AN ENDORSEMENT FOR THE TEST OF GENERAL APPLICABILITY: *SMITH II*, JUSTICE SCALIA, AND THE CONFLICT BETWEEN NEUTRAL LAWS AND THE FREE EXERCISE OF RELIGION

Ernest P. Fronzuto, III

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The 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. To make an individual's obligation to obey such a law contingent upon the laws coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense.[1]

I. INTRODUCTION

John is a citizen of the State of X and is affiliated with a religious denomination known as the Church of Y.[2] The Church of Y is an organization within the State of X and, as a periodic ritual of the Church, members ingest heroin as a sign of peace toward their God. John, attending a Church of Y function, and ingesting heroin, was criminally charged under a statute making it illegal to buy, sell, transport or use any "controlled substance." As defined under the statute, heroin was listed as a controlled substance. Upon being indicted under the controlled substance statute, John argues that his reason for ingesting heroin was religiously motivated and

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*This Comment is dedicated to the loving memory of Richard Ferraro. Awed by his intelligence and competitiveness, admired and thanked for his friendship and live-for-today lifestyle, anyone who ever knew Rich would agree that he truly was a legend. Like no person I have ever known, Rich had a way of bringing happiness to the bleakest of situations. Rich, who meant so much to so many different people, truly was an inspiration. To say that he is missed is, of course, an understatement. Fortunately, for those of us who knew and loved him, the memories he provided will leave an impression in our minds and feeling in our hearts that will last a lifetime. My prayers and love are with the Ferraros, now and always.

[1]Justice Antonin Scalia writing for the Court in Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 885 (1990) (citations omitted) [hereinafter *Smith II*].

[2]The hypothetical illustrated here is similar to the facts which were presented to the Court in *Smith II*.

therefore he should not be criminally liable under the statute. John wants to know if he may be exempt from the law pursuant to the protection provided under the Free Exercise Clause of the First Amendment.[3]

Under the Free Exercise Clause there are certain religious rights which are undeniably protected and may not be abridged by the state. Specifically, the right to hold religious beliefs is firmly grounded in the First Amendment.[4] Likewise, the First Amendment prohibits government action which is purposely directed at the inhibition of religious practices.[5] These situations are, however, different from the issues raised in the preceding hypothetical. Here the issue presented is whether an individual is entitled to a free exercise exemption because his religious practices are incidentally infringed by the law. The United States Supreme Court has addressed this conflict by holding that individuals *are not* entitled to constitutionally-based free exercise exemptions in order to avoid the civil consequences of their illegal acts. This standard, referred to as the "test of general applicability," was recently reaffirmed by a majority of the Court in *Human Services of Oregon v. Smith* ("*Smith II*"),[6] and has been throughout American history the prevailing standard of free exercise review. Congress, with passage of the Religious Freedom Restoration Act of 1993,[7] has attempted to overrule

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[3]U.S. Const. amend. I. This Amendment, as it pertains to religion, reads that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." By way of incorporation through the Due Process Clause of the Fourteenth Amendment, the United States Supreme Court has held that provisions of the First Amendment are fully applicable to the States. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[4]*See, e.g.*, *Smith II*, 494 U.S. at 877 (recognizing that the essence of free exercise protection is to safeguard religious beliefs); *Cantwell*, 310 U.S. at 303-04 (holding that the right to religious beliefs is absolute); Reynolds v. United States, 98 U.S. 145, 166 (1878) (stating that the Free Exercise Clause prohibits government from restricting religious beliefs and opinions).

[5]*See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67 (1953).

[6]494 U.S. 872 (1990). *See infra* text accompanying notes 80 to 116.

[7]The Religious Freedom Restoration Act ("RFRA") is a congressional response to the Supreme Court decision in *Smith II* that attempts to change the standard of review of free exercise claims from the test of general applicability to the compelling interest test. RFRA, 42 U.S.C. § 2000bb (Supp. V 1993), was introduced by Senators Edward Kennedy and Orin Hatch on March 11, 1993. S. Rep. No. 111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892; *see also infra* notes 124 to 133 and accompanying

the Court's free exercise jurisprudence and displace the test of general applicability in favor of the "compelling interest test." In direct contrast to the test of general applicability, the compelling interest test almost automatically allows for a religious-based exemption any time a law is challenged on free exercise grounds.[8] Needless to say, the test of general applicability and the compelling interest test cannot be reconciled.

Given the contradictory approaches to free exercise review presented by the Court and Congress, and their inconsistent application, this Comment addresses two fundamental questions: First, what does it mean to say that government cannot prohibit the free exercise of religion,[9] and, second, how far may religious denominations permissibly stretch the concept of religious freedom without endangering society as a whole? These questions, like the conflict between the test of general applicability and the compelling interest test, are ultimately about the strength of religious freedom balanced against other, perhaps, more important constitutional goals; namely, the government's interest in enforcing its laws and maintaining civil order.[10] Part II of this Comment will analyze the historical foundations of the Free Exercise Clause and the social conditions under which the Clause was enacted. This section will draw heavily upon the contrasting interpretational views of religion between Thomas Jefferson and James Madison. Part III will explore the Supreme Court's interpretation of the Free Exercise Clause and the Court's reading of the Clause not to provide constitutionally based

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text.

[8]*See infra* note 192 and accompanying text (discussing the "fatal in fact" application of the compelling interest test); *see, e.g.*, Frazee v. Illinois Dep't, 109 S. Ct. 1514 (1989); Thomas v. Review Bd. of the Indiana Employment Security Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

[9]See *supra* note 3 discussing the text of Free Exercise Clause.

[10]The issue here is clearly one of competing constitutional goals and their relative force in the constitutional scheme. It is not, as Professor Laylock suggests, a dispute between religious believers and nonbelievers. *See* Douglas Laylock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 884 (1994) ("On one side are all those people who take religion quite seriously. . .[and o]n the other side . . . [are those] who do not take religion seriously . . . ."). This distinction is drawn because this debate, at least on the surface, has little, if anything, to do with the strength of one's religious convictions. Simply because a person is of the belief that individuals should obey neutral laws for the good of society it does not necessarily mean that their religious experience is somehow inferior or subordinant to those who have a more expansive interpretation of the Free Exercise Clause. This debate is not about strengths or weaknesses in beliefs, but rather is about the allocation of constitutional goals.

exemptions to otherwise neutral and generally applicable laws. In Part IV, this Comment will address the interpretation problems that have been created by Congress's passage of the Religious Freedom Restoration Act of 1993 and its attempt to impose upon the Court the use of the compelling interest test to free exercise claims. This section will ultimately posit that RFRA is unconstitutional and therefore should not be considered in free exercise analysis. Part V will move away from the original intent, precedential and constitutional arguments raised in prior sections, and will analyze both the test of general applicability and the compelling interest test against Kantian notions of "good law." Here the two standards will be analyzed based on their efficiency, predictability and judicial feasibility in fostering a sound body of free exercise jurisprudence, as well as their respective utility in preserving religious integrity. Finally, Part VI will reach the conclusion that Justice Scalia and the majority in *Smith II* were correct in applying the "test of general applicability."[11] In this regard, not only does precedent support the test of general applicability, but the reasoning and rationale espoused by Justice Scalia in *Smith II* also makes for a desirably sound and cohesive standard under which to scrutinize free exercise claims. It is concluded that the test of general applicability is clearly the favored standard for free exercise review.

II. CIVIL ORDER v. RELIGIOUS INTEGRITY: A HISTORICAL ANALYSIS OF THE FREE EXERCISE CLAUSE

Given the modern divisions concerning the proper scope of the Free Exercise Clause, the sensible place to begin analysis of the Clause is the historical circumstances and realities under which the First Amendment was drafted.[12] Although recent Supreme Court free exercise decisions have avoided an original intent analysis,[13] such an inquiry would be helpful in

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[11]The "test of general applicability" states that the Free Exercise Clause does not provide religious exemptions to otherwise neutral and generally applicable laws. *See generally* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878). The test of general applicability is set out in greater length *infra* text accompanying notes 193 to 198.

[12]ANITA OLGA BOWSER, THE MEANING OF RELIGION IN THE CONSTITUTION 103 (1976) (discussing the value of interpreting historical circumstances and the founders' intent to provide assistance in addressing constitutional questions as they pertain to current issues).

[13]*See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413 (1990) [hereinafter McConnell, *The Origins and Historical Understanding*]. The Court, while frequently undergoing historical analyses in the area of Establishment Clause, has paid little, if any, attention to the

establishing a groundwork from which to build a solid free exercise jurisprudence.[14] In fact, even opponents of an "originalist interpretation" are likely to agree that a historical understanding is relevant, even if not dispositive.[15] As it was once stated by Justice Holmes, a historical analysis is often quite helpful since in many cases "a page of history is worth a volume of logic."[16]

Examining the historical foundations of the Free Exercise Clause, it is first important to consider the individuals responsible for the Clause's drafting and ratification. Like most other provisions of the Bill of Rights, the two figures who played the most prominent role in the enactment of the Free Exercise Clause were Thomas Jefferson and James Madison.[17] The contrasting views of these two men form the basis of the debate surrounding the Free Exercise Clause.[18]

On the one end of the debate were the Madisonians who took a very sympathetic stance on religion.[19] By attempting to preserve religious integrity, the Madisonians believed there existed a "jurisdictional division between religion and government."[20] Viewing religion as superior to the

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historical circumstances and social pressures which surrounded the adoption of the Free Exercise Clause. *Id.*

[14]For an inquiry into the interpretive value of an "original intent" analysis see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); *see generally* ROBERT BORK, THE TEMPTING OF AMERICA (1990). In support of taking an originalist approach toward understanding the Free Exercise Clause, it has been stated that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." McConnell, *The Origins and Historical Understanding*, *supra* note 13, at 1413 (quoting Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting)); *accord* McGowan v. Maryland, 366 U.S. 420, 437-42 (1961).

[15]McConnell, *The Origins and Historical Understanding*, *supra* note 13, at 1415.

[16]New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[17]*See* McConnell, *The Origins and Historical Understanding, supra* note 13, at 1449.

[18]*See id.*

[19]*See id.* at 1452.

[20]*Id.* at 1453. *See* James Madison, *Memorial and Remonstrance*, in 2 THE WRITINGS OF JAMES MADISON 183, 183-84 (G. Hunt ed., 1901). James Madison poignantly articulated:

goals of the state,[21] Madisonians claimed that the free exercise of religion should not be defined by the government, but rather by a "higher being."[22] In sum, the Madisonians supported the position that "the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable."[23]

In contrast, Jeffersonians claimed that the Madisonian interpretation of free exercise of religion was tantamount to anarchy.[24] Under the Jeffersonian interpretation, civil order and the enforcement of civil laws superseded an individual's interest in religion.[25] Similar to the views espoused by John Locke, Jefferson favored "a mild, tolerant and rationalistic brand of [free exercise of] religion."[26] Apparent from his works,[27]

> The religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate . . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.

Id.; *see generally* JAMES MADISON ON RELIGIOUS LIBERTY (Robert S. Alley ed., 1985).

[21]*See* McConnell, *The Origins and Historical Understanding*, *supra* note 13, at 1446.

[22]*See id.* "[As individuals] have a master in heaven, no earthly power can constrain them to deny his name or desert his cause." *Id.* (quoting J. Witherspoon, The Charge of Sedition and Faction Against Good Men, Especially Faithful Ministers, considered and accounted for in 2 THE WORKS OF THE REV. JOHN WITHERSPOON 415, 427 (Philadelphia 1802)).

