generally applicable, neutral law.⁶

The federal RFRA, like its state counterparts, sought to eviscerate *Smith* and restore what proponents refer to as the pre-*Smith* standard: the "compelling interest/least restrictive means" test found in *Sherbert v. Verner*⁷ and *Wisconsin v. Yoder*.⁸ The federal RFRA strict scrutiny test produced some notorious results, such as: (1) the Ninth Circuit's decision to uphold the right of Sikh Khalsa children to wear daggers to school;⁹ (2) the insulation of a Native American who killed a bald eagle from criminal conviction under the endangered species law;¹⁰ and (3) the Vermont Supreme Court's decision that a father was protected from a contempt citation for refusing on religious grounds to make child support payments.¹¹ More typical were the City of Chicago's experiences under the federal RFRA, which included claims for exemption from the Chicago Fair Housing Ordinance,¹² the Chicago Zoning Code,¹³ and the City's uniform employment policies for police.¹⁴

6. *See id.* at 878.

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

8. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

9. *See Cheema v. Thompson*, 67 F.3d 883, 886 (9th Cir. 1995).

10. *See United States v. Gonzales*, 957 F. Supp. 1225, 1230 (D.N.M. 1997).

11. *See Hunt v. Hunt*, 648 A.2d 843, 853 (Vt. 1994).

12. *See Jasniowski v. Rushing*, 678 N.E.2d 743, 751 (Ill. App. Ct. 1st Dist.), *vacated on ripeness grounds*, 685 N.E.2d 622 (Ill. 1997). *Jasniowski* involved a landlord who claimed exemption from a marital status discrimination suit because renting to unmarried couples violated his religious beliefs. *See id.* The court found a substantial burden but held that eradicating discrimination was a compelling state interest and that prohibiting every discriminatory act was the least restrictive means of achieving the goal. *See id.*; *cf. Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909, 925 (Cal. 1996). *Smith* involved the application of the Fair Employment and Housing Act to a landlord with religious objections to cohabitation. *See id.* at 912. The court held that this application did not violate RFRA, finding no substantial burden because it was possible to avoid a conflict by investing capital outside of the housing market. *See id.* at 925.

13. *See C.L.U.B. v. City of Chicago*, No. 94-C6151, 1996 U.S. Dist. LEXIS 2230, 2233 (N.D. Ill. Feb. 26, 1996) (stating a RFRA claim where a zoning code bans churches from locating in Manufacturing Districts and requires special use permits in Business and Commercial Districts), *rev'd sub nom. Iglesia De La Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997).

14. *See Rodriguez v. City of Chicago*, No. 95-C5371, 1996 U.S. Dist. LEXIS 533 (N.D. Ill. Jan. 12, 1996) (involving a RFRA claim based on a religious objection to occasional abortion clinic protection duty and holding that compelling interest and least restrictive means are ques-

In 1997, the United States Supreme Court struck down the federal RFRA in *City of Boerne v. Flores*,¹⁵ primarily on federalism grounds. The Court held that Congress lacked the power under the Enforcement Clause of the Fourteenth Amendment¹⁶ to change the meaning of the First Amendment.¹⁷ Although the Court also noted the federal RFRA's separation of powers problem in dicta, its narrow holding gave impetus to claims that the door was open for states to enact such legislation, and they have done so.

The Illinois RFRA, which had the support of a broad spectrum of religious and civil liberty groups,¹⁸ arose out of a national movement to enact state RFRAs. The Coalition for the Free Exercise of Religion,¹⁹ which earlier lobbied for the federal law, formed the State RFRA Task Force to push for such laws in every state.²⁰ To date, Arizona, Florida, Connecticut, Rhode Island, South Carolina, and Texas have enacted state RFRAs, and bills have been introduced in many other state legislatures.²¹ Local government organizations opposed the Illinois RFRA, fearing numerous exceptions to neutral laws and increased litigation due to its unusual award of attorney's fees to successful defendants.²² Given that the Illinois RFRA is one of the first state

tions of fact), *later proceeding*, 975 F. Supp. 1055 (N.D. Ill. 1996), *aff'd*, 156 F.3d 772 (7th Cir. 1998) (granting summary judgment for City under Title VII, reasoning that contractual right to transfer to a district with no abortion clinic was reasonable accommodation).

15. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

16. U.S. CONST. amend. XIV, § 5 (stating that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

17. *See Boerne*, 521 U.S. at 536.

18. *See* H.B. 2370, 90th Leg. Day 1 (Ill. 1998) (indicating the support of the Christian Coalition, the Concerned Christian Americans, the Family Institute, the Jewish Community Relations Council, People for the American Way, and the American Civil Liberties Union).

19. *See Current Members of the Coalition* (last modified Feb. 4, 1999) <<http://www.religious-freedom.org/coalition.html>> (listing the 72 members of this umbrella organization as of July 10, 1997).

20. *See* Jeremy Learning, *Restoration Drama: Downfall of Federal Religious Protection Law Produces New Coalition Strategy* (visited on Oct. 31, 1999) <<http://www.freedomforum.org/religion/series/keeping.faith.2.asp>> (discussing state coalition strategies after federal RFRA declared unconstitutional).

21. In the 1999 legislative session, 16 states had bills under consideration, including those signed into law in Arizona, South Carolina, and Texas. *See Chart of Church/State Issues* (last modified July 28, 1999) <<http://www.Au.org/st-chart.htm>>. In 1998, 23 states had RFRA bills pending or in place. *See* Jeremy Learning, *A Stampede of State Religious-Freedom Protection Bills: What's Going On?* (visited Oct. 31, 1999) <<http://www.freedomforum.org/religion/series/keeping.faith.1.asp>> (discussing RFRA proponents' efforts to pass state RFRAs after the federal RFRA was declared unconstitutional by the United States Supreme Court).

22. *See* Verla Gillmor, *States Pass New Protections for Religious Expression*, CHRISTIANITY TODAY, January 11, 1999, at 20. *See generally* 1999 LEGISL. BULL. (Illinois Municipal League).

RFRAs enacted in the aftermath of *Boerne*, the legal issues decided in challenges to this law will have far-reaching implications.²³

There are two primary constitutional concerns raised by the state RFRAs, including Illinois': (1) the separation of powers between the judicial and the legislative branches; and (2) the Establishment Clause²⁴ and its state constitution counterparts. This Article focuses primarily on Illinois law, but the core issues and analysis will be very similar in challenges to other state RFRAs, as well as to the federal RFRA as applied to federal law.²⁵ Although there has been a great deal of legal commentary on the federal RFRA,²⁶ little of the discussion has involved these issues.²⁷ Additionally, there has been almost no legal analysis of

23. Numerous cases certainly will be brought under the Illinois RFRA. See, e.g., R. Bruce Dold, *A Cross to Bear*, CHI. TRIB., Dec. 18, 1998, at 29. Dold noted that days after the Illinois RFRA's passage, the attorneys for Sprint argued its application before a zoning board, which had called a hearing over a 120-foot-high cellular telephone tower, paid for by Sprint, and dressed up as a cross. See *id.*; Steve Kloehn, *Law Would Give Religions Free Reign, Towns Argue*, CHI. TRIB., July 4, 1998, at 12 (describing a church's desire to build a home for the elderly with a wing for Alzheimer's patients in the middle of a residential neighborhood as a potential RFRA suit). For the first case applying the Illinois RFRA, see *infra* notes 150-54 and accompanying text (noting that ramifications of this case are uncertain, but the opinion could be useful to government attorneys). Although Connecticut and Rhode Island passed RFRAs in 1993 prior to the focus on state RFRAs that followed *City of Boerne v. Flores*, 521 U.S. 507 (1997), those statutes have been largely ignored and there are no published decisions.

24. The Establishment Clause, which is contained in the First Amendment, provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

25. Several courts have expressed some doubt about the constitutionality of the federal RFRA as applied to federal laws. See, e.g., *United States v. Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (stating that the United States Supreme Court's decision in *Flores* casts doubt on the continued viability of the federal RFRA); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 853 n.8 (S.D. Ind. 1998) (noting that the constitutionality of the RFRA as applied to federal laws is "far from clear"). Courts, however, have applied the federal RFRA without analysis because the federal government has agreed that RFRA applies to federal laws. See *Adams v. Commissioner*, 170 F.3d 173, 175 n.1 (3d Cir. 1999); *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 24 n.6 (D.D.C. 1999). The one court to evaluate the RFRA in the federal context upheld it against federal separation of powers and Establishment Clause challenges. See *In re Young*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998).

26. See generally *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 1 (1995) (covering the constitutional implications of the RFRA in multiple articles); *Symposium: Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 597 (1998) (covering various aspects of the decision in multiple articles).

27. See *infra* notes 86, 180 (listing the relatively few articles addressing separation of powers or the Establishment Clause in connection with the federal RFRA).

the Illinois separation of powers clause or Illinois' equivalent of the Free Exercise²⁸ and Establishment Clauses.²⁹

The separation of powers and the Establishment Clause concerns are related in that they both arise because of a fundamental problem inherent in all RFRA's, including Illinois': legislatures did not enact them to solve any actual, recognized problem of discrimination or burden on religious conduct. Thus, arguably, the RFRA's purpose was to institute a global protection of religiously motivated conduct whenever it conflicts with government regulation. Indeed, all the RFRA's, including Illinois', are the product of legislative disagreement with the Supreme Court's interpretation of the Free Exercise Clause.

The Illinois RFRA raises fascinating new issues at the heart of the separation of powers doctrine. Under the guise of creating a new statutory cause of action, the Illinois Legislature has unduly interfered with the core judicial function of defining constitutional rights. Because the statutory cause of action is identical to the constitutional one, the Illinois RFRA's standard of review supplants, rather than supplements, the constitutional standard of review, effectively preventing Illinois courts from following *Smith*.

The Illinois RFRA also reveals the crux of the inherent tension between the Establishment Clause and the Free Exercise Clause and, correspondingly, between Illinois' constitutional prohibition of religious preferences and protection of religious freedoms.³⁰ The statute, which requires strict scrutiny for every law or policy that infringes on religiously motivated conduct in order to protect the free exercise of religion, violates the core nonestablishment principle that laws must not favor religion over "irreligion." Under Establishment Clause principles, laws making exceptions solely for religious conduct must be lifting a specific burden placed on that religious conduct or else protection of religious freedoms strays into preference. The Illinois RFRA, however, is global in nature and fails to identify any such burden.

28. Like the Establishment Clause, the Free Exercise Clause is contained in the First Amendment and provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]" U.S. CONST. amend. 1. The Establishment and Free Exercise Clauses are sometimes referred to as the Religion Clauses.

29. See Michael P. Seng, *Freedom of Speech, Press and Assembly, and Freedom of Religion under the Illinois Constitution*, 21 LOY. U. CHI. L.J. 91, 93 (1989) (noting the dearth of state constitutional commentary and analyzing legislative history of the religious freedom provision).

30. See *infra* note 126 and accompanying text (providing the text of Illinois' freedom of religion clause). As one commentator pointed out: "the Religion Clauses 'are cast in absolute terms, and either . . . if expanded to a logical extreme, would tend to clash with the other.'" Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673 (1990) (quoting *Walz v. Commissioner*, 397 U.S. 664, 668-69 (1970)).

Moreover, the Establishment Clause issue and the separation of powers problem coalesce in the Illinois RFRA. Because judges consider the constitutional ban on religious preferences when deciding between free exercise rights and general laws, changing the standard of review by statute does more than enhance an important free exercise right; it disturbs the judicial balancing of the two religion clauses.

This Article first sets forth the provisions of the Illinois RFRA, and then further explains the Supreme Court cases referred to in the Illinois statute.³¹ Next, it addresses the issue of whether the Illinois RFRA violates the Illinois Constitution's separation of powers clause.³² This section also provides the foundation for an explanation of current Illinois free exercise law, which the statute fails to recognize.³³ Next, this Article explores how the Illinois RFRA also violates nonestablishment principles of both the federal and state constitutions.³⁴ Finally, the Article discusses whether the Illinois RFRA could be redrafted and concludes that only a more tailored statute would be constitutional.³⁵

II. BACKGROUND

A. *The Illinois RFRA*

The central provision of the Illinois RFRA reads:

Free exercise of religion protected. Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.³⁶

The statute broadly defines "exercise of religion" as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."³⁷

The stated purpose of the Illinois RFRA is "to restore the compelling interest test as set forth in *Wisconsin v. Yoder* and *Sherbert v. Verner*"

31. See *infra* Part II.

32. See *infra* Part III.A.

33. See *infra* Part III.B.

34. See *infra* Part IV.

35. See *infra* Part V.

36. 775 ILL. COMP. STAT. 35/15 (West Supp. 1999).

37. *Id.* § 35/5.

and to provide a private right of action and a statutory defense to government enforcement actions.³⁸ The legislative findings, which in large part parrot those of the invalidated federal RFRA, begin by stating that the free exercise of religion is a fundamental right secured by Article I, Section 3 of the Illinois Constitution.³⁹ The Illinois Legislature then notes its dissatisfaction with the Supreme Court's holding in *Smith* by stating: "[i]n *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement under the First Amendment to the United States Constitution that government justify burdens on the exercise of religion imposed by laws neutral toward religion."⁴⁰ Finally, the Illinois Legislature expresses a preference for the compelling interest test of *Yoder* and *Sherbert* for all free exercise claims.⁴¹

The Illinois Legislature attempts to lay the groundwork for the constitutionality of the Illinois RFRA in its characterization of the *Boerne* Court's rationale for striking down the federal RFRA. Specifically, it notes: "[i]n *City of Boerne v. P.F. Flores*, the Supreme Court held that an Act passed by Congress to address the matter of burdens placed on the exercise of religion infringed on the legislative powers reserved to the states under the Constitution of the United States."⁴² The Illinois RFRA later states that it should not be construed to affect governmental funding of religious institutions or interpretations of the federal or state establishment clause provisions.⁴³ The statute also preempts home rule powers, thereby restricting units of local government from legislating differently on this issue.⁴⁴

The statute next creates a separate statutory cause of action by providing that a violation of its standard may be asserted as a claim or defense.⁴⁵ Parties who prevail against the government are entitled to attorneys' fees and costs incurred in maintaining their claim or defense.⁴⁶ This award of attorneys' fees puts the government in the

38. *Id.* § 35/10(b)(1)-(2) (citation omitted).

