EMPLOYMENT DIVISION V. SMITH AND THE NEED FOR THE RELIGIOUS FREEDOM RESTORATION ACT

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INTRODUCTION

No one saw it coming. Attorneys who litigated religious liberty cases prior to 1990, had no idea that the Supreme Court of the United States was about to demolish the free-exercise standard that it had clearly and repeatedly upheld since 1963. Nonetheless, when the Supreme Court handed down its decision in *Employment Division v. Smith*,[1] a case most considered relatively insignificant, that is exactly what happened. As news of the decision spread, most constitutional attorneys, regardless of their ideological persuasion, agreed that religious freedom had suffered a severe blow. To this day, most constitutional scholars, conservative and liberal, are critical of *Smith*.[2] Only a tiny minority believe that *Smith* was rightly decided.[3]

The Supreme Court's decision in *Smith* overturned three decades of legal precedent protecting the free exercise of religion. Before *Smith*, the Supreme Court treated free-exercise as a fundamental right and applied the "compelling state interest"

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1. 494 U.S. 872 (1990).

2. Fifty-five legal scholars petitioned the Supreme Court to rehear *Employment Division v. Smith* because they thought it was wrongly decided. *See infra* note 44 and accompanying text.

3. See William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 308 (1991), for a discussion in favor of the *Smith* rule. *See also* Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT L. REV. 7 (1995).

test to decide free-exercise cases. That test required the government to justify any state action that imposed a significant burden upon an individual's religiously motivated conduct by showing that the state action was necessary to further a compelling state interest, and that it employed the least restrictive means to achieve that interest. *Smith* changed all that by significantly shrinking constitutional protection for the free exercise of religion. According to the *Smith* rule, a religious adherent cannot successfully challenge a law under the Free Exercise Clause, even if the religiously motivated practice is banned altogether, so long as the law is neutral vis-à-vis religion and applies generally to everyone.[4] Justice Scalia, author of the majority opinion, went so far as to say that the Free Exercise Clause is not even implicated in such cases.[5] Now, the only time a religiously motivated actor, whose conduct is burdened by a neutral law of general application, may call upon the protection of the Free Exercise Clause, is in a case where the law also violates another fundamental right, such as the freedom of speech, the freedom of the press, or the right of parents to direct the education of their children—the so-called "hybrid situations."[6]

Smith relegated our national commitment to the free exercise of religion to the sub-basement of constitutional values. Indeed, the majority declared that treating the free exercise of religion as a fundamental constitutional freedom gave it too high a standard of legal protection; the free exercise of religion was a "luxury"[7] our nation could no longer afford. Fortunately, Congress disagreed. By enacting the Religious Freedom Restoration Act[8] (RFRA) in 1993, Congress restored the compelling state interest test to all cases where religious conduct suffers significant burdens, and returned the free exercise of religion to its proper place—first among freedoms.

This article reviews how the United States Congress, urged on by defenders of religious liberty, responded to the remarkable challenge of the *Smith* case. In Sections I through III, this article

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4. *Smith*, 494 U.S. at 878, 881.

5. *Id.* at 878 ([I]f prohibiting the exercise of religion ... is not the object of the [state action] but merely an incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

6. *Id.* at 881. For a discussion of *Smith's* "hybrid situations" see James R. Mason, Note, Smith's *Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 Regent L. Rev. 201, 225 (1995).

7. *Id.* at 888.

8. 42 U.S.C. § 2000bb (Supp. V 1993).

will briefly discuss the Supreme Court's approach to the Free Exercise Clause during three main eras: From ratification in 1791 until 1963; from the adoption of the compelling state interest test in 1963 until *Smith* in 1990; and finally, the Free Exercise Clause under *Smith*, from 1990 through 1993. Next, in Section IV, this article will discuss RFRA and will demonstrate the wisdom of returning to the pre-*Smith* standard for the protection of religious liberty. Section IV will also address the two main criticisms of RFRA: First, that courts will allow marginal or extreme applications of the compelling state interest test, and second, that Congress lacked constitutional authority to enact RFRA in the first place.

I. THE FREE EXERCISE OF RELIGION: FROM 1791 TO 1963

The Supreme Court heard only a few free-exercise cases in the first 172 years of its existence. *Reynolds v. United States*,[9] in 1878, was the first major free-exercise case. *Reynolds* involved Mormon practitioners of polygamy in the Utah Territory who challenged the federal law prohibiting polygamy. The Court upheld the anti-polygamy law and established a quasi-*Smith* test for free-exercise claims: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[10] Illustrating the belief/conduct distinction, the Court asserted that the Free Exercise Clause would not protect those whose religious beliefs required them to engage in human sacrifice, or Hindu widows whose religion required them to throw themselves on their husbands' burning funeral pyre in acts of *suttee*.[11]

The Supreme Court basically held that religious-based beliefs and opinions are protected, but religious-based actions may be regulated by the state. Upon closer examination, it is not quite that simple. The Supreme Court, in *Reynolds*, skipped over some important distinctions and complexities that it had to wrestle with later. These deeper issues demonstrated the need for the compelling interest prong to be added to the analysis of free-exercise claims.

The Free Exercise Clause restrains the government from exercising plenary power to regulate religious-based actions. It

9. 98 U.S. 145 (1878).
10. *Id.* at 166.
11. *Id.*

protects actions as well as beliefs and opinion. The text of the clause states that Congress shall make no law "prohibiting the free *exercise*" of religion. "Exercise" means that the religious adherent is doing something, not just thinking or speaking. That is why it is called the "Free *Exercise*" Clause, and not the "Beliefs and Opinions" Clause. Justice Scalia understood and agreed with this point in *Smith*: "But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."[12]

Although not all religious-based actions are protected by the Free Exercise Clause, many clearly are. How should the courts differentiate between them? For example, although communion and baptism are "actions," the state may not ban them. But the government can ban human sacrifice and widow burning. Why? Because there is a compelling governmental interest in protecting life while there is no compelling state interest served by banning communion and baptism. In *Reynolds*, the government could ban polygamy because there was (and is) a compelling state interest in protecting the sanctity of marriage and limiting it to a one-man, one-woman relationship. Because the Supreme Court was addressing the extreme situation of polygamy in *Reynolds*, it did not moderate its expansive rhetoric granting government the power to regulate all religious-based actions.

After *Reynolds*, it was not until the 1960's that the Supreme Court began to significantly interpret the Free Exercise Clause. In the 1940's, the Court dealt with a number of cases involving Jehovah's Witnesses, but those decisions dealt with free-speech as well as free-exercise rights.[13] In the early 1960's the Supreme Court began addressing numerous free-exercise issues, many of which remain unresolved today.

II. THE COMPELLING STATE INTEREST TEST: FROM 1963 TO 1990

To understand the devastating impact of *Smith*, it is important to examine how the Supreme Court evaluated free-exercise

12. *Smith*, 494 U.S. at 877.

13. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that Jehovah's Witnesses have the constitutional right to preach their faith in public places); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that Jehovah's Witnesses' children in public schools cannot be forced to participate in the flag salute).

cases under the compelling state interest test from 1963 until 1990. The Court first announced the compelling state interest test in the 1963 case, *Sherbert v. Verner*.[14] Under that test, the religious adherent had the burden to show that she had a sincerely-held religious belief[15] that was significantly burdened by the government's actions.[16] The government's burden on the religious adherent's religious belief violated the Constitution unless the state could show that it used the "least restrictive means of achieving some compelling state interest."[17] The Supreme Court set the compelling state interest standard quite high in *Sherbert* and reaffirmed that high standard in *Wisconsin v. Yoder*,[18] stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion."[19]

Although the Court repeatedly invoked this test, the religious adherent won at the Supreme Court only five times between 1963 and 1990. Four of those cases dealt with the state denying unemployment compensation to people who lost or left their jobs for religious reasons.[20] The fifth case granted Amish parents an exemption from sending their children to high school in accordance with the state's compulsory school attendance law.[21] While most of the time the Supreme Court was quick to find either a compelling state interest or an absence of burden on the adherent's religious beliefs, causing the religious adherent to lose, it repeatedly reaffirmed the compelling state interest test as the constitutional test for examining free-exercise claims.

A. Did the Framers Intend a Compelling Interest Test for the Free Exercise Clause?

Some argue that the compelling state interest test is an aberration, coming on the scene in 1963 for the first time, and

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14. 374 U.S. 398 (1963).

15. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Thomas v. Review Bd., 450 U.S. 707 (1981); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

16. *Thomas*, 450 U.S. at 713-14.

17. *Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 713-14; and Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987).

18. 406 U.S. 205 (1972).

19. *Id.* at 215.

20. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

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

that the *Smith* standard is actually a return to the original understanding of the Free Exercise Clause. This article primarily focuses on the constitutional power of Congress to respond to *Smith*, rather than whether *Smith* was rightly decided. It is beyond the scope of this article to examine the historical evidence on this question, although at least one major scholar, Michael McConnell of the University of Chicago Law School, has persuasively argued that the Framers of the First Amendment did intend constitutional protection for religious adherents whose religious practice was burdened by laws facially neutral toward religion.[22]

The Framers intent for the Free Exercise Clause cannot be examined in isolation from their intent regarding constitutional limits on the size of government, both federal and state. The Supreme Court cannot reduce free-exercise protection for individuals based on original intent while allowing government to regulate many areas of life that the Framers never intended government to enter, such as education and social welfare. The need for the compelling state interest test has increased over the years because individuals need protection from the growing reach of government.

Justice Rehnquist, in his dissent in *Thomas v. Review Board*,[23] expressed his opposition to the compelling state interest test and his support for a *Smith*-like standard for free-exercise cases. He offered an interesting insight as to why so much jurisprudential tension exists between the Free Exercise Clause and the Establishment Clause: "[T]he growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two clauses, since such legislation touches the individual at so many points in his life."[24] In other words, government has grown so large that it collides with the lives of individuals much more than it did at the time of the framing of the Constitution. Although the federal government is not empowered to grow beyond the Constitution's enumerated powers, it has anyway. State governments now perform functions and intrude into areas unimagined at the time that the Constitution and the Bill of Rights were ratified. Bigger government is usually an enemy of personal liberty and freedom. Justice

22. *See* Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

23. 450 U.S. 707 (1981).

24. *Thomas*, 450 U.S. at 721.

Brennan, in a 1985 speech at Georgetown University Law School, made a similar point about the constitutional relationship between government and individuals in these modern times:

> [T]he days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government—licenses, employment contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century.[25]

Assuming that the supporters of the test in *Employment Division v. Smith* are correct—that *Smith* lays out the test the Framers of the First Amendment envisioned for the Free Exercise Clause—we are left with the fact that other parts of the Constitution have been distorted to allow government to grow far beyond the boundaries envisioned by the Framers. Unless government is cut back significantly, the *Smith* test would leave individuals defenseless and vulnerable in the face of the oversized governmental behemoth. As this article will demonstrate, during the period from 1990 to 1993, after *Smith* and before the Religious Freedom Restoration Act was signed into law, federal courts almost always ruled against the religious adherent. Unless government gets out of many of the areas it now regulates, the compelling state interest test offers the individual the only significant protection from the reach of big government. The Supreme Court recognized the intrusiveness of big government (partly a creation of the Court's own faulty decisions in other areas of constitutional law), and developed the compelling state interest test to protect individual freedom.

III. *EMPLOYMENT DIVISION V. SMITH*: FROM 1990 TO 1993

Constitutional scholars were not the only ones who were surprised by *Smith's* departure from the compelling interest

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25. Justice William J. Brennan, Jr., Text and Teaching Symposium, Georgetown University, (Oct. 12, 1985), *in The Great Debate: Interpreting Our Written Constitution*, published by the Federalist Society, 1986, at 19.

standard, as Justice O'Connor demonstrated in her concurring opinion:

> The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the free exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of the free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.[26]

One major reason why no one expected the ruling in *Employment Division v. Smith* was that a strong majority of the justices had rejected a *Smith*-like test at least three times during the ten years preceding *Smith*.[27] No one anticipated the Court's sudden flip-flop.

A. *The Long Gestation of the* Smith *Test*

Justice Rehnquist first suggested that the Court overturn the compelling state interest test in *Thomas v. Review Board*.[28] In that case, a Jehovah's Witness quit his job at a foundry in Indiana when he was transferred to a division that made tank turrets. Participating in the making of armaments was against his religious beliefs.[29] The ex-employee applied for unemployment compensation, but was denied.[30] By an eight-to-one vote, the Supreme Court applied *Sherbert's* compelling state interest test

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26. *Smith*, 494 U.S. at 892 (O'Connor, J., concurring) (citations omitted) (alterations in original).

27. Another reason the ruling in *Smith* was unexpected was that no one involved in the case, party or amicus, urged the Supreme Court to abandon the compelling state interest test for the "neutral law of general applicability" test. In its briefs, the State of Oregon argued this case as one involving the compelling state interest test. The State did mention what was to become the new test: "In actual practice, this Court has found no room for "accommodating religion-by-religion exemptions from neutral laws of general applicability when those laws directly serve health, safety or public order interests." Brief of Petitioner State of Oregon at 16-17, Employment Division v. Smith, 494 U.S. 872 (1990) (No. 88-1213).

28. 450 U.S. 707 (1981).

29. *Id.* at 709.

30. *Id.* at 710.

under the Free Exercise Clause and ruled that the denial of benefits was unconstitutional.[31]

Justice Rehnquist's dissent criticized the majority opinion and offered a proto-*Smith* understanding of the Free Exercise Clause:

> Where, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert v. Verner*: "Those situations in which the Constitution may require special treatment on account of religion are ... few and far between."[32]

The second time the *Smith*-like rule appeared at the Supreme Court level was in *Bowen v. Roy*[33] in 1986. In that case, three justices flirted with the rule later announced in *Smith*, but were rebuked by a majority. Chief Justice Burger announced the judgment of the court, which involved the question of whether a Native American girl, Little Bird of the Snow, could be exempted from obtaining a social security number due to her parents' Native American religious beliefs.[34] The Court rejected the substance of Little Bird of the Snow's free-exercise claim.

In Part III of his opinion, Chief Justice Burger inserted some *Smith*-like language and was joined in that section of the opinion by only Justice Powell and Justice Rehnquist. Five justices[35] refused to join Part III, which included the statement that "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[36] They chided the three justices for suggesting a less rigorous test for free-exercise cases and specifically rejected the "neutral and uniform in its application" test.[37] Clearly, a majority of the justices were not interested in

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31. *Id.* at 717-18.
32. *Id.* at 723 (citations omitted).
33. 476 U.S. 693 (1986).
34. *Id.* at 695.
35. *Id.* at 715-16 (Blackmun, J., concurring in part and concurring in the judgment); *Id.* at 728 (O Connor, J., concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined); *Id.* at 733 (White, J., dissenting).
36. *Id.* at 707-08.
37. *Id.* at 727-28 (O'Connor, J., concurring in part and dissenting in part).

abandoning the compelling state interest test for religious liberty cases.

One year later, in 1987 (three years before *Employment Division v. Smith*), the Supreme Court seemed to bury, once and for all, the proposal later adopted in *Smith*. In *Hobbie v. Unemployment Appeals Commission*,[38] Florida officials raised the *Smith*-like "neutral and uniform in its application" test and the Supreme Court unanimously rejected it.[39] *Hobbie* was another unemployment compensation case, brought by a woman who lost her job because her religious beliefs would not allow her to work on Saturday. In a unanimous opinion, Justice Brennan went out of his way to bat down the proposed alternative to the compelling state interest test.[40] He specifically incorporated into the majority opinion a statement from Justice O' Connor's concurring opinion in *Bowen v. Roy*, in which she criticized the proto-*Smith* test that Chief Justice Burger had unsuccessfully advanced in Part III of that opinion. Chief Justice Burger's proposed test said that free-exercise protection would not extend to laws "neutral and uniform in [their] application," but Justice O'Connor stated that, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."[41]

No one dissented in *Hobbie*, so it seemed to those who monitored religious liberty cases that the flare-up in *Bowen v. Roy* was an anomaly, a brief insurrection that had been quickly put down by a majority of the justices. Indeed, in 1989, one year before *Employment Division v. Smith*, the Supreme Court applied the compelling state interest test in yet another unemployment compensation case and unanimously ruled in favor of the religious adherent who quit his job due to his religious beliefs about not working on Sunday.[42] All seemed secure on the free-exercise front.

It was into this settled area of free-exercise law that the Supreme Court dropped its bomb. When the Supreme Court granted review of *Employment Division v. Smith*, no one suspected that the Court might use the case to radically revamp free-exercise jurisprudence. That scenario simply was not dis-

38. 480 U.S. 136 (1987).
39. *Id.* at 141.
40. *Id.*
41. *Id.* at 141-42 (quoting Bowen v. Roy, 476 U.S. at 733).
42. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

cussed by the parties or any of the *amici* in their briefs. Court watchers marveled that this was the fifth free-exercise case dealing with unemployment compensation that the high court had accepted for review. Why the obsession with unemployment compensation cases? Certainly unemployment issues are not the focal point of conflict for the free exercise of religion in the United States. Indeed, the main battlefield for free-exercise is education, with parents trying to use the Free Exercise Clause to opt out of state rules governing public or private schools. Although the Supreme Court had a plethora of these cases to accept for review, it denied them all during the 1980's.[43]

It is difficult to understand why the Court changed its view of the "compelling interest" standard. Between *Bowen* and *Smith*, Chief Justice Burger and Justice Powell had been replaced by Justices Scalia and Kennedy, who, like their predecessors, adopted the "neutral, generally applicable" standard. Mysteriously, Justices White and Stevens moved away from their position in *Bowen* and *Hobbie* to accept the very rule they had previously rejected. This combination, including Chief Justice Rehnquist, formed the five-justice majority that overruled the compelling state interest test and adopted the "neutral law of general applicability" test.