[23]McConnell, *The Origins and Historical Understanding, supra* note 13, at 1453. Under this theory, the "claims of conscience" are superior to all, and therefore civil society "must recognize exemptions from its laws." *Id.* at 1446. This view is referred to today as the "liberty rights view" of religion. *See* Laylock, *supra* note 10, at 885.

[24]*See* McConnell, *The Origins and Historical Understanding, supra* note 13, at 1447.

[25]*See id.* at 1451.

[26]*Id.* at 1449.

[27]Jefferson's views on religion are most frequently cited from his drafting of the Preamble to the Virginia Statute of Religious Freedom, and his famous letter of 1802 to the Danbury Baptists. The Preamble to The Virginia Statute of Religious Freedom stated:

> [T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, because he being of course judge of that

Jefferson drew a clear distinction between permissible regulation of actions and impermissible regulation of opinions.[28]

Troubled by the Madisonian interpretation of free exercise, Jeffersonians frequently asked the question that if conscious must be respected, and an individual's conscious can be defined only by the individual believer,[29] then does not liberty of conscience give believers a license to violate laws vital to social order?[30] Jefferson proffered that social duties to obey the law may not under any circumstances be overridden by

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> tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.

Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800, 1815 (1994) (quoting The Statute of Virginia for Religious Freedom, *reprinted in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY xvii, xviii (1988)). Jefferson's letter of 1802 to the Danbury Baptists reads:

> Believing with you that religion is a matter which lies solely between man and God, that he owes account to none other for his faith or worship, *that the legislative powers of government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, *convinced he has no natural right in opposition to his social duties.*

David Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U. L. REV. 57, 58-59 (1976) (emphasis in original) (quoting *Thomas Jefferson, Letters to a Committee of the Danbury Baptist Association* (Jan. 1, 1802), *reprinted in*, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (A. Koch & W. Peden eds., 1944)).

[28]*See* Little, *supra* note 27, at 59. "[Jefferson] made those distinctions because he considered the opinions or beliefs of people to be basically irrelevant and unimportant in respect to their actions." *Id.*

[29]See *supra* note 20 discussing Madison's view that religion must be left to the convictions and conscience of every man.

[30]McConnell, *The Origins and Historical Understanding, supra* note 13, at 1447.

other duties or beliefs.[31] Under the Jeffersonian interpretation of free exercise, "[s]ocial duties . . . become the standard for appraising and tolerating beliefs and opinions."[32] Hence, where religiously motivated actions violate the law, the rights of the individual to participate in the conduct must be subordinate to the interests of civil government and public peace.[33]

Comparing the respective views of Madison and Jefferson, the Jeffersonian interpretation of free exercise of religion comports with the democratic ideal that individual liberties may not trump the interests and welfare of society as a whole.[34] Considering the social circumstances during the adoption of the Bill of Rights, the Jeffersonian view presented pragmatic solutions to societal dilemmas. Following this rationale, most commentators would agree that the Free Exercise Clause came into being not to promote religion, but rather to maintain the public peace.[35] Similar to other provisions of the Bill of Rights, the Free Exercise Clause was a means of preventing civic turmoil within the American states.[36] Based on the social conditions surrounding the adoption of the Free Exercise Clause, inclusion of religion in the Constitution was politically motivated, and not a

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[31]*See* Little, *supra* note 27, at 63-64.

[32]*Id.* at 64.

[33]The Jeffersonian interpretation of religion is referred to today as the "equal rights" theory of free exercise. *See* Laylock, *supra* note 10, at 885.

[34]*See* Little, *supra* note 27, 58-59 (quoting Jefferson's statement that "man . . . has no natural right in opposition to his social duties").

[35]Phillip Kurkland, *Of Church and State in the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); *see also* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 57-58 (1960). On the issue of public peace and societal order, Murray explained:

> Every historian has catalogued the historical facts which made for religious liberty and separation of Church and State in America would doubtless agree that these institutions came into being under the pressure of their necessity for public peace . . . . If history makes one thing clear it is that the [religion] clauses are the twin children of social necessity, the necessity of creating a social environment . . . in which men of differing faith may live together in peace.

Id.

[36]*See* BOWSER, *supra* note 12, at iii.

tenet of theological faith.[37] Free exercise analysis is not, therefore, merely about religious freedom, but rather is a balance of many competing interests.[38] Thus, the right of religious freedom should be evaluated as a civil right, and respected so long "as it is not understood to include any claims to independent sovereignty."[39] An interpretation of the Free Exercise Clause must serve the Constitution's ultimate goal: the maintenance of civic peace.[40]

III. FREE EXERCISE JURISPRUDENCE: THEN AND NOW

The Supreme Court did not address the permissive scope and applicability of the Free Exercise Clause until one hundred years following its adoption. Despite this century-wide gap, however, in 1878, the Court handed down its most authoritative ruling on the relationship between the Free Exercise Clause and generally applicable laws in *Reynolds v. United*

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[37]*See id.* at iii. The Constitution was drafted by lawyers, and not theologians, thus, making the prospect that the religion clauses are articles of faith is very unlikely. *See* Murray, *supra* note 35, at 56. For an example of the minority view that the religion clauses were theistic and not the product of political invention, see George C. Freeman, III, *The Misguided Search for the Constitutional Definition of Religion*, 71 GEO. L.J. 1519 (1983).

[38]This is, of course, not to say that religion is an insignificant interest in our society. Rather, the notion of the Free Exercise Clause as a "political charter" merely indicates that the free exercise of religion cannot be interpreted or understood as if it took place in a vacuum. The rights afforded under the Free Exercise Clause must be analyzed in light of other important constitutional considerations, namely government's interest in the maintenance of domestic tranquility. *See generally* Murray, *supra* note 35, at 56-63.

[39]*Id.* at 53. Murray explains that:

> The notion that any church should acquire status in public life as a society in its own right is per se absurd; for there is only one society, civil society, which may so exist . . . . The United States is [and was founded on the principles of creating] . . . a secular sanctuary . . . [and] is simply a civil community, whose unity is purely political . . . .

Id. at 53-54.

[40]*See* BOWSER, *supra* note 12, at iii.

States.[41] In *Reynolds*, the Court confronted the issue of whether a religious belief may justify violation of an otherwise generally applicable law.[42]

A. *REYNOLDS V. UNITED STATES*

George Reynolds, a member of the Mormon Church, practiced polygamy as an accepted doctrine of his church.[43] Reynolds, having two wives, was charged with bigamy under Utah law.[44] At trial, Reynolds requested jury instruction that he married twice pursuant to, an in conformity with, his religious duty.[45] The trial court rejected Reynold's request and the jury found him guilty as charged.[46]

Before the United States Supreme Court, the issue was presented whether Reynolds should have been acquitted because he believed polygamy was his religious duty.[47] Delivering the opinion for a unanimous Court, Chief Justice Waite began the free exercise inquiry by addressing the

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[41]98 U.S. 145 (1878); *see also* RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 1 (Terry Eastland ed., 1993). Of the relatively few religion cases decided by the Supreme Court prior to the mid-twentieth century, the only decision of "major doctrinal importance" was *Reynolds*. *See id.*

[42]*Reynolds*, 98 U.S. at 162.

[43]*Id.* at 161. According to his testimony at trial, Reynolds stated that he had a duty, under his faith, to practice polygamy and that if he failed or refused to practice polygamy, he would be punished and "that the penalty for such failure and refusal would be damnation in the life to come." *Id.*

[44]*Id.* at 146. Section 5352 of the Utah Revised Statutes stated that:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.

Id. (citation omitted).

[45]*Id.* at 161-62.

[46]*Id.* at 162.

[47]*Id.* at 153.

contrasting interpretational views of Thomas Jefferson and James Madison.[48] Favoring Jefferson's interpretation, the Chief Justice noted that Madison's proposed views on religion were overridden by Jefferson's views.[49] In support of this position, Chief Justice Waite cited with approval Jefferson's writings on the free exercise of religion.[50] Showing unbridled respect for Jefferson, the Chief Justice posited that "[c]oming as this does from an acknowledged leader of the advocates of the measure, . . . [Jefferson's works] may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[51]

After acknowledging the Court's overwhelming support of the Jeffersonian view, the Chief Justice rejected the notion that free exercise of religion was intended to preempt the civil laws of society.[52] Noting that the Free Exercise Clause prohibited Congress from restricting mere opinion, the Chief Justice recognized Congress's authority to limit actions which were in violation of social duties or subversive of good order.[53] According to the *Reynolds* Court, to interpret the Free Exercise Clause otherwise would "make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[54] Consequently, the Court upheld Reynold's conviction for bigamy based on what it deemed to be a neutral, generally applicable law.[55]

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[48]*Id.* at 163-64.

[49]*Id.* at 163. Chief Justice Waite stated that "Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe to the Creator,' was not within the cognizance of civil government. At the next session . . . [Madison's] proposed bill was not only defeated, but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed." *Id.* (citations omitted).

[50]*Id.* at 163-64. For the text of the Preamble to the Virginia Statute for Religious Freedom and Jefferson's Letter to the Danbury Baptists, see *supra* note 27.

[51]*Reynolds*, 98 U.S. at 164.

[52]*Id.* at 165.

[53]*Id.* at 166. The Court stated that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.*

[54]*Id.* at 167.

[55]*Id.* at 168.

B. FROM *REYNOLDS* TO *SMITH II*

From *Reynolds* to *Smith II*, the Court consistently upheld generally applicable laws in light of free exercise claims. The Court upheld a variety of generally applicable polygamy statutes,[56] child labor laws,[57] Selective Service laws,[58] Sunday closing laws,[59] tax laws,[60] and social security laws,[61] and thereby, reiterated the basic *Reynolds* principle that once a law is found to be within the legislative power of the state and generally applicable, courts may not carve out any exceptions for religious believers so long as the purpose and primary effect of the statute does not prohibit or

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[56]*See* Cleveland v. United States, 329 U.S. 14 (1946) (affirming the conviction of a Mormon polygamist under the Mann Act which prohibited the transportation of a woman across state lines for an immoral purpose); Davis v. Beason, 133 U.S. 333 (1890) (validating the requirement that voters take an oath that they are not members of an organization that teaches polygamy).

[57]*See* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite that the fact that a child of the Jehovah's Witnesses faith believed that it was her religious duty to perform the work).

[58]*See* Gillette v. United States, 401 U.S. 437 (1971) (affirming the validity of the Selective Service System despite the claim that it violated free exercise by enrolling individuals whose religious beliefs were in opposition to war); *see also* Hamilton v. Regents of California, 293 U.S. 245 (1934) (affirming a public university's suspension of students who refused to participate in ROTC on account of their religious beliefs against war).

[59]*See* Braunfeld v. Brown, 366 U.S. 599 (1961) (affirming a Pennsylvania Sunday closing law rejecting a free exercise challenge by Orthodox Jews' that it prevented them from working on Saturday). Several Sunday closing laws were challenged under the Establishment Clause and rejected, as well. *See* Gallagher v. Crown Kosher Super Mkt. of Mass., 366 U.S. 617 (1961); Two Guys v. McGinely, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

[60]*See* United States v. Lee, 455 U.S. 252 (1982) (explaining that the imposition of social security tax is not a burden on free exercise of religion of persons who object on religious grounds to receipt of public insurance benefits and refuse to pay taxes to support public insurance funds).