39. *See id.* § 35/10(a)(1); *see also infra* Part III.B (discussing Art. I, Section 3 of the Illinois Constitution, which contains Illinois' equivalent of the Free Exercise Clause).

40. *Id.* § 35/10(a)(4) (citation omitted).

41. *See id.* § 35/10(a)(6).

42. *Id.* § 35/10(a)(5) (citation omitted).

43. *See id.* § 35/25(c).

44. *See id.* § 35/25(d).

45. *See id.* § 35/20.

46. *See id.*

unusual position of risking large fee expenses for merely prosecuting violations of the law in a neutral manner.⁴⁷

The scant legislative history available includes the remarks of the Illinois RFRA's sponsors, Representative Gash and Senator Parker. Their remarks emphasize two points. First, the scope of the Illinois RFRA is vast: it applies the same standard of review for religious claims to every area of state and local law. Second, its purpose is to restore the judicial standard of review that until recently, has been used for decades.⁴⁸

B. Supreme Court Cases Referred to in the Illinois RFRA

A brief discussion of the Supreme Court cases referred to in the Illinois RFRA provides important background information and is also useful to illustrate two points. First, the RFRA test, which requires the government to prove a compelling interest and the least restrictive means each time a neutral law affects religiously-motivated conduct, does not reflect the pre-*Smith* case law as suggested by the Illinois Legislature. Although *Smith* represents a significant change in the

47. There do not appear to be any other federal or Illinois statutes awarding fees to those who successfully defend against a valid government prosecution. Those statutes that provide that courts may award attorneys' fees to prevailing parties do so where a party has brought a proceeding against the government to enforce the statutory right. *See, e.g.*, 42 U.S.C.A. § 1988(b) (West 1994 & Supp. 1999); 5 ILL. COMP. STAT. 140/1-11 (West 1998) (Illinois Freedom of Information Act).

48. *See* H.B. 2370, 90th Leg., Day 20-21, 26 (Ill. 1998) (Remarks of Sen. Parker). Senator Parker stated:

[N]o area of law—including public health and safety, civil rights, education, and any others—is exempt from the standard that RFA [sic] establishes. Again, no Statute necessarily constitutes a compelling governmental interest. As Section 10(b)(1) states, RFA [sic] simply restores a standard of review to be applied to all State and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened . . . I want to stress, because there have been several questions: Remember that, up until recently, State and local governments have had to follow the same standards of RFA [sic] as we are proposing here. This has been done for decades. If State or local governments had a problem, we would have heard about these problems.

Id. Similarly, Senator Gash noted:

[N]o area of law, including public health and safety, civil rights, zoning, education, employment, housing, public accommodations, and any others is exempt from this standard which RFRA establishes. Again, no statute necessarily constitutes a compelling government interest. As Section 10(b)(1) states, 'RFRA simply restores a standard of review to be applied to all,' and I emphasize 'all,' 'state and local laws and ordinances. In all cases in which the free exercise of religion is substantially burdened.'

H.B. 2370, 90th Leg., Day 1 (Ill. 1998) (Remarks of Sen. Gash during debate on Senate Amendment I to House Bill 2370, which changed the effective date). Generally, there are no transcripts of committee hearings for Illinois statutes. Thus, the only legislative intent available for the Illinois RFRA comes from the brief floor debates of the House and Senate and the findings set forth in the bill itself.

Court's approach to the Free Exercise Clause, the Illinois RFRA is much stricter than the context-dependent balancing test previously used. Second, the analysis in *City of Boerne v. Flores* undermines, rather than supports, the constitutionality of the Illinois RFRA.

First, a discussion of *Wisconsin v. Yoder* helps to show that the Illinois RFRA does not reflect pre-*Smith* case law. *Yoder*, which the Illinois RFRA purports to restore, is regarded as the high water mark for protection of free exercise rights, but even this decision is narrowly drawn. In *Yoder*, the Supreme Court used a balancing process and held that the First Amendment prevented the state from compelling Amish parents to send their children to formal high school.⁴⁹ The Court weighed the Amish claim that this requirement severely undercut their 300-year-old community by exposing their children to a worldly environment at a critical developmental stage against the state's general interest in compulsory education, which include preparing children to become economically self sufficient and good citizens.⁵⁰ Ultimately, the Court determined that the state's interests were weak in this application.⁵¹ Although the majority used expansive language similar to the Illinois RFRA test,⁵² the decision was carefully limited to the facts and relied heavily on the centrality of the Amish tradition of home schooling to the long-established Amish religion.⁵³ The Illinois RFRA's strict scrutiny standard does not permit this consideration and, thus, goes beyond *Yoder*.

Sherbert v. Verner also reveals that the standard set forth in the Illinois RFRA does not reflect the pre-*Smith* standard. Like *Yoder*, *Sherbert*, the other decision that the Illinois Legislature seeks to restore, was also much narrower in scope than some of its expansive language suggests. *Sherbert* involved a member of the Seventh Day Adventist Church who was fired by her employer because she would not work on Saturday, the Sabbath Day of her faith.⁵⁴ The state then denied her application for unemployment compensation, because she had failed to accept suitable work without "good cause."⁵⁵ The Supreme Court held that this denial violated the Free Exercise Clause, because the state conducted an individualized evaluation of the claimant's reasons for

49. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

50. See *id.* at 213-28.

51. See *id.* at 210-11, 219-20.

52. See *id.* at 215-16.

53. See *id.* at 219, 235.

54. See *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

55. See *id.* at 399-401.

unemployment and failed to respect the observance of a minority religion's Saturday Sabbath.⁵⁶ Also, although *Sherbert* contained language similar to the Illinois RFRA's strict scrutiny standard, it did not actually use a least restrictive means test.

As *Yoder* and *Sherbert* demonstrate, the Supreme Court's pre-*Smith* approach to free exercise is best described as "context-dependent balancing," in which the standard of review is calibrated to the factual setting.⁵⁷ Indeed, prior to *Smith*, the Court never really imposed a "least restrictive means" requirement.⁵⁸ For example, in the areas of prisons,⁵⁹ the military,⁶⁰ and administrative requirements of government welfare programs,⁶¹ the Court has held that the compelling interest test does not

56. See *id.* at 410. Moreover, the Court found that other South Carolina laws protected the mainstream Sabbath and found no evidence supporting the State's asserted interest in avoiding deceit and malingering. See *id.* at 406. Note that the court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* held that, even after *Smith*, where a facially neutral statute is enacted to target the activities of a religion, the law is subject to strict scrutiny. 508 U.S. 520, 546 (1993). In *Church of Lukumi Babalu Aye*, the Court struck down an ordinance designed to suppress the central element of the Santeria worship service, animal sacrifice. See *id.* at 524.

57. See Marci A. Hamilton, *Does Religious Freedom Have a Future? The First Amendment After Boerne*, 2 NEXUS J. OP. 33, 39 (1997).

58. See *id.* (discussing the pre-*Smith* practice by courts of "context-dependent balancing"). Commentators appear to agree that the Court has never strictly applied the "compelling interest/least restrictive means" test to religious claims. Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 5-12 (1994) (examining half-hearted application of the compelling interest test in pre-*Smith* cases); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 447 (1994) (finding that use of the compelling interest test was "strict in theory but feeble in fact" in pre-*Smith* religious exemption cases, and, outside of *Sherbert* and *Yoder*, the test proclaimed dead in *Smith* had never really lived); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 84-86 (1996) (finding that prior to *Smith*, military and prison regulations received special deference, but otherwise the Court was balancing the government interest against the burden imposed); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 158 (1997) (asserting that pre-*Smith*, the "freedom-protective"—versus nondiscriminatory—interpretation was firmly entrenched, but "haphazardly enforced"); cf. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 602 (1998) (concluding that courts also had applied the federal RFRA strict scrutiny test in an inconsistent manner).

59. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (reviewing prison regulations under a reasonableness test and upholding restrictions on Islamic inmates attending Friday religious services).

60. See *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986). In *Goldman*, the Court stated that the military need not accommodate religious practices, and upheld an Air Force dress code that penalized wearing a yarmulke. See *id.* at 509-10.

61. See *Bowen v. Roy*, 476 U.S. 693, 700-01 (1986). The *Bowen* Court rejected the *Yoder* test for neutral regulations on "internal affairs" of government bureaucracy and used a reasonableness test to uphold a regulation requiring welfare recipients to have a social security number as against a Native American's claim that the rule robbed his child's spirit. See *id.* at 707; see also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (rejecting the com-

apply. Accordingly, the Illinois Legislature's contention that the Illinois RFRA's strict scrutiny test simply restores the pre-*Smith* standard is incorrect.

A brief discussion of *Employment Division, Department of Human Resources v. Smith*, which the Illinois RFRA was enacted to address, provides important background. In *Smith*, Justice Scalia, writing for the Court, took the position that throughout the history of the Court's free exercise decisions, general, neutral law has always been able to unintentionally burden religious conduct without violating the First Amendment.⁶² He reasoned that this is so because "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"⁶³ Further, to do so would allow every individual "by virtue of his beliefs" to become a law unto himself.⁶⁴

According to Justice Scalia, the only decisions where the First Amendment has barred application of a nondiscriminatory law to religiously motivated conduct have involved either: (1) additional protections, or "hybrid rights," such as the parental rights in *Wisconsin v. Yoder*,⁶⁵ or (2) unemployment compensation cases,⁶⁶ where the government is already doing individualized assessments of the reasons for the relevant conduct, as in *Sherbert v. Verner*.⁶⁷ Finally, the *Smith* Court rejected using the "centrality" of the religious practice as a limit

elling interest test for claim that government decision to build road on land sacred to Native Americans violated First Amendment because the government policy did not coerce anyone into acting in violation of their religious beliefs). As a practical matter, these decisions open up an alternative argument for RFRA defendants: namely, that where there is a Supreme Court decision on point, which does not use the compelling interest test, litigants may assert that, because the RFRA purports to restore pre-*Smith* free exercise law, those cases should be followed.

62. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878 (1990).

63. *Id.* at 885 (quoting *Lyng*, 485 U.S. at 451).

64. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (rejecting free exercise defense to criminal polygamy law)).

65. See *id.* at 881-82 (citing *Yoder*, 406 U.S. at 219-20).

66. See *id.* at 883 (citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indep. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963)).

67. See *id.* at 884 (citing *Sherbert*, 374 U.S. at 410). But see *id.* at 899 (O'Connor, J., concurring) (criticizing sharply the majority's methodology of looking at outcomes to define the Court's free exercise approach). In Justice O'Connor's view, "the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim." *Id.* (O'Connor, J., concurring).

on governmental actions⁶⁸ and found the legislature better suited to weigh the social value of laws against the importance of religious practices.⁶⁹

Finally, a brief discussion of *City of Boerne v. Flores*, the case that struck down the federal RFRA, provides important background information and also demonstrates the Illinois Legislature's error in stating that *Boerne* supports the Illinois RFRA's constitutionality. Indeed, despite the Illinois Legislature's interpretation of *Boerne* as holding that religious freedom legislation is reserved to the states,⁷⁰ *Boerne* strongly supports the proposition that any RFRA violates the separation of powers doctrine. *Boerne* involved a local government's denial of a building permit to enlarge a church, based on an historic preservation district ordinance.⁷¹ The Catholic Archbishop sued under the federal RFRA and challenged the constitutionality of the ordinance.⁷² Starting from the basic Constitutional premise that the federal government is one of enumerated powers, the Court's opinion primarily evaluated Congress' reliance on its Enforcement Clause powers to enforce the Fourteenth Amendment and held that Congress had exceeded that power.⁷³

The underlying premise of *Boerne* is that the Constitution is what the Supreme Court says it is.⁷⁴ Accordingly, legislating a standard different from the Court's interpretation of the Free Exercise Clause is, in effect, an attempt to change the Constitution. Although the *Boerne* Court used this principle to show that Congress had legislated beyond its section 5

68. See *id.* at 886-87.

69. See *id.* at 890. My own view, which is beyond the scope of this Article, is that there must be some circumstances under which religious claimants, especially those with minority practices, can obtain judicial relief from unintentionally burdensome laws. In fact, the situation in *Smith*, where a criminal law was imposed on persons engaged in the central element of their Native American worship service, seems especially suited to application of the compelling interest/least restrictive means test. See *id.* at 874.

70. See 775 ILL. COMP. STAT. 35/10(a)(5) (West Supp. 1999); see also *supra* note 42 and accompanying text (discussing the Illinois Legislature's characterization of the *Boerne* rationale).

71. See *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

72. See *id.*

73. See *id.* at 532-36 (discussing U.S. CONST. amend. XIV, § 5). The Court held that the RFRA attempted to change the substantive law set out in *Smith*, rather than enforce it, on several grounds. See *id.* at 530-34. First, the legislative record lacked any modern examples of generally applicable laws passed due to religious prejudice. See *id.* at 530. Second, the RFRA's sweeping coverage meant that many laws valid under *Smith* would fail, even though they did not target free exercise. See *id.* at 534. Third, RFRA's stringent test goes far beyond the disparate impact test that sometimes is used to infer discriminatory intent. See *id.* at 533. Fourth, the Act imposed a "least restrictive means" test, which was not even used in the pre-*Smith* cases it sought to codify. See *id.* at 534.

