RESTORING RITES AND REJECTING WRONGS: THE RELIGIOUS FREEDOM RESTORATION ACT

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I. Introduction

On April 17, 1990, the United States Supreme Court handed down a decision concerning the right to free exercise of religion which has been variously described as an "embarrassment,"[1] "a

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[1] *Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 8 (1990) [hereinafter *1990 House Hearings*] (opening statement of Rep. William E. Dannemeyer (R-CA)). Representative Dannemeyer also remarked that, while he had the utmost respect for Justice Scalia, "I don't know what he had for dinner the night before, but when he produced this decision [*Smith*], I think he deviated from the wisdom he has exhibited as a member of the U.S. Supreme Court." *Id.* at 7.

sweeping disaster for religious liberty,"[2] and "a dastardly and unprovoked attack on our first freedom."[3] The decision evoking such negative commentary was *Employment Division, Department of Human Resources v. Smith.*[4] In *Smith,* the Court held an Oregon criminal statute to be constitutional even though it had the effect of burdening the claimants' free exercise of religion because the statute was valid, neutral and of general applicability.[5] Prior to the *Smith* decision, the Court had only upheld laws that burdened religion if they were furthering a compelling governmental interest and only if they were narrowly construed to achieving that interest.[6]

In response to the Court's weakening of the protection previously accorded the free exercise of religion, Rep. Stephen Solarz introduced to the House of Representatives a bill known as the Religious Freedom Restoration Act (RFRA) of 1990.[7] The purpose

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[2] Dean Edward McGlynn Gaffney et al., *An Answer to* Smith: *The Religious Freedom Restoration Act,* Q. CHRISTIAN LEGAL SOC'Y, Winter 1990, at 17. Another commentator similarly described the decision as "a major erosion of the rights of religious observers." Amy Adelson, *Repairing High Court's Breach of Faith,* LEGAL TIMES, Dec. 24, 1990, at 19.

[3] 137 CONG. REC. E2422 (daily ed. July 27, 1991) (statement of Rep. Solarz). Senate sponsor, Edward M. Kennedy, characterized the decision as "a serious, and unwarranted setback for the First Amendment's guarantee of freedom of religion." *The Religious Freedom Restoration Act of 1992: Hearings on S. 2969 Before the Senate Judiciary Comm.,* 102d Congress, 2d Sess. (1992) [hereinafter *1992 Senate Hearings*] (statement of Sen. Kennedy). Representative Brooks claimed that *Smith* "transformed a most hallowed liberty into a mundane concept with little more status than a fishing license." Holly Idelson, *Religious Freedom Bill on Way to Passage,* 51 CONG. Q. 1230 (May 8, 1993).

[4] 494 U.S. 872 (1990). One author noted that of the sixteen law review articles written on *Smith* to date, fifteen criticized the decision. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment,* 78 VA. L. REV. 1407, 1409 (1992). One such law review criticized Justice Scalia's use of legal sources, as well as the theoretical underpinnings of his argument. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision,* 57 U. CHI. L. REV. 1109, 1111 (1990). Some newspaper editorials critical of *Smith* included: Stephen Chapman, *A Way To Defuse The Danger To Religious Freedom,* CHI. TRIB., Mar. 28, 1993, at C3; Nat Hentoff, *Is Religious Liberty a Luxury?,* WASH. POST, Sept. 15, 1990, at A23; Adelson, *supra* note 2, at 19.

[5] *Smith,* 494 U.S. at 886 (citing Justice Steven's concurrence in United States v. Lee, 455 U.S. 252, 263 (1982)).

[6] Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

[7] *1990 House Hearings, supra* note 1, at 3. The RFRA has been endorsed by religious liberty commentators, by those in the religious community and by civil rights advocates. *See* Oliver S. Thomas & J. Brent Walker, *Religious Freedom Is Not a Luxury,* Q. CHRISTIAN LEGAL SOC'Y, Fall 1991, at 3, 5 (arguing that remedial federal legislation needed to be passed or else the free exercise clause would "remain virtually a dead letter."); Steven T. McFarland, *Resuscitating the Free Exercise Clause,* Q. CHRISTIAN LEGAL

of the RFRA of 1990 was to overrule the *Smith* decision by restoring the compelling interest test, thus returning free exercise jurisprudence to its pre-*Smith* state.[8]

The authors of the RFRA chose *Sherbert v. Verner*[9] and *Wisconsin v. Yoder*,[10] two free exercise decisions overruled by *Smith*, as illustrative of the former state of free exercise jurisprudence. The ultimate effect of the RFRA will be determined by how courts construe the restored compelling interest test.[11] Both *Sherbert* and *Yoder* are examined below, as is the single United States Supreme Court case to date in which *Smith* has been discussed, *Church of the Lukumi*

Soc'y, Spring 1992, at 10 (announcing the Christian Legal Society's unqualified support of the RFRA, as post-*Smith* cases illustrate that the Free Exercise Clause no longer provides protection against government interference with religious practices); *1990 House Hearings*, *supra* note 1, at 61 (written statement submitted by the Coalition for the Free Exercise of Religion, an organization representing liberal and conservative religious groups, wholeheartedly endorsing the RFRA). *See generally* Dean Edward McGlynn Gaffney et. al., *supra* note 2 (RFRA should be passed as quickly as possible to restore protection of religious freedom); *ACLU Strongly Supports Religious Freedom Restoration Act: Urges Congress to Act Quickly to Restore Protections*, ACLU NEWS (ACLU, Wash., D.C.), Mar. 11, 1993.

8 H.R. REP. No. 103-88, 103d Cong., 1st Sess. 1 (1993) [hereinafter H. REP. No. 103-88] (when a generally applicable law burdens someone's free exercise rights under the statutory right created by the RFRA, the compelling governmental interest test must be applied). *See 1990 House Hearings*, *supra* note 1, at 9 (statement of Rep. Dannemeyer) (describing *Smith* as an "embarrassment" and as "a case study in intellectual rigidity," Rep. Dannemeyer stated that he was testifying that day to return the law to what existed before *Smith*); *id.* at 11 (statement of Rep. F. James Sensenbrenner, Jr.) ("purpose of this bill is to reinstate the 'compelling interest' test for free exercise claims that was eviscerated by the Supreme Court. . ." in *Smith*); *id.* at 17 (statement of Rep. Solarz) (the RFRA "would correct the Court's unwise and unwarranted action by simply reinstating the compelling interest test. . ."); *id.* at 22 (statement of Rep. Smith) (RFRA restores "the standard that required the Government to prove it had a compelling interest in enforcing a statute that restricted our first amendment right of free exercise of religion").

One commentator predicted that the bill would work significant change in free exercise law. David O. Stewart, *Arguing Religion: Searching for Clear Commandments in this Term's Religion Cases*, ABA J., Aug. 1993, at 48.

9 374 U.S. 398 (1963).

10 406 U.S. 205 (1972). The purpose of the RFRA is 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). . . ." The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 42, 107 Stat. 1488 (1993).

11 H.R. REP. No. 103-88, *supra* note 8, at 6-7 (1993). Congress found that the compelling interest test set forth in prior Supreme Court cases sensibly balanced religious liberty and governmental interests. *Id.* The compelling interest test is discussed extensively throughout the legislative history of the RFRA. *Id. See also* S. REP. No. 103-111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1894-1902.

Babalu Aye, Inc. v. City of Hialeah.[12] The legislative history of the RFRA is then set forth. An analysis of the RFRA follows.

*II. Pre-*Smith *Free Exercise Jurisprudence*

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof. . . .*"[13] The Free Exercise Clause was made applicable to the states when it was incorporated into the Fourteenth Amendment in *Cantwell v. Connecticut.*[14] The *Cantwell* Court also explained that the Free Exercise Clause actually encompassed two rights: the right to believe in whatever religion one chooses, and the right to choose how to practice this religion.[15] While the right to believe is absolute, the right to prac-

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12 113 S. Ct. 2217 (1993).

13 U.S. CONST. amend. I (emphasis added). While this note deals with the Free Exercise Clause of the First Amendment, much of religious freedom jurisprudence is concerned with the tension between the Establishment Clause ("Congress shall make no law respecting an establishment of religion") and the Free Exercise Clause ("or prohibiting the free exercise thereof. . ."). Walz v. Tax Comm'n, 397 U.S. 664, 701 (1970) (in upholding tax exemptions for organizations using property for religious, educational or charitable purposes, Chief Justice Burger describes how "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

While the Warren and Burger Courts have been criticized for being hostile or indifferent to religion by their promotion of secularism, rather than pluralism and diversity in public life, not all agree that the Rehnquist Court's approach of permitting state interference, as illustrated in *Smith*, is necessarily an improvement. *See generally* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). McConnell asserts that the purpose of the Establishment and Free Exercise Clauses is to foster religious pluralism. *Id.* at 117. *Cf.* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1990) (critical of religious freedom jurisprudence since the 1940s for its development of an artificial ridge between the two clauses, the authors argue that the current Court's posture of deference to the legislature provides the opportunity to replace the existing flawed approach with a holistic, structural approach that emphasizes text, history and tradition).

14 310 U.S. 296, 303 (1940). In *Cantwell*, Jehovah's Witnesses who had been selling religious books door-to-door were prosecuted under a Connecticut statute prohibiting religious, charitable or philanthropic solicitation unless it was first approved by the public welfare council secretary. *Id.* at 301-02. The Supreme Court found that the statute infringed upon the appellants' free exercise rights, and, thus, was a violation of their Fourteenth Amendment rights as well because "[t]he fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." *Id.* at 303.

15 *Id.* at 303. The *Cantwell* Court explained:

On the one hand, it forestalls compulsion by law of the acceptance of any

tice may be regulated in the interest of public safety.[16] However, such regulation must not unduly infringe upon this right.[17]

The *Cantwell* principles were further advanced in *Sherbert v. Verner*.[18] The Court ruled in *Sherbert* that the government was required to prove a compelling state interest to justify its restriction of free exercise rights, and once proven, the government had the further obligation to show that the law or regulation was the least restrictive means of achieving that interest.[19] The claimant in *Sherbert* was a devout Seventh-Day Adventist[20] employed by a South Car-

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> creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.

Id.

16 *Id.* at 303-04 (citing Reynolds v. United States, 98 U.S. 145 (1879); Davis v. Beason, 133 U.S. 333 (1890)).

17 *Id.* at 304. For example, the government cannot prohibit preaching altogether, but it may regulate the time, place and manner in which it takes place. *Id.*

18 374 U.S. 398 (1963).

19 *Id.* at 407.

20 The Seventh-Day Adventist Church traces its roots to the religious revivals of the 19th century. *Adventists Disavow Waco Cult*, CHRISTIAN CENTURY, Mar. 17, 1993, at 286 [hereinafter *Adventists Disavow*]. Originally, the Adventists were led by William Miller, who prophesied Christ's second-coming in 1844. *Id.* When Miller's prophecy did not materialize by 1863, a group of his followers broke away and formally organized the Seventh-Day Adventist Church. *Id.* Their central tenet was the belief in the "second advent" of Christ, but they declined to predict a specific date. *Id.*

The Adventists, with 783,000 adherents in the U.S. and over seven million spread across 208 different countries, is currently one of the fastest growing Protestant religions. *Id.* at 285. The Adventists recently made headlines during the Branch Davidian stand-off against federal authorities outside Waco, Texas. *Id.* The Branch Davidians had been formed in 1929 when a Bulgarian emigre, Victor Houteff was "disfellowshipped" from the Seventh-Day Adventists. *Id.* at 286. Initially known as the Shepherd's Rod, this group claimed they were sent by God to "cleanse" the Adventists. *Id.* Houteff's widow took over the leadership of the group after his death in 1955. *Id.* Discredited when her predictions of her husband's resurrection and the divine slaughter of the Adventists did not materialize, leadership changed hands until eventually it was assumed by Vernon Howell, also known as David Koresh, in 1988. *Id.* Howell claimed he was Jesus Christ and a prophet. *Id.* at 285.

Not surprisingly, the Branch Davidians' history has been characterized by violence. *Id.* at 286. Thus, the Seventh-Day Adventists moved quickly to distance themselves from the Waco incident, forging a crisis management team to spread the message to the public that the cult had absolutely no ties with the church. Marilyn Thomsen, *Church Distances Its Name From Waco Cult*, PUB. REL. J., Aug. 1993, at 10. On the other hand, the group from which the Branch Davidians had the greatest success at recruiting was the Adventists. Paul Boyer, *A Brief History of the End of Time: The American Roots of the Branch Davidians*, NEW REPUBLIC, May 17, 1993, at 30-33 (relating the history and impact of prophetic interpretation).

olina mill.[21] Similar to the Christian prohibition on Sunday labor, Seventh-Day Adventists are prohibited by their religious beliefs from working on Saturdays.[22] Due to this religious belief, Sherbert refused to work Saturdays and for this reason was fired.[23] Other area mills subsequently refused to hire her because she would not work on Saturdays.[24] Sherbert then requested unemployment compensation from the state of South Carolina.[25] The South Carolina Unemployment Compensation Act provided that unemployment claimants must be "able" and "available" for work, and since Sherbert could not work on Saturdays, she was not considered to be "available."[26] Therefore, she did not qualify for unemployment benefits.[27]

Justice Brennan, author of the majority opinion in *Sherbert*, first addressed the question of whether Sherbert's free exercise rights had indeed been burdened by the South Carolina Unemployment Compensation Act.[28] At the outset, he emphasized the irrelevancy of a distinction between laws that directly burden free exercise and those that burden them indirectly, the latter encompassing the unemployment compensation law under consideration; both types of laws had the effect of burdening religion.[29]

There was concern among the religious community that the public's reaction to the Waco incident might threaten the RFRA. Michael Hirsley, *Full Religious Freedom Is Goal*, CHI. TRIB., May 14, 1993, at N7. To counteract such an effect, sixteen religious groups, in a joint statement entitled "Religious Liberty at Risk," urged the government to avoid repressing religious cults in response to the "national mourning" over the tragic deaths of Koresh and his followers. *Id.* The authors noted that religion was no excuse for violence, but that some of today's cults might be tomorrow's mainstream religions. *Id.* One reporter reassured readers that the RFRA could not have been used to insulate David Koresh from prosecution for allegedly stockpiling weapons and having sex with underage girls because such conduct threatens the public safety, thereby evoking the compelling interest test. Linda Feldmann, *Congress To Boost Freedom Of Religion*, CHRISTIAN SCI. MONITOR, May 17, 1993, at 1.

21 *Sherbert*, 374 U.S. at 399.

22 *Id.* The Seventh-Day Adventists are known for such traits as observance of Saturday, known as the "seventh day," their emphasis on health and nutrition and their nonviolent lifestyles. *Adventists Disavow*, *supra* note 20, at 286.

23 *Sherbert*, 374 U.S. at 399.

24 *Id.* at 399 n.2.

25 *Id.* at 399-400.

26 *Id.* at 400-01.

27 *Id.* at 401.

28 *Id.* at 403.

29 *Id.* at 404. Justice Brennan stated that if the law's effect was to either thwart a religious observance or to discriminate between religions, the law was unconstitutional even though the burden was indirect. *Id.*

Justice Brennan also stated that it was irrelevant whether unemployment compensation was considered a right or a privilege.[30] The South Carolina unemployment law had the effect of forcing Sherbert to choose between exercising her religious rights or receiving the benefit of unemployment compensation. Because her free exercise rights had been so penalized, the Court ruled that the unemployment compensation law constituted a burden.[31]

Once it was determined that the South Carolina law infringed upon Sherbert's free exercise rights, Justice Brennan considered whether the state interest being protected was compelling enough to justify the burden.[32] The State had suggested two possible compelling interests: false claims might be filed under the guise of religious objection, and employers might encounter difficulty in finding people willing to work on weekends.[33] However, these arguments had not been introduced in the lower court and, even if they had, it was unlikely that they would outweigh Sherbert's free exercise rights.[34] Justice Brennan also opined that even if the state's interests had qualified as compelling, the state had the additional burden of proving the absence of a less restrictive means of achieving these interests.[35] Since the State failed to meet both prongs of this compelling-interest test, the Court ruled that the South Carolina unemployment compensation scheme unconstitutionally infringed upon Sherbert's right to freely exercise her religion.[36]

The Court later applied *Sherbert's* compelling interest test in *Wisconsin v. Yoder.*[37] In *Yoder,* two Amish fathers refused to send

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30 *Id.* Justice Brennan opined that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a *benefit or privilege.*" *Id.* at 404 (emphasis added).

31 *Id.* at 404-06.

32 *Id.* at 403 (citing NAACP v. Button, 371 U.S. 415, 438-39 (1963)) (the state's interest in banning the improper solicitation of legal business was not so compelling as to justify burdening the NAACP's rights of expression and association).

33 *Id.* at 407.

34 *Id.* at 406. Justice Brennan stated that only the "gravest abuses" can qualify as compelling state interests and only if such grave abuses threaten "paramount interests." *Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

35 *Id.* at 407. *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 1256 (2d ed. 1988) (discussion of the doctrinal advances made with the adoption of *Sherbert's* "least restrictive alternative -compelling state interest mode of analysis in a free exercise context.")

36 *Sherbert,* 374 U.S. at 408-09.

37 406 U.S. 207 (1972). This was the first and only time that the Court applied

their three teenage children to school once the children had completed the eighth grade.[38] The fathers were charged and convicted for violating Wisconsin's compulsory school-attendance law, which required children to attend school until age sixteen.[39] The fathers argued that the statute violated their free exercise rights under the First and Fourteenth Amendments.[40] Chief Justice Burger began the majority opinion by emphasizing the sincerity of the Amish belief that sending their children to high school was harmful to the children's religious upbringing and counter-productive to the

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Sherbert's compelling interest test to a criminal prohibition. TRIBE, *supra* note 35, § 14-13, at 1193.