[61]*See* Bowen v. Roy, 476 U.S. 693 (1986) (validating a statute requiring the challenger to obtain a Social Security number despite the challengers allegation that it would violate his religious beliefs to do so).

discriminate against a particular religious practice.[62] As the Court stated, "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on religion, . . . would radically redistrict the operating latitude of the legislature."[63] In fact, even when the Court appeared to be retreating from the religious belief/conduct dichotomy,[64] the basic principles of law adopted in *Reynolds* have since been reaffirmed, and the precedential value of *Reynolds* has essentially remained unaltered.[65]

1. THE DISTINCTION BETWEEN "PURE" FREE EXERCISE CLAIMS AND OTHER AREAS OF RELATED FREE EXERCISE JURISPRUDENCE

While the Court continually adhered to *Reynolds*, two separate and factually distinct bodies of free exercise jurisprudence emerged, co-existing with the *Reynolds* standard.[66] In one line of cases, commonly referred to

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[62]Joseph M. Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 684 (1969) (citing Hamilton v. Regents of California, 293 U.S. 245 (1934)).

[63]Braunfeld v. Brown, 366 U.S. 599, 606 (1961). The Court went on to say:

> [I]f the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance . . . .

Id. at 607.

[64]*See* Cantwell v. Connecticut, 310 U.S. 296 (1940). Cantwell, a Jehovah's Witness, violated a statute that prohibited the solicitation of religious subscriptions and contributions without a permit. *Id.* at 301-02. In overturning Cantwell's conviction, the Court relied mainly on free speech grounds, however the Court also supported the reversal on the ground that the statute deprived Cantwell religious liberty guaranteed by the First Amendment. *Id.* at 305. Although, *Cantwell* in effect provides that religious "conduct" is protected under the First Amendment, this holding only applies to the limited circumstance when both "speech" and "religious conduct" are intertwined. This holding *does not* stand for the proposition that religious conduct alone, without elements of speech, will be protected under the First Amendment.

[65]There were several decisions which made it clear that the principles of law professed in *Reynolds* remained firmly intact following *Cantwell*. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944).

[66]As these cases have been interpreted, they have neither diminished nor diluted the force of *Reynolds* and its progeny.

as the "unemployment cases,"[67] the Court permitted religious exemptions which contravene the regulation of unemployment. In these cases, the Court allowed religious exemptions for unemployment regulations unless the government showed a "compelling interest" supporting the regulation.[68] Outside of the unemployment benefits area, however, these decisions have had no effect on the principles established in *Reynolds* since the focal concern addressed in *Reynolds* and its progeny is absent in the unemployment context.

In *Reynolds*, the Court emphasized that generally applicable laws promote civil order by preventing citizens from violating laws implemented for their protection.[69] As the Court stated in *Reynolds*, by allowing individuals to escape their civic duty to society under the guise of religion would in effect "permit every citizen to become a law unto himself" and put society in peril.[70] An individual exemption from unemployment regulations, however, does not place society in the same peril[71] created by the lax, subjective enforcement of criminal, military or tax laws.[72] Thus, while these "unemployment cases" do provide religious exemptions to the government regulation of unemployment, and appear on the surface to contradict the *Reynolds* rationale, they, in fact, do not. Outside of the

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[67]*See* Frazee v. Illinois Dep't, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); Thomas v. Review Board of the Indiana Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

[68]The "compelling state interest test" allows for individualized governmental assessment of the reasons for the relevant conduct. Under this test, claims must be evaluated by a balancing test whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest." *See Sherbert*, 374 U.S. at 402-03. The "compelling interest test" was first enunciated in the context of equal protection analyses in Korematsu v. United States, 323 U.S. 214 (1944). *See infra* text accompanying notes 187-192 for a discussion of the "compelling interest" (strict scrutiny) standard.

[69]Reynolds v. United States, 98 U.S. 145, 167 (1878); *see also supra* text accompanying notes 43-55.

[70]*Id.*

[71]Clearly, nonconformity to unemployment laws does not pose a substantial risk of harm to society. If for religious reasons an individual does not comply with unemployment regulations, it is not a violation of social duties that are "subversive to good order" as contemplated by Jefferson or the *Reynolds* Court. *See* Dodge, *supra* note 62, at 683.

[72]*See generally supra* notes 56-61 and accompanying text.

unemployment benefits area, the Supreme Court has consistently rejected application of the compelling interest test.[73]

In a second line of cases, commonly referred to as "hybrid" cases,[74] the Court has been willing to provide exemptions to otherwise generally applicable laws only where free exercise claims are brought in conjunction with other constitutional protections.[75] For example, in *Cantwell v. Connecticut*,[76] the Court overturned a conviction for solicitations which promoted religious ideas. The Court, however, based its decision not solely on the Free Exercise Clause, but rather, relied, in large part, on the

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[73]*See* McConnell, *The Origins and Historical Understanding, supra* note 13, at 1417. Since 1972 the Supreme Court has rejected every claim for a constitutionally based free exercise exemption to come before it. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (refusing to apply the compelling interest standard to a government decision to build a road on public lands sacred to Native Americans); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (finding that the compelling interest test was not applicable to prison regulations); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding the compelling interest test inapplicable to military regulations); Bowen v. Roy, 476 U.S. 693 (1986) (declining to apply the compelling interest test to a government regulation requiring a welfare recipient to have a social security number); Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (ruling that federal minimum wage requirements imposed no burden upon those who refuse, for religious reasons, to accept wages); Bob Jones University v. United States, 461 U.S. 574 (1983) (upholding a denial of religious school tax exempt status because of the university's religiously based rule against interracial dating and marriage). Even in the lower court rulings there appeared to be no significant following of the compelling interest test. Of 97 free exercise claims brought before the court of appeals from *Sherbert* to *Smith II*, the courts have rejected 85 of them. *See* James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1418-20 (1992).

[74]This characterization belongs to Justice Scalia. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882 (1990).

[75]*See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the compulsion of a display on a license plate slogan that offends religious beliefs is a violation of free speech rights); Follett v. McCormick, 321 U.S. 573 (1944) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (holding that compulsory flag salute regulation abridged challengers free speech rights); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (upholding the right of parents to direct their children's education).

[76]310 U.S. 296 (1940).

constitutional protections afforded by the Free Speech Clause.[77] Similarly, in *Wisconsin v. Yoder*,[78] the Court provided an exemption to Amish parents who refused to send their children to school in accordance with compulsory school attendance laws. Again, the Court rested its decision not solely on the ground that the parents decision was religiously compelled, but rather recognized that "when the interests of parenthood are combined with a free exercise claim," there are a "charter of [parental] rights" to be considered.[79]

Thus, in the context of the "hybrid" and "unemployment" cases, it is not accurate to maintain that these decisions place a limitation on *Reynolds* because they only remotely or partially touch on the free exercise issue. Nonetheless, however one wishes to characterize both these line of cases, it is apparent that these decisions are factually and, in many respects, legally distinct from "pure" free exercise claims such as *Reynolds*.

C. *EMPLOYMENT DIV., DEP'T OF HUMAN RESOURCES OF OREGON V. SMITH*

In perhaps its most definitive statement of free exercise law since *Reynolds*, the Court in *Smith II* held that the Free Exercise Clause does not provide a constitutional exemption to an otherwise neutral and generally applicable law.[80] Under Oregon law, the possession of a "controlled substance" constituted a felony.[81] Alfred Smith, along with others, was fired from his job for ingesting peyote, a hallucinogenic drug, during a

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[77]U.S. CONST. amend. I. The Free Speech Clause of the First Amendment provides that: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.* *See* Laura M. Plastine, *"In God We Trust": When Parents Refuse Medical Treatment For Their Children Based Upon Their Sincere Religious Beliefs*, 3 SETON HALL CONST. L.J. 123, 126 n.12 (1993); *see also* Steve Rosenstein, Note, Employment Div. v. Smith: *Sacramental Peyote Use and Free Exercise Analysis - Vision Wanted*, 22 U. WEST L.A. L. REV. 185, 186 (1991).

[78]406 U.S. 205 (1972).

[79]*Id.* at 233.

[80]Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

[81]*Id.* at 874. The Court explained that Oregon law defines a "controlled substance" as a drug classified in schedules I through V of the Federal Controlled Substance Act. *Id.* (citing ORE. REV. STAT. § 475.992(4) (1987)).

ceremony of the Native American Church.[82] Smith was subsequently denied unemployment benefits by the Oregon Employment Division because the discharge was characterized as work-related "misconduct."[83]

Challenging the denial of benefits under the Free Exercise Clause, Smith argued that the "controlled substance" statute posed an undue burden on his religious practice and, therefore, he should be exempt from the law.[84] After the Oregon Court of Appeals rejected Smith's argument, the Oregon Supreme Court held in favor of Smith, stating that even though the consumption of peyote was criminal under Oregon law, his practices were still protected under the Free Exercise Clause.[85] Granting *certiorari* to hear this case, and briefly remanding the matter to the Oregon Supreme Court for a clarification of the "controlled substance" statute,[86] the United States Supreme Court reversed.[87]

In an articulately trenchant statement on the appropriate scope and applicability of the Free Exercise Clause, Justice Scalia, writing for the

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[82]*Id.*

[83]This case is not analogous to the "unemployment cases" referred to in the previous section because in those cases the denial of unemployment compensation to employees required the employee to choose between fidelity to their religious beliefs and cessation of work. *See supra* notes 67-73 and accompanying text. All those cases involved employee conduct that was perfectly legal. This case deals with denial of benefits based on the employees' violation of a criminal statute. *See* Employment Div., Dep't of Human Resources of Oregon v. Smith, 485 U.S. 660, 671 (1988) (stating that the results reached in *Sherbert* and its progeny might well have been different had the employee been discharged for engaging in criminal conduct) [hereinafter *Smith I*].

[84]*Smith II*, 494 U.S. at 875.

[85]*Id.* at 876 (citing Smith v. Employment Div., Dep't of Human Resources, 721 P.2d 445, 44-50 (1986)).

[86]The first time the United States Supreme Court reviewed the decision of the Oregon Supreme Court in this matter they were unclear whether or not the religious use of peyote fell under the Oregon "controlled substance" statute. *See Smith I*, 485 U.S. at 660. On remand, the Oregon Supreme Court held that peyote was in fact proscribed under its drug laws, however reaffirmed its decision in favor of Smith claiming that denying him the right to use peyote would unconstitutionally deny rights protected under the Free Exercise Clause. *Smith II*, 494 U.S. at 876 (citing 763 P.2d 146, 148 (1988)).

[87]*Smith II*, 494 U.S. at 890.

majority,[88] reaffirmed the proposition that individuals may not be exempt from neutral, generally applicable laws merely because the law imposes an incidental burden on religious practices.[89] As a starting point, Justice Scalia distinguished this case from both the "unemployment"[90] and "hybrid"[91] exceptions.[92] Paying particular attention to Justice O'Connor's and the dissents' contention that the "compelling interest" test should apply, Justice Scalia offered solid precedential authority and valid constitutional reasoning why the Court has not applied the compelling interest standard to pure free exercise cases.[93] Making it unequivocally clear that this case does not fall within either of the "unemployment" or "hybrid" exceptions,[94] Justice

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[88]Justice Scalia's majority opinion was joined by Chief Justice Rehnquist and Justices White, Stevens and Kennedy. *Id.* at 873.

[89]*Id.* at 890.

[90]*See supra* text accompanying notes 67-73.

[91]*See supra* text accompanying notes 74-79.

[92]*Smith II*, 494 U.S. at 881-84.