74. See *id.* at 535-56.

enforcement power,⁷⁵ this principle is also useful in portraying how the Illinois RFRA violates the separation of powers doctrine.

Specifically, the *Boerne* conclusion, while admittedly slipping into dicta, focused almost entirely on the importance of preserving the proper separation of powers *as between the legislature and the court*. Indeed, the Court stated:

Our national experience teaches that the Constitution is preserved best when each part of government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.⁷⁶

The opinion concluded: “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”⁷⁷ Therefore, contrary to the Illinois RFRA’s premise, nothing in *City of Boerne v. Flores* suggests that Congress was infringing on “legislative powers reserved to the states,”⁷⁸ nor does it encourage state legislatures to take over judicial interpretation.

III. ILLINOIS’ RFRA VIOLATES THE ILLINOIS CONSTITUTION’S SEPARATION OF POWERS CLAUSE

A. *The Separation of Powers Problem*

From one vantage point, the Illinois RFRA is a legislative attempt to transfer the power to interpret the Illinois Constitution’s Religious Freedom Clause from the judiciary, where it normally resides, to the legislature. The statute’s focus on restoring a prior judicial standard, without creating any new prohibitions on government conduct, suggests that it is discussing the proper treatment of a previously-existing constitutional claim.⁷⁹

75. *See id.* at 536.

76. *Id.* at 535-36 (citation omitted).

77. *Id.*

78. 775 ILL. COMP. STAT. 35/10(a)(5).

79. *See id.* § 35/10(b)(1).

The above conclusion is the most straightforward reading of the legislative findings and purpose sections of the Illinois RFRA. The findings begin by stating that the free exercise of religion is a fundamental right secured by Article I, Section 3 of the Illinois Constitution,⁸⁰ then opines that *Smith* undermined free exercise⁸¹ and that the compelling interest test, set forth in other decisions, is a better standard of review for free exercise claims.⁸² There are no findings regarding any burdens that existing law has placed on any particular religious group or practice.⁸³

This conclusion is buttressed by the comments of RFRA's legislative sponsors, particularly Senator Parker, who stated:

RFRA simply restores a standard of review to be applied to all State and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened. [U]p until recently, State and local governments have had to follow the same standards of RFA (sic) as we are proposing here. This has been done for decades.⁸⁴

The Illinois RFRA merely stamps a legislative interpretation onto the previously existing constitutional claim. Even though the statute purports to create a new statutory cause of action, its superficial use of the phrase "provides a claim or defense"⁸⁵ cannot transform the underlying realities. The triggers for a claim under Article I, Section 3 of the Illinois Constitution, Illinois' Free Exercise Clause, and a claim under the Illinois RFRA are identical: any time a person's religiously motivated conduct is substantially burdened by a government law, policy or action. Neither the text nor the legislative history make any distinctions between the types of cases or facts that are covered by the statute versus those covered by the Illinois Constitution.

Thus, the statute is either: (1) purposely telling the courts how they must interpret Article I, Section 3 free exercise claims; or (2) creating a statutory cause of action that is identical to that under Article I, Section 3. Under either interpretation, the Illinois RFRA mandates the preferred legislative standard of review for all claims that assert that the government has burdened religious conduct. As several federal courts and commentators recognized with the federal RFRA, any distinction between requiring the "compelling interest/least restrictive means" test

80. *See id.* § 35/10(a)(1).

81. *See id.* § 35/10(a)(4).

82. *See id.* § 35/10(a)(6).

83. *See id.* § 35/10(a)(5), 25(c), 25(d).

84. H.B. 2370, 90th Leg., Day 20-21 (Ill. 1998) (providing the transcript of the Senate Debates from May 1998 concerning the Illinois RFRA).

85. 775 ILL. COMP. STAT. 35/10(b)(2).

under a constitution or applying it under a RFRA is "functionally meaningless."⁸⁶

RFRA supporters assert that legislatures are free to protect rights beyond those deemed covered by the Constitution, relying on examples such as the Pregnancy Discrimination Act of 1978 and the Civil Rights Act of 1964.⁸⁷ A better analogy, however, is if, following *Craig v. Boren*,⁸⁸ which settled on intermediate scrutiny for sex discrimination claims under the Fourteenth Amendment,⁸⁹ Congress had passed a law stating that this level of protection was insufficient and that judges must apply strict scrutiny in all cases where the government classifies persons according to sex, as in equal protection sex discrimination claims. Although the legislature certainly may extend protections to unprotected factual situations, it is far less certain whether the legislature may simply alter the judiciary's standard of review for a previously existing constitutional claim without a separation of powers violation.

86. *Keeler v. Mayor and City Council of Cumberland*, 928 F. Supp. 591, 600 (D. Md. 1996) (concluding that the federal RFRA was a violation of the separation of powers); see also Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995) (arguing that forcing the Supreme Court to make decisions it has determined are outside its judicial competence violates separation of powers); Eisgruber & Sager, *supra* note 58, at 443 (noting that the RFRA attempts to subvert, rather than supplement, the Court's constitutional judgement); Gressman & Carmella, *supra* note 58, at 105 (stating that the RFRA is a replacement for the Free Exercise Clause); Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2-8 (1998) (arguing that the federal RFRA is unconstitutional as it applies to either federal or state law). But see *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (ruling that RFRA does not infringe on separation of powers), *vacated*, 521 U.S. 1114 (1997) (remanding for further consideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997)); Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715 (1998) (arguing that the RFRA creates a separate statutory right); Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM. & MARY L. REV. 665, 670 (1998) (stating that the Constitution allows states to augment minimum federal regulations of free exercise).

87. See, e.g., *In re Young*, 141 F.3d 854, 860 (8th Cir. 1998) (observing that Congress often provides protection for liberties that exceed the Court's idea of minimum constitutional protection), *cert. denied*, 119 S. Ct. 43 (1998); Berg, *supra* note 86, at 739-42. In response to the Supreme Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), which held that an insurance plan for California employees that did not cover pregnancy, did not discriminate on the basis of sex, Congress passed the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1994), which included pregnancy within Title VII's prohibitions on discrimination. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000-2000(n)(6) (1994), which includes Title VII, also created new protections. See *id.* at 742-43. The Act addressed the *Civil Rights Cases*, 109 U.S. 3 (1883), that held that the Fourteenth Amendment did not authorize Congress to protect against discriminatory conduct beyond state action. See *id.*

88. *Craig v. Boren*, 429 U.S. 190 (1976).

89. See *id.* at 197 (striking down statute prohibiting beer sales to males under 21 and females under 18, using the "substantially related to important governmental objectives" test).

Turning to the Illinois law of separation of powers, the case for a violation may be more compelling under Illinois law than it is under federal law, because the separation of powers doctrine is grounded not only in the three-part structure of government, but is stated in an express provision in the Illinois Constitution. Specifically, Article II, Section 1 provides: “[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”⁹⁰

Not surprisingly then, no Illinois precedent exists where the legislature has intentionally sought to fashion its own standard of review for a fundamental constitutional right. Three lines of cases, however, suggest that Illinois’ Separation of Powers Clause is violated by the Illinois RFRA. First, a line of property tax cases establishes that the Illinois Supreme Court is the ultimate interpreter of the Illinois Constitution and that the legislature cannot change a judicial interpretation of a clause by passing a statute that ascribes a different meaning to it. Importantly, the Illinois Supreme Court has interpreted Article I, Section 3 of the Illinois Constitution, Illinois’ Religious Freedom Clause, as prohibiting any exceptions to general laws when they incidentally burden persons engaged in religiously motivated conduct.⁹¹

Second, Illinois separation of powers cases show that the legislature cannot change a judicial interpretation of a law without first changing the law.⁹² Arguably, the Illinois RFRA tries to change the judicial interpretation of the Illinois Constitution. As such, the legislature should be required to follow the procedures necessary to amend the Constitution. A third line of separation of powers cases shows that the Illinois Supreme Court has consistently struck down statutes that infringe too greatly on an essential judicial function and that constitutional interpretation has long been recognized as the court’s primary role. Because the Illinois Supreme Court has not yet determined whether it will follow *Smith*, the Illinois RFRA may be viewed as taking over the judicial prerogative to determine the free exercise standard. The following sections address these three lines of cases in detail.

90. ILL. CONST. art. II, § 1.

91. See *infra* notes 136–40 and accompanying text (discussing *Department of Mental Health v. Warmbir*, 226 N.E.2d 4 (Ill. 1967)).

92. See *infra* Part III.A.2 (setting forth a line of cases prohibiting retroactive application of a statute to overrule a judicial decision).

1. A Statute Cannot Alter a Judicial Interpretation of the Constitution

A line of Illinois Supreme Court cases involving the property tax provisions of the Illinois Constitution demonstrates that it is primarily the role of the courts, not the legislature, to interpret and apply constitutional provisions. Statutes that attempt to interpret provisions of the Illinois Constitution cannot override judicial interpretations.⁹³

The opinion in *Chicago Bar Association v. Department of Revenue*⁹⁴ ("CBA") is illustrative. In CBA, the Chicago Bar Association constructed a new building adjacent to the John Marshall Law School and requested tax relief based on the Illinois Revenue Act's statutory exemption for school property.⁹⁵ The Illinois Revenue Act had defined school property as property "adjacent to . . . the grounds of a school which property is used by . . . [a] professional society . . . which serves the advancement of learning in a field or fields of study taught by the school and which property is not used with a view to profit."⁹⁶

Despite the Illinois Revenue Act's definition of school property, the Illinois Supreme Court held that the Chicago Bar Association could not take advantage of the school property exemption. The court pointed out that the Illinois Constitution permits tax exemption for school property only when it is used "exclusively for . . . school . . . purposes."⁹⁷ Courts have interpreted this to mean the exemption is available only where property is used primarily for a school purpose.⁹⁸

Because the CBA headquarters served primarily as a place where members of a professional organization could meet and dine, the court held that it did not meet the constitutional standard as judicially interpreted, despite the applicable legislation.⁹⁹ In so deciding, the Illinois Supreme Court made clear that: (1) the constitution means what the courts say it means; and (2) the legislature has no power to change judicial interpretations of the constitution by statute.¹⁰⁰

93. See *Chicago Bar Ass'n v. Department of Revenue*, 644 N.E.2d 1166, 1171 (Ill. 1994); *McKenzie v. Johnson*, 456 N.E.2d 73, 76 (Ill. 1983); *People ex rel. Nordlund v. Association of the Winnebago Home for the Aged*, 237 N.E.2d 533, 538 (Ill. 1968); *MacMurray College v. Wright*, 230 N.E.2d 846, 849 (Ill. 1967).

94. *Chicago Bar Ass'n v. Department of Revenue*, 644 N.E.2d 1166 (Ill. 1994).

95. See *id.* at 1168.

96. *Id.* (quoting ILL. REV. STAT., 1991, ch. 120, par. 500.1 (1991)). The current version of this statute is codified at 35 ILL. COMP. STAT. ANN. 200/15-35(d) (West 1996 & Supp. 1999).

97. *Id.* at 1168 (quoting ILL. CONST. art. IX, § 6).

98. See *id.* at 1171.

99. See *id.* at 1171-72.

100. See *id.* at 1171. The court stated:

Whether particular property is used 'exclusively for . . . school . . . purposes' within the

The court did not strike down the Illinois Revenue Act or rely on the Separation of Powers Clause, however, because there was no evidence that the legislature had acted to override a judicial interpretation. Indeed, the definition of property in the Illinois Revenue Act could be viewed as one example of the types of properties that may meet the constitutional tax exemption.¹⁰¹ Also, the Illinois Legislature may have enacted the tax statute to implement the constitutional standard for the tax exemption, because the relevant constitutional section is not self-executing.¹⁰²

With the Illinois RFRA, however, the legislature is not entitled to any presumption of constitutional intent, because the statute itself admits that its purpose is to change the current judicial interpretation of free exercise. In addition, the Bill of Rights is self-executing and, thus, a statute purporting to implement its protections should be inherently suspect.¹⁰³ One appellate court clearly stated that because of the separation of powers, the legislature lacks the power to alter a "constitutional right . . . that flows from judicial interpretation of the constitution."¹⁰⁴ Thus, as opposed to these property tax statutes, it is

meaning of the constitution is a matter for the courts, and not the legislature, to ascertain. The legislature cannot, by its enactment, make that a school purpose which is not in fact a school purpose.

Each individual claim must be determined from the facts presented.

Id. (citations omitted).

Similarly, in *People ex rel. Nordlund v. Association of Winnebago Home for the Aged*, 237 N.E.2d 533 (Ill. 1968), despite a nursing home's conformity with the statutory test for tax exemption, the court held that "it must also comply unequivocally with the constitutional requirement of exclusively charitable use. *The determination of compliance or noncompliance is a judicial function which may not be usurped by the legislature.*" *Id.* at 538 (emphasis added). Because the nursing home charged a sizeable admission fee and imposed certain entrance requirements, it was not inclusive enough to meet the judicial interpretation of the "exclusively charitable" constitutional exemption. *See id.* at 539-40; *see also* *People v. Gaulano*, 240 N.E.2d 467, 470 (Ill. App. Ct. 1st Dist. 1968) (stating that where the constitution barred persons convicted of "infamous crimes" from state office, a statute cataloging "infamous crimes" was "not controlling, for the legislature . . . legislated beyond the boundaries of its authority into an area which is subject to judicial interpretation").

101. *See Chicago Bar Ass'n*, 644 N.E.2d at 1169-71.