Many were shocked and surprised by the unexpected ruling in *Smith*. Fifty-five legal scholars from around the nation petitioned the Court to rehear the case because the Court had revamped the Free Exercise Clause with no briefing and no indication that the Court was considering doing what it did. The petition for rehearing stated:

> The case briefed by the parties and the *amici* was, in retrospect, a different case from that decided by the Court. The issues presented were directly focused, and narrowly tailored toward one concern, namely, whether the State of Oregon had a compelling state interest in regulating illegal drugs that overrode the Respondents' religious liberty interest in

43. *See, e.g.*, Mozert v. Hawkins County Sch. Dist., 827 F.2d 1058 (6th Cir. 1987) (holding that public school students have no free exercise right to opt out of reading classes that teach material objectionable to the students' religious beliefs), *cert. denied* 484 U.S. 1066 (1988); New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (holding that the Free Exercise Clause does not exempt a private Christian school from submitting to government approval for its education program), *cert. denied* 494 U.S. 1066 (1990); Patzer v. North Dakota, 382 N.W.2d 631 (N.D. 1986) (holding that home school families have no free exercise right to be exempted from state law requiring all students to be taught by state-certified teachers, even though the state showed no evidence that the certification requirement furthered a compelling state interest), *cert. denied* 479 U.S. 825 (1986).

> the sacramental use of peyote. The majority opinion eschewed discussion of the question briefed and decided the case on far-reaching grounds without the benefit of briefing or oral argument on the specific concerns raised *de novo* by the Court's opinion.[44]

When the Supreme Court refused to rehear the case, certain legal optimists hoped that the Court would limit the reach of *Smith* to religious drug use by Native Americans. On April 23, 1990, a scant six days after *Smith*, that hope was shattered. In *Minnesota v. Hershberger*,[45] the Supreme Court vacated a decision of the Minnesota Supreme Court which had granted free-exercise protection under the federal Free Exercise Clause. That case involved the criminal prosecution of members of an Amish community who refused on religious grounds to bring Amish buggies into line with modern traffic safety laws. The Supreme Court told the Minnesota Supreme Court to reexamine its decision in light of *Employment Division v. Smith.*

The remaining optimists believed that *Hershberger* should be understood to limit the reach of *Smith* to the criminal context. They opined that the Court would use the traditional legal standard in civil cases. That ground for optimism was eliminated on March 4, 1991, in *City of Seattle v. First Covenant Church*,[46] a case wherein the Court reversed a victory obtained by the First Covenant Church of Seattle. The city and church were locked in a free-exercise dispute over control of the church building in light of a landmark preservation ordinance. The Washington Supreme Court had granted constitutional protection to the church to control its own building.[47] The Court again vacated the decision of the state supreme court which had protected religious freedom. And, as was the case in *Hershberger*, the Court remanded the case to the lower court for further proceedings in light of its decision in *Smith*.[48] The lower courts picked up this theme, and began applying *Smith* in a similarly rigid fashion.

B. The Lower Federal Courts Applied Smith *Harshly*

For almost three years, the *Smith* standard reigned supreme in the lower federal courts. These courts applied *Smith* harshly,

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44. Petition for Rehearing, Employment Div., v. Smith, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990).

45. 495 U.S. 901 (1990).

46. 499 U.S. 901 (1991).

47. First Covenant Church of Seattle v. City of Seattle, 787 P.2d 1352 (Wash. 1990) *vacated*, 499 U.S. 901 (1990) (*mem*).

48. *First Covenant Church*, 499 U.S. at 901.

denying almost all free-exercise claims that came before them during that time. Those federal court losses drove religious liberty litigation into state courts where litigants could assert state constitutional free-exercise claims and get a more sympathetic hearing.

In *Salaam v. Lockhart*,[49] a prisoners' rights case, the Eighth Circuit made the shocking statement that Americans' free-exercise rights after *Smith* were no better than those of prisoners: "We do not believe that the Supreme Court's recent decision in *Employment Div., Dep't of Human Resources v. Smith*, affects our analysis. *Smith* does not alter the rights of prisoners; it simply brings the free-exercise rights of private citizens closer to those of prisoners."[50]

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, wrote a concurring opinion in *Miller v. City of South Bend*,[51] stating that "the principle derived from the free-exercise clause of the First Amendment [is] that government must accommodate its laws of general applicability to the special needs of religious minorities [and] that principle is moribund after *Employment Division v. Smith*."[52]

In *Hunafa v. Murphy*,[53] a prisoners' rights case, the Seventh Circuit wrote the following about *Smith*:

> The defendants have not cited to us the Supreme Court's recent decision in *Employment Division v. Smith*, rendered after the appeal in this case was filed. *Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded.[54]

Even though the standards for prisoner religious liberty cases were already lower than those applicable to the general citizenry, the Seventh Circuit expressed a strong opinion that *Smith* may have taken those rights to an even lower level. And it must be remembered that *Smith* was not a prisoners' rights case. Thus,

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49. 905 F.2d 1168 (8th Cir. 1990).

50. *Id.* at 1171, n.7 (citations omitted). In fairness to the Eighth Circuit, this statement, taken in context, expresses despair over the state of religious liberty rights of private citizens.

51. 904 F.2d 1081 (7th Cir. 1990) (en banc).

52. *Id.* at 1102-03 (citations omitted).

53. 907 F.2d 46 (7th Cir. 1990).

54. *Id.* at 48.

the religious rights of citizens may actually be lower than those previously enjoyed by prisoners.[55]

These generally brutal assessments of religious liberty were borne out by specific applications of the new *Smith* test by the lower federal courts. In *St. Bartholomew's Church v. City of New York*[56] an Episcopal Church was pitted against the City Landmark Commission in a battle for control of church buildings and land. Next door to the church building the church owned a seven-story structure that it used for auxiliary church services, a preschool, and office space. In order to raise more money for programs, the church wanted to tear down the seven-story structure and replace it with a forty-seven-floor office tower. The office tower would house both church programs and commercial space for rental income.[57] The Second Circuit stated:

> It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues are very large because the Community House is on land that would be extremely valuable if put to commercial uses. Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause.[58]

The court of appeals used *Smith* to conclude that the Constitution affords no protection for churches that desire to dispose of their own property as they see fit in order to expand and pay for church ministries. The court held that there was no constitutional violation unless the church could "prove that it cannot continue its religious practice in its existing facilities."[59] Gone are the days when churches were able to decide how best to expand their ministries. As long as a government rule does not impair the status quo, churches have no constitutional right to use their own property without governmental control.

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55. The constitutional law of religious liberty for prisoners is worth an entire law review article in its own right. Questions about the sincerity of the religious adherent's beliefs (which tend to be presumed outside of the prison context) have caused the case law of jailhouse religion to develop in its own unique way. In fact, congressional debate continues to this day on whether RFRA should have the same standard protecting the religious freedom rights of prisoners that protects non-prisoners.

56. 914 F.2d 348 (2d Cir. 1990).

57. *Id.* at 351.

58. *Id.* at 355.

59. *Id.*

In *Cornerstone Bible Church v. City of Hastings*,[60] the Eighth Circuit ruled in favor of a church in a zoning dispute, but essentially rejected the church's free-exercise claim.[61] The church challenged a city ordinance that prohibited churches from locating in commercial districts. The district court granted summary judgment against the church on its free-speech, free-exercise, equal protection, and due process claims.[62]

The Eighth Circuit reversed the grant of summary judgment against the church on the free-speech and equal protection claims, but affirmed the dismissal of the free-exercise claims in light of *Smith*.[63] The court did allow the "hybrid free-exercise" claims to be argued on remand, but explicitly affirmed the dismissal of any claim that religious freedom alone offers any protection to a church.[64] In allowing the hybrid claims, the court made it clear that since the church's free-speech claim had merit, its hybrid free-speech/free-exercise claim also had plausible merit. In other words, the freedom of religion claim was utterly superfluous; a church has freedom only if it can point to some clause in the Constitution other than the one guaranteeing the free exercise of religion.