[93]Justice Scalia emphasized that the Court has never invalidated any government action based on the compelling interest test outside of the unemployment benefits area. *Smith II*, 494 U.S. at 883. Recognizing that the Court has attempted to apply the standard in contexts other than unemployment benefits, Justice Scalia noted that the Court has abstained from ever doing so. *Id.* In this regard, Justice Scalia posited that "[e]ven if we were inclined to breathe into *Sherbert* life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Id.* at 884. On a theoretical level Justice Scalia also questioned the practicality of applying the compelling interest test. *Id.* at 884-85. In this regard, Justice Scalia attacked Justice O'Connor's reasoning in support of the compelling interest test since applying this test in the free exercise field would require the courts to make a determination about the "centrality" or importance of an individuals particular religious practices. *Id.* at 887. In addressing this issue, Justice Scalia rhetorically asked "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?" *Id.* Thus, such an inquiry would ask the courts to judge centrality and enter the unacceptable business of evaluating the merits of differing religious claims. *Id.* According to Justice Scalia, "dispensing with a centrality inquiry is utterly unworkable." *Id.* (citations omitted)

[94]Justice Scalia stated that since "the present case does not present a hybrid situation" and is "unconnected with any communicative activity or parental right," it is clearly a pure free exercise claim. *Id.* at 882. Justice Scalia noted that this case does not fall into the context of the "unemployment cases" because here, unlike in those cases, the Court is dealing with the violation of a criminal law. *Id.* at 883.

Scalia determined that this case involved a pure free exercise claim, and hence, governed by *Reynolds*.[95]

Citing *Reynolds*, Justice Scalia stated that the essence of free exercise protection is to safeguard an individual's right to believe and profess whatever religious doctrine the individual desires.[96] This unconditional protection of religious belief, however, does not extend to all religious practices and actions.[97] Where the state has the constitutional authority to pass a law proscribing conduct, and the law is not directed at a particular religious practice, the Free Exercise Clause is not offended if the law only incidentally infringes upon religious practices.[98] Denying Smith's contention that his religious motivations for using peyote placed him beyond the reach of the criminal law, Justice Scalia posited that it has never been held that an individual's religious beliefs excuse him from compliance with an otherwise valid law.[99] In the spirit of *Reynolds*, Justice Scalia professed that "laws . . . are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."[100] Excusing an individual's actions because of his religion, Justice Scalia noted, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[101] Finding Oregon's controlled substance

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[95]*Smith II*, 494 U.S. at 882. Justice Scalia, positing that Reynolds governed, stated:

> There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

Id. at 882.

[96]*Id.* at 877.

[97]*Id.* at 877-78. Justice Scalia posited that it would doubtlessly be unconstitutional if the state passed a law with the express intention of banning acts that are only engaged in for religious purposes. *Id.*; *see also infra* notes 118-119 and accompanying text. It has also been established that some religious practices are clearly protected because they are expressive; i.e. the "hybrid" cases. *See supra* notes 74-79 and accompanying text.

[98]*Smith II*, 494 U.S. at 878.

[99]*Id.* at 878-79.

[100]*Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)).

[101]*Id.*

statute generally applicable,[102] the Court held that the ingestion of peyote may be constitutionally proscribed without running afoul of the Free Exercise Clause.[103]

Providing viable and practical means for religious accommodation, Justice Scalia drew an important distinction between constitutionally required exemptions and permissible legislative exemptions.[104] Although the Free Exercise Clause does not provide for a constitutionally-based religious exemption to otherwise generally applicable laws, the Court left open the possibility that legislatures may affirmatively foster and accommodate religious practices.[105] For example, Justice Scalia noted that a number of states have provided exceptions to their drug laws for the sacramental use of peyote, as well as other drugs and alcohol.[106] Under this means of

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[102]Once the Court determines that a law is neutral and generally applicable, there is no issue left. *See* Laylock, *supra* note 10, at 888. Consequently, a law that is neutral and generally applicable need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

[103]*Smith II*, 494 U.S. at 890.

[104]*Id.*

[105]*Id.* "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not say that it is constitutionally required . . . ." *Id.*

[106]*Id.* Justice Scalia cited statutes from Arizona, Colorado and New Mexico which provide a legislative exemption for the sacramental use of peyote. *Id.* The Arizona statute reads:

> A person who knowingly possesses, sells, transfers or offers to sell or transfer peyote is guilty of a class 6 felony . . . . In prosecution for violation of this section it is a defense that the peyote is being used or is intended for use . . . [i]n connection with the bona fide practices of a religious belief . . . [and] [a]s an integral part of a religious exercise . . . .

ARIZ. REV. STAT. ANN. § 13-3402(A)(B)(1)-(3) (1989). The Colorado statute reads:

> The provisions of this part . . . do not apply to peyote if said controlled substance is used in religious ceremonies of any bona fide religious organization.

COLO. REV. STAT. § 12-22-317(3) (1985). The New Mexico statute reads:

> The enumeration of peyote as a controlled substance does not apply to the use of peyote in bona fide religious ceremonies by a bona fide religious

religious accommodation, Justice Scalia reserved the right to the legislatures, not the courts, to condone illegal religious practices through the promulgation of statutory exceptions.[107] Recognizing, however, the possibility that not all religions may be provided a legislative exemption, Justice Scalia, although sympathetic to these concerns, reasoned that this is ultimately the "unavoidable consequence of democratic government."[108]

Although Justice O'Connor joined in the judgment of the Court, the Justice's interpretation of the Free Exercise Clause differed from the majority. Since Justice O'Connor's free exercise views align significantly with the three dissenters in *Smith II*, Justice O'Connor's concurrence and the dissents' opinion will be combined and referred to as the "minority" opinion.[109]

> organization, and members of the organization so using peyote are exempt from registration . . . .

N.M. STAT. ANN. § 30-31-6(D) (Supp. 1989). Shortly after the *Smith II* decision, the Oregon State Legislature revised its "controlled substance" statute to provide a legislative exemption for the sacramental use of peyote. *See* ORE. REV. STAT. § 37-475.992(5)(a)-(c).

[107]*Smith II*, 494 U.S. at 890.

[108]*Id.* This portion of Justice Scalia's opinion is frequently cited. It states:

> It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious belief.

Id.

[109]*See* Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1246 (1994) [hereinafter Eisgruber, *The Vulnerability of Conscience*]. In *Smith II*, Justice O'Connor filed a separate concurring opinion in which Justices Brennan, Marshall and Blackmun joined only in part, refusing to concur in the judgment of the Court. *Smith II*, 494 U.S. at 891 (1990) (O'Connor, J., concurring). In addition, Justice Blackmun filed a dissenting opinion with whom Justices Brennan and Marshall joined. *Id.* at 907 (Blackmun, J., dissenting). Although these two opinions are slightly different with regard to the particular application of the facts in this case (Justice O'Connor found that Oregon's interest in prohibiting peyote use to be compelling while the dissenters did not), all four Justices agreed that the majority's decision not to apply the compelling interest test was misplaced.

The minority opinion posited two basic themes under which these Justices attacked Justice Scalia and the majority. First, the minority argued that the majority "depart[ed] from well-settled First Amendment jurisprudence" by endorsing the test of general applicability and not the compelling interest test.[110] In this regard the minority spends a great deal of effort attempting to discredit Justice Scalia's categorization of cases, i.e. "unemployment cases," "hybrid" decisions, and "pure" free exercise claims.[111] According to the minority, the combination of all these cases have in effect become part of the foundation of the Court's free exercise jurisprudence and stand for the fundamental proposition that freedom of religion may not be burdened, absent a compelling governmental interest.[112] The minority attempted to make the argument that the compelling interest test is the only prevailing free exercise standard.[113]

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[110]494 U.S. at 891 (O'Connor, J., concurring). Setting forth the compelling interest standard, the minority posited that the essence of free exercise claims is the relief from a burden imposed by government on religious beliefs and practices. *Id.* at 897 (O'Connor, J., concurring). Under this standard, "[o]nce it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion," the burden shifts to the government to show that the applicable law is essential toward the accomplishment of an overriding governmental interest and that it represents "the least restrictive means of achieving some compelling state interest." *Id.* at 899 (O'Connor, J., Concurring). The government must offer evidentiary support, and not merely speculation, why there must be a refusal to allow the religious exemption. *Id.* at 911 (Blackmun, J., dissenting). This, by its nature, requires that courts inquire, on a case by case basis, whether or not the interest asserted by the state is "compelling" and whether or not the burden placed on the plaintiff's religious beliefs is "constitutionally significant." *Id.* at 899 (O'Connor, J., concurring).

[111]*Id.* at 897-921.

[112]*Id.* at 896 (O'Connor, J., concurring).

[113]The minority spends less time making a case for the compelling interest test than it does attacking Justice Scalia and the majority for allegedly departing from precedent. Trying to reconcile the Court's free exercise precedents, the minority attempts to eliminate the categorical divisions in free exercise precedent interpreted by Justice Scalia. Speaking to *Cantwell* and the line of cases referred to by Justice Scalia as the "hybrid cases," Justice O'Connor stated that these decisions, despite resting on other constitutional grounds, "have [been] consistently regarded . . . as part of the mainstream of our free exercise jurisprudence." *Id.* at 896 (O'Connor, J., concurring). In an attempt to reason why the Court has been unwilling to extend the compelling interest test beyond the "unemployment compensation cases," the minority contended that the Court has rejected such application because those cases presented "narrow, specialized contexts which have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest." *Id.* at 900-01 (O'Connor, J., concurring). According to the minority, the fact that the compelling interest test has never been extended outside of the

Secondly, the minority raised the argument that the test of general applicability is, in addition to being misplaced, incompatible with the nation's fundamental commitment to individual religious liberty.[114] By stating that "[t]he compelling governmental interest test effectuates the First Amendment's command that religious liberty is an independent liberty," the minority maintained that the compelling interest test adequately accomplishes the purpose of the Free Exercise Clause.[115] According to the minority, "[o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of . . . [free exercise] freedoms."[116] The minority, therefore, would have applied the compelling interest test to this case.

D. *SMITH II* AND BEYOND

As the decision of a five-Justice majority demonstrated, the *Smith II* holding did not change free exercise analysis. From a practical, interpretational perspective, the Court in *Smith II* merely reaffirmed the principle adopted in *Reynolds* and its progeny, that individuals may not be exempt from neutral, generally applicable laws merely because the law imposes an incidental burden on an individual's religious practices.[117] In fact, in the lone free exercise decision of significance to follow *Smith II*,

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unemployment cases "says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here." *Id.* at 901 (O'Connor, J., concurring).

In providing this strained interpretation of precedent in an attempt to reconcile the clear differences among the unemployment, hybrid and pure free exercise line of cases, these Justices were reluctant to concede that in different circumstances, the Court has throughout history applied different standards of free exercise review.

[114]*Id.* at 891 (O'Connor, J., concurring). The minority opinions referred to Justice Scalia's application of the test of general applicability as a "distorted view of precedents" which leads to its treatment of free exercise as a "luxury" and that the repression of minority religions is an "unavoidable consequence of democratic government." *Id.* at 909-10 (Blackmun, J., dissenting).

[115]*Id.* at 895 (O'Connor, J., concurring). Justice O'Connor indicated that independent religious liberty occupies a preferred position in our society, and the Court should not "permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order." *Id.* (citations omitted).

[116]*Id.*

[117]*Id.* at 890.