The Amish trace their roots to the Anabaptists, cousins of the Protestant Lutherans and Calvinists. William J. Whelan, *Why Some Faiths Want To Make The World Go Away*, U.S. CATH., May, 1986, at 32. The Anabaptists stressed the importance of living a basic, simple life. *Id.* They later became known as the Mennonites after one of their early members, Menno Simons. *Id.* A faction of Mennonites who formally split from the main group in 1693 became known as the Amish because of their leader, Jacob Amman. *Id.* Amman and his followers adopted the policy of "strict observance" to Anabaptist doctrine, including the shunning of excommunicated members until they repented. *Id.*

Today, the Amish attempt to preserve their simple lifestyle and their religious beliefs by isolating themselves from the rest of the world. *Id.* They refuse to use electricity, automobiles, telephones, televisions, etc. *Id.* at 33. They do not believe in photographs or in such adornments as buttons. *Id.* Their homes are plain and simple, as are their personal appearances. *Id.* Similar to the Mennonites, the Amish abhor violence, espouse pacifist principles, and oppose all war. *Id.* They reject any government interference in religion, and they do not believe in social security or medicaid. *Id.* at 32-33. They do not believe in birth control and their families average seven to nine children. *Id.* at 34.

In Lancaster, Pennsylvania, where most of the Amish live, a thriving tourism industry has developed around them. *Wave Goodbye To The Amish?*, THE ECONOMIST, July 22, 1989, at 28. The resulting prosperity of the town has put upward pressure on the price of farmland, which is becoming increasingly scarce due to a growing Amish population. *Id.* Many Amish have been forced to work in shops and on construction sites. *Id.* Some Amish elders feel that such prosperity is threatening the continued existence of their way of life and are talking about leaving the area. *Id.*

[38] *Yoder*, 406 U.S. at 207. Amish parents believed that sending their children to school beyond the eighth grade would threaten both their own and their children's salvation. *Id.* at 209.

[39] *Id.* at 208. The Wisconsin statute provided that anyone who had control of a child between the ages of seven and sixteen years old must send that child to school during regular school hours when school was in session. *Id.* at 207 n.2. The statute provided exceptions for children who were not physically or mentally capable of attending school, for children who were excused for good cause by the school board, or for children who had already completed the high school course requirements. *Id.* Violation of the statute resulted in a fine between $5.00 and $50.00 and/or up to three months imprisonment. *Id.*

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

Amish way of life.[41] Chief Justice Burger described how the Amish reject the values of material success and competition that permeate the modern world, and their resulting attempt to completely isolate themselves from those outside their own community.[42] To require Amish children to attend high school would be to impermissibly expose them to "worldly" influences at a time when the children should be training for their forthcoming life of manual labor, indoctrinating Amish attitudes, and generally integrating into the Amish community.[43]

The *Yoder* court applied the two-pronged compelling interest test first established in *Sherbert*.[44] First, the majority considered whether the Wisconsin compulsory school attendance law infringed upon the free exercise rights of the Amish.[45] The Court concluded that the impact of the law was severe and inescapable because it forced the Amish to act in conflict with their basic religious beliefs.[46] Furthermore, it forced the Amish to send their children to high school, thus forcing them to choose between abandoning their religion or moving to another state.[47] The com-

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41 *Id.* at 209-10. In fact, those Amish who choose to go to high school are usually ostracized from the rest of the church and community. Whelan, *supra* note 37, at 34.

42 *Yoder*, 406 U.S. at 210. The Amish religion requires its adherents to live a simple, agrarian life, in harmony with nature. *Id.* In accordance with their belief in personal simplicity, Amish males go unshaven. *Keep Your Whiskers*, TIME, Apr. 11, 1988, at 29. This practice raised a potential conflict for two Amish firefighters when Ohio recently passed a new state law prohibiting firemen from having beards. *Id.* Supposedly, the presence of a beard hampered the development of a proper seal between the skin and the required breathing mask. *Id.* However, the fire chief exempted the two Amish men from complying, considering they comprised half his day force and that one of them, who happened to work across the street, was usually the first to answer a call. *Id.*

43 *Yoder*, 406 U.S. at 212. The Amish did not object to sending their children to school up to the eighth grade because they realized the importance of learning basic skills. *Id.* They had to be able to read the Bible, be good farmers and communicate with non-Amish people. *Id.* The Amish, in fact, often establish their own elementary schools. *Id.*

44 *Id.* at 214.

45 *Id.* at 215-19.

46 *Id.* at 218. One of the witnesses testifying on behalf of the Amish was Dr. Hostetler, an expert on Amish affairs, who stated that forcing Amish children to attend high school would damage them psychologically because of the conflicts in values they would face. *Id.* at 213. Dr. Hostetler was raised Amish and has published a compilation of Amish drawings, bookplates, and writings about the Amish entitled AMISH ROOTS: A TREASURY OF HISTORY, WISDOM, AND LORE. Gertrude Enders Huntington, *Voices of the Amish*, NAT'L HIST., Apr. 1990, at 94, 96.

47 *Yoder*, 406 U.S. at 218.

pulsory school attendance law, in effect, posed a threat to the Amish community's very survival, and therefore, constituted a substantial burden.[48]

Chief Justice Burger rejected as inconclusive two arguments set forth by Wisconsin.[49] First, Wisconsin argued that even though the Free Exercise Clause absolutely prohibits state interference with religious beliefs, religious conduct is not similarly protected.[50] The Court conceded that the state may regulate conduct "to promote the health, safety, and general welfare" of its citizens.[51] However, even if the law is generally applicable, there still remains some religious conduct that is protected.[52] Second, Wisconsin argued that the compulsory education statute applied uniformly to all sixteen-year olds without targeting a specific religion and was, therefore, neutral on its face.[53] The Court also dismissed this argument as inconclusive because even neutral laws could burden free exercise rights.[54]

After concluding that the free exercise rights of the Amish were burdened, the Court turned to the second-prong of the *Sherbert* test: whether the state's interest in educating its children outweighed the burden on the free exercise rights of the Amish.[55] Wisconsin argued that compulsory education served two compel-

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48 *Id.* at 219.

49 *Id.* at 219-20.

50 *Id.*

51 *Id.* at 220.

52 *Id. See generally* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that plaintiff's refusal to work on Saturday because it was her sabbath day constituted religious conduct protected from state infringement); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (Pennsylvania statute requiring Jehovah's Witness to pay a license tax before soliciting door-to-door held unconstitutional because power to tax is power to control and suppress); Cantwell v. Connecticut, 310 U.S. 296 (1939) (holding that solicitation by Jehovah's Witnesses without a license, which was to be granted by state employee who had arbitrary power to deny license if he felt the solicitation was not for a religious reason, constituted religious conduct protected from state interference).

53 *Yoder*, 406 U.S. at 220.

54 *Id.* Even if a regulation is facially neutral and is applied uniformly it may still have the effect of burdening religion. *Id.* However, the Court must be wary in granting exceptions from such regulations so as not to be accused of violating the Establishment Clause. *Id.* at 221. The Chief Justice describes the balancing between protecting a person's free exercise and avoiding the semblance of establishing a religion as walking a "tight rope." *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

55 *Id.* at 219. Only state interests of the "highest order" can "overbalance" legitimate free exercise claims. *Id.* at 215. Furthermore, the State's interest in universal education is not absolute. *Id.*

ling interests: it prepared its citizens to effectively participate in a democratic society and it equipped them to be self-sufficient and self-reliant members of the community.[56] Chief Justice Burger noted two weaknesses in Wisconsin's argument.[57] First, the Amish have historically been productive members of society despite their lack of a formal high school education.[58] Second, even though Amish children do not formally attend school beyond the eighth grade, their education does not necessarily end there.[59] Rather, they continue a vocational-type training whereby Amish adults teach Amish children the skills necessary to their way of life.[60] The Court concluded that two additional years of formal schooling for Amish children did not significantly advance the state's interests to justify the burden on their religious rights.[61] Accordingly, the Amish were exempted from complying with the Wisconsin compulsory school attendance law.[62]

The compelling interest test as set forth in *Sherbert* and *Yoder*

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56 *Id.* at 222. The State claimed it had to protect Amish children from ignorance. *Id.*

57 *Id.* at 222-23.

58 *Id.* at 222. The Chief Justice conceded that the idiosyncrasies of the Amish separated them from the mainstream, but nonetheless, they were still self-sufficient and even rejected any public welfare. *Id.* Congress has recognized this independence by exempting them from having to pay social security taxes. *Id.*

59 *Id.* at 223. The Amish are not opposed to education beyond the eighth grade, but rather, they are opposed to the education received in conventional high schools. *Id.* The Chief Justice wrote that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Id.* at 224.

60 *Id.* An expert witness characterized their education as "learning-by-doing" and opined that they prepared their children for adult life more successfully "than most of the rest of us do." *Id.* at 223. The Chief Justice rejected the State's argument as too speculative that an Amish child would be educationally handicapped if they ever chose to leave the Amish community. *Id.* at 224. No evidence was introduced concerning such an attrition rate, nor did the State show that the agricultural skills of the Amish were unmarketable or that the Amish would be burdens on society. *Id.*

61 *Id.* at 222. The Chief Justice pointed out that while the Amish have been successfully self-sufficient for over 200 years, compulsory education beyond the eighth grade dated back only 60 years and was at least partly instituted to prevent child labor. *Id.* at 226-28.

62 *Id.* at 236. The Chief Justice noted that it was improbable that many other faiths outside the Amish could prove such sincerity of religious belief, that these religious beliefs were so intertwined with their way of life, that the state regulation could so burden this way of life and that an alternative education was sufficient to overcome the state's interests in educating children. *Id.* at 235-36.

was, at least purportedly,[63] the law applied to free exercise claims by the Court from 1963 until 1990. However, to the dismay of a broad spectrum of civil rights and religious organizations, the *Smith* decision of 1990 drastically changed the landscape of free exercise jurisprudence.[64]

III. *The Principles of* Smith

A. Employment Division, Department of Human Resources v. Smith

Alfred Smith and Galen Black, counselors at a private rehabilitation center, were fired for admitting they ingested peyote,[65] arguably an illegal substance under Oregon law,[66] during a religious ceremony at their Native American Church.[67] Smith and Black were then denied unemployment compensation by Oregon's Employment Division.[68] The Oregon Supreme Court established that

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[63] *See* Ryan, *supra* note 4, 1413-29 (after analyzing free exercise decisions by the United States Supreme Court and Circuit Courts of Appeal in the 10 years preceding *Smith*, the author concludes that free exercise claimants usually lost despite their powerful claims and despite the fact that the state had the burden of proving a compelling interest).

[64] *1990 House Hearings*, *supra* note 1, at 61 (letter from Coalition for the Free Exercise of Religion). In response to the *Smith* decision and the subsequent introduction of the RFRA of 1990, a broad range of politically diverse religious groups formed a coalition endorsing the proposed legislation. *Id.*

[65] Peyote is a type of cactus that Native Americans have used in their religious ceremonies for hundreds of years. Linda Greenhouse, *Use of Drugs in Religious Rituals Can be Prosecuted, Justices Rule*, N.Y. TIMES, Apr. 18, 1990, at A1, A22. The cactus contains mescaline, a hallucinogenic substance. *Id.* Twenty-three states and the federal government exempt sacramental peyote use from criminal sanctions. *Id.* One Native American Church leader claimed that peyote worked emotional, spiritual and physical miracles. Ben Winton, *Indian Church to Unify in Battle for Right to Peyote Sacrament*, PHOENIX GAZETTE, July 15, 1991, at A1. He described peyote as "our way of life" and commented that "sacramental peyote on our altar is a teacher, and it is a healer." *Id.*

[66] Under Oregon law, the knowing or intentional use of a "controlled substance," as listed in Schedule I, other than that prescribed by a doctor constitutes a Class B felony. *Smith*, 494 U.S. at 874 (citing OR. REV. STAT. § 475.992(4) (1987)). Schedule I listed peyote, but Smith and Black argued that under the free exercise clause of the Federal Constitution their sacramental use of peyote was entitled to an exemption. *Id.* at 876. This issue remained unresolved until *Smith* was ultimately decided by the Supreme Court. *Id.*

[67] *Smith*, 494 U.S. at 874.

[68] *Id.* at 874. The Employment Division claimed it was justified in this denial because Smith and Black were dismissed for "misconduct." *Id.* The Oregon Court of Appeals reversed the Employment Division's decision, ruling that the denial of unemployment compensation was a violation of Smith's and Black's free exercise rights. *Id.*

sacramental use of peyote was indeed a crime under Oregon law, but that Smith and Black were entitled to an exemption from compliance based on their right to freely exercise their religion.[69] The United States Supreme Court ultimately reversed the Oregon Supreme Court's ruling in the now infamous *Smith* decision.[70]

Justice Scalia, writing for the majority, distinguished *Smith* from *Sherbert* by explaining that, in *Sherbert*, a free exercise violation had occurred because unemployment compensation had been conditioned upon Sherbert's willingness to comply with a religious belief.[71] However, Sherbert's particular religious conduct, i.e., her refusal to work on Saturdays, *was not illegal*.[72] Conversely, the religious conduct at issue in *Smith*, i.e., Smith's and Black's ingestion of peyote, *was illegal*.[73] Thus, the Court ruled *Smith* was inapposite from *Sherbert*.[74]

Justice Scalia explained that the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[75] However, the Court has found that religious exercise sometimes entails not only belief and profession, but also "the performance of (or abstention from) physical acts."[76] If a law targets such physical acts, then that law would likely

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The Oregon Supreme Court affirmed the lower court's decision, concluding that regardless of whether peyote use was illegal in Oregon, the true purpose of the Employment Division's "misconduct" rule was to preserve the integrity of the employment compensation fund. *Id.* at 875. Then, applying *Sherbert*, the Oregon Supreme Court ruled that this purpose was not sufficiently compelling to justify an infringement of Smith's and Black's free exercise rights and therefore, they were entitled to unemployment compensation. *Id.* On appeal, the U.S. Supreme Court, disagreeing with the Oregon Supreme Court, ruled that the criminality of peyote ingestion was indeed relevant to the free exercise analysis, and therefore remanded the case for determination of whether sacramental use of peyote was a crime under Oregon law. *Id.* at 875-76. This first decision is referred to as *Smith I*. *See* First Covenant Church v. Seattle, 840 P.2d 174, 179 (1992).

69 *Id.* at 876. Employment Division appealed the Oregon Supreme Court's reaffirmation of its earlier decision and the Court granted certiorari. *Id.* This second Supreme Court decision is generally referred to as *Smith II*. *See* First Covenant Church v. Seattle, 840 P.2d 174, 179 (1992).

70 *Id.* at 890.

71 *Id.* at 884-85.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 877.

76 *Id.* Examples of such physical acts would be gathering together to worship, eat-

be unconstitutional.[77] However, if burdening religion is not the object of the law in question, but is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[78] In other words, if a law is religiously neutral and generally applicable, free exercise rights do not excuse an individual from complying with that law, despite the effect on those rights.[79] While recognizing that laws *may not* interfere with *beliefs*, Justice Scalia asserted that laws *may* interfere with *conduct*, for if not, then religious conduct would effectively become "superior to the law of the land" and would allow "every citizen to become a law unto himself."[80]

Justice Scalia stated that in their previous free exercise decisions, the Court had only invalidated neutral, generally applicable laws having the incidental effect of burdening religious practices in situations where *both* the right to free exercise of religion and some other constitutional right were at stake.[81] Such past "hybrid" situations combined free exercise rights with such rights as freedom of speech and of the press,[82] freedom of parents to decide how to educate their children,[83] or freedom of association.[84] Since the

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ing bread and drinking wine during a ceremony, engaging in the solicitation of converts and abstaining from the consumption of particular foods. *Id.*

77 *Id.* In other words, it would be unconstitutional to ban acts or abstentions that are religiously motivated. *Id.* For example, it would be a violation of the Free Exercise Clause if a statute banned the production of religious statues or made it a crime to bow before a golden calf. *Id.*

78 *Id.* at 878.

79 *Id.* at 879.

80 *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

81 *Id.* at 881.

82 *Id.* As support for this "hybrid" situation, Justice Scalia cites two cases involving the rights of Jehovah's Witnesses to solicit door-to-door. *Id.* In Murdock v. Pennsylvania, a Pennsylvania law requiring payment of a license tax before canvassing was held to violate freedoms of speech, press and religion because the power to tax is the power to control or suppress. 319 U.S. 105, 112 (1942). A similar South Carolina licensing tax was ruled unconstitutional in Follett v. McCormick, 321 U.S. 573, 577-78 (1943).

83 *Smith*, 494 U.S. at 881. Justice Scalia cited Wisconsin v. Yoder, 406 U.S. 205 (1972) as an example of a hybrid situation in which the compelling interest test was applicable because two constitutional rights were at stake in that case: the right to free exercise of religion and the right of parents to educate their children as they see fit. *Id.* at 881. The right of parents to educate their children according to their own beliefs was first established in Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding unconstitutional an Oregon statute requiring parents to send their children to public school as violative of parents' liberty interest in raising their children).