The Third Circuit supplied strong evidence that free-exercise claims, standing alone, are a constitutional nullity. In *Salvation Army v. New Jersey Department of Community Affairs*,[65] the Third Circuit rejected any contention that *Smith* would have limited application by specifically casting aside the argument that *Smith* should be limited to criminal cases.[66] The Salvation Army disputed a regulatory scheme imposed on one of its facilities that ministered to homeless men. A part of the regulatory scheme precluded the Salvation Army from requiring a resident to attend religious services as a condition of residence.[67] In the course of the litigation, the government voluntarily waived that preclusion.[68] However, that waiver was made prior to the *Smith* decision. It is seriously doubtful that a government unit would grant such a waiver today in light of *Smith*. In any event, there were

60. 948 F.2d 464 (8th Cir. 1991).
61. *Id.* at 472.
62. *Id.* at 468.
63. *Id.* at 472.
64. *Id.* at 472-73.
65. 919 F.2d 183 (3d Cir. 1990).
66. *Id.* at 194-95.
67. *Id.* at 187.
68. *Id.* at 185.

a number of other regulations that were not waived, and the Salvation Army continued its constitutional challenge of the government's plan to enact a detailed scheme to regulate the conduct of a religious ministry. After undertaking a painstaking analysis of *Smith,* the court simply concluded that "[a]ccordingly, [The Salvation Army's] free-exercise arguments, taken alone, must fail."[69] The court flatly rejected the Salvation Army's right to object to such a regulatory scheme on free-exercise grounds because the regulations were rules of general application.[70] Thus, religious organizations could be coerced to comply.

The court went on to examine the "hybrid" claims which the Supreme Court permitted in *Smith*:

> After *Smith*, it is apparent that the right to free speech has different contours than the right to free exercise of religion, and, accordingly, the right of expressive association has different contours depending upon the activity in which a group is engaged. We would not expect a derivative right to receive greater protection than the right from which it was derived. In the context of the right to exercise of one's religious convictions, we think it would be particularly anomalous if corporate exercise received greater protection than individual exercise—if, for example, the right to congregational prayer received greater protection than the right to private prayer. Similarly, we would not expect the Supreme Court to treat the use of peyote for religious purposes in groups differently than the right to do so individually. As we have seen, the primary right of free-exercise does not entitle an individual to challenge state actions that are not expressly directed to religion. Accordingly, the derivative right to religious association could not entitle an organization to challenge state actions, such as those at issue in the present controversy, that are not directly addressed to religious association.
>
> Because the present controversy does not concern any state action directly addressed to religion, [The Salvation Army] cannot receive protection from the associational right derived from the free exercise clause.[71]

As to the hybrid "free-exercise/free-speech" claim, the court made it plain that the fact that religion was involved was legally irrelevant. In other words, if a person can make a free-speech claim, a religious message adds absolutely nothing to the consti-

69. *Id.* at 196.
70. *Id.*
71. *Id.* at 199-200.

tutional claim. The court affirmed this conclusion when it also stated:

> The *Roberts* opinion teaches that strict scrutiny is to be applied to infringements on the [freedom of association] for free speech purposes even when the challenged action is not specifically directed to the exercise of that right. To invoke this scrutiny, it is sufficient that [The Salvation Army] seeks to communicate a message; for this purpose it is not relevant that TSA's message happens to be religious in nature.[72]

There is a three-fold lesson from *Salvation Army*: First, free-exercise claims are worthless in challenging laws of general applicability; second, freedom of association claims are not enhanced by religion; and finally, freedom of speech claims are not enhanced by religion. The net result is that religious activity has no special constitutional protection whatsoever.[73]

Friend v. Kolodzieczak[74] involved a challenge by Roman Catholic prisoners to a prison ban on the possession of rosaries and scapulars. Their claim was evaluated under the reasonableness standard for prisoners asserting constitutional claims, established by the Supreme Court in *Turner v. Safley*.[75] The Ninth Circuit upheld the rosary-scapular ban under the theory that allowing these items might give the impression of the state favoring Roman Catholic inmates.[76]

There is a statement in *Friend* that should sound a warning alert to defenders of religious liberty regarding the government's interpretation of *Smith*. In a footnote, the court stated that "[w]e need not decide whether [*Smith*] lessens the government's burden under *Turner*, because appellants fail the *Turner* test."[77] Apparently the government lawyers argued that *Smith* contains a lower standard of free-exercise protection than was contained in the 1989 *Turner* decision. While *Turner* applies only to the free-

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72. *Id.* at 200.

73. Some critics of the Religious Freedom Restoration Act have complained about the provision which declares that RFRA has no application in cases arising under the Establishment Clause. These critics have argued that the Establishment Clause's "entanglement" prong in Lemon v. Kurtzman, 403 U.S. 602 (1971), grants religious organizations some protection from government intrusion. The court rejected this argument in a terse section holding that the entanglement doctrine offers no protection to the Salvation Army. *Salvation Army*, 919 F.2d at 200.

74. 923 F.2d 126 (9th Cir. 1991).

75. 482 U.S. 78 (1987).

76. *Friend*, 923 F.2d at 128.

77. *Id.* at n.1.

exercise rights of prisoners, *Smith* applies to the religious freedom of all citizens. The court did not simply reject the government's argument by making a statement similar to the Eighth Circuit's in *Salaam v. Lockhart*, which compared the free-exercise rights of all citizens to those enjoyed by prisoners.[78] Instead, the court simply reserved the issue for another day. Given the reservation of the issue, the footnote should serve as a warning of the direction courts would likely head in the absence of RFRA.[79]

One of the most disturbing cases decided after *Smith*, and before RFRA, was *NLRB v. Hanna Boys Center*.[80] Hanna Boys Center is a residential school owned and operated by the Catholic Church. The case involved the proposed unionization of non-teacher workers at the Boys Center. In its free-exercise claim, the school relied heavily on *NLRB v. Catholic Bishop of Chicago*,[81] which held that the NLRB could not assert jurisdiction over a Catholic school in a case that involved the proposed unionization of teachers. In *Catholic Bishop*, the Court held that there would be serious constitutional problems if the National Labor Relations Act were interpreted to provide jurisdiction.[82] The Ninth Circuit held that *Catholic Bishop* was limited to teachers[83] because of their " 'unique' role ... in accomplishing the religious goals of the school."[84] In *Hanna Boys Center*, the court rejected the argument that the child-care workers were the functional equivalent of teachers even though the record disclosed that the child-care workers' duties included: seeing that the boys said their prayers, selecting a boy to say the evening prayer, and assisting with homework.[85] Despite these involvements in religion, the court found that the overwhelming bulk of the workers' duties was secular in nature.[86]

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78. *See supra* note 49 and accompanying text.

79. The Ninth Circuit made a virtually identical statement in another prisoner-religion case, Friedman v. State of Arizona, 912 F.2d 328 (9th Cir. 1990). The government lawyers there claimed that "prisoner rights have been further limited as a result of the Supreme Court's decision in [*Smith*]." *Id.* at 331 n.1. Again, the court put off a decision on this claim.

80. 940 F.2d 1295 (9th Cir. 1991).

81. 440 U.S. 490 (1979).

82. *Id.* at 501.

83. *Hanna Boys Center*, 940 F.2d at 1302.

84. *Id.* at 1301.

85. *Id.* at 1302.

86. *Id.* at 1303.

The Ninth Circuit found no serious constitutional problem with asserting jurisdiction over non-teacher employees of a Catholic residential school. The court flatly rejected the argument that the assertion of jurisdiction violated the Free Exercise Clause.[87] The net effect of the *Hanna Boys Center* ruling is that government agencies can assume jurisdiction over any employee of any church or church-related ministry, unless that employee is specifically engaged in religious teaching.

In *Montgomery v. County of Clinton*,[88] a federal district court rejected a free-exercise claim that an autopsy violated the mother's religious beliefs. A teenager was killed as a result of a high-speed car chase and an autopsy was done without the mother's knowledge or consent. Citing *Smith*, the court rejected the free-exercise claim, holding that the violation of her religious views, while regrettable, was reasonable.[89]

In a similar case, *Yang v. Sturner*,[90] the government performed an autopsy in violation of a Laotian family's Hmong religious beliefs.[91] Yang's twenty-three year-old son died in his sleep of a seizure.[92] There was no suggestion of foul play or any condition of public concern. Over the stated objection of the Yangs, a medical examiner performed an autopsy on the young man. In a ruling issued before *Smith*, the federal district court in Rhode Island held that the medical examiner violated the free-exercise rights of the parents and scheduled a subsequent hearing on the issue of damages.[93] Prior to a decision on damages, the Supreme Court issued the *Smith* opinion. With extreme reluctance, the district court withdrew its earlier opinion on liability and ruled for the defendant based on *Smith*.[94] The district court expressed open disagreement with the majority view in *Smith*, but held that *Smith* forced lower federal courts to dismiss cases invoking free-exercise claims involving laws of general application.[95]

In *Greater New York Health Care Facilities Ass'n, Inc. v. Axelrod*,[96] the district court affirmed state regulations that limited

87. *Id.* at 1305.
88. 743 F. Supp. 1253 (W.D. Mich. 1990).
89. *Id.* at 1260.
90. 728 F. Supp. 845 (D. R.I. 1990).
91. *Id.* at 846.
92. *Id.*
93. *Id.*
94. Yang v. Sturner, 750 F. Supp. 558 (D. R.I. 1990). This short, eloquent opinion is well worth reading.
95. *Id.* at 560.
96. 770 F. Supp. 183 (S.D. N.Y. 1991).