102. *See id.* at 1172 (discussing ILL. CONST. art. IX, § 6); *see also* *MacMurray College v. Wright*, 230 N.E.2d 846, 849 (Ill. 1967)).

103. *See* *City of Boerne v. Flores*, 521 U.S. 507, 523-24 (1997). The Bill of Rights and the Fourteenth Amendment, which applies the Bill of Rights to the States, "set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those provisions." *Id.* at 524.

104. *People v. Gallegos*, 689 N.E.2d 223, 226 (Ill. App. Ct. 3d Dist. 1997). In *Gallegos*, a criminal defendant challenged the constitutionality of a statute that eliminated the "substantive" rule of venue. *See id.* Prior to this, the statute required the state to prove the location of the offense as an element of the crime. *See id.* at 224. The court found that this rule was an independent obligation placed upon the state by the common law; it was not derived from the constitu-

more likely that a court would strike down the Illinois RFRA as a violation of the Separation of Powers Clause.

2. The Legislature Can Only Overrule a Judicial Decision by Prospectively Amending the Law Interpreted by the Court

Second, a series of cases involving attempted retroactive application of an amended statute sheds light on the separation of powers issues presented by the Illinois RFRA.¹⁰⁵ In each of these cases, legislators responded to a court decision that interpreted a statute, declaring that the amendment was a clarification of the original intent of the statute. In amending the respective statute, the legislators also provided for the retroactive application of the "corrected" statutory provision. The Illinois Supreme Court has repeatedly held that this practice violates the Separation of Powers Clause, because it effectively overrules a judicial interpretation.

This line of cases has an indirect, but significant, application to the Illinois RFRA. Specifically, these cases hold that the Illinois Legislature cannot pass a statute that overrules the manner in which the Illinois courts have interpreted a law. Instead, if the legislature disagrees with the judicial interpretation of a law, it can change that law prospectively. The amended law will become the basis for subsequent judicial interpretations.¹⁰⁶ Arguably, in the case of the Illinois RFRA, the law that the legislature thinks the courts have misinterpreted, and

tional right to a speedy trial by a jury from the county where the crime occurred. *See id.* at 225 (discussing ILL. CONST. art. I, § 8). Thus, changing the substantive rule of venue by statute did not violate the separation of powers. *See id.* at 226. In contrast, the court pointed out that the legislature could not, without violating the separation of powers, have altered the "procedural" aspect of venue, which by judicial interpretation of the constitutional right allows objections to improper venue at the start of the trial. *See id.* Although taking away an individual's constitutional right is clearly more problematic than granting individuals additional protection against government, *Gallegos* did not make that distinction, but spoke to the broader separation of powers limits on legislative action. *See id.*

105. *See* *Hamilton County Tel. Coop. v. Maloney*, 601 N.E.2d 760, 763 (Ill. 1992) (refusing to apply an amendment to the Illinois Human Rights Act made in response to an adverse judicial decision); *Bates v. Board of Educ.*, 555 N.E.2d 1, 3 (Ill. 1990) (holding that a legislative clarification regarding a section of the School Code violated the separation of powers); *In re Marriage of Cohn*, 443 N.E.2d 541, 547 (Ill. 1982) (finding that the legislature invaded the province of the judiciary by retroactively overruling a court decision concerning a divorce statute prospectively); *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill. 1979) (overruling the legislature's attempt to retroactively amend the Cannabis Control Act to make costs a reasonable term of probation following a contrary court decision).

106. *See* *Bates*, 555 N.E.2d at 4. The *Bates* court stated: "[w]hile the General Assembly can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation was at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended." *Id.* (citations omitted).

which the statute seeks to correct, is not a statute but the constitutional free exercise provision.

If one views the Illinois RFRA as legislation designed to change a judicial interpretation of Article I, Section 3, Illinois' Free Exercise Clause, it can only be done by following the proper procedures for constitutional amendment.¹⁰⁷ Amendments require a three-fifths approval by each house and submission to the public for a vote with approval by either three-fifths of those voting on the question or a majority of those voting in the election.¹⁰⁸ Thus, because the procedures for constitutional amendment were not followed, the statute cannot successfully change the judicial test for Illinois religious freedom claims.¹⁰⁹

3. Laws Invading the Province of the Judiciary are Unconstitutional Under the Separation of Powers Clause

In numerous decisions, the Illinois Supreme Court has struck down statutes that violate the Separation of Powers Clause, because they invade the province of the judiciary. As the court recently stated in *Best v. Taylor Machine Works*:¹¹⁰ "[i]n furtherance of the authority of the judiciary to carry out its constitutional obligations, the legislature is prohibited from enacting laws that unduly infringe upon the inherent powers of judges."¹¹¹ In *Best*, the court found the Civil Justice Reform Amendments of 1995 unconstitutional.¹¹² Specifically, the court determined that two elements in the amendments, the cap on noneconomic compensatory damages¹¹³ and the requirement for mandatory disclosure of plaintiffs' medical records¹¹⁴ violated the Separation of Powers Clause.

107. See ILL. CONST. art. XIV, § 2 (defining the procedure for the Illinois General Assembly to amend the Illinois Constitution).

108. See *id.* The only other valid mechanisms for changing the Illinois Constitution are set out elsewhere in Article XIV. Specifically, section 1 provides the mechanism for calling a Constitutional Convention for a more comprehensive review, and section 3 provides the procedures for amendments to the Legislative Article. See ILL. CONST. art. XIV, §§ 1, 3. In addition, section 4 sets out procedures for requests to amend the United States Constitution. See ILL. CONST. art. XIV, § 4.

109. Moreover, if the Illinois RFRA were otherwise constitutional, its attempted retroactive application clearly violates the separation of powers.

110. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997).

111. *Id.* at 1079.

112. See *id.* at 1064.

113. See *id.* at 1066-81.

114. See *id.* at 1089-1100.

The Illinois Supreme Court's approach in *Best* and related cases demonstrates the problem with the Illinois RFRA. The *Best* court looked first to the nature of the judicial power affected by the statute and next to the degree of legislative interference. Specifically, the court first established that for over a century, the doctrine of remittitur¹¹⁵ has been a traditional and inherent power of the judiciary.¹¹⁶ Second, the court stated that the statutory cap unduly undercut this "fundamentally judicial prerogative" by making mandatory what should be done on a case-by-case basis by a judge who carefully examines all of the evidence.¹¹⁷

Since the early days of *Marbury v. Madison*,¹¹⁸ there has been no more well-established and traditional right of the judiciary than its role as the primary and final authority on matters of constitutional interpretation.¹¹⁹ Moreover, the property tax cases make clear that where a judicial interpretation of the Constitution comes up against a legislative one, the judicial view always prevails.¹²⁰ In fact, the judicial interpretation is deemed equivalent to the Constitutional provision itself.

There can be no greater intrusion into this fundamental judicial prerogative than that presented by the Illinois RFRA, which effectively tells the court to stop using one interpretation of a constitutional right and to substitute it with the legislative interpretation. Numerous courts have held that the legislature has no power to tell the judiciary how to interpret a law. For instance, discussing the Separation of Powers Clause in *People v. Crawford Distributing Co.*,¹²¹ the Illinois Supreme

115. Remittitur is the ability to correct excessive jury verdicts. See BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

116. See *Best*, 689 N.E.2d at 1079.

117. See *id.* at 1080. Similarly, with respect to the statute's discovery provision, it restricted courts from assessing the relevance of discovery requests and, thus, unduly interfered with the exercise of inherent judicial powers to regulate the process of litigation. See *id.* at 1093; see also *Murneigh v. Gainer*, 685 N.E.2d 1357, 1365 (Ill. 1997) (holding that the legislature "may not require judges to exercise their discretionary authority to punish for contempt, or tell the judiciary the manner in which it will exercise such power" (citations omitted)); *In re C.R.H.*, 644 N.E.2d 1153, 1158-59 (Ill. 1994) (holding that a statute that interfered with judges' common law ability to override waivers of notice in the interest of justice violated separation of powers).

118. *Marbury v. Madison*, 5 U.S. 137 (1803).

119. See *Aguayo v. Christopher*, 865 F. Supp. 479, 487 (N.D. Ill. 1994) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)); see also *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 5 (4th ed. 1991); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). But see Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998) (questioning rationales for judicial supremacy); Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945 (1998).

120. See *supra* Part III.A.1 (discussing property tax cases).

121. *People v. Crawford Distrib. Co.*, 291 N.E.2d 648 (Ill. 1972).

Court declared: "[t]he judicial power is vested solely in the courts, and the legislative branch is without power to specify how the judicial power shall be exercised under a given circumstance; it is without authority to state explicitly how the judiciary shall construe a statute."¹²²

In *Crawford Distributing*, the court took issue with a provision of the Illinois Antitrust Act, which stated that where the language was similar to a federal antitrust law, "the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts."¹²³ Ultimately, the court looked to the federal case law for useful guidance, but not as a result of the Illinois Antitrust Act's directive. Rather, the court relied on Illinois cases stating that federal law can be helpful when there is a dearth of Illinois precedent.¹²⁴ In the case of the Illinois RFRA, however, there can be no saving the statute; rather than being a minor provision attached to a substantive law, the legislature's directive to the courts on the proper interpretation of the constitutional free exercise right is the entirety of the statute.

B. *The Free Exercise of Religion Under the Illinois Constitution*

The Illinois RFRA's separation of powers problem can only be fully demonstrated by considering the above cases in conjunction with the Free Exercise Clause of the Illinois Constitution and existing Illinois Free Exercise precedent. The text of the Illinois Constitution's provision protecting the free exercise of religion is quite different from that of the familiar First Amendment provision.¹²⁵ Entitled "Religious Freedom," the provision states:

122. *Id.* at 652.

123. *Id.* (quoting ILL. REV. STAT. ch. 38, para. 60-77 (1969)). The current version of this statute is codified in 740 ILL. COMP. STAT. 10/11 (West 1993). The language of the current statute is substantially the same.

124. See *Crawford Distrib.*, 291 N.E.2d at 652 (citations omitted); see also *People v. Barrett*, 26 N.E.2d 478, 480 (Ill. 1940) (noting that where the text of the Motor Fuel Tax Act asserted that notes thereunder did "'not constitute an indebtedness of the state . . . within any constitutional limitation' [i]t is sufficient to say that such a provision . . . is without effect, as the question of whether they do constitute an indebtedness contrary to constitutional limitation is judicial and not a legislative matter"); *Fitzgerald v. Chicago Title & Trust*, 361 N.E.2d 94, 96 (Ill. App. Ct. 1st Dist. 1977) ("Although the legislature is without authority to state explicitly how the judiciary shall construe a statute, federal authorities will be consulted where there is a lack of Illinois precedent."), *aff'd*, 380 N.E.2d 790 (Ill. 1978); cf. *Palella v. Leyden Family Serv. & Mental Health Ctr.*, 404 N.E.2d 228, 231 (Ill. 1980) (holding that "[a] legislative body . . . is without power to say how the judiciary shall construe a legislative enactment").

125. See U.S. CONST. amend. I. The Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.¹²⁶

Although Illinois free exercise jurisprudence is somewhat difficult to characterize because it involves a melange of First Amendment, state constitutional, mixed, and generic claims, it seems to mirror the *Smith* Court's characterization of free exercise jurisprudence. Namely, this jurisprudence provides that religious objections have not entitled claimants to exemption from neutral laws except where there are individualized determinations or hybrid claims.¹²⁷ Illinois courts, however, are not limited to following United States Supreme Court precedent in a lockstep fashion when interpreting the Illinois Bill of Rights; indeed, both the text and the legislative history of the Illinois religious freedom provision suggest an independent construction.¹²⁸ The Illinois Supreme Court has not yet had the opportunity to decide whether it will follow the *Smith* rule without exception, so at a minimum, the Illinois RFRA takes away the court's essential power to fashion free exercise standards on a case-by-case basis.

1. The Illinois RFRA Test Is Contrary to the Few Illinois Cases on Point

Importantly, only a single Illinois case, *Corlett v. Caserta*,¹²⁹ mentions *Smith*. Despite this mention, however, the Illinois Appellate Court did not base its holding on *Smith*; rather it arrived independently at a similar conclusion.¹³⁰ Also, only four published Illinois cases make any reference to *Yoder* or *Sherbert*, the two cases that the Illinois RFRA seeks to "restore." Moreover, each of these four cases used the federal precedent to limit, rather than protect, religious freedom claims.¹³¹

126. ILL. CONST. art. I, § 3.

127. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878, 881-83 (1990).

128. See *infra* Part III.B.2 (discussing the restrictions placed upon Illinois courts in interpreting the Illinois RFRA).

129. *Corlett v. Caserta*, 562 N.E.2d 257 (Ill. App. Ct. 1st Dist. 1990).

130. See *id.* at 263.

131. On one occasion, an Illinois Appellate Court applied *Sherbert* to an unemployment com-

Corlett v. Caserta involved a wrongful death suit where the patient died after he refused a blood transfusion for religious reasons.¹³² The court held that although the deceased's exercise of his fundamental right to refuse medical treatment should not be a complete bar to recovery, the patient's estate should bear a proportionate share of tort liability determined by the extent the death was proximately caused by his decision.¹³³

After reviewing Illinois tort law, then-appellate court Justice McMorro wrote: "We decline to create, for a patient who refuses a reasonable life-saving medical treatment because of the patient's religious convictions, an exemption from tort principles governing mitigation of damages, comparative fault, and assumption of the risk."¹³⁴ She went on to state that such an allocation of proportionate liability "does not, in our opinion, violate the patient's religious or fundamental rights. The prerogative to exercise one's religious beliefs does not permit a person, 'by virtue of his beliefs, "to become a law unto himself . . .'"¹³⁵ Although *Corlett* cited to and used the rationale of *Smith*, the decision's careful analysis could also be viewed as using the pre-*Smith* context-dependent approach to determine when an exception to a general rule is good policy.

