The First Amendment of the U.S. Constitution protects many freedoms Americans hold dear, but these freedoms are not absolute. The U.S. Supreme Court has ruled that burning a flag is protected under the First Amendment, but trading or soliciting child pornography is not. Freedom of the press doesn’t give a reporter the right to refuse a grand jury subpoena, but it does allow a newspaper to publish classified documents.

The right of Americans to freely exercise their religious beliefs also intersects with laws otherwise neutral to religion. Some religions use controlled substances, such as peyote, in religious ceremonies, while others deem education unnecessary after eighth grade. Religious Freedom Restoration Acts (RFRAs) provide a “strict scrutiny” test for courts: namely, that government may not burden or restrict a person’s exercise of religion, unless it demonstrates that the burden or restriction furthers a compelling government interest and is done through the least restrictive means.

Federal Action

The First Amendment states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” This clause, comprising the “Establishment Clause” and the “Free Exercise Clause,” is the basis of the First Amendment freedom of religion protection. For most of American history, these clauses were the basis upon which court challenges of an individual’s religious freedom were decided. However, a series of court decisions, beginning in the 1960s and culminating in the 1990 Employment Division v. Smith decision, expanded states’ power to enforce laws applicable to all citizens, when the impact on religious beliefs was incidental.

The federal Religious Freedom Restoration Act (RFRA) was enacted in 1993 as a response to the Smith decision. This bipartisan legislation aimed to restore and codify Americans’ religious freedom rights by requiring that even laws of general applicability must be narrowly tailored to meet a compelling government interest in instances where the free exercise of religion is affected. The act was considered applicable to both the states and the federal government until 1997 when, in City of Boerne v. Flores, the Supreme Court ruled that RFRA was an unconstitutional intrusion into state authority, and was invalid as applied to state law.

In an effort to further clarify federal law, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, providing that state and local zoning laws cannot impose a significant burden on religious institutions. Congress also amended RFRA in 2003 to clarify that it applies only to federal laws and those in Washington, D.C., Puerto Rico, and any other U.S. territories or possessions.
The U.S. Supreme Court weighed in again in 2014 in *Burwell v. Hobby Lobby*, when it determined that closely held for-profit corporations qualify as persons under federal RFRA and therefore could assert a valid RFRA claim.

**State Action**

Prior to the *Boerne* decision, Connecticut and Rhode Island had already taken action to emulate the federal Religious Freedom Restoration Act. From 1994 to 1997, no other state enacted a religious freedom restoration law, but after the *Boerne* decision, states became more active. Between 1998 and 2000, nine states enacted RFRA. Four states enacted religious freedom restoration acts between 2002 and 2009, six have done so since 2010, and 11 states are considering religious freedom bills in 2015 sessions. Some, such as Alabama and Illinois, explicitly mention the *Boerne* decision in their preambles. Others, such as Arkansas and South Carolina, reiterate the original federal law's purpose.

All state religious freedom restoration acts contain language similar to the federal act regarding the basic test for weighing government interest versus religious burden, but state RFRA contain unique provisions beyond that basic principle. For example, five states—Alabama, Connecticut, Missouri, New Mexico and Rhode Island—do not require the burden or restriction on religion to be “substantial.”

The Supreme Court has not differentiated between “substantial burden” and “burden” in the context of religious freedom restoration acts, but some decisions have attempted to distinguish the terms. For example, nonpayment of federal income taxes based on religious beliefs is not a substantial burden on religion because the government interest in maintaining the public fiscal health is a compelling one. Nine states—Arizona, Idaho, Kansas, Kentucky, Louisiana, Oklahoma, Pennsylvania, Tennessee and Virginia—define “burden” or “substantial burden” in statute. Their definitions vary. Burdens must be greater than “trivial … or de minimis infractions” in Arizona and Idaho; they are defined as actions that would “inhibit or curtail religious practice” in Oklahoma, Tennessee and Virginia; and specific examples of burdens are provided in Kansas, Kentucky, Louisiana and Pennsylvania.

Six states also define “person” in their laws. Just as the Supreme Court did in the *Hobby Lobby* case, two states—Indiana and South Carolina—define a person as, among other provisions, a corporation. Three other states—Arizona, Louisiana and Pennsylvania—extend the definition to religious assemblies or institutions. Kansas defines a person as “any legal person or entity” under Kansas or federal law.

Finally, Indiana and Texas provide that RFRA can be invoked when the state government is not involved in the lawsuit. In the 19 other states with a religious freedom restoration act, a RFRA lawsuit must be invoked against the government, presumably in response to the laws that restrict their religious practices. Texas allows its law to be used only as a defense “without regard to whether the proceeding is brought in the name of the state or another person.” Indiana's law similarly allows a religious freedom claim to be asserted as a claim or a defense, presumably allowing RFRA to be invoked in a private civil lawsuit, although NCSL is unaware of a notable case in either state where this has occurred.

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NCSL, 2015 State Religious Freedom Restoration Act Legislation

NCSL, State Religious Freedom Restoration Acts