the services volunteers could perform in nursing homes (*e.g.*, volunteers could not feed patients in some circumstances).[97] The plaintiffs claimed that the regulations violated their religious beliefs because they prevented them from "observing such fundamental Biblical commandments as, Honor one's father and mother, and Love one's brother as thyself."[98] The district court rejected this cause of action saying no specific plaintiff had asserted that claim and, even if one had, that claim would have been barred by *Smith*.[99]

In *Lukaszewski v. Nazareth Hospital*,[100] a Catholic hospital failed in its efforts to prevent application of the federal Age Discrimination in Employment Act (ADEA) to its operation.[101] The court concluded that the holding in *NLRB v. Catholic Bishop* was not applicable.[102] Like the National Labor Relations Act, the ADEA had no specific provision excluding religious organizations from its coverage. But, in this case, the court held that the employee filled a secular position, so there was no reason to read his position as being outside the coverage of the ADEA.[103] The court rejected the Catholic hospital's free-exercise argument in a six-sentence paragraph citing *Smith*. The court bluntly stated that "Nazareth's motion suggests that application of the ADEA to religious institutions also violates the Free Exercise Clause. However, that claim is precluded by [*Smith*]."[104]

The above cases demonstrate that federal courts have given little protection to religious liberty since *Smith*. Before Congress passed the Religious Freedom Restoration Act, religious adherents turned to state courts to find protection under state constitutions. Interestingly, state courts have refused to adopt the cramped *Smith* test for interpreting their state constitutions' free exercise clauses.

C. State Courts Protect Religious Liberties Under Their State Constitutions

During the period after the Supreme Court handed down *Smith* in 1990 and before RFRA became law in 1993, state courts

97. *Id.* at 185.
98. *Id.* at 187.
99. *Id.*
100. 764 F. Supp. 57 (E.D. Pa. 1991).
101. *Id.* at 61.
102. *Id.* at 60.
103. *Id.*
104. *Id.* at 61.

used their state constitutions to provide a safe haven for religious freedom. To date, every state appellate court that has ruled on the issue has refused to substitute the *Smith* test for the compelling state interest test in applying state free exercise clauses. Some state courts, such as those in Minnesota, have demonstrated by example how to protect free-exercise rights under state constitutions.

Minnesota v. Hershberger was the first free-exercise decision that the United States Supreme Court remanded to a lower court after its ruling in *Smith*.[105] The case involved the refusal of members of the Amish community to place orange triangles on their horse-drawn buggies to designate slow-moving vehicles.[106] The Amish held a religious belief that they were forbidden from wearing bright colors.[107] In the first decision, the Minnesota Supreme Court applied the compelling state interest test of the federal constitution.[108] The court ruled that the state violated the federal Free Exercise Clause by requiring the Amish to place the orange triangles on their buggies.[109] On remand, the Minnesota Supreme Court again ruled in favor of the Amish by finding that the Minnesota Constitution's Free Exercise Clause retained the compelling state interest test.[110] The court then repeated the analysis it used in the earlier decision.

In *First Covenant Church of Seattle v. City of Seattle*,[111] the Washington Supreme Court also emphatically rejected the application of the *Smith* "neutral law of general applicability" standard to its state constitution.[112] It had ruled that under the federal Free Exercise Clause, the City of Seattle could not use its landmark preservation ordinance to stop the church from renovating its building. The Washington Supreme Court's decision was appealed to the United States Supreme Court after *Smith*. The Supreme Court vacated and remanded in light of *Smith*.[113] On remand, the Washington Supreme Court evaded *Smith* by basing its ruling solely on the state constitution, rejecting the *Smith* test as the standard for state free-exercise claims.[114]

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105. 495 U.S. 901 (1990).
106. Minnesota v. Hershberger, 444 N.W.2d 282 (Minn. 1989).
107. *Id.* at 284.
108. *Id.*
109. *Id.*
110. Minnesota v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990).
111. 840 P.2d 174 (Wash. 1992).
112. *Id.* at 185.
113. City of Seattle v. First Covenant Church of Seattle, 499 U.S. 901 (1991) (*mem*).
114. First Covenant Church, 840 P.2d at 185-89.

The California Court of Appeals and the Supreme Judicial Court of Massachusetts have used their respective state free exercise clauses to exempt landlords who object to extramarital sex on religious grounds, from laws prohibiting discrimination in housing against unmarried couples. The cases are very similar. A Presbyterian widow in *Smith v. Fair Employment and Housing Commission*,[115] a Catholic couple in *Donahue v. Fair Employment and Housing Commission*,[116] and two Catholic brothers[117] in *Attorney General v. Desilets*,[118] each refused to rent an apartment to an unmarried couple due to their religious beliefs that sex belongs only within marriage. The State of California filed charges of marital status discrimination against Mrs. Smith and the Donahues, and, in separate hearings, found them guilty of marital status discrimination. Separate panels of the California Court of Appeals reversed, ruling that the California Constitution's free-exercise rights exempted the landlords from the marital status provision of the housing discrimination law. The two courts said that under the state constitution's Free Exercise Clause the claims were to be analyzed under the compelling state interest test.[119] Both courts said there was no compelling state interest in protecting unmarried couples from discrimination.[120] In *Desilets*, the Supreme Judicial Court of Massachusettes remanded the case to the trial court to determine whether the Commonwealth could meet the compelling state interest standard which it held the Massachusettes Constitution retained.[121]

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115. 30 Cal. Rptr. 2d 395 (1994).

116. 2 Cal. Rptr. 2d 32 (1991).

117. The Desilets are brothers by blood, not brothers in a Catholic religious order.

118. 636 N.E.2d 233 (Mass. 1994).

119. *Smith*, 30 Cal. Rptr. 2d at 406; *Donahue*, 2 Cal. Rptr. 2d at 46.

120. In a strange procedural twist, the California Supreme Court accepted Donahue for review, 5 Cal. Rptr. 2d 781 (1992), then dismissed the appeal as improvidently granted a number of months later. 23 Cal. Rptr. 2d 591 (1993). The California Supreme Court has accepted Mrs. Smith's case for review and oral arguments are scheduled for Jan. 16, 1996. The Alaska Supreme Court rejected the RFRA claim of a religious landlord who refused to rent to an unmarried couple in Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994). The landlord's counsel raised the RFRA claim for the first time in a motion for rehearing at the Alaska Supreme Court, which was granted, but the RFRA claim rejected. On October 31, 1994, the United States Supreme Court denied review of *Swanner*, with Justice Thomas dissenting and urging the Court to take the case because of the Alaska Supreme Court's bungling of the RFRA claims. 115 S. Ct. 460 (1994). It seems that eventually one of these landlord-unmarried couple cases will reach the Supreme Court.

121. *Desilets*, 636 N.E.2d at 243.

The Michigan Supreme Court also severely criticized the *Smith* test. In *People v. DeJonge*,[122] the Michigan Supreme Court ruled that families who home school their children based on religious beliefs are exempt from the state law requiring all students to be educated by state-certified teachers. The Michigan high court used the compelling state interest test to analyze the home schoolers' federal free-exercise claim, stating that it was a "hybrid situation" combining religious freedom with parental rights. The Michigan Supreme Court noted the loud chorus of criticism that *Smith* had engendered and commented that it could rule that the Michigan Constitution grants greater freedom than does the federal constitution as interpreted in *Smith*.[123] However, because the court found that the home-schoolers presented a hybrid claim under *Smith*, it did not decide whether the state constitution adopts a *Smith* standard or a compelling state interest standard.

In *Rupert v. City of Portland*,[124] the Maine Supreme Court refused to recognize a free-exercise right to smoke marijuana.[125] Acting under the state Drug Paraphernalia Act, police confiscated a man's marijuana pipe. The man sought recovery of his pipe, claiming that he used it in Native American Church religious rituals and, therefore, the state was violating his free-exercise rights under both the federal and state constitutions.[126] The Maine Supreme Court rejected his claim using the compelling state interest test to analyze the state constitutional claim. In an interesting twist, the Maine Supreme Court admitted that in an earlier case[127] it had held that the Maine Constitution went no farther than the federal constitution, and stated that the compelling state interest test was the test for both constitutions.[128] In *Rupert*, the Maine Supreme Court acknowledged the existence of *Smith*, but stated that "we have no reason in this case to decide whether we in applying the Maine Free Exercise Clause will change course to follow the Supreme Court's lead in *Smith*."[129]

The United States Supreme Court found itself leading a one court parade after the announcement of the new test in *Smith*.

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122. 501 N.W.2d 127 (Mich. 1993).
123. *Id.* at 134 n.27.
124. 605 A.2d 63 (Me. 1992).
125. *Id.* at 68.
126. *Id.* at 65.
127. Blount v. Department of Educ. & Cultural Services, 551 A.2d 1385 (Me. 1988).
128. *Rupert*, 605 A.2d at 65.
129. *Id.* at n.3.

State appellate courts have unanimously rejected the "neutral law of general applicability" standard as providing inadequate protection for religious freedom.