Arguably, the fact that the court in *Corlett* did not suggest that it was changing Illinois law to follow a new test from *Smith* could reflect that

pensation case, but it erroneously limited the holding to cases where the person's refusal to work on a Sabbath is required by a particular religious body. See *Frazee v. Department of Employment Sec.*, 512 N.E.2d 789, 791 (Ill. App. Ct. 3d Dist. 1987), *rev'd*, 489 U.S. 829 (1989). The United States Supreme Court reversed the Illinois Appellate Court's decision in *Frazee*, holding that it was enough that the claimant's refusal to work on Sundays was based on a sincerely held religious belief. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833-35 (1989). Similarly, several cases used *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to show that there is no protection for personal preferences that are not integrally tied to religious beliefs. See *Bethel Evangelical Lutheran Church v. Village of Morton*, 559 N.E.2d 533, 537 (Ill. App. Ct. 3d Dist. 1990) (holding that building a church on a particular piece of property is an unprotected preference and that protection is granted only if religious conduct is integrally related to a religious belief); *In re Marriage of Goldman*, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1st Dist. 1990) (holding that an ex-husband who sought court enforcement of a "get," a release to remarry under Jewish law, had no right to the protection of the Free Exercise Clause under either the First Amendment or Illinois Constitution, because this was a personal preference, not a protected religious belief); see also *In re E.G.*, 515 N.E.2d 286, 295 (Ill. App. Ct. 1st Dist. 1987) (holding minor mature enough to exercise the constitutional right to refuse blood transfusions and citing *Yoder* for principle that parents may not exercise religious beliefs in manner that jeopardizes health of child), *aff'd in part and rev'd in part*, 549 N.E.2d 322, 328 (Ill. 1989).

132. See *Corlett*, 562 N.E.2d at 258-59.

133. See *id.* at 262, 264.

134. *Id.* at 262.

135. *Id.* at 263 (quoting *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 885 (1990) (citation omitted)).

its approach was already the law in Illinois, prior to the *Smith* decision. This suggestion is based on the 1967 Illinois Supreme Court case, *Department of Mental Health v. Warmbir*.¹³⁶ In *Warmbir*, a woman challenged a provision of the Mental Health Code which made spouses liable where a patient was unable to pay.¹³⁷ Although she had grounds for divorce, her religion prohibited her from getting a divorce.¹³⁸ The woman claimed the statute penalized her for the practice of her religion and operated to give an unfair preference to persons whose religion permits divorce and to persons with no religion.¹³⁹ The Illinois Supreme Court interpreted Article I, Section 3 to mean that although legislation seeking to discourage a particular religion would be invalid, a statute that "is concerned with a legitimate governmental purpose is not vitiated merely because as an incidental effect it may place at some disadvantage persons of a particular religious faith."¹⁴⁰

The paucity of Illinois free exercise cases makes it impossible to state confidently that *Corlett* represents the Illinois Supreme Court's pre-*Smith* viewpoint on neutral laws that unintentionally burden religious conduct.¹⁴¹ Indeed, *Warmbir* and *Corlett* appear to be the only precedent deciding whether religious objectors should be exempted from neutral laws on free exercise grounds, and their holdings conform to *Smith*.

136. *Department of Mental Health v. Warmbir*, 226 N.E.2d 4 (Ill. 1967). It should be noted that the Illinois constitutional provision has not been changed since the 1967 decision, though it has been renumbered. See ILL. CONST. art. I, § 3.

137. See *Warmbir*, 226 N.E.2d at 5.

138. See *id.*

139. See *id.*

140. *Id.* The Illinois Supreme Court reversed the lower court's holding, which had found the statute unconstitutional, explaining that people are free to choose their religion and whether to marry:

If in making these voluntary choices she feels herself bound to preserve the marriage regardless of circumstances, she like everyone else who is married must comply with requirement based upon that relationship. Any other rule would result in a preference given to her particular religion.

Id. at 6. The claim in *Warmbir*, brought as a defense to a department collections suit, was one of few defenses based exclusively on the Illinois Religious Freedom Provision and cited no federal cases. See *id.*

141. There are no free exercise cases citing *Warmbir* and the *Warmbir* court relies on only two, somewhat dubious, decisions. See *Warmbir*, 226 N.E.2d at 6; see also, e.g., *Pacesetter Homes, Inc. v. Village of S. Holland*, 163 N.E.2d 464 (Ill. 1959) (striking down a broad Sunday closing law as beyond the police power); *Kut v. Albers Super Mkts.*, 66 N.E.2d 643 (Ohio 1946) (suggesting that claimant's refusal to work on his Sabbath justified denial of unemployment compensation).

Unlike *Corlett* and *Warmbir*, which involved general rules, the two main lines of Illinois free exercise cases¹⁴²—(1) zoning of churches and religious institutions, and (2) refusal of medical treatment on religious grounds—involve individualized determinations and, thus, presumably would not be affected by *Smith* if the Illinois Supreme Court were to explicitly adopt *Smith*.¹⁴³ These cases exemplify that Illinois courts have never applied a “least restrictive means” test in free exercise cases. As such, the Illinois RFRA, which uses a “least restrictive means test,” changes the courts’ standard of review.

The zoning cases all involve applications for special use permits, which involves an individualized determination based on specified criteria.¹⁴⁴ In the Illinois Supreme Court decision *Columbus Park Congregation of Jehovah’s Witnesses v. Board of Appeals*,¹⁴⁵ the court established that where a zoning decision in some way limits the free exercise of religion, the burden of proof shifts to the government.¹⁴⁶ Rather than establishing a standard for free exercise claims in the zoning context, however, *Columbus Park* and its progeny give heavy weight to religious interests within the traditional due process analysis, proclaiming that religious freedom rises above mere property rights and outweighs considerations of public inconvenience.¹⁴⁷

142. The third main group of Illinois Free Exercise cases involves First Amendment limitations on civil courts’ role in church disputes. This third group, however, has little relevance in this context. See, e.g., *Apostolic New Life Church of Elgin v. Dominguez*, 686 N.E.2d 1187, 1191 (Ill. App. Ct. 2d Dist. 1997).

143. See *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994 (D. Colo. 1994) (holding that because a zoning permit decision involved an individualized hearing, the *Sherbert* compelling interest test applied). Alternatively, one could view zoning code cases as outside of *Smith* because they do not involve the same type of neutral law. Zoning codes specifically classify the use “churches,” rather than regulating by using some more general category, such as meeting houses.

144. See generally 3 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *RATHKOPF’S THE LAW OF ZONING AND PLANNING* § 41 (Edward H. Ziegler, Jr., ed., 4th ed. 1975) (discussing special uses). See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 17 (1999) (setting forth special use standards and procedures).

145. *Columbus Park Congregation of Jehovah’s Witness v. Board of Appeals*, 182 N.E.2d 722 (Ill. 1962).

146. See *id.* at 724.

147. See *id.* at 724-25 (holding that denying plaintiffs’ right to locate their church at chosen premises based on concerns of traffic congestion and business continuity bore no rational relation to health, safety, and welfare); see also *Our Savior’s Evangelical Lutheran Church of Naperville v. City of Naperville*, 542 N.E.2d 1158, 1162 (Ill. App. Ct. 2d Dist. 1989) (holding that denial of special use permit for expansion of church’s existing parking lot was unreasonable); *Family Christian Fellowship v. County of Winnebago*, 503 N.E.2d 367, 373 (Ill. App. Ct. 2d Dist. 1986) (holding that denial of permit for a proposed church and school at location of former public school was arbitrary and unreasonable); *Lubavitch Chabad House v. City of Evanston*, 445 N.E.2d 343, 347 (Ill. App. Ct. 1st Dist. 1983) (holding that denial of special use permit for Hasi-

The second line of free exercise cases involves the refusal of medical treatment for religious reasons. These free exercise claims arise in an individualized context and involve hybrid rights, particularly the due process liberty interest. Courts have recognized that the Illinois Constitution's religious freedom provision and the Free Exercise Clause protect the right to refuse medical treatment for religious reasons.¹⁴⁸ The exercise of religious liberty is limited, however, when it threatens the health or welfare of others.¹⁴⁹

The one case decided to date under the new Illinois RFRA, *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries*,¹⁵⁰ applied the statute in such a surprising manner that its ramifications are uncertain, although it is helpful to government lawyers in arguing Illinois RFRA cases. The trial court found denial of a special use permit to locate a church in a commercial zone invalid under *Columbus Park*. The appellate court, however, reversed, ostensibly applying the new Illinois RFRA standards.¹⁵¹ In so doing, the court found a compelling interest in the city's desire to reinvigorate its commercial corridor and create a strong tax base.¹⁵² The court further determined that the ordinance was the least restrictive means of pursuing these interests because approximately sixty percent of Chicago Heights was zoned noncommercial, and churches could locate in non-commercial zones without special permits.¹⁵³ Although surely a

dic Jewish student center infringed on plaintiffs' freedom of religion); cf. *Bethel Evangelical Lutheran Church v. Village of Morton*, 559 N.E.2d 533, 536-39 (Ill. App. Ct. 3d Dist. 1990) (relying on several federal free exercise cases to use a cost-balancing approach and concluding that government should approve request for higher enrollment cap on religious school and permit more parking).

148. See *In re Baby Boy Doe*, 632 N.E.2d 326, 331 (Ill. App. Ct. 1st Dist. 1994) (upholding a woman's right to refuse a Cesarean section in violation of her religious beliefs); see also *In re Estate of Brooks*, 205 N.E.2d 435, 442 (Ill. 1965) (finding a First Amendment violation in forcing a Jehovah's Witness through a court-appointed conservator to accept blood transfusions in violation of her religion).

149. See *Brooks*, 205 N.E.2d at 442 (noting one reason that the court upheld the refusal to accept transfusion was that the woman had no dependent children); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 774 (Ill. 1952) (upholding an order that permitted medically necessary blood transfusions to a baby against a federal and state constitutional free exercise challenge).

150. *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries*, 707 N.E.2d 53 (Ill. App. Ct. 1st Dist. 1998), *appeal granted*, 714 N.E.2d 525 (Ill. 1999); see also *County of Kankakee v. Anthony*, 710 N.E.2d 1242, 1249 (Ill. App. Ct. 3d Dist. 1999) (taking note of the new Illinois RFRA, but "find[ing] it unnecessary to consider it in the instant [zoning] case in light of our decision to resolve the case on grounds unrelated to the constitutional claims").

151. See *Living Word Outreach*, 707 N.E.2d at 59-60.

152. See *id.* at 59.

153. See *id.*

counterintuitive result of the Illinois RFRA, *Living Word Outreach* shows the potential flexibility of the supposed strict scrutiny standard.¹⁵⁴

2. Illinois Courts are not Bound to Interpret the Illinois Religious Freedom Provision Lockstep and, thus, the Illinois RFRA Unduly Interferes with Judicial Selection of a Standard

The Illinois Supreme Court has been criticized in the past for following what is known as the "lockstep doctrine," in which United States Supreme Court Bill of Rights cases are viewed as controlling Illinois courts' interpretation of similar provisions in the Illinois Constitution.¹⁵⁵ The Illinois Supreme Court, however, is more likely to interpret its freedom of religion provision independently. Without lockstep, it is unclear whether the Illinois Supreme Court will agree with the *Smith* categorical rule or do a more context-dependent analysis. Because the judicial role in developing the contours of religious freedom is great, the Illinois RFRA's interference with the judiciary's prerogative is also great.¹⁵⁶

Generally, the state court trend is toward independent constitutional analysis.¹⁵⁷ For example, in *People v. DiGuida*,¹⁵⁸ the Illinois Supreme Court made clear that it is not automatically bound to follow federal precedent "where the language of the State constitution, or where debates and committee reports of the constitutional convention show

154. Restrictive interpretations of the compelling interest test occurred under the federal RFRA and pre-*Smith* First Amendment cases. See *supra* notes 57-61 and accompanying text (discussing pre-*Smith* cases decided under a stricter "context-dependent balancing" standard). It should be noted that generally in special use situations, courts look to the state's interest in the particular zoning decision, rather than the interests served by the Zoning Code as a whole.

155. See generally Thomas McAfee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1 (1987) (criticizing the Illinois lockstep doctrine); Seng, *supra* note 29, at 93 (noting lack of state constitutional commentary about First Amendment issues); Roger Kangas, Comment, *Interpreting the Illinois Constitution: Supreme Court Plays Follow the Leader*, 18 LOY. U. CHI. L.J. 1271 (1987) (analyzing the Illinois Supreme Court's adoption of the United States Supreme Court's interpretations); Rick A. Swanson, Comment, *Regaining Lost Ground: Toward a Public Forum Doctrine Under the Illinois Constitution*, 18 S. ILL. U. L.J. 453 (1994) (examining Illinois' adoption and application of the public forum doctrine).

156. Alternatively, if lockstep forces Illinois courts to follow *Smith*, then arguably the Illinois RFRA is purposely directed toward overturning the Illinois Supreme Court approach.

157. See Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 244-47 (1998) (noting the increasing number of states that are electing to apply their own analysis to Free Exercise Clause cases).