84 *Smith*, 494 U.S. at 882. Justice Scalia felt it would be easy to imagine a case in

present case involved merely a free exercise claim, the Court concluded that the *Sherbert* analysis was inapplicable and therefore, it was permissible to curtail the plaintiffs' religious conduct.[85]

The plaintiffs contended that the *Sherbert* analysis should at least be utilized in determining whether they were entitled to an exemption from the Oregon law.[86] The Court concluded that only unemployment compensation laws had been invalidated under *Sherbert*, and they were only invalidated where individuals were forced to work under conditions at odds with their religious beliefs.[87] Outside the unemployment compensation context, if the Court had applied *Sherbert's* compelling interest test at all, the test was found to be satisfied.[88] On the other hand, *Sherbert* had never been used to require exemptions from, or invalidate, generally applicable, neutral laws, such as the Oregon criminal law at issue in this case.[89]

Justice Scalia rejected a compromise position that *Sherbert's* compelling interest test be applied only when a belief was found to be central to one's religion.[90] Justice Scalia felt that the determination of whether conduct was central to a litigant's religion was

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which a free association claim could be bolstered by a free exercise claim. *Id.* For example, the situation might arise in a context similar to that of Roberts v. U.S. Jaycees, where it was ruled that a Minnesota statute prohibiting discrimination on account of sex was not a violation of club members' free association rights. 468 U.S. 609, 621 (1984).

85 *Smith*, 494 U.S. at 882.

86 *Id.*

87 *Id.* at 883-84. Outside the hybrid cases, Justice Scalia asserted that the only government action that has ever been overruled based on the compelling interest test has been the denial of unemployment compensation, and that this has happened on only three occasions. *Id.*

88 *Id.* Justice Scalia also stated that, in cases such as United States v. Lee, 455 U.S. 252 (1982), the Court only "purported" to have applied the compelling interest test and it was found to be satisfied. *Id.* at 883. In *Lee*, the Court found that Amish employers were not entitled to an exemption from social security payments even though their religion proscribed payment of taxes or receipt of government benefits. *Lee*, 455 U.S. at 260. The Court justified its ruling based on the public's interest in maintaining a sound tax system. *Id.* Justice Scalia also noted that, in cases such as Bowen v. Roy, 476 U.S. 693 (1968), the Court refused to apply the compelling interest test at all. In *Bowen*, a Native American claimed that the use of his daughter's social security number would "rob her spirit" and therefore, he should not have to provide it in order to receive state welfare benefits. *Id.* at 696. The Court held the social security number requirement constitutional. *Id.* at 712.

89 *Smith*, 494 U.S. at 883-85.

90 *Id.* at 886-87.

outside the judge's role and that it would be inappropriate for a judge to choose one religious practice over another.[91] Therefore, Justice Scalia concluded, if one must apply *Sherbert* at all, it must be applied to every free exercise claim, not just to those that involve conduct central to one's religious beliefs.[92]

Justice Scalia added that the Court could not afford the "luxury" of allowing religious objectors a presumption of invalidity in their challenges to the many regulations that might not further a compelling interest because, due to the nation's broad range of religious diversity, that would be "courting anarchy."[93] Justice Scalia agreed that religious exemptions from nondiscriminatory criminal laws were permissible, but not that they were constitutionally mandated.[94] Rather, their determination should be left to the political process, regardless of the fact that minority religions would be placed at a disadvantage.[95]

Widely quoted in the commentary against *Smith* is Justice O'Connor's concurrence in *Smith*.[96] Disagreeing with the majority's dichotomization of religious beliefs and religious conduct,[97]

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91 *Id.* Justice Scalia posed the question, "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his [or her] personal faith?" *Id.* at 887.

92 *Id.* at 888.

93 *Id.*

94 *Id.* at 889.

95 *Id.* at 890. One writer thought that Justice Scalia might as well have said:

> Look, lots of general laws conflict with particular religions. For fifty years, we federal judges have been trying to balance the interests of individual worshippers against the state's interest in passing the law. It's really hard. And we aren't going to do it anymore. From now on the law's the law. Religious groups that want exemptions will have to tell it to Congress, or the legislature, or the city council — not the judge.

John D. McKinnon, *Santeria Ruling Shows Changing Nature of Law*, MIAMI HERALD, June 16, 1993, at 5B.

96 *See* H.R. REP. NO. 103-88, *supra* note 8, at 4-5; S. REP. NO. 103-141, *supra* note 11, at 1896. Justice O'Connor accused the majority of overruling long established precedent in the free exercise area and of undermining the right to religious freedom. 494 U.S. at 891 (O'Connor, J., concurring). She wrote that the *Smith* holding "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.*

97 *Id.* at 893. Justice O'Connor wrote that free exercise includes "[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)." *Id.* (quoting 3 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 401-02 (J. Murray ed. 1897)). She also wrote that "belief and action cannot be neatly confined in logic-tight compartments." *Id.* (quoting Wis-

Justice O'Connor asserted that laws that burden religious belief or religious conduct implicate First Amendment concerns, despite the fact that a law is neutral and generally applicable.[98] Therefore, she opined that *Sherbert's* compelling interest test should have been applied.[99] Applying the compelling interest test, Justice O'Connor found that, while the claimants' free exercise rights were burdened, Oregon did have a compelling interest in controlling drug abuse.[100] Allowing an exemption for religious use of peyote would undermine this governmental interest and, while conceding that it was a close call, uniform application of the prohibition on peyote was essential.[101] Justice O'Connor therefore concluded that Oregon was not required to grant an exemption to accommodate the

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consin v. Yoder, 406 U.S. 205, 220 (1972)). She pointed out that the majority's interpretation had been explicitly rejected by the *Yoder* Court, in which it was established that conduct could be regulated by the States to promote the public health, but that was not equivalent to saying that there was no religious conduct outside of the state's control. 494 U.S. at 895-96.

98 *Id.* at 901. "There is nothing talismatic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious . . . duties just as effectively as laws aimed at religion." *Id.* The First Amendment clearly states that the free exercise of religion is a "preferred constitutional activity," which, once implicated, triggers heightened scrutiny, requiring the application of *Sherbert's* compelling interest test. *Id.* at 902 (quoting Michael McConnell, *Accommodation of Religion*, 1985 S. CT. REV. 1, 9). Justice O'Connor pointed out that the purpose of the First Amendment is to protect those religious practices not shared by the majority. *Id.* at 902. She quoted the following passage in support of this position:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 903 (quoting Justice Jackson's majority opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943)). She also accused the majority of denigrating the First Amendment when the compelling interest test was described as nothing more than a luxury. *Id.* at 902.

99 *Id.*

100 *Id.* at 904. Justice O'Connor related how the Court recently noted that drug abuse is "one of the greatest problems affecting the health and welfare of our population" and is "one of the most serious problems confronting our society today." *Id.* (citing Treasury Employees v. Von Raab, 489 U.S. 656, 668, 674 (1989)).

101 *Id.* at 905. Justice O'Connor wrote that uniform application of the controlled substance statute was necessary for two reasons: to prevent physical harm that results from peyote use regardless of the motivation of the user, and to prevent the trafficking of peyote. *Id.* at 903.

claimants' free exercise rights.[102]

Dissatisfaction with *Smith* was widespread.[103] Therefore, it is no surprise that those in the religious and legal communities were anxiously awaiting the next free exercise case that had worked itself up to the Supreme Court.[104] The case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, involved an unpopular religious sect and the right of its members to engage in the ritual slaughter of animals.[105] The case is significant not only for the majority opinion's comprehensive analysis of the holding in *Smith*, but also for Justice Souter's reasoning as to why *Smith* should be reexamined.[106]

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102 *Id.* at 906. In his dissenting opinion, joined by Justices Brennan and Marshall, Justice Blackmun agreed with Justice O'Connor's free exercise analysis, but when he applied the compelling interest test, he came to the opposite conclusion: Oregon should have been required to grant an exemption to the unemployment compensation law when it concerned peyote use in Native American Indian religious ceremonies. *Id.* at 907-20.

103 *See, e.g., Cause for Concern on Religious Liberty*, CHI. TRIB., Sept. 8, 1992, at 24. An affiliate of the American Jewish Congress conducted a survey of 18 legal scholars in which they were asked to grade the state of religious freedom safeguards in five areas. *Id.* The grades received were: one "B," three "Cs," and a "D." *Id.* The "D" represented the dissatisfaction with the Court's ruling in *Smith*. *Id.* Also disturbed by *Smith*, several Native American Church groups with close to one million members banned together to enhance their legislative presence. Winton, *supra* note 65, at A1. Their strategy was to have the Controlled Substances Act amended to allow members to use peyote in all 50 states. *Id.* Additionally, noting that *Smith* dealt "a crippling blow to freedom of religion," the Arizona Legislature passed a resolution urging Congress to pass the RFRA in order to prevent states from passing legislation restricting religious peyote use. Randy Kull, *Legislature Asks U.S. to OK Peyote Use, Drug a Part of Indian Religious Ceremonies*, PHOENIX GAZETTE, May 8, 1993, at A15. Arizona grants an exemption for such use from its general prohibition on peyote use. *Id.*

When the aforetomentioned survey on religious freedom safeguards was replicated the following year, the grades given by 21 legal scholars rose to three "Cs," a "B–," and a "B+." Michael Hirsley, *'Grades' Rise Slightly in Religious Freedom Safeguards*, CHI. TRIB., Oct. 1, 1993, at 7. The rise is attributed to the Supreme Court's *Hialeah* decision. The RFRA's passage is likely to have a positive impact on the next set of grades. *Id.*

104 *See* Linda Greenhouse, *Justices Will Hear Appeal of Animal Sacrifice Ban*, N.Y. TIMES, Mar. 24, 1992, at A13; James J. Kilpatrick, *Will High Court's Chickens Go from the Roost to Slaughter?*, DET. FREE PRESS, Oct. 9, 1992, at 15A; Larry Rohter, *Court to Weigh Law Forbidding Ritual Sacrifice*, N.Y. TIMES, Nov. 3, 1992, at A10; Richard N. Ostling, *Shedding Blood in Sacred Bowls: Does American Religious Liberty Extend to Animal Sacrifice? That's all for the Supreme Court to Decide*, TIME, Oct. 19, 1992, at 60.

105 113 S. Ct. 2217 (1993). For a brief summary of the decision, see Linda Greenhouse, *Court, Citing Religious Freedom, Voids A Ban on Animal Sacrifices*, N.Y. TIMES, June 12, 1993, at 1.

106 113 S. Ct. at 2222-34, 2240-50 (Souter, J., concurring).

B. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

The Church of the Lukumi Babalu Aye, Inc. (hereinafter "the Church"), comprised of congregants of the Santeria faith,[107] leased land in Hialeah, Florida, on which they planned to build a church, school, cultural center and museum.[108] The Hialeah community opposed the Church's plan because they disapproved of animal sacrifice, one of the central practices of the Santeria faith.[109] Consequently, an emergency public session of the city council was held, during which a resolution was passed to the effect that the citizens of Hialeah were committed to prohibiting acts of religious groups that were inconsistent with public safety, morals and peace, including animal sacrifice.[110]

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107 113 S. Ct. at 2222. Justice Kennedy, author of the majority opinion, discussed in detail the history of the Santeria religion. *Id.* The Santeria religion originated in the nineteenth century, when African slaves in Cuba mixed certain aspects of the Roman Catholic religion with their own. *Id.* Central to the Santeria religion is the worship of spirits, called "orishas," through animal sacrifice. *Id.* Most of their rituals require animal sacrifice. *Id.* Persecution drove the Santeria religion underground, and it is still rarely practiced openly. *Id.* at 2222-23. The religion was brought to the United States by Cuban exiles. *Id.* at 2223.

108 *Id.* The Church wanted to bring the practice of the Santeria faith into the open. *Id.* The Church had already obtained the required licenses, inspections and zoning approvals. *Id.*

109 *Id.* Animal sacrifices are performed at birth, marriage and death ceremonies. *Id.* at 2222. Animals are also sacrificed to cure illnesses, to initiate new members and during celebrations. *Id.* Usually sacrificed are chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles. *Id.* The animals' carotid arteries in the neck are cut and then the animals are cooked and eaten unless sacrificed in a healing or death ceremony. *Id.*

A retired Miami detective complained that animal sacrifice has become so common in Dade County, Florida, that a cleanup boat on the Miami River cleans up about 100 carcasses per week. Michael Reese with Vincent Coppola, *A Cuban Ritual Disturbs Miami*, NEWSWEEK, June 22, 1981, at 44. The detective described how he recently watched two women in white robes chanting on the banks of the river while another women rubbed a chicken over her body as she waded into the river. *Id.* The woman then slaughtered the chicken, throwing its remains into the current. *Id.* The detective commented that "[n]ot a day goes by without chickens or doves, with their heads cut off and feathers on, floating by." *Id.*

110 *Hialeah*, 113 S. Ct. at 2223 (citing City of Hialeah Res. 87-66). *See id.* at 2234 app. (text of Resolution). Also passed was an ordinance that incorporated Florida's animal cruelty laws criminalizing the unnecessary killing of animals. *Id.* at 2233 (citing HIALEAH, FL. ORDINANCE 87-40). *See id.* at 2235 app. (text of ordinance). The council would have gone further, but since Florida prohibited municipalities from passing animal cruelty laws that conflicted with state law, the city council attorney first contacted the Florida Attorney General for clarification of the state law. *Id.* at 2223.

At a city council meeting several months later, three substantive animal cruelty ordinances were passed.[111] In response to their passage, the Church sued the city of Hialeah, the mayor, and the city council members, claiming that the ordinances violated the free exercise rights of its members.[112]

The Court, with Justice Kennedy writing for the majority, reiterated the *Smith* holding that a neutral law of general applicability does not have to be justified by a compelling governmental interest, even if it has the incidental effect of burdening religion.[113] Conversely, the Court held that if a law is not neutral or not generally applicable, then it must be justified by a compelling governmental interest.[114]

Explaining the neutrality requirement, Justice Kennedy stated that a law whose object is to restrict a religious practice is not neu-

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The Attorney General concluded that the ritualistic sacrifice of animals was unnecessary and therefore prohibited, and that any city ordinance doing the same would not be in conflict with state law. *Id.* Upon receipt of this information, the Hialeah city council immediately passed Resolution 87-90, stating its opposition to the public ritualistic sacrifice of animals. *Id.* at 2223-24. *See id.* at 2235-36 app. (text of Resolution).

As one reporter phrased it, Hialeahans were not going to stand for "any chicken wings" on their streets. Kilpatrick, *supra* note 104, at 15A.

111 *Hialeah*, 113 S. Ct. at 2224. The city council enacted Ordinances 87-52, 87-71 and 87-72, respectively. *Id.* Ordinance 87-52 prohibited the sacrifice or killing of animals in a public or private ritual if the animal was not intended for food consumption. *Id.* It also defined sacrifice as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* The ordinance specifically exempted slaughtering by licensed establishments raising animals for food. *Id.* Ordinance 87-71 made it unlawful to sacrifice any animal within the corporate city limits of Hialeah. *Id.* In passing this ordinance, the city council declared that it "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare, and morals of the community." *Id.* Ordinance 87-72 limited the slaughtering of animals to only those areas zoned for such a use. *Id.* It defined slaughter as "the killing of animals for food." *Id.* See *id.* at 2236-39 app. (full texts of ordinances).

112 *Id.* at 2224-25. The United States District Court for the Southern District of Florida ruled in the city's favor, agreeing that the laws were not neutral, but that they were aimed at preventing animal sacrifice rather than at excluding the Church from the city. *Id.* Furthermore, the ordinances were not discriminatory on their face and any effect they had on the complainants' religious rights was at most incidental and justified by compelling governmental interests. *Id.* The Court of Appeals for the Eleventh Circuit, in a *per curiam* opinion, affirmed by stating only that the ordinances were constitutional. *Id.* at 2225. The Eleventh Circuit did not address *Smith* at all. *Id.*

113 *Id.* at 2226.

114 *Id.* Justice Kennedy explained that the concepts of neutrality and general applicability were closely related and that the absence of one likely indicates the other's absence. *Id.*

tral.[115] To determine the object of a law, one must first look to its text to see if it discriminates on its face.[116] If the text expressly implicates a religious practice and lacks a secular purpose, it fails the test of facial neutrality.[117] If an ordinance, however, is determined to be facially neutral, the law must still be examined more closely to ensure that the government, while complying with facial neutrality, is not overtly discriminating.[118]

Adverse impact of the operation of a law is evidence that a religion has been targeted.[119] Justice Kennedy concluded that the operation of the three Hialeah ordinances created a "religious gerrymander"[120] improperly targeting the Santeria religion.[121] He based his conclusion on several observations of the operation of the ordinances.[122] First, only those animal sacrifices occurring during religious ceremonies were prohibited, while other animal killings, even inhumane ones, were allowed.[123] Second, a pattern of exemptions in the ordinances resulted in only prohibiting the

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115 *Id.* at 2227.

116 *Id.* This is the minimum requirement of neutrality. *Id.*

117 *Id.* The Church argued that the ordinances discriminated on their face because they included such religious words as "sacrifice" and "ritual." *Id.* Justice Kennedy rejected this argument, stating that since these words also have secular meanings, their inclusion in the ordinances did not conclusively establish that the ordinances discriminated. *Id.* He noted however that their use may be evidence of such discrimination. *Id.* Other evidence of discrimination was the lack of any reference in the record to any other religion. *Id.*

118 *Id.* "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.*

119 *Id.* at 2228. However, adverse impact does not always implicate discrimination, such as in the case when the government is trying to deal with a legitimate social harm. *Id.*

120 *Id.* Gerrymander is defined as:

> A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.

BLACK'S LAW DICTIONARY 473 (6th ed. 1991).

121 *Hialeah*, 113 S. Ct. at 2228 (citing Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970)) (Harlan, J., concurring).