V. CONGRESS ENACTS THE RELIGIOUS FREEDOM RESTORATION ACT: 1993

The need to protect religious liberty brought together a most ideologically eclectic collection of organizations to draft the Religious Freedom Restoration Act.[130] Groups that disagreed on almost everything else found common ground in the need for RFRA. They banded together to form the Coalition for the Free Exercise of Religion. For example, People for the American Way and Concerned Women for America have battled each other on many issues, but worked together on RFRA.[131]

A. Elements of RFRA

The main goal of the RFRA working coalition was to reinstate the compelling state interest test for deciding religious liberty claims. The organizations working for the passage of

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130. Michael Farris, one of the authors of this article, helped form and lead the RFRA coalition and was co-chairman of the Drafting Committee.

131. The full membership of the Coalition for the Free Exercise of Religion was as follows:

Agudath Israel of America
American Ass'n of Christian Schs.
American Civil Liberties Union
American Conference on Religious Movements
American Humanist Ass'n
American Jewish Comm.
American Jewish Congress
American Muslim Council
Americans for Democratic Action
Americans United for Separation of Church & State
Americans for Religious Liberty
Anti-Defamation League
Ass'n of Christian Schs. Int'l
Baptist Joint Comm. on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Christian Church (Disciples of Christ)
Christian College Coalition
Christian Legal Society
Christian Life Comm'n,
Southern Baptist Christian Science Comm. on Publication
Church of the Brethren
Church of Scientology Int'l
Coalitions for America
Concerned Women for America
Council of Jewish Fed'ns
Council on Religious Freedom
Criminal Justice Policy Found.
Episcopal Church
Fed'n of Reconstructionist Congregations & Havurot
First Liberty Inst.
Friends Comm. on Nat'l Legislation
Gen. Conference of Seventh-Day Adventists
Guru Gobind Singh Found.
Hadassah, Women's Zionist Org. of America
Home Sch. Legal Defense Ass'n
Int'l Inst. for Religious Freedom
Jesuit Social Ministries, Nat'l Office
Justice Fellowship
Mennonite Central Comm., U.S.
Nat'l Ass'n of Evangelicals
Nat'l Council of Churches
Nat'l Council of Jewish Women
Nat'l Fed'n of Temple Sisterhoods
Nat'l Jewish Comm'n on Law and Public Affairs
Nat'l Jewish Community Relations Advisory Council
Nat'l Sikh Center
Native American Church of North America
North American Council for Muslim Women
People for the American Way Action Fund
Presbyterian Church (U.S.A.), Social Justice
Rabbinical Council of America
and Peacemaking Unit
Traditional Values Coalition
Soka-Gakkai Int'l-U.S.A.
Union of American Hebrew Congregations
Unitarian Universalist Ass'n of Congregations
Union of Orthodox Jewish Congregations, America
United Methodist Church, Bd. of Church & Soc'y
United Church of Christ, Office for Church in Soc'y
United Synagogue of Conservative Judaism

RFRA agreed on three main guiding points: (1) RFRA would use terms of art that are already commonly used and defined in the case law. RFRA would not contain new terms that courts could define in skewed or unintended ways; (2) RFRA would only address free-exercise issues, not Establishment Clause issues. Although the various groups agreed on free-exercise issues, they greatly disagreed on Establishment Clause issues; (3) RFRA would contain legal standards and would not dictate the outcome of cases. The legal standard RFRA would contain would be the compelling state interest test.

The RFRA coalition succeeded when President Clinton signed the Religious Freedom Restoration Act, on November 16, 1993. Following are some important features of RFRA:

1. RFRA is to be interpreted according to pre-*Smith* court decisions.

The coalition and the congressional framers intended to resurrect the Supreme Court decisions construing the compelling state interest test. Those decisions had all been rendered obsolete by *Employment Division v. Smith*. The text of RFRA states that the compelling state interest test is to be applied according to pre-*Smith* court decisions. RFRA § 2000bb(b) states that the purposes of the Act are to "restore the compelling state interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened."[132]

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132. 42 U.S.C. § 2000bb(b) (Supp. V 1993) (citations omitted). RFRA states:

> (a) In General.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) Exception.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
> (c) Judicial Relief.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government by the general rules of standing under Article III of the Constitution.

Id.

2. RFRA applies retroactively.

RFRA § 2000bb-3 states that the act applies retroactively "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act."[133] Courts interpreting RFRA have applied it retroactively to cases that were active in court at the time RFRA was signed into law.

3. Government must offer evidence of a compelling state interest.

Under RFRA, the government may substantially burden a person's exercise of religion only if it "demonstrates that application of the burden to the person" furthers a compelling state interest, implemented by the least restrictive means.[134] The government may not merely assert a compelling state interest, nor may a court take judicial notice of a compelling state interest. The government must demonstrate its compelling interest by competent evidence.[135]

4. RFRA may be used by defendants.

Because of the way RFRA is worded, it may be invoked by either a plaintiff or a defendant. If the government prosecutes a person who refuses to obey a law due to religious beliefs, the

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133. *Id.* § 2000bb-3.

134. *Id.* § 2000bb(b)(1).

135. Patzer v. North Dakota, 382 N.W.2d 631 (N.D. 1986), is an example of how the government avoids proving a compelling state interest and how courts acquiesce. This case involved the prosecution of several home schooling families who challenged a North Dakota law that required all students to be taught by state-certified teachers. The families argued that the teacher certificate requirement burdened their religious belief that as parents they were to educate their own children. The local school districts involved in the litigation made no effort to prove a compelling state interest: They called no expert witnesses; they did not ask the trial court to take judicial notice of any legislative facts; and they placed no studies into evidence. The trial court rejected the free exercise defense. On appeal to the North Dakota Supreme Court, the home schoolers argued that they should win because the government had utterly failed to meet its burden of proof to show a compelling state interest. The North Dakota Supreme Court ruled against the home schoolers and avoided the problem of no evidence of a compelling state interest by taking judicial notice of legislative facts. RFRA will not allow courts or governments to decide a case against the religious adherent on those grounds. Under RFRA, the government has the affirmative duty to offer evidence showing its compelling state interest. The author, Michael Farris, and Home School Legal Defense Association represented the home schoolers in *Patzer*.

defendant can invoke RFRA as a defense.[136] This also means that if a defendant prevails on a RFRA defense, the defendant is entitled to attorneys' fees as a "prevailing party" under the United States Code.[137] Now that RFRA is law, courts have been interpreting and applying it in a way to protect religious liberties.

B. Courts Have Interpreted RFRA Reasonably

Since November 1993, a number of federal and state courts have applied RFRA to religious liberty cases. As RFRA supporters expected, courts have protected the religious adherents in some cases, but have rejected the marginal or extreme applications of RFRA urged by some plaintiffs. The list of cases successfully asserting a RFRA claim look like the lower courts' decisions in pre-*Smith* days. For example, the lower federal courts have ruled that under RFRA, the District of Columbia may not use its zoning laws to shut down a church's feeding center for the homeless located in its church building;[138] that the federal Age Discrimination in Employment Act does not apply to a teacher fired from a Catholic high school;[139] and that Jehovah's Witnesses employed at a California state community college could not be forced to say a constitutional oath.[140]

The greatest number of cases invoking RFRA have involved prisoners seeking greater religious freedom, such as access to sweat lodges, religious materials, and special meals. The prisoners have won a number of their cases,[141] but have lost many more[142] even though courts have applied the compelling state interest standard for RFRA claims. The courts understand that very different governmental interests are involved when dealing with prisoners. So far, the courts have not let prisoners use RFRA to

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136. 42 U.S.C. § 2000bb(c).

137. 42 U.S.C. § 1988 (Supp. V 1993).

138. Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D. D.C. 1994).

139. Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994).

140. Bessard v. California Community College, 867 F. Supp. 1454 (E.D. Cal. 1994).

141. *E.g.*, Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995); Hamilton v. Schriro, 863 F. Supp. 1019 (W.D. Mo. 1994); Campos v. Coughlin, 854 F. Supp. 194 (S.D. N.Y. 1994); Rust v. Clarke, 851 F. Supp. 377 (D. Neb. 1994); Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994); Allah v. Menei, 844 F. Supp. 1056 (E.D. Pa. 1994).

142. *E.g.*, Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995); Brown-El v. Harris, 26 F.3d 68 (8th Cir. 1994); Woods v. Evatt, 876 F. Supp. 756 (D. S.C. 1995); Campbell v. District of Columbia, 874 F. Supp. 403 (D. D.C. 1994); Fawaad v. Herring, 874 F. Supp. 350 (N.D. Ala. 1995); Messina v. Mazzeo, 854 F. Supp. 116 (E.D. N.Y. 1994).

demand and receive all sorts of bizarre things that would undercut the government's ability to run a penal system.