Church of Lukumi Babalu Aye v. City of Hialeah,[118] the Court went to great lengths in supporting its *Smith II* decision.[119]

Despite the Court's adherence to long standing free exercise principles in *Smith II*, commentators and legal scholars have criticized the test of general applicability and the *Smith II* Court for allegedly ignoring the rights of minority religions.[120] Fueled by the criticism of prominent legal

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[118]113 S. Ct. 2217 (1993). Justice Kennedy writing for the Court in *Lukumi* articulated that a Florida law prohibiting the killing of animals was invalid because it intentionally burdened the practices of the Santerian religion. *Id.* at 2233. In reaching this decision, the Court stated that a law that is neutral and generally applicable need not be justified by a compelling governmental interest. *Id.* at 2226. The Court noted, however, that where a law is not neutral and generally applicable in the first instance, then the law may only be justified by a compelling interest. *Id.* at 2233 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."). Concluding that the law was not neutral or generally applicable, *id.* at 2231, and finding no compelling justification for placing an intentional burden on the Santerian religion, the Court invalidated the applicable statute. *Id.* at 2234.

[119]Throughout the Court's opinion in *Lukumi* there is continual reference to, and approval of, the test of general applicability posited by Justice Scalia in *Smith II*. In this regard, the Court stated:

> In addressing the constitutional protection of free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

Id. at 2226 (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990)). The *Lukumi* Court further stated that "[t]hese [animal sacrifice] ordinances fail to satisfy the Smith requirements." *Id.* Thus, in handing down *Lukumi*, the Court did not cast the slightest doubt on *Smith II*. *See* Laylock, *supra* note 10, at 892. Analyzing the opinions written in *Lukumi*, it appears that 6 Justices on the Court (Chief Justice Rehnquist, Justices Scalia, Kennedy, Stevens, White and Thomas) adhered strictly to the *Smith II* decision, while only 3 Justices (Justices O'Connor, Blackmun and Souter) attacked the validity of the test of general applicability. *See id.*

[120]*See, e.g.*, Angela Carmella, *A Theoretical Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 782 n.1 (1992); Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 747 (1993); Karen M. Rebescher, Note, *The Illusory Enforcement of First Amendment Freedom:* Employment Division, Department of Human Resources v. Smith *and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332, 1336 n.36 (1991); *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 129, 200 (1990).

scholars such as Douglas Laylock[121] and Michael W. McConnell,[122] the conflict over free exercise of religion and generally applicable laws has been brought to the forefront of constitutional debate. Adding to the fervor, and confusion, of this free exercise debate, is the Religious Freedom Restoration Act of 1993.[123]

IV. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

A. PASSAGE OF THE ACT

Feeling pressure from a handful of legal scholars,[124] as well as various "civil liberties organizations,"[125] the 103d Congress passed RFRA[126] in a legislative effort to "correct" *Smith II*.[127] Promulgated as

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[121]*See* Laylock, *supra* note 10 and accompanying text.

[122]*See generally* McConnell, *The Origins and Historical Understanding*, *supra* note 13.

[123]42 U.S.C. § 2000bb.

[124]*See supra* notes 120-122.

[125]Among the groups who supported the passage of the Religious Freedom Restoration Act were The American Civil Liberties Union ("ACLU"), People for the American Way and the American Humanist Association. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994).

[126]42 U.S.C. § 2000bb (Supp. V 1993); *see also supra* note 7. The Act provides, in part:

> Section 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE.
> (a) FINDINGS — Congress finds that—
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> (2) laws "neutral" toward religion may burden religion as surely as laws intended to interfere with religious exercise;
> (3) governments should not substantially burden religious exercise without compelling justification;
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neural toward religion; and
> (5) the compelling interest as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES— The purposes of this Act are—
(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.
Section 3. FREE EXERCISE OF RELIGION PROTECTED.
(a) IN GENERAL— Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b)EXCEPTIONS— Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.
(c) JUDICIAL RELIEF— A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government . . . .

. . . .

Section 5. DEFINITIONS.
As used in this Act—
(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State,
(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
(4) the term "exercise of religion" means the exercise of religion under the First Amendment of the Constitution.
Section 6. APPLICABILITY.
(a) IN GENERAL— This Act applies to all Federal and
State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
(b) RULE OF CONSTRUCTION— Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.
(c) RELIGIOUS BELIEF UNAFFECTED— Nothing in this Act shall be construed to authorize ant government to burden any religious belief.
Section 7. ESTABLISHMENT CLAUSE UNAFFECTED.
Nothing in this Act shall be construed to affect, interpret or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting," used with respect to government funding, benefits or exemptions,

a direct response to the Supreme Court's decision in *Smith II*,[128] RFRA was intended to eliminate the test of general applicability,[129] and impose the compelling interest standard upon the Court.[130] It has been argued that Congress relied on Section Five of the Fourteenth Amendment to pass RFRA.[131] Since RFRA is most likely an unconstitutional exercise of congressional authority, and not part of the free exercise debate, emphasis

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does not include the denial of government funding, benefits or exemptions.

42 U.S.C. § 2000bb; *see also* Stuart, *supra* note 126, at 412-14.

[127]*See* Michelle L. Stuart, *The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom after the Destruction of the Free Exercise Clause*, 20 DAYTON L. REV. 383, 385 (1994).

[128]Despite allegations to the contrary, it is clear that RFRA was a direct initiative aimed at derailing the Court's interpretation of the Free Exercise Clause. As it is stated under the Act, RFRA was enacted in response to "Employment Division v. Smith . . . [where the Court] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ." 42 U.S.C. § 2000bb(2)(a)(4). The "purpose" of the Act is to "restore the compelling interest test as set forth in Sherbert . . . ." *Id.* § 2000bb(2)(b)(1).

[129]*Id.* § 2000bb(3)(a). The Act attempts to eliminate the test of general applicability by stating that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." *Id.*

[130]*Id.* § 2000bb(3)(b)

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

[131]*See* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under the Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 362 (1994). Section 5 of the Fourteenth Amendment reads that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIX, § 5.

is placed here on not what the Act says,[132] but rather on how courts have reached the conclusion that RFRA is unconstitutional.[133]

B. WHY RFRA IS UNCONSTITUTIONAL

Since passage of RFRA, lower courts have been presented with the difficult task of sorting out which of the contradictory free exercise standards to apply. In an attempt to remove RFRA from the inquiry and enforce generally applicable laws, most government entities have challenged RFRA's validity on constitutional grounds. Although several tribunals have declined to pass judgment on the Act's constitutionality,[134] and others have upheld the Act,[135] some courts have reached the conclusion that RFRA is an

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[132]At this juncture, perhaps an interpretation of RFRA would be appropriate; however other commentators have dedicated entire articles to this lengthy topic. For an interpretive guide to RFRA, see Douglas Laylock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994) [hereinafter Laylock, *Interpreting RFRA*]; *see also* Berg, *supra* note 125.

[133]The argument that RFRA is unconstitutional is in no way claimed to be novel. Several courts, *see* Hamilton v. Schriro, No. 94-3845, 1996 WL 11119, *25 (8th Cir. Jan. 12, 1996) (McMillan, C.J., dissenting) ("I would hold that the Religious Freedom restoration Act is unconstitutional"); Flores v. City of Bourne, 877 F. Supp. 355, 357-58 (W.D. Tex. 1995) ("[T]he Court is of the opinion RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof as established under Employment Division v. Smith."); In re Tessier, No. 94-31615-13, 1995 WL 736461, *1 (Bankr. D. Mont. Dec. 8, 1995) ("RFRA violates the Supreme Court's holding in Smith . . . [and] violates the doctrine of separation of powers . . . ."), and commentators, *see* Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 60 N.Y.U. L. REV. 437, 439 (1994) [hereinafter Eisgruber, *Why RFRA is Unconstitutional*] ("RFRA is deeply unwise . . .[and] unconstitutional . . . ."), agree that Congress exceeded its constitutional authority by passing RFRA.

[134]*See Hamilton*, 1996 WL 11119; Van Dyke v. Washington, 896 F. Supp. 183 (C.D. Ill. 1995); Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) (although declining to pass judgement on RFRA, the Seventh Circuit recognized that the "constitutionality of [RFRA] — surely not before us — raises a number of questions involving the extent of Congress's power under Section 5 of the Fourteenth Amendment.").

[135]*See* Flores v. City of Boerne, No. 95-50306, 1996 WL 23205 (5th Cir. Jan. 23, 1996); Abordo v. Hawaii, 902 F. Supp. 1220 (D. Haw. 1995); Belgard v. Hawaii, 883 F. Supp. 510 (D. Haw. 1995); Sassnet v. Department of Corrections, 891 F. Supp. 1305 (W.D. Wisc. 1995).

unconstitutional exercise of congressional authority.[136] Needless to say, lower courts have expressed confusion over RFRA's validity and the appropriate standard of free exercise review. Nonetheless, in support of the position that RFRA is unconstitutional, it is maintained that RFRA impermissibly infringes upon the separation of powers doctrine and exceed's Congress's authority under Section Five of the Fourteenth Amendment.[137]

1. RFRA VIOLATES THE SEPARATION OF POWERS DOCTRINE

Courts and commentators reaching the conclusion that RFRA is unconstitutional on separation of power grounds have relied upon the landmark decision in *Marbury v. Madison*.[138] Under our constitutional form of government, and the principle of separation of powers[139] which it endorses, there are three distinct branches of government: the legislative, the executive and the judicial. Under this constitutional edict, each branch of government has enumerated core powers over which the others may not infringe.[140] Although this principle states that powers among the branches be "separate," separation of powers in its strictest sense, is only theoretical, and authority among the branches often does overlap.[141] To declare, however, that the doctrine of separation of powers is not applied "strictly," is not to say that the doctrine does not exist at all. Surely, in light of other

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[136]*See Hamiliton*, 1996 WL 11119, *11 (McMillan, C.J., dissenting); *Flores*, 877 F. Supp. 355; In Re Tessier, 1995 WL 736461 (Bankr. D. Mont. 1995).

[137]*See* U.S. CONST. amend. XIX, § 5.

[138]5 U.S. (1 Cranch) 137 (1803).

[139]The doctrine of the separation of powers embraces the Madisonian objective of dividing power among government in an attempt to ameliorate the evils of tyranny and self interested majoritarian rule. *See generally*, THE FEDERALIST No. 10, 47, 51 (James Madison) (Clinton Rossiter ed., 1961).

[140]The first three Articles of the United States Constitution define the authority granted to each branch of government. Article I reads, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. art. I, § 1. Article II reads, "All executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. Article III reads, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[141]*See* Wallace Mendelson, *Separation of Powers, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 774 (Hall ed., 1992).

constitutional principles such as checks and balances and limited government, the branches must only act within their respective "constitutional powers."[142]

Analyzing the constitutional authority given to the judiciary, the Supreme Court in *Marbury v. Madison* defined the scope of the Court's constitutional powers. In *Marbury*, Chief Justice John Marshall set forth the foundational principle of constitutional interpretation known as "judicial review."[143] Speaking about judicial review and the Court's authority, the Chief Justice stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[144] This statement, although brief and less than captivating, laid the foundation for future constitutional interpretation. Since *Marbury*, interpretation of the law by the judiciary has become a constitutional norm.[145]

Considering the Court's constitutional duty to interpret the Constitution and the laws, it is important to recognize that in some cases it is permissible,

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[142]The term "constitutional powers" signifies those powers which are clearly enumerated in the Constitution as well as those powers that the Supreme Court has determined reside in any one particular branch. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). By virtue of the Court's power of judicial review and constitutional interpretation, the Court has the final word on the scope and allocation of constitutional authority. *Id.*

[143]"Judicial review" is defined as the "[p]ower of the courts to review decisions of another department or level of government." BLACK'S LAW DICTIONARY 849 (6th ed. 1990).