122 *Id.*

123 *Id.*

Santerians from killing animals.[124] Third, the ordinances had been construed so that killing for religious purposes was deemed unnecessary, while other killing, such as hunting and fishing or euthanasia, had not.[125] Fourth, the city could have achieved its purported goal of preventing animal cruelty with a more narrowly tailored ordinance.[126] Due to the effects of the Hialeah ordinances on the Santeria's exercise of religion, the Court concluded that they were unconstitutional.[127]

Justice Kennedy then explained that the general applicability requirement allows governments to burden religion in pursuing a state interest, so long as the religion is not selectively burdened.[128] The city of Hialeah argued that the two legitimate goals of the Hialeah ordinances were: to prevent animal cruelty and to protect the public from improper disposal of animal carcasses and from consumption of uninspected meat.[129] However, Justice Kennedy concluded that, while the ordinances regulated and prevented animal sacrifice as practiced by the Santerians, they failed to regulate and prevent animal sacrifice done for non-religious reasons.[130] He con-

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124 *Id.* Ordinance 87-52 prohibits the "possess[ion], sacrifice, or slaughter" of animals in any type of ritual "with the inten[t] to use such animals for food purposes." *Id.* However, the ordinance exempts licensed establishments raising and slaughtering animals for food purposes, including Kosher establishments. *Id.* The ordinance does not prohibit animal sacrifice without intent to use for food, nor does it prohibit animal sacrifice occurring outside rituals. *Id.* at 2228-29. Animal sacrifice during a ritual and for food consumption is also exempted if it takes place in an area zoned for such use. *Id.* at 2229.

125 *Id.* The government has, in effect, discretion to decide what constitutes unnecessary versus necessary killing. *Id.* Here, religious killings were judged to be less important than nonreligious killings. *Id.* For example, hunting and fishing of animals were not considered "unnecessary." *Id.*

126 *Id.* at 2230. For example, the city could have drafted an ordinance regulating the conditions and treatment of animals. *Id.*

127 *Id.* Justice Kennedy also explained that equal protection analysis could be used to determine whether a law was neutral. *Id.* Examining such history as the events leading to passage of the ordinances, their legislative history, and their administrative history, Justice Kennedy concluded that the object of the city council was to target animal sacrifice as practiced by the Santerians. *Id.* at 2230-31. Thus, the ordinances were discriminatory because while the Santeria religion was suppressed, other religions were not. *Id.* at 2231.

128 *Id.* at 2232.

129 *Id.* at 2232-33.

130 *Id.* at 2233. For example, the Hialeah ordinances did not prohibit such cruelty to animals as euthanasia of strays or the killing of animals for use in medical research. *Id.* Also, hunters did not have to comply with the carcass disposal and uninspected meat regulations. *Id.*

cluded that the ordinances were underinclusive in protecting the public health as well.[131] Since the ordinances failed to advance either of the town's interests while simultaneously burdening those of the Santeria faith, the ordinances were not generally applicable.[132]

Since the Hialeah ordinances were neither neutral nor generally applicable, they had to be justified by a compelling state interest.[133] Justice Kennedy found that the governmental interests of prohibiting animal cruelty and of protecting the public health were not compelling, and even if they were, the ordinances were not narrowly tailored to achieve those interests.[134] Therefore, the free exercise rights of the adherents' of the Santeria faith were found to be unconstitutionally burdened.[135]

Similar to Justice O'Connor's concurring opinion in *Smith*, Justice Souter's partial concurrence in *Hialeah* also questioned the holding of the *Smith* case.[136] Justice Souter explained that the disagreement among the Justices arises when a neutral, generally applicable law, such as the unemployment compensation law at issue in *Smith*, burdens religion.[137] To clarify his discussion, Justice Souter defined two types of neutrality: (1) formal neutrality, which requires that a law have as its object something other than the intent to discriminate and (2) substantive neutrality, which requires that the government accommodate religious practices by providing for exemptions to a law when the law has a secular object, but incidentally burdens religion.[138] While the *Smith* majority only required

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131 *Id.*

132 *Id.*

133 *Id.* "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct a religious motivation will survive strict scrutiny only in rare cases." *Id.*

134 *Id.* at 2234.

135 *Id.*

136 *Id.* at 2240 (Souter, J., concurring). Justice Souter has "doubts about whether the *Smith* rule merits adherence." *Id.* Justice Blackmun, joined by Justice O'Connor, concurred in the judgment but wrote separately to state his disagreement with the majority's use of the *Smith* test and to advocate a return to the compelling interest test. *Id.* at 2250 (Blackmun, J., concurring). He concluded that, under the compelling interest test, the Hialeah ordinances in question failed strict scrutiny because they targeted religion. *Id.* at 2251.

137 *Id.* at 2240 (Souter, J., concurring). Justice Souter noted that there was a consensus among the Justices that the free exercise clause was violated when a law targeted religious belief or practice. *Id.*

138 *Id.* at 2241 (Souter, J., concurring). Justice Souter stated that the general appli-

formal neutrality and general applicability, those Justices rejecting the *Smith* rule required, in addition to general applicability, both formal *and* substantive neutrality.[139] Justice Souter concluded that because *Smith* only required formal, and not substantive neutrality, it was also at odds with prior free exercise decisions by the Court, thus creating a conflict in free exercise jurisprudence that needed to be resolved.[140]

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cability requirement was self-explanatory, but that the concept of neutrality was not. *Id.* at 2241-42 (citing Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990)).

139 *Id.* at 2242. Those Justices were: Justice O'Connor, Justice Blackmun, Justice Brennan and Justice Marshall. *Id. See also, Smith*, 494 U.S. at 890-921. While Justice Kennedy embraced the *Smith* rule in his majority opinion in *Hialeah*, Justice Souter asserted that *Smith's* holding was unnecessary to decide the issue because the Hialeah ordinances clearly failed the test of formal neutrality and general applicability, and thus, Justice Kennedy's discussion of *Smith* was merely dicta. *Hialeah*, 113 S. Ct. at 2242-43 (Souter, J., concurring). The Hialeah ordinances presented a rare case in which the Court had to decide whether ordinances aimed at suppressing religion, as opposed to the much more common situation where the Court had to decide whether laws that were formally neutral and generally applicable, were constitutional. *Id.* at 2243 (Souter, J., concurring).

140 *Id.* Justice Souter felt that *Smith* left a "free exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed by reexamining the *Smith* rule in the next case that would turn upon its application." *Id.*

Justice Souter felt that *Smith* could be reexamined consistent with stare decisis principles. *Id.* at 2247. First, both parties in *Smith* argued the outcome of the case under a strict scrutiny analysis, rather than under free exercise clause concepts, upon which the Court ultimately based its decision. *Id.* Since such *sua sponte* decisions lacking full briefs on point command less deference than those that are fully argued, it would not be inconsistent with stare decisis to overrule *Smith*. *Id.* Second, the new precedent set forth in *Smith* was not needed to settle the issue in question, and therefore, rather than making a broad constitutional rule, the Court should have decided the case using already established free exercise principles. *Id.* at 2247-48. Third, the novelty of the *Smith* decision lends itself to reexamination. *Id.* at 2248. Fourth, *Smith* failed to overrule previous cases based on *Sherbert's* compelling interest test, instead using those cases as precedent, in effect creating two constitutional laws at odds with each other. *Id.* Fifth, looking to the plain language of the free exercise clause, it does not distinguish between laws whose object is to burden a religious practice and those laws that have the incidental effect of doing so. *Id.* Finally, similar to most free exercise decisions preceding it, *Smith* did not examine the intent of the authors of the free exercise clause and, thus, reexamination of the case would provide the Court an opportunity to do so. *Id.* at 2248-49. Although there are many divergent views among scholars concerning the original meaning of the Free Exercise clause, Justice Souter pointed out that, unlike Establishment Clause decisions, which have incorporated historical analysis, Free Exercise decisions have failed to do so. *Id.* at 2249.

Some scholars argue that the original intent of those who authored the Free Exercise Clause was to allow individuals to engage in conduct allowing them to fulfill religious duties, as long as that conduct did not interfere with the rights of others or

Prior to *Smith*, the Court had applied the compelling interest test to formally neutral and generally applicable laws that burdened religion, just as it did to those laws that singled out religion.[141] Justice Souter was not persuaded by the majority's attempt in *Smith* to distinguish prior free exercise decisions through the use of the "hybrid" construct because, even though those cases relied upon by the majority did involve other constitutional rights, such

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the needs of the States. *See generally* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414-16 (1990). Whether the Constitution should be interpreted according to the original intentions of its authors is another issue. Supporting this view is Chief Justice Rehnquist. DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 132 (Prometheus Books, 1991) (while the government may not favor a specific religion over another, nothing in the Constitution prohibits the government from accommodating and supporting religions). *Contra* Philip B. Kurland, *The Origins of the Religion Clauses Of The Constitution*, 27 WM. & MARY L. REV. 839 (1987) (while the First Amendment has prevented the government's involvement in religious conflicts for the last 200 years, it is doubtful that the situation will remain the same due to the government's increasing participation in both the social and economic spheres).

141 *Hialeah*, 113 S. Ct. at 2243-44. For examples of cases deciding the constitutionality of formally neutral, generally applicable laws, see Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (California tax statute requiring payment of tax on interstate sales not violative of Louisiana religious organization's free exercise rights); Hernandez v. Commission, 490 U.S. 680 (1989) (IRS's refusal to allow taxpayer to deduct payment for religious classes as a charitable contribution not a free exercise violation); Frazee v. Employment Sec. Dept., 489 U.S. 829 (1989) (denial of unemployment compensation to an Illinois employee who refused to work Sundays violated her free exercise rights); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (Florida unemployment statute violative of Seventh-day Adventist's free exercise rights); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (IRS's denial of tax-exempt status to private, religious schools with discriminatory policies not a violation of free exercise); United States v. Lee, 455 U.S. 252 (1982) (state's interest in maintaining sound tax system found to outweigh Amish employer's religious prohibition on the payment or receipt of social security taxes); Thomas v. Review Bd., 450 U.S. 707 (1981) (Indiana unemployment compensation statute pursuant to which Jehovah Witness was denied benefits violated his free exercise rights); Wisconsin v. Yoder, 406 U.S. 207 (1972) (Oregon compulsory education statute held to be an unconstitutional burden on the free-exercise rights of the Amish); Sherbert v. Verner, 374 U.S. 398 (1963) (South Carolina unemployment compensation statute a violation of Seventh-day Adventist's free exercise rights); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Connecticut statute prohibiting door-to-door solicitation an infringement on Jehovah Witness's free exercise and free speech rights).

Conversely, for examples of laws aimed directly at religion, see Church of the Lukumi Babalu Aye, Inc. & Ernesto Pichardo v. City of Hialeah, 113 S. Ct. 2217 (1993) (Hialeah municipal ordinances targeting the practice of religious ritual sacrifice violated free exercise rights of the Santerians); McDaniel v. Paty, 435 U.S. 618 (1978) (Tennessee statute prohibiting ministers or priests from serving as state legislators violated their free exercise rights).

as freedom of speech and freedom of the press, it is clear that, in those cases, fundamental free exercise rights were also at stake.[142] Furthermore, if a "hybrid" case is defined as one in which free exercise *plus* another constitutional right was implicated, then *Smith* should also have qualified as hybrid since not only were free exercise rights at issue, but also free speech and free association rights.[143]

Justice Souter was not persuaded by the argument in *Smith* that *Sherbert's* compelling interest test was limited to the area of unemployment compensation cases since that very argument had been rejected by the Court in the past.[144] In any event, at issue in *Smith* was, in fact, an unemployment compensation law that burdened religion and, therefore, *Smith* should have fallen within *Sherbert's* reach.[145] Justice Souter also rejected the majority's attempt to distinguish prior unemployment compensation cases on the grounds that *Smith* involved conduct violating an across-the-board criminal prohibition, while the unemployment cases did not.[146] Even assuming *Smith* was a criminal case, the Court still should have applied the compelling interest test just as it did in *Yoder*, in which an exemption from an across-the-board criminal prohibition was also sought.[147]

IV. The Religious Freedom Restoration Act

A. *Legislative History*

1. The 101st Congress

The RFRA of 1990, H.R. 5377, was originally introduced to the House by its chief sponsor, Representative Stephen J. Solarz, (D-N.Y.), on July 26, 1990.[148] The House Subcommittee on Civil and

142 113 S. Ct. at 2244. *See also* Wisconsin v. Yoder, 406 U.S. 207 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1939).

143 113 S. Ct. at 2244-45.

144 *Id.* at 2245.

145 *Id.* If *Smith* was really concerned with criminal charges for peyote use, the government would have conducted a different kind of prosecution in which the actions and motives of the claimants would have been examined. *Id.* (citing Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990)).

146 *Id.* at 2245. *See also* Bowen v. Roy, 476 U.S. 693, 706-07 (1986); McDaniel v. Paty, 435 U.S. 618, 628 n. 8 (1978).

147 *Hialeah*, 113 S. Ct. at 2245 (Souter, J., concurring) (citations omitted).

148 *1990 House Hearings, supra* note 1, at 1, 3 (reproduction of bill following open-

Constitutional Rights held hearings on the RFRA on September 27, 1990.[149] Rep. Solarz, the first witness to testify at these hearings, described *Smith* as fundamentally retreating from the previous protection accorded religious freedom in our country.[150] He refuted *Smith's* premise that generally applicable laws having the effect of burdening religion were an "unavoidable consequence of democracy."[151] He speculated that *Smith* could threaten not only minority religions, but also well established practices of many mainstream religions.[152] Therefore, he felt compelled to introduce the RFRA in order to prohibit the government from burdening free exercise rights unless it was advancing a compelling interest through the least restrictive means available.[153] In the absence of a compelling state interest, the government would be required to grant exemp-

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ing statement of Chairman Edwards). Representative Edwards, a Democrat from California, has been described as "the pre-eminent defender of constitutional rights on Capitol Hill." Robert Pear, *A Champion of Civil Liberties Lays Down His Lance*, N.Y. TIMES, Apr. 3, 1994, at 7. He served as chairman of the Judiciary Subcommittee on Civil and Constitutional Rights for more than 20 of his 32 years in the Congress. *Id.* Rep. Edwards plans to retire in January, 1995. *Id.*

149 *1990 House Hearings*, *supra* note 1, at 1.

150 *Id.* at 13. Rep. Solarz prefaced his remarks by announcing that the previous day, the Soviet Union passed a law protecting religious freedom and he lamented that he "never thought the day might come when the Congress of the United States was a little bit behind the Supreme Soviet in protecting fundamental religious liberties." *Id.*

151 *Id.* at 13-14. He observed that, contrary to Justice Scalia's fear, the free exercise of religion has been adequately protected under our democratic government for over 200 years without such a dire consequence. *Id.*

152 *Id.* at 14. Rep. Dannemeyer expressed fear that Christians, believing wine to be the body and blood of Christ, could be prohibited from partaking of it during religious ceremonies. *Id.* Representative Lamar Smith of Texas also provided some examples of currently accepted religious practices that could potentially be curtailed: the drinking of wine by Christian children under the legal drinking age; the ritual slaughter of animals by Moslems; the reading of religious literature in public; or even the granting of religious holidays to government employees. *Id.* at 23. Reverend Dean M. Kelley accused Justice Scalia of obscuring the reality of such possibilities by ruling on such an unconventional set of facts, hoping that people would think only peyote-using Indians would be affected. *Id.* at 29. Reverend Robert P. Dugan, Jr., representing the Office of Public Affairs, National Association of Evangelicals, also provided examples of free exercise violations that might be tolerated under *Smith*: before moving an alter, a Catholic church might be forced to obtain the permission of the landmark commission; Orthodox Jews might not be allowed to participate in basketball games because of their religious belief in wearing yarmulkes; certain religions might be forced to ordain women; public school students might be forced to attend sex education classes or wear gym clothes to which they are religiously opposed; or students might be forced to salute the flag when it is against their religious beliefs. *Id.* at 39-40.

153 *Id.* at 15. The Bill of Rights was passed in order to remove certain issues, such as

tions from laws which infringed upon free exercise rights.[154] In order to return the law to its pre-*Smith* state, the RFRA created a statutory right under which claimants could bring an action against federal or state government for burdening their exercise of religion.[155]

Senator Joseph R. Biden Jr. (D-Del.) introduced a companion measure to the Senate Committee on the Judiciary, S. 3254, on October 26, 1990[156]. However, the RFRA of 1990 died at the end of the 101st Congress.[157]

2. The 102d Congress

The RFRA of 1991, H.R. 2797, was reintroduced to the House by Representative Solarz in the first session of the 102d Congress

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freedom of speech, freedom of the press, freedom of assembly and freedom of religion, from political debate. *Id.* at 14-15.

154 *Id.* at 22. Adding to the testimony of Rep. Solarz was Rep. Smith, who also advocated passage of the RFRA to restore the compelling interest test on the grounds that the right to freely exercise one's religion differentiated free nations from totalitarian, suppressive nations. *Id.* Despite the claim in *Smith* that the holding was limited to religious conduct, Rep. Smith felt that the decision would have the effect of restricting religious beliefs as well as religious conduct, and thus, without RFRA's passage, the right to free exercise of religion was at risk. *Id.* at 22-23. He stated that "[t]o treat religion as if it should not be seen or heard is to deny its essential power, for one's faith means little unless it is put into practice." *Id.* at 23. Rev. Kelley noted the effect of *Smith* on free exercise rights was to demote it as compared with other First Amendment rights by eliminating the requirement of strict scrutiny, unless another right was implicated, and by allowing its subjection to the political process, thereby disadvantaging minority religions. *Id.* at 27-28. He reminded the committee that representatives from several states at the Constitutional Convention refused to vote for ratification of the Constitution until they were assured that the freedom of religion would be protected in a Bill of Rights that was to be added at a later date. *Id.* at 27. Rev. Dugan predicted that *Smith*, by allowing the government to burden religious freedom no matter how severe the burden, would eventually lead to civil disobedience unless the RFRA was passed. *Id.* at 40. Rev. Buchanan emphasized the American struggle for religious freedom and how religious freedom has become a necessity, not a luxury as it was described in *Smith*. *Id.* at 49-50.