Non-prisoner RFRA cases that have been decided against the religious adherent demonstrate a few interesting trends. A number of pro-life demonstrators have challenged the Freedom of Access to Clinic Entrances Act (FACE) under RFRA—all have lost.[143] There have been several other unsuccessful RFRA cases involving a diversity of claims. For example, a federal court sustained the Florida Midwifery Practices Act challenged by a woman who helped deliver babies, but who had not complied with the requirements of the Midwifery Act.[144] Similarly, the former Assistant Chief of Police of the Los Angeles Police Department, Robert Vernon, sued the City of Los Angeles for initiating an investigation of his on-duty conduct and how it related to his being an elder of a conservative evangelical Christian church.[145] The Ninth Circuit held that the City's investigation of Vernon did not violate the Constitution.[146] Likewise, a woman arrested for not paying child support sued because she was required to remove her wig for a police photograph in violation of her religious beliefs.[147] The federal district court for Maryland rejected the claim because the police made her remove her wig only momentarily.[148]

Two cases in which the RFRA claims lost deserve special comment. In a disturbing decision, *Hsu v. Roslyn Union Free School District*,[149] the federal district court in Long Island upheld a public high school requirement that a student Bible study allow non-Christians to be leaders and members of the group.[150] The federal district court rejected the Christian students' constitutional claims under the Free Speech Clause, the Establishment Clause, and the right of association as well as their claim under RFRA.[151] The court rejected the RFRA claim stating that the

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143. *E.g.*, American Life League v. Reno, 47 F.3d 642 (4th Cir. 1995); U.S. v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994). A federal district court in Wisconsin has declared FACE unconstitutional on the grounds that Congress lacked the authority under the Commerce Clause to pass it. United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995).

144. Dickerson v. Stuart, 877 F. Supp. 1556 (M.D. Fla. 1995).

145. Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994).

146. *Id.* at 1395.

147. Levinson-Roth v. Parries, 872 F. Supp. 1439 (D. Md. 1995).

148. *Id.* at 1452.

149. 876 F. Supp. 445 (E.D. N.Y. 1995).

150. *Id.* at 462.

151. *Id.* at 463.

school district had a compelling state interest to ensure that the other high school students were "free from invidious discrimination in school."[152]

This politically correct decision violated the clear-cut constitutional right of all people, including those with religious beliefs, to organize together around their common beliefs.[153] An axiomatic right under both the Free Exercise Clause and RFRA is that religious groups have the right to set their own membership standards. There is no governmental interest in regulating a private group's membership, especially that of a religious organization. It is illogical to require a Christian group to allow Buddhists or Hindus to be members or leaders. Such a requirement destroys the unique theological distinction of the private group. It absurdly distorts the concept of discrimination to say, for example, that the Roman Catholic Church engages in illegal religious discrimination by requiring American bishops to be Catholic. The district court's opinion in *Hsu* trampled the First Amendment rights of the religious students in order to protect an extreme and superficial form of "nondiscrimination."[154]

In contrast to the Second Circuit's misuse of antidiscrimination law in *Hsu*, the Michigan Court of Appeals used RFRA to block a state law claim of employment discrimination against a Catholic school. The Michigan Court of Appeals ruled in *Porth v. Roman Catholic Diocese of Kalamazoo*[155] that a teacher who had been terminated because she did not share the religious beliefs of her employer could not sue the Catholic school for religious discrimination.[156] The court ruled that the Catholic school had the power under RFRA to hire only teachers who are Catholic. The Michigan Court of Appeals correctly held that a private religious school has complete discretion to select teachers according to whatever theological or ideological standards it chooses.[157] The government simply has no jurisdiction to interfere or second-guess those employment decisions.

In *Fordham University v. Brown*,[158] a federal district court in Washington, D.C. agreed with the Commerce Department that Fordham University was ineligible for a federal program that

152. *Id.* at 462.
153. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-61 (1958).
154. *Hsu*, 876 F. Supp. at 462.
155. 532 N.W.2d 195 (Mich. App. 1995).
156. *Id.* at 200.
157. *Id.*
158. 856 F. Supp. 684 (D. D.C. 1994).

funded construction of radio towers because Fordham's radio station broadcasted a one hour Catholic Mass on Sunday mornings.[159] The court rejected the line of cases that holds that if the government offers financial aid based on secular and neutral criteria to a wide array of groups, it cannot single out the religious users and exclude them because they are religious.[160] It also held that the government's failure to subsidize the broadcast was not a "burden" under RFRA.[161] Although there may be a more basic issue of whether Congress even has the authority under the Constitution to fund construction of radio towers, the First Amendment requires that religious groups should not be excluded from participating in government programs that are widely available to many groups.

Overall, courts have applied RFRA in a fair manner. With a few noteworthy exceptions, courts have been able to separate the legitimate religious liberty claims from the marginal ones.

C. Congress Had the Authority to Pass RFRA

Some have expressed the concern that Congress lacks the constitutional authority to enact RFRA, regardless of the need for it. An article on RFRA would be incomplete without explaining the argument for congressional power to pass RFRA. Although this subject deserves its own exhaustive law review article,[162] the following is a summary of that argument and how it has arisen in the RFRA cases. Generally, the governmental body involved in a dispute with a religious adherent has raised the argument that Congress had no grant of power under the Constitution to enact RFRA. So far, courts have been divided on the issue.

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159. *Id.* at 696.

160. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986). The Court recently reiterated this principle; *see* Rosenberger v. University of Virginia, 115 S. Ct. 2510 (1995).

161. *Brown*, 856 F. Supp. at 697. Fordham appealed to the U.S. Court of Appeals for the D.C. Circuit. While that appeal was pending, the Commerce Department settled and agreed to award the grant to Fordham. "The Commerce Department said [on December 20, 1995] that public radio stations with a religious element in their programs no longer will be barred from federal grants available to all public broadcasting outlets." Larry Witham, *Radio Stations With Religious Content Cleared to Get Grants*, WASH. TIMES, Dec. 21, 1995, at A5.

162. For an excellent (and exhaustive) treatment of Congress' authority under Section 5 of the Fourteenth Amendment, see Matt Pawa, Note, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993).

This concern was raised in *Belgard v. Hawaii*,[163] but was rejected by the federal district court. The court upheld RFRA as an exercise of Congress' authority under Section 5 of the Fourteenth Amendment,[164] which empowers Congress to enforce the provisions of that amendment.[165] The Supreme Court has recognized such congressional power under *Katzenbach v. Morgan*.[166]

One federal court has declared RFRA unconstitutional. In *Flores v. City of Boerne*,[167] a federal district court declared RFRA unconstitutional on the grounds that Congress violated the doctrine of separation of powers by "changing the burden of proof as established under *Employment Division v. Smith*."[168] This case involved the city's attempt to use its historic landmark preservation ordinance to stop a local Catholic parish from renovating its building. The district court ruled that the Supreme Court had issued an authoritative interpretation of the Free Exercise Clause, and Congress could not go beyond that interpretation.[169] That federal district court's abbreviated opinion, however, did not reconcile its holding with the Supreme Court's decisions that allow Congress to go beyond the Court's constitutional rulings by enacting further protection under Section 5 of the Fourteenth Amendment. That is exactly what happened in *Morgan*. Declaring RFRA unconstitutional without analyzing Congress' power under Section 5 of the Fourteenth Amendment as interpreted in *Morgan*, fails to deal with the heart of the issue.

Section 5 of the Fourteenth Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[170] Sections 2 of both the Thirteenth[171] and Fifteenth[172] Amendments have similarly-worded provisions.

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163. 883 F. Supp. 510 (D. Haw. 1995).

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

165. *Belgard* at 516-17.

166. 384 U.S. 641 (1966).

167. 877 F. Supp. 355 (W.D. Tex. 1995). Just before going to press, another federal court ruled that RFRA is unconstitutional under the separation of powers doctrine. The bankruptcy court also interpreted *Smith* as holding that courts lack the institutional capacity to apply the *Sherbert/Yoder* compelling interest test. In re Tessier, 1995 WL 736461, (Bankr. D. Mont.).

168. *Id.* at 358.

169. *Id.* at 357.

170. U.S. CONST. amend. XIV, § 5

171. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

172. U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

Collectively, these three amendments are known as the "Civil War Amendments" because they were passed just after the Civil War to protect the rights of the newly-freed slaves. For over a century, courts have addressed the question: What power does this provision grant to Congress?

In 1879, in *Ex parte Virginia*,[173] the Supreme Court issued its first major pronouncement on these enforcement clauses:

> All of the [Civil War] Amendments derive much of their force from [the enforcement] provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[174]

The Supreme Court has consistently upheld this deferential view of Congress' authority under the enforcement provisions of the Civil War Amendments.[175]

It is important to remember that any right, at least in a legislative context, is written as a restriction on government power. The Founders properly captured this principle in the First Amendment. Religious freedom, freedom of speech, and freedom of the press, were not declared to be rights. Rather, Congress was told it could pass "no law" which contravened these natural God-given rights. When government has less power,

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173. 100 U.S. 339 (1879).