[144]*Marbury*, 5 U.S. (Cranch) at 177.

[145]Expanding on the statement that it is the duty of the judiciary to interpret law, in a decision one hundred fifty years following *Marbury*, the Court stated in *United States v. Nixon*, 418 U.S. 683 (1974):

> Notwithstanding the deference that each branch must accord the others, the judicial Power of the United States' vested in the federal courts by Article III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government. We therefore reaffirm that it is the province and duty of this Court 'to say what the law is . . . .

Id. at 704-05 (citations omitted).

and in fact even desirable, to have Congress work as the Court's partner.[146] This, of course, returns to the proposition that the branches are not as distinctly "separate" as the doctrine of separation of powers might suggest.[147] For example, the Court and Congress, in a partnership-type effort, vindicated voting rights in this country.[148] This type of partnership, particularly in the area of the Reconstruction Amendments and civil rights, has proven a significant tool in the legal progression of civil equality.[149] This situation, however, is very different from the issues presented by RFRA. In the voting rights context, Congress's purpose and intent for enacting the voting rights legislation was consistent with the Court's recognized position that the Constitution mandated a society free from racial discrimination.[150] In contrast, Congress's enactment of RFRA directly contravenes the Court's interpretation of the Free Exercise Clause and creates an impermissible interbranch impasse.[151] By passing RFRA, Congress is not the Court's "partner," but rather its "adversary."[152] This is a

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[146]*See* Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 463.

[147]See *supra* note 141 and accompanying text explaining that the branches are not separate in a strict sense of the word.

[148]*See* Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 463. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966) the Court relied on Congress's "section 5" authority to uphold legislation barring literacy tests as a condition to voting.

[149]*See* Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 463.

[150]*See id.*

[151]What distinguishes RFRA from the voting rights legislation is that in the case of RFRA the Supreme Court already acted in *Smith II* and expressly rejected the very test which is attempted to be imposed by RFRA. *See* Hamilton v. Schriro, No. 94-3845, 1996 WL 11119, *21 (8th Cir. 1996) (McMillan, C.J., dissenting) ("The Court [in *Smith II*] could not have been clearer in its expression of the view that the compelling interest test . . . should be abandoned as inconsistent with its constitutional judgement.") In the voting rights context, the Court had not yet decided a case on English literacy requirements which was the subject of section 4(e) of the Voting Rights Act. *See* Belgard v. Hawaii, 883 F. Supp. 510, 514 (D. Haw. 1995).

[152]*See* Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 437 ("When Congress, as in RFRA, acts not as the Court's partner but as its adversary, . . . it acts at great constitutional hazard.").

relationship which is neither desirable nor constitutionally permitted.[153] Congress did not act within its constitutional powers in enacting RFRA and encroached upon the core function of the judiciary.

Justice Scalia in *Smith II* reaffirmed a body of prior rulings which held that the appropriate standard of free exercise review is the test of general applicability.[154] In rendering this decision, the *Smith II* Court expressly rejected the compelling interest test by stating that it is "normatively unjustified and practically unworkable" in evaluating free exercise claims.[155] Congress, with its enactment of RFRA, attempts to impose upon the Court an interpretation of the Free Exercise Clause expressly rejected in *Smith II*.[156] Unlike in the voting rights context, Congress here has commanded the Court "to act as though its understanding of the Constitution is different than it is."[157] This it cannot do.[158] RFRA attempts to tell the Court "what the law is" and is nothing more than a congressional initiative to subvert the wisdom and judgment of the Court.[159] RFRA violates the

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[153]This is not to say that the Court and Congress can never disagree on an interpretation of law. This statement that an adversarial relationship is not constitutionally permitted stands for the limited proposition that Congress cannot merely substitute its own judgement with that of the Court. If Congress disagrees with the Court's interpretation of the law, the only constitutional means of recourse is a constitutional amendment. For a further discussion on the issue of legislative responses to the Court's constitutional interpretation see LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 372-75 (1994).

[154]Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

[155]*Id.* at 886; *see also* Hamilton v. Schriro, No. 94-9835, 1996 WL 11119, *21 (8th Cir. Jan. 12, 1996) (McMillan, C.J., dissenting) ("The Court [in *Smith II* held] . . . that the compelling interest test . . . should be abandoned as inconsistent with its constitutional judgement. Yet, through RFRA, Congress expressly intended 'to restore the compelling interest test . . . .").

[156]See *supra* note 128 and accompanying text stating that congressional intent behind the enactment of RFRA was a direct response to the Court's decision in *Smith II* and that its purpose was to impose upon the Court's free exercise analyses the compelling interest test.

[157]Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 445.

[158]*See id.* "Congress cannot . . . command the Court to follow Congress' judgment in preference to its own," and it cannot overrule the Court on issues of constitutional substance. *Id.* at 442.

[159]*See id.* at 43.

doctrine of separation of powers and, therefore, should be found unconstitutional.[160]

2. CONGRESS EXCEEDED ITS AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

Congress also exceeded its authority under Section Five of the Fourteenth Amendment by enacting RFRA.[161] Put simply, Section Five of the Fourteenth Amendment does not authorize Congress to impose upon the Court a standard of review previously rejected.[162]

Under the Constitution, Congress is powerless to enact legislation absent a provision that empowers it to do so.[163] Congress receives its authority to enact legislation under Article I of the Constitution[164] and the Civil War Amendments — the Thirteenth, Fourteenth and Fifteenth Amendments.[165] Since Article I clearly does not provide Congress authority to enact RFRA, Section 5 is presumably the sole basis for congressional authority.[166]

Examining Section Five, the Court has stated that this provision was intended to allow Congress to "pass all laws necessary and proper for

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[160]*See* Hamiliton v. Schriro, No. 94-3845, 1996 WL 11119 (8th Cir. Jan. 12, 1996) (McMillan, C.J., dissenting); Flores v. Boerne, 877 F. Supp. 355 (W.D. Tex. 1995); In Re Tessier, No. 94-31615-13, 1995 WL 736461 (Bankr. D. Mont. 1995).

[161]*See generally* Hamilton, *supra* note 131; *see also* Hamilton, 1996 WL 1119, *16-25 (McMillan, C.J., dissenting).

[162]*See* Hamilton, 1996 WL 11119, *23 (McMillan, C.J., dissenting).

[163]*See* Hamilton, *supra* note 131, at 361.

[164]See *supra* note 140 discussing the language of congressional authority under Article I of the United States Constitution.

[165]*See* Hamilton, *supra* note 131, at 361.

[166]*See id.* at 362 (discussing how the First Amendment is the only constitutional provision discussed in RFRA). Recognizing that The First Amendment is not an enumerated power which would provide congressional authority to enact RFRA, it is presumed that section 5 of the Fourteenth Amendment is Congress's only legitimate motive of congressional authority. In fact, countless references to section 5 in the legislative history of RFRA suggests that Congress did in fact rely on this provision for congressional authority. *See id.* at 368.

abolishing all badges and incidence of slavery."[167] Outside of interest in remedying government discrimination,[168] however, Section Five has been strictly construed in granting congressional authority.[169] As Professor Eisgruber and Sager have noted, Section Five is not a "blank check" empowering Congress to pass any legislation connected to liberty or citizenship.[170] As section Five has been construed,[171] Congress has authority to enact legislation under this provision that is either remedial or substantive toward the incidences of discrimination, and is customarily applied to the states in the area of Equal Protection claims.[172]

Clearly, Section Five does not authorize Congress to establish a standard of free exercise review to be applied across the board.[173] First, Congress's enumerated powers under Section Five only apply to states.[174] Since RFRA's broad application applies to both state and federal laws burdening religion,[175] RFRA is unconstitutionally overbroad and lacks constitutional basis.[176] Second, there is no indication from the congressional intent of the Act that there is any traditional Section Five

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[167]Jones v. Alfred Mayer, 392 U.S. 409, 439 (1968).

[168]*See* Hamilton v. Schriro, No. 95-3845, 1996 WL 11119, *19 (8th Cir. Jan. 12, 1996) (McMillan, C.J., dissenting).

[169]*See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (recognizing that § 5 is directed against state action).

[170]Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 461.

[171]The leading case interpreting congressional authority under section 5 of the Fourteenth Amendment is Katzenbach v. Morgan, 384 U.S. 641 (1966). *See* Hamilton, 1996 WL 11119, *18 (McMillan, C.J., dissenting).

[172]*Id.* at *18-20.

[173]*See* Hamilton, *supra* note 131, at 371.

[174]*See id.*

[175]*See* Geraci v. Eckankar, 526 N.W.2d 391 (1995) (holding that RFRA applies to both state and federal laws).

[176]The theory that section 5 of the Fourth Amendment only applies to the states and therefore renders RFRA unconstitutional belongs to and is discussed at length by Professor Hamilton. *See* Hamilton, *supra* note 131.

remedial or supplemental purpose to be served.[177] Unlike the voting rights cases where it was rationally concluded that the Voting Rights Act was enacted for the purpose of remedying past invidious discrimination, RFRA does not survive a similar inquiry.[178] In fact, the only reasonable interpretation of RFRA is that it is aimed at interpreting the Free Exercise Clause differently than the Court.[179] Unfortunately for Congress, there are no enumerated congressional powers which allow it to enact legislation simply because it does not approve of the Court's jurisprudence.[180] In sum, RFRA is nothing more than "a bare standard of review yoked to no particular substantive policy arena within which Congress is constitutionally empowered to Act."[181] As a result, Congress unconstitutionally enacted RFRA under Section Five of the Fourteenth Amendment.[182]

V. WHY THE TEST OF GENERAL APPLICABILITY MAKES FOR A SOUND FREE EXERCISE JURISPRUDENCE AND THE COMPELLING INTEREST TEST DOES NOT

Despite the arguments raised in the previous section, for the time being RFRA must be assumed to be valid until the Supreme Court makes a final determination on the Act's constitutionality.[183] This being the case, it may be presumed that, for purposes of this Comment, RFRA is constitutional.

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[177]Hamilton v. Scriro, No. 95-3845, 1996 WL 11119, *24-25 (8th Cir. Jan. 12, 1996) (McMillan, C.J., dissenting) ("RFRA is neither remedial or supplemental . . . .").

[178]*Id.* at *25.

[179]*Id.*

[180]*See* Hamilton, 1996 WL 11119, *25 (McMillan, C.J., dissenting). As Justice Harlan stated in Oregon v. Mitchell, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part), "[t]o allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure." *Id.*

[181]Hamilton, *supra* note 131, at 364.

[182]*Hamilton*, 1996 WL 11119 at *25 (McMillan, C.J., dissenting).

[183]*See* David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 283 (1991); *see also* Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[It is the responsibility of this Court to act as the ultimate interpreter of the constitution."); Baker v. Carr, 369 U.S. 186, 211 (1962) ("[T]his Court [is the] ultimate interpreter of the Constitution.").

With this assumption as the premise, the situation presently arises wherein two valid, but very different, bodies of free exercise law exist: the Court's (*Smith II*, *Reynolds*, etc. — test of general applicability) and Congress's (RFRA — compelling interest test).

Presently, most free exercise claims will be challenged on statutory grounds. This is, of course, the case because the compelling interest test is perceived as being more favorable to the individual litigant than the test of general applicability.[184] Despite this fact, however, there are questions to be answered as to which standard makes for "good law." Certainly the efficacy of law cannot be judged simply by those who benefit most from it. Instead the more effective way to analyze the competing standards is to weigh them on an objective scale. Drawing on the teachings of Immanuel Kant, this section examines the test of general applicability and the compelling interest test against Kantian notions of good law.[185] Here the two standards will be compared, and then examined, according to their respective fairness, certainty, and judicial feasibility, as well as their ability to preserve religious integrity.[186]

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[184]*See* Wendy S. Whitbeck, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 872 (1994).