155 *Id.* at 17 (statement of Rep. Solarz).

156 136 CONG. REC. S17330 (daily ed. Oct. 26, 1990) (introduction of S. 3254 to Senate Comm. on the Judiciary by Sen. Biden). Co-sponsoring the bill were Senators Hatch, Kennedy, Specter, Inouye, Lieberman, Metzenbaum and Moynihan. *Id.*

157 Kitty Dumas, *Religious Freedom Bill Would Reverse Supreme Court*, 50 CONG. Q. 1889 (June 27, 1992). *See also* Adelson, *supra* note 2, at 19 (noting that legislators did not have enough time to consider the bill in the 101st Congress, but that it would be reintroduced in the 102d Congress).

on June 26, 1991.[158] A second round of hearings on the bill was held by the House Subcommittee on Civil and Constitutional Rights on May 13 and May 14, 1992.[159] The topic dominating the discussion of the bill was whether the RFRA created a new statutory right to an abortion.[160]

Those opposing the RFRA because of its potential to expand abortion rights first stressed that pro-choice groups had maintained as far back as the 1960's that the free exercise of religion was a basis on which to claim an abortion right.[161] However, pro-choice groups had never been presented with an opportunity to

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158 137 CONG. REC. H5210 (daily ed. June 26, 1991) (statement of Rep. Solarz) (introduced RFRA of 1991 for himself and 41 co-sponsors).

159 *See The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 99 (May 13-14, 1992) [hereinafter *1992 House Hearings*].

160 *Id.* at 7. Representative Hyde (R-Ill.), ranking member of the House Subcommittee on Civil and Constitutional Rights, agreed that Congress should pass some form of legislation to protect religious liberty. *Id.* However, he was particularly concerned that the RFRA went further than merely restoring the law to its state before *Smith* by actually expanding religious freedom. *Id.* His biggest worry was that the RFRA provided pro-choice groups, such as the ACLU and the Religious Coalition for Abortion Rights, a statutory basis upon which to claim a free exercise right to abortion. *Id. See* Anne Kornhauser & Judy Sarasohn, *Abortion and Religious Freedom*, LEGAL TIMES, Apr. 8, 1991, at 5; Joan Biskupic, *Abortion Dispute Entangles Religious Freedom Bill*, 49 CONG. Q. 913 (Apr. 13, 1991).

Second, he feared that plaintiffs would be more likely to prevail under the RFRA than they would have in the past under *Sherbert*, which, according to Hyde, was "the admitted highwater mark of free exercise jurisprudence." *1992 House Hearings*, *supra* note 159, at 8. If *Sherbert's* compelling interest test were incorporated into the RFRA, the Courts would be required to apply it in all cases, under all circumstances, which was a situation that did not exist before *Smith*. *Id.* Third, as opposed to the law before *Smith*, the RFRA would require a compelling interest analysis to be applied to the military, prisons and any government programs that had the incidental effect of burdening religious practices. *Id. See* 136 CONG. REC. S17331 (daily ed. Oct. 26, 1990) (statement of Sen. Hatch). Addressing such claims as that of Rep. Hyde, Senator Hatch, a co-sponsor of the RFRA, pointed out that prior to *Smith* there had been certain situations in which a lesser standard than the compelling interest test was applied, such as in the military, in prisons, and in instances when government programs had an incidental impact on religion, all issues that he wanted addressed in future hearings. *Id.*

161 *1992 House Hearings*, *supra* note 159, at 270. The Concerned Women for America, originally a member of the Coalition for the Free Exercise of Religion, withdrew its membership when the Religious Coalition for Abortion Rights advocated the RFRA's passage because it created a right to an abortion. Kornhauser & Sarasohn, *supra* note 160, at 5. James Bopp, Council to the National Right to Life Committee, claimed that the ACLU and the American Jewish Congress already had such a strategy planned. *1992 House Hearings*, *supra* note 159, at 271.

test their theory in front of the Court because the right to an abortion had been protected under the rubric of the right to privacy since 1973.[162] Since 1973, however, the foundation of the right to privacy argument has been weakened, inducing pro-choice groups to search out alternative means of protecting abortion rights.[163] Consequently, some pro-choice groups have renewed their efforts to establish the Free Exercise Clause as a basis for abortion rights.[164]

Pro-life groups warned that the RFRA would change existing law in two ways that would make it easier for pro-choice groups to establish the right to abortion under the Free Exercise Clause.[165] First, under pre-RFRA law, to have standing for a claim under the Free Exercise Clause, a woman must be seeking an abortion "under compulsion of religious belief."[166] However, under the RFRA, the barrier of having to establish standing would be weakened because litigants would only have to show that their free exercise rights had been burdened, rather than compelled.[167] Second, assuming that the Court overruled the constitutional right to an abortion, under *Smith,* so long as abortion statutes were neutral and generally applicable, the state would not be required to show a compelling interest on which to base a denial of an abortion.[168] However, if *Smith* were reversed, the government would be required to prove a compelling interest, a very difficult standard to meet, in order to deny an abortion.[169] Despite assurances by those advocating the RFRA's

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162 *1992 House Hearings, supra* note 159, at 270. *See* Roe v. Wade, 410 U.S. 113, 153, 163 (1973) (abortion right based on constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment; state's interest in preserving human life becomes compelling at point of viability, established to be the end of the first trimester of pregnancy).

163 *See* Webster v. Reproductive Health Serv., 492 U.S. 490, 514 (1989) (weakening of trimester analysis of viability in determining level of state's interest in protecting human life as established in Roe v. Wade).

164 *1992 House Hearings, supra* note 159, at 271. In *Webster,* several Justices indicated a willingness to overturn *Roe* and with that possibility looming, pro-life legislators were particularly concerned that abortion rights advocates would pursue the theory that the free exercise clause provided the basis for that right. *Id.*

165 *Id.* at 272.

166 *Id. See* Harris v. McCray, 448 U.S. 297 (1980) (Hyde Amendment prohibiting use of Medicaid funds for abortions found to be constitutional).

167 *1992 House Hearings, supra* note 159, at 271.

168 *Id.* at 271. *See also id.* at 134-139 (discussion between Rep. Hyde and Rep. Solarz on whether the RFRA protects conduct "compelled by religious belief").

169 *1992 House Hearings, supra* note 159, at 271.

passage that it would not expand abortion rights,[170] pro-lifers refused to support the bill unless it was amended to include language indicating that it would be abortion-neutral.[171]

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170 *Id.* at 117, 119-20. Rep. Solarz first noted that many other pro-life organizations were supporting the RFRA. *Id.* at 119. He then explained that Jewish law requires an abortion be performed if the life of the mother is in danger. *Id.* Therefore, if an abortion-neutral amendment were added stating that abortion could not be considered in a compelling interest analysis, the religious rights of Jews would be violated. *Id.* at 119-20. He also pointed out that there is a difference between a claim that one has a right to have an abortion and a claim that one is required to have an abortion. *Id.* at 120.

Rev. Dugan, who also testified for the RFRA in the 1990 House hearings, again urged its passage. *Id.* at 10. He too denied that it created a statutory right to an abortion. *Id.* Rev. Dugan said that only those rights that currently existed under the Free Exercise Clause continue to exist under the RFRA. *Id.* at 11. And, even assuming that one could claim an abortion right under the RFRA, the Supreme Court has already decided that the state has a compelling interest in preserving life, therefore, that claim would be unsuccessful. *Id.* Rev. Dugan also remarked that the "RFRA is not a wolf in sheep's clothing," and argued that "[r]eligious liberty should not be held hostage to irrational fears." *Id.* at 12. He also warned that the RFRA would not stand a chance at being passed if an abortion-neutral amendment were added. *Id.* at 11.

Professor Douglas Laycock, of the University of Texas Law School, also denied that the RFRA is an abortion bill and accused James Bopp of "holding the bill hostage to inject abortion into a bill that is about religious liberty." *Id.* at 328.

The House Committee on the Judiciary agreed with a study done by the Congressional Research Service which concluded that the RFRA could not be used to advance abortion rights. H.R. REP. NO. 103-88, *supra* note 8, at 8.

171 *1992 House Hearings*, *supra* note 159, at 272. The National Right to Life Committee proposed the following amendment: "Nothing in this act shall be construed to grant, secure, or guarantee any right to abortion, access to abortion services, or funding of abortion." Kornhauser & Sarasohn, *supra* note 160, at 5. The Committee warned that failure to pass an abortion neutral amendment could cause the RFRA to be stalled just as another bill designed to overturn a Supreme Court decision restricting the scope of a civil rights law had been. Ruth Marcus, *Reins on Religious Freedom?; Broad Coalition Protests Impact of High Court Ruling*, WASH. POST, Mar. 9, 1991, at A1.

Representative Christopher Smith of New Jersey and Mark Chopko, General Counsel to the United States Catholic Conference, which sets social policy for the National Conference of Catholic Bishops, both had concerns over abortion similar to that of the National Right to Life Committee and therefore also refused to support an unamended RFRA. *See 1992 House Hearings*, *supra* note 159, at 34-35, 139. *See also* 137 CONG. REC. E4186-87 (daily ed. Nov. 26, 1991) (statement by Rep. Smith). Rep. Smith introduced an alternative to the RFRA, the Religious Freedom Bill of 1991. *Id.* This bill was similar to the RFRA, except that it included a provision specifying that it could not be construed to provide a right to an abortion as well as specifying that the tax status of religious organizations was to be preserved. *Id. See also Judiciary Panel Gets Busy, Dispatches Passel of Bills*, 50 CONG. Q. 3061 (Oct. 3, 1992) [hereinafter *Judiciary Panel*] (subcommittee defeated five different amendments offered by Rep. Hyde, including an amendment that stated the RFRA was abortion neutral); Kornhauser & Sarasohn, *supra* note 160, at 5. The Concerned Women for America, originally a member of the Coalition for the Free Exercise of Religion, withdrew its membership

Another area of contention concerned whether the RFRA actually expanded the protection granted religious freedom beyond that which existed prior to the *Smith* decision.[172] In particular, some feared that the RFRA would allow challenges to the participation of religious organizations in public programs[173] or it would expand standing to challenge an organization's tax-exempt status.[174]

Other concerns were also voiced both in these and the earlier House hearings. One issue was whether Congress had the authority to pass such legislation.[175] Another issue concerned the scope of the compelling interest test.[176] An inquiry was also made as to whether free exercise decisions should be left to the states.[177]

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as it did not want to be associated with the abortion issue. *Id.* The United States Catholic Conference also refused to endorse the RFRA, in part due to the abortion issue. *Id.*

172 *1990 House Hearings, supra* note 1, at 58. Rev. Kelley explained that the bill was intended only to restore the standard that existed prior to *Smith*, but that the U.S. Catholic Conference had expressed concerns that the bill was not neutral as applied to the establishment clause. *Id.*

173 *1992 House Hearings, supra* note 159, at 34. Mark Chopko described past challenges based on the Free Exercise Clause to which much of the organization's money was devoted: participation in federal and state education programs by children who attend religious schools; tax deductions and credits received by parents who send their children to religious schools; and participation in public welfare programs by religious organizations. *Id.* at 43. He theorized that under the RFRA, a situation might arise in which a taxpayer could challenge the use of tax money to support soup kitchens or homeless shelters run by religious organizations. *Id.* at 57.

174 *Id.* at 46. The United States Catholic Conference had incurred large expenses defending itself against several such suits in the past. *Id.* Therefore, Chopko recommended that language be included in the RFRA expressly stating that it did not provide additional grounds for standing to bring this type suit. *Id.*

175 *Id.* at 7. Rep. Hyde said that the Congress "is institutionally unable to restore a prior interpretation of the first amendment." *Id.* Dean Herbert Titus of Regent University School of Law, noted that the bill "will probably be found unconstitutional as an exercise of congressional power. . . ." *Id.* at 89. This question was briefly addressed in the earlier 1990 House hearings as well. *1990 House Hearings, supra* note 1, at 56.

176 *1990 House Hearings, supra* note 1, at 56 (statement of Rep. Edwards). Rep. Edwards wanted to know under what circumstances would the government be allowed to burden someone's free exercise rights. *Id.* Rev. Kelly responded that the government could do so in order to protect the public health and safety. *Id. See 1992 House Hearings, supra* note 159, at 302-04. Associate Professor Robert A. Destro of the Catholic University of America agreed that legislation should be drafted to ensure the right to free exercise, but that he was opposed to the RFRA because it restores the compelling interest test, a term which has not been clearly defined in free exercise jurisprudence. *Id.* at 303-04.

177 *1990 House Hearings, supra* 1, at 26 (statement of Rep. Edwards). Rep. Smith responded that because the free exercise of religion was of such importance to every-

Supporters of the RFRA emphasized throughout both House hearings the unusual alliance of both legislators and organizations uniting behind the RFRA.[178] Both large, mainstream organizations and smaller, minority groups urged that the RFRA be passed in order to restore protection to the free exercise of religion immediately.[179] Civil rights groups stressed the need to remove the fundamental right of free exercise of religion from the reach of legislative whims.[180]

Other witnesses were altogether opposed to the RFRA because they believed that the free exercise of religion, an inalienable right,

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one across the nation, the issue should be governed by a single standard rather than many standards differing according to state or municipality. *Id.*

On the other hand, *see 1992 House Hearings* at 372-74 (statement of Ira C. Lupu of George Washington University). Professor Lupu argued that under the RFRA, Congress was going much farther than it had in the past in enforcing the Fourteenth Amendment, or at least in the past it had been moving in the same direction of the Court. *Id.* at 373-74. Conversely, under the RFRA, Congress was directly opposing the Court. *Id.*

178 *1990 House Hearings, supra* note 1, at 7. Rep. Dannemeyer questioned whether he fit in with the group sponsoring the bill. *Id.* Rep. Solarz commented that the RFRA of 1990 has "facilitated the establishment of an extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats." *Id.* at 13. Rev. Kelley stated that the coalition in support of the RFRA of 1990 was "the widest spectrum of agreement among voluntary organizations and religious groups" that he had seen in more than 30 years. *Id.* at 27. John H. Buchannan, Jr. observed that support for the RFRA was uniting many who are seldom united on public policy. *Id.* at 49. *See also id.* at 61 (prepared statement of the Coalition for the Free Exercise signed by 28 organizations). Steven T. McFarland of the Christian Legal Society remarked that "[n]ever before have so many diverse ideologies come together to support a piece of human-rights legislation." George W. Cornell, *Religions Band to Back Legislation*, ARIZ. REPUBLIC, Mar. 27, 1993, at C6. Another writer described the groups backing the bill as "more often fighting than agreeing on legal principles." Marcus, *supra* note 171, at A1.

179 *1992 House Hearings, supra* note 159, at 147-52 (statement of Dean Edward Gaffney of Valparaiso University School of Law). Gaffney urged the Committee to "smoke out the redherrings," so that legislation protecting the free exercise of religion can be passed. *Id.* at 150. *See also id.* at 326-29 (statement of Professor Douglas Laycock).

Elder Oaks, representing the Church of Jesus Christ of Latter-Day Saints, also known as the Mormons, recalled the historic persecution suffered by the Mormons at the hands of the government due to their non-conventional religious beliefs. *1992 House Hearings, supra* note 159, at 23. The Mormons were afraid that, once freed from the compelling interest test, the government would begin to restrict religious freedom as it had in the past. *Id.* at 24-25. Oaks equated the principles in the RFRA to those embodied in the Mormon Articles of Faith: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." *Id.* at 25.

180 *1992 House Hearings, supra* note 159, at 64-65 (statement of Nadine Strossen, president of the American Civil Liberties Union).

should not be burdened by any law whatsoever, despite the existence of a compelling governmental interest.[181] Since the purpose of the RFRA was to restore that test, the RFRA would, in effect, allow free exercise rights to be burdened in many instances.[182]

On June 24, 1992, the House Subcommittee on Civil and Constitutional Rights approved the RFRA for action by the full House Committee on the Judiciary by a 5-3 vote.[183] The vote was along party-lines, with Democrats supporting the bill and Republicans opposing it over the abortion issue.[184]

The RFRA of 1992, S. 2969, was introduced to the Senate Committee on the Judiciary by Sen. Kennedy (D-Mass.) on July 2d, 1992.[185] Hearings on the RFRA of 1992 were held by the Senate Judiciary Committee on September 18, 1992.[186] Many of the witnesses testifying before the Committee had testified at the earlier two House hearings and voiced similar opinions.[187]

The full House Committee on the Judiciary approved the RFRA of 1991, H.R. 2797, by voice vote[188] on October 1,

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181 *Id.* at 87-88 (statement of Dean Herbert Titus).

182 *Id.* at 89.

183 138 CONG. REC. D784 (daily ed. June 24, 1992). *See also* Dumas, *supra* note 157, at 1889.

184 Dumas, *supra* note 157, at 1889. Republicans feared the bill created a statutory right to abortion. *Id.*

185 138 CONG. REC. S9821 (daily ed. July 2, 1992) (statement of Sen. Kennedy).

186 *Religious Freedom Restoration Act of 1992: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) [hereinafter *1992 Senate Hearings*].