174. *Id.* at 345-46.

175. *Accord* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding federal preclearance provision of the Voting Rights Act as an appropriate exercise of congressional power under the Fifteenth Amendment's enforcement clause); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding amendments to Title VII that extended coverage for employment discrimination to state employees under section 5 of the Fourteenth Amendment and were not barred by the Eleventh Amendment); City of Rome v. United States, 446 U.S. 156 (1980) (upholding provisions of the Voting Rights Act).

the people have greater freedom and greater protection of their rights.

Congress can restrict the power of government—i.e. protect rights—to a greater degree than the minimum set by the Constituiton. Where due process and equal protection are concerned, Congress has the power under Section 5 of the Fourteenth Amendment to override otherwise permissible acts of state governments.[176] The Constitution sets a floor for rights, not a ceiling—a state law may pass the Supreme Court's test, yet still be superseded by an Act of Congress.

This was the scenario in *Morgan*. The Supreme Court considered whether a provision of the Voting Rights Act of 1965 that prohibited the enforcement of a New York statute requiring literacy in English before one could vote, was "appropriate legislation under section 5 of the Fourteenth Amendment."[177] The interesting twist in the case was that in 1959, the Supreme Court, in *Lassiter v. Northampton Election Board*,[178] upheld a similar North Carolina literacy requirement from a Fourteenth Amendment challenge.[179] In *Morgan*, the New York Attorney General argued that Congress could not protect with legislation something that the Supreme Court had ruled was not a right under the Fourteenth Amendment.[180]

The Supreme Court rejected that argument and held that Congress could independently determine whether something was a right under the Fourteenth Amendment that needed protection by legislation.[181] It ruled that way because it viewed Section 5 as a grant of power enabling Congress to make its own determinations about Fourteenth Amendment rights: "There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause."[182] It was therefore reasonable for Congress to assess all of the various factors involving Puerto Ricans who were disenfranchised by the English literacy rule and find that the rule violated their rights under the Equal Protection Clause. Congress had the ability to engage in exten-

176. JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 19.4, at 533 (2d ed. 1992).

177. *Morgan*, 384 U.S. at 651.

178. 360 U.S. 45 (1959).

179. *Id.* at 53-54.

180. *Morgan*, 384 U.S. at 648.

181. *Id.* at 657-58.

182. *Id.* at 652.

sive legislative fact-finding to determine that English literacy requirements were widely tainted with racial bias.[183]

The Supreme Court paralleled the rulings of *Lassiter* and *Morgan* in two cases involving voting rights. On the same day that it held that the Fifteenth Amendment and § 2 of the Voting Rights Act banned only intentional discrimination in *City of Mobile v. Bolden*,[184] the Court, in *City of Rome v. United States*, upheld the constitutional power of Congress to require the Attorney General to object to electoral changes that had the effect of diluting minority political power.[185]

In the case of RFRA, Congress has determined, through effective fact-finding, that the compelling state interest test is needed to provide sufficient protection for religious liberties. Although the Supreme Court in *Smith* rejected the view that the Free Exercise Clause embraces the compelling interest standard, Congress has the authority to independently evaluate the situation and provide its own protection via legislation, as it did with RFRA.

In *Sasnett v. Department of Corrections*,[186] the federal district court found RFRA constitutional for all the reasons outlined above, but added an additional argument for Congress' power to enact it. The court noted two different reasons why Congress passed RFRA. On the one hand, it could have acted to *interpret* the Constitution more broadly than the Supreme Court had done in *Smith*.[187] On the other hand, the *Sasnett* court noted that Congress may have acted *remedially*, by prohibiting otherwise lawful actions in order to create a zone of protection around First Amendment liberties.[188] Under this "remediation" theory, RFRA creates a buffer zone designed to protect and facilitate full enjoyment of the constitutional right to free religious exercise.[189] The *Sasnett* court held that Congress was well within its authority to pass such remedial legislation. The court stressed that there is no disparity between the Supreme Court and Con-

183. *Id.* at 654 nn. 12, 14.

184. 446 U.S. 55 (1980).

185. 446 U.S. 156 (1980).

186. 891 F. Supp. 1305 (W.D. Wis. 1995).

187. Although not yet adopted by the Court, four justices have expressed the view that Congress may define the Equal Protection Clause substantively. Oregon v. Mitchell, 400 U.S. 112, 141-44 (1970) (Douglas, J.); *Id.* at 280-81 (Brennan, J., concurring, in which White and Marshall, JJ., joined).

188. *Sasnett*, 891 F. Supp. at 1316.

189. *Id.* at 1318.

gress' view of the underlying right to free-exercise. The only difference between the two is that the Court would require proof of discriminatory intent on the part of the government, whereas Congress would not.[190] Many real cases of unconstitutional activity would go unpunished if religious believers were required to prove that the government was "out to get them." As the *Sasnett* court observed: "Only intentionally discriminatory state actions violate the First Amendment, and it is difficult to prove intentional discrimination.... This nation's history is replete with examples of facially neutral, generally applicable laws intended to curb religious practices."[191]

According to *Sasnett*, then, the difference between the Court and Congress is simply that the *Smith* Court was willing to permit some cases of unconstitutional activity to go unpunished for lack of proof, while Congress was not. Congress has constitutional power under Section 5 of the Fourteenth Amendment to pass laws punishing unconstitutional acts. The Court's willingness to tolerate some unconstitutional activity in no way diminished Congress' independent power to give force to constitutional guarantees. RFRA is therefore constitutional.[192]

Some argue that Congress only has Section 5 authority to protect rights that appear in the text of the Fourteenth Amendment, such as equal protection and due process of law. They note that the guarantee of the free exercise of religion applies to the states solely because the Fourteenth Amendment incorporates that First Amendment right against the states. Therefore, the critics argue, Congress' Section 5 authority does not extend to such "incorporated" rights.

The Supreme Court rejected that argument in *Hutto v. Finney*,[193] in which the Court upheld a congressional law authorizing a civil rights plaintiff to receive an attorneys' fee award against a state for an Eighth Amendment[194] violation.[195] The Supreme Court stated that the Eleventh Amendment[196] was not

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190. *Id.*

191. *Id.* at 1318-19 (citations omitted).

192. *Id.*

193. 437 U.S. 678 (1978).

194. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

195. *Hutto*, 437 U.S. at 700.

196. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.").

a bar to this and similar awards because Section 5 of the Fourteenth Amendment empowered Congress to pass such a law, creating an exception to the Eleventh Amendment.[197] The Eighth Amendment claim that prevailed in that case was a right incorporated into the Fourteenth Amendment and one that does not appear in the text of that amendment. Therefore, Congress' Section 5 authority applies to incorporated rights as well as rights that appear in the text of the Fourteenth Amendment.

Those who argue that Congress' Section 5 authority does not empower it to pass RFRA must realize that their argument would require the invalidation of many other federal laws that the Supreme Court has already upheld as constitutional. If Congress does not have the power to pass RFRA, it does not have the power to pass the Voting Rights Act[198] or to extend Title VII to the states.[199] It is doubtful that the Supreme Court would find that Congress acted *ultra vires* when it passed RFRA, but allow all of its old decisions to stand, upholding other laws passed under Section 5 authority.

Also, by passing RFRA, Congress responded to an invitation by the Supreme Court to pass such a law. The Supreme Court in *Smith* invited legislatures to grant statutory exemptions from particular laws to religious adherents:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.... [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use ....[200]

Congress accepted the invitation from the Supreme Court and passed RFRA. Although RFRA is more than an exemption from a specific law, it still fits within the invitation.

Finally, should the Supreme Court accept review of a case that questions whether RFRA is constitutional, the Court may avoid that question altogether by overruling *Employment Division v. Smith*, and reinstating the compelling state interest test. At least one Justice who has joined the Court since *Smith* was

197. *Hutto*, 437 U.S. at 692.
198. City of Rome v. United States, 446 U.S. 156 (1980).
199. Fitpatrick v. Bitzer, 427 U.S. 445 (1976).
200. *Smith*, 494 U.S. at 890.

handed down, David Souter, has called for *Smith* to be reconsidered.[201] It is unclear whether the *Smith* test is still supported by a majority of the Court.

CONCLUSION

The free exercise of religion is not a mere privilege tolerated or granted by the state. Rather it is an affirmative right, prior in time and degree of obligation to all but the most compelling state interest. For a free society, its protection is of the utmost importance.

Religious liberties fared poorly in federal courts between the time of the Supreme Court's *Smith* ruling in April of 1990 and Congress' passage of the Religious Freedom Restoration Act in November of 1993. During that time, those seeking relief for their religious liberties turned to state courts and state constitutions for protection. With the passage of RFRA, religious liberty has regained significant protection under federal law and litigants are now returning to federal court. Since its enactment, RFRA has served to protect religious liberty for many, without crippling government with a blizzard of bizarre claims.

201. Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring in part and concurring in the judgment).