[185]*See* Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987). Although interpretation of Kant's theories have varied throughout history, it is accepted that Kant supported the proposition that implicit in all good law is the notion that it embodies coherence, rationality and bindingness. *Id.* at 473. Recognizing that law based on reason does not waft down from above, Kant articulated that there must be a systematic regulation of the interaction and interrelationships of people. *Id.* at 507. For Kant, unless a judge is constrained by consistency in the application of law, legal decision-making is indistinguishable from politics. *Id.* Under Kantian legal theory, public law must be as certain and predictable as possible in order to bear semblance of rationality and practical reason. *Id.*

[186]Murray, *supra* note 35, at 56. Murray posited:

> [The Founders] had a strong sense that the primary criterion of good law is its necessity or utility for the preservation of the public peace . . . . All law looks to the common good, which is normative of all law. And social peace, assured by equal justice in the possibility of conflicting groups, is the highest integrating element of the common good. This legal criterion is the first and most solid ground on which the First Amendment rests.

Id.

A. COMPARING THE STANDARDS

1. "STRICT SCRUTINY" — THE COMPELLING INTEREST TEST

Strict scrutiny is the most rigorous constitutional standard of review to overcome.[187] Under this standard, in order for a challenged governmental law to pass constitutional muster, the law must be "narrowly tailored" to a "compelling governmental interest."[188] Unlike most standards of review where the burden lies on the party challenging the law, strict scrutiny presumes that the law is unconstitutional unless the government comes forward and demonstrates a "compelling governmental interest."[189] As a result of the onerous burden placed on government to demonstrate a compelling interest, it is not surprising that nearly every law which is reviewed under strict scrutiny is invalidated.[190] Borrowing language from Professor Gunther, the compelling governmental interest test is "strict" in theory, and "fatal in fact."[191]

In the free exercise context, strict scrutiny would provide that any time a neutral, generally applicable law is challenged on free exercise grounds, the law would be presumptively invalid. Thus, once a plaintiff demonstrates that a law inhibits a religious practice, the burden shifts to the government to

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[187]Harold J. Spaeth, *Strict Scrutiny, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES at 845 (Hall ed., 1992).

[188]*Id.*

[189]*Id.*. See *supra* note 68 explaining the compelling governmental interest test.

[190]*See* Eisgruber, *The Vulnerability of Conscience*, *supra* note 109, at 1260.

[191]Gerald Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Despite criticism from Justice O'Connor that the compelling interest test is not "fatal in fact," *see* Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2117 (1995); *see also* Charles J. Falletta, Note, Adarand Constructors, Inc. v. Pena, 6 SETON HALL CONST. L.J. 295, 334 n. 178 (1995), history convincingly supports Professor Gunther's characterization of the compelling interest test. In the area of law where the genuine "compelling interest" test was developed, i.e. Equal Protection, no such interest has been discovered in almost a half century since its adoption in *Korematsu v. United States*. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990) [hereinafter McConnell, *Free Exercise Revisionism*].

demonstrate a compelling interest.[192] Considering Professor Gunther's "fatal in fact" characterization, neutral, generally applicable laws would rarely, if ever, be enforced as long as the challenger rests her violation of the law on free exercise of religion.

2. THE TEST OF GENERAL APPLICABILITY

In contrast to the compelling interest test, the test of general applicability relies less on valuing one's religious beliefs and the law, as it does with promoting equitable and consistent results. The test of general applicability, as it is set forth by Justice Scalia in *Smith II*, requires a two pronged analysis.

First, the test examines whether a governmental entity has authority to regulate the conduct in question.[193] If it is determined that the legislature lacks authority to legislate in the area, then the law would be automatically invalidated.[194] If, however, the law is within the authority of the governing body, then secondly, it must be determined whether the law is neutral and generally applicable to all members of society.[195] If the challenger demonstrates that the law is not neutral or generally applicable, or that the motivation behind the law was aimed at banning particular religious practices, then the law would be invalidated.[196] Once the law is deemed neutral and generally applicable, however, an individual's religious beliefs may not excuse him from compliance with the law.[197] Under this standard, religious accommodation to neutral and generally applicable laws may be provided only through nondiscriminatory legislative exemption.[198]

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[192]*See* McConnell, *The Origins and Historical Understanding*, *supra* note 13, at 1416-17.

[193]Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-80 (1990).

[194]*Id.*

[195]*Id.*

[196]*Id.* at 877; *see also supra* notes 118-119 and accompanying text. Where it is determined that a law is not neutral or generally applicable, it must undergo the most rigorous of scrutiny. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233 (1993).

[197]*Smith II*, 494 U.S. at 878-79.

[198]*Id.* at 887.

B. ANALYSIS OF THE STANDARDS: JUDICIAL FEASIBILITY AND RELIGIOUS INTEGRITY

To determine which of the two standards makes for a more meaningful review of free exercise claims, these standards must be measured based on their efficiency in preserving the interests of religion, as well as their ability to frame a consistent and cohesive body of free exercise law.[199] Matching these considerations to the two standards, it is obvious that the desirable standard of free exercise review is the test of general applicability.

1. FAIRNESS, CERTAINTY, AND JUDICIAL FEASIBILITY

Any time an evaluation is made on the effectiveness of a standard of review, there are always considerations of fairness, certainty and judicial feasibility.[200] After all, the law is only as effective as the standard under which it is tested. If a body of law is tested under a standard that is not practical in its application and it produces anomalous results, its value as an effective standard of review is significantly diminished. This, of course, is no different in the free exercise context. It has been frequently stated that a sound goal of interpreting religion in the Constitution is to produce fair and uniform results in its application.[201] In order for there to be meaningful and efficient review of free exercise claims, the law demands that a fair, predictable and workable standard of review be applied.

a. THE ONEROUS BURDEN OF THE COMPELLING INTEREST TEST

As previously discussed, the compelling interest test requires that any time a law is challenged on free exercise grounds the government must demonstrate a "compelling interest" to justify enforcement of the law.[202] Although, this standard would protect the interests of religion, it is simply not practical.

The compelling interest test is far too strict to be applied in the free exercise context given government's interest and duty to enforce laws and

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[199]*See* Weinrib, *supra* note 185 (discussing Kantian notions of "good law").

[200]*See id.*

[201]*See* Jesse H. Choper, *Defining Religion in the First Amendment*, 1982 U. ILL. L. REV. 579, 580 (1982) (stating that one goal of a sound definition of religion is to produce fair and uniform results in its application).

[202]*See supra* text accompanying notes 188-192.

maintain domestic tranquility. Under the compelling interest test, at the moment a free exercise claim is brought, the law in question is presumptively invalidated and the government must demonstrate a compelling interest in support of the law.[203] Although in theory a showing of a compelling interest would enforce the law, the reality is that the compelling interest test is extremely rigorous and in most cases the government cannot meet this onerous burden.[204] Given the "fatal in fact" nature of the compelling interest test,[205] free exercise challengers are effectively given an automatic exemption from otherwise generally applicable laws, and would create a state of anarchy whereby each individual would, by virtue of his beliefs, "become a law unto himself."[206] Since the compelling interest test is so "strictly" applied, and because there is a substantial range of religiously motivated conduct that quite clearly must yield to generally applicable laws, the presumptive invalidity inherent in the compelling interest test is misplaced.[207]

A second, and overlapping, deficiency which will ultimately result from the "strictness" of the compelling interests test is the problem of determining the genuiness of a challenger's claim. In this regard, the compelling interest standard does not consider the overwhelming number of religions which exist in our society and the difficulty that courts will have in distinguishing genuine religious practices from those which are insincere and the product of *post hoc* lawyering. In a nation where there are many groups, many denominations and many views and practices of religion, it is not unrealistic to assume that government would be overwhelmed with an assortment of free exercise litigation. By placing such an onerous burden on government to justify generally applicable laws, the compelling interest test will ultimately encourage individuals, in attempt to avoid the civil consequences of their illegal acts, to allege participation in practices which are questionably religious. If insincere assertions of religiously motivated conduct become the norm, and if no satisfactory judicial means can be devised to determine the

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[203]*See supra* text accompanying notes 188-192.

[204]*See supra* note 191 and accompanying text.

[205]*See supra* note 191 and accompanying text.

[206]*See* Berg, *supra* note 125, at 9 (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 885 (1990); Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[207]*See* Eisgruber, *Vulnerability of Conscience*, *supra* note 109, at 1260; *see also* James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23 (1995).

genuiness of claims, the courts will be confronted with the formidable task of sorting out the viable from the insincere.[208]

To demonstrate how difficult it will be for courts to determine the genuiness of a challenger's claim, we need to look no further than the Court's opinion in *Frazee v. Illinois Department of Employment Security*.[209] Applying the compelling interest test in the "unemployment" context,[210] the Court stated that as long as a claimant demonstrates some religious motivation for his actions, he will satisfy the genuiness threshold.[211] An individual's conduct would be considered religious even if his actions were not "consistent, coherent . . . or congruent with those of . . . [his own] religious denomination," so long as they are brought under the broad rubric of religion.[212] Based on this standard, not only would courts have to protect individuals who engage in practices mandated by the their own denomination, but they would also have to respect, and protect, any activity engaged in by the individual that is claimed to be religious, regardless of the individual's affiliation. Under this standard not only are courts looked upon to determine when practices are religiously genuine, they are also required to consider all possible forms of religious practices. If the challenged action falls within any one of the infinitely varied practices considered to be "religious," the actor will satisfy the genuiness threshold and in effect be exempt from the law. By allowing the suppression of all religious practices whatsoever as this standard implies, and given the number of potential religious practices this will cover, such a standard would result in exemptions reaching epidemic proportions and will ultimately create anarchy.[213] Thus, given the inherent "strictness" of the compelling interest test, and the

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[208]*See* Eisgruber, *Vulnerability of Conscience*, *supra* note 109, at 1260.

[209]109 S. Ct. 1514 (1989).

[210]*See supra* text accompanying notes 67-73.

[211]*Frazee*, 109 S. Ct. at 1517-18.

[212]*Id.*

[213]Criticizing the compelling interest test, Justice Scalia in *Smith II* stated that "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888 (1990). Even more confusing is that proponents of this standard reasonably expect courts to engage in this highly subjective and burdensome inquiry every time a free exercise claim is brought, and then expect to have a body of free exercise law that can be made sense out of for meaningful appellate review. It is simply not practical.

multiple interpretive problems which it ultimately creates, the compelling interest test does not provide for a workable, sound standard of review for free exercise claims.[214]

b. THE "MODIFIED" COMPELLING INTEREST TEST — ABUSE OF DISCRETION AND INCONSISTENT IN APPLICATION

Recognizing, as some scholars have, that the compelling interest test is not workable in the free exercise context, proponents of this standard have made a pitch to modify it. In this regard, the compelling interest test would be diluted from its traditional application and applied less rigidly to free exercise cases.[215]

In this "modified" version, the compelling interest test would be relinquished to a basic balancing test, "obscuring rather than clarifying the analysis."[216] Under this standard, the court hearing the free exercise claim would weigh the relative value of the competing secular and religious interests involved, and then make the subjective determination as to which interest should prevail. Unlike the traditional compelling interest context where laws are almost automatically invalidated, the modified version would allow the courts to evaluate the law, and make value judgments about its applicability, depending on the importance of the challengers religious beliefs.[217] Similar to the problems courts face in making a subjective

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[214]*See* Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 451.