187 *See generally id.* Michael P. Farris, co-chairman of the RFRA drafting committee and President of the Home School Legal Defense Association, testified in favor of the RFRA. *Id.* The Home School Legal Defense Association is an organization dedicated to religious freedom and represents 26,000 families of various faiths including evangelical Christians, Jews, and those of eastern faiths. *Id.* Also in favor of the RFRA was Oliver Thomas, representing the Baptist Joint Committee and the American Jewish Committee. *Id.* The Baptist Joint Committee is a Public Affairs office representing various Baptist organizations in their fight for religious liberty and separation of church and state. *Id.* The American Jewish Committee is dedicated to the protection of the civil and religious rights of Jews. *Id.*

One new witness testifying against the RFRA was Bruce Fein. *Id.* He claimed that the RFRA would prohibit the states from regulating constitutional religious conduct and that the statutory standard makes its enforcement unworkable. *Id.*

188 A voice vote is a "form of open ballot in which the assembly's responses are given *viva voce*, or orally . . . ." WILLIAM R. GONDIN, DICTIONARY OF PARLIAMENTARY PROCEDURE 141 (1969). It is the method usually used to take a vote. GENERAL HENRY M. ROBERT, ROBERT'S RULES OF ORDER REVISED 188 (1971). Once a body is ready to vote, the chair restates the motion and asks for those in favor to reply "Aye" and those opposed to reply "No." GONDIN, *supra*. If the voting is close, the chair may ask for a

1992.[189] Supporters of the RFRA attempted to expedite procedures to bring the bill to the House floor before the end of the 102d Congress, but their efforts were thwarted when Senator Alan K. Simpson (R-Wyo.) threatened to block the bill in the Senate.[190]

3. The 103d Congress

Prior to the reintroduction of the RFRA in the new Congress, supporters of the RFRA worked out an agreement with its opponents to allay their concerns about the bill.[191] First, staff members of the House and Senate Judiciary Committees agreed to include statements in the committee reports making it clear that the legislation was not intended to have any effect on abortion law.[192] Second, some actual language in the bill was changed to assure that the bill did not create more rights than those that existed prior to *Smith.* Originally, in the section of the bill listing its purpose was language stating that it would "restore the compelling interest test *as set forth in Sherbert and Yoder. . . .*"[193] In the revised version, the language in the purpose section was changed to state that it would "restore the compelling interest test *as set forth in cases prior to Smith.*"[194] Since abortion rights advocates had been unsuccessful in establishing a free exercise right to an abortion under the law before *Smith,* wording the RFRA so that it restored the law to that state, rather than wording it so that the *Sherbert* and *Yoder* standards replaced that law, assured that abortion rights advocates would

"show of hands," a "standing vote," or a second vote altogether. *Id.* ROBERT'S RULES require that Congress use the voice method of voting. ROBERT, *supra.*

189 138 CONG. REC. D1261 (daily ed. Oct. 1, 1992); *Judiciary Panel, supra* note 171; CONGRESSIONAL QUARTERLY, INC., CONG. Q. ALMANAC 332 (Neil Skene et al eds., 1993).

190 David Masci, *Religious Freedom Bill Wins Subcommittee Approval,* 51 CONG. Q. 676 (Mar. 20, 1993).

191 139 CONG. REC. H2356 (daily ed. May 11, 1993) (statement of Rep. Hyde).

192 Masci, *supra* note 190, at 676.

193 138 CONG. REC. S9821 (daily ed. July 2, 1992) (text of S. 2969 as read into record following introduction of bill by Sen. Kennedy) (emphasis added). The stated purpose of the Act is "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise is burdened by government . . . ." *Id.*

194 139 CONG. REC. H2356 (daily ed. May 11, 1993) (text of H.R. 1308 read by clerk) (emphasis added). The stated purposes of the Act are: "to restore the compelling interest test as set forth in Federal court cases before Employment Division of Oregon v. Smith and to guarantee its application in all cases where free exercise of religion is burdened . . . ." *Id.*

continue to be unsuccessful.[195]

Supporters also agreed to add language to the RFRA making it clear that the bill was to have no effect on the participation of religious organizations in government programs.[196] They also agreed to add language ensuring that claims concerning the tax-exempt status of religious organizations and their right to participate in publicly funded social and educational programs should continue to be brought under current Establishment Clause law and not under the Free Exercise Clause.[197] Furthermore, the rules currently controlling the standing of litigants were to remain unchanged.[198] Based on these changes and additions, previous opponents of the bill now endorsed it.[199]

The RFRA of 1993, H.R. 1308, was reintroduced to the House

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195 *Id.* (statement of Rep. Hyde). Rep. Hyde asserted that any such claims are to be addressed within the framework of Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct 2791 (1992), the Court's decision outlining the constitutional guidelines to be used in deciding abortion rights claims. *Id. See* H.R. REP. NO. 103-88, *supra* note 8, at 8. *Planned Parenthood* "renders discussions about the bill's application to abortion increasingly academic." *Id.*

196 139 CONG. REC. S2822 (daily ed. Mar. 11, 1993). The new language was to ensure that the bill would not provide standing for Establishment Clause claims against organizations that have been granted government funding, benefits or tax exemptions. S.578, 103d Cong., 1st Sess. § 7 (1993). *See also* H.R. REP. NO. 103-88, *supra* note 8, at 8-9.

197 S. 578, 103d Cong., 1st Sess. (1993). Specifically, this section reads: "[g]ranting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act." *Id.* § 7. In fact, in Tilton v. Richardson, 403 U.S. 672, 689 (1971), the Supreme Court rejected a claim challenging the constitutionality of the granting of federal funds to a religiously affiliated college brought under the Free Exercise Clause. H.R. REP. NO. 103-88, *supra* note 8, at 8.

198 S. 578, 103d Cong., 1st Sess. (1993). Specifically, § 3 reads: "[s]tanding to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution." *Id.* § 3. *See also* H.R. REP. NO. 103-88, *supra* note 8, at 9.

199 *Catholic Group Will Back Act On Religious Freedom*, L.A. TIMES, Mar. 13, 1993, at B4. As noted earlier, the U.S. Catholic Conference had opposed the RFRA for two years because of its concern over the effect it would have on abortion rights and on the Establishment Clause, but now the organization endorsed the bill. *Id. See* Cornell, *supra* note 178, at C6. Another reporter stated that the bill's supporters suspected that former President Bush could not decide if he should side with the evangelical supporters of the bill or with the Catholic opposition. Feldmann, *supra* note 20, at 1. For a discussion of how President Clinton's approach to religion differs from his predecessor, see Michael Hirsley, *New White House, New Religion Agenda*, CHI. TRIB., Mar. 7, 1993, at C1.

by Rep. Charles E. Schumer (D-N.Y.)[200] and Representative Chris Cox (R-Cal.) and referred to the House Committee on the Judiciary on March 11, 1993.[201] Also on March 11, 1993, Sen. Edward Kennedy (D-Mass.) reintroduced H.R. 1308's companion bill, S. 578, and referred it to the Senate Judiciary Committee.[202] Senator Kennedy noted that more than fifty cases had been decided against free exercise claimants since *Smith* and that religious freedom was increasingly threatened with each day that *Smith* continued to be law.[203] Senator Kennedy also expressed his appreciation to the new Clinton administration for its support of the bill.[204]

Consequently, the House Subcommittee on Civil and Consti-

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200 Stephen Solarz, author and original sponsor of the RFRA, was no longer a member of the House of Representatives at the time of the RFRA's third introduction. Todd S. Purdum, *Solarz, Who Made Enemies, Pays the Price in a Lost Job*, N.Y. TIMES, Mar. 20, 1994, at 33. His 1992 electoral defeat has been attributed to his involvement in the House of Representatives Bank scandal (he made 743 overdrafts) and to his unpopularity among peers, who eliminated his district when New York lost three Congressional seats based on the 1990 Census. *Id.* More recently, Solarz, an expert on Asian affairs who had supported Clinton in the 1992 presidential election, was to have been rewarded with an Ambassadorship to South Asia. *Id.* However, as it came to light that Solarz had been involved with a Hong Kong businessman reputed to have ties with the Hong Kong mafia, the Clinton administration backed away from him, eventually offering him only an envoyship to the Sudan. *Id.*

201 139 CONG. REC. S2822 (daily ed. Mar. 11, 1993) (statement of Senator Kennedy noting the identities of the House sponsors of the RFRA and that there were 130 other sponsors of the bill in the House). Quick passage of the RFRA was a top priority for most religious lobbyists. *Freedom Act is Top Priority for Lobbyists*, ARIZ. REPUBLIC, Jan. 2, 1993, at C4. In fact, Rabbi David Saperstein of the Union of American Hebrew Congregations said it was their number one priority. *Id. See Bipartisan Religious-Liberty Bill Aims To Overturn Court Ruling*, ARIZ. REPUBLIC, Mar. 13, 1993, at B7.

202 139 CONG. REC. S2822 (daily ed. Mar. 11, 1993) (introduction of the RFRA of 1993 by Sen. Kennedy for himself, Sen. Hatch and 31 other sponsors); Holly Idelson, *Panel Approves Bill to Limit State Curbs on Religion*, 51 CONG. Q. 760 (Mar. 27, 1993).

203 139 CONG. REC. S2822 (daily ed. Mar. 11, 1993) (statement of Sen. Kennedy).

204 139 CONG. REC. S2823 (daily ed. Mar. 11, 1993) (text of the letter sent to Sen. Kennedy by President Clinton supporting passage of the RFRA). Pleased that Sen. Hatch and Reps. Schumer and Cox were planning to reintroduce the RFRA, President Clinton expressed his view that the free exercise of religion was one of the most fundamental rights protected by the Constitution. *Id.* Adding that the RFRA needed to be passed in order to restore protection of this right, he said he was looking forward to working with Congress to achieve this result. *Id.* At an interreligious prayer breakfast several months later, President Clinton assured Catholic, Jewish and Protestant that his administration was committed to passing the RFRA and he remarked that "[t]he fact that we have freedom of religion doesn't mean we need to try to have freedom from religion." *Clinton, Religious Leaders Share Thoughts, Breakfast*, RELIGIOUS NEWS SERVICE, Sept. 3, 1993, at 7.

tutional Rights approved by voice vote an unamended RFRA[205] for full consideration by the House Judiciary Committee on March 17, 1993.[206] On March 24, 1993, the House Judiciary Committee ordered the unamended bill reported to the full House by a vote of 35-0.[207]

The RFRA of 1993, S. 578, was approved 15-1 by the Senate Judiciary Committee on May 6, 1993.[208] Senator Alan K. Simpson (R-Wyo.), again the only dissenter, voted against the bill because of the concern among state attorneys generals that the bill might expand the rights of prisoners by increasing the number of exceptions to prison rules that must be granted to prisoners based on their religious beliefs.[209]

On May 11, 1993, under suspension of the rules, the full House passed the RFRA of 1993, H.R. 1308, by a two-thirds voice vote.[210] When the issue of prisoners' rights was again raised, the Representatives were assured that prisoners' rights were to remain unaffected under the bill.[211] Furthermore, they were informed that the bill was supported by Attorney General Janet Reno, who expressed that she was confident the courts would defer to prison officials when it came to security and disciplinary actions.[212]

On May 13, 1993, H.R. 1308 was received by the Senate from the House and placed on the Senate calendar.[213] The Senate con-

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205 H.R. REP. NO. 103-88, *supra* note 8 (no additional hearings on the bill were conducted in the 103d Congress).

206 139 CONG. REC. D241 (daily ed. Mar. 17, 1993) (statements of Rep. Kennedy & Rep. Hatch). *See also* Masci, *supra* note 190, at 676.

207 Idelson, *supra* note 202, at 760.

208 Jeffrey L. Katz, *Senate Judiciary Endorses Religious Freedom Bill*, 51 CONG. Q. 1160 (May 8, 1993). Originally, the Senate Judiciary Committee was scheduled to consider the bill in March, but Sen. Kennedy postponed it so that the bill's effects on prisons could be considered by prison officials. *Id. See generally* Adam Clymer, *Congress Ponders Bill to Protect Some Religious Practices*, N.Y. TIMES, May 10, 1993, at A16.

209 Jonathan Groner, *New Snag for Religion Bill*, LEGAL TIMES, May 17, 1993, at 15. The Federal Bureau of Prisons was also afraid that under the RFRA prisons would be required to grant special requests among prisoners that would lead to disciplinary problems among them. *Id.*

210 Idelson, *supra* note 3, at 1230.

211 139 CONG. REC. H2356 (daily ed. May 11, 1993) (statement of Judiciary Chairman Jack Brooks).

212 *Id.* (text of Attorney General Janet Reno's letter expressing her support for the RFRA).

213 139 CONG. REC. S5972 (daily ed. May. 13, 1993).

sidered S. 578 on October 26, 1993[214] and October 27, 1993.[215] Two amendments were submitted.[216] The first, by Senators Kennedy and Hatch, was a technical amendment designed to clarify that, under the RFRA, pre-*Smith* law was to apply and that only those governmental actions that placed *substantial* burdens on the free exercise of religion were obligated to meet the compelling interest test.[217] The body agreed to the amendment.[218]

The purpose of the second amendment, proposed by Senator Reid of Nevada, was to make the RFRA inapplicable to prisoners in federal, state or local prisons.[219] Senators supporting the Reid amendment expressed concern over two issues: the large number of civil cases that prisoners file and the fear that the RFRA would provide additional grounds upon which prisoners could bring suits, thereby creating burdens that prisons could not bear.[220] To

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214 139 CONG. REC. S14350 (daily ed. Oct. 26, 1993).

215 139 CONG. REC. S14461 (daily ed. Oct. 27, 1993).

216 139 CONG. REC. S14437 (daily ed. Oct. 26, 1993).

217 139 CONG. REC. S14352 (daily ed. Oct. 26, 1993) (Kennedy and Hatch Amendment No. 1982). In other words, under the RFRA, the government would not have to justify those actions that had only an incidental effect on free exercise, but rather, only those that constituted a substantial effect. *Id.*

218 *Id.* After the amendment was agreed to, Senator Hatch described three cases illustrating the need for the RFRA's passage to curtail the erosion of free exercise rights under *Smith*: 1) in *In re* Welfare of T.K., 475 N.W.2d 88 (Minn. Ct. App. 1991), the county government successfully petitioned the court to have two children removed from their parents' home, in which they were taught by their mother, because their mother refused to allow them to take a standardized test based on her religious beliefs; 2) in Greater New York Health Care Facilities v. Axelrod, 770 F. Supp. 183 (S.D.N.Y. 1991), the court upheld nursing home regulations that restricted volunteer services which violated plaintiffs' religious belief that mothers and fathers should be honored by performing for them these very services; 3) in Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991), the court, based on Smith, upheld zoning ordinances that effectively excluded from operation any church in the central business district. *Id.* at S14353.

219 *Id.* (Reid Amendment No. 1083). Sen. Reid opposed passing an unamended RFRA because he feared it would result in expanding prisoners' rights. *Id.* Thus, the purpose of his amendment was to make the RFRA inapplicable to First Amendment claims of persons incarcerated in federal, state, or local prisons. *Id.* Sen. Reid felt that applying the same judicial test to prisoners that applied to the rest of society would result in prisoners filing an avalanche of frivolous claims, as well put courts in a position of second-guessing the decisions of prison officials. *Id.*

220 *Id.* at S14354 (statement of Sen. Reid). Sen. Reid expressed his concern over the large number of federal cases filed by prisoners in the last year, which included 48,538 criminal cases and 49,939 civil cases. *Id.* In fact, prisoner litigation made up as much as 40% of some of the federal district court dockets. *Id.* Exacerbating the situation was the increase in the number of incarcerated prisoners while economic

bolster their argument, Senators provided examples of outrageous suits actually brought by prisoners under the guise of religious freedom, in addition to listing frivolous rights that prisoners could potentially claim under the RFRA.[221] Those advocating the Reid

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resources were dwindling. *Id. See also id.* at S14359 (text of letter to Utah Sen. Michel from the former U.S. Attorney for the Southern District of Ill., Frederick J. Hess, discussing the "historic rise" in prisoner litigation over the past 27 years). Wyoming Sen. Simpson, a co-sponsor of the Reid amendment, opined that the RFRA would result in the creation of new rights, "ones that could prove particularly helpful and useful to hardened criminals and prisoners." *Id.* at S14359 (statement of Sen. Simpson). "It would, therefore, deeply frustrate prison officials, prison discipline, and the courts." *Id.* at S14357. Another Congressman concerned that the RFRA would expand prisoners' rights warned that, "once again the courthouse doors are about to fly open as thousands will demand protection for religious practices as varied as the use of hallucinogenic drugs and animal sacrifice." *Id.* at S14516 (statement of Sen. Helms).

221 *See, e.g., id.* at S14354 (statement of Sen. Reid describing the case of Lawson v. Dugger). In *Lawson*, plaintiff Ben Yahweh, imprisoned for convictions of conspiracy to commit murder and racketeering, headed a bona fide religious sect, the Hebrew Israelites, which was headquartered at the Temple of Love in Miami, Florida. Lawson v. Dugger, 840 F.2d 781, 782 (11th Cir. 1987). Followers of the faith believe that African-Americans are descendants of the " 'lost tribe of Israel,' " that God is an African-American, and that mainstream religions have managed to conceal these truths from blacks. *Id.* One of the central beliefs of the Hebrew Israelites is that white oppression of blacks is their punishment for their failure to follow the commands of the Yahweh. *Id.* Thus, their published materials portray whites as the enemy and Ben Yahweh as their savior. *Id.* Prison officials refused to allow into Florida prisons publications that depicted mutilated, tortured and oppressed African-Americans. *Id.* Yahweh brought a class action against the Florida Department of Corrections to force them to allow the literature to be admitted into the prison and to let the Hebrew Israelites practice their faith as other religions did. Lawson v. Wainwright, 641 F. Supp. 312, 314 (1986). The district court ruled in Yahweh's favor. *Id.* at 330. *See also* 139 CONG. REC. S14353-58 (daily ed. Oct. 26, 1993) (statement of Sen. Simpson). After a protracted procedural history, the district court reaffirmed and readopted its initial findings. Lawson v. Dugger, No. 83-8409, 1994 U.S. Dist. LEXIS 1715, at *1 (S.D. Fla. Feb. 16, 1994).