158. *People v. DiGuida*, 604 N.E.2d 336 (Ill. 1992).

that the Framers intended a different construction, it will construe similar provisions in a different way"¹⁵⁹

The Illinois religious freedom provision contains markedly different terms from the Free Exercise Clause of the United States Constitution, including express limitations on religious liberty. The legislative history of the Illinois provision indicates that these qualifications were purposeful. Specifically, the religious freedom section was redrafted in the 1870 Constitution to include the phrase: "but the liberty of conscience hereby secured shall not be construed to . . . excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State." The delegates to the Constitutional Convention extensively debated this provision and a number of the delegates objected to its inclusion.¹⁶⁰ Supporters, whose version prevailed and was included in the current 1970 Constitution, argued that many practices condemned by society were religiously motivated.¹⁶¹

The 1970 Constitutional Convention retained the religious freedom provision in its entirety after hearing witnesses primarily on the parochial school aid question.¹⁶² In response to questions regarding whether the provision was read the same way as the federal clause, the Bill of Rights Committee responded that the two were closely parallel, but the Illinois provision might be more restrictive.¹⁶³ A proposed

159. *Id.* at 342 (holding that the state action requirement is implicit in both federal and Illinois free speech provisions); *accord* *People ex rel. Daley v. Joyce*, 533 N.E.2d 873, 875 (Ill. 1988) (construing the Illinois Constitution's "right to a jury trial" provision as distinguishable from the comparable provision in the United States Constitution).

160. *See* 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS OF 1869-70, 1559-66 (1870).

161. *See id.* (citing to Mormon polygamy, a recent nudist sect, and foreign examples of child sacrifice and wife burning). The 1869-1870 Constitutional Convention predated the decision in *Reynolds v. United States*, where the United States Supreme Court rejected the claim that criminal laws against polygamy could not be applied to those belonging to the Mormon religion, which required it. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

162. *See* Proposal on Religious Freedom from the Committee on Bill of Rights, in 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969-70, at 21-22 (1970). Because the area of the free exercise of religion is so sensitive and there are many Illinois cases interpreting the provision, the consensus was that the better course was not to make any changes. *See* Verbatim Transcript of May 29, 1970, in 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969-70, at 1372 (1970).

163. *See* Verbatim Transcript of May 29, 1970, *supra* note 162, at 1372-73. Note that the Illinois Constitution cannot be "more restrictive," if that means placing greater restrictions on free exercise than the Free Exercise Clause allows. Even if the government action did not violate the Illinois provision, the claimant still would be entitled to relief under the First Amendment. Given the current interpretation of the First Amendment under *Smith*, arguably, the text and legislative history of the Illinois religious freedom provision limits the exercise of religious conduct in a manner similar to *Smith*, but perhaps more restrictively than a plain reading, or earlier interpretations, of the federal provision.

amendment to substitute wording identical to the Free Exercise Clause was defeated, primarily because it was thought wiser to leave this sensitive area untouched.¹⁶⁴ Thus, the legislative history of this provision provides support for an independent interpretation.¹⁶⁵

In the more likely case that the Illinois Supreme Court decides to do an independent analysis of the Illinois religious freedom provision, without the Illinois RFRA's statutory constraint, the court could interpret the Illinois text in a variety of ways. The only case to analyze that provision, *In re C.L.T.*,¹⁶⁶ relied on the limiting language to reject a mother's free exercise challenge to an order allowing her child to choose his own religious training.¹⁶⁷ Conversely, the Minnesota Supreme Court's treatment of an almost identical provision exemplifies another approach: "[s]ection 16 also expressly limits the governmental interests that may outweigh religious liberty. Only the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution."¹⁶⁸ Minnesota's differing interpretation of the religious freedom provision, however, could be attributed to the different tones of the Minnesota and Illinois Constitutions. Specifically, the Minnesota

164. See Verbatim Transcript of August 5, 1970, 4 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969-70, at 3643-46 (1970).

165. There is some argument, however, that the Illinois Supreme Court may look to the drafters of the 1970 Constitution and conclude that their intention was to read Illinois' provision identically to the Free Exercise Clause. A comprehensive guide to and analysis of the 1870 Constitution, which was prepared to assist the 1970 delegates stated: "[T]hough the state seems to have spelled out areas of permissible governmental interference with religious practices . . . the kinds of interferences which would be held valid under state law would in all probability be held valid under federal interpretations of the Fourteenth Amendment . . ." G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED & COMPARATIVE ANALYSIS 16 (1970). This guide was prepared prior to *Wisconsin v. Yoder* and, thus, it is possible that after *Yoder*, all would have agreed that there might be situations where the federal constitution would recognize a free exercise claim; while the claim would be denied if brought under the Illinois Constitution's more restrictive language. See also *Board of Educ. v. Bakalis*, 299 N.E.2d 737, 744 (Ill. 1973) (concluding that it was the Constitutional Convention delegates' intent to follow the federal Establishment Clause in retaining Article 1, Section 3, a provision specifically banning public aid to parochial schools).

166. *In re C.L.T.*, 540 N.E.2d 1043 (Ill. App. Ct. 4th Dist. 1989).

167. See *id.* at 1045 (finding that a mother's religion was intertwined with excessive discipline and control and noting that the Illinois Constitution "expressly limits religious freedom in those instances which interfere 'with the peace or safety of the State.'" (quoting *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 773-74 (Ill. 1952))).

168. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990). On remand after *Smith*, the court held that the Minnesota Constitution required the "compelling state interest/least restrictive means test" and barred strict application of a safety sticker law to Amish objectors. *Id.* at 396, 399. The court declined to evaluate whether the case could be viewed as a hybrid case under the Free Exercise Clause. See *id.* at 396.

Constitution grants a broad affirmative guarantee of rights whereas the Illinois Constitution focuses on nondiscriminatory treatment.¹⁶⁹ At the same time, at least six state supreme courts have explicitly rejected *Smith* and reaffirmed strict scrutiny under their state constitutions.¹⁷⁰ The Illinois Supreme Court could reasonably do the same.

C. *Illinois Separation of Powers—Conclusion*

The Illinois RFRA's attempted "restoration" of a "compelling interest/least restrictive means" test does not comport with Illinois courts' existing interpretation of the Illinois Constitution's religious freedom provision. Under the separation of powers cases, the legislature cannot change a judicial interpretation of a constitutional right by statute.

Alternatively, the Illinois Supreme Court has not yet had the opportunity to confront *Smith*, so the Illinois RFRA unduly interferes with the essential judicial function of interpreting the Illinois Constitution. Once confronted with the freedom of religion provision, the court may extend the holding and reasoning of *Warmbir* to every case, or it may agree with the state supreme courts that have rejected *Smith* under their own state constitutions. Alternatively, the court may continue the *Corlett* approach, which carefully analyzes each context. Because the Illinois RFRA has taken this discretion away from the Illinois Supreme Court, it violates the Separation of Powers Clause under *Best v. Taylor Machine Works* and related cases.

The separation of powers cases analyzing legislative encroachments on the judicial prerogative focus primarily on the contours of judicial power. Whether the legislature acts outside its area of competence is also relevant to the separation of powers question and, therefore, a discussion of the proper role of the legislature in making laws is necessary. The main source of the Illinois RFRA's constitutional problems—that it does not identify any actual, tangible problem suffered by religious persons—also gives rise to a fundamental question about the legislature's power to enact the statute: Does it exceed the

169. Compare MINN. CONST. art. I, § 16 ("The right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of or interference with the rights of conscience be permitted . . ."), with ILL. CONST. art. I, § 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions . . .").

170. See Crane, *supra* note 157, at 245 n.71 (citing various state supreme court decisions that have rejected *Smith*).

limits of the police power when it acts without naming any problem other than disagreement with a constitutional test?

Generally, the courts have described the Illinois Legislature's power to enact laws as very broad and unlimited except where restricted by the Constitution.¹⁷¹ Although the Illinois RFRA does not raise due process concerns, the test used in substantive due process cases nicely illustrates what is often viewed as the minimal standard for legislation. There, courts ask "whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and welfare."¹⁷² In the present case, the only threat to the welfare of religious persons that the legislature has identified is that posed by an unpopular United States Supreme Court decision.

Similarly, when evaluating legislative classifications using the minimal level of scrutiny under the Equal Protection Clause, courts ask whether the statute is rationally related to a legitimate state purpose.¹⁷³ An interesting comparison can be made to *Romer v. Evans*,¹⁷⁴ where the Supreme Court held that a Colorado statute, which prohibited any law, or executive or court order from giving homosexuals "protected status," violated the Equal Protection Clause. The law failed the rational basis test, because it was so extraordinarily broad that it bore no rational relationship to the purported justifications of protecting the associational rights of anti-homosexual landlords and employers.¹⁷⁵ In fact, "its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything [other than] animus toward the class it affects"¹⁷⁶

The Illinois RFRA is equally broad in scope; it affects every state and local law and government action. Indeed, the statute itself does not present any justifications other than protecting religious freedoms. Of course, the Equal Protection Clause would not be used for evaluating a claim that a statute favors religion over "irreligion" because the

171. See, e.g., *People v. Francis*, 239 N.E.2d 129, 140 (Ill. 1968) (upholding Public Junior College Act's scheme of electing board members); *Richardson v. Mulcahey*, 637 N.E.2d 1217, 1219 (Ill. App. Ct. 3d Dist. 1994) (upholding constitutionality of a statute that allowed a county to simultaneously adopt "an executive form of government and to opt out of home-rule status").

172. *People v. Reed*, 591 N.E.2d 455, 459 (Ill. 1992) (quoting *People v. Bradley*, 403 N.E.2d 1029, 1032 (Ill. 1980)) (upholding statute imposing harsher penalty for criminal sexual assault of persons aged 13-16 when perpetrator was more than five years older than victim); see also *People v. P.H.*, 582 N.E.2d 700, 711 (Ill. 1991) (applying this test to determine whether the law at issue infringed on individuals' Fourteenth Amendment rights).

173. See, e.g., *Reed*, 591 N.E.2d at 459 (recognizing the two tests as essentially equivalent).

174. *Romer v. Evans*, 517 U.S. 620 (1996).

175. See *id.* at 635.

176. *Id.* at 632.

Establishment Clause governs such cases. But, as shown in Part IV below, courts scrutinize statutory preferences to religion with greater care than the rational basis test.¹⁷⁷ Thus, the Illinois RFRA's extreme generality and complete failure to address a tangible evil raises questions about whether the legislature has exceeded its powers. Where the legislature has acted outside the scope of its competence, as in the present case, courts should be more likely to find that it has crossed the permeable line demarcating the separation of powers.

IV. RFRA VIOLATES THE ESTABLISHMENT CLAUSE AND IS AN INVALID PREFERENCE

The Illinois RFRA also violates the Establishment Clause and the Illinois Constitution because it is an across-the-board qualified exemption from general laws, which is applied to religious objectors alone, and is not directed at lifting any actual, identified burden on religious practices. This Part will discuss the criteria of the test established in *Lemon v. Kurtzman*¹⁷⁸ and the endorsement test¹⁷⁹ and will then show that this statute fails under both because it is not a defensible accommodation.¹⁸⁰ Next, this Part will argue that the statute also violates the Illinois Constitution's express prohibition against religious preferences.¹⁸¹ Finally, this Part will demonstrate the solid rationale for this conclusion by applying the Illinois RFRA to one class of covered persons: religious organizations performing work identical to that of secular entities but with religious motivations.¹⁸²

A. *The Lemon and Endorsement Tests and the Accommodation Cases*

Under the familiar *Lemon* test, a law violates the Establishment Clause if it: (1) does not have a secular purpose; (2) has the primary effect of advancing religion; or (3) leads to excessive entanglement between church and state.¹⁸³ The endorsement test, championed by

177. See *infra* Part IV (examining how the RFRA violates the Establishment Clause and its equivalent in the Illinois Constitution).

178. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

179. See *infra* Part IV.A.

180. *Accord* Eisgruber & Sager, *supra* note 58, at 448-50, 457 (discussing religious exemption cases before *Smith*); Hamilton, *supra* note 86, at 8-14 (arguing that the federal RFRA is unconstitutional); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995) (concluding that the exemption of nonreligious claims from RFRA litigation raises constitutional concerns).

181. See *infra* Part IV.B.

182. See *infra* Part IV.C.

183. See *Lemon*, 403 U.S. at 612-13. The United States Supreme Court in *Agostini v. Felton*, 521 U.S. 203 (1997), recently suggested that the "excessive entanglement" inquiry be incorpo-

Justice O'Connor and relied on by the majority in several Supreme Court cases,¹⁸⁴ asks whether an objective observer would perceive the statute as conveying a governmental message of endorsement of religion.

At bottom, the Illinois RFRA has no secular purpose. The Illinois Legislature never identified or referred to any specific burden on religious practices. Rather, the legislative history of the statute evidences concern over its breadth, while the statute's proponents spoke of restoring the standard of review ostensibly used prior to *Smith*.¹⁸⁵ As discussed above, where a law has a universal scope far in excess of any societal ill it purports to address its "sheer breadth" reveals a motivation to favor or disfavor the affected class, rather than a valid legislative purpose.¹⁸⁶

Comparing the strict scrutiny test of the Illinois RFRA with the more moderate balancing tests used elsewhere to protect similar rights also suggests that the Illinois RFRA has an improper purpose of favoring religion. For instance, where content-neutral laws burden speech, another critical First Amendment value, the Supreme Court requires only that the law be "narrowly tailored to serve the government's legitimate . . . interests."¹⁸⁷ Similarly, Title VII imposes on employers the duty to "reasonably accommodate" the religious practices of their employees, but only where they can do so without "undue hardship."¹⁸⁸

1. The Accommodation Cases under the *Lemon* and the Endorsement Tests

The Illinois RFRA would be analyzed as an accommodation case, which are those cases involving laws that give special treatment to religious actors. Because government neutrality between different

rated into the primary effect test. *See id.* at 232-34. Courts, however, still refer to the three-part test.