[215]Although no commentator or court has come out and expressly proposed what I refer to as a "modified" version of the compelling interest test, there are a host of lower court decisions which have in effect applied this "modified" version by referring to the compelling interest test only in name and have applied a relaxed, policy-weighing version of the compelling interest test. In these cases, the courts have nearly every time found the standard satisfied. *See generally* Stuart, *supra* note 126.

For illustrations of this policy-weighing approach, see People v. Woodruff, 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (1966), *aff'd*, 21 N,Y.2d 848, 236 N.E.2d 159 (1968); In re Jenison, 265 Minn. 96, 120 N.W.2d 515 (1963); *see also* Dodge, *supra* note 62, at 686-87.

[216]*See* Eisgruber, *Vulnerability of Conscience*, *supra* note 109, at 1260.

[217]This idea is similar to notion that was raised by Justice O'Connor in *Smith II*. There, Justice O'Connor posited that "the sounder approach . . . is to apply the test in each case to determine whether the burden on the specific plaintiff before [the court] is *constitutionally significant* and whether the particular criminal interest asserted by the state before us is *compelling*." Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 899 (1990) (emphasis added).

inquiry into the genuineness of a challenger's claim under the traditional compelling interest test, under this modified version the courts would not only be expected to determine the genuiness of a challenger's claim, but also to balance those interests against the court's judgment about the importance of the challenged law.[218] While this standard does remedy some of the "strictness" problems present in the traditional application of the compelling interest test, the modified version creates a host of new concerns and problems which makes it similarly undesirable and unworkable.

Generally, a "watered down" version of the compelling interest test will likely threaten the test's effectiveness in its other, more proper, applications.[219] Use of a diluted compelling interest test in the free exercise area may have the undesirable effect of subverting the compelling interest test's rigor in other fields where it is applied.[220] Second, the "modified" version, as well as the traditional version, imposes upon the courts the duty of weighing and judging beliefs of individuals against subjective judgments of the law. By allowing judges to subjectively determine the value of religious claims and the law, the judiciary in effect becomes a "superlegislature" with an unrestricted susceptibility for abuse.[221] Since placing "value judgments" in the hands of the judiciary has long been looked upon as undesirable,[222] society maintains a strong interest in avoiding problems which will likely arise from the "arbitrary decisions by parochial, biased and in some cases intolerant judges."[223]

Furthermore, a modified version of the compelling interest test is undesirable because this type of "ad hoc balancing" will ultimately result in

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[218]*See* Eisgruber, *Why RFRA is Unconstitutional*, *supra* note 133, at 445.

[219]*See* Eisgruber, *Vulnerability of Conscience*, *supra* note 109, at 1260.

[220]Justice Scalia speaks to this concern in *Smith II* by claiming that "watering . . . [the compelling interest test] down . . . [in the free exercise field] would subvert its rigor in the other fields where it is applied." *Smith II*, 494 U.S. at 888.

[221]*See* Dodge, *supra* note 62, at 685-86.

[222]Justice Scalia noted in *Smith II*, and the dissenters agreed, that the Court has repeatedly and in many different contexts warned of the dangers in allowing courts to determine the value of religious beliefs or the plausibility of a religious claim. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 887 (1990), and, *Id.* at 919 (Blackmun, J., dissenting).

[223]*See* Dodge, *supra* note 62, at 686.

a free exercise anomaly.[224] Decisions which are rendered based on the value judgment of the particular judge hearing the free exercise claim will undoubtedly create inconsistencies in the law from one case to the next, and relinquish the predictability of free exercise claims to nothing more than the chance of the sitting judge. Taking into consideration the interests in religion, as well as the other governmental interests involved, the Free Exercise Clause demands a more predictable and consistent standard of review. Due to its inherent subjective nature, and the inconsistent results it will produce, the compelling interest test must be rejected as being arbitrary, unpredictable and useless.[225]

c. THE TEST OF GENERAL APPLICABILITY: UNIFORM AND PREDICTABLE APPLICATION

Understanding the deficiencies which exist in the application of the compelling interest test, it is easy to see how the test of general applicability is the more practical and judicially feasible standard of review. Stemming from the goal of having an efficient and predictable free exercise standard which will produce fair and uniform results,[226] the test of general applicability, with its consistent and evenhanded application, will adequately preserve these interests.

Unlike the compelling interest test which relies upon the subjective and arbitrary "value judgments" of a judge, the test of general applicability limits the analysis to the relatively simple inquiry in determining whether or not the law is neutral and generally applicable.[227] If the law is neutral and generally applicable, no constitutionally-based religious exemptions will be recognized.[228] If the challenger proves that the law is not neutral or generally applicable, then the law will be invalidated.[229] Judges are not asked to sort out genuine from insincere claims, and abuses of judicial discretion and arbitrary applications will be minimized. The test of general

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[224]*See id.* at 687.

[225]*See id.*

[226]*See supra* note 186 (noting that it is the primary goal of good law to be predictable and efficient).

[227]*See supra* text accompanying notes 193-98.

[228]*See supra* text accompanying notes 193-98.

[229]*See supra* text accompanying notes 193-98.

applicability is simple, objective and predictable, and will ultimately foster a uniform body of free exercise law. From the standpoint of fairness, certainty, and judicial feasibility, the test of general applicability is clearly the favored standard of free exercise review.

2. RELIGIOUS INTEGRITY

Given the preceding analysis, proponents of the compelling interest test admittedly have a very difficult time justifying their position in support of its application. This being the case, it is not surprising then that proponents of the compelling interest standard rely primarily on the contention that the test of general applicability does not adequately protect interests of religion.[230] Despite these contentions, however, the test of general applicability does not ignore, and in fact promotes, the preservation of religious rights.

a. THE LEGISLATIVE EXEMPTION AS A MEANS OF PRESERVING RELIGIOUS RIGHTS

Under the test of general applicability, the law is clear; exemptions to neutral and generally applicable laws are not constitutionally compelled under the Free Exercise Clause. Yet, religious exemptions are available. Under the test of general applicability prescribed by Justice Scalia in *Smith II*, the Court leaves the decision to the legislatures to determine what exemptions may be carved out of laws.[231] State legislatures, therefore, may properly provide exemptions that will foster and accommodate religious practices.

As a practical matter, the generally applicable laws which religious groups seek to be exempt from, originate in the legislature. The test of general applicability encourages religious groups wishing to be exempt from the law to lobby the legislature. Therefore, when the legislature is passing or revising a statute, with all the facts regarding the purpose and intent of the law in front of them, the legislature will employ its fact-finding capabilities and policy-making acumen to make the determination whether the exemption should be permitted. If the exemption does not undermine the purpose and intent of the law, the legislature will likely provide the exemption. Unlike the blanket exemption approach of the compelling interest test, this process will consider all secular and religious interests involved, and will allow for exemptions so long as they do not hinder the law or place society in peril.

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[230]*See, e.g.*, Stuart, *supra* note 126, at 423.

[231]*See supra* text accompanying notes 104-08.

b. PROTECTION FOR MINORITY RELIGIONS: THE ESTABLISHMENT CLAUSE

The main criticism regarding the legislative exemption does not reside with its failure to provide religious exemptions in general as much as it does with the concern that minority religions may be overlooked.[232] Critics of the test of general applicability argue that due to the nature of the political system, it is possible that the legislature may go out of its way to accommodate the practices of a majority religion, with a powerful lobby, and overlook the interests of minority religions.[233]

When legislatures show preferential treatment to some religions and not others, minority religions look for protection not under the Free Exercise Clause, but rather under the Establishment Clause. Under the Establishment Clause of the First Amendment,[234] the Supreme Court has recognized that any government action which attempts to promote one religion in favor of another is clearly forbidden.[235] Minority religions are, therefore, free to raise their "discrimination" claims under the guise of the Establishment Clause. If in fact, then, the legislature is showing favored accommodation to majority religions and is "establishing" particular religious practices in favor of others, the Establishment Clause will clearly protect minority religions' rights. Thus, if the legislature enacts accommodations that at any time "tend to benefit mainstream more than fringe religions, the solution . . . [is] to strike them down under the Establishment Clause."[236]

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[232]*See, e.g.*, Stuart, *supra* note 126, at 423.

[233]This is a concern which ultimately revolves around Justice Scalia's comment in *Smith II* that political decisions such as this are the "unavoidable consequence of democratic government." Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990).

[234]U.S. Const. amend. I. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." *Id.*

[235]*See, e.g.*, Everson v. Board of Education, 330 U.S. 1, 15 (1947) (holding that the state or federal government cannot "pass laws which aid one religion . . . or prefer one religion over another."); Abbington School District v. Schempp, 374 U.S. 203 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971). *See generally* Derrick R. Freijomil, *Has the Court Soured on Lemon?: A Look into the Future of Establishment Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 141 (1994).

[236]*See* McConnell, *Free Exercise Revisionism*, *supra* note 191, at 1132.

VI. CONCLUSION

The test of general applicability provides sound reasoning and feasible resolution to a contradiction which is fundamental to the constitutional scheme of government. On the one hand, few would question the importance of religion in society; however, on the other hand, it is also understood that a government that does not enforce its laws is a government in name only. The test of general applicability promotes both secular and religious interests. The presumptive invalidity of laws under the compelling interest test does not.

To summarize, the historic support for the test of general applicability is compelling. Beginning with acceptance of a rationalistic interpretation of religion by Thomas Jefferson early in American history, and the Supreme Court's affirmation of this standard with decisions such as *Reynolds* and *Smith II*, the constitutional principle promulgated is that individuals may not be exempt from the civil consequences of their actions simply because these acts are engaged in for religious purposes. This standard, with a few variations built into the law by the Court, has become the foundation of the Court's free exercise jurisprudence. It is neither Congress's duty or place to impose upon the Court a standard of free exercise review that the Court specifically rejected, and one that directly contradicts over two hundred years of free exercise philosophy.

Support for the test of general applicability is even more compelling when considering the reasoning and rationale which is embodied in its application. It is recognized that the test of general applicability advances the two most important interests in devising a sound standard of free exercise review: judicial feasibility and religious integrity. First, in contrast to the subjective and arbitrary free exercise analysis that is utilized under the compelling interest test, the test of general applicability will promote efficiency and predictability in its application. This will ultimately foster a cohesive and reviewable body of free exercise law. Secondly, despite criticism to the contrary, the test of general applicability does foster the accommodation of religion. By allowing the legislature to provide religious accommodation, and not the courts, the test of general applicability is a classic exercise of judicial restraint and the appropriate allocation of interbranch authority. It is not for a biased or parochial judge to determine, after a law is enacted, what religious beliefs are constitutionally significant enough to be exempt from the law. Under the test of general applicability, all religious actors are treated fairly, providing little room for judicial abuse. Minority religions submit requests for exemptions to their legislature and rely upon the democratic process. If the system should fail, and minority religions are overlooked for exemptions, their recourse clearly lies within the ambit of the Establishment Clause.

In short, individuals do not have a right to practice religion as they wish insofar as the conduct is proscribed by neutral and generally applicable laws. This standard, as professed by Justice Scalia in *Smith II*, is strongly buttressed by historic references and persuasive reasoning. The preferred standard of free exercise review is the test of general applicability because to hold otherwise would "contradict[] both constitutional tradition and common sense."[237]

[237]Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 885 (1990).