In another example of an outrageous case brought by prisoners, inmates claimed their religion required a diet consisting of Porterhouse steak and sherry. 139 CONG. REC. at S14360 (text of letter sent to Sen. Simpson by O. Lane McCotter, Executive Director of the Utah Department of Corrections). There, prisoner Harry Theriault, a doctor of divinity by mail-order degree, formed the Church of the New Song. James J. Kilpatrick, *A Bad Ruling Corrected by a Good Bill*, BUFFALO NEWS, Nov. 19, 1993, at 3. When Theriault was denied these special dinner privileges, he sued the prison for breaching his free exercise rights. *Id.* Although the judge, who described the case as "sham" and "a masquerade," ultimately threw it out, the suit tied up federal courts for four years. *Id. See also* Church of New Song v. Establishment of Religion on Taxpayers' Money in Fed. Bureau of Prisons, 620 F.2d 648 (7th Cir. 1980).

In Illinois, prison officials have had to deal with gangs who claimed to be holding religious meetings, gang members who have hid weapons under religious garb, and

amendment did not want the RFRA's compelling interest test to displace the current lower standard applied to prisoners' free exercise claims.[222] This lower standard was articulated by the U.S. Supreme Court in *O'Lone v. Estate of Shabazz*.[223] They noted that the amendment was supported by all the state prison directors.[224]

Those Senators opposing the Reid amendment argued that these concerns could be adequately addressed under the compel-

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visitors who claimed to be clergymen. Michael Hirsley, *Prisons Fear Law to Restore Religious Rights*, CHI. TRIB., Aug. 1, 1993, at 1. One corrections officer feared that courts would not be willing to question groups claiming religious status and that gangs would take advantage of such a situation. *Id.*

Potentially frivolous claims that Sen. Simpson felt prisoners might be able to bring under the RFRA included: the right to perform animal sacrifice, the right to wear certain clothing or the right to pray multiple times per day. 139 CONG. REC. S14357-58 (daily ed. Oct. 26, 1993) (statement of Sen. Simpson).

222 *Id.* at S14356 (statement of Sen. Reid). Agreeing with Mary Schnabel's article in the Willamette Law Journal, Sen. Reid argued that to apply to prison regulations the same legal standard applied to laws outside prisons was "impractical and contrary to two decades of case law." *Id.* at S14357. *See also* Mary Schnabel, The Religious Freedom Restoration Act: A Prison's Dilemma, 29 WILLAMETTE L. REV. 323 (1993). Nevada Attorney General Frankie Sue Del Papa held a similar view, remarking that "[t]hese are not Holiday Inns we're running. . . [t]hese are the institutions where we put our most dangerous people. And a different set of rules should apply." Mark Hansen, *Religious Freedom Act Worries AG's*, ABA J., Feb. 1994, at 20.

Before the *O'Lone* decision, the Court had balanced inmates' free exercise rights against the penological concerns of the institution. S. REP. NO. 103-111, *supra* note 11, at 1899. The burden on the inmate's right would be upheld only if the institution's concern was of the "highest order." *Id.* (citing Weaver v. Jago, 675 F.2d 116, 119 (6th Cir. 1982)). However, that standard was changed in *O'Lone*, when the Court held that prison regulations were constitutional so long as they were "reasonably related to legitimate penological interests." O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987). The Court held that the following factors were to be considered in this analysis: (1) whether there is a reasonable relationship between the regulation and the prison administration's interest; (2) whether the prisoner has some other method by which to exercise his religious right; (3) the impact accommodating the right would have on other prisoners, personnel and resources; and (4) the absence of an alternative means of accommodation as evidence of reasonableness of regulation. *Id.* at 350-53. *See also* H.R. REP. NO. 103-88, *supra* note 8, at 6-7; 139 CONG. REC. S14353-54 (daily ed. Oct. 26, 1993) (statement of Sen. Reid).

223 482 U.S. 342 (1987).

224 139 CONG. REC. S14355-56 (daily ed. Oct. 26, 1993) (text of letter signed by all 50 state prison directors and two former Directors of the Federal Bureau of Prisons expressing their view that passage of the RFRA would jeopardize prison safety due to the burden that an increase in prisoner litigation would have on resources and that this concern was not adequately addressed because not one prison administrator testified on the bill). They demanded that they be given greater ability to reject religious demands of prisoners. Feldmann, *supra* note 20, at 1. *See also Officials Say Religion Bill Would Hamstring Prison Operations*, STAR TRIB., Sept. 7, 1993, at 6A.

ling interest test.[225] Courts have always considered prison order, safety, security and discipline as compelling, and they would continue to do so under the RFRA.[226] Furthermore, prisoners also have the right to freely exercise their religion and, in fact, should be encouraged in such endeavors.[227] The amendment's supporters also pointed out that both President Clinton and Attorney General Reno supported the RFRA without amendment,[228] as did thirteen State Attorneys General.[229] Those opposed to the Reid amendment convinced enough Senators to vote with them such that the amendment was defeated by a vote of 58-41.[230]

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225 *See* Hansen, *supra* note 222, at 20. An ACLU representative characterized the fears of those supporting the Reid amendment as "uninformed" and "terribly overblown." *Id.*

226 139 CONG. REC. S14362 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). Sen. Hatch was confident that the courts would be able to distinguish bona fide religious claims from attempts by prisoners to gain special benefits. *Id.* For example, when a prisoner was ordered to attend a meeting for alcoholics, the court rejected the prisoner's claim that his free exercise rights were being violated because the program made a reference to God. S. REP. NO. 103-111, *supra* note 11, at 1900.

Furthermore, courts would continue to defer to prison administrators' expertise and experience. *Id.* Therefore, despite the fact that the RFRA overruled the lower *O'Lone* standard, prison authorities would find that the compelling interest standard was workable. *Id.* at 1901.

The bill's supporters were afraid that the addition of this one amendment would result in other groups demanding amendments, which would ultimately kill the bill. Feldmann, *supra* note 20, at 14.

227 139 CONG. REC. S14351 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy). Sen. Kennedy stated that "[t]he guarantee of freedom of religion protected by the first amendment contains no exemptions, and this legislation should contain no exemptions." *Id.* at S14363. Sen. Hatch felt that the Reid amendment would "deprive many prisoners of their religion in a misguided attempt to address the prisoner litigation crisis." *Id.* (statement of Sen. Hatch). To illustrate the positive impact of religion on prisoners, Sen. Hatch discussed how prisoners who attended prison fellowship ministry programs were less likely to be repeat offenders than those who did not attend. *Id.* at S14362. He also noted that many religious organizations have expressed opposition to the amendment. *Id.* An objection was raised to corrections' officials having total discretion to decide whether prisoners' claims were valid. *Religious Freedom in Prison*, CHI. TRIB., Oct. 11, 1993, at 12.

228 139 CONG. REC. S14351 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy including text of Attorney General Janet Reno's letter to Sen. Kennedy opposing any amendment to the RFRA).

229 *Id.* at S14351 (text of letter to the Senators and text of separate letter to Sen. Kennedy and Sen. Hatch from Robert Abrams supporting an unamended RFRA, which, in its current form, properly balances the free exercise rights of prisoners against the interests of prison administrators).

230 139 CONG. REC. S14468 (daily ed. Oct. 27, 1993). Sen. Rockefeller was absent. *Id.* Sen. Reid, not yet ready to give up on the amendment, said he might introduce it as separate legislation or propose it as an amendment to another bill. Holly Idelson,

The Senate passed the amended RFRA by the large margin of 97-3.[231] The House of Representatives considered and accepted the Senate amendment to the RFRA on November 3, 1993.[232] President Clinton enthusiastically signed the RFRA of 1993 into law on November 16, 1993.[233] It was designated Public Law 103-141.[234]

Senate Passes Bill Strengthening Religious Freedom Protections, 51 CONG. Q. 2984 (Oct. 30, 1993).

231 139 CONG. REC. S14470 (daily ed. Oct. 27, 1993). One writer commented that the RFRA "snubs Scalia and upholds O'Connor." Kilpatrick, *supra* note 104, at 3. A representative of the American Jewish said that Congress had not done this much for religious freedom since it adopted the First Amendment. *Senate Approves Bill Bolstering Religious Freedom*, CHI. TRIB., Oct. 28, 1993, at 4.

232 139 CONG. REC. H8173 (daily ed. Nov. 3, 1993).

233 President Clinton appeared with Vice-President Al Gore before 200 religious and civil liberty leaders to sign the RFRA on the South Lawn. Mark Silk, *New Law Overturns Supreme Court, Expands Freedom to Practice Religion*, ATLANTA J. & CONST., Nov. 20, 1993, at E8. President Clinton thanked all those who worked to pass the bill, including the Coalition for the Free Exercise of Religion. President's Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993). Noting the many friendships that had been formed between people of different religions and ideological backgrounds while working on the bill, he said that "the power of God is such that even in the legislative process miracles can happen." *Id.* President Clinton claimed that the signing of this bill was more than just a ministerial task as bill signings often are because of the importance of protecting religious freedom, our most precious right. *Id.* Reestablishing the prior standard, he felt, was more "consistent with the intent of the Founders of this Nation" than was the Supreme Court's *Smith* decision. *Id.* "They knew that religion helps to give our people the character without which a democracy cannot survive." *Id.* Thus, it was proper for the Congress to take the extraordinary measure of reversing "legislation by legislation." *Id.*

See A Victory for Religious Freedom, ST. PETERSBURG TIMES, Nov. 20, 1993, at 18A; David E. Anderson, *Signing of Religious Freedom Act Culminates 3-Year Push*, WASH. POST, Nov. 20, 1993, at C6 (in which one religious leader commented that "[t]oday we celebrate the end of this dark night."); *Clinton Signs Religious Freedom Bill*, DAILY LAB. REP., Nov. 17, 1993; *American Jewish Congress Hails Enactment of RFRA at Post-Signing Ceremony Press Conference*, PR NEWSWIRE, Nov. 16, 1993; Peter Steinfels, *Clinton Signs Boost for Religious Freedom; Liberals, Conservatives Back New Law*, HOUS. CHRON., Nov. 17, 1993, at A6.

After the signing of the RFRA, religious groups warned that they needed to remain vigilant to ensure that the bill worked. Larry Witham, *Religious Freedom Bill Signed, But Groups Warn Against Lapse*, WASH. TIMES, Nov. 17, 1993, at A4. They predicted that the bill would be tested in communities and courts. *Id.*

Based on their increased use of religious references in their speeches since the RFRA was signed, some close to the Clintons feel they are experiencing spiritual development. Deborah Mathis, *Clinton Brings Religion Back To White House*, GANNETT NEWS SERVICE, Dec. 3, 1993.

234 Act of Nov. 16, 1993, Pub. L. No. 103-141, § 3(a), 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. § 2000bb).

B. *Analysis of the Religious Freedom Restoration Act*

The RFRA prohibits the government from passing laws that burden the free exercise rights of individuals, even if that law is generally applicable.[235] In this context, a burden has been defined as a "substantial external impact" on a religious practice.[236] Even those laws that neither coerce a person into violating his or her religious beliefs nor penalize citizens by depriving them of rights, benefits or privileges may burden religion and are hence subject to the RFRA.[237] The Courts are directed to free exercise decisions before *Smith*, such as *Sherbert v. Verner*,[238] and *Wisconsin v. Yoder*,[239] for guidance in determining that which constitutes a burden.[240]

The only instance in which a burden on a free exercise claimant will be permitted is when the government demonstrates that it is advancing a compelling state interest *and* that it has chosen the narrowest means of achieving this end.[241] In determining whether a compelling governmental interest exists, or whether the least restrictive means possible has been employed, the courts should be

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235 *Id.* Section 3(a) states that: "IN GENERAL.-Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." *See* H.R. REP. No. 103-88, *supra* note 1, at 1; S. REP. No. 103-111, *supra* note 11, at 1893.

236 H.R. REP. No. 103-88, *supra* note 8, at 6. The Senate Judiciary Committee wrote that "only those laws placing a substantial burden on free exercise are subject to the compelling interest test." S. REP. No. 103-111, *supra* note 11, at 1898. In other words, those laws having only an incidental effect are not subject to the RFRA. *Id.* Not subject to the RFRA are regulations concerning the government's management of its internal affairs and its use of resources. *Id.*

237 H.R. REP. No. 103-88, *supra* note 8, at 6. *See* S. REP. No. 103-111, *supra* note 11, at 1894 (free exercise can be burdened "not only by Government actions singling out religious activities for special burdens, but by governmental rules of general applicability which operate to place substantial burdens on individuals' ability to practice their faiths.").

238 374 U.S. 398 (1963).

239 406 U.S. 205 (1972).

240 H.R. REP. No. 103-88, *supra* note 8, at 7. Members of the Senate Judiciary Committee emphasized that they did not disapprove pre-*Smith* law or any particular free exercise decision. S. REP. No. 103-111, *supra* note 11, at 1898.

241 Act of Nov. 16, 1993, Pub. L. No. 103-141, § 3(b) 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. § 2000(b). As stated, "[g]overnment may 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.*

guided by free exercise decisions prior to *Smith*.[242] The bill was not designed to codify any particular decision, but rather, to restore the compelling governmental interest test as a legal standard[243] and to provide a claim or defense to anyone whose free exercise rights have been infringed.[244]

C. *Constitutional Issues*

Much of the discussion of the RFRA has focused on the question of whether Congress has the authority to overrule an interpretation of the Constitution issued by the Court.[245] Supporters of the

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242 139 CONG. REC. H8713 (daily ed. Nov. 3, 1993).

In addition to *Sherbert* and *Yoder*, another case often cited when the Court has rejected the government's claim of a compelling state interest is Thomas v. Review Bd., 450 U.S. 707 (1981) (Jehovah Witness who refused to manufacture weapons because it was against his religion was unconstitutionally denied unemployment benefits). *See, e.g.*, S. REP. No. 103-111, *supra* note 11, at 1895 n. 8. An often-cited example of a case in which the Court found the government to have a compelling interest is Hernandez v. Commissioner, 490 U.S. 680 (1989) (when Court ruled that taxpayer was not entitled to deduct cost of religious classes from his income for federal tax purposes, the opinion's author stated that he "doubt[ed] that the burden is substantial and even if it is, it is justified by the public's interest in a sound tax system.") *Id.* For an analysis of the use of the compelling interest test, see Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U.L. REV. 917. Gottlieb observes that there has been extensive commentary concerning fundamental rights of citizens, but very little discussion on the government's interests in restricting these rights. *Id.* at 917. He believes the sources of both fundamental rights and governmental interests are the same and that they are on equal par. *Id.* at 918.

Cases illustrative of the "most narrowly tailored" concept include: Schneider v. Town of Irvington, 308 U.S. 147 (1939) (prohibition of distribution of handbills to prevent littering violative of free speech and free press because a less restrictive means, such as prohibiting fraud or trespass, could be employed); Martin v. Struthers, 319 U.S. 141 (1943) (statute prohibiting door-to-door distribution of leaflets violated Jehovah Witness' and homeowners' freedoms of press and speech); Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring state-school teachers to disclose every organization they belonged to in the previous five years held to be a violation of teachers' free association rights because regulating the competency and fitness of teachers could be achieved in a less intrusive manner).

243 H.R. REP. No. 103-88, *supra* note 8, at 7. Therefore, the compelling interest test should not be construed any more stringently or leniently than it had been prior to *Smith*. S. REP. No. 103-111, *supra* note 11, at 1898.

244 S. 578, 103d Cong., 1st Sess. § 2 (1993).

245 *See generally 1990 House Hearings*, *supra* note 1, at 72-79 app. 3 (1990) (letter to Chairman Don Edwards from Douglas Laycock, Alice McKean Young Regents Chair in Law, School of Law, University of Texas at Austin, arguing that such legislation is constitutional); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?* 15 HARV. J.L. & PUB. POL'Y 181 (1992);

RFRA claim that while it might seem "anomalous at first blush," the bill is not actually overruling the Court's decision in *Smith*.[246] Rather, it is creating "a statutory right where the Court declined to create a constitutional right."[247] The drafters of the RFRA believe that this Congressional authority to enact a law providing more protection to a constitutional right arises out of two sources: section 5 of the Fourteenth Amendment[248] and the Necessary and Proper Clause.[249] Cited as support for this proposition is *Katzenbach v. Morgan*.[250] In *Katzenbach*, the Court ruled that Congress may pass "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view."[251] However, there are several limitations on this power.[252] First, Congress may not abridge a protection provided for in the Bill of Rights while attempting to enforce another of those rights.[253] Second, Congress may not abridge another constitutional grant of power.[254] Third, Congress may not "assert its section 5 powers as a sham to achieve ends unrelated to the Fourteenth Amendment."[255]

The RFRA does not abridge another protection afforded by the Bill of Rights, nor does it abridge another Constitutional grant

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Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?* 141 U. PA. L. REV. 1029 (1993). *Contra* Ira C. Lupu, Article, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993) (many questions remain unanswered concerning statutes that use the language of the Constitution).