184. *See, e.g.,* County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985). *But see* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 775 (1996). In *Capital Square*, Justice Scalia, writing for the plurality, rejected the endorsement test in a case involving private speech in a public square. Five Justices, however, disagreed and gave support to the test. *See id.* at 772-83 (O'Connor, J., concurring); *id.* at 785 (Souter, J., concurring); *id.* at 800-12 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

185. *See supra* note 48 and accompanying text (discussing the statute's legislative history).

186. *See supra* notes 174-76 and accompanying text (discussing *Romer v. Evans*).

187. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (finding New York regulations regarding the volume of amplified music allowed to be broadcast from a Central Park bandshell to be a valid time, place or manner restriction).

188. *See* 42 U.S.C. § 2000e(j) (1994); *see also* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 (1986) (interpreting this statute).

religions is a "well-grounded" principle in Establishment Clause jurisprudence,¹⁸⁹ these cases walk a fine line between aiding religious freedom and avoiding establishment violations. The United States Supreme Court has summarized the accommodation cases as "allow[ing] the State to accommodate religious needs by alleviating special burdens."¹⁹⁰ Looking at two principle accommodation cases, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*¹⁹¹ illustrates the application of the *Lemon* test, while *Texas Monthly v. Bullock*¹⁹² applies the endorsement test.¹⁹³ Both cases, however, show that the Illinois RFRA fails to provide a sufficient justification for favoring religion over "irreligion."

Amos held that applying section 702, the religious organization exemption to Title VII's prohibition against employment discrimination based on religion, to secular non-profit activities of a religious organization did not violate the Establishment Clause.¹⁹⁴ The Court held that there was a valid secular purpose in "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions."¹⁹⁵ While the Free Exercise Clause may require only that religious groups be able to select religious employees for religious positions, the Court found the line between secular purpose and religious functions "hardly a bright one," so that fear of potential liability might unduly inhibit a religious organization.¹⁹⁶

Amos is distinguishable from Illinois RFRA in several ways. *Amos'* focus on protecting the internal management of church organizations is grounded in an established line of noninterference cases.¹⁹⁷ *Amos* is also consistent with the recurring principle that courts are not equipped

189. See *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 704 (1994).

190. *Id.* at 705 (holding that New York's creation of a special school district identical to the borders of a religious enclave went too far, by "crossing the line from permissible accommodation to impermissible establishment").

191. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

192. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

193. See *id.* at 8; *Amos*, 483 U.S. at 335.

194. See *Amos*, 483 U.S. at 339.

195. *Id.* at 335.

196. *Id.* at 336.

197. For example, the Free Exercise Clause prohibits civil courts from resolving disputes involving church property and internal church affairs. See, e.g., *Serbian Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 724 (1976) (holding that decisions of ecclesiastical tribunals are binding upon civil courts under the First and Fourteenth Amendments to the United States Constitution); see also *supra* note 147 (discussing cases involving First Amendment limitations on the role of civil courts in church disputes).

to say what kind of conduct is required by a religion.¹⁹⁸ Further, the special treatment accorded religious organizations in *Amos* was quite narrow: section 702 did not even relieve religious organizations from all of Title VII's general prohibitions, let alone apply to all burdensome laws.¹⁹⁹

The Court in *Amos* also held that the statute satisfied the second prong of the *Lemon* test, which it characterized as permitting churches to advance religion, so long as the government itself does not do so.²⁰⁰ As Justice O'Connor rightly recognized, this description of the "effects" test would mean that almost no law violates it.²⁰¹ Moreover, the *Amos* Court's discussion of when a statutory accommodation satisfies the *Lemon* test was qualified by its recognition that it is constitutionally permissible to benefit religious entities exclusively only when government acts with "the proper purpose of lifting a regulation that burdens the exercise of religion"²⁰²

The Illinois RFRA violates the *Lemon* test because, at bottom, it has no secular purpose. The legislature never identified or referred to any actual burden on religious practices. In addition, the Illinois RFRA violates the second prong of *Lemon*, even under *Amos*, because it unconstitutionally advances religion. Where a statute gives such a decided advantage to religious organizations and persons who assert a religious motivation, the government provides a powerful incentive for individuals to join the favored group, or at least to cloak oneself in a religious mantle when in conflict with an onerous legal requirement.

The ultimate principle in the accommodation cases is the same, whether couched in terms of *Lemon* or endorsement. As shown in *Texas Monthly*, the endorsement test similarly requires an identifiable burden before approving a government accommodation of religion.²⁰³ In *Texas Monthly*, the Court struck down a statute exempting only

198. See, e.g., *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 886 (1990) (stating that the First Amendment limits the role of civil courts in resolving church disputes).

199. Religious entities still are proscribed from racial discrimination, for example, even given a sincere belief that their religions demands it. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding the withdrawal of tax-exempt status from schools that practice racial discrimination on religious grounds).

200. See *Amos*, 483 U.S. at 338.

201. See *id.* at 347 (O'Connor, J., concurring).

202. *Id.* at 338.

203. See *Texas Monthly v. Bullock*, 489 U.S. 1, 10 (1989); see also *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) ("Of course, in order to perceive the government action as a permissible accommodation of religion, there must be in fact an identifiable burden on the exercise of religion that can be said to be lifted by the government action.").

religious periodicals from Texas sales tax.²⁰⁴ This targeted relief was thus unlike the property tax exemption upheld in *Walz v. Tax Commission of New York*,²⁰⁵ which was extended to a broad range of civic institutions, so that it had both a secular purpose and effect. Because there had been no showing that payment of sales tax inhibited the purchase of religious magazines, and secular interests did not receive the benefit, the statute was deemed closer to the religious favoritism previously invalidated by the Court.²⁰⁶ The Court recognized that unjustifiable benefits to religious organizations “cannot but ‘conve[y] a message of endorsement’ to slighted members of the community.”²⁰⁷

Similarly, the Illinois RFRA clearly benefits only religious persons. It grants to all persons who believe government has burdened their religiously-motivated conduct a qualified exception—an exception by definition not currently required by the Free Exercise Clause. The next step in the accommodation case analysis is to identify a special burden to which religious adherents are subjected to as a result of some government action, which the challenged statute seeks to lift. But the only burden Illinois RFRA alleviates is that imposed by *Smith* itself: not being exempted from general laws. Under *Texas Monthly*, this is unconstitutional endorsement.

Further, although some have argued that because RFRA is triggered by a “substantial burden” on religious exercise, most applications of the statute will themselves be valid accommodations,²⁰⁸ this does not solve

204. See *Texas Monthly*, 489 U.S. at 5.

205. *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970).

206. See *Texas Monthly*, 489 U.S. at 29 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (holding that a Connecticut statute that gives Sabbath observers the absolute right not to work on their Sabbath violates the Establishment Clause)).

207. *Id.* at 15 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring)). Justice Brennan in *Texas Monthly* did posit that where a religion-specific exemption does not impose substantial burdens on non-beneficiaries, it might be permissible. See *id.* at 18 n.8. (citing *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding public-school release time for outside religious instruction)). Because RFRA is so broad, it is not possible to foresee its effects on non-beneficiaries. More powerfully, RFRA provides for exemptions to general laws, which presumably are there to serve the overall public good. So, allowing subsets of people to escape the laws' directives must have at least some negative results. Further, because *Texas Monthly* involved a subsidy, in that non-payment of sales tax indirectly puts money otherwise belonging to the taxpayers in the hands of religious organizations, some courts have required that any statutory exemption of religious organizations from a general law be limited to non-profit entities. See, e.g., *Cohen v. City of Des Plaines*, 8 F.3d 484, 492 (7th Cir. 1993). RFRA contains no such limitation, so that some applications of the statute would be even more problematic because they would entail a subsidy.

208. See Berg, *supra* note 58, at 61 (“There is a greater likelihood that recognizing mere financial or paperwork burdens will create multiple exemptions or inducements to practice religion.”).

the Illinois RFRA's flaws. Facial challenges to statutes brought under the Establishment Clause are evaluated under the *Lemon* test, which looks at the purpose and effect of the statute itself; it is not sufficient that some applications of the law would be valid, if the law itself were valid.²⁰⁹

*B. RFRA Violates the Illinois Constitution's
Prohibition Against Preferences*

An even stronger case can be made that the Illinois RFRA violates the Illinois Constitution's prohibitions on religious preferences.²¹⁰ First, the text of the Illinois religious freedom section, which prohibits "any preference" to religion rather than the "establishment" of religion, suggests a lesser tolerance for laws specially benefiting religion. Next, in the *Warmbir* case, the Illinois Supreme Court refused to exempt a religious claimant from a neutral law because such an exemption would result in an unconstitutional preference for the woman's religion.²¹¹

Based on *Warmbir's* holding, one could argue that going beyond the *Smith* view of free exercise creates an invalid religious preference under the Illinois Constitution. Although some commentators may contend that the Illinois Supreme Court has already decided to follow federal Establishment Clause precedent lockstep, the textual differences between the Illinois Constitution and the United States Constitution, coupled with Illinois' trend toward independent analysis make it more likely that Illinois courts will determine anew whether to analyze the issue separately.²¹²

209. See *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("There is precedent in this area of constitutional law for distinguishing between the validity of the statute on its face and its validity in particular applications.").

210. The Illinois Constitution's prohibition of religious preferences states: "nor shall any preference be given by law to any religious denomination or mode of worship." ILL. CONST. art. I, § 3.

211. See *Department of Mental Health v. Warmbir*, 226 N.E.2d 4, 4-6 (Ill. 1967); *supra* notes 136-40 and accompanying text (discussing the Illinois Supreme Court's decision in *Warmbir*).

212. In *Board of Education v. Bakalis*, 299 N.E.2d 737 (Ill. 1973), after an extensive discussion of the relevant committee report, the Illinois Supreme Court clearly held that the intent of the 1970 Constitution's framers was that any program that is constitutional under the Establishment Clause is also constitutional under Article X, Section 3, the specific constitutional prohibition on public funding of sectarian institutions. See *id.* at 745. There was some legislative history to the contrary that indicated that Article X, Section 3 is more restrictive in that even if the United States Supreme Court becomes more favorable to public aid to sectarian schools, the specific Illinois Constitution provision will continue to prohibit it. See Seng, *supra* note 29, at 100-04 (stating that "if federal decisions became less restrictive, the Illinois Supreme Court still could hold that Article X, § 3 prohibited public aid to sectarian schools"); see also *Bakalis*, 299 N.E.2d at 750 (Ryan, J., concurring) (disagreeing with the majority by failing to equate the Illinois Constitution with the United States Constitution). In the next case on the subject, the court interpreted

Illinois' accommodation cases also support the argument that the Illinois RFRA violates Illinois' ban on religious preferences. In *Heckmann v. Cemeteries Association of Greater Chicago*,²¹³ the main Illinois case analyzing a government accommodation of religion, the court upheld a statute that invalidated union contracts prohibiting all burials on Sundays.²¹⁴ The legislature passed the statute to help certain Jewish groups who were unable to bury their dead in accordance with their prescribed rituals because of the existing no-Sunday-burial rule.²¹⁵ The court found no violation of the Establishment Clause or of Illinois' Article I, Section 3 religious preference ban. The court first noted that statutes enacted to eliminate even unintentional discrimination and to accommodate religious beliefs have a secular purpose.²¹⁶ The court then held that the statute did not have a primary effect of advancing religion because: "[t]he Act does [sic] confer a benefit to one group to the exclusion of others, but relieves a burden on those who were unable to freely exercise their beliefs."²¹⁷

Heckmann is an excellent example of the legislative ability to correct a concrete, serious obstacle to a minority group's religious practice upon recognizing an unintentional burden to that practice.²¹⁸ The distinction between conferring a special statutory right versus relieving

Bakalis as stating that the federal and state prohibitions were identical: "section 3 of article X of the Illinois Constitution of 1970 imposes restrictions concerning establishment of religion that are identical to those imposed by the first amendment. . . . Thus, any statute which is valid under the first amendment is also valid under the constitution of Illinois." *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129, 130 (Ill. 1973) (holding several state funding programs for children attending non-public schools unconstitutional according to the Establishment Clause). The court in *Bakalis* only skirted around making such a definitive pronouncement with respect to the religious preference ban. *See Bakalis*, 299 N.E.2d at 745-46. Instead, the *Bakalis* court concluded that because the busing statute at issue satisfied the *Lemon* test, no violation of Article I, Section 3 had occurred. *See id.* at 745-46 (rejecting a challenge to a statute providing state-funded busing for private school students, approximately 90% of whom were Catholic). Thus, it is unsettled whether the Illinois Supreme Court may choose to do an independent analysis of Article I, Section 3, when confronted with a case outside of the controversial school aid context.

213. *Heckmann v. Cemeteries Ass'n. of Greater Chicago*, 468 N.E.2d 1354 (Ill. App. Ct. 1st Dist. 1984).

214. *See id.* at 1359.

215. *See id.* at 1358.

216. *See id.*

217. *Id.*

218. Similarly, Congress has made numerous specific, valid accommodations to address identified obstacles to religious exercise that the Free Exercise Clause did not resolve. In the wake of *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress passed a statute allowing religiously-mandated headgear for military personnel. *See* 10 U.S.C.A. § 774 (West 1994). Following *Lyng v. Northwest Indian Cemetery Protective Association*, Congress decided not to fund a road project on federal land sacred to Native Americans. *See* H.R. REP. NO. 100-713, at 72 (1988).

a recognized burden is especially germane in light of Article I, Section 3's focus on nondiscrimination.²¹⁹

C. A Problematic Application of the Illinois RFRA

Without arguing that there are no cases in which courts should exempt religious groups from general laws, one application of the Illinois RFRA demonstrates why its overly broad scope is unconstitutional. Specifically, the Illinois RFRA's imposition of a strict scrutiny test even when laws are applied to religiously motivated conduct that is identical to secular conduct is unfair and contrary to nonestablishment principles.

The above problem is exemplified through a specific application of the federal RFRA, which contained the same strict scrutiny test as the Illinois RFRA. A number of courts held that the federal RFRA compelled zoning administrators to allow churches to operate homeless shelters and soup kitchens in residential locations, despite the fact that their secular charitable counterparts, which were performing an identical function, were banned from doing so.²²⁰ One court accepted the church members' assertion that provision of food and shelter to the poor flows from their religious beliefs and, thus, is an exercise of those beliefs.²²¹ In another case, the court held that the zoning code substantially burdened plaintiffs' religion because the plaintiffs had

219. The other Illinois case that upheld a law making an exception for religious interests is *Pre-School Owners Association v. Department of Children and Family Services*, 518 N.E.2d 1018, 1027 (Ill. 1988). *Pre-School Owners* is not a true "accommodation" case because it involved a day-care licensing statute that did not single out religious schools, but instead included exemptions for a broad range of other, secular types of schools and day-care centers for a variety of rationales. See *id.* at 1024. In *Pre-School Owners*, the court applied *Amos* and found no violation of the Establishment Clause or Article I, Section 3. See *id.* The Free Exercise Clause, however, probably required the statute because it was narrowly targeted at non-profit day-care centers that operated primarily to provide religious education and received no governmental aid. See *id.* But see *Cohen v. City of Des Plaines*, 8 F.3d 484, 495 (7th Cir. 1993) (holding that a zoning ordinance that permitted churches to have day-care centers in single-family residential districts even though other operators had to obtain special use permits did not violate the Establishment Clause).

220. See, e.g., *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1240 (E.D. Va. 1996) (granting temporary restraining order barring enforcement of zoning code against church-operated shelter because it violated RFRA); *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) (holding that enforcement of zoning regulations to bar church-sponsored soup kitchen was an impermissible burden on church's religious freedom under RFRA); *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 705 (Mich. App. Ct. 1996) (holding that board's decision that ordinance did not allow homeless shelter as "accessory use" to church violated RFRA). But see *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (upholding denial of permit for operation of church-sponsored shelter and soup kitchen against RFRA claim).

221. See *Jesus Center*, 544 N.W.2d at 703.

demonstrated that inviting the homeless into their church as part of worship was central to their faith.²²²

Although the churches' work in these cases is both admirable and necessary,²²³ the distinction between social work performed by churches or religious organizations versus non-sectarian, equally charitable groups, is not. Making a distinction based on those motivated by theistic versus humanistic values as the predicate for exemptions from otherwise valid laws is an insurmountable obstacle to the Illinois RFRA's constitutionality under the Establishment Clause.²²⁴ This flaw in RFRA is especially egregious as the Establishment Clause expands to allow equal participation by religious entities in government aid that helps fund many worthwhile community goals. This expansion is demonstrated by *Bowen v. Kendrick*,²²⁵ which re-invigorated the principle that the First Amendment does not prohibit religious institutions from participating in "publicly sponsored social welfare programs." This trend continued in *Agostini v. Felton*,²²⁶ where the Supreme Court reversed its earlier holding in *Aguilar v. Felton*²²⁷ and held that the Establishment Clause does not prohibit school districts

222. See *Stuart Circle*, 946 F. Supp. at 1239; see also Marc-Olivier Langlois, Note, *The Substantial Burden of Municipal Zoning: The Religious Freedom Restoration Act as a Means to Consistent Protection for Church-Sponsored Homeless Shelters and Soup Kitchens*, 4 WM. & MARY BILL OF RTS J. 1259, 1279 (1996) (arguing that under the religious tradition of sanctuary, churches are the appropriate place to feed and house the poor and, thus, once a church operates in a given location, any zoning burden on the charitable function impermissibly regulates methods of worship).

223. To place these comments in my own context, I volunteered in homeless shelters for several years, including helping to start one in a church basement located in an urban residential neighborhood.

224. See *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring) (explaining that allowing an exemption from a zoning law for a religious group, but not others, shows a "preference" for religion, which is forbidden by the First Amendment); Ira C. Lupo, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 809 (1998) (asserting that serious nonestablishment objection to federal RFRA as applied to federal laws would be saved by "limiting its protection to concerns of secular conscience").

225. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (upholding grants for teen sex counseling under the Adolescent Family Life Act to a wide spectrum of social and health organizations, including religiously affiliated and religiously inspired ones). *Bowen* relied on an earlier case, *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which the Court upheld a District of Columbia construction grant for a religiously affiliated hospital. See *Bowen*, 487 U.S. at 609. "Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics . . . is of not the slightest consequence . . . Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church." *Bradfield*, 175 U.S. at 298.

226. *Agostini v. Felton*, 521 U.S. 203 (1997).

227. *Aguilar v. Felton*, 473 U.S. 402 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

from sending public school teachers into parochial schools to conduct remedial education classes for poor students under Title I.²²⁸ Moreover, the Wisconsin Supreme Court has even approved government vouchers for parochial school tuition, reflecting the Establishment Clause's change in the government aid arena.²²⁹ Based on all of these cases, all levels of government involved in distributing public funds for humanitarian purposes go to creative lengths to include organizations animated by religious goals and to ensure that religious organizations are not discriminated against or shut out of the public purse.²³⁰ Given this inclusion, it is especially unjust to legislate that those same organizations can obtain exemptions from neutral laws that burden their projects, while their secular counterparts are given no such tool.

Zoning cases involving shelters may be a less than perfect example of this problem because many of them—but not all²³¹—involve individualized hearings where *Smith* would not apply. In Illinois, even without RFRA, religious claims get special deference in special use permit appeals.²³² No Illinois state court case, however, has applied this deferential standard to charitable uses such as shelters, and pre-RFRA Illinois zoning law did not require the government to demonstrate the “least restrictive means.” Moreover, the Illinois RFRA as written would apply to a wide variety of religiously-motivated charity work and the neutral laws that apply to them. For example: health codes apply to soup kitchens; building codes apply to shelters and transitional residences; and licensing requirements apply to day-care centers. Because waiving any particular rule in a given instance might not

228. See *Agostini*, 521 U.S. at 234-35.

229. See *Jackson v. Benson*, 578 N.W.2d 602, 632 (Wis. 1998) (upholding Milwaukee Parental School Choice Program), *cert. denied*, 119 S. Ct. 467 (1998); see also *Helms v. Picard*, 151 F.3d 347, 377 (5th Cir. 1998) (holding that giving computer to parochial schools violated the Establishment Clause), *cert. granted sub. nom. Mitchell v. Helms*, 119 S. Ct. 2336 (1999).

230. See, e.g., Rosalind Rossi, *Fearing Suit, Cristo Rey High Rejects Federal Grant*, CHI. SUN-TIMES, Nov. 26, 1998, at 16; Rosalind Rossi & Fran Spielman, *Grant Aids Kids' Work Program; Government Money Benefits Catholic Students*, CHI. SUN-TIMES, Oct. 8, 1998, at 8 (discussing school board's rejection of a grant for Cristo Rey High School Work Study Program despite city attorneys' attempt to comply with the Establishment Clause); see also 24 C.F.R. § 570.200j(2) (1996) (containing federal regulations explaining in detail how to set up corporate entities to structure Community Development Block Grants to religious organizations in a constitutional manner).

231. See, e.g., *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1228 (E.D. Va. 1996) (involving the municipal prosecution of a violation of a zoning code provision that limited churches to feeding and housing programs for no more than 30 persons on no more than eight occasions in winter before falling under a different zoning category); cf. *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 U.S. Dist. LEXIS 2230 (N.D. Ill. Feb. 26, 1996) (challenging city aldermen instituting zoning code restrictions on churches).

232. See *supra* notes 144-47 (describing cases dealing with special use permits).

threaten public health and safety, under the Illinois RFRA, those carrying out a religious mission could be entitled to exceptions, while those merely doing good works would be bound by each detailed regulation.

Asserting that the Illinois RFRA is unconstitutional, of course, does not restrict the government from redressing any actual burdens on religious conduct by passing an accommodation statute targeted at lifting that burden. For example, suppose that a municipality evaluated its homelessness problem and discovered that while secular charities tended to use empty warehouses for shelters, which were located in districts already open to that use, churches and religious groups wanted to open shelters in closed-down convents and parish schools, located in residential areas that were not currently zoned for this new use. Arguably, the municipality could change its zoning code to accommodate the proposed use by lifting the burden on churches' ability to serve the poor in this way without violating the Establishment Clause, even though such an exemption is not required by the Free Exercise Clause.

The Illinois RFRA's universal mandate for treating religiously motivated conduct more favorably under the law than identical conduct motivated by other worthwhile values violates the Establishment Clause and Article I, Section 3 of the Illinois Constitution. It goes beyond the demands of religious freedom and subverts the neutrality principle underlying our constitutional protections.

V. EVALUATION OF ALTERNATIVES

The *Smith* decision does not constitute the best possible approach to the balancing of interests necessary where religious claims confront general laws, but the Illinois RFRA's effort to overrule it is unconstitutional. It is up to the Illinois courts, and not the legislature, to determine whether to embrace *Smith* in full; ultimately reject *Smith's* categorical stance, or find some middle ground. In *Warmbir*, the Illinois Supreme Court made one pronouncement identical to *Smith* and in *Corlett*, a more recent case, the Illinois appellate court decision followed the *Smith* rationale after evaluating the particular context. Given that the scope of and the trigger for the Illinois RFRA are identical to that of the Illinois Constitution's religious freedom provision and that the statute was enacted purely to "restore" a standard of review, any distinction between the two is functionally meaningless. Arguably, the Illinois RFRA attempts to overrule judicial interpretations of the Illinois Constitution. In addition, RFRA takes away from the

Illinois courts one of its most cherished functions—its primary role in interpreting the Illinois Constitution in a gradual, organic fashion—and substitutes the legislature's own mandatory test. Viewed either way, the Illinois RFRA violates the Illinois Separation of Powers Clause.

Additionally, because the Illinois RFRA responds to no concrete injustice, but rather grants religious actors a privileged position as against every state and local law and policy, it violates the Establishment Clause and is an unlawful preference under the Illinois Constitution. Looking at examples where the religious and the secular are performing identical functions with admirable motivations, this preference has numerous applications that are contrary to the text and spirit of the Illinois religious freedom provision.

Accordingly, the question remains whether and how this statute could be amended to resolve these constitutional problems. The logical first step, of course, would be a statute that made no reference to the Illinois Constitution, judicial decisions, or the various standards of review used for free exercise claims. This step alone, however, would be insufficient because courts look beyond a statute's facial validity to its underlying realities to determine its context and purpose.²³³ Because the statute would still be functionally identical to the religious freedom clause, legislative silence as to the motivation for the statute would not ameliorate the separation of powers problem. Also, Establishment Clause concerns would continue if the statute did not identify any existing burden on religious practices.

The next level for amending the Illinois RFRA would be to target the statute at the perceived gap in coverage of the First Amendment as a result of *Smith*. The legislature could have responded to *Smith* by drafting a RFRA statute that established a "compelling interest/least restrictive means" test or a more moderate balancing test, in all cases where general, neutral laws substantially burden religious practices. The constitutionality of such a statute would be less clear-cut than the current breed of RFRAs, but such a law would still be too broad. It would effectively foreclose the Illinois courts from adopting the *Smith* approach to Illinois religious freedom claims, and without specifying the burden being lifted, this modified RFRA still would not be a valid accommodation law.

233. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534-40 (1993) (discussing the need to look beyond an ordinance's facial neutrality to the legislative history, scope of coverage and terms used to determine if the suppression of Santeria's religious practice of animal sacrifice was the ordinance's objective).

In addition, the structure of the religion clauses provides an independent reason why even a RFRA directed at protecting rights not covered by *Smith* would be problematic. While there is certainly an area open to legislation, the instances in which religious conduct may receive protection greater than that required by the Free Exercise Clause without violating the Establishment Clause are narrow. The inherent tension between these two principles means that a judicial decision with respect to one clause is often a balance drawn between the two.

The Illinois Supreme Court's decision in *Warmbir*²³⁴ is a key example of this balance. There, the court's holding that free exercise does not entitle individuals to exceptions to general laws was partly based on the rationale that to allow an exception to general laws would grant a preference to the claimant's religion. It is reasonable to conclude that even a modified RFRA goes too far by granting additional protection to free exercise rights, and instead grants a statutory preference for religious persons. The Illinois RFRA's wholesale grant to religious objectors of a qualified right to escape valid laws thus interferes with the judicial ability to strike the proper balance between the two religion clauses.

Finally, if the legislature did target some specific practice that was burdened by general laws but not protected under the Illinois Constitution's religious freedom provisions, such a statute would be unconstitutional, but it would not be a RFRA. A classic accommodation, such a statute would survive an Establishment Clause and religious preference challenge. It would not present a separation of powers issue because it would be addressing a real world problem, which is the province of the legislature. One example of a law that would likely be held constitutional is one providing that individual landlords with religious or moral objections to cohabitation are exempt from marital status discrimination ordinances.²³⁵

VI. CONCLUSION

The newly passed Illinois RFRA should be struck down to clear the way for more focused methods of eradicating unintentional stifling of religious freedoms. Whether by laws lifting a specific burden on religion or by context-sensitive judicial interpretations that strive for

234. See *supra* notes 136-40 and accompanying text (discussing the Illinois Supreme Court's decision in *Department of Mental Health v. Warmbir*, 226 N.E.2d 4 (Ill. 1967)).

235. The Legislature could find that Illinois has a longstanding policy against cohabitation and common law marriage, see *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1206 (Ill. 1979), and that there is no demonstrable housing shortage for cohabitators.

just outcomes, there are better and constitutional ways of responding to dissatisfaction with the *Smith* decision.