246 *1990 House Hearings*, *supra* note 1, at 72-79 app. 3 (1990) (letter to Chairman Don Edwards from Douglas Laycock, Alice McKean Young Regents Chair in Law, School of Law, University of Texas at Austin, arguing that such legislation is constitutional).

247 *Id.* at 73.

248 U.S. CONST. amend. XIV, § 5. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Id.*

249 H.R. REP. No. 103-88, *supra* note 8, at 9. *See* U.S. CONST. art. I, § 8, cl. 18. The last of the enumerated rights of the Congress is "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

250 384 U.S. 641 (1966). *See also* H.R. REP. No. 103-88, *supra* note 8, at 73. The House Committee on the Judiciary also cites the following cases as authority for the proposition: South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Thornburgh v. Gingles, 478 U.S. 30 (1986).

251 Katzenbach v. Morgan, 384 U.S. at 650.

252 H.R. REP. No. 103-88, *supra* note 8, at 75-78.

253 *Id.* at 75.

254 *Id.* at 76.

255 *Id.* at 75.

of power, and it is not an attempt to achieve some end not protected by the Fourteenth Amendment.[256] Because the RFRA does not violate these principles, its proponents argue that Congress has the authority to pass it.[257]

D. *The Effect of the Religious Freedom Restoration Act on Free Exercise Jurisprudence*

Supporters of the RFRA urged that the bill be passed as quickly as possible since between fifty and sixty cases had already been decided against free exercise litigant's since *Smith*.[258] However, trying to avoid being seen as condoning peyote use, legislators emphasized that they were unsure as to whether the outcome in *Smith* would have been the reverse if the RFRA had been law.[259] The outcome in *Smith* under the RFRA would depend upon the Court's assessment of whether Oregon had a compelling state interest in controlling drug use and whether the statute was the least restrictive means of achieving that interest.[260] Therefore, it is diffi-

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256 *Id.* at 77-78.

257 *Id.* at 78.

258 Professor Douglas Laycock remarked that the lower courts were taking the *Smith* decision "for all it's worth." Marcus, *supra* note 171, at A1. J. Brent Walker predicted that the government would almost always win under *Smith's* reasonableness test. *Id.*

Examples of other decisions since *Smith* adverse to free exercise litigants include: American Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808 (9th Cir. 1991) (federal statute requiring employers to verify that their employees are not legal immigrants not a free exercise violation despite fact that Quakers believe they should not deny people the means by which to feed and clothe themselves); *In re* Chinske, 785 F. Supp. 130 (D. Mont. 1991) (government does not have to show a compelling interest in issuing grand jury subpoena even though testifying is against petitioner's religious beliefs); New Life Gospel Church v. Dept. of Community Affairs, 257 N.J.Super. 241 (N.J. Super. Ct. App. Div. 1992) (fee imposed by administrative department on church-owned and church-operated school did not constitute a burden on free exercise rights).

259 One writer suggested that, even though more than 68 religious and civil liberties groups backed the RFRA, the public has not really been aroused over *Smith* because the issue of peyote use was "too exotic for most rank-and-file religionists." Gustav Niebuhr, *Disparate Groups Unite Behind Civil Rights Bill on Religious Freedom*, WASH. POST, Oct. 16, 1993, at A7.

One member of Congress objected to a headline that suggested he promoted the use of peyote among Indians just because he supported the RFRA. Editorial by Morris K. Udall, *Bill Not Aimed At Peyote, But At Religious Freedom*, PHOENIX GAZETTE, Aug. 3, 1990, at A13. Pointing out that the legislation did not even contain the word peyote, he said that the headline did not relate to the intent of the bill. *Id.*

260 As stated previously, Justice O'Connor ruled in her concurrence that Oregon had a compelling interest in controlling drug use and therefore the burden placed on

cult to assess the effect that the RFRA would have had on these post-*Smith* cases. However, judges in several post-Smith decisions indicated that, had it not been for *Smith*, the free exercise plaintiffs would have prevailed.[261]

One case that would likely have been resolved in favor of the free exercise plaintiffs under the RFRA is *Yang v. Sturner*,[262] which involved the Yangs, a Hmong couple.[263] Three days after suffering a seizure in his sleep, the Yang's son died.[264] Pursuant to a state law requiring the performance of autopsies in unusual or suspicious deaths, the chief medical examiner performed an autopsy on the Yangs' son without obtaining their consent.[265] Since the

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the plaintiff's free exercise rights was constitutional. *Smith*, 494 U.S. at 904 (O'Connor, J., concurring). On the other hand, Justice Blackmun ruled in his dissent, joined by Justices Brennan and Marshall, that Oregon should grant the plaintiff's an exemption from the statute. *Id.* at 906 (Blackmun, J., dissenting).

Marc Stern, of the American Jewish Congress commented that under the RFRA, religious groups would not automatically win, but as the law is under *Smith*, there remains no room for argument. Ruth Marcus, *supra* note 171, at A1.

261 *See, e.g.*, Yang v. Sturner, 728 F. Supp. 845 (D.R.I. 1990) (*Yang I*) and Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (*Yang II*); First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990).

262 *Yang I*, 728 F. Supp. 845 (D.R.I. 1990).

263 Hmong "hill tribers" of Southeast Asia fought against the communists in Laos as part of a secret army organized by the U.S. Central Intelligence Agency during the Vietnam War. Lee Kravitz, *This is Just a Waiting Place*, SCHOLASTIC UPDATE, Oct. 18, 1991, at 14. Upon the withdrawal of U.S. troops, a communist government took over Laos, thus causing many of the Hmong to flee to the U.S., where they are officially recognized as political refugees. *Id.* The over 100,000 Hmong who have relocated here since 1975 have had difficulty assimilating into society, perhaps more than any group immigrating to the U.S. Daniel Golden, *Passing the Torch*, BOS. GLOBE, Oct. 13, 1991, at 20. This difficulty can be attributed to the fact that they did not have a written language until the 1950s, which has impeded their mastery of the English, and to the fact that their cultural beliefs are so different from those in the United States. *Id.* For example, tribal leaders make almost every decision, boys and girls do not touch one another, and girls are raised believing all their worth comes from marriage, children and serving their husbands. Kravitz, *supra*, at 14-15. In fact, according to tribal customs, girls are married as soon as they reach puberty so that they can begin producing sons as quickly as possible. Golden, *supra*.

264 *Yang I*, 728 F. Supp. at 846. He died from a mysterious affliction known as Sudden Unexpected Night Death Syndrome, which strikes southeast males. Ken Ross, *Medical Examiner Faulted for Autopsy*, UPI, Jan. 16, 1990. One-hundred ten deaths have been attributed to the syndrome according to the U.S. Centers for Disease Control. *Id.* Victims, who are otherwise healthy, suddenly die while asleep. Kravitz, *supra* note 263, at 15.

265 *Yang I*, 728 F. Supp. at 846. *See also* R.I. GEN. LAWS § 23-4-7 (1989). Under this law, medical examiners in Rhode Island were authorized to investigate deaths only if they have a reasonable belief that the manner of death could be pronounced as:

Hmongs hold a strong religious belief that human bodies should not be mutilated, the Yangs were understandably distraught upon learning that an autopsy had been performed on their son.[266] In the liability phase of the bifurcated trial, the district court judge, applying the compelling interest test, granted the Yang's summary judgement motion on the grounds that their free exercise rights had been violated and that the state's interest in protecting the public from infectious agents was not compelling, nor was it the least restrictive means of accomplishing the interest.[267] However, before the damages part of the trial was conducted, *Smith* was decided.[268] According to *Smith's* test of neutrality and general applicability, the district court judge felt compelled to reverse his decision, even though he regretted doing so.[269] Thus, were it not

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(1) Death by homicide, suicide, or casualty;
(2) Death due to criminal abortion;
(3) Death due to an accident involving lack of due care on the part of a person other than the deceased;
(4) Death which is the immediate or remote consequences of any physical or toxic injury incurred while the deceased person was employed;
(5) Death due to the use of addictive or unidentifiable chemical agents; or
(6) Death due to an infectious agent capable of spreading an epidemic within the state.

Yang I, 728 F. Supp. at 847.

266 *Yang II*, 750 F. Supp. 558 (D.R.I. 1990). The Hmong believe that they meet with their ancestors after death. Golden, *supra* note 263, at 20. Fearful that their bodies will not be recognized or reincarnated if lacerated or mutilated, they are adamantly opposed to autopsies being performed on their bodies at death. *Id.* They also believe that when a spirit is prevented from leaving a body because it is mutilated, that spirit goes after another body. Kravitz, *supra* note 263, at 15. Some Hmong believe this is at the root of Sudden Unexpected Death Syndrome. *Id.*

267 *Yang I*, 728 F. Supp. at 855-57.

268 *Yang II*, 750 F. Supp. at 558.

269 *Id.* at 559-60. Senior District Judge Pettine wrote in his decision that he had been on firm legal ground when he decided *Yang I*, but in light of *Smith* he had to withdraw his earlier opinion. *Id.* at 560. He could not do this without first expressing his "profound regret" and his "own agreement with Justice Blackmun's forceful dissent." *Id.*

In a similar decision, Montgomery v. Michigan, despite the fact that an autopsy was performed on a Jewish boy without his mother's consent and in violation of their religious beliefs, the court found that no free exercise violation had occurred because the law pursuant to which the autopsy was performed was neutral and generally applicable. 743 F. Supp. 1253, 1259 (W.D. Mich. 1990). On appeal, the district court's opinion was affirmed. Montgomery v. Michigan, No. 90-1940, 1991 U.S. App. LEXIS 19070, at *7 (6th Cir. Aug. 9, 1991) (not recommended for full-text publication). *See also* Stephen Chapman, *Restoring the True Meaning of Religious Freedom*, CHI. TRIB., Apr. 16, 1992, at 27.

for *Smith*, it seems that the Yangs would have prevailed.

In another decision directly affected by *Smith*, *First Covenant Church v. City of Seattle*,[270] the plaintiffs ultimately prevailed, but not until the court found alternate grounds upon which to base its decision. Ruling before *Smith* was decided, the Washington Supreme Court found a landmark zoning law to be violative of the free exercise rights of churches based on *Sherbert's* compelling interest test.[271] After deciding *Smith*, the Supreme Court granted certiorari, vacated the Washington Supreme Court's judgment, and remanded the case for further deliberation in light of the holding in *Smith*.[272] In reconsidering its decision, the Washington Supreme Court distinguished *Smith* on three grounds: first, *Smith* involved the use of the state's police power, while *First Covenant Church* did not; second, the landmark ordinances at issue were not neutral and not generally applicable; and third, at stake in *First Covenant Church* were both free exercise rights and free speech rights and therefore, the case fell within *Smith's* hybrid exception.[273] Based on this analysis, the court reinstated its decision ruling that the landmark ordinances violated both the federal and the state constitutions.[274]

Smith not only affected the decisions of courts, but the decisions of at least one administrative agency as well. For example, in order to accommodate the religious beliefs of its Amish and Sikh employees, the Occupational Safety and Health Administration ("OSHA") had granted the two groups an exemption from complying with the requirement that employees wear hard hats while working.[275] However, despite no evidence that anyone had ever been injured because of not wearing a hard hat, relying on *Smith*, OSHA withdrew the exemption.[276]

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270 787 P.2d 1352, 1361 (Wash. 1990).

271 *Id.*

272 499 U.S. 901 (1991).

273 *First Covenant Church*, 840 P.2d at 174.

274 *Id.* at 185. Even though *First Covenant Church* had been distinguished from *Smith*, due to *Smith's* "uncertainty," the Court did not feel comfortable basing its decision solely on federal grounds. *Id.* Therefore, the court also relied on the Wisconsin Constitution, noting that states had the option of conferring even greater protection of rights than does the Federal Constitution. *Id.* at 185-97.

275 Amy Adelson, *Atoning for the High Court's Breach of Faith*, N.J.L.J., Dec. 27, 1990, at 8. Sikhs wear turbans. Marcus, *supra* note 171, at A1.

276 Adelson, *supra* note 269, at 8. *See also* OSHA Notice CPL 2. (Nov. 5, 1990).

Thus, if the RFRA reinstates the compelling interest test as it existed prior to *Smith* as its authors intend, it appears that the act will at minimum be a factor in the analysis of free exercise cases. Under the RFRA, cases similar to *Yang v. Sturner* will likely be decided in favor of the free exercise litigants rather than in favor of the government as they would under *Smith's* regime.

V. Conclusion

The exact effect RFRA will have on free exercise jurisprudence is as yet unknown. Its supporters claim it will simply restore the compelling interest test. Its critics fear that it will give free exercise claimants more rights than they had prior to *Smith*. Others feel the RFRA does not go far enough in protecting free exercise rights and would instead have preferred that the Court overrule *Smith* in favor of a jurisprudence affording more protection than does the compelling interest test.[277]

The possibility exists that the Court may reexamine *Smith*, but this is by no means likely.[278] In the interim, absent the RFRA, the

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[277] *See generally* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992) (arguing that the civil liberties paradigm within which pre-*Smith* jurisprudence operated protected counter-cultural religious conduct, but not acculturated religion, i.e., religious conduct that is so engaged with the surrounding society that it loses it religious quality, e.g., efforts by a church to address social problems; courts can better protect free exercise claims if the government is forced to examine acculturated conduct by giving this conduct the benefit of a presumption that the challenged regulation burdens religion); McConnell, *supra* note 140, at 1451-52, 1488-90 (arguing that compelling interest standard should be replaced by standard that government can only infringe upon conduct repugnant to "peace and safety of state"); Ryan, *supra* note 4, at 1443-46 (more effective approaches to protecting religious freedom include: 1) avoiding the *Smith* holding by qualifying as a "hybrid" claim, thus evoking compelling interest analysis or by arguing that regulation at issue targets religion; or 2) by concentrating the efforts of religious organizations on gaining exemptions to legislation for religious activities and then convincing the courts that particular forms of religious conduct fall within these exemptions).

[278] Several Supreme Court Justices have indicated a willingness to overrule, or at least revisit, the *Smith* decision. Justice O'Connor would restore the compelling interest analysis as indicated in her concurrence in *Smith*. 494 U.S. at 907 (O'Connor, J., concurring). So would Justice Blackmun, as indicated in his dissent in *Smith*. *Id.* at 907-09 (Blackmun, J., dissenting). Two justices not sitting on the Court at the time of the *Smith* decision may also be willing to reexamine the case. Justice Souter intimated in his concurrence in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, that he would be willing to reexamine and even overrule *Smith*. 113 S. Ct. 2247-50 (Souter, J., concurring). *See also* 136 CONG. REC. S17,297 (daily ed. Oct. 26, 1990) (Sen. Biden, in questioning Justice Souter about *Smith*, noted that the trend among legal scholars was to embrace Justice O'Connor's concurrence in *Smith*; Justice Souter responded

government had free reign to trample on the free exercise rights of religious claimants without being held accountable.[279] This was illustrated in both *Yang* and *First Covenant Church*, as well as in the OSHA incident. Thus, in forming an opinion about the RFRA, the emphasis should not be upon the shortcomings of the compelling interest test, but rather on the improvement of the position of free exercise litigants under the RFRA as compared to that under *Smith*, even if the outcome in only a few cases is actually affected. And if nothing else, the RFRA's passage sends a symbolic message to both the Supreme Court and the government that the public and Congress will not tolerate the withdrawal of a constitutional right as fundamental as the right to freely exercise one's religion.

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that he saw no reason to question the compelling interest test). Justice Ruth Bader Ginsberg has also indicated her strong support of First Amendment rights as evidenced in her impassioned dissent from the majority's decision to deny a free exercise plaintiff's motion for a rehearing in Goldman v. Secretary of Defense, 739 F.2d 657, 658-60 (D.C. 1984).

In *Goldman*, the plaintiff, an ordained rabbi and Orthodox Jew, was a member of the military. 734 F.2d 1531, 1532 (D.C. 1984), *reh'g denied*, 739 F.2d 657 (D.C. 1984). Plaintiff had worn his traditional yarmulke for over 10 years of his exemplary military career without event. *Id.* at 1532-33. However, in 1982, he was informed that the presence of the yarmulke violated the military dress code and was thus ordered to cease wearing it. *Id.* at 1533. The court found that, despite the fact that the yarmulke was small and unobtrusive, the Air Force's interest in uniformity of dress outweighed Goldman's free exercise claim *Id.* at 1540. Dissenting from that court's decision not to rehear Goldman's case, Judge Ginsberg wrote that Goldman's treatment was patently unconscionable and that the First Amendment meant more than just a strong and free press, more than the right to assemble peaceably and more than preventing the National Government from establishing a state religion. *Goldman*, 739 F.2d at 657 (Ginsberg, J., dissenting). She wrote that "[i]t means the inalienable right of all our people as free men and women to worship God. That is what this country is all about." *Id.* at 660. Therefore, the possibility exists that four sitting Supreme Court justices, the number of votes needed to hear a case, would reexamine the compelling interest test if provided such an opportunity.

279 For example, members of the Christian Science Church, who believe in spiritual healing rather than traditional medical treatment, are hopeful that the RFRA will discourage the state from intervening in their religion. Feldmann, *supra* note 20, at 1. On the other hand, a church official did not think the RFRA would have much impact on cases involving zoning disputes, such as when local residents fight the establishment of church programs because they attract the poor and the mentally ill to their neighborhoods. Laurie Goodstein, *A Mission Not All Will Embrace: "Not In My Back Yard" Attitude Impedes Church Efforts For Poor*, WASH. POST, Oct. 21, 1993, at A1. In such a case, the government can legitimately regulate to ensure the safety of families. *